

Srinivas Burra
R. Rajesh Babu *Editors*

Locating India in the Contemporary International Legal Order

 Springer

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Foreword

International law, a body of law designed to regulate interstate relations, has now transformed into a powerful force governing not only inter-state relations but also laying down the norms for non-state actors and entities. The evolution of international law has impacted different legal fields, in particular human rights law, international criminal law, and private international law. This evolutionary process has not only put limits on state sovereignty but also enhanced rights as well as responsibilities of individuals through new norms of human rights and individual criminal responsibility.

The United Nations has served as the principal venue for codification and progressive development of law through the adoption of binding conventions and treaties, and resolutions and declarations, laying down the road map for desirable standards promoting not only “economic and social development, but also advancing international peace and security”.

The emergence of a norm and its influence start long before such a norm is codified in an international treaty. Post decolonization, developing countries led by India and others were particularly active in the UN General Assembly when a number of UN General Assembly Resolutions including UNGA Res. 1803 (XVII) on Permanent Sovereignty over Natural Resources and Res 3281 (XXIX) containing the Charter of Economic Rights and Duties were passed that laid down the framework for future instruments. During this period, Indian scholars played a pivotal role in highlighting the concerns of the third world.

The legitimacy of international law is enhanced by the adoption of consensual treaties that involve participation by all states including developing countries. This leads to greater likelihood of incorporation of these norms in domestic law and their acceptance and compliance.

Since its inception in 1945, the United Nations has come a long way. However, its continued relevance and effectiveness in addressing the emerging global challenges will largely depend upon its ability to keep itself abreast with changing times and realities. The issue of UN reform, that involves the revitalization of the General Assembly and reform of the Security Council, is therefore of great significance.

India with the unique combination of being the largest democracy in the world and a strong tradition of respect for rule of law has been pushing for democratization of these institutions so that they reflect contemporary realities and continue to remain credible and legitimate and equipped to meet increasingly complex and pressing transnational challenges of our time.

International law is not static but is in a constant process of development in the light of new challenges and situations. Therefore, in order to make it effective, it is necessary for states to critically analyse their positions and reformulate them where necessary. In this regard, this book is very valuable and timely as it attempts to evaluate and analyse India's positions on various contemporary international law issues.

I am hopeful that this collection of essays will attract scholarly attention and generate more debate on India's practice on international law matters.

New Delhi, India

Dr. Neeru Chadha
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Contents

Introduction	1
Srinivas Burra and R. Rajesh Babu	
Part I Ideas, Justice and Humanitarianism	
Gandhi and International Law: <i>Satyagraha</i> as Universal Justice	9
S. G. Sreejith	
A Critic and an Apologist: India's Quest for UN Security Council Permanent Membership	31
Srinivas Burra and Haris Jamil	
Collective Engagement and Selective Endorsement: India's Ambivalent Attitude Towards Laws of Armed Conflict	51
Srinivas Burra	
Part II Trade, Investment and Taxation	
Two Decades of Trade Remedy Litigations in WTO: India the Protectionist Trader	69
K. D. Raju	
India and Bilateral Investment Treaties: From Rejection to Embrace to Hesitance?	101
Prabhash Ranjan	
Making International Tax Law: Analysing Tax Jurisprudence in India	127
Ajay Kumar	

Part III Intellectual Property Regimes

Protection of Traditional Knowledge and Expressions of Folklore: Locating India in the Global Framework	151
R. Rajesh Babu	
Transnational Influences in Trade Mark and Domain Name Protection: The Indian Experience	185
V. K. Unni	
India's Participatory Role in the Database Debate at WIPO	205
Indranath Gupta	
TRIPS and Public Health: Challenges for India and Its Response	235
Reji K. Joseph	

Part IV Nature, Resources and Rights

India and International Environmental Law	257
Shiju Mazhuvanchery	
Implementation of the Convention on Biological Diversity and Its Protocols in India	275
Pushpa Kumar Lakshmanan	
Indian Civil Nuclear Liability Law (CNLD Act): An Adventurism or Exceptionalism in International Legal Discourse	307
M. P. Ram Mohan	

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Introduction

Srinivas Burra and R. Rajesh Babu

Historically, India's role and contribution in shaping the international legal order has been significant and more so in the last six decades. India's emergence as a postcolonial independent State with significant diplomatic influence coincided with the end of the Second World War and the emergence of international law and institutions as important means of engagement at the international level. India's non-aligned policy during the Cold War era and the collective articulation of the same by the similarly placed States influenced immensely the world order and international norm setting. The collective position, with India at the lead with a few other States, developed as the voice of the newly independent States manifested in the development and formalization of legal positions on matters like decolonization, new international economic order, permanent sovereignty over natural resources (PSNR), differential treatment for developing countries, prohibition of racial discrimination, non-intervention and multilateralism.

Since then, the world and along with it the international legal order has changed significantly. The priorities of the 1970s and the collectivism that was the dominant expression of developing countries arguably have given way to the practicalities of international relations and realities of national development. Events such as the end of the Cold War, neoliberal restructuring, changes in the economic priorities of nation States and the rise of violent challenges to the North from non-traditional sources like the non-State actors in the form of incidents like 9/11 attacks are reshaping the international legal discourse. Influenced by these factors pragmatism is replacing Third World solidarity in several aspects, and India is no exception. India, it is observed, has been drifting in many respects from its traditional role of a trusted ally and leader of the Third World towards pragmatism of self-interest which often corresponds with the dominant players on several issues. For about two decades (1980s–90s), India arguably distanced itself from its position as champion of the Third World cause and moved towards a policy compelled by internal political and

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economic conditions, and dictates of external forces. Understandably, this phase was marked by political and economic turbulence, from balance of payment crises, IMF loan and attached conditionality to internal issues, and political violence. Indeed, to problematise the situation further, the argument that India's traditional positions are changing could be considered as too sweeping an assertion which can be contested. It can be argued that India's role and response to various facets of international legal order are not always uniform, as its position in respect of economic matters may be different from what it articulates in the field of human rights.

In the last decade, India seems to reclaim its lost international position, however, in an avatar different from the past, owing to the arguably new found economic and political stability and the financial crisis in the traditional North. The dynamics of India's engagement with key international organizations and the negotiating coalitions it forged around environment (climate change negotiations) and trade (WTO Doha negotiations) issues display its role as a force against the western influence. The developing countries groupings in the WTO Doha round off trade negotiations as a bulwark against developed countries, and the proposed BRICS Fund and other strategic Asian partnerships in trade and investment are evidence of the changing dynamics and structure of international legal order and of norm creation, and the critical role India is playing in this process. It is in this context that we undertake this endeavour to explore and critically analyse India's role and attitude towards international law in various fields and its influence and contribution towards its development.

Our attempt is to put together varying views on locating India in the contemporary international legal order. Any effort to look at the present would be incomplete without relating it with the past. Therefore, the contributions to the volume equally focus on the historical context when they analyse the present in its historical trajectory. The running theme of every essay is to map India's practice and positions in the last six decades or so in respect of the field the essay covers. Therefore, specific treaties and statements constitute examples in capturing the larger reality of the chosen field. It is also possible to choose a specific issue and explain the chosen field in its totality like critically evaluating India's claim for permanent membership of the UN Security Council and try to understand its position vis-a-vis the UN in general. Essays also deal with bilateral issues which redefined India's multilateral engagements.

Anti-colonial assertions constituted important rallying points in the initial stages of the United Nations Organisation (UN). Certain forms of anti-colonial resistance adopted in India continue to occupy a significant space in resisting other forms of domination and discrimination. They are equally important in understanding developments in the field of international law. Chapters in Part I deal with such issues. For instance, Sreejith in his Chapter "[Gandhi and International Law: Satyagraha as Universal Justice](#)" emphasizes on the contribution of Indian philosophy and explores Gandhian ideals and their potential for securing a non-violent universalism through international law. Specifically, he analyses the theory and practice of *Satyagraha* to see whether it has the potential to secure universal justice for humanity. He argues that *Satyagraha* aimed at political corrections and adaptations helps humanity in its social self-becoming through individual self-perfecting. This universalizing potential of *Satyagraha* qualifies it to become a process of international law, an international law

which is conscious of its ontology and has no forgetfulness. Srinivas and Haris Jamil in their Chapter “[A Critic and an Apologist: India’s Quest for UN Security Council Permanent Membership](#)” deal with India’s claims for the United Nations Security Council permanent membership. This chapter critically evaluates India’s position in relation to the UN Security Council from the inception of the United Nations. They observe that India’s desire to sit on the high table along with other permanent five States is neither fully consistent with its past position vis-à-vis the role of the Security Council nor is a demand which would democratize the Security Council. They are of the view that democratization of the Security Council cannot happen by inclusion of a few more States in it with certain privileges. Issues like veto power and equal participation of all States in Security Council decisions are equally important aspects. Any reform exercise, which does not address these issues, would further reinforce the hegemonic role of a few at the expense of other States. They underline that India’s aspiration for its permanent membership in the Security Council may be of significant value from its individual standpoint in international relations, but it would remain as a demand with a democratic deficit. Srinivas’ Chapter on “[Collective Engagement and Selective Endorsement: India’s Ambivalent Attitude towards Laws of Armed Conflict](#)” evaluates India’s engagement with the laws of armed conflict and its ambivalent attitude towards some of the issues like the non-international armed conflict. It also attempts to evaluate India’s engagement with humanitarian organizations like the International Committee of the Red Cross (ICRC). The Chapter observes that from the point of view of maintaining balance between humanitarian considerations and military necessity, India’s attitude of selective acceptance of International Humanitarian Law (IHL) treaties would go against the stated objectives of the IHL framework.

India’s participation and domestic implementation of international trade and economic regimes has been much deeper and eventful than some other areas of international law. Chapters in Part II bring out from a historical perspective India’s engagement and experience with the international investment framework, the agreement establishing the World Trade Organization (WTO) and the implementation of the intellectual property regimes. Raju’s Chapter on WTO trade remedies, titled, “[Two Decades of Trade Remedy Litigations in WTO: India the Protectionist Trader](#)” analyses the use of trade remedy measures under the WTO by India including anti-dumping, subsidies and safeguard agreements and the emerging jurisprudence. He examines the two decades of operation of the WTO trade remedies agreements, the impact of those trade remedies on India, and the use and abuse of these instruments as a policy tool by India for the protection of the domestic industry. Prabhash Ranjan in his Chapter, “[India and Bilateral Investment Treaties: From Rejection to Embrace to Hesitance?](#)”, traces India’s approach to protection of foreign investment through Bilateral Investment Treaties (BITs) since 1947. He brings out the changing phases of India’s approach to BITs, specifically India’s attempt to balance protection of foreign investment and host State’s (India’s) right to regulate. He brings out the paradigm shift in investment protection forced by the *White Industries* Arbitration claim (2011) as reflected in the 2016 Model BIT and argues for a more balanced approach. Ajay Kumar through his Chapter “[Making International Tax Law: Analysing Tax Jurisprudence in India](#)” seeks to contextualise India’s

present position on international tax law to chart out the direction. This chapter also attempts to look at the processes (tax administrators, treaties and judiciary) that create international tax law and the interconnectedness or the “coherence” of law. Given the nascent state of international tax law, he urges courts in India “to carve out a path, that while upholding the national interests, it thereby creates practice that coheres with the principle of ‘equity’ and supports the further use of this principle”.

Part III deals with debates surrounding intellectual property regimes. Rajesh Babu in his Chapter “[Protection of Traditional Knowledge and Expressions of Folklore: Locating India in the Global Framework](#)” highlights the problems in the international protection of traditional knowledge/folklore which has direct implications to India, a host country to rich biodiversity, traditional knowledge and art forms. He critically examines the existing intellectual property regime as a means to protect the traditional knowledge and folklore and the international efforts for their protection that are ongoing at the World Intellectual Property Organization (WIPO), World Trade Organization (WTO), and Convention on Biodiversity (CBD), and the role and the experience of India in these negotiations. He argues for a comprehensive international treaty for the protection of traditional knowledge in all its dimensions and for a model law for the States to emulate. Unni in his Chapter “[Transnational Influences in Trade Mark and Domain Name Protection: The Indian Experience](#)” attempts to capture the major international developments which have influenced the trademark law in India. He also brings out India’s experience in balancing the interests of the trademark owners and the general public, and the proactive role played by the Indian judiciary for the development of the trademark law. Similarly, Indranath Gupta in his Chapter “[India’s Participatory Role in the Database Debate at WIPO](#)” looks at the role that India had played in the prolonged debate surrounding the proposal for an international treaty protecting non-original databases. India was one of the countries that opposed its adoption. The chapter revisits the negotiating history at the WIPO, the role India played, and raises important questions on the issue of prior consultation in the process of law making. Reji’s Chapter on “[TRIPS and Public Health: Challenges for India and its Response](#)” examines the use of flexibilities in the WTO TRIPs agreement, such as compulsory licensing, for meeting the domestic public health concerns and priorities of India. He underlines that India has used the TRIPs flexibilities to “strike balance between providing incentives for innovations on the one hand and protecting public interest on the other—ensure that that meritorious inventions in the pharmaceutical are entitled for patent right protection and that patent rights do not result in harming public interests”. He observes that though India was fully compliant with WTO rules while incorporating the TRIPs flexibilities in its Patents Act, there is pressure on India to do away with the exercise of such flexibilities and it has to be seen whether India would be able to withstand the pressure.

Dwelling on another important area of international law that India had made substantial contribution, Shiju Mazhuvanchery’s Chapter on “[India and International Environmental Law](#)” attempts to analyse the active role and contribution of India in the development of international environmental law and the contribution of international environmental law to Indian domestic environmental legislation. Since the

days of Stockholm Conference, India has been an active participant at the multilateral environmental negotiations and has argued for an environmental regime that takes into account the needs of the present and future generations, at the same time giving flexibilities to developing economies. While stating that international environmental law has influenced Indian law making and the development of a robust environmental jurisprudence, he concludes that the influence at the domestic level, compared to the developments at the international level, remains much to be desired. Pushpa Kumar Lakshmanan's Chapter on "[Implementation of the Convention on Biological Diversity and its Protocols in India](#)" brings out one specific aspect of India's engagement with international environmental law. He critically looks at the international legal obligations for India under the Convention on Biological Diversity, the Cartagena Protocol, Nagoya Protocol and the Nagoya–Kuala Lumpur Supplementary Protocol. He further evaluates their implementation and effectiveness at the domestic regulatory mechanisms, including alternative options available to India.

Finally, Ram Mohan's Chapter on "[Indian Civil Nuclear Liability Law \(CNLD Act\): An Adventurism or Exceptionalism in International Legal Discourse](#)" undertakes historical evaluation of the development of nuclear law in India through tort jurisprudence and maps the civil nuclear liability law-making process both at the international level and in India. He examines India's role as an established nuclear power while re-engaging with world nuclear community subsequent to the 2005 India–United States Nuclear Cooperation. He notes that India has been successful in drafting a liability legislation that incorporates decades of international and domestic legal learning on industrial disasters, and fully utilizes the inherent flexibility that exists within international nuclear liability conventions. He, however, concedes that the real test of the Indian civil liability law will be before the courts.

We are aware that a single volume of essays would not be able to cover the vast practice of India in the field of international law. The issues that we attempted to capture in the volume broadly reflect certain trends in the approaches adopted by India so far. We are also acutely aware that rich practice of India in the field of international law requires continuous academic engagement and assessment and considerable academic work of that nature already exists. We believe that reflections in this volume would add to the ongoing work in that direction.

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Part I
Ideas, Justice and Humanitarianism

Gandhi and International Law: *Satyagraha* as Universal Justice

S. G. Sreejith

Abstract Gandhi's encounter with international law, as the discipline is understood in the classic epistemological and functional sense, is tangential. Hence, there are hardly a few legal discourses that have Gandhian perspectives on international law. However, if international law is viewed as a teleological enterprise, which in a sense would have the effect of orientalizing international law, many of the Gandhian ideals would become germane to the discipline. In view of that, this chapter first examines whether international law has a teleological function. Answering that question in the affirmative, it concludes that among the many posited telos, securing universality, of whatever variety, stands out as the true telos of international law, though the discipline is in a tragic forgetfulness of that telos. Then, the chapter appraises the theory and practice of satyagraha—a search for universal truth—as propounded and practiced by Gandhi to see the universalizing potential of satyagraha. Therein, the chapter argues that satyagraha is an individual means to search for universal justice. The chapter further argues that satyagraha—unlike the popular movement it is (of civil disobedience, noncooperation, strikes, marches, and fasting) aimed at political corrections and adaptations, has an often-ignored phenomenological side to it which makes it akin to Hegelian “teleological movement,” helping humanity in its social self-becoming through individual self-perfecting. This universalizing potential of satyagraha qualifies it to become a process of international law, an international law which is conscious of its ontology and has no forgetfulness.

Keywords Satyagraha · Universalism · New international law · Teleology
Universal justice

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1 Introduction: The Universalist *Telos* of International Law

Universalism, though not much of an avowed objective of international law, as a concept, has no less an impact as any other highly prized and formalized objectives of the discipline.¹ The mainstream of international law, however, is badly process-oriented: It only generates discourses to help a state system that hardly has any teleological sophistication to exist in larger scales of time and space.² Nothing more polemical than a metadiscourse in the form of self-congratulations on that auto-sustenance can come from the mainstream, let alone universalizing possibilities or universalizable concepts. On the other hand, heterodoxy in international law, in its rigorous search for alternatives and in its soaring passion to transform the world, is aimed at uniting causes, if not for celebrating pluralism, hardly ever hoping for universality. Other discourses on universalism within the discipline have been criticized for their expansionist, imperial character³; such discourses are perhaps what Anthony Carty calls, sheer “universalist pretentions.”⁴

However, serious search for universal ideals, at the minimum for a political or public consciousness that has universalizing potential, has been part of many post-modern projects in international law, projects that pay homage to certain scholarly oeuvre or a tradition, as if a tribute to a scholarly life well-lived or celebration of a tradition—from Kant to Lauterpacht and from medieval cosmopolitanism to universal institutionalism. As part of such projects, one also gets to see biographies of individuals, who envisaged universalism (in its fine varieties), studied for their altruistic visions and conceptions of global unity.⁵

The last said allusion to universalism has little charm for internationalists, partly due to the mystic touch of the lives studied and partly due to their having mere tangential connection with other universalizing models that have the shades of medievalist orthodoxy or modernist radicalism. However, the marginal scholarly interest is not an indication that individual notions of universalism have little import for the renewalist

¹See generally Weeramantry (2004) (signifying that to explore its best potential international law needs to transcend its structural plurality); Simma (2009), pp. 266–68 (emphasizing that universalism in international law is a structural fact, a functional convenience, and a “comprehensive blueprint for social life”).

²Asserting that state system lacks teleological sophistication would, perhaps, be an overstatement, especially given that teleology often can be a process of progress. See Koskenniemi (2012), pp. 3–7. Koskenniemi, however, finds such teleology rather “dubious”.

³On the imperial nature of universalism, see generally Jouannet (2007), pp. 379–407; Pahuja (2004), pp. 381–93.

⁴Carty (1991), p. 2.

⁵See, e.g., Chimni (2006), pp. 198–217.

program of international law⁶; they have been part of a postmodernist idea-set for a global re-ordering.⁷

Although individual notions of universalism are considered futuristic, the extent of persuasion they exert on the international community cannot be overlooked. Most of such visions serve as a motivation for a historical inquiry and for establishing a dialectical connection between an ideal and the real, e.g., a rational transition from a pantheistic idealism toward dialectic materialism. It is more often the case that such individuals of wisdom have their universalistic visions revealed not through textual semiotics but through their lives' performative ability by which life becomes the predicate of an ideal. In this kind of non-textual pragmatics, life assumes a narrative structure which cogently, free from any narrative incoherence that plagues textual philosophic propositions, relays the ethical imperatives (of universalizable quality) of well-lived lives.⁸

In search of universalist visions which have a constitutive potential to re-imagine the world and which can fine-tune (if not redefine) the role of international law therein, rescuing it from the criticism of it being too much legalistic, if not too much rationalistic, this chapter pays attention to the life and works of Mohandas Karamchand Gandhi (hereinafter "Gandhi") and the message of universalism they relay. The chapter understands that Gandhi's life has a textualist fineness to it: It is an effective bearer, as historical narratives are, of a given, but ahistoric, ideal.⁹ The universalizing potential of Gandhi's concept of the truth has been empiricized from what ought to have been an intricate textualist mesh to plain actions intelligible to the masses. For such and many other reasons, Gandhi's life and works seem to be worth examining to see what they can offer in terms of universality. In other words, can they offer universality in the truth?

Serious and systematic studies on the influence of Gandhi on international law have hardly been undertaken thus far.¹⁰ Such a gap in the scholarship is regardless of the fact that during his social and political life Gandhi had on many occasions been face to face with international law, and many of the principles that he adhered to and ideals which he stood for, no doubt a coincidence, have gone on to become the

⁶One might always ask: is not renewalist program heterodox in nature? Are they not epistemically one and the same? I would argue that renewalism has heterodoxy as its tonal and modal scheme. In another word, renewalism, otherwise a nebulous reformist consciousness, when escapes its organic form and localizes itself in a functional context, the process which David Kennedy aestheticizes as the "risk-taking pleasures", it becomes heterodoxies of sorts. See Kennedy (...) p. 336.

⁷See Chimni (2005), pp. 398–400.

⁸See and Cf. Gail Weiss (2008), p. 63.

⁹On the theoretical formulation that life is a conscious bearer of an ahistorical ideal, Cf. Poma (2006), p. 210.

¹⁰But see Chimni (2012), pp. 1159–73. Gandhism has also been viewed from international relations perspective, examining the functional utility of the philosophy in conducting international relations. Gandhism has also been an "approach" in Peace Studies. However, in most of those researches Gandhism has either provided a value-addition to an otherwise imperfect system or served as a standard against which to measure the effectiveness of a given international action.

fundamental principles of international law.¹¹ Yet many of the individual universalist conceptions for a world unity, as Gandhi and many of his likes had, could not enter international law primarily due to a certain “forgetfulness,” the discipline has about its self-transcending potential and thereby to transform the self for a global unity.¹²

This forgetfulness of international law is forgetfulness about its own *telos*, supposing its own existence as a seamless Web of rights and duties to facilitate cooperation and resolve conflicts as part of the overall sustenance of the state system. Even if a *telos* other than the *telos* of dogmatic statism exists, international law’s forgetfulness would not recognize them, and even if it recognizes, it will deem such a *telos* as auxiliary to the overall sustenance and well-being of the state system. On balance, international law does not know what it stands for and why it functions for.

Eurocentric international law, however, considers the *telos* of international law as the sustenance of state system as, as Martti Koskenniemi succinctly puts it:

Until late-19th century, histories of international law were unthinkingly Eurocentric. Europe served as the origin, engine and *telos* of historical knowledge. In the 20th century, it became more difficult to articulate the normative goal of international law ... [I]nternational law now appears as a modernist project, a state-building project.¹³

A magnificent normative architecture was also erected for keeping the state system alive so that the state continues to fulfill its functions of securing peace, order, security, and justice to its subjects, interestingly, through international law itself. On another side of this normative architecture, there thrive schools which challenge the normative role and functions of international law. Because they were meant to combat the evils of doctrinal dogmatism and infuse pragmatism into international law, they disagreed to the *telos* of dogmatic statism; the role of international law, according to them, is neither to sustain the state system nor to constrain state behavior; rather, it is a means for states to fulfill their national self-interest.¹⁴ This position is less teleological and more instrumentalist.

No matter the claims that international law is “path dependent” or process-oriented, there is greater consensus among the international law scholars that international law is a teleological enterprise the *telos* of which is nothing but reaching a certain universality, observes Koskenniemi:

To ‘do’ international law is to operate with a teleology that points from humankind’s separation to unity” ... Whatever differences may exist between international lawyers, we tend to be united in our understanding that legal modernity is moving towards what an influential [...] *jus gentium* uniting individuals (and not states) across the globe, giving expression to ‘the needs and aspirations of humankind’.¹⁵ (footnotes omitted)

¹¹ Moreover, there were occasions when Gandhi openly affirmed his internationalist attitude: “My mission is not merely brotherhood of Indian humanity. My mission is not merely freedom of India ... But through realization of freedom of India I hope to realize and carry on the mission of brotherhood of man”. *The Selected Works of Mahatma Gandhi* (1968b), pp. 211, 212.

¹² Chimni, *supra* note 10, p. 1168.

¹³ Koskenniemi (2011), p. 158.

¹⁴ See generally Posner and Goldsmith (2006).

¹⁵ Koskenniemi (2011), p. 4.

Despite the teleologies, so to speak, that exists, and often coexists, in international law, preference has always been for certain ends outside of international law.¹⁶ However, for teleologies, no matter they are transcendental (“primary”) or social (“secondary”), a functional fineness is achieved only when they have an ethical sophistication.¹⁷ Quite naturally, many of the posited *telos* of international law have an ethical orientation. Philip Allott puts forth such a *telos*, creating scope for the homogenization of all other *telos* of international law:

International law is the self-constituting of all-humanity through law. It is the actualizing through law of the common interest of international society, the society of all societies. The legal relations of international law organize the potential willing and acting of all human being and all human societies, including the forms of society conventionally known as ‘states’.¹⁸

Such a teleology, while has an ontological comfort, has the wherewithal—an all-inclusiveness—that encompasses all dimensions of law, normative, deontological, moral, rational, and so on. Moreover, having an ethical teleology does not, in any way, decry the power of norms, procedures, or rational choices.¹⁹ Rather, it helps “find ways in which the aims of law with respect to just peace, good order, and common good function as the final recourse in situations of impasse and lack of consensus.”²⁰ That is, when norms obtain unfavorable outcomes, procedures chock the processes, rational choice misses the human element, and when systems behave as if there is a breakdown, the ethical teleology keeps things in play by creating scope for an explanation by final cause, putting things as part of a scheme in an evolutionary process.²¹

On balance, teleological perspectives have an instrumental role in international law; that is, there is no objectively predetermined end—though there is an end, and that end is an open-ended universalism. It is in view of this universalist teleology—a teleology of a universalist variety (e.g., statism, common good, common market)—that international law adopts functional designs, which are most often disparate and dissimilar. Such a teleological scheme does not, however, limit the scope of designs to few concepts and contexts. Rather, it provides scope for functional designs, which while achieves universalism, of whatever type that is, has the potential to get international law out of its forgetfulness. One of the many such potential designs is *satyagraha*, the Gandhian way of finding universal justice.

In what is forthcoming, this chapter examines, in Part II, the theory and practice of *satyagraha* to see whether it has the potential to secure universal justice. It observes that *satyagraha* in its simplest form appears as if it is a popular movement of civil disobedience, noncooperation, strikes, marches, and fasting aimed at political corrections and adaptations, though it is not free of profound transcendental meanings

¹⁶Rovira (2013), p. 112.

¹⁷Primary teleology and secondary teleology are Aristotelian classification.

¹⁸Allott (1999a, b), p. 37.

¹⁹Reed (2013).

²⁰*Id.*

²¹On this defense of explanation by final cause as an explanation on the evolutionary hurdles of systems, see Lycan (1995), p. 45.

buried in it. In that form, apparently, *satyagraha* is more of an act of social resistance and less of a movement that has the potential to lead to universalism of sorts. In Part II, the chapter argues that *satyagraha* has an often-ignored phenomenological side to it which makes it akin to the Hegelian “teleological movement,” helping humanity in its social self-becoming through individual self-perfecting. In Part III, the chapter develops an analytic to present how relevant a teleological instrument *satyagraha* can be insofar as there is an international law that is conscious of its *telos* of securing universal justice for humanity.

2 Satyagraha: Its Theory and Practice

Satyagraha is disobedience of laws that are unjust.²² Though a disobedience, there is, however, nothing criminal about *satyagraha* since the disobedience is done civilly and the disobedient deems obedience to an unjust law as a dishonor.²³ Moreover, a *satyagrahi* also courts punishment for the breach of law, writes Gandhi in the context of Transvaal Ordinance which attempts to segregate Indians in South Africa, “If ... the Government enforces the Ordinance, Indians will not abide by it; they will not [re-]register themselves, nor will they pay fines; they will rather go to goals.”²⁴ However, in disobedience to even an unjust law, there shall be no use of violence.²⁵

Gandhi believed that *satyagraha* “should crystallize around some truth—or, rather, it must embody some aspect, admittedly partial, of universal truth.”²⁶ In the practice of *satyagraha*, most often, the untruth is deemed as absence of “social fairness” against which a community or mass movement is launched.²⁷ The purpose of such resistance is to bring on focus the injustice the untruths render, thereby morally indicting the wrongdoers.²⁸

However, Raja Jayaraman highlights that passive resistance is a “negative form” of *satyagraha* and shall not be deemed as exhausting the scope of *satyagraha*. Rather, there is a constructive side to it whereby *satyagrahis* actively and routinely indulge in social and cultural production. This side of *satyagraha* has both a symbolic and material effect. That is to say, for instance, practices like promotion of *Khadi* (home-spun) and the *Charka* (spinning wheel), while aim at the attainment of economic self-sufficiency of the nation and functional unity among *satyagrahis*, have also a figurative fineness that they move the feelings of masses far effectually than the language of persuasion or rhetoric.²⁹

²²Gandhi (1961), p. 7.

²³*Id.*

²⁴As quoted in Geetha ed. (2004), p. 43.

²⁵Gandhi, *supra* note 22, p. 9.

²⁶Jayaraman (1990), p. 115.

²⁷*Id.* at 115.

²⁸*Id.*

²⁹Charteris-Black (2007), pp. 64–66.

Even in case of the passive resistance form of *satyagraha*, it is not sheer spotlighting of injustice that all what is intended by *satyagraha* is public attention and mobilization of public support. Rather, it is an endurance directed at a social- and self-transformation. Mary Grey contextually puts forth that the purpose of *satyagraha* is twofold, first the endurance of justice by the *satyagrahis* engenders an ontological sense of “shared humanity”—a “connectedness with everyone and everything—to give meaning and energy to its sense of justice.”³⁰ Second, the individual *satyagrahi* has an ontological persuasion—an existentialist variant of the human sense of morals—to eliminate the ontic evils by endurance of the evil itself, for it is a *satyagrahi*’s conviction that every being has an ontological immediacy to its beingness and whatever ontic evils exist they can be eliminated by performing out (by endurance—an expending) that evil.³¹

However, for bringing *satyagraha* to the masses, its complex phenomenological and social ambitions have been simplified into a materialistic theism by Gandhi. According to William Borman, it was nothing short of a strategy to make public aware of the functional potency of *satyagraha*. He opines that since Gandhi was aware that *satyagraha* provides the greatest experience of practical power, he has equated it with God—the Kantian “immediate knowledge”—a concept that has more import and recognition among the masses.³² Later on Gandhian commentators have adopted the same theistic language to explain and further develop *satyagraha*. For example, Ajay Shanker Rai writes, “It [*satyagraha*] appears to Gandhi as a religious pursuit and rests on a religious belief that there is one God, who resides in everyone.”³³ According to Suman Kwatra, “Gandhi’s *Satyagraha* is based on moral and spiritual force so a *Satyagrahi* must believe in the supremacy of God []. He [Gandhi] is fully convinced that a *satyagrahi* has no other stay but God.”³⁴ At times, Gandhi himself, especially when addressing the masses, spoke of *satyagraha* in all the theoretical simplicity of God-centrism.

The word *Satya* (Truth) is derived from *Sat*, which mean ‘being’. *Nothing is or exists* in reality except Truth. That is why *Sat* or Truth is perhaps the most important name of God. In fact it is more correct to say that Truth is God, than to say that God is Truth.³⁵ (emphasis added)

One reason why Gandhi deified *satyagraha* is that he wanted to bring the concept of truth—read as God—and its practice thereof to the public fore. Even while popularizing *satyagraha* among the masses, Gandhi, however, had not let it get situated in the wilds of religious faith but has transformed it as a quest for the transcendence. He cautioned: “Truth ... is not just abstaining from telling some untruth to one’s fellow-humans: Truth is God, One and Only Reality.”³⁶

³⁰Grey (2004), p. 123.

³¹Ibid, pp. 123, 124. See also Puri (2015), pp. 119–20.

³²Borman (1986), p. 61.

³³See Rai (2000), p. 38.

³⁴Kwatra (2001), p. 145.

³⁵*The Selected Works of Mahatma Gandhi* (1968b), p. 177.

³⁶Klostermaier (2014), p. 33.

Regarding the practice of *satyagraha*, Gandhi believed that one shall adhere to *Ahimsa* (nonviolence). It is a means to practice *satyagraha*. Though in material sense *ahimsa* is nonuse of force, in metaphysical sense *ahimsa* is love—love for life, love for earth, love for the universe, love for humanity, and love for everything everywhere.³⁷ Dhiman echoes this postulation: “[L]ove, that is *ahimsa*, is not the mercenary affair which is based on the object of love. It is true love that is self-effacing and demands no consideration.”³⁸ Such a love has a caustic effect on all material evils that it helps the *satyagrahi* realize the oneness of his/her own body and soul with the numerous bodies and souls in the universe.³⁹

Yet, such idealist perspectives have been eclipsed by the socialist goals, Gandhi wanted to achieve by means of *satyagraha*. Gandhi believed that love for all animate and inanimate things in the universe builds a kind of sociality that can free the society of all its evils. He held that one should try to convert the opponent clinging to the untruth to the truth using *ahimsa*, while himself/herself persistently adhering to the truth. This type of socialism of Gandhi has translated into a certain way of living—the Gandhian way, popularly known as *Gandhi Marg*. Appraising Gandhi Marg, Rai, drawing on Vinoba, observes that *satyagraha*, more than a theory-based practice, is a normative way evolved out of the egalitarian ambitions of the masses for a just and fair society: “Satyagraha is a way of living, way of doing and a way of remedying.”⁴⁰ Indeed, it exemplified the *Gandhi Marg* (the Gandhian Way of Living) by laying down guidelines for a *satyagrahi* for leading a just and fair life that culminates in the feeling of universal love. And at the societal level, it generates shared sentiments and means for resolving social issues.⁴¹

However, albeit an effective instrument of social change and means of conflict resolution, *satyagraha* did not find place in the normatively rigid ways of international law because a resistance-based action like *satyagraha* cannot traverse the justificatory process of positivist international law meant for its epistemological candidates. One need not, however, deem this an emphatic and permanent rejection of *satyagraha* from the sphere of international law. Albeit not with the purity of positivist self-consciousness, the very reformist nature of *satyagraha* can qualify it to situate alongside other reformist projects that have been a consequence of the modernist renewalism in international law. Though such an assimilative possibility can help situate *satyagraha* in the periphery of international law, that can neither fully explore the universalizing potential of *satyagraha* nor turn it into an instrument for securing universal justice.

Hence, in the next part, the chapter revisits *satyagraha* to explore its socio-phenomenological side with the presumption that perhaps therein lies the true function of *satyagraha*—to generate the universalism of inquiry into the truth. Proceeding in that line, however, does not guarantee, at least at this stage, that having a socio-

³⁷ See generally Tiwari (2011).

³⁸ Dhiman (2010), p. 88.

³⁹ Ibid.

⁴⁰ Rai, supra note 33, p. 47.

⁴¹ Sharma (2006), p. 75.

phenomenological side to *satyagraha* will bring it straight to the normative world of international law.

3 The Social Phenomenology of Satyagraha

The axiomatic it seems, *satyagraha* is neither a normative quest for a factual reality nor a desire for an objective account of an otherwise relative truth.⁴² It is a firm resolution to transcend the relativity of truth.⁴³ The truth, according to Gandhi, is the eternal unmanifest *Brahman* which is deemed as the macro-intelligence from which has emerged all dimensional human perceptions including the three-dimensional manifest universe—an oriental variance of Anaximander’s *Apeiron*.⁴⁴ The Vedic tradition holds that *Brahman* is the “total inclusiveness that tries to convey the sense that everything is embraced within a universal ground awareness and that [it] is the only enduring reality.”⁴⁵ For Gandhi, the individual and collective phenomenological experience of *Brahman* is the truth. Gandhi made his logic clearer in *Young India*: “[*Brahman* is] a living power that is changeless, that holds all together, that creates, dissolves, and recreates. That informing power or spirit is God ... God is Life, Truth, Light.”⁴⁶ Elsewhere, he reiterates this transcendentalism of the truth and explains the possibility of cognitively situating the truth in oneself.

[T]here is one absolute truth which is total and all embracing. But it is indescribable, because it is God. Or say, rather, God is truth ... Other things, therefore can be true only in a relative sense.

He ... who understands truth, follows nothing but truth in thought, speech and action, comes to know God and gains the seer’s vision of the past, the present and the future. He attains Moksha [liberation] though still encased in the physical frame.⁴⁷

In a phenomenological parlance, Gandhian concept of the truth is a mystic microperception of the macro-*Brahman* which is, however, phenomenologically discernible.⁴⁸ But knowledge of the truth is a *non-scientific* knowledge which lacks the scientific sophistication of modern knowledge traditions.⁴⁹

⁴²See Rai, *supra* note 33, p. at 30 (“Truth in fact is transcendental value encompassing all existence of life and time”) (*Id.* at 36.).

⁴³See Gandhi (2006), p. 124.

⁴⁴Sonnleitner (1985), p. 54. For an analysis of the concept of *Brahman* from various perspectives, see generally Myers (2001). On the concept of *Apeiron*, see Warren (2007), pp. 28–33.

⁴⁵Anslow (2010), p. 17.

⁴⁶Young India October 11, 1928. As quoted in Deats and Jegan (2005), p. 34.

⁴⁷Dalton (1996), p. 35.

⁴⁸See Rao (1978), p. 61.

⁴⁹A fine classification between scientific knowledge (*apara vidya*/other knowledge) and non-scientific knowledge (*para vidya*/higher knowledge) is in *Mantra 9* of Isa Upanishad. For details, see Chinmayananda (2001), pp. 113–16.

Satyagraha is thus a desire to know the unmanifest *Brahman*. Knowing *Brahman* requires a conjoining of the notions about *Brahman* and the worldly reality projected as sense perceptions and a subsequent negation of the latter.⁵⁰

But a *satyagrahi* should also be aware that though the truth is the essence of all existence, it remains unmanifest.⁵¹ The unmanifestability of the truth, however, casts a metaphysical penumbra when the truth becomes a real-world pursuit—*satyagraha*. But the difficult it may be for a philosopher to describe an unmanifest object in textualist terms, such difficulties did not deter Gandhi either in the fulfillment of his desire for the truth or in his pursuit of it: After all, *satyagraha* is a soul-force that requires body to submit to the push-pull of causality.

In *satyagraha*, body becomes a medium to realize the truth and life becomes a method.⁵² A *satyagrahi* sees his body, unlike the Cartesians, as an external projection of the soul, though it is fraught with imperfections, which is the cause of all internal and external tensions.⁵³ However, irrespective of its imperfections, human body is an expression of all universal natural phenomena as well as of the universal human mind. Hence, a *satyagrahi* recognizes the potential of the body for a spiritual and social self-becoming. However, there lies a paradox in this approach: On the one side, a *satyagrahi* looks at the body as an instrument of performance, whereas on the other hand, *satyagrahi* often submits the body for receiving torture and suffering—“the more a *satyagrahi* suffers, the more thoroughly he is tested,” states Gandhi.⁵⁴ Two reasons can be submitted for this paradox. First, given that *satyagraha* has a teleological sophistication, which is accompanied by the practical complexity of seeking a transcendental goal through material/worldly means, it entails a tacit acceptance of all the vices of the society.⁵⁵ Since vices, for that matter violence, are immanent in human social living, they have to be eliminated by living through them.⁵⁶ Receiving torture is thus seen as an elimination of vices, a self-purification through suffering, a catharsis.⁵⁷ Such a warm reception to sufferings is based on the presumption that

⁵⁰On the process of knowing the Brahman, see Rangaswami (2012), pp. 114–211.

⁵¹*Id.*

⁵²*Selected Works of Mahatma Gandhi (1968b)*, p. 328.

⁵³Attributing the all depravities in the world to Cartesian dualism Capra Writes:

The inner fragmentation mirrors our view of the world ‘outside’ which is seen as a multitude of separate objects and events. The natural environment is treated as if it consisted of separate parts to be exploited by different interest groups. The fragmented view is further extended to society which is split into different nations, races, religious and political groups. The belief that all these fragments—in ourselves, in our environment and in our society—are really separate can be seen as the essential reason for the present series of social, ecological and cultural crises.

See Capra (1976), p. 28.

⁵⁴As quoted in Suhrud (2007), p. 78, fn. 15.

⁵⁵That *satyagraha* has a teleological base is emphasized in Mishra and Narayanasamy (2009), p. 95.

⁵⁶Geetha (2004), p. 12.

⁵⁷Sharma (2008), p. 17.

unless the material body is negated—falsified of the conviction that body is the axis of all empirical existence—the truth, which is a non-material finality, cannot be realized. Receiving blows, a *satyagrahi* observes the interaction between the body and the torture it is subject to, which generates a sense of detachment with the body. It is this sense of detachment with the body that helps a *satyagrahi* enter into an ecstatic absorption, a state closest to the truth.

The second approach to the paradox is to understand that for a *satyagrahi* the body, apart from it being an instrument for performance, has an expressive ability. That is, by bodily afflictions, a *satyagrahi* creates a “powerful social situation of invincible potency whose dynamic effects almost compels the oppressor to yield to the demands of truth and justice.”⁵⁸ As Ramana Murty infers, “the way of violence works as a monologue, but the nature of nonviolence is a dialogue.”⁵⁹ Besides this empathetic pull a *satyagrahi* exerts on the oppressor, *satyagraha* has a symbolic function as well.⁶⁰ That is, as the *satyagrahi*’s endurance and joyful suffering challenge the credibility of the moral position of the assailant, they also send strong social symbols of transformative potential to the society at large.⁶¹

The symbolic function of *satyagraha* deserves some elaboration. The point this chapter wants to make is that, as in the previous part, one need not deem *satyagraha* as a sheer empirical action designed on a revolutionary prototype and *satyagrahi* as the “most prototypical” member of an action group, though theoretical expositions on *satyagraha* seem to suggest so.⁶² The chapter rather contents that Gandhi’s concept of *satyagraha* in its function was more semiotic and less symbolic.⁶³

Deeming that body has a semiotic function implies that body has text-like characteristics, which in turn implies a marriage between the natural (the body) and the cultural (the text), resulting in a “unified sense of self.”⁶⁴ It is this sense of oneness of the experienced reality and the transcendental reality (which the *satyagrahi* seeks) that renders *satyagraha* free of parochialism of sorts. However, one needs to be aware that the text-like quality of human body is not a convenient theoretical postulation which facilitates bio-hermeneutical analyses.⁶⁵ Text-likeness is an integral feature of human interactive conduct, mostly public and to a certain extent private. It is a transmitting quality of human body that invites others—who are in collective participation in a social reality—to participate in the subjective experiences of a *satyagrahi*. What makes the invitation and the participation thereof untouched of individual moral sub-

⁵⁸*Id.*

⁵⁹Murti (1968), p. 608 (captures certain variations in the concept and application of *satyagraha*).

⁶⁰Sharma, *supra* note 41.

⁶¹A strong theoretical backing for this argument is at Verkuyten (2004), pp. 166–201.

⁶²For discerning a prototypical image of *satyagrahi* and to situate him/her in larger societal dynamics, see Hogg (2007), pp. 184–200.

⁶³Such a juxtaposition of the semiotic and symbolic is reminiscent of (but not a replica of) Julia Kristeva’s psychoanalytical model. Though I did not invoke that model *per se*, similarities with certain points of departure of Kristeva are highly probable. For a reference on Kristeva’s position, See generally Beardsworth (2004).

⁶⁴Weiss (2003), p. 25.

⁶⁵See generally Koubová (2011), pp. 127–47.

jectivities is that the subjective experiences, for that matter the bodily sufferings, of a *satyagrahi* are empirical denials of material reality—of violence, of untruth. In other words, a *satyagrahi* invites others to participate in his/her inquiry for the truth.

On balance, *satyagraha* is an art of self-perfecting by self-denial—a striving to feel the permanent presence of the truth in oneself and in others. Rai succinctly relays this idea:

[S]atyagraha begins and ends by turning the inward searchlight. The employment of satyagraha against others must be preceded by its application against one's own self, the intelligent cultivation of Non-violent values. The self discipline [sic] which includes control of thought and emotions, life and committant ethical beliefs.⁶⁶

It is true that the theoretical accounts of *satyagraha* are not free of misconceptions. However, responding to the delusions that surround it is adequately telling to the extent that it revealed the universalizing potential of *satyagraha*: *Satyagraha* is a practice of social self-becoming through individual self-perfecting; it is the means of internalizing the universal rightness; at the same time, it externalizes to the society the internalized individual rightness.⁶⁷ The universalizing process it is, *satyagraha* similar to the Hegelian “teleological movement” which is a process of “self-identification,” “self-differentiation,” and “self-universalizing.”⁶⁸ It is this universalizing potential of the truth, which *satyagraha* seeks, that makes it socially significant, and not the social dynamism of the various forms of it.

A different phenomenological take—perhaps a phenomenological output in itself—on *satyagraha* is that knowing the truth in *satyagraha* is intuitively same as sensing the justice. That sense of justice is nothing but a perception of the particularized universal good.⁶⁹ When such perceptions are extended to social collectives—through collective participation in the quest for the truth—*satyagraha* becomes the process toward universal justice.

The truth is thus qualitatively tantamount to universal justice, for in truth the sense of alterity yields its existence to a fine presence of the other in the self. Perhaps it is the fairest sense of justice: the fairest of all approaches that individuals can have toward their fellows in the society, fairness fairer than the hypothesized fairness of Rawls (reflective equilibrium), Smith (impartial spectator), and Hume (judicious spectator). Moreover, in the Gandhian scheme of things, search for the truth is as imperative as realization of the truth. It follows that search for the truth is search for justice, a search for fairness in conduct, fairness in character, and fairness in approach. Though this concept of truth-as-justice-and-justice-as-fairness provides ground for universal justice, the universality, that is the universalizable element, lies in the search for the truth than in the truth itself.⁷⁰ Then that the search for the truth is an interactive dialectical process, the universalism of *satyagraha* is a “discursive universalism.” It

⁶⁶Rai, *supra* note 33, p. 39.

⁶⁷See Allott (2012), p. 8

⁶⁸Min (2003), p. 162.

⁶⁹See Allott (2011), p. 1171.

⁷⁰On such a position, see Sreejith S.G. (2010) (arguing that the common interest of humanity lies in a collective pursuit of an ontological ideal).

is, however, a non-textual discursive universalism, though the discursive quality of which is often text-like.⁷¹

However, holding that the universalism of *satyagraha* is a discursive universalism has the effect of defying the teleological nature of *satyagraha*—*satyagraha* after all is a quest for the truth, a process that has to end in universalism. Yet, its process-orientedness can be reassuring as far as situating *satyagraha* in the conceptual and functional landscape of international law is concerned. In other words, though the socio-phenomenological form of *satyagraha* (a dialectic process) is antithetical to the simple form of *satyagraha* (a resistance-based action), it is perhaps the former with its dialectic process that is more qualified to become a process in the teleological progression of international law. However, for such a synthesis to happen, if at all a possibility, first international law needs to come out of its existential mode of normative singularity which has been rejecting non-procedural, non-formal processes out of the sphere of international law.

As long as international law remains in its existential and functional singularity, no effort at situating *satyagraha* or similar universalist projects is realizable. Hence, in the next part, the chapter, in order to allow us to conceptualize the universalizing possibilities of *satyagraha*, develops an analytic to present international law as a much more radical and “open” system (normatively less tight) conscious of and closely focused on its *telos* of universal justice.

4 Situating Satyagraha: The New International Law Analytic

4.1 *The New International Law Analytic*

The new international law analytic shall not be mistaken as New Approaches to International Law (NAIL)—an influence which at best and in short can be described as an amalgamation of liberal Western and neoclassical extremism in law, economics, and law and economics. Though this chapter accepts the epistemological possibilities of NAIL, it believes that there is little scope in NAIL for the broadening of international legal consciousness which has to be the cause for universality. Instead, what the chapter deems as new international law is a sort of social idealism that aims to “change fundamentally the social organisation of the world by changing fundamentally the ideas that support the social organization of the world.”⁷² The purpose of such a project *inter alia* is to recover the world from a social madness—the mad-

⁷¹On “discursive universalism” see generally Shapcott (2001). Allott (2009).

⁷²Scobbie (2011), p. 170.

ness of the “self-forming of nations within a reality-for-the-nation”—recovering and reconceiving the universal.⁷³

In international law, Philip Allott is the pioneer of social idealistic thinking. He conceives law as “a universalizing system, reconceiving the infinite particularity of human willing and acting in the light of the common interest of society.”⁷⁴ Human willing and acting is a routine dialectical process, occurring through social interactions made possible by law, by which humanity self-constitutes and self-evolves.⁷⁵ A society thus collectively self-constituted and self-evolved is a society of all societies, and international law is the law of such a society.⁷⁶ Thus, in the social idealist system, international law is the law of an ideal society, a reflection of the existence of a self-actualized humanity.

Apropos of law in society (which is different from international law, the law of the ideal society) social idealists view that law is a medium that helps human minds discover their social selves and thereby self-constituting. If so, then law shall also be able to help human minds to know all that transcends social knowledge and society or else law would be an unconstructive medium that forges a tragic singularity of human existence in society.⁷⁷ And if human minds have such a self-transcending possibility, then law, which facilitates human minds to self-constitute, to fulfill its true function and purpose, shall also have a self-transcending capacity. However, since law, as it is socially conceived, is miserably limited to a singularized conception of a record (the normative function) of and means (the instrumental function) for human social interaction, social idealists stand for providing law with means for a transcending experience in order and in turn to provide a participation in the collective self-constituting of humanity.⁷⁸

Though social idealists do not believe that law, as it is in its current form, has a self-transcending potential, they admit that socially acquired knowledge including social conceptions of law which perform a normative function have a certain epistemological value which more or less is because of an instrumental utility such conceptions have.⁷⁹ However, social idealists oppose the deterministic dialectic of law which eventually reinforces a materialist rationality to generate a false idea of reality, what has been subject to criticism by social idealists as social evil or “sociality.”⁸⁰ On balance, the problem of social conceptions of law is that it has prompted human minds to mistake the reality-forming process as reality itself.⁸¹ According to

⁷³*Id.* See also Allott (2002), p. 130.

⁷⁴Allott, *supra* note 18, p. 32.

⁷⁵*Id.*

⁷⁶*Id.*

⁷⁷Allott (2014), p. 2.

⁷⁸See e.g., Sreejith (2015).

⁷⁹*Id.*

⁸⁰*Id.* See also Philip Allott, “Deliver US from Social Evil”, available at <http://trin-hosts.trin.cam.ac.uk/fellows/philipallott/pinochetevil.pdf>.

⁸¹Allott, *supra* note 73, p. 7.

Allott, the reason for this error is the emergence “of a discontinuity in human reality, a duality in the very self-constituting of the human species.”⁸²

Thus, working on the finding that sociality is a false reality, social idealists call for a transformation of law from being an instrument for humanity’s social-becoming to an epistemological medium that helps guide humanity to actualize its ideal. In this process, what social idealists suggest shall be the true function of law is to help humanity realize its self-transcending potential by a move-through the process of “globalization from below, involving the propagation of ideas and laws in which humanity repeatedly rehumanizes itself.”⁸³ Allott refers to this move a revolution, “a revolution not in the street but in our minds.”⁸⁴ He summarizes the process:

It is possible to identify rather precisely the way in which law achieves its wonder-working. Within general human reality, and within the social reality of a particular society, there is a *legal reality* in which everything without exception—every person, every thing, every event—has legal significance. Legal reality is created by means very similar to the way, [] in which the human mind constructs human reality generally—that is to say, by re-presenting to itself in the form of ideas what it conceives as being the ‘real’ world.

In this framework, as is obvious, law has a substantial import in the reality-forming process of humanity. Law is not only a determining medium of human reality, but also a causal element in the general human reality. Accordingly, what shall be the nature of human reality to a large extent depends on what shall be the form and substance of law. And what shall humanity socialize for, if at all, shall also depend on the reality law is designed to create.

Thus social idealists see immense possibilities in law. Underlines Allott:

Law [] corresponds to whatever is the ultimate self-integrating capacity of the individual consciousness, that capacity which enables us to pursue our personal survival and prospering in our unique existential situation, in the moment and at the place where our own systematic functioning, as body and mind, intersects with the systematic functioning of all that is not us, that is to say, the natural world and the human world of other people as individuals and as society.⁸⁵

Writers who claim allegiance to social idealism have further extrapolated Allott’s revolutionary expositions. Attempt has been made to rediscover the reality-forming potential of law by attempting to rewrite not only the role and function of law but also its form, substance, discursive contexts, and patterns of discourse.⁸⁶ In an attempt at building a transcendental project that posits human reality as a super-consciousness, S. G. Sreejith puts it that in conceptualizing law at the level of super-consciousness as against the socially given consciousness, law

[W]ould be devoid of its canonical and inscriptional form, its linguistic discursivity and the logical coherence of the individual subjectivities it defends. Law would then become part of

⁸²*Id.* at 89.

⁸³Booth et al. (2001), p. 12.

⁸⁴Allott, *supra* note 73, p. 421.

⁸⁵*Id.*, pp. 33, 34.

⁸⁶Sreejith, *supra* note 78.

the non-becoming of consciousness—an intellectual pursuit, the transcending. Consequently, law would be a communication of the absolute super-consciousness that would steer the mind and body dwelling in the time–space of physical dualities.⁸⁷

In this order, law of the socially conceived world becomes the epistemology of consciousness (mind): Law would be a “discipline that includes the material ontology of humanity, methods of reasoning and logic to evaluate that ontology, semiotic linguistics of a high intellectual order, and an epistemology to realize the ultimate reality of humanity, [it] would become a methodically organized knowledge which transcends all other disciplines.”⁸⁸

Calling law that has a self-transcending potential “the Law,” which he holds is the sublimity of international law, and which Allott has referred to as the process of law gradating to the law of the society of societies, a self-transcended, self-constituted, collectivity of enlightened humanity, Sreejith concludes on what the nature of law would be in a self-transcending state:

The Law would no longer be a state of consciousness existing in a social consciousness within individuals, but a rich epistemology to metaevaluate the constructs and causes of consciousness and consciousness itself. It would no longer be a set of doctrines sustaining a social consciousness, but would be a method of inquiry that provides a pathology of the social conditions in which humanity exists. It would no longer be a constituent of sociality, but would be a first step and first lesson toward, and the first perception of, transcendental reality.⁸⁹

4.2 *Situating Satyagraha in International Law*

It is into such a new international law—a universalist scheme—that this chapter proposes to conceive *satyagraha*. What needs to be seen is whether international law, the normative enterprise it presently is, that would have a limited acceptance for *satyagraha* because of the latter’s resistance-basedness and its constructive otherness, when undergoes a structural transformation, would have *satyagraha* as a process deep-seated in it. There is also to be seen the extent to which international law benefits from *satyagraha* in fulfilling its *telos* of universal justice.

As has been observed above, in a social idealist world, as law moves into newer foundations, as it gains self-actualizing potential, international law would attain a sublimity in the form of a “new ideal of human self-constituting” that brings humanity to its universal consciousness. In this way, international law would recover its memory from its forgetfulness of its purpose and *telos* and a place “within the self-constituting of international society [] as an essential part of the self-creating and self-perfecting of the human species.”⁹⁰

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Allott, *supra* note 18, p. 50.

But how *satyagraha* can be situated within such a self-actualizing order? *Satyagraha*, when seen beyond its resistance-based form, is nothing short of a quest for the universal mind of humanity. As a quest for a universality, which has to be conducted through an epistemological process of self-discovery, *satyagraha* becomes a process in the self-constituting of humanity. The new international law which is the law of supreme societies is also a reflection of a self-constituted and self-actualized humanity. When international law relays the constructive potential of a self-actualized universal mind, that is to say, the ability to destine its own reality for humanity, it prompts minds to stand against the imposed injustices of society, bringing *satyagrahis* into action.

Apart from the overall phenomenological gains *satyagraha* can provide to a humanity self-constituting through a social idealist international law, some of its seemingly implausible strategies (from a conventionalist standpoint) make a powerful impact on human self-becoming. For example, the physical self-torture that is done in the process of *satyagraha* may have nothing to offer to a statist international law, even with all the humanist elements that it claims to have. However, from a social idealist standpoint, the human body, which is considered as an evident presence of a false consciousness that needs negating for a humanity in search of its self-transcending potential, *satyagraha's* ways of self-torture is a denial of the bodily reality, a trivialization of body and a negation of the false reality of a social injustice the body has produced. Gandhi echoes this disembodiment: "The body [is] simply a tool: a very useful and valuable tool that could be used for its own destruction."⁹¹ Philip Allott elevates this idea to the constructive program of a social idealist international law: "The potentiality of human reality, a potentiality which would be actualized over the succeeding centuries ... That potentiality must have been present, in the capacities of the human body and the human mind."⁹²

Satyagraha would become a full-fledged process of international law if/once the ground of international law changes from the society of states to a self-ordering society. In the latter type of society, socialization, as in society of states, is not the particularization of statist norms but is a particularization of a collective desire for human reality. Thus, socialization therein is a humanization of sorts, as Allot puts it: "Law [in self-ordering societies] is nothing but the socialization of a particular desire." And, the desire that law socializes is a desire for truth, *satyagraha*: It is a "never-ending quest for the ideal, the pursuit of the aspirational" which is the sole purpose of social idealism.⁹³

⁹¹ Alter (2000), p. 161.

⁹² Allott, *supra* note 73, p. 135.

⁹³ Scobbie, *supra* note 72, p. 175.

5 Conclusion

The chapter set out to inquire why Gandhian ideals, despite the sway they exert in nation building, have failed to play up its potential for securing a nonviolent universalism through international law. That inquiry revealed that international law tragically missed its ontological leitmotif, rejecting universalist models that cannot be located within the established paradigms of international legal thinking. Then again, the chapter was able to recognize the universalizing possibilities of Gandhian model *satyagraha*. But when *satyagraha* is taken at its simplistic crudity and popular application, though finds itself in a certain diametric relationship with international law, it leaves the functions of international law unfulfilled and frustrates its own universalizing potential. When *satyagraha* was seen from a socio-phenomenological perspective, a perspective which this chapter has asserted as the true discursive reasoning of *satyagraha*, it was found to stand totally alienated from the normative ways of international law. Hence to demonstrate the universalizing possibilities of *satyagraha*, the chapter has relied on a new international law analytic, which has not only helped situate *satyagraha* in the heart of international legal discourse but also discovered the renewalist possibilities of international law.

In this process, the chapter has accomplished a few things: First, it has added on to the finding that Eurocentric international law is a system that is ignorant of the finest civilizational diversities of the world. Moreover, its boast of state-centrism is simply an excuse for its narrow universalism which is an unholy convenience for imperialist interests to affirm their will. In such an existence, international law simply cannot afford to provide universality of human reality.

Second, *satyagraha*, notwithstanding its self-transcending, self-constitutive potential, was brought down in its routine applications by using it as a resistance to highly fractured political programs. Though such an action might have had success to claim, it defeats the very purpose of *satyagraha*. Also, if politics is characterized by a modernist chaos, the counter-philosophic corrective action of *satyagraha* will have no relevance. However, the chapter has proven that such a feeling of pointlessness itself is pointless if *satyagraha* is resurrected to its true sense of a route to universal truth—rather than as a medium of resistance in a relativist world, *satyagraha* is a soul-force, a “force within” to transcend the duality and relativism of the world.⁹⁴

Third, the chapter has spotlighted on the ongoing social idealist revolution that aims to regenerate the fundamental ideas that support the world. Investing faith in the self-constitutive possibilities that is inherent in the ontology of international law, social idealists aim to import universalist considerations that were classically considered as exogenous to legal discourse. Making use of that renewalism and polemical advantage of social idealism, the chapter has juxtaposed the self-transcending potential of *satyagraha* with the universalizing possibilities of a new international law envisaged by the social idealists, bringing forth the scope for a discursive project to help realize international law its universalist *telos*.

⁹⁴Pattery (2001), p. 49.

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A Critic and an Apologist: India's Quest for UN Security Council Permanent Membership

Srinivas Burra and Haris Jamil

Abstract Since the inception of the United Nations (UN), the Security Council membership has been a contentious issue. It is mainly so for two reasons. Firstly, the primary task of maintaining international peace and security lies with the Security Council under the UN Charter. Thus, having prohibited the use of force in general, the Charter authorizes the use of force and other forms of measures against any State for the purpose of maintaining international peace and security under chapter seven of the UN Charter. Secondly, any decisions taken under chapter seven by the Security Council are binding on all the UN member States. The permanent five (P5), China, France, Russia, UK and USA, also enjoy veto power, one of the most controversial aspects of the UN system, which requires concurrent vote of all permanent members on all except procedural matters. For this reason, the Security Council is considered as an undemocratic institution vested with the significant function of maintaining international peace and security, where P5 States can prevent any substantive decision being taken with their negative vote. Thus, there has been discussion to reform the Security Council and bring new members into it to make it more representative and transparent. There have been several proposals for reforming it. India is one of the prominent contenders for the permanent membership along with countries like Brazil, Germany and Japan. Some of the arguments in favour of India's case are that it is the largest democracy in the world, with a sizable geographical area and population and also it is a growing economy. This chapter attempts to critically evaluate India's position in relation to the UN Security Council reform.

1 Introduction

United Nations Security Council (UNSC) reformation has been in discussion for long. In the recent past, it is focused more on the expansion of its membership, though the arguments for reform include other issues also like its working methods. Along with membership, another contentious issue is the veto power of the UNSC

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permanent members. The demand for reforming the UNSC started long ago, and as a result, non-permanent membership was expanded in 1963 from six to ten States. The arguments that led to the expansion of the membership in 1963 are equally valid now warranting its further expansion. However, it is argued that the issues of the UNSC structure and membership were equally contentious when the UN itself was formed. It is observed that '[i]n several critical respects, the struggles of the first half of the 1940s over establishing the UN Security Council were remarkably similar to the debates today over reforming and enlarging it. Then, as now, the contentions revolved around its composition and voting rules much more than its powers or approach to issues of war and peace. The debate pitted a handful of determined world powers, backed by smaller states facing acute security threats, against the demands from many member states for a larger, more representative, and more accountable Council.'¹

This chapter would deal with the issue of India's claim to permanent membership of the UNSC. While analysing India's claim, the chapter would look at India's engagement and its views in the past on the structure and functioning of the UNSC. It would also evaluate reasons which India relies on to substantiate its claim and their maintainability towards pursuing the demand for the permanent membership. The chapter would end with highlighting the doubtful compatibility of India's claim with the existing international legal framework. The chapter is divided into five parts. Part two deals with the importance of the UNSC in terms of its membership and functions and the demands for its reformation. Part three provides the positions of the different stakeholders on reforming the UNSC. Part four deals with India's views on the UNSC at different stages. Part five provides the evaluation of India's claims and concluding remarks.

2 Significance of the Security Council and Demands for Its Reformation

Since the inception of the United Nations, the structure and role of the UNSC continue to attract the attention of the Member States. The attention the UNSC draws is mainly for two important reasons. Under the UN Charter, the primary task of maintaining international peace and security lies with the UNSC. Having prohibited the use of force in general, the Charter creates exception in the form of collective security and authorizes the use of force and other forms of measures against a State for the purpose of maintaining international peace and security. The significance of these decisions by the Security Council is that they are binding on all Member States. The second reason why the UNSC attracts the attention of the Member States is its structure in terms of its membership. When the UN was established, the membership of the UNSC consisted of 11 Member States. Of these, five were permanent Member States and six were non-permanent. The five permanent members are China, France, the erstwhile Soviet Union, UK and the USA. When the UN was established, it consisted

¹Luck (2010), p. 81.

of 51 Member States. The number increased steadily by 1960s.² During this time, the process of decolonization led to the coming into existence of new independent States who were becoming parties to the UN. The increase in the number of Member States, mainly from Africa and Asia, also changed the nature of the organization. There were calls for the reorganization of the Security Council membership.³ Accordingly, the number of non-permanent members was increased from six to ten, making the total number of members 15.⁴ Since then, the number remains the same.

The nature of its functions and the nature of its membership in a way mutually reinforce to make it a powerful organ in the UN system. To further elaborate it, even if its functions remain the same and if its membership does not have the privileged status of permanent membership with veto power, then the UNSC would not have been as contentious as it is now. Similarly, even if the membership is what it is today, the UNSC would not have been as contentious if its functional structure would have been different, i.e. maintenance of international peace and security not being its primary function. Thus, it would be an ideal step to talk in terms of restructuring its functional structure and also its membership. However, most of the discussions around reforming the UNSC are centred on the membership. An attempt to dent the power of the UNSC in maintaining international peace and security was made through the Uniting for Resolution during the cold war time. The Uniting for Peace resolution was adopted by the UN General Assembly on 03 November 1950. India abstained in the voting.⁵ India's abstention may be explained by its developing proximity with the erstwhile Soviet Union and also by its developing non-aligned position. This also seems to be in accordance with India's attitude of accepting the UNSC as it was then. Thus, though the efforts for reforming the Security Council have attained momentum in the recent years, its structure and membership remained as contentious in its inception as they are now. Hence, it is observed that 'while the inequities built into the Security Council's voting and decision-making rules, particularly the veto power for the five Permanent Members, proved highly controversial at the founding conference in San Francisco, the convening powers would not bend on these core elements of their vision. Agreed upon at Dumbarton Oaks and Yalta beforehand, the veto and permanent membership were designed to transform a wartime alliance into a big power oligarchy to secure the hard-won peace that would follow. The convening powers offered concessions on numerous other points in the draft Charter in order to persuade other prospective member states to go along with this one-sided bargain,

²In 1960 the UN membership was 99 States. In 1965 it was 117, and in 1970 it went up to 127.

³According to Article 108 of the United Nations Charter, the Charter can be amended by a General Assembly decision approved by two thirds of General Assembly membership and ratified by two thirds of Member States, including the permanent members of the Security Council. Changing the composition of the Security Council involves amending the Charter; therefore, Article 108 applies to the issue of reforming the Security Council membership.

⁴UN General Assembly adopted a resolution on 17 December 1963 making provisions for amending the United Nations Charter in order to increase non-permanent membership of the Security Council to fifteen member states. UN Doc. A/RES/1991 (XVIII), 17 December 1963.

⁵United Nations General Assembly Resolution 377(V) of 3 November 1950. 52 States were in favour, five against and two abstentions. India along with Argentina abstained.

but would not budge at all on these core arrangements (or on keeping the bar high for efforts to amend them in the future)'.⁶

3 Positions of Different Stakeholders

Any attempt to reform the most powerful and controversial organ of the United Nations has been considered as a troublesome and long drawn out task, and it turns out to be the same. The quest for the UNSC reform is reflection of both consensus and conflict among States. While most of the States agree that the UNSC must reflect the changing global reality, they disagree on the modalities of the reform. Though the issue of the UNSC reform has been on the agenda of the UN General Assembly since 1992,⁷ a major breakthrough was achieved on 15 September 2008, when it adopted Decision 62/557 on the 'Question of equitable representation on and increase in the membership of the Security Council and related matters', stipulating the commencement of inter-governmental negotiation on the UNSC reform in informal plenary of the General Assembly during the 63rd session of the General Assembly. Decision 62/557 also identified the key issues to be considered during the inter-governmental negotiations. These included: categories of membership; the question of the veto; regional representation; size of an enlarged UNSC and its working methods; and the relationship between the UNSC and the General Assembly.

While some States see a reformed UNSC as a tool to reinforce their dominance in the international order, some others look for a say in continuing the existing dominant relations. What needs to be underlined is that almost all the States react to the developments relating to the reform from the perspective of national and regional interests. Positions from time to time show that States do not seem to perceive the UNSC reform as a collective objective; rather they seem to be inclined to safeguarding their larger interests. This is despite the fact that almost every non-P-5 State recognizes the undemocratic, arbitrary and non-inclusive nature of the UN Security Council system. It is because of the conflicting interests, States have formed groups to push their individual and like-minded demands more strongly. There are five important stakeholders whose positions may significantly influence the reform process. They include: African Union, Arab States, G-4, L-69 and permanent members of the UNSC. The permanent members maintain their individual positions and do not act as a group.

African Union believes that the reform should take place in both the permanent and the non-permanent seats. It underlines that Africa, despite comprising of 54 States and accounting for 70% of the work of the Security Council, is the 'only region that is not

⁶Luck (2010), p. 63.

⁷Several resolutions were adopted on the "Question of equitable representation on and increase in the membership of the Security Council" since 1992. See, UNGAR 47/62 (11 December 1992); UNGAR 48/26 (3 December 1993); UNGAR 53/30 (23 November 1998); UNGAR A/Res/60/1 (2005).

represented in the permanent category ... [and is] underrepresented in the Council's non-permanent category.⁸ African Union believes that a reformed UNSC should have a total of 11 permanent seats, out of which two should be for Africa. It also insists that the selection of Africa's representatives should be done by the African Union for submission to the General Assembly for election.⁹ Similarly, African Union proposes that total number of non-permanent members with a two-year term should not be less than 15, out of which a total of 5 seats should belong to Africa.¹⁰ It also suggests that the system of veto should be completely abolished, but as long as it exists, it should be extended to all the members of the reformed permanent category as a matter of 'common justice'.¹¹ With regard to the working methods, African Union expects the Security Council, *inter alia*, to be 'more accessible, accountable and more effective [...] responding to the exigencies of the time.'¹² Similarly, Arab States demand a permanent Arab representation in the reformed Security Council.¹³ They also believe that a reformed Security Council should reflect all geographic and regional groups. According to Arab States, despite comprising of 22 members, equivalent to 12% of the membership of the UN, they do not have permanent seat in the Security Council. Criticizing the arbitrary use of veto by the permanent members, Arab States affirm the 'need to deal with veto right from a comprehensive perspective'.¹⁴ The position of the Uniting for Consensus Group (UfC) is slightly different from other groups and focuses more on the democratic aspect of such reform.¹⁵ UfC advocates for 'an expansion limited to elected seats' only. According to this Group:

Elections are irreplaceable in ensuring a democratic Council that is accountable to all Member States on equal footing. Small and Medium-size states, which represent the vast majority of the UN membership, should benefit from a reform outcome that recognizes their right to vote, to have their voice heard on a regular basis, and not on a single unrepeatable occasion. A democratic reform should address the current imbalance in regional representation, in response to the claims and aspirations of African, Asian and Latin American countries.¹⁶

⁸ See comments by Mr. Sumah on behalf of State members of the African Union. UN Doc A/71/PV.42 (7 November 2016).

⁹ 'Framework Document: Inputs submitted by the Committee of Ten African States on UN Security Council Reform on behalf of the African Union Members States' (22 April 2015) For compilation of the positions of different States on UN Security Council reform, visit- <https://www.pminewyork.org/pdf/PGA_Letter_Annexes.pdf> accessed 29 October 2017.

¹⁰ *Ibid*, at p. 1.

¹¹ *Ibid*, at p. 3.

¹² *Ibid*, at p. 1.

¹³ 'Response to Framework Paper on the Question of Security Council Reform on behalf of the Arab Group' (1 May 2015) <http://www.un.org/en/ga/president/69/pdf/letters/050515_Security%20Council%20Reform%20-%20Framework%20Document%20%20additional%20submissions.pdf> accessed on 04th March 2018.

¹⁴ *Ibid*.

¹⁵ 'Letter by Sebastiano Cardi on behalf of Uniting for Consensus Group' (1 May 2015) <http://www.un.org/en/ga/president/69/pdf/letters/050515_Security%20Council%20Reform%20-%20Framework%20Document%20%20additional%20submissions.pdf> accessed on 04th March 2018.

¹⁶ *Ibid*.

With regard to veto, UfC group considers its abolition to be ideal, but is also open to consider formulas to limit its use.¹⁷ Like African group, L.69 proposes for 11 permanent members in the Council; out of which, apart from the P-5 members, 2 each should belong to Africa and Asia and one each to GRULAC and WEOG.¹⁸ Similarly, it proposes that the number of non-permanent seats with two-year term should increase to 16. With regard to veto, L.69 proposes that it should be abolished; but so long as it exists, all the members of the reformed Security Council should have it.¹⁹ Like L.69, G-4 proposes for increase in the permanent members of the Security Council to a total of 11 seats.²⁰ While prescribing the application of legal procedures for the election of new seats, G-4 notes that the criteria of Article 23(1) should also apply; i.e. ‘due regard shall be paid, in the first instance to their contributions to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution’.²¹ G-4 also proposes for the increase in the number of non-permanent members with two-year term to a total of 14/15 seats.²² With regard to the question of veto, G-4 notes that States should be invited to discuss the issues relating to the use of veto in certain circumstances by the permanent members. With regard to the use of veto by the new permanent members, G-4 notes that:

The new permanent members would as a principle have the same responsibilities and obligations as current permanent members. However, the new permanent members shall not exercise the veto right until a decision on the matter has been taken during a review, to be held fifteen years after the coming into force of the reform.²³

Even among the permanent members, there is no consensus with regard to the UNSC reform. France proposes that the total number of seats in the Security Council could be increased to somewhere in the mid-20s.²⁴ In addition to the present permanent members, it proposes that Brazil, Germany, India, Japan and African representation can become permanent members.²⁵ With regard to veto, France believes that if the new permanent members pursue to have veto powers, it would not oppose such an extension.²⁶ UK supports the enlargement of the UNSC ‘to a level that will not negatively impact upon [Council’s] effectiveness and ability to carry out its responsi-

¹⁷ Ibid.

¹⁸ ‘L.69 Group Inputs on Framework Document regarding Security Council Reform’ (2015) <https://www.pminewyork.org/pdf/PGA_Letter_Annexes.pdf> accessed 29 October 2017.

¹⁹ Ibid.

²⁰ ‘Framework Document: G-4 Inputs’ (2015) <https://www.pminewyork.org/pdf/PGA_Letter_Annexes.pdf> accessed 29 October 2017.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ ‘Framework Document: France’ (2015) <https://www.pminewyork.org/pdf/PGA_Letter_Annexes.pdf> accessed 29 October 2017.

²⁵ Ibid.

²⁶ Ibid.

bilities'.²⁷ Like France, it supports the inclusion of Brazil, Germany, India, Japan and African representation as permanent members of the Security Council²⁸; but unlike France, it rejects the idea of expansion of the veto power to the new members.²⁹ USA, too, agrees with the idea of modest expansion of both permanent and non-permanent membership. However, it notes that 'an expansion of permanent members must take into account the ability and willingness of countries to contribute to the maintenance of international peace and security and to the other purposes of the United Nations'.³⁰ USA insists that the consideration of the new permanent members to the Security Council must be 'country-specific in nature'.³¹ It also registers its opposition to 'any alteration and expansion of the veto'.³² Like other States, China, too, agrees with the idea of the reform of the Security Council's membership and working methods; however, it notes that the reform should not take place at the 'expense of the unity of the Member States'.³³ Russia also supports the representation of the developing countries from Africa, Asia and Latin America on the Security Council.³⁴ However, it notes that the 'prerogatives of the current Permanent Members', which include use of veto, should not be extended to the new permanent members.

4 India's Views on the UN Security Council

India has been a non-permanent member of the UNSC for seven terms. The last term was in 2011–2012.³⁵ It may take some more years for India to get its turn again to sit in the Security Council as a non-permanent member. The other possible entry for India into the Security Council could be through the much talked about reform of the Security Council and India's entry as a permanent member. Evaluation of India's efforts to achieve permanent membership in the Security Council in accordance with international law would help contextualize India's aspiration, particularly with a view to looking at the impact of its realization.

²⁷'Framework Document: The United Kingdom' (2015).

<https://www.pminewyork.org/pdf/PGA_Letter_Annexes.pdf> accessed 29 October 2017.

²⁸Ibid.

²⁹Ibid.

³⁰'Letter by Ambassador Samantha Power on behalf of the United States of America' (16 April 2015)

<https://www.pminewyork.org/pdf/PGA_Letter_Annexes.pdf> accessed 29 October 2017.

³¹Ibid.

³²Ibid.

³³'Position of China on the Security Council Reform' (2015)

<https://www.pminewyork.org/pdf/PGA_Letter_Annexes.pdf> accessed 29 October 2017.

³⁴'Russia's Letter on Security Council Reform' (2015)

<https://www.pminewyork.org/pdf/PGA_Letter_Annexes.pdf> accessed 29 October 2017.

³⁵India was a non-permanent member of the Security Council during 1950–1951, 1967–1968, 1972–1973, 1977–1978, 1984–1985, 1991–1992, and 2011–2012.

Since the inception of the United Nations India continued to look at the Security Council as an institutional reflection of unevenness of the real world. It was critical of those Security Council decisions in which its stakes were involved like in the case of Liberation of Goa. It continues to have critical stance on its role and functioning on other occasions also, like its position on the power of the Security Council in the Rome Statute. India's critical stance is very much grounded on important tenets of international law. It is undeniable that the hierarchical nature of the membership of the Security Council goes against some of the formally proclaimed fundamental tenets of the post-Second World War international law.³⁶ Though this is the product of a multilaterally agreed treaty, it still cannot be argued as a fair form of representation in international institutions. Remaining part of this section would cover India's positions vis-à-vis the UNSC at various stages. It would attempt, based on statements, to map the changing nature of India's attitude towards the UNSC at different stages.

1. 1945–1960

India's initial response to the institutional structure and the working methods of the UN Security Council was not critical. Although India did not advocate for a permanent seat in the UN Security Council for itself, it proposed that due regard should be paid to population and economic capacity in selecting the non-permanent members.³⁷ It saw the Security Council as the most responsible organ and iterated that international peace and security depended on the actions of the powerful States. Speaking on 18th January 1946 at the 1st session of the UN General Assembly, the Indian representative stated that:

The Security Council has been described by some as the most powerful of all organs. I venture, respectfully and humbly, to dissociate myself from that description. No, the Security Council is the most responsible of all our organs. On it falls a burden greater than the burden on any other organ of this Organization, but it is not a powerful body. . . . On the Security Council, certainly, depends the solution of many of the problems that will arise from time to time. On its perspicacity, on the level at which the problems are approached, on the courage with which great nations and small nations try to tackle the problems that will come day after day before it, on these will depend the efficient functioning of the Security Council.³⁸

Taking an idealist position, India refused to acknowledge that there existed a gap between 'great powers' and the 'middle powers'. Indian representative speaking on 19th September 1947 at the 2nd session of the UN General Assembly and after the independence of India stated that:

It is sometimes said that this is an issue between the great Powers on the one side and the small and medium Powers on the other. While it is convenient to speak of the permanent

³⁶It is though an irony that it is the UN Charter which proclaims the 'principle of the sovereign equality of all its Members', it is the same Charter which enshrines the undemocratic nature of the membership of the UN Security Council. Article 2 of the UN Charter states that the 'Organization is based on the principle of the sovereign equality of its entire Members'.

³⁷Russell (1958), p. 648.

³⁸Statement by Mr. Ramaswamy Mudaliar in the 14th Plenary Meeting of the 1st session of UN General Assembly (18th January 1946). <<https://www.pminewyork.org/adminpart/uploadpdf/806861ms1.pdf>> accessed on 30 September 2017.

members of the Council as "great Powers", the tendency to classify countries as great and small is not useful. For instance, I would not like to assign India to any of these categories. We are all great in some respects, and no doubt small in others, but we all have an equal right to consideration in this Assembly in accordance with the principles laid down in the Charter.³⁹

Implicit in the above statement is to underline the significance of the UN General Assembly where all the States have equal powers, unlike the UN Security Council. However, India's advocacy for the UN General Assembly was not linked to the deficiencies of the UNSC, although this eventually changed post-1960. It needs to be emphasized that this was the time when India had not emerged as a chief proponent of multilateralism. Therefore, even when Outer Mongolia failed to get UN membership due to the use of the veto in the Security Council, India reiterated its belief in other permanent members of the Security Council. The Indian representative stated:

We believe that that State is as entitled as anyone else to take its place here, and we deeply regret that the use of the veto in the Security Council has prevented its admission. We hope that the influence of the other permanent members will be used this time to blot this out, so that the United Nations will become truly universal.⁴⁰

Despite realizing that the UNSC was not a truly representative body, India believed that proper efforts should be made to make UN more representative and inclusive. Speaking on the issue of admission of new members to the United Nations, the Indian representative said that:

If it were possible to make a beginning-I do not say that this is a perfect end, because there are still large States that would be outside the Security Council and the General Assembly-it would still make a breach in this wall of opposition to the newcomer. The exclusiveness like that of a club, and the psychology of blackballing, would begin to disappear.⁴¹

India believed that the actions of the permanent members of the UNSC were central to the maintenance of international peace and security. Therefore, during the 1953 session of the UN General Assembly, Indian representative stated that:

... the Security Council has tended to be a body which meets when it has to meet, that is, when it is obliged to do so by some reference to it. ... if indeed it is the Security Council, and if we are working towards removing the scourge of war and creating neighbourliness between nations, and towards the evolution of a world community, it is necessary that world leaders, especially those with effective power-the foreign ministers of States-should occasionally meet each other.⁴²

³⁹Statement at the 85th Plenary Meeting of the 2nd session of the UN General Assembly (19th September 1947) <<https://www.pminewyork.org/adminpart/uploadpdf/64080lms2.pdf>> accessed on 30 September 2017.

⁴⁰Statement at the 611th Plenary Meeting of the 11th session of the UN General Assembly (6th December 1956) <<https://www.pminewyork.org/adminpart/uploadpdf/57059lms10.pdf>> accessed on 30 September 2017.

⁴¹Statement at the 448th Plenary Meeting of the 8th session of the UN General Assembly (28th September 1953) <<https://www.pminewyork.org/adminpart/uploadpdf/73877lms8.pdf>> accessed on 30th September 2017.

⁴²Statement by Mr. V K Krishna Menon at the 8th session of the United Nations General Assembly (28th September 1953) <<https://www.pminewyork.org/adminpart/uploadpdf/73877lms8.pdf>>

One needs to remember that India continued to believe in the UN system and did not criticize the UNSC structure, despite failing to achieve the desired result on the issue of Kashmir from the Security Council. Prime Minister of India's statement at the 15th session of the UN General Assembly on 3rd October 1960 aptly sums up India's attitude towards the UNSC:

The United Nations took birth on a note of high idealism, embodied in the noble wording of the Charter. There was this aspect of idealism, but there was also a realization of the state of the post-war world as it was then, and so provision was made in the structure of the Organization to balance certain conflicting urges. There were the permanent members of the Security Council and the provision for great-Power unanimity. All this was not very logical, but it represented certain realities of the world as it was. Because of this we accepted it. At that time many large areas in Asia, and even more so in Africa, were not represented in the United Nations, as they were under colonial domination. Since then the colonial part of the world has shrunk greatly and we welcome here many countries from Africa in their new freedom. The United Nations has become progressively more representative, but we must remember that even now it is not fully so.⁴³

India's position therefore was both idealistic and pragmatic. On the one hand, it believed in the objectives of the UN system, and on the other hand it realized that the UN institutions reflected certain realities. At the same time, it believed that the UN system could be made more inclusive and representative. The former Prime Minister of India believed that the UN was a necessity of the time, and it has justified its existence. In his words:

During these past fifteen years the United Nations has often been criticized for its structure and for some of its activities. . . These criticisms have often had some justification behind them, but looking at the broad picture I think that we can definitely say that the United Nations has amply justified its existence and repeatedly prevented our recurrent crises from developing into war. It has played a great role, and it is a little difficult now to think of this troubled world without the United Nations. If it has defects, those defects lie in the world situation itself which, inevitably, it mirrors. If there had been no United Nations today, our first task would have been to create something of that kind, I should like, therefore, to pay my tribute to the work of the United Nations as a whole, even though I might criticize some aspects of it from time to time. The structure of the United Nations when it started was weighted in favour of Europe and the Americas. It did not seem to us to be fair to the countries of Asia and Africa, but we appreciated the difficulties of the situation and did not press for any changes. With the growth of the United Nations and with more countries coming into it, that structure today is still more unbalanced. Even so, we wish to proceed slowly and with agreement and not to press for any change which would involve an immediate amendment of the Charter and the raising of heated controversies.⁴⁴

accessed on 30th September 2017. Quoting B N Rau, Mr Menon said that: "I speak with great diffidence, but the subject is so important that I cannot refrain from making a suggestion or two. The Ministers for Foreign Affairs of the United States, the Soviet Union, the United Kingdom and France all are present here."-that was in Paris-"Could they not meet and discuss or rediscuss at least the most outstanding matters of disagreement between them?"

⁴³Statement by the Prime Minister of India at the 15th session of the UN General Assembly (3rd October 1960) <<https://www.pminewyork.org/adminpart/uploadpdf/25273lms15.pdf>> accessed on 30th September 2017.

⁴⁴Ibid.

He was also pragmatic in commenting on the issue of structural changes in the UN organs. According to him:

It has been suggested that some structural changes should take place in the United Nations. Probably some changes would be desirable,... and because of the emergence of many independent countries in Asia and Africa. But any attempt at bringing about these structural changes by an amendment of the Charter at the present juncture is likely to raise many controversial questions and thus add greatly to the difficulties we face.⁴⁵

These views display the awareness of the problems that the United Nations had, which however were qualified with the necessity of continuing with them keeping in view the reality at the international level. It was also a reflection of the fact that countries like India looked at the UN as a relatively neutral forum where their voices could be heard. Thus on the one hand, India affirmed its belief in the objectives of the UN system, and on the other hand it acknowledged that although the UN organs had many problems it reflected certain realities of the time.⁴⁶

2. 1960–1990

The period beginning from 1960 to 1990 changed India's attitude towards the UN Security Council. This was also the period when India emerged as an important voice of the Third World in the UN General Assembly in the adoption of several General Assembly resolutions. During this period, the conflict between the powerful and the Third World States within UN system was more direct and India, too, was quite vociferous in its criticism of the Security Council dominated by the powerful States. India's most severe criticism of the UNSC came in the backdrop of the invasion of Goa. Speaking in the UNSC on the issue on 18 December 1961, the Indian representative stated that:

It is a question of getting rid of the last vestiges of colonialism in India. That is a matter of faith with us. Whatever anyone else may think, Charter or no Charter, Council or no Council, that is our basic faith which we cannot afford to give up at any cost.⁴⁷

Showing complete discontentment towards the UNSC, Indian representative added that:

The only thing that the Security Council could do is to tell Portugal to vacate Goa, Damao and Diu, those three enclaves of the Indian continent, and to give effect to the numerous resolutions of the General Assembly with the regard to the freedom of dependant peoples.⁴⁸

Similar sentiment was voiced by the then Defence Minister of India who stated that:

⁴⁵Ibid.

⁴⁶Such was the idealism of the then Prime Minister Jawaharlal Nehru that, according to a later revelation, when in 1950, America offered India the Chinese permanent seat in the UN Security Council, Jawaharlal Nehru discarded the idea and suggested that China had the legitimate claim for the seat. Mahesh Vijapurkar (2004)

⁴⁷UN Doc S/PV.987 (18th December 1961), para 40.

⁴⁸Ibid.

Had the Security Council intervened, we would not have stopped the action [to take Goa by military force]. We had learned some lessons. . . . The nation that behaves well is always in a bad position.⁴⁹

India's discontentment towards the UN Security Council was not just limited to the issues of national interest. In 1979, India along with other States raised the voice in relation to the reform of the UN Security Council. In a letter dated 14 November 1979 to the Secretary General, representatives of 10 Member States (including India)⁵⁰ requested the inclusion in the agenda of the thirty-fourth session of the General Assembly of an item entitled 'Question of equitable representation on and increase in the membership of the Security Council'. It was recommended that it was necessary to review the composition of the Council with a view to providing for a more equitable and balanced representation in order to strengthen the primary role of the Security Council in maintaining international peace and security. According to the letter:

Since the amendment of the Charter of the United Nations in 1963, enlarging the membership of the Security Council from 11 to 15 members, the membership of the United Nations has increased from 113 to 152. This increase is mainly due to the emergence and admission to the United Nations of a large number of new States from Africa, Asia and Latin America. . . . However, this increase has not been reflected in the membership of the Security Council.⁵¹

Subsequently, a draft resolution was submitted to the General Assembly by 14 States including India on 14th December 1979 at the 34th session calling for amendments to Articles 23 and 27 of the UN Charter with an aim to increasing the number of non-permanent seats of the Security Council to 19. The idea was to provide for a more equitable representation in the Council.⁵² However, this proposal was met with opposition from most of the permanent members of the UNSC. According to them:

the enlargement of the Council would have a negative effect on the ability of the body to undertake rapid and effective action to maintain international peace and security; and that the composition of the non-permanent membership of the Council was not determined by arithmetical proportions but by paying special regard to the contribution of Member States to the maintenance of international peace and security.⁵³

On behalf of the States which proposed the draft resolution, India stated that the failure to enlarge the membership gave rise to the problem of inequitable representation in the UN Security Council.⁵⁴ India also stated that the proposal only related to the increase in the number of non-permanent seats and did not touch upon the substantive aspects of the role and functions of the Council or the position of its

⁴⁹Brecher (1968), p. 133 quoted in Berman (2005), p. 101.

⁵⁰These States included Algeria, Argentina, Bangladesh, Bhutan, Guyana, India, Maldives, Nepal, Nigeria and Sri Lanka. See, UN Doc A/34/246 (1979).

⁵¹UN Doc A/34/246 (14 November 1979).

⁵²UN Doc A/34/L.57 and Add.1.

⁵³See, the discussion during the 104th Plenary Meeting of the 34th Session of the UN General Assembly, paras. 325–328.

⁵⁴See, statement made during 103rd Plenary Meeting of the 34th Session of the UN General Assembly, paras. 136 and 137.

permanent members.⁵⁵ After wide debate and consultations, on 16 January 1981, the UN General Assembly accepted the proposal, without vote, as decision 35/450.

One can see that during this period India showed its discontentment towards the decisions of the UN Security Council. This was also the time when India was seen as an important voice of the Third World.

3. 1992-till the present

India's views during this period reflect three broad features. First, its views emphasize on complete reform of the Security Council i.e., reformation of both institutional and working methods, and not just limited to non-permanent membership. Second feature is that the reasons given for reform are not just limited to making the UNSC more representative but also include the questions of legitimacy, transparency and working methods. The third feature is that India claims permanent seat for itself. This is different from the second stage [1960–1990] where India did not demand a permanent seat for itself and just highlighted the need for increase in the number of non-permanent members.

Further, India's statements can be divided into three different groups based on their underlying assertions. These assertions are in the form of highlighting the problems of the UNSC mainly in relation to membership, its demand for permanent membership and lastly, some statements reflecting inconsistencies in its stand in terms of making some fundamental criticisms on the UNSC.

(a) India's statements highlighting problems of the UNSC

Some of its statements during this time highlighted the problems with the current structure of the UNSC. They mainly focused on the current membership and the need for reforming it. On 29 June 1993, Indian representative, highlighting the unrepresentative nature of the UNSC membership, stated that:

... there has been a particularly steep fall in the ratio between the number of permanent members and the General Assembly membership, which has declined from 1:10 in 1945 to 1:36 today. . . India is of the view that the number of permanent members of the Security Council should be increased to 10 or 11 and the non-permanent members to 12 or 14.⁵⁶

The representative also stated that the new membership should be based on 'the basis of equitable regional representation, consistency in support for, and participation in, important political and economic activities and peace-keeping operations of the United Nations; and consistency in fulfilling financial obligations towards the United Nations and the specialized institutions. For selecting additional States in an expanded Security Council, population, size of the economy and future potential of the countries concerned should also be taken into account.'⁵⁷

In 1995, Indian representative reiterated the demand for reform and stated that:

⁵⁵Ibid, para. 138.

⁵⁶UN Doc A/48/264 (20 July 1993), p. 47.

⁵⁷UN Doc A/48/264 (20 July 1993), p. 46.

The United Nations needs a Council that is effective, but it cannot be effective if the impression grows that it represents entrenched privileges and that its agenda could vary from those of the general membership. The democracy and good governance which are urged upon all States cannot stop at the gates of the United Nations. The present-day composition of the Security Council reflects the power balance of the immediate post-war period. Since then, the membership of the world body has increased many times over. There is also a greater diffusion of power. To give the Council's actions greater legitimacy, moral authority and political effectiveness, it is imperative to expand the membership of the Council.⁵⁸

He further added that:

A selective, piecemeal expansion of the number of permanent members would not be prudent. The Security Council is not a corporate board, where equity shares determine the voting power, nor can it be likened to the Bretton Woods institutions, which reflect the wealth of nations. The United Nations is based on the principle of the sovereign equality of nations. Its primary objective remains the maintenance of international peace and security. These elements must find expression in the composition of the Council, which must be able to address the challenges of the twenty-first century.⁵⁹

Similar views continued to be expressed by Indian representatives on other occasions also. These statements underline the legitimacy deficit that the UNSC decisions face in its current form. In 2000, criticizing the unrepresentative nature of the Security Council and its working methods, Indian representative stated that:

[...] if it decided to take or authorise humanitarian action, the Council would claim to act on behalf of the international community. However, the Council's membership is unrepresentative, and in its methods of work it does not welcome or accept the views of the wider membership. . . There would be well founded fears that the Council would act, not for humanitarian, but for less lofty, reasons.

[...] The more the Security Council tries, perhaps with the best motives, to arrogate to itself the role to protect and promote humanitarian action, the more it is likely to work against the best interests of civilian populations at risk.⁶⁰

In 2003, the Prime Minister of India reiterated that if the Security Council is to represent genuine multilateralism in its decisions and actions, its membership must reflect current world realities.⁶¹

⁵⁸Speech by Mr. Pranab Mukherjee at the 49th Session of the UN General Assembly, (3rd October 1994). <<https://www.pminewyork.org/adminpart/uploadpdf/77859lms44.pdf>> accessed 29th September 2017.

⁵⁹Ibid. Similar concerns were expressed by the then Prime Minister of India at the 50th Anniversary of the U.N. (24th October 1995) <<https://www.pminewyork.org/adminpart/uploadpdf/43538lms46.pdf>> accessed on 29th September 2017.

⁶⁰Statement by the Acting Permanent Representative of India, on 9th March 2000 on the issue of 'Maintaining Peace and Security: Humanitarian Aspects of issues before the Security Council' <<https://www.pminewyork.org/adminpart/uploadpdf/40173Maintaining%20Peace%20and%20Security.pdf>> accessed on 29th September 2017. Also see, the statement made by Indian Representative at the 35th plenary meeting of the fifty-fifth session of the UN General Assembly [UN Doc A/55/PV.35 (17th October 2000), p. 7].

⁶¹Statement by the Prime Minister of India at the 58th session of the UN General Assembly on 25 September 2003 <<https://www.pminewyork.org/adminpart/uploadpdf/2941201.pdf>> accessed

In 2011, the Permanent Representative of India stated that most of the work of the UNSC is focused on those regions which did not have adequate representation on it. He said:

How do I tell them that there are some in the Council who were victors of a past war and say well, we are permanent members and continue to perpetuate their privileged position? Do I tell them to be blind to the fact that in the months of January and February 2011, more than 70% of the Council's meetings were on African issues and in terms of the amount of time spent, more than 90% of the Council's attention was focused on African issues. And yet there is no single permanent member from Africa! Do I tell them that in the instance of the Latin American region, all slots have been filled up for the Council's elected seats till 2034 and so there are no further opportunities. And be happy with this continuing under-representation.⁶²

India emphasizes on the effectiveness of the UNSC and continues to believe that its ineffectiveness is linked to its structural issues like its membership. Thus, the Permanent Representative of India felt in 2014 that the 'Security Council has been paralysed by its inherent flaws'.⁶³ Thus, it was observed that '[i]f the Security Council continues to be ineffective, the lives of millions of people and the uninterrupted flow of trade, investment and technology, all of which depend on a stable and predictable global political environment will be jeopardized'.⁶⁴

on 29th September 2017. Also see, Statement by the Minister of State for External Affairs, on Agenda Item 11: Report of the Security Council, Agenda Item 53: Question of Equitable Representation on and Increase in Membership of the Security Council and Related Matters at the 59th Session of the UN General Assembly on 11 October 2004 <<https://www.pminewyork.org/adminpart/uploadpdf/16564ind996.pdf>> accessed 29th September 2017; Address by the Prime Minister of India at the High level Plenary Meeting of the 60th Session of the United Nations General Assembly on 15th September 2005 <<https://www.pminewyork.org/adminpart/uploadpdf/79079lms57.pdf>> accessed on 29th September 2017; Remarks by Mr. Nirupam Sen, Permanent Representative, at the Plenary Meeting under Agenda Items 117 And 120 "On the Question of Equitable Representation on and Increase in the Membership of the Security Council" and "Follow-Up to the Outcome of the Millennium Summit" on 21 July 2006 <<https://www.pminewyork.org/adminpart/uploadpdf/80241ind1241.pdf>> accessed on 29th September 2017; Statement by India's Permanent Representative, during the Open Debate of The United Nations Security Council on the Implementation of the Measures set out in the Note by the President of the Security Council [S/2006/507] on 27th August 2008 <<https://www.pminewyork.org/adminpart/uploadpdf/58993ind1441.pdf>> accessed on 29th September 2017.

⁶²Intervention by India's Permanent Representative, at the informal meeting (closed) of the plenary on the intergovernmental negotiations on the question of equitable representation on and increase in the membership of the Security Council and other matters related to the Council, on 2nd March 2011 <<https://www.pminewyork.org/adminpart/uploadpdf/75808ind1832.pdf>> accessed on 29th September 2017.

⁶³Statement by India's Permanent Representative at the Informal Plenary Meeting of the Intergovernmental Negotiations on 'Question of equitable representation on and increase in the membership of the Security Council and other matters related to the Council' at New York on 08th May 2014 <https://www.pminewyork.org/pages.php?id=1924&search_back=%27bck%27> accessed on 29th September 2017.

⁶⁴Statement by India's Permanent Representative following the adoption of Decision on UNSC Reforms at the United Nations General Assembly on 14th September 2015 <https://www.pminewyork.org/adminpart/uploadpdf/75585pr_14sept.pdf> accessed on 29th September 2017.

(b) **India's claim for permanent membership**

During this period, India asserted its claim for the permanent membership of the UNSC. It has been reflected clearly in the statements made by its representatives. Thus, while speaking at the 50th session of the UN General Assembly, the Minister of External Affairs of India stated that:

India believes that, to truly reflect the expanded membership of the UN, developing countries must be included as permanent members. New permanent members should be chosen not arbitrarily, but on objective criteria ... On objective criteria, some countries will clearly qualify for permanent membership. We believe India will be among them.⁶⁵

Later on, this view was reiterated by the Prime Minister of India when he spoke at the 52nd Session of the United Nations General Assembly on 24th September 1997. He stated that:

India has let it be known from 1995, in this General Assembly, that it is prepared to accept the responsibilities of permanent membership. We are the largest democracy in the world, with ancient civilisational values and attainments, and a world view based on a universalist inspiration, participative governance, respect for diversity and pluralism, as well as readiness for constructive engagement in the world's affairs. These strengths, we believe, would be an asset to an expanded Security Council. India's standing as one of the leading economies in the world will be progressively strengthened, and we are prepared to bear in full the responsibilities of permanent membership. India's long-standing participation in UN peace-keeping operations testifies not only to the dedication and professionalism of the Indian soldiers but also to the political will of the Government to actively contribute to these operations.⁶⁶

(c) **Statements reflecting inconsistencies**

Despite India's claim to the UNSC permanent membership, some of its statements reveal the inherent deficiencies with the UNSC which go beyond the expansion of its membership by a few more States. These statements also reflect the historical criticism against the UNSC for being in the hands of a few developed States. The Indian representative, while speaking in 2008 on the issue of maintenance of peace and security and post-conflict peace-building, stated that:

The Council is a purely political body. Its decisions reflect a balance of interests and power which is not constant. If the Council tries to build peace, its blueprint will either reflect the ideology of dominant members — in cases where others have no interest — or a hodgepodge, where conflicting views have to be reconciled. In neither case is this calculated to help the country concerned.⁶⁷

⁶⁵Speech by Mr. Pranab Mukherjee at the 50th Session (12th Plenary Meeting) of the UN General Assembly (29th September, 1995) <<https://www.pminewyork.org/adminpart/uploadpdf/55796lms45.pdf>> accessed on 30th September 2017.

⁶⁶Address by the Prime Minister of India to the 52nd Session of the United Nations General Assembly on 24th September 1997 <<https://www.pminewyork.org/adminpart/uploadpdf/75000lms47.pdf>> accessed on 30th September 2017; Also, Statement by Mr. Vajpayee at the 53rd Session of the General Assembly on 24th September 1998 <<https://www.pminewyork.org/adminpart/uploadpdf/92927lms48.pdf>> accessed on 30th September 2017.

⁶⁷UN Doc S/PV.3954 (Resumption) (23 December 1998), p. 25.

During the Rome Conference also Indian delegate criticized the power of referral and deferral given to the UNSC under the Rome Statute. According to the Indian representative:

As the Council would almost certainly include non-party States among its members, that provision would confer on such States the power to compel both States parties and other non-party States to submit to the Court's jurisdiction, in violation of the law of treaties, as well as conferring on the Council a role never envisaged for it by the Charter of the United Nations.⁶⁸

India had also criticized the establishment of the criminal tribunals by the UNSC and believed that it has exceeded its power under the UN Charter by doing so.⁶⁹ However, India's position seems to be inconsistent in this regard. It has, on other occasions, acknowledged that the 'support of the Security Council is crucial for the tribunals' and there should be close cooperation between the Council and the tribunals.⁷⁰ Similarly, with regard to the International Criminal Court (ICC), in 2011, India voted in favour of the resolution relating to referral of Libya's situation.⁷¹ Indian representative stated that:

... [w]e note that several members of the Council, including our colleagues from Africa and the Middle East, believe that referral to the Court would have the effect of an immediate

⁶⁸'Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' (Vol. II) (15 June–17 July 1998), UN Doc A/CONF.183/13, 360-361, p. 322.

⁶⁹In 2004, Indian Representative stated:

A case in point is the Council's assuming for itself the power to set up judicial bodies. Nothing under the Charter gives it the right to set up the tribunals that it has, nor indeed can it be demonstrated that those set up have in fact contributed to the maintenance of peace and security.

[UN Doc A/55/PV.35 (17 October 2000), p. 7]. Again, in 2006, Indian Representative said that:

... perhaps the Security Council's greatest encroachment is in the sphere of law making. Though in the Tadic case the ICTY justified its setting up in terms of Article 29 on the creation of subsidiary bodies, its judgement is untenable because the Charter has not given the Security Council any judicial functions and therefore it cannot, under Article 29, give a subsidiary body functions it does not possess.

[Remarks by the Permanent Representative at the Plenary Meeting under Agenda Items 117 and 120 'On the Question of Equitable Representation on and Increase in the Membership of the Security Council' And 'Follow-Up to the Outcome of the Millennium Summit' on 21st July 2006 <<https://www.pminewyork.org/adminpart/uploadpdf/80241ind1241.pdf>> accessed on 30th September 2017].

⁷⁰See, Statement by the Acting Permanent Representative at the UN Security Council Debate on ICTY/ICTR (6th June 2011); Statement Delivered by Mr. Ananth Kumar, Member of the Indian Delegation on Agenda Item 73: Report of the ICTR and ICTY at the 67th Session of the UN General Assembly (15th October 2012); and the Statement by Ambassador Hardeep Singh Puri, Debate on International Criminal Tribunal For Rwanda and International Criminal Tribunal For Territory of Former Yugoslavia at the UN Security Council (5th December 2012).

⁷¹UNSC Res. 1970 (2011) (26th February 2011).

cessation of violence and the restoration of calm and stability. The letter from the Permanent Representative of Libya of 26 February addressed to you, Madame President, has called for such a referral and strengthened this view. We have therefore gone along with the consensus in the Council.⁷²

But on 17 October 2012, Indian representative, speaking at the UNSC meeting, stated that:

India's reservations about the Rome Statute and the International Criminal Court are well known. The role given to a political body like the Security Council in its work has prevented the ICC from becoming a universal institution, and three of the five permanent members of the Council are not parties to the ICC. Furthermore, the selectivity with which the Security Council has made referrals under Article 16 of the Rome Statute has raised concerns about political considerations playing a dominant role in such referrals, which also raises questions about the independence of the International Criminal Court.⁷³

These views reflect India's inconsistent approach in relation to the role of the UNSC in matters involving international criminal tribunals.

5 Evaluation and Conclusion

India's positions in relation to the UNSC have not been uniform. International and geopolitical considerations continue to influence its attitude towards the UNSC. However, its statements from the inception of the UN reflect the recognition of deficit that the UNSC suffers from, particularly in the form of its membership and the veto power. It is this recognition which, also shared by many other States, provides the basis for demands for the reform of the UNSC.

Thus, some of its statements are critical of the UNSC's role in international relations as mainly dominant few exercise unhindered power through their position as P-5 and with veto power. An example is that while explaining its reasons for not becoming a party to the Rome Statute, the Indian representative said that 'the Statute gives to the Security Council a role in terms that violate international law. We have been told that the Council must have a role built into the Statute because it had set up the ad hoc tribunals for the former Yugoslavia and for Rwanda, and has therefore established its right to do so. Those were decisions of a dubious legality. The Charter did not give the Council the power to set up Courts, the Council did so in any case, and can do so again, only because its power cannot be challenged'.⁷⁴ This position reflects India's belief that council is undemocratic in nature and it contradicts the legal premise of sovereign equality of States which is the fundamental precept of the UN Charter.

⁷²UNSC, 6491st meeting (26th February 2011) UN Doc S/PV.6491, 2-3.

⁷³See, the statement made at the 6849th meetings of the UN Security Council (17th October 2012). UN Doc S/PV.6849, 10.

⁷⁴Explanation of vote by Mr. Dilip Lahiri, Head of Delegation of India, on the adoption of the Statute of the International Criminal Court (17 July 1998)

The arguments taken in favour of India's case are that it is the largest democracy in the world, with a sizable geographical area and population and also it is a growing economy. None of these arguments are at least tenable in the background of fundamental democratic principles of international law, i.e. the notion of sovereign equality of States irrespective of their size, population and economic and military power. Equally, these arguments are not true about the existing permanent P5 either. Therefore, the eagerness on the part of India to become a permanent member of the Security Council is not based on the changed character of the Security Council which India has been critical of on several occasions, but because of the changed perception of itself which has to do more with international and domestic economic and political reasons.

India's desire to sit on the high table along with other permanent five States is neither fully consistent with its past position vis-à-vis the role of the Security Council nor is a demand which would democratize the Security Council. Democratization of the Security Council cannot happen by inclusion of a few more States with certain privileges but by removing the veto power and allowing equal participation of all States in the Security Council decisions. Therefore, any reform exercise, which does not address these issues, would further reinforce the hegemonic role of a few at the expense of other States. Therefore, India's aspiration for its permanent membership in the Security Council may be of significant value from its individual standpoint in international relations, but it would remain as a demand with a democratic deficit.

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Collective Engagement and Selective Endorsement: India's Ambivalent Attitude Towards Laws of Armed Conflict

Srinivas Burra

Abstract It is argued that ancient Indian warfare had certain practices which were of significance to the conduct of hostilities in terms of their humanitarian values. India also had the instances of individuals taking humanitarian lead in providing relief in situations of armed conflict. An example of this being Bhai Kanhaiya who can be considered as an Indian counterpart to Henry Dunant of the Red Cross and Red Crescent movement. India had taken part in the drafting of the four Geneva Conventions of 1949. It is a party to the four Geneva Conventions and also brought in the implementing legislation to give effect to them. India actively participated along with many other newly independent States in the negotiations of the two Additional Protocols which were adopted in 1977 to strengthen the protection mechanism provided in the four Geneva Conventions of 1949. During the negotiations, India, along with other post-colonial States, supported the expansion of the definition of international armed conflicts to include national liberation movements. This was a clear reflection of the experience of many newly independent States who were under the yoke of colonialism till then. However, it expressed its reluctance to accept the category of non-international armed conflicts. It has not yet become a party to the two Additional Protocols. However, India participates in several other treaties which are of relevance to the situations of non-international armed conflicts. India's ambiguous position in respect of non-international armed conflicts seems to reflect its non-ratification of some of the treaties. Though it cannot be considered as a consistent position as there are also some examples to the contrary. This chapter would evaluate India's engagement with the laws of armed conflict and its ambivalent attitude towards some of the issues like the non-international armed conflict. It also would attempt to evaluate India's engagement with humanitarian organizations like the International Committee of the Red Cross.

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1 Introduction

International humanitarian law (IHL) or law of war or armed conflict constitutes an important component of the corpus of international law. IHL comes into application when armed conflicts take place. It regulates the conduct in armed conflicts. It seeks to mitigate the effects of armed conflict, by way of limiting the choice of means and methods of conducting military operations and also by obliging the belligerents to spare persons who do not or no longer participate in hostile actions.¹

IHL is defined as: “international rules established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international and non-international armed conflicts and which, for humanitarian reasons, limit the right of parties to a conflict to use the methods, and means of warfare of their choice, or protect persons and property that are, or may be, affected by conflict”.²

IHL has expanded significantly during the twentieth century. Even after the United Nations Charter prohibited the use of force between States, several important treaties were adopted by States dealing with the behaviour on the battleground. India has been engaging with these developments before and after its independence. However, it continues to have a critical stance in respect of some developments and also in dealing with some humanitarian institutional mechanisms. The present chapter is divided into four parts. Part two deals with legacy of humanitarianism in India. Part three deals with India’s attitude towards IHL treaties, mainly the four Geneva Conventions of 1949, two additional Protocols of 1977 and the third Additional Protocol of 2005. Part four focuses on India’s engagement with humanitarian organizations, particularly the International Committee of the Red Cross (ICRC). Part five critically evaluates India’s position and Part six provides concluding observations.

2 Legacy of Humanitarianism in India

International humanitarian law (IHL) mainly exists in the form of treaties and customary international law. Dominant narrative of the development of these laws generally starts with its origins in the European context, and its progressive development is mostly associated with the international events centred in Europe. This narrative is in certain respects challenged by highlighting the parallel history of similar rules in other geographical and historical contexts. When it comes to India, it is argued that ancient Indian warfare did have certain practices which were of significance to the conduct of warfare in terms of their humanitarian values.³ There were examples of upholding humanitarian values by resorting to resolving disputes and transfer of power through fights alternative to wars.⁴ India also had the instances of individuals

¹Gasser (2007).

²Pictet et al. (1987).

³See, Mani (2001) and Sinha (2005).

⁴See, Rajan (2014).

taking humanitarian lead in providing relief in situations of armed conflict. An example of this is Bhai Kanhaiya who could be considered as an Indian counterpart to Henry Dunant of the Red Cross and Red Crescent movement. Bhai Kanhaiya (1648–1718) was a disciple of Sikh Guru Tegh Bahadur and was the founder of the Sevapanthi or Addanshahi sect of the Sikhs. He was born in Sodhara near Wazirabad in Sialkot District (Now in Pakistan). As he had religious bent of mind, he left home and roamed about with sadhus and ascetics in search of spiritual peace. His quest ended as he met Guru Tegh Bahadur. Bhai Kanhaiya established a dharamshala at Kavha village in the present Attock district of Pakistan, which he made into a preaching centre. His special mission was selfless service of humanity with no distinction of nationality, caste or creed. During the battle of Anandpur Sahib in 1705, Bhai Kanhaiya served water to all the wounded and sick soldiers on the battleground irrespective of the side they belonged to.⁵ This is an example of humanitarian principles in practice in situations of conflict in the past in India. This is similar to what Henry Dunant felt when he witnessed the battle of Solferino in 1859. It is the experience of Henry Dunant during the battle of Solferino which made him think towards mobilizing neutral and independent humanitarian help during armed conflicts. These efforts led to the establishment of the international Red Cross and Red Crescent movement and also the adoption of the first Geneva Convention of 1864.⁶

Bhai Kanhaiya's example reveals that prior to those instances which led to the development of humanitarianism and legal principles in the European context, there were humanitarian practices in the South Asian context which deserve adequate place in the history of humanitarianism. This is not to claim historical precedence in a chronology of events but to underline the absences and hierarchies in the knowledge production. Thus, based on this, two assertions can be made on the origin and development of international humanitarian law. Firstly, humanitarian principles and practices respected and followed outside the European context do not find adequate attention in the writings of mainstream history of the origins and the development of IHL. The second is that the formal legal principles seen as the product of civilizational achievement of the European powers were not extended and respected by the same powers when they were engaged with the non-European entities.⁷ Despite this

⁵During the battle of Anandpur Sahib (1704–5), Bhai Kanhaiya was seen carrying water in mashak (a kind of pouch made of goat's skin) and serving the wounded soldiers without any discrimination between Guru's soldiers and others. This was criticized by fellow Sikhs, and they complained to Guru Gobind Singh. When Guru asked him about this, Bhai Kanhaiya replied that it was true that he served water to all the soldiers because he did not see any distinction between soldiers as they all were human beings. Guru was convinced with this answer and said that he understood the Guru's teachings correctly. See <http://www.discoversikhism.com/sikhs/bhai_kanhaiya.html> accessed on 19th December 2017.

⁶See, Dunant (1939, 1959). What was to become the International Committee of the Red Cross (ICRC) met for the first time in February 1863. Later developments led to the origin of the International Red Cross and Red Crescent Movement. See, <<https://www.icrc.org/en>> accessed on 06th March 2018. First Geneva Convention: Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva, 22 August 1864.

⁷Megret (2006).

selective acknowledgement and application of IHL, humanitarian principles continue to be considered as part of the past and present outside the European context.

3 India and IHL Treaties

Geneva Conventions of 1949 (GCs)

Though India was a party or signatory to some of the important IHL treaties prior to its independence,⁸ its relatively authoritative views on humanitarian law can be evaluated by examining its positions after its independence in respect of some of the important treaties. Thus, this chapter attempts to evaluate India's engagement with humanitarian law by analysing its positions in respect of the four Geneva Conventions of 1949 and its three Additional Protocols.

The four Geneva Conventions and their three Additional Protocols are generally considered as the core of IHL. They protect people who are not taking part in hostilities like civilians, health workers and aid workers, and those who are no longer participating in hostilities, such as wounded, sick and shipwrecked soldiers and prisoners of war. They also contain rules dealing with gross violations known as grave breaches. They specifically talk about the role of humanitarian organizations like the ICRC and the protection of humanitarian emblems.

India had taken part in the drafting the four Geneva Conventions of 1949. The four Conventions were adopted on 12 August 1949.⁹ The four conventions deal with four categories of victims of armed conflict, i.e. wounded and sick soldiers on the ground, wounded and sick on the sea, prisoners of war and civilians. It is said that the four Geneva Conventions are largely influenced by the experiences of the Second

⁸India was a party or signatory to some of the important international humanitarian law-related treaties prior to its independence in 1947. These are: Treaty relating to the Use of Submarines and Noxious Gases in Warfare. Washington, 6 February 1922, (Ratification/Accession: 04.08.1922); Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Geneva, 17 June 1925, (Ratification/Accession: 09.04.1930); Final Act of the Diplomatic Conference. Geneva, 27 July 1929, (Signature: 27.07.1929); Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Geneva, 27 July 1929, (Ratification/Accession: 23.06.1931); Convention relative to the Treatment of Prisoners of War. Geneva, 27 July 1929, (Ratification/Accession: 23.06.1931); Treaty for the Limitation and Reduction of Naval Armaments, (Part IV, Art. 22, relating to submarine warfare). London, 22 April 1930, (Ratification/Accession: 27.10.1930); Procès-verbal relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of 22 April 1930, (Signature: 06.11.1936); and Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945, (Ratification/Accession: 22.12.1945). See <<https://www.icrc.org/en/icrc-databases-international-humanitarian-law>> accessed on 19th December 2017.

⁹The four Geneva Conventions of 1949 are: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; Convention (IV) relative to the Protection of Civilian Persons in Time of War.

World War. It is also underlined that in 1949 large part of the world was under colonialism and the contribution from those territories was minimal in the making of these conventions. India having attained independence from colonialism in 1947 participated in the drafting of these conventions. It signed the four conventions on 16 December 1949 and ratified on 09 November 1950. In compliance with its obligations under these conventions, domestic legislation was also adopted in the form of Geneva Conventions Act of 1960. It contains provisions dealing with the legal proceedings in respect of protected persons and on the misuse of protected emblems.¹⁰ Chapter II of the said Act deals with punishment of offenders against the conventions and the jurisdiction of courts to deal with breaches by punishing them. It provides for the punishment of the grave breaches of 1949 Geneva Conventions. It includes provisions for sentence of death or punishment ranging upto imprisonment for life. Chapter III lays down the procedure for the trial of protected persons. Chapter IV prohibits the use of the Red Cross and other emblems without the approval of Central government and provides for a penalty. Chapter V gives power to the Central government to make rules. The Act then contains the four Conventions as its schedules. Further, the Act also repeals the Geneva Convention Implementing Act, 1936 and declares that the Geneva Convention Act, 1911 shall cease to have effect as part of the law of India.

Additional Protocols I and II of 1977

The Diplomatic Conference which adopted the four Geneva Conventions of 1949 also passed a resolution expressing hope that the governments might never have the opportunity to apply them. The resolution stated that the conference wished that, “its work having been inspired solely by humanitarian aims, its earnest hope is that, in the future, governments may never have to apply the Geneva Conventions for the Protection of War Victims”.¹¹ The resolution further said that “its strongest desire is that the powers, great and small, may always reach a friendly settlement of their differences through cooperation and understanding between nations, so that peace shall reign on earth forever”.¹² This wishful thinking was soon proved to be wrong. In the following years after the adoption of the Geneva Conventions, the world witnessed an increase in the number of armed conflicts, particularly non-international armed conflicts and wars of national liberation. In certain respects, the four conventions were found to be inadequate in these conflicts. Hence, there were efforts to strengthen the Geneva Conventions. The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts was convened and organized by the Swiss government in its capacity as the depositary of the Geneva Conventions.¹³ As the outcome of the Conference,

¹⁰Balachandran (1997)

¹¹Final Record of the Diplomatic Conference of Geneva of 1949, vol. I, p. 362.

¹²Ibid.

¹³The Conference met in Geneva in four sessions. The first session was held from 20 February to 29 March 1974, the second from 3 February to 18 April 1975, the third from 21 April to 11 June 1976 and the fourth from 17 March to 10 June 1977. All States which were Parties to the Geneva Conventions or Members of the United Nations were invited to attend, in all numbering 155 nations. The number of those participating in the Conference varied from 107 to 124 in the

two Protocols Additional to the four 1949 Geneva Conventions were adopted in 1977.¹⁴ Additional Protocol I (API) and Additional Protocol II (APII) strengthen the protection of the victims of international and non-international armed conflicts, respectively. They also place limits on the way armed conflicts are fought.

India took part in the negotiating process of the Additional Protocols. It was in favour of strengthening the legal mechanisms applicable to armed conflict situations. The Indian delegate said that India “recognized the importance and complexity of the task before the conference and the need to revise the principles of humanitarian law set forth in the 1949 Geneva Conventions”.¹⁵ Some of the contributions of the Additional Protocols are: expansion of the definition of international armed conflicts,¹⁶ inclusion of provisions on means and methods of warfare,¹⁷ modification of conditions for combatant status,¹⁸ establishing an International Fact-Finding Commission¹⁹ and the regulation of the situations of non-international armed conflict.²⁰

India was in principle in favour of strengthening the Geneva Conventions and drafting of the two Additional Protocols. However, it had certain reservations with some of the provisions of APs. India, *inter alia*, was not in favour of an international treaty dealing with non-international armed conflicts. The Indian delegate while explaining its position on AP II stated that he “did not think it necessary to emphasize that India was committed to the humane treatment of all persons through national laws. India was second to none in enacting and implementing legislation ensuring humane treatment of all its citizens. India did not need any Protocol II to remind it of its obligations to its citizens. The situation might be different in some countries; but India was against the internationalization of any purely internal situation through an international instrument”.²¹ However, it is argued that India’s subsequent practice in

various sessions. In addition, 11 national liberation movements and 51 intergovernmental or non-governmental organizations participated as observers.

¹⁴The two Additional Protocols of 1977 are: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

¹⁵Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–77) vol. V, p. 198.

¹⁶Article 1(4) of the API expands the definition of international armed conflicts by including “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination...”.

¹⁷Part III and several chapters of Part IV (Articles 35–60) of the Additional Protocol I deal with the conduct of hostilities.

¹⁸Article 44(3) of AP I provides for a major change regarding the militias or volunteer corps and other organized resistance movements. It modifies the conditions provided in Article 4A(2) of the third Geneva Convention of 1949.

¹⁹Article 90 of AP I.

²⁰Additional Protocol II specifically governs the situations of non-international armed conflict. After the Common Article 3 of the four Geneva Conventions, this is the second major development regulating the situations of non-international armed conflict situations.

²¹Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–77), vol. VII, p. 204.

respect of other treaties dealing with the category of non-international armed conflicts contradicts with its position in respect of APs.²² It is further argued that it would be very much in accordance with its domestic legal framework and international obligations to become a party to APs. India has not yet become party to these two protocols.

Additional Protocol III of 2005

Emblems constitute an important aspect of the international humanitarian law framework. Emblems play an important role in the identification and protection of humanitarian actors and supplies in situations of conflict. Thus, the Geneva Conventions specifically regulate the use of certain symbols as humanitarian emblems. The third Protocol to the four Geneva Conventions was adopted to address the challenges faced by the existing emblems. The third Protocol deals with the adoption of an additional distinctive emblem. The Geneva Conventions recognize Red Cross, Red Crescent and Red Lion and Sun. Though the Red Cross movement started with the Red Cross as the symbol of humanitarianism, soon it was seen as associated with Christianity and Red Crescent was used by some national societies, followed by Red Lion and Sun. Accordingly, the four Geneva Conventions recognize all three emblems.²³ Despite widespread recognition of these symbols, they were subjected to criticism based on religious and political grounds. The criticism led to two major difficulties for the international Red Cross and Red Crescent movement. Firstly, it challenges the notion of neutrality and impartiality of the Red Cross and Red Crescent movement. Secondly, it led some States and relief societies to argue that any of the existing emblems were not suitable to them.²⁴ To overcome this situation and to avoid any religious and political connotations, the third Protocol was adopted for the purpose neutral emblem known as red crystal.²⁵ It is known as Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005. It was adopted during a Diplomatic Conference held in Geneva from 5 to 8 December 2005. It came into force on 14 January 2007.²⁶

India is yet to become a party to the Additional Protocol III. However, India is specially related to the subject matter of this Protocol. Discussions on neutral symbol have been there for long, and it was also explored during the negotiations on the four Geneva Conventions of 1949. During the negotiations on four Geneva

²²See, Burra (2013), pp. 442–448.

²³See, Bugnion (2007).

²⁴Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005, Commentary of 2007, Preamble, <<https://ihldatabases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=629F44FFE4CF6B42C12573A60031DB46>> accessed on 19th December 2017.

²⁵Additional Protocol III refers to this additional emblem as the “third Protocol emblem”. However, paragraph 14 of the Final Act of the Diplomatic Conference on the adoption of Protocol III stated that the ICRC and the Federation had informed the Conference that the designation “red crystal” had gained currency and would be introduced formally at the next International Conference of the Red Cross and Red Crescent.

²⁶Currently 73 States are parties to it and 23 States are signatories.

Conventions, the Indian delegate submitted a draft resolution for the adoption of a new emblem without any religious significance. The Indian delegate said that the Red Cross deserved greatest respect, but a new symbol was necessary.

The Indian delegate said that “his Delegation had submitted a draft resolution intended to reconcile the various points of view expressed regarding the question of the distinctive emblem. A new sign, devoid of all religious significance, could alone serve as a universal protective emblem, acceptable to everybody. The emblems actually in use would serve thereafter merely as descriptive signs. The Red Cross was certainly entitled to the greatest respect; but a new symbol would have to be found to serve as a universally accepted protective sign. Whatever might be said to the contrary, the cross would always evoke the idea of the Christian faith”.²⁷

Thus, the Delegation of India requested Committee I to adopt the following resolution:

Committee I urges the Conference to set up suitable machinery for devising an emblem, as the protective sign of the Medical Service of the armed forces, which shall fulfil the following conditions:

- (1) it shall have no religious significance in any part of the world, nor be popularly associated with any religious, cultural or other organization;
- (2) it shall be of red colour on a white background;
- (3) it shall possess maximum visibility;
- (4) it shall be a simple geometrical pattern which can be easily executed with minimum materials and labour;

it being intended that, with effect from the date of adoption of the new protective emblem as mentioned above, such a new emblem shall alone be entitled to protection under the terms of the present Conventions, and that the protective emblems now in force shall be used as distinctive emblems only.²⁸

This resolution was opposed by Switzerland,²⁹ USA, Mexico, Holy See, Italy, Venezuela and other countries. Burma and Iran supported India’s proposal. It was rejected by 16 votes to 6, with 13 abstentions. While quoting Muhamad Ali Jinnah and Mahatma Gandhi, the president of the ICRC in his address at the plenary meeting argued against India’s proposal and for retaining the Red Cross symbol.³⁰ Despite opposition from majority participating States at the time of drafting of the

²⁷Final Record of the Diplomatic Conference of Geneva of 1949, vol II Section A, p. 150.

²⁸Ibid.

²⁹Ironically it was Switzerland, which convened the 2005 Diplomatic Conference which adopted the Third Additional Protocol.

The delegate of Switzerland said that “his Delegation was opposed to that resolution. The Committee had discussed the question on many occasions and had decided by a large majority to retain the present system. The symbol of the Red Cross, which had been in existence for more than 85 years, had now attained such moral value that it was impossible to dispense with it without greatly prejudicing the Conventions themselves. The Wounded and Sick Convention, also known as the Geneva Convention, was the Red Cross Convention and as such should conserve the emblem of the Red Cross”. Ibid.

³⁰The president of the ICRC said:

1949 Conventions, the emblem issue continued to attract the attention. This continuing concern led to the adoption of the Third Protocol. The proposal by India during the 1949 negotiations was intended to serve the similar purpose for which the Third Protocol was adopted in 2005. However, it was opposed by the ICRC and a few other States who later favoured the Third Protocol for the similar reasons which India underlined in 1949. It is essential to have a non-religious symbol as a humanitarian emblem. Attribution of any apparent motives to humanitarian operations would adversely affect the victims of armed conflict. Therefore, India's proposal should have been welcomed with that spirit during the negotiations on the four Geneva Conventions. Despite the efforts to project the red cross as the neutral symbol without any religious connotations, there had been opposition to it from being accepted as a universal humanitarian emblem. Thus, the adoption of the Third Protocol in 2005 needs to be contextualized in that backdrop. Going by its position in the past, it is expected of India to become a party to the Third Protocol unless it expresses its unwillingness based on any cogent changed circumstances.

4 Engaging with Humanitarian Organizations

As it is with IHL, India's attitude towards humanitarian organizations like the ICRC is guarded, if not hostile. ICRC has been present in South Asian subcontinent for long. It had its operations in the subcontinent in 1917 during the First World War. ICRC also worked during the partition between India and Pakistan (1947–1948) and in conflicts between India and Pakistan in 1965 and 1971. A regional Delegation of the ICRC was established in Delhi in 1982.³¹ India arguably maintains a guarded position in relation to the ICRC while acknowledging its outstanding role in the humanitarian field. While speaking on a resolution during the negotiations on four Geneva Conventions, seeking financial contributions to the ICRC, the Indian delegate stated that the ICRC was “less well known in Asiatic countries than in Europe and America. In some Asiatic countries, it is looked upon with suspicion, mainly

“The International Committee of the Red Cross would like to warn the governments represented at this Conference against the putting into effect of plans which would sooner or later inevitably entail the risk of a multiplication of protective symbols, which would, in turn, diminish the value attached to them. The protective emblem cannot be fully efficacious unless it is universally known, unless it is the symbol which is automatically and universally recognizable by all of the protection given to war victims. Any infringement of this principle of universality can only undermine the value of the symbol and hence increase the dangers incurred by those whom it is designed to safeguard”.

He further observed while referring to India's position:

“Ten days before the foul assassination of the Mahatma, the present President of the International Committee of the Red Cross heard the holy man who prayed for understanding and peace between nations say: “The Red Cross creed is my creed”. We should like to conclude that the symbol of the Red Cross was also his symbol, and we place this invaluable testimony on record”. *Final Record of the Diplomatic Conference of Geneva of 1949*, vol II section B, pp. 223–224.

³¹ See, <<http://blogs.icrc.org/new-delhi/about-us/>> accessed on 19th December 2017.

because of its association with an emblem”.³² The Indian delegate further said that the ICRC should give increased attention to Asian countries to do away with this deep suspicion.³³ In this regard, the delegate suggested “the creation of a Far Eastern section of the Committee, on the lines of the regional organization of the World Health Organization, in order to build up goodwill and sympathy similar to that found among all sections of the population in Europe”.³⁴

India continues to recognize the humanitarian credentials ICRC enjoys across the world. ICRC was granted the observer status with the United Nations in 1990. The resolution granting the observer status to the ICRC was adopted by the United Nations General Assembly by consensus on 16 October 1990.³⁵ ICRC is the first international organization, which is not an intergovernmental organization, which has been given such a status.³⁶ As one of the sponsors of the resolution, India underlined the unique contribution and nature of the ICRC. The Indian delegate said:

The draft resolution before us is to confer observer status on the International Committee of the Red Cross (ICRC). We are considering granting observer status in light of the special role and mandates conferred upon the ICRC by the Geneva Conventions of 12 August 1949. It is against this background that India is happy to be one of the Sponsors of this draft resolution.

At the same time, without prejudice to the draft, my delegation would like to suggest that the draft resolution not be considered a precedent for other non-governmental organisations to seek or be granted observer status; in other words, the case of the ICRC should be considered unique in view of its status.

The role of the ICRC in humanitarian efforts is known throughout the world. India has been cooperating with it in the service of humanity. In many areas, it has had a pioneering presence and we are happy to have been associated with it.

The ICRC has by tradition and practice tried to fulfil the need for humanitarian assistance. My delegation would like to express the hope that its contributions in this respect will obtain the international support they deserve and fulfil objectives that benefit mankind.³⁷

One of the core activities of the ICRC in conflict areas across the world is to visit the detainees in relation to the conflict situations. In India, as a result of an understanding with the government of India, ICRC delegates visit people arrested

³²Final Record of the Diplomatic Conference of Geneva of 1949, vol II Section B, p. 517.

³³Ibid.

³⁴Ibid.

³⁵UNGA Res. 45/6, “Observer Status for the International Committee of the Red Cross, in Consideration of the Special Role and Mandates Conferred Upon it by the Geneva Conventions of 12 August 1949”, 16 October 1990. It is to be noted that the title of the resolution specifically refers to the four Geneva Conventions only but does not mention the Additional Protocols. This is probably because Geneva Conventions are universally accepted, whereas several States are not yet party to the Additional Protocols.

³⁶Later on, three more such organizations were given similar status. The three other international organizations which are of non-governmental nature that have been granted observer status with the UN General Assembly are: the International Federation of Red Cross and Red Crescent Societies (A/RES/49/2, 19 October 1994), the Inter-Parliamentary Union (A/RES/57/32, 19 November 2002) and the International Olympic Committee (A/RES/64/3, 20 October 2009). See, Debuf (2016).

³⁷UN General Assembly, Provisional Verbatim Record of the 31st Meeting, UN Doc. A/45/PV.31, New York, 16 October 1990, pp. 73–83.

in connection with the situation in Jammu and Kashmir, who are held within the State and as well as in other parts of India, to monitor their treatment and living conditions. Where necessary, the ICRC distributes basic items to detainees and their close relatives in certain situations. They help detainees to re-establish and maintain contact with their family members.³⁸

ICRC's main role is to work for the victims of armed conflict and other situations of violence. Despite its long presence in India, ICRC is not involved in some of the arguably conflict areas in India. India does not recognize the existence of any armed conflict on its territory. In a report submitted to the Committee on the Rights of the Child on the involvement of child soldiers, the government of India States that there is no armed conflict in India. The report says that "India does not face either international or non-international armed conflict situations".³⁹ It further says that "[e]ven though India does not face armed conflict, there are legislative provisions that prevent involvement of children in armed conflict and provide care and protection to children affected by armed conflict".⁴⁰ Despite India's assertion that there is no armed conflict involving India, it is argued that international humanitarian law should be made applicable to conflict situations in India. It is observed that IHL should be extended to the Maoist situation in Central India.⁴¹

As it is officially not recognized by the government, even if a situation meets the legal requirements of an armed conflict it becomes difficult for humanitarian organizations to work among the victims. Such a situation was confronted by the ICRC in the context of its activities in Chhattisgarh. After over 30 months of making health care and safe drinking water available to people affected by violence, the ICRC stopped its activities in Chhattisgarh at the end of 2013 at the request of the government authorities.⁴² It was reported that the Ministry of External Affairs refused to give permission to the ICRC to work in Chhattisgarh.⁴³ Relationship between the government of India and the ICRC attracted the attention when Wikileaks revealed that the ICRC shared the prison situation in Kashmir with the officials of the US embassy in New Delhi. The dispatches, obtained by WikiLeaks Website, revealed that the US diplomats in New Delhi were briefed in 2005 by the ICRC about the use of electrocution, beatings and sexual humiliation against hundreds of detainees in Kashmir.⁴⁴ Though there does not seem to be any public resentment by the government on it, this kind of issues would generate a cautious attitude among government

³⁸<http://blogs.icrc.org/new-delhi/about-us/> accessed on 19th December 2017.

³⁹CRC/C/OPAC/IND/1.

⁴⁰Ibid.

⁴¹Varadarajan 2007.

⁴²<https://www.icrc.org/eng/resources/documents/update/2014/india-chhattisgarh-health-care.htm> accessed on 05th March 2018.

⁴³Withdrawal of Red Cross hits healthcare in Chhattisgarh villages, The Hindu, 08 September 2013, <http://www.thehindu.com/news/national/other-states/withdrawal-of-red-cross-hits-healthcare-in-chhattisgarh-villages/article5106930.ece> accessed on 05th March 2018.

⁴⁴WikiLeaks cables: India accused of systematic use of torture in Kashmir, The Guardian, 16 December 2010, <https://www.theguardian.com/world/2010/dec/16/wikileaks-cables-indian-torture-kashmir> accessed on 05th March 2018.

machinery. Though based predominantly on humanitarian considerations, meeting with other country officials and sharing information on a deteriorating humanitarian situation in a country is an overt political action the consequences of which would not be necessarily in the control of the ICRC. It may be an important step from humanitarian point of view, however, it may have political implications. It is so because when one wants to mobilize other countries for a particular cause, one has to approach only those countries that have the capacity to influence. There is a possibility that these influential countries go beyond mere word of caution and genuine pressure and use humanitarian situation for other political purposes including interventions. It is not difficult to find examples of this nature as debates around humanitarian interventions rely on similar situations.

5 Critical Evaluation

India's position in respect of IHL treaties reflects the continuation of colonial selectivity in a post-colonial context. As mentioned earlier, the dominant history of IHL is linked to the European context. European powers selectively applied the IHL framework, denying its application to the colonial context and in relation to non-European territories. As a result of the assertion of post-colonial States, IHL was revised in the form of Additional Protocols to include national liberation movements under the category of international armed conflicts. However, India continues to remain outside Additional Protocols by not becoming a party to them. India's position in this respect is driven by its view on some of the issues governed by the Additional Protocols.

India refused to accept the category of non-international armed conflicts at the time of drafting of the Additional Protocols. The Indian representative at the Diplomatic Conference said:

The situation was entirely different in internal armed conflict. The situations were basically law and order problems which were within the exclusive domestic jurisdiction of each State. Each State had or should have its own internal laws for dealing humanely with those brought before its courts, including those accused of political offences such as secession or rebellion. Almost every country had penal laws and constitutions which guaranteed certain fundamental rights to its citizens at all times. Among those rights were those of equality before the law and a fair trial. It was illogical and illegal to ask a State to treat its citizens differently according to whether they were accused of criminal or political offences.⁴⁵

Denying the existence of non-international armed conflicts, other than national liberation movements goes against the factual possibility of internal conflicts taking place for various political, economic and ethnic reasons. However, this position seems to have undergone changes as it started accepting the existence of the category of non-international armed conflicts as it has become a party to some treaties applicable

⁴⁵Official Records of the Diplomatic Conference in the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–77), vol. VII, pp. 202–203.

to non-international armed conflicts. An example of this is that it is a party now to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (CCW) of 1980.

In the recent past, there are no international armed conflicts in which India is involved. However, use of force in the form of exchange of fire takes place intermittently between India and Pakistan. Recent such firing by India was referred to as surgical strikes.⁴⁶ It was argued that this kind of response by India was legal under the right of self-defence. However, both the States avoid using terminology that would amount to use of force under international law.⁴⁷ At the domestic level, there are several political groups within India who are involved in putting violent resistance to the Indian State. These include areas with Maoist presence, Kashmir and northeastern part of India. Government of India considers some of these political formations as a major threat and internal security problem in India. Often armed confrontations take place between the security forces and these armed political formations leading to deaths on both sides. A careful legal analysis and classification of the activities, organizational structure, control of the territory, command structure, may, in respect of some armed political groups, arguably satisfy the legal criteria for the classification of these conflicts as non-international armed conflicts in accordance with international humanitarian law. Some of the government of India's official reports point to the fact that conflicts involving Maoists have been there for a few decades. In one of its reports it States that "[a]lthough vestiges of Left Wing Extremism(LWE) insurgency have been prevalent in certain parts of India for a few decades now, the problem assumed serious proportions during the last decade or so. In terms of geographical spread, the worst affected States are, Chhattisgarh, Jharkhand, Odisha and Bihar."⁴⁸ Long period of existence and its increasing influence may arguably satisfy the legal requirements of the non-international armed conflict. However, the government of India has not officially declared any of these conflicts as non-international armed conflicts.

Application of international humanitarian law in the Indian context came before the Supreme Court of India in the case of *Rev. Mons. Sebastiano v. State of Goa*.⁴⁹ In this case, the appellant argued that the Geneva Conventions had become a part of the law of India under the Geneva Conventions Act 6 of 1960. The case was related to the taking control of Goa by India on 19 December 1961 which came under Indian administration on 20 December 1961. The appellant argued that the fourth Geneva Convention of 1949 should apply to Goa since the occupation did not end. The Court held that the Geneva Conventions ceased to apply after 20 December 1961. This was the case which was dealt with extensively by the Supreme Court of India exclusively with regard to the enforcement of international humanitarian law

⁴⁶Press Statement by DGMO, 29 September 2016, <<http://pib.nic.in/newsite/PrintRelease.aspx?relid=151242>> Accessed on 19 December 2017.

⁴⁷See, Burra (2016).

⁴⁸Annual Report 2012–13, Ministry of Home Affairs, government of India, p. 22.

⁴⁹*Rev. Mons. Sebastiao Francisco ... vs State Of Goa*, All India Reporter SC(1970) at 329.

in the Indian context. However, there are a few cases which have briefly touched the IHL or related to its application.⁵⁰

6 Conclusion

India has the long tradition of respecting humanitarian principles in situations of armed conflict. This respect primarily arose out of moral commitments or as religious precepts. India's relationship with modern developments in international humanitarian law has been that it was a party to a few international treaties prior to its independence. After attaining independence, it took part in the major developments in the field of international humanitarian law. It participated in the Diplomatic Conference that adopted the four Geneva Conventions in 1949 and put in place the domestic legislation implementing these conventions. It participated in the Diplomatic Conference from 1974 to 77 which adopted the two Additional Protocols. Its colonial past to a large extent influenced its positions during this conference on Additional Protocols. Despite its active participation in the negotiations of these Additional Protocols, it continues to remain outside these treaties, seemingly because of its differences which were expressed during the conference. However, its subsequent practice reflects a change in its view in respect of issues like the category of non-international armed conflicts. It moved from non-recognition to recognition of the category of non-international armed conflicts by becoming a party to some treaties which are applicable to non-international armed conflicts. It has not yet led to the acceptance of Additional Protocols of 1977. Further in terms of gravity and protractedness, India arguably experiences violent situations which have the potential to meet the requirements of definition of non-international armed conflicts. However, it denies the existence of any armed conflicts on its territory or with other countries. These assertions leave the victims of these violent situations at receiving end sometimes, though human rights framework becomes relevant in such contexts. India not becoming a party to the third Additional Protocol is also not in accordance with its position on the neutral emblem which it argued for at the time of negotiations on four Geneva Conventions. Engaging with humanitarian organizations like the ICRC cautiously seems to be very much in accordance with its position on the IHL treaties as it does not accept the existence of any armed conflicts currently. However, it may deprive the victims of violent situations humanitarian assistance.

India's participation in the developments in the field of IHL shows its willingness to be part of any collective engagement along with other States and international organizations. However, its selective acceptance of IHL instruments seems to be driven by its colonial past and post-colonial domestic constraints. Its selective endorsement is also often driven by larger political issues linked to these conflict situations. On the other hand, in the case of most of the humanitarian law treaties it becomes imperative that humanitarian considerations of victims need to be given a relative priority.

⁵⁰See, Chandrachud (2014).

It is argued that balance should be maintained between humanitarian considerations and military necessity. In that respect, India's attitude of selective acceptance of IHL treaties would go against the stated objectives of the IHL framework.

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Part II
Trade, Investment and Taxation

Two Decades of Trade Remedy Litigations in WTO: India the Protectionist Trader

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Abstract India is a contracting party to the GATT and a founding Member of WTO among 160 countries. She is very active in WTO litigation, especially in the areas of anti-dumping, subsidies, countervailing and safeguards which are used as most popular policy instruments to restrict imports as trade remedy measures. These agreements are an exception to the Most Favoured Nation (MFN) treatment. The present chapter analyses the provisions of trade remedy measures under the WTO including anti-dumping, subsidies, and safeguard agreements and the jurisprudence which has emerged over the last two decades in relation to these agreements. India becomes a trade protectionist by using these agreements in order to protect domestic industries. Empirical data reveals that trade remedy measures are mostly used by developing countries including India, China, and Brazil.

Keywords Trade remedies · Anti-dumping · Subsidies · Safeguards · India

1 Introduction

In the last two decades of working of the world trading system, the largest number of disputes resolved by the dispute settlement system of the World Trade Organization (WTO) are of trade remedies. Trade remedy measures are legal mechanisms in the General Agreement on Trade and Tariff (GATT) and various WTO agreements that allow parties to take action against unfair trade or injurious imports.¹ These are trade policy tools that a government can use to take remedial action against imports that hurt domestic producers.² The domestic industries petition to their own governments for taking action against imports under various areas such as dumping (if the goods are sold at unfair value), countervailing duties (when subsidized prod-

¹Emerson (2008), p. 11.

²Institute of Economic Affairs (2013), p. 37.

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ucts are imported into domestic market) and safeguard duties (when the increased imports cause substantial or threat of injury to the domestic industry).³ All these three trade measures at the domestic level constitute 5434 in number out of which 4757 initiations are of anti-dumping.⁴ Under the WTO, all these trade appropriate remedy measures are considered as distorting trade in the international market and actions are permitted under respective WTO agreements.⁵ In the last decade, adoption of the trade remedies increasingly becomes a part of domestic trade policy measures in order to help the domestic industries from global competition.⁶ Some authors consider these agreements as “unfair trade laws” which are used as a “safety valve” in international trade.⁷ This chapter deals with trade remedy measures under WTO agreements: safeguard measures, anti-dumping duties and countervailing duties with special reference to India.

2 Safeguard Measures

Safeguard measures are defined as “emergency” actions with respect to increased imports of particular products, where such imports have caused or threaten to cause serious injury to the importing Member’s domestic industry.⁸ If the domestic industry is injured or threatened with a sudden surge in imports, then a WTO Member country may restrict the imports of a product temporarily by imposing safeguard duties.⁹ The same provision has been taken and elaborated from GATT Article XIX.¹⁰ Under the GATT 1947 as well, this provision was considered as an “emergency provision” or an “escape clause” from tariff concession commitments.¹¹ The suspension of such con-

³USITC, http://www.usitc.gov/press_room/trao/trade_laws.htm, Accessed 16th Feb 2015.

⁴WTO Dispute Settlement Database, https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm, Accessed 12th Sept 2015.

⁵WTO, http://www.wto.org/english/res_e/res_e.htm, Accessed 16th Feb 2015.

⁶Hardeep S. Puri, “India’s Trade Policy Dilemma and the Role of Domestic Reform”, Carnegie India, 2017. <http://carnegieindia.org/2017/02/16/india-s-trade-policy-dilemma-and-role-of-domestic-reform-pub-67946>, Accessed 26th July 2017.

⁷Hathaway et al. (2003), pp. 821–825.

⁸WTO, http://www.wto.org/english/tratop_e/safeg_e/safeint.htm, Accessed 17th Feb 2015.

⁹WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm#safeguards, Accessed 16th Feb 2015.

¹⁰Art. XIX(1)(a) of GATT 1947 provides that If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession”.

¹¹Safeguards are temporary remedies—increased tariffs, quantitative restrictions or a combination of both. This is mainly done to maintain a higher level of competitiveness to the domestic industry.

cessions can be extended till such injury is remedied.¹² Under the provision, GATT Contracting Parties can deviate from their obligations temporarily for a limited period of time when such action causes or threatens to cause injury to the domestic industry due to the sudden surge in imports. In such cases, the parties taking action must consult the party against which action is intended to take and to pay “compensation” to adversely affected party due to such imports. If there is no consultation before taking such action and there is no consensus between the parties, the adversely affected Member may suspend “substantially equivalent concessions” against the Member which has taken safeguard measure.

But the “unforeseen developments” mentioned in Article XIX of the GATT agreement is not defined in any other provisions. During the GATT period, safeguard measure was not a contentious issue due to the reason that most of the countries entered into bilateral agreements and agreed to “orderly marketing” arrangements and “voluntary export restraints”. These “grey area measures”¹³ were considered as outside the purview of GATT provisions.

The Appellate Body in *Argentina—Footwear (EC)* noted that the remedy provided by Article XIX is of an emergency character and is to be “invoked only in situations when, as a result of obligations incurred under the GATT 1994, a Member finds itself confronted with developments it had not ‘foreseen’ or ‘expected’ when it incurred that obligation”.¹⁴ In *Korea—Dairy*¹⁵ also it was held that any safeguard measure imposed after the entry into force of the *WTO agreement* must comply with the provisions of *both the Agreement on Safeguards and Article XIX of the GATT 1994*. Members cannot use this trade remedy as a protectionist measure for blocking trade.

2.1 WTO Safeguard Agreement

The safeguard agreement aims to: (1) clarify and reinforce GATT disciplines, particularly those of Article XIX; (2) re-establish multilateral control over safeguards and eliminate measures that escape such control; and (3) encourage structural adjustment on the part of industries adversely affected by increased imports, thereby

¹²Sykes (2005).

¹³The grey area measures referred in WTO are like bilateral voluntary export restraints, orderly marketing agreements and similar measures to restrict imports of certain products.

¹⁴DS 121, Appellate Body Report in 1999. On 3 April 1998, the EC requested consultations with Argentina in respect of provisional and definitive safeguard measures imposed by Argentina on imports of footwear. The EC alleged that the measure violates Arts. 2, 4, 5, 6 and 12 of the Agreement on Safeguards, and Art. XIX of GATT 1994.

¹⁵DS 98, Appellate Body Report in 1999. On 12 August 1997, the EC requested consultations with Korea in respect of a definitive safeguard measure imposed by Korea on imports of certain dairy products. The EC considered that this measure is in violation of Arts. 2, 4, 5 and 12 of the Agreement on Safeguard Measures, as well as a violation of Article XIX of GATT 1994.

enhancing competition in international markets.¹⁶ Article 2 of the Agreement provides two conditions to be fulfilled for imposing safeguard duties:

1. serious injury or threat thereof caused by increased imports; and
2. such measures be applied on a Most Favoured Nation (MFN) basis.

Such measures need to be taken after following the pre-published procedures. The factual basis should be on “serious injury”¹⁷ and “threat of serious injury”¹⁸ to the domestic industry and not based on mere allegation, conjecture or remote possibility. The investigating authorities are to evaluate all relevant factors having a bearing on the condition of the industry and are not to attribute imports injury caused by other factors.¹⁹ The Members shall apply measures only to the extent of quantitative restrictions to prevent or remedy “serious injury” and to facilitate adjustment (Article 5). The causation is a serious issue in most of the cases. In *USA—Lamb Meat* case,²⁰ the Appellate Body favoured a strict, textual approach to the causation issue. Injury caused to the domestic industry by factors other than increased imports was not attributed to increased imports in this case. The Appellate Body referred to the object and purpose of the Agreement on Safeguards in distinguishing between the concepts of “serious injury” under the Agreement on Safeguards and “material injury” under the Anti-dumping Agreement (ADA) and the SCM Agreement as follows:

We believe that the word ‘serious’ connotes a much higher standard of injury than the word ‘material’. Moreover, we submit that it accords with the object and purpose of the *Agreement on Safeguards* that the injury standard for the application of a safeguard measure should be higher than the injury standard for antidumping or countervailing measures ...²¹

Increased imports is always a question of fact. The Panel in *Argentina—Footwear (EC)*²² examined a finding of increased imports on the basis of a comparison between the volume of imports at the starting point of an investigation period and the volume of imports at the end of that period (“end-point-to-end-point comparison”). The Appellate Body held that end-point-to-end-point increase in imports satisfies the increased imports requirement of Article 2.1.²³

¹⁶Safeguard Agreement, http://www.wto.org/english/tratop_e/safeg_e/safeint.htm, Accessed 17th Feb 2015.

¹⁷Art. 4 (1)(a) of Safeguard Agreement - “serious injury” shall be understood to mean a significant overall impairment in the position of a domestic industry.

¹⁸Art. 4(1)(b) of Safeguard Agreement - “threat of serious injury” shall be understood to mean serious injury that is clearly imminent and based on facts and not merely on allegation, conjecture or remote possibility.

¹⁹The factors that must be analysed are the absolute and relative rate and amount of increase in imports, the market share taken by the increased imports and changes in level of sales, production, productivity, capacity utilization, profits and losses, and employment of the domestic industry.

²⁰DS 177, Request for consultations in 1997, Panel Report in 1999 and Appellate Body Report in 2001.

²¹Appellate Body Report para. 124.

²²DS 121, Request for consultations are made in 1998, Panel Report in 1999 and Appellate Body Report in 1999.

²³Article 2(1) of the Safeguard Agreement provides that “A Member (1) may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below,

Article XIX:1(a) of the GATT 1994 and Article 2.1 of the Agreement on Safeguards not only speak of an “increase” in imports but also contain specific requirements with respect to the quantitative and qualitative nature of the “increase” in imports of the product concerned. Both provisions require that a product is being imported into the territory of the Member concerned in such increased quantities (absolute or relative to domestic production) as to cause or threaten serious injury.²⁴ In *USA—Wheat Gluten*, the Appellate Body expressed scepticism as to the usage per se in the absence of any clear evidence of unfair trade practices such as dumping or subsidies.²⁵

In *USA—Line Pipe*,²⁶ the Panel found that “there is no need for a determination that imports are presently still increasing. Rather, imports could have ‘increased’ in the recent past, but not necessarily be increasing up to the end of the period of investigation or immediately preceding the determination”. The notification of safeguard duties also has to be made as soon as possible, not several weeks later. In *Argentina—Preserved Peaches*, the Panel also concluded that there is no absolute formula to determine whether increased imports justify the application of a safeguard measure.²⁷ In *USA—Steel Safeguards*,²⁸ the Panel, in a ruling explicitly confirmed by the Appellate Body, insisted that there are no absolute standards in judging how sudden, recent and significant the increase must be in order to qualify as an “increase” in the sense of Article 2.1 of the Agreement on Safeguards. With regard to injury criteria, the Appellate Body in *USA—Line Pipe* also cited the 1947 *USA—Fur Felt Hat Bodies* case,²⁹ in which it was noted that the Working Party had “conducted a single analysis based on the presence of serious injury or threat of serious injury, and that it did not consider it necessary to make a discrete determination of serious injury or threat of serious injury”.

that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.”

²⁴*USA – Wheat Gluten*, Panel Report, paras. 8.31 and 8.33.

²⁵Bhala and Gantz (2002), p. 468.

²⁶DS 202, Request for consultations are made in 2000.

²⁷DS 238, Request for consultations are made in 2001 and Panel Report circulated in 2003.

²⁸DS 252, Request for consultations are made in 2002 and Panel and Appellate Body Report circulated in 2003.

²⁹BISD 1S/28, United States Concession under Article XIX of the General Agreement on Tariffs and Trade, October 1951.

In 2010, El Salvador,³⁰ Honduras,³¹ Guatemala³² and Costa Rica³³ requested consultations with the Dominican Republic concerning the provisional and definitive safeguard measures imposed by the Dominican Republic on imports of polypropylene bags and tubular fabric and the investigation that led to the imposition of those measures. The Panel found that the Dominican Republic acted inconsistently with its obligations under Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c) and 11.1(a) of the *Safeguards Agreement* because the report published by the competent authorities failed to provide an explanation of the existence of unforeseen developments and of the effect of the obligations of the GATT 1994.³⁴ On 13 February 2012, India requested consultations with Turkey regarding certain safeguard measures on imports of cotton yarn (other than sewing thread) from all origins.³⁵ In a recent case even safeguard duties imposed on automobiles by Turkey compelled Japan to file a complaint with the WTO dispute settlement body.^{36,37}

2.2 Indian Scenario

India is a party to the WTO Agreement on Safeguards and amended its laws to comply with its commitment to the WTO. It added Section 8B to the Customs Tariff Act, 1975, which empowers the Central Government to impose Safeguard Duty on goods which enter in increased quantities and cause or threaten to cause serious injury to domestic industry producing like or directly competitive goods. The Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997, and Customs Tariff (Transitional Products Specific Safeguard Duty) Rules, 2002, govern the procedural aspects of imposing safeguard duties. This provision (Section 8B) is included to offset the increased effect of imports. It is provided that if the Government is satisfied after an investigation, that any article is imported into India in increased quantities which

³⁰DS 418 - *Dominican Republic — Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric* (Complainant: El Salvador).

³¹DS 417 - *Dominican Republic — Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric* (Complainant: Honduras).

³²DS 416 - *Dominican Republic — Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric* (Complainant: Guatemala).

³³DS 415 - *Dominican Republic — Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric* (Complainant: Costa Rica).

³⁴DS 418, Panel Report in 2012.

³⁵DS 429 - *United States — Anti-Dumping Measures on Certain Shrimp from Viet Nam* (Complainant: Viet Nam), 2012.

³⁶DS 468, On 30 October 2013, Japan requested consultations with Ukraine regarding the definitive safeguard measures imposed by Ukraine on imports of certain passenger cars and the investigation that led to the imposition of those measures.

³⁷Very recently, safeguard duties were imposed on automobiles by Turkey on imports from Japan which led to filing a complaint with the WTO dispute settlement body.

causes or threatens to cause serious injury to the domestic industry, then by official notification in the Gazette it may impose safeguard duties.

A special provision was inserted in Indian laws to tackle increased imports from China. Section 8C which was introduced in Finance Act, 2002, provides for imposing safeguard duty on any article imported into India from China in such increased quantities and under such conditions so as to cause market disruption to domestic industry.³⁸ The Director General of Safeguards will investigate into the existence of increased imports, serious injury to the domestic industry or market disruption or threat of serious injury or threat of serious market disruption as a consequence of increased import to the domestic industry.

The Director General shall, on receipt of a written application by or on behalf of the domestic producer of like article or directly competitive article, initiate an investigation to determine the existence of “serious injury” or “threat of serious injury” to the domestic industry, caused by the import of an article in such increased quantities, absolute or relative to domestic production.³⁹ The safeguard duty rule stipulates that the investigation has to be completed within a period of 8 months by the Director General. A review of such duties also has to be done within 8 months of such duty imposition.⁴⁰ However, there is no appellate remedy available under the rules against the decision of the Director General of Safeguards.

India initiated consultations with Turkey in 2008 on safeguard measures on imports of cotton yarn to Turkey.⁴¹ But India did not proceed with the case further against Turkey. There is no other dispute on safeguard duties in which India is a party. But if we look into the domestic scenario India has initiated 54 safeguard duty cases since 1998 up to 2014. However, only in 31 cases definitive safeguard duties had been imposed which constitutes 57% of cases initiated. There was increased number of initiations in 2009 which reached 10 in number, and the second largest number of initiations are recorded in 2014 with 7 in number. Majority of the cases are against the imports of chemical and allied substances⁴² (Fig. 1).

Safeguard measure is a temporary additional tariff when there is a sudden surge in imports. The urgent measures are used effectively by developed as well as developing countries.⁴³ Indonesia had also initiated 26 investigations at the domestic level followed by Turkey (21). The increased number of initiations in developing countries like India shows that this is used as a trade remedy measure.

India started its first safeguard duty investigation in 1997 on imports of acetylene black from Japan, Singapore, South Africa, France, Philippines and Belgium. The

³⁸Finance Act, 2002, www.allindiantaxes.com/doc/89337d82.doc, Accessed 26th June 2015.

³⁹Directorate General of Safeguards, http://www.dgsafeguards.gov.in/legal_framework_provisions.html, Accessed 18th Feb 2015.

⁴⁰Rule 18 of Safeguard Duty Rules, 2002.

⁴¹DS 428 - Turkey — Safeguard measures on imports of cotton yarn (other than sewing thread) (Complainant: India), 13 February 2012.

⁴²Directorate General of Safeguards, India, <http://www.dgsafeguards.gov.in/newversion/archive-cases.html#2014>, Accessed 13th Sept 2015.

⁴³Knudsen (2014), p. 2.

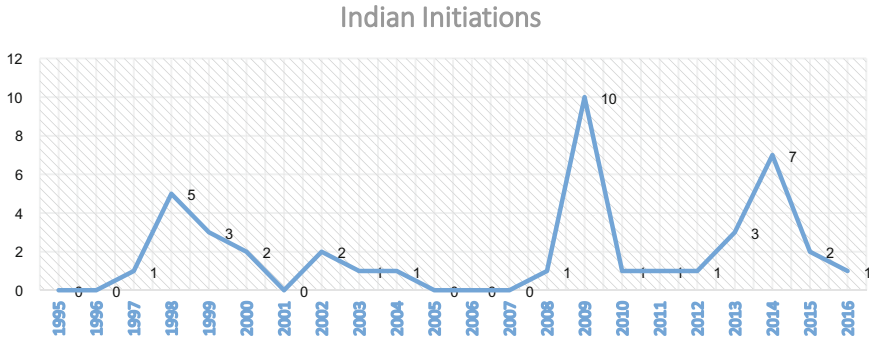


Fig. 1 Safeguard initiations 1995–2016. *Data Source* Directorate General of Safeguards India

domestic industry complained that the imported acetylene is a threat to it and the prices of domestic product are reducing steadily due to imports. It is interesting to note that only four domestic producers constituted the domestic industry. The imports were increased substantially which caused serious injury to the domestic industry. Finally, India imposed duties. In the year 2000, imports of soda ash was under investigation and six domestic industries complained that their market share has decreased due to increased imports especially from China. Safeguard authorities applied the “market disruption” test for finding the serious injury to domestic industry. The identified relevant factors for finding material injury are as follows:

- (i) Rate of increase of imports,
- (ii) Share of the domestic market taken by increased imports,
- (iii) Change in level of sales,
- (iv) Production,
- (v) Productivity,
- (vi) Capacity utilization,
- (vii) Profits and losses,
- (viii) Employment,
- (ix) Export capacity in the country of origin or export, as it stands or is likely to be in the foreseeable future and the likelihood that the capacity will be used to export to India,
- (x) India as focus to exports by China and
- (xi) Inventory.

It was found that most of the grounds were favourable to the domestic industry and on an average of 15% safeguard duties were imposed mainly focusing on China.⁴⁴ India decided to impose 20% safeguard duties on certain steel products originating from China, Japan and Korea for a period of 200 days under the safeguard provisions.

⁴⁴Safeguard investigation concerning imports of soda ash into India under Rules 5 of the Custom Tariff (Transitional Product Specific Safeguard Duty) Rules, 2002, read with Section 8C of the Customs Tariff Act, 1975.

This is the first time that India imposed safeguard duties on steel products after the economy liberalized in 1991.⁴⁵ Individual cases are not discussed here elaborately, but it can be observed that India has started imposing safeguard duties after a short while.

3 Anti-dumping Duties

Anti-dumping is one of the most preferred methods of trade remedy measure used by many Members in WTO including India to restrict international trade.⁴⁶ All the WTO Members initiated 4757 anti-dumping remedy initiations up to December 2014. The “objectives” of the Anti-Dumping Agreement (ADA) is to provide a multilaterally agreed framework of rules governing actions against injurious dumping, and claims of more specific objectives are difficult to discern with any facility or compelling force due to the lack of anything that could properly be described as constituting a clear statement of the objectives of the ADA.⁴⁷ Anti-dumping policies are many times justified as legitimate actions by governments in order to protect the domestic industry from foreign competition.⁴⁸ Anti-dumping duties basically deal with the price behaviour of exports. Dumping exists when normal value is more than the export price. If a company exports a product at a price lower than the price it normally charges on its own home market, it is said to be “dumping” the product.⁴⁹ The basic requirement of imposing anti-dumping duties is: (1) dumping exists; (2) injury to the domestic industry; and (3) causal link between dumping and injury to the domestic industry. The roots of dumping can be traced to the GATT Article VI.⁵⁰ The Kennedy Round and Tokyo Round Codes elaborated the provisions and agreed upon the complete regime of anti-dumping rules. For greater clarity and determination of the method of calculation of dumping, injury criteria and procedures, the Tokyo Round Code was renegotiated and ADA was concluded.⁵¹ The entire process involves different steps which are described in detail below.

3.1 Determination of Dumping

There is no definitive definition of anti-dumping in the ADA. Article 2 provides a methodology to be followed in the calculation of dumping margin. A product is to be

⁴⁵Economic Times, 15th September 2015.

⁴⁶Brown (2005), pp. 515–555.

⁴⁷Panel Report on Zeroing (EC), footnote 292.

⁴⁸Wooton (1998), pp. 340–362.

⁴⁹WTO, http://www.wto.org/english/tratop_e/adp_e/adp_e.htm, Accessed 22nd Feb 2015.

⁵⁰Art. VI condemns dumping of goods at comparatively lower prices in the foreign market.

⁵¹WTO, http://www.wto.org/english/tratop_e/adp_e/antidum2_e.htm, Accessed 22nd Feb 2015.

considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. Article VI of the GATT propounds that dumping is unfair and is to be condemned but not prohibits dumping actions. The Appellate Body in the *USA—Stainless Steel* (Mexico) case held that dumping and margin of dumping have the same meaning.⁵²

Anti-dumping investigation requires a complaint from the domestic industry injured by the dumping. A preliminary determination will be made on an investigation and presentation of evidence by both the parties. If the finding is affirmative, interim duties will be imposed. If the final determination also finds evidence of dumping, definitive duty will be imposed. If the margin of dumping finding is less than two per cent of the export price, it will be considered as *de minimis* and no duty will be imposed.

The magnitude of dumping margin is calculated based on the “normal value” and the “export price”. Article 2.1 makes a comparison of export price with the comparable price of the like product destined for consumption in the exporting country. If the export price is unreliable, it can be constructed on the basis of price at which the imported products are first resold to an independent buyer (A.2.3). “Like product” is also misinterpreted and defines the product under consideration to include only products that are “like”.⁵³ Apples and oranges cannot be compared and considered as “like product” and subsequently impose anti-dumping duties. Like product is defined as “a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration”. If the like product is not available in the domestic market, price comparison of “similar product” is allowed. These calculations based on comparisons of like product can be complex, and finding of dumping can be based on shaky assumptions by the importing country.

The normal value and export price calculation mostly end up in controversies. The prescribed method in the ADA is based on the price charged in the home market. The starting point for export price calculation is “the comparable price, in the ordinary course of trade” for the like product when destined for consumption in the exporting country. Sales between affiliated companies is comparatively on a lower price, and calculation of dumping margin is an issue in those cases. These sales were not considered as “in the ordinary course of trade”.⁵⁴ In such cases, constructed value is calculated based on cost of production plus a reasonable amount of expenses for

⁵²DS 344 - *United States — Final Anti-Dumping Measures on Stainless Steel from Mexico* (Complainant: Mexico), Appellate Body Report, para. 96.

⁵³DS – 397 - *European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* (Complainant: China). *EC — Fasteners (China)* case.

⁵⁴DS 184 - *United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* (Complainant: Japan), para. 26.

selling, general and administrative expenses.⁵⁵ Usually, the exporters manipulate the home market sale prices and transaction between related parties in order to escape from the imposition of anti-dumping duties. Arm's length sales can be always under scanner of anti-dumping authorities.

Article 2.4 requires that "the comparison should be made at the factory level, sales made at as nearly as possible the same time". The other method is the "weighted average" in calculating the amount for administrative, selling and general costs (SG&A) to determine the constructed normal value of subject products and collecting data from "other exporters or producers". Another problematic area of determination of dumping is the "Zeroing" methodology used by countries like the United States (USA) and the European Union (EU). In *USA—Zeroing (Japan)* case,⁵⁶ average-to-average comparisons of export price and normal value within individual "averaging groups" have been done and disregard any amounts by which average export prices for particular models exceed normal value in aggregating the results of these multiple comparisons to calculate a weighted-average margin of dumping virtually constituted "Zeroing" of negative margins leads to finding positive dumping margin.⁵⁷ In *EC—India Bed Linen* dispute, the Appellate Body held that practice of "Zeroing" is inconsistent with this method because, *inter alia*, Zeroing the negative dumping margins violates the ADA provisions.⁵⁸ In *USA—Softwood Lumber V*, the Appellate Body confirmed its view that an authority is not allowed to practise Zeroing while using the weighted-average-to-weighted-average comparison methodology for calculating the margin of dumping. Zeroing thus inflates the margin of dumping for the product as a whole.⁵⁹ The calculation of dumping margin is always at controversy, and there is no uniform method of its calculation. Consequently, it ends up in inflated dumping margins and consequent imposition of duties.

3.2 Determination of Injury

Article VI(6)(a) of GATT provides that

No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material

⁵⁵WTO, https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm, Accessed Sept 17, 2015.

⁵⁶DS 322 - *United States — Measures Relating to Zeroing and Sunset Reviews* (Complainant: Japan), paras. 151 and 152.

⁵⁷Specifically, "simple Zeroing" means that when aggregates the results of comparisons of normal value and export price made on an average-to-transaction basis or on a transaction-to-transaction basis, the numerator of the weighted-average margin of dumping only includes the results of those comparisons in which individual export prices are less than the normal value

⁵⁸DS 141 - *European Communities — Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India* (Complainant: India), para. 159.

⁵⁹DS 264 - *United States — Final Dumping Determination on Softwood Lumber from Canada* (Complainant: Canada), Appellate Body, para. 162.

injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.⁶⁰

The ADA also includes the same methodology for the calculation of dumping margin criteria stipulated in GATT 1947. Article 3 of the ADA deals with obligations of Members with respect to the determination of injury. Material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry must be proved. The determination of injury is based on—(a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products and (b) the consequent impact of these imports on domestic producers of such products.⁶¹ The investigating authorities shall examine the volume of dumped imports and its injurious effect on the domestic industry. In *Egypt—Steel Rebar* dispute, the Panel held that “Article 3.5 makes clear, through its cross-references, that Articles 3.2 and 3.4 are the provisions containing the specific guidance of the ADA on the examination of the volume and price effects of the dumped imports, and of the consequent impact of the imports on the domestic industry”.⁶²

With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member. The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments (Article 3.4). Making a determination of the threat of injury, authorities must consider the following factors:

- (i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;
- (ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member’s market, taking into account the availability of other export markets to absorb any additional exports;
- (iii) Whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
- (iv) Inventories of the product being investigated.⁶³

⁶⁰WTO, https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm, Accessed 7th March 2015.

⁶¹Art. VI of GATT.

⁶²DS 211 - *Egypt – Definitive Anti-dumping Measures on Steel Rebar from Turkey*, para. 227.

⁶³WTO, https://www.wto.org/english/res_e/booksp_e/analytic_index_e/anti_dumping_02_e.htm#article3A, Accessed 5th March 2015.

The causality between the dumped imports and injury to the domestic industry is also to be proved (Article 3.5). The different injury factors are to be calculated based on an objective examination of different economic factors.⁶⁴ The injury determination should be done according to positive evidence. Such evidence must be of an affirmative, objective and verifiable character and that it must be credible as well.⁶⁵ In the *Thailand—H-Beams* dispute, Poland alleged that the determination of injury was not based on positive evidence and must involve an objective examination of the volume of dumped imports, and their effects on price of the Polish imports.⁶⁶ In *Mexico—Steel Pipes and Tubes* dispute, the Panel held that it is the duty of the investigating authority to conduct an objective assessment of the positive evidence.⁶⁷ In *EC—India Bed Linen* case, the Panel held that dumped imports refer to all imports attributable to producers or exporter and factors for companies outside the domestic industry provide no basis for conclusions about the impact of dumped imports on the domestic industry itself.⁶⁸ It is clear that the injury must be to the domestic industry in question. Like product-producing industry is also relevant in the context of deciding the injury criteria. Cumulative assessment is permitted under Article 3.3 of the ADA when the following conditions are fulfilled:

1. dumping margins for each individual country are more than *de minimis*;
2. the volume of imports from each country is not negligible;
3. a cumulative assessment of the effects of imports is appropriate in the light of the conditions of competition between the imported products and the like domestic product.⁶⁹

Threat of material injury may occur when domestic industry alleges that it is not yet suffering material injury, but threatened with material injury to the domestic industry, then anti-dumping measures can be imposed. Threat of injury provision is on occasions misused by the domestic industry for imposing anti-dumping duties.

3.3 Domestic Industry

Domestic industry is defined as “domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products” (Article 4). In the *USA—Hot-Rolled Steel* dispute, the Appellate Body held that domestic industry includes “an evaluation of particular parts, sectors or segments within a domestic

⁶⁴DS 241, *Argentina — Poultry Anti-Dumping Duties*, Panel, para. 7.283.

⁶⁵DS 184, *USA — Hot-Rolled Steel*, para. 246.

⁶⁶DS 122, *Thailand – H-Beams* and see also *USA — Hot-Rolled Steel*, the Appellate Body, para. 181.

⁶⁷DS 331, *Mexico - Anti-Dumping Duties on Steel Pipes and Tubes*, Panel Report, para. 7.237.

⁶⁸Panel Report, para.6.182.

⁶⁹Raju (2008), p. 113.

industry”⁷⁰ and the assessment to be made as an industry as a whole. It means that “those of whose collective output of the products constitute a major proportion of the total domestic production”. The investigators must evaluate the “bearing” of relevant factors on the “state of the domestic industry”. Domestic industry must be as in accordance with the definition of Article 4.1.⁷¹ But the position of multinational companies under the ADA is not clear. According to Article 5.4 of the ADA, an anti-dumping action application should be supported by domestic producers whose collective output constitutes more than 50% of the domestic industry. Whether the multinational companies working at the domestic jurisdictions can support this kind of application is neither dealt in the ADA nor in domestic legislations. The major condition of ADA is “a major proportion of the total domestic production”.

3.4 Zeroing Methodology

Article 2.4.2 of the ADA provides for calculation of the dumping margin which is found to be distortive, fabricating and exaggerating.⁷² The weighted-average prices are compared with most similar products in the home market. Instead of calculating the negative value of dumping margin, it will be “zeroed” and all dumping margins added to get a positive dumping margin. Thus, “Zeroing” eliminates all negative dumping margins from cumulative calculation. Thus, every calculation creates a positive dumping margin which is not the correct methodology of calculation of dumping margin envisaged in Article 2.4.2 of ADA. In the dispute, *USA—Zeroing (Japan)*,⁷³ USA used a “simple Zeroing” methodology of calculating dumping margin. The USDOC “aggregates the results of comparisons of normal value and export price made on an average-to-transaction basis or on a transaction-to-transaction basis, the numerator of the weighted average margin of dumping only includes the results of those comparisons in which individual export prices are less than the normal value”.⁷⁴ In the *EC—Bed Linen*⁷⁵ dispute as well the Appellate Body held that the EC practice of “Zeroing” was inconsistent with the provisions of ADA. In *USA—Softwood Lumber V*, the Appellate Body confirmed its view that an authority is not allowed to practise Zeroing when using the weighted-average-to-weighted-average comparison methodology for calculating the margin of dumping.⁷⁶ The Panel in *USA—Shrimp*

⁷⁰Appellate Body Report, Para. 193–94.

⁷¹DS 101, *Mexico — Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States* (Complainant: United States), para. 7.147.

⁷²Daniel J. Ikenson (2004).

⁷³DS 322 - *United States — Measures Relating to Zeroing and Sunset Reviews* (Complainant: Japan), Panel Report, 2006.

⁷⁴Panel Report, para. 7.2 & 7.3.

⁷⁵DS 141 - *European Communities — Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India* (Complainant: India), Appellate Body Report, 2001, para. 7.1(g).

⁷⁶Appellate Body Report, para. 101.

(*Ecuador*)⁷⁷ disputes held that the USA had acted inconsistently with Article 2.4.2 of the ADA in using Zeroing under the weighted-average-to-weighted-average methodology.⁷⁸ Repeatedly, the Panels and the Appellate Body held that the method of “Zeroing” is against the letter and spirit of ADA, but most of the countries are using this methodology clandestinely for distorting international trade.

4 India’s Experience with Anti-dumping Cases: A Statistical Overview

India has been a party to a total of 12 cases, of which nine cases were as complainant and the remaining three cases were filed against India in the DSU. It means that out of the 108 anti-dumping cases filed in the DSU, India contributed only 11% of the total cases. When compared with largest number of domestic anti-dumping initiations, this figure is insignificant. India actively defended only two cases in the DSU, and they are the *USA—Continued Dumping and Subsidy Offset Act of 2000*⁷⁹ and *India—EU Bed Linen* cases⁸⁰ (Table 1).

4.1 *USA—Customs Bond Directive for Merchandise Subject to Anti-dumping/Countervailing Duties—Complainant India*⁸¹

Thailand and India complained to the DSU in 2006 on USA-enhanced continuous bond requirement on the product frozen warm water shrimp from India and Thailand. Another measure challenged by Thailand was USA practice of “Zeroing”. The bond requirement is equal to the amount of 100% of the anti-dumping/countervailing duty rate. India raised claims under Article 18.1 of the ADA. Article 18.1 provides that no action against dumping of exports from another Member can be taken except in accordance with the provisions of the ADA. Thailand and India argued that the bond imposed was within the ambit of Article 18.1 of the ADA. The USA argued that the bond is not a “specific action against dumping” and the bond constitutes only a “reasonable security” within the scope of Article VI:2 and 3 of GATT 1994. The Panel found that the bond is a “specific action” in response to dumping because it

⁷⁷Panel Report, paras.7.38–7.39.

⁷⁸This position was confirmed in *USA — Anti-Dumping Measures on PET Bags* by the Panel as well. Panel Report, Para. 7.18 & 7.25

⁷⁹DS 217 - *United States — Continued Dumping and Subsidy Offset Act of 2000* (Complainants: Australia; Brazil; Chile; European Communities; India; Indonesia; Japan; Korea, Republic of; Thailand).

⁸⁰DS 141.

⁸¹DS 243 and 24.

Table 1 Indian cases (as complainant and respondent)

S. no.	Case no.	Parties	Panel	Appellate Body report
1	DS 385	EC—Expiry Reviews of Anti-dumping and Countervailing Duties Imposed on Imports of PET from India (Complainant: India)	Request in 2008—no further action	
2	DS 345	USA—Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties (Complainant: India)	Panel Report circulated in 29 February 2008	Appellate Body Report circulated in 16 July 2008
3	DS 318	India—Anti-Dumping Measures on Certain Products from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Complainant Taiwan)	Request for consultation in 2004—no further proceedings	
4	DS 313	EC—Anti-Dumping Duties on Certain Flat Rolled Iron or Non-Alloy Steel Products from India (Complainant: India)	Mutually agreed solution 2004	
5	DS 306	India—Anti-Dumping Measure on Batteries from Bangladesh(Complainant: Bangladesh)	Request for consultation in 2004—no further proceedings	
6	DS 304	India—Anti-Dumping Measures on Imports of Certain Products from the European Communities (Complainant: European Communities)	Request for consultation in 2003—no further proceedings	
7	DS 229	Brazil—Anti-Dumping Duties on Jute Bags from India (Complainant: India)	Request for consultation in 2001—no further proceedings	
8	DS 217	USA—Continued Dumping and Subsidy Offset Act of 2000 (Complainants: Australia; Brazil; Chile; European Communities; India; Indonesia; Japan; Korea, Republic of; Thailand)	1. Panel Report 16 September 2002 2. Article 21.3 (c) Arbitration—13 June 2003 3. Article 22.6 Arbitration Report—31 August 2004	16 January 2003
9	DS 206	USA—Anti-Dumping and Countervailing Measures on Steel Plate from India (Complainant: India)	Panel Report circulated in 2002	

(continued)

Table 1 (continued)

S. no.	Case no.	Parties	Panel	Appellate Body report
10	DS 168	South Africa—Anti-Dumping Duties on Certain Pharmaceutical Products from India (Complainant: India)	Request for consultation in 1999—no further proceedings	
11	DS 141	EC—Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India (Complainant: India)	1. Panel Report—30 October 2000 2. Article 21.5 Panel Report—29 November 2002	1. 1 March 2001 2. Article 21.5 Appellate Body Report—8 April 2003
12	DS 140	EC—Anti-Dumping Investigations Regarding Unbleached Cotton Fabrics from India (Complainant: India)	Request for consultation in 1998—no further proceedings	

Source Compiled from WTO Dispute Settlement Data

is “inextricably linked to or has a strong correlation with the constituent element of dumping”. The Panel held that the bond constitutes action “against” dumping because it has an adverse effect on dumping and results in additional costs to exporters and producers.

On appeal, India contended that the Panel erred with reference to Article 18.1 of the ADA and Article 32.1 of the SCM Agreement. India pointed out that in *USA—1916 Act* and in *USA—Offset Act (Byrd Amendment)*, the Appellate Body emphasized the importance of reading Article VI:2 in conjunction with the whole of the ADA to determine what are the permissible specific actions against dumping. India argued that the Panel’s analysis of the relationship between Article VI and provisions of ADA is based on the Appellate Body decision in the case of *Brazil—Desiccated Coconut*, according to which the provisions of the SCM Agreement do not supersede the provisions of Article VI of GATT. According to India, the Panel could not have relied on the general observation to find that a specific action against dumping is permissible and Article VI cannot be independently interpreted without reference to provisions of the ADA. India also contended that the Panel’s approach was not in accordance with the customary principle in Article 31(1) of the Vienna Convention on Law of the Treaties which provides for a provision to be interpreted in ordinary meaning in its context and in the light of the object and purpose. India also appealed against the Panel finding that cash deposits are not anti-dumping duties within the meaning of Article 9 of the ADA.

The Appellate Body held that dumping in the *Ad Note* covers both the “existence” of dumping and the amount or margin of dumping and consequently con-

cluded that *Ad Note* authorizes taking of a reasonable security after the imposition of an anti-dumping duty order, pending the determination of the final anti-dumping duty order.⁸² The Appellate Body also observed that the Appellate Body reports in previous findings in *Byrd Amendment* and *USA-1916 Act* that the ADA does not allow a fourth category of specific action against dumping.⁸³ The Appellate Body further held that the particular security amount collected constitutes a “specific action against dumping” that should be evaluated in the light of the nature and characteristics of the security and the particular circumstance of each case. Finally, Appellate Body held that a reasonable security taken in accordance with *Ad Note* for potential additional anti-dumping duty liability does not necessarily constitute a fourth autonomous category of response to dumping.⁸⁴

India and Thailand had also argued that the scope of the *Ad Note* should be limited to securities taken as provisional measures in accordance with Article 7. The Appellate Body, however, disagreed with India and Thailand that *Ad Note* is completely subsumed under Article 7 so that the taking of a reasonable security is not allowed after a definitive anti-dumping duty is imposed. The Appellate Body clarified that in *Brazil—Desiccated Coconut*,⁸⁵ the ADA does not supersede the provisions of GATT 1994, but these two agreements represent an inseparable package of rights and disciplines. With regard to the cash deposit, Appellate Body confirmed the view that the application of the bond is within the scope of *Ad Note*. The Appellate Body concluded that CDSOA provisions were inconsistent with Articles 5.4, 18.1 and 18.4 of the ADA and Articles 11.4, 32.1 and 32.5 of the SCM Agreement.⁸⁶

4.2 USA—Continued Dumping and Subsidy Offset Act 2000 (CDSOA)—Complainant India⁸⁷

A joint complaint was filed by Australia, Brazil, Chile, EC, India, Indonesia, Japan, Korea and Thailand against the USA concerning the amendment to the Tariff Act of 1930 signed on 28 October 2000 popularly known as “the Byrd Amendment”. The complainants alleged that the Continued Dumping and Subsidy Offset Act 2000 (CDSOA) violated the provisions of GATT, ADA and SCM agreements. The Act provides for distribution of anti-dumping and countervailing duties collected annually to the affected domestic producers who supported the petition. Complaining parties

⁸² Appellate Body Report, para. 227.

⁸³ Appellate Body Report, para. 230.

⁸⁴ Appellate Body Report, para. 231.

⁸⁵ DS 22, p. 14.

⁸⁶ Appellate Body Report, para. 323.

⁸⁷ DS 217 -*United States — Continued Dumping and Subsidy Offset Act of 2000* (Complainants: Australia; Brazil; Chile; European Communities; India; Indonesia; Japan; Korea, Republic of; Thailand).

argue that “offset” constitutes a specific action against dumping and subsidization. It was also argued that “offset” makes a strong incentive for the petitioning domestic industry to support trade remedy actions. Thus, CDSOA Act as stimulation to support the petition and offset is to be paid only to the petitioners those who support the application. India argued that such pecuniary interest was not permitted by ADA and it nullifies or impairs the benefit accruing to the complaining parties under the ADA, SCM and GATT provisions.

The Appellate Body confirmed the Panel position that the CDSOA is a non-permissible specific action against dumping and subsidy agreements contrary to Article 18.1 of the ADA and Article 32.1 of the SCM Agreement.⁸⁸ The Appellate Body concluded that the CDSOA is inconsistent with Article 18.4 of the ADA and Article 32.5 of the SCM Agreement along with Article XVI:4 of the WTO agreement. The Appellate Body, however, reversed the Panel finding that the CDSOA is inconsistent with Article 5.4 of the ADA and Article 11.4 of the SCM Agreement. But it is interesting to note that the USA alleged that the Panel exceeded in its reference by examining its claims on CDSOA and its compatibility with ADA and SCM provisions, thus directly examining the CDSOA provisions without reference to or challenging USA anti-dumping and SCM agreements. India along with EU, Thailand and Indonesia submitted that the Panel correctly applied the test enunciated by the Appellate Body in *USA—1916 Act* dispute by determining that CDSOA is a specific action against dumping and subsidies. The offset payments constitute specific action against dumping and subsidy because it has an adverse impact on dumping and subsidization. According to the Appellate Body, the only action against dumping allowed under Article VI is definitive duties, provisional measures and undertakings according to *USA—1916 Act*. The subjective motivation of the producer in supporting the application through financial incentive is criteria for the determination of violation of the provisions of ADA and SCM agreements.

Appellate Body held that Article 18.1 of ADA and 32.1 of SCM Agreement are identical, and the Appellate Body decision in *USA—1916 Act* dispute is applicable equally to SCM Agreement as well.⁸⁹

The Appellate Body differed with the Panel that the pecuniary incentive is an express provision to support the application by the domestic industry and held that Article 5.4 of the ADA and Article 11.4 of the SCM Agreement do not permit the investigating authorities to presume industry support based on the indirect incentive and benefit arising from such support and thus the CDSOA has defeated the purpose of Article 5.4 of ADA and 11.4 of the SCM Agreements. The Panel need not to dig into the motives of the domestic industry supporting the application under the provisions of these agreements. The Appellate Body also rejected the Panel conclusion that the USA has acted not in good faith by violating substantive provisions of a treaty by enacting CDSOA.⁹⁰

⁸⁸ Appellate Body Report, para. 242.

⁸⁹ Appellate Body Report, para. 238.

⁹⁰ Appellate Body Report, para. 299.

4.3 *Arbitration Proceedings Under Articles 21.3(C) and 26 of the DSU*

The Appellate Body adopted the report in February 2003, and the USA asked for a “reasonable period of time” to implement the decision of the DSU. In March 2003, the complainants, including India, approached the DSB saying that there is no consensus on the implementation period with the USA and they want to settle the implementation period under arbitration proceedings. The USA asked for 15 months’ time period for the implementation of the DSB rulings as decided in the previous rulings in *Japan—Alcoholic Beverages II*,⁹¹ *EC—Bananas III*,⁹² and *EC—Hormones*⁹³ disputes. The USA informed that it requires such time to amend the CDSOA. The USA rejected the argument of the complainants that the reasonable period of time is 6 months as happened in *USA—1916 Act*⁹⁴ and *USA—Section 110(5) Copyright Act*.⁹⁵ The complainants argued that the only way to comply with the decision of DSB is to amend the CDSOA urgently. Article 21.3 of the DSU stipulates that “prompt compliance” means “immediate compliance” and “reasonable period of time” is only available when “it is impracticable to comply immediately with the recommendations and rulings” of the DSB. In the award, 11 months was prescribed as a reasonable period of time in this particular case after taking into consideration of the complex USA legislative process.

On 15 January 2004, India and other complainants in the original petition complained to the DSU that the USA has failed to implement the decision of the DSB allowed under the arbitration proceedings, with 11 months. The complainants requested that the DSB authorize to suspend concessions pursuant to Article 22.2 of the DSU. The DSB decided to refer the matter to arbitration. India wanted to suspend the concessions to the tune of annual distribution of anti-dumping and countervailing duties under CDSOA. India intended to impose additional customs duties on listed products originating from the USA under Article 22.4 of the DSU. According to Article 22.7 of the DSU, the level of suspension should be equivalent to the level of nullification or impairment of benefits.

The USA contented that the parties had failed to specify the level of suspension of concessions and the level of nullification or impairment. India considered that Article 22 of the DSU does not require a “trade effect” test. According to India, the amount of annual offset payments constituted the level of nullification or impairment up to

⁹¹DS 8 – *Japan – Taxes on Alcoholic Beverages* (Complainant: European Communities), mutual solution reached between parties after the arbitration proceedings in 1998.

⁹²DS 27 - *European Communities — Regime for the Importation, Sale and Distribution of Bananas* (Complainants: Ecuador; Guatemala; Honduras; Mexico; United States), the dispute started in 1996 and Appellate Body report in 2008.

⁹³DS 26 – *European Communities – Measures Concerning Meat and Meat Products* (Complainant: United States).

⁹⁴DS 136 - *United States — Anti-Dumping Act of 1916* (Complainant: European Communities).

⁹⁵DS 160 - *United States — Section 110(5) of USA Copyright Act* (Complainant: European Communities).

which each party may suspend concessions or other obligations. The suspension of concession was authorized by the arbitrator. The arbitrator determined that the level of nullification or impairment suffered by India in a year is equal to the level of disbursements made under CDSOA for the preceding year relating to anti-dumping or countervailing duties paid on imports from India.⁹⁶ Other than the EU and Japan, none of the other complainants, including India, has imposed any additional duties till 2015.

4.4 USA Anti-dumping and Countervailing Measures on Steel Plate from India⁹⁷

India in the year 2000 requested consultations with the USA concerning the affirmative determination of sales of certain carbon quality cut-to-length carbon steel plate originating from India. This was on the background of the fact that on 29 July 1999, USDOC issued a preliminary determination of dumped sales. The sole Indian respondent was the Steel Authority of India, Ltd. (SAIL). SAIL challenged USDOC's final determination in the USA Court of International Trade (USCIT). SAIL argued that USDOC's decision was based on an incorrect interpretation of the applicable statute and regulations. The USCIT upheld USDOC's interpretation of the applicable USA statute and regulations based on "facts available" provision. USDOC imposed 72.49% anti-dumping duties on the Indian product in question. India challenged the USA statutory provisions implementing the "facts available provision" rules into USA municipal law as being inconsistent on their face with the ADA. In this case, USDOC rejected all of SAIL's reported information and data and made its final determination on the basis of facts available provision. The USDOC concluded that SAIL had failed to cooperate to the best of its ability, justifying an adverse inference, and consequently imposed the final dumping margin.

India argued that as a result of improper application of facts available, the USA final anti-dumping measure is in violation of Articles 2.2 and 2.4 of the ADA, because it is based on an improper calculation of normal value and an unfair comparison in the calculation of dumping margins. India also claimed that the USA violated Article 15 of the ADA by failing to give special regard to India's status as a developing country under the provision. India argues that the USA in this case rejected all data submitted by SAIL as non-usable and acted hastily under the "facts available" provision and erred in concluding that SAIL had failed to act to the best of its ability in gathering and submitting the information, and applying adverse facts available.

India further argued that the ordinary meaning of Article 6.8 and paragraph 3 of Annex II of the ADA requires an investigating authority to use, in its calculation of dumping margins, any information submitted by a company in response to question-

⁹⁶WT/DS217/ARB/IND, p. 47.

⁹⁷DS 206 -United States — *Anti-Dumping and Countervailing Measures on Steel Plate from India* (Complainant: India).

naire requests that meets the conditions set out in paragraph 3. India maintains that those conditions are that:

1. the information must be verifiable, that is, capable of being verified,
2. “appropriately” submitted, that is, at a time, in a format, and in a manner that makes it capable of being used by investigating authorities without undue difficulties,
3. submitted in a timely fashion, and
4. submitted in a medium or computer language requested by the authorities.

The Panel was of the view that Article 6.8 provides that if essential knowledge or facts, which cannot be done without, are not provided to the investigating authority by an interested party, the investigating authority may make preliminary or final determinations on the basis of facts available. But both the parties must cooperate with each other for evaluation of the data submitted and request under this provision. The standard of cooperation was set by the Appellate Body in *USA—Hot-Rolled Steel* case.⁹⁸ The Appellate Body commented that “cooperation is indeed a two-way process involving joint effort”. India argued that information submitted could have been corrected and sorted so as to make possible a determination of export price and allow an appropriate comparison of export price so determined, and normal value based on facts available (i.e. the information in the application), without undue difficulty. The Panel concluded that USDOC violated the ADA provisions by relying on the “facts available provision”.

India also challenged Sections 776(a), 782(d), and 782(e) of the Tariff Act of 1930, as amended, on their face, as inconsistent with the United States’ obligations under Article 6.8 and paragraph 3 of Annex II of the ADA. The Panel considered some of the domestic decisions of the USCIT,⁹⁹ and the Panel concluded that USDOC’s interpretation of the statute was reasonable. The Panel did not accept the Indian contention that these provisions of the Tariff Act of 1930 were violative of the ADA.

India argued that the data submitted by SAIL has not been used by the USDOC and the final dumping margin was not based on a fair comparison between SAIL’s export price and normal value as required by Article 2.4 of the ADA. But the Panel declined to rule on India’s claims under Articles 2.2, 2.4 and 9.3 of the ADA, and Article VI:1 and 2 of GATT on the reason that it had already ruled in favour of India on “facts available provision” under Article 6.8 of the ADA; hence, there is no need to rule on this point. This escapist attitude of the Panel can be seen in many cases of DSU, and it is the duty of the Panel to rule on the question of law and facts raised by the parties. The Panel also held that the USDOC did not act inconsistently with Article 15 of the ADA with respect to India in anti-dumping investigation targeted against India. By 2003, the USA and India agreed to implement the decision as mutually agreed time period.

⁹⁸DS 184 - *United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* (Complainant: Japan), Appellate Body Report, Paras.102 and 104.

⁹⁹*Heveafil Sdn. Bhd v. United States*, 25 CIT (Feb. 27, 2001) and *Corning Glass Works v. United States Int’l Trade Comm’n*, 799 F2d 1559, 1565 (Fed. Cir. 1986).

The Panel's decision in this case in favour of India against the USA is welcome development, but other than Indian argument on the "facts available provision", the Panel rejected all other contentions of India. Developed countries often ask developing countries to furnish complex data in the format which they want.

4.5 *EU Bed Linen Case*¹⁰⁰

The first anti-dumping action against Indian cotton-type bed linen from India and Pakistan was initiated in 1994. Due to lack of adequate support from the EU domestic industry, this petition was abandoned in 1996. However, another complaint was initiated against India just 20 days after abandoning the first petition in 1996.

India requested for consultation with EU in 1998 on EU's anti-dumping proceeding against cotton-type Bed Linen from India. India alleged that EU violated Articles 2.2, 3, 5 and 15 of ADA. The consultations failed, and India asked for constituting a Panel in 1999.¹⁰¹ EU imposed definitive anti-dumping duties in 1997 which made nullification and impairment of benefits accruing to India under the ADA. In this case, the complainant before the EU authorities was "Eurocotton", Committee of the Cotton and Allied Textiles Industries of the EU.

4.6 *Determination of Margin of Dumping*

Determination of dumping is explained in Article 2.1 of the ADA. Margin of dumping is usually calculated on the difference between normal value and export price of the dumped imports of like products. A fair comparison is to be made between export price and normal value. But the determination of normal value is a tricky business in all countries. If the comparison is not possible, prices to a third country will be taken into consideration. The third method is the constructed value method, if other methods mentioned above are not possible by using cost of production, profit and other expenses. The margin is to be calculated on the basis of weighted-average normal value with weighted-average prices of all export transactions or on a transaction-to-transaction basis.¹⁰² But the price comparisons are left to the investigators of each country. The methodology used by domestic authorities is always in favour of finding dumping margin. In case of dumping margin calculation, all export transactions and margins are to be taken together for the calculation of dumping margin. In most of the cases all sales are to be taken together when calculating the margin. When the price

¹⁰⁰DS 141 - *European Communities — Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* (Complainant: India).

¹⁰¹WT DS 141/3.

¹⁰²Ministry of Economy, Trade and Industry, Japan, <http://www.meti.go.jp/english/report/data/gCT9905e.html>, Accessed 20th June 2015.

of the product is negative, EU considers it as “Zero” and always found the dumping margin positive and consequently imposes anti-dumping duties. It means that except in all business transactions with negative dumping margin, even a single transaction can lead to imposing anti-dumping duties. The EU methodology had more bitterness than import bans in business and used as a weapon of choice by the domestic industry.¹⁰³ Exaggeration and fabrication of dumping margin by the domestic industry and actions taken by governments on many occasions violate WTO agreements. Developing countries like India and other countries fall prey to these kinds of calculations by developed countries. The WTO dispute settlement body consistently “Zeroing” calculation is against the ADA, but one way or other countries like the EU and USA are using the same methodology for the calculation of dumping margin.

4.7 Indian “Dumping” of Anti-dumping Duties

India has adopted the definition of dumping from the ADA. India started its first anti-dumping initiation in 1992. Since 1995 till the end of 2014, India has initiated 690 investigations against all countries, out of which in 535 cases anti-dumping duties were imposed.¹⁰⁴ It means that approximately in 78% of the investigations India imposed definitive anti-dumping duties. The largest number of investigations was against China with 166 which ended up in 134 cases of imposing duties (80%). The EU faced 80 investigations and duties were imposed in 64 cases (80%) followed by Korea RP with 54 investigations ending up in 41 cases of imposing duties (76%). A total of 90 fresh cases are under investigation against all countries in which China leads the number with 32 investigations. The total initiations are found in Table 2.

Chemicals and petrochemicals are the leading product with maximum initiations followed by pharmaceuticals, textiles, steel and other metals, consumer goods and other products.

5 Subsidies and Countervailing Duties

Countervailing duties are selective tariffs on imports stimulated by government subsidies in the exporting nation.¹⁰⁵ Subsidies are a thorny problem for the international trading system.¹⁰⁶ It is considered to be trade distorting and to be prohibited by Subsidies and Countervailing Measures Agreement (SCM) and the Agreement on

¹⁰³CATO Institute, <http://www.cato.org/publications/free-trade-bulletin/zeroing-antidumpings-flawed-methodology-under-fire>, Accessed 19th June 2015. Free Trade Bulletin No. 11, 2004.

¹⁰⁴Ministry of Commerce and Industry, India, http://commerce.nic.in/traderemedies/Data_Anti_dumping_investigations.pdf?id=25, Accessed 17th March 2015.

¹⁰⁵Marvel and Ray (1995).

¹⁰⁶Sykes (2005).

Table 2 Number of initiations 1994–2014

S. no.	Country	Number of initiations	Duty imposed
1	China PR	166	134
2	EU	80	64
3	Korea RP	54	41
4	Chinese Taipei	52	42
5	Thailand	37	28
6	USA	37	28
7	Japan	34	29
8	Singapore	24	19
9	Malaysia	22	17
10	Russia	22	14
11	Others	162	119
	Total	690	535

Source Directorate General of Anti-dumping, India

Agriculture (AoA) separately under the WTO system.¹⁰⁷ The SCM Agreement deals with disciplining subsidies and use of countervailing measures to offset injury caused by such subsidies.¹⁰⁸ Subsidies that cause or threaten material injury to import-competing firms are offset by countervailing duties.¹⁰⁹

Article VI of the GATT 1947 permits imposing duties when subsidy is provided directly or indirectly for export of such product. The GATT provisions underwent a major overhaul during the Uruguay Round, and the present provisions are more elaborate than the GATT provisions. The definition of subsidy contains three basic elements in the present WTO agreement: (i) a financial contribution (ii) by a government or any public body within the territory of a Member (iii) which confers a benefit.¹¹⁰ Article 1 of the SCM Agreement broadly defines subsidy as:

1. financial contribution by Government or any governmental body¹¹¹;
2. government practice involves a direct transfer of funds;
3. government revenue that is due is foregone or not collected;
4. government provides goods or services other than infrastructure;
5. government makes payment or asks a private body to carry out one or more of the functions described above;

¹⁰⁷WTO, https://www.wto.org/english/docs_e/legal_e/14-ag_01_e.htm, Accessed 26th June 2015.

¹⁰⁸WTO, https://www.wto.org/english/tratop_e/scm_e/subs_e.htm, Accessed 21st March 2015.

¹⁰⁹USDOC, http://tcc.export.gov/Trade_Agreements/Exporters_Guides/List_All_Guides/WTO_subsidies_AG_guide.asp, Accessed on 21.03.2015.

¹¹⁰WTO, https://www.wto.org/english/tratop_E/scm_e/subs_e.htm, Accessed 7th March 2015.

¹¹¹The control of government on a public body itself is not sufficient to establish that entity is a public body. *United States—Definitive Anti-dumping and Countervailing Duties on Certain Products from China*, Appellate Body Report.

6. any form of support of income or price support under Article XVI of GATT 1994.¹¹²

The elements of “financial contribution” and “benefit” have to be satisfied for ordering a countervailing duty imposition. Countervailing measure can be imposed if there are subsidized imports, injurious to a domestic industry, and a causal link between the subsidized imports and the injurious. The nullification and impairment of benefits to the WTO Member is a necessary ground for invoking the agreement. The list of financial contribution includes grants, loans, equity infusions, loan guarantees, fiscal incentives, the provision of goods or services, and the purchase of goods. The financial contribution can be given by central or state governments or even public enterprises such as state-owned companies. The Appellate Body in *Canada—Aircraft* case has ruled that the existence of a benefit is to be determined in comparison with the marketplace.¹¹³

The export subsidies include any kind of government payments or incentives contingent on the exportation and on domestic production. But all financial contribution is not a subsidy unless it confers a “benefit” specifically provided to an enterprise or industry or group of enterprises or industries. In *Canada—Aircraft*, the Appellate Body emphasized that “a ‘financial contribution’ and a ‘benefit,’ are two separate legal elements in Article 1.1 of the *SCM Agreement*, which together determine whether a subsidy exists”.¹¹⁴ In *USA—Export Restraints* dispute as well the Panel held that definition of a subsidy has two distinct elements: (i) a financial contribution (or income or price support), (ii) which confers a benefit. This position has been confirmed by the Appellate Body in *US—Softwood Lumber IV*,¹¹⁵ dispute as well.¹¹⁶ In this case,¹¹⁷ the Appellate Body rejected the contention of Canada that export restraints should be considered as financial contribution and held that USA has not violated SCM agreement in this case. But the issue of the real definition of “benefit” is not resolved so far.

There are four specific type of subsidies mentioned in the agreement based on the targeted industry:

1. enterprise specific,
2. industry specific,
3. regional specific and
4. prohibited subsidies.¹¹⁸

¹¹²Dispute Settlement, http://unctad.org/en/docs/edmmisc232add15_en.pdf, Accessed 7th March 2015.

¹¹³DS 46 - *Brazil — Export Financing Programme for Aircraft* (Complainant: Canada), Appellate Body Report in 1999.

¹¹⁴Appellate Body Report para. 157.

¹¹⁵DS 257 - *United States — Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada* (Complainant: Canada), Appellate Body Report, 2004.

¹¹⁶Appellate Body Report, para. 51.

¹¹⁷*United States – Measures Treating Export Restraints as Subsidies*, Panel Report, para. 8.131.

¹¹⁸WTO, https://www.wto.org/english/tratop_e/scm_e/subs_e.htm, Accessed 27th June 2015.

The prohibited subsidies¹¹⁹ and actionable subsidies¹²⁰ are the two categories based on end results.¹²¹ The subsidies provided by government and public bodies are actionable.¹²² Any kind of grants, loans, debt-to-equity swaps, interest rate reductions, interest forgiveness and interest deferral at issue constitute “financial contributions”. Export subsidies under prohibited class is basically contingent upon various export performance and in the illustrative list, Annexure-I.¹²³ Import substitution subsidies are also prohibited under SCM Agreement. The use of domestic products over the imported products and any kind of incentive given for such use is considered as prohibited. These are in the form of local content requirements.

Actionable subsidies are not prohibited per se, but they are subject to challenge, either through multilateral dispute settlement or through countervailing action, in the event that they cause adverse effects to the interests of another Member.¹²⁴ Non-actionable subsidies are explained in Article 8 of the SCM Agreement. A dispute can there be the DSU if a Member’s export interests are affected. The duties can be imposed when there are adverse effects to the Members, or serious prejudice¹²⁵ and material injury to the domestic industry due to such subsidized imports. Article 15(1) of the SCM Agreement provides that “determination of material injury must be based on positive evidence and involve an objective examination of the volume of the dumped imports, their effect on the domestic prices in the importing country market and their consequent impact on the domestic industry”.

According to Article 13 of the AoA, after the implementation period, other than “green box” subsidies are actionable under SCM Agreement subject to AoA (Article 21). The duties shall be imposed only to the extent of countervailing the subsidy amount. The valuation of the subsidy is more complicated sometimes. Even a loan and grant to a particular industry can be branded as “benefit”, and consequently, countervailing duty can be imposed. Government investment in domestic equity, grants or loans may not be always with same terms and conditions as that of private

¹¹⁹Art. 3 of the SCM Agreement prohibits subsidies contingent, in law or in fact, whether wholly or as one of several conditions, on export performance known as export subsidies. Local content subsidies are also under the prohibited subsidies.

¹²⁰The second category consists of subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods which are known as local content subsidies. Actionable subsidies are not prohibited, but it can be disputed under the DSU or through imposing SCM duties if they adversely affect other Members. There are three types of adverse effects, first there must be injury to the industry caused by subsidized imports; secondly, serious prejudice due to export displacements; and thirdly, there is nullification or impairment of benefiting accruing under GATT 1994.

¹²¹EU Treaties Office, <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?redirect=true&treatyId=578>, Accessed 21st March 2015.

¹²²*European Communities — Aid for Commercial Vessels* (Complainant: Republic of Korea), dispute, para. 7.28.

¹²³Panel Report, *Canada — Certain Measures Affecting the Automotive Industry* (Canada — Autos), WT/DS139/R, WT/DS142/R, para. 10.196.

¹²⁴United States, Report of the department of commerce on subsidies, (1999), <http://enforcement.trade.gov/esel/reports/scm0699/scm-0699.htm>, Accessed 26th Sept 2015.

¹²⁵Panel Report, *Indonesia — Autos*, paras 14.234-14.235.

market players. In that case, there is every possibility of finding benefits to the industry concerned and consequently fall within the ambit of the *SCM Agreement*.

In 2005, Canada is the first country to impose countervailing duties on certain products from China.¹²⁶ The USA followed the suit and started subsidies investigations against China later.

The general WTO perception that subsidies are market distortive need not be always correct in the case of SCM Agreement. If an upstream industry gets subsidies on a raw product for its production and the same raw material used by a downstream industry for the production of a final product, then the question is whether the upstream industry subsidy pass on to the downstream industry? The determination of financial “benefit” under SCM Agreement is a problematic area. Moreover, subsidy programmes are different for different segments of the same industry; in such cases, individual subsidy rates are to be calculated for different segments at different states. It is also interesting to look into the rationale for imposing SCM Agreements as well when the importers getting cheaper products to its market than the domestic market. The difficulty with this agreement is that the concept of subsidization is exceedingly difficult to apply in many cases. The Governments failed to set a benchmark for the subsidy concept under the SCM Agreement. Each and every governmental programme cannot be blamed as subsidies. Unless an economic link is established between the governmental incentive and domestic production, the conclusion of “subsidized” product will be on an erroneous premise. Ultimately, the trade remedy measures like SCM Agreement have become protectionist rather than designed to protect unfair trade practices under WTO.¹²⁷

There are 380 investigations against all countries initiated by WTO Members. China initiated 90 investigations against other Members out of which 46 investigations are against the USA followed by 20 investigations against Canada, 10 against Australia and 9 against the EU. India is the second largest initiator of SCM measures with 65 investigations. The victim country is the USA that faced 156 investigations followed by 74 initiations against the EU and Canada (49). Base metals and other articles faced maximum number of initiations with 155 investigations followed by resin, plastic and rubber Articles (37), chemical and allied industries (36), food, beverages, spirits and wines (33), machinery and electrical equipment (25) and textile articles (22) constitute the majority of actions.¹²⁸

¹²⁶United States — *Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (Complainant: China), WT/DS379/AB/R.

¹²⁷Marvel and Ray (1995).

¹²⁸WTO Statistics, https://www.wto.org/english/tratop_e/scm_e/CV_InitiationsBySector.pdf, Accessed 20th Sept 2015.

6 Indian Experience

India amended its Customs Tariff Act and formulated Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidized Articles and for Determination of Injury) Rules, 1995, in order to deal with subsidies under the SCM Agreement. India initiated 65 investigations against all countries out of which 20 initiations are against the EU and 18 are against the USA followed by nine cases against South Africa, seven against Canada and six against Brazil. On the other hand, India faced only two investigations so far. The process of investigation followed is according to the 1995 Rules similar to that of anti-dumping investigations.

Countervailing measures are only imposed after ascertaining the following factors:

- a. whether the subsidy is a specific one,
- b. the subsidy relates to export performance,
- c. the subsidy relates to the use of domestic goods over imported goods in the export article or
- d. the subsidy has been conferred on a limited number of persons engaged in manufacturing, producing or exporting the article.

The subsidy is found in the following circumstances:

1. if there is a financial contribution by Government or any public body within the territory of the exporting country where there is a direct transfer of funds, including grants, loans and equity by the government;
2. Government revenue which is otherwise due is foregone and not collected including fiscal incentives, income tax exemption;
3. Government provides goods or services other than general infrastructure free of cost or at concessional rates;
4. Government grants are in the form of income or price support which operates directly or indirectly to increase export of any article from its territory.

There are certain exceptions provided in the subsidies agreement:

- a. research activities conducted for manufacture, production or export;
- b. assistance to the disadvantaged region within the territory of exporting country;
- c. assistance to promote adaptation of existing facilities to new environmental requirements.

The procedure followed in the investigation and finding of injury criteria is same as that of imposing anti-dumping duties. India may use more number of SCM measures in order to offset subsidized products flooding in the market. The jurisprudence is not clear whether the SCM measures are used as a protectionist measure or as a cure in the globalized world.¹²⁹ The objective of SCM is to reduce subsidies at the domestic level to exporting products. However, recently, the number of measures is increasing in some countries like China and India.

¹²⁹Marvel and Ray (1995).

7 Conclusion

Trade remedies are policy measures taken by the domestic governments when the domestic industries are materially injured by other country exports, even though such measures are to be in accordance with respective WTO agreements. These measures include anti-dumping, safeguards and countervailing duties. ADA disciplines protectionism and dumping of goods, SCM Agreement disciplines domestic subsidies and safeguard measure is an emergency measure in case of unexpected and unforeseen increase in imports.

The traditional users of anti-dumping were the developed countries, and the scenario has entirely changed in the last two decades of WTO regime. The new users like India have taken over the position of most of the developed countries¹³⁰ and become the topmost country in terms of initiating investigations with 740 in number up to December 2014. The new users are increasing in number, both developed and developing countries. China is the victim country with 1052 investigations faced since its Membership in WTO. All the 160 Members initiated 4757 anti-dumping investigations against imports show a cascading effect on the international trade, and it is a clear evidence of protectionism.

Subsidies are provided by governments with different objectives like social and economic benefits to the domestic industry. Subsidies are not out-rightly prohibited under the SCM Agreement, but trade distorting subsidies are prohibited under SCM and AoA as well. Subsidized goods can be disciplined when it threatens domestic industry with injury. But India imposed only 65 countervailing initiations at the domestic level to curb the subsidized goods since 1995 which is comparably a lesser number with anti-dumping duties. In total, there are 380 initiations at the domestic level so far and the EU with the highest number, 74, and China is the victim country with 90 initiations.

The concept of safeguard is different from anti-dumping and countervailing duties. Safeguard duties can be imposed only when there is extraordinary competition to the domestic industry and sudden surge in imports. So far there are 297 safeguard initiations by Members till April 2015 which shows a steady increase from 2 in 1995 to 23 in 2014.

It shows that trade remedy mechanism under the trade remedy agreements is strong and the Members are using the administrative mechanisms formed under this agreement effectively, and the jurisprudence emerged in the past 20 years proves that the protectionist measures are used by Members unrestrainedly and the rulings of DSU are disregarded many times even after commitment to eliminate the practices like “Zeroing”. The instances of initiations show that India has emerged as the destination of protectionism with all trade remedies.

India is a pioneer in initiating anti-dumping investigations since 1992 much before the conclusion of the ADA, and it reached 740 in number followed by the USA with 527 initiations till December 2014. In 78% of the investigations, India imposed anti-

¹³⁰The USA investigated 527 cases and EU 468 cases. https://www.wto.org/english/tratop_e/adp_e/adp_e.htm, Accessed 27th June 2015.

dumping duties. On the other hand, India is targeted by other countries with 192 anti-dumping initiations. India initiated 54 investigations under safeguard agreement, and in 57% of the cases, duties were imposed. There are 65 initiations under the subsidies agreement, and the number is increasing slowly. The above scenario evidently shows the protectionism resorted to by India.

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India and Bilateral Investment Treaties: From Rejection to Embrace to Hesitance?

Prabhash Ranjan

Abstract This chapter will study the evolution of India's approach to bilateral investment treaties (BITs) since 1947. The chapter will trace this evolution by dividing the time period from 1947 to date in three phases. In the first phase, from 1947 till 1990, India didn't undertake international treaty obligations in the form of BITs to protect foreign investment in India primarily because of import substitution economic policies. However, this started to change in early 1991—the second phase of this study. In this phase, India decided to lift her self-imposed insulation from the global economy and unleashed major structural adjustments and macro-economic reforms, of the kind never undertaken before. Due to this changed economic approach, India's approach towards BITs also changed. India started signing BITs with many countries aimed at protecting foreign investment. This launch and expansion of signing BITs continued till 2010. Post 2010, we are witnessing the third phase of India's approach towards BITs. In this phase, India started critically reviewing her BITs in the aftermath of numerous BIT claims brought by foreign investors against India. A critical step in this phase has been the adoption of the 2016 Model BIT. This development points towards India's new investment treaty practice, which does not put the same faith in BITs as the second phase. The chapter will conclude by observing that India's new investment treaty practice should evolve in a manner that reconciles investment protection with the host State's right to regulate.

Keywords India · Bilateral investment treaties (BITs) · Investor–state dispute settlement (ISDS)

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101

1 Introduction

Bilateral investment treaties (BITs) are treaties between two countries aimed at protecting investments made by investors of both countries.¹ BITs protect foreign investments by ‘providing guarantees for the investments of investors from one contracting state in the other contracting state’.² Typically BITs contain a guarantee of full protection and security; a guarantee of most favoured nation treatment and national treatment; an assurance of fair and equitable treatment; guarantees if the investment is expropriated; guarantee of free transfer of the payments, etc.³ The vast majority of BITs contain investment arbitration clauses and thereby provide for adjudication of investment disputes before an international tribunal. This covers both state–state arbitration and investor–state arbitration (in this paper referred to as ‘investor–state dispute settlement or ISDS’). Under the state–state arbitration, one party to the treaty can bring a claim against the other country. The ISDS provisions allow an individual foreign investor to directly bring a claim against the host State challenging its exercise of public power.⁴ Most BITs allow foreign investors to bring BIT claims against the host State even without exhausting local remedies.⁵ In many of the BITs, these ISDS clauses offer unequivocal consent for arbitration to investors who are nationals of the other contracting state.⁶

There has been a steady increase in the number of BITs across the world—from 500 in 1990s to more than 3324 by the end of 2016.⁷ This increase in the number of BITs has been followed by an increase in the number of disputes between foreign investors and host States. The number of known ISDS disputes has increased from a little more than 50 in 1996 to 767 as of 1 January 2017.⁸

India started signing BITs, or bilateral investment promotion agreements (BIPAs), as they are called in India, in the early 1990s. This was part of its overall strategy of economic liberalisation, unleashed in 1991 and had the clear objective of attracting foreign investment. India signed the first BIT with the UK in 1994. This BIT served as the template for India to negotiate further BITs.⁹ In fact, the Indian Model BIT of

¹For a general discussion on BITs, see Dolzer and Schreuer (2012), Newcombe and Paradell (2009), 1–73; and Salacuse (2010).

²Dolzer and Schreuer (2012), p. 13.

³Ibid.

⁴Ibid, pp. 353–392.

⁵Dolzer and Schreuer (2012), p. 265. Also see *Helnan v Egypt*, Decision on Annulment, 14 June 2010, paras 43–57; *Generation Ukraine, Inc v Ukraine*, Award, 16 September 2003, para 13.4.

⁶Schreuer (2008), pp. 835–836, Vandeveldel (2010), pp. 433–39.

⁷This includes 2957 stand-alone investment treaties and 367 Treaties with Investment Provisions (TIPs) or investment chapters in FTAs (UNCTAD 2017).

⁸UNCTAD (2017).

⁹Krishan (2008), p. 277.

2003¹⁰ is inspired from the India–UK BIT. Since 1994, India has entered into BITs with more than 80 countries.¹¹

From 1994 till 2004, India's investment treaty practice was restricted to stand-alone BITs. Post 2004, India continued signing stand-alone BITs and also started entering into free trade agreements (FTAs)¹² containing a chapter on investment. The first such FTA with an investment chapter was signed with Singapore in 2005.¹³ Subsequently, India entered into FTAs containing an investment chapter with Korea,¹⁴ Malaysia,¹⁵ Japan¹⁶ and ASEAN.¹⁷ Furthermore, India is in the process of negotiating FTAs with investment chapters with the EU, the European Free Trade Association (EFTA), Thailand, New Zealand and Australia.¹⁸ Thus, currently, India's investment treaty programme stands on two legs: stand-alone investment treaties (BITs) and investment chapters in FTAs.¹⁹

Given this proliferation of BITs, the purpose of this chapter is to trace and map India's approach to BITs since her political independence in 1947 till date. In this regard, the chapter divides India's approach to BITs in three parts. The period from 1947 till the end of 1990 is discussed in Part II of the chapter. In this phase, India didn't adopt BITs and hence this is described as the phase of 'rejection'. In part III, the chapter discusses the period from early 1991 till end of 2010. This phase is described as the phase of 'Embracement'. In this phase, India adopted BITs with open arms for the protection of foreign investment. The chapter discusses the key features of India's approach towards BITs including the focus on limited discussion on the interface

¹⁰Indian Model Text of Bilateral Investment Promotion and Protection Agreement, <<http://www.italaw.com/sites/default/files/archive/ita1026.pdf>> accessed 17 April 2017.

¹¹Recently, India terminated some of its BITs – this issue is discussed in Part 4 of the paper. The full list of India's BITs is available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/96#iiaInnerMenu> accessed 15 June 2017.

¹²In India, these FTAs are known as Comprehensive Economic Cooperation/Partnership Agreements (CECAs or CEPAs). The list of India's current engagements in FTAs is available at http://commerce.nic.in/trade/international_ta.asp?id=2&trade=i accessed 15 June 2017.

¹³Comprehensive Economic Cooperation Agreement between Republic of India and Republic of Singapore, 29 June 2005 available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2707> accessed 15 June 2017.

¹⁴Comprehensive Economic Partnership Agreement between Republic of India and Republic of Korea, 7 August 2009 available at <http://commerce.nic.in/trade/INDIA%20KOREA%20CEPA%202009.pdf> accessed 15 June 2017.

¹⁵Comprehensive Economic Cooperation Agreement between the Government of Malaysia and the Government of Republic of India, 18 February 2011 available at <http://fta.miti.gov.my/miti-fta/resources/Malaysia-India/MICECA.pdf> accessed 15 June 2017.

¹⁶Comprehensive Economic Partnership Agreement between Republic of India and Japan 16 February 2011 http://commerce.nic.in/trade/IJCEPA_Basic_Agreement.pdf accessed 15 June 2017.

¹⁷Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation Between the Association of Southeast Asian Nations and the Republic of India 12 November 2014 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3337>.

¹⁸Government of India, Ministry of Commerce and Industry http://commerce.gov.in/international_WTO.aspx?LinkID=31&SectorID=5&Id=32 accessed 20 June 2017.

¹⁹Ranjan (2011), p. 192.

between BITs and host State's right to regulate. In Part IV, the chapter discusses the phase from 2011 onwards till date. Here the chapter discusses the factors that forced the Indian government to revisit her BITs. The most important development of this phase: the new 2016 Model BIT is also critically analysed. Part V gives the conclusion.

2 The Period from 1947 to End of 1990—The Phase of 'Rejection'

In the initial years after independence, India's attitude towards foreign direct investment (FDI) was receptive²⁰ although India's policy was characterised by import substitution and focused on developing indigenous industries.²¹ FDI was sought in 1950s in mutually advantageous ways with conditions like joint ventures with local industries, local content clauses and export obligation.²² However, FDI during this period was also subject to careful scrutiny due to India's fragile Balance of Payment (BoP) position.²³

This receptive attitude to foreign investment started to change in the late 1960s and early 1970s when there was a more conscious shift towards adopting protectionist and inward-looking economic policies to protect India's infant industries that had developed in the 1950s and 1960s.²⁴ Laws having detrimental impacts on foreign investment were enacted such as the Foreign Exchange Regulation Act (FERA),²⁵ which required a foreign company to convert foreign equities into minority holdings. Only if a foreign company diluted its equity to a minority holding of 40% would it get national treatment.²⁶ This led to transnational corporations like IBM and Coca-Cola exiting India.²⁷

Low economic growth in 1970s led to limited liberalisation and deregulation in 1980s.²⁸ Somewhat receptive attitude towards FDI was adopted by introducing flexibility in foreign ownership and exceptions to the 40% ceiling rule.²⁹ On the whole, foreign investment didn't figure very prominently in India's economic policy till about mid-1980s. The Indian economic model was characterised by inward-looking economic policies focussing on indigenisation and self-reliance.

²⁰Kumar (1998).

²¹For a detailed discussion on India's import substitution strategy after independence, see Bhagwati and Desai (1970).

²²Nagaraj (2003), Kumar (1998).

²³Palit (2009).

²⁴Kumar (1998), p. 1322, Palit (2009).

²⁵Chaudhary (1979).

²⁶Industrial Policy (1977).

²⁷Kumar (1998), p. 1322, Nagaraj (2003), p. 1701, Ahluwalia (1991), Virmani (2005).

²⁸Virmani (2005), Kumar (1998), pp. 1322–1323, Nayar (2007), p. 346.

²⁹Kumar (1998), p. 1323.

This economic policy rooted in economic nationalism explains India's approach to international law on foreign investment during this period. India, and other newly independent countries of Asia and Africa, in 1950s and 1960s, strived to build a new international legal order emphasising their sovereign status.³⁰ A key development in 1950s was the setting up of Asian Legal Consultative Committee (ALCC) on 15 November 1956 with India, along with six other Asian countries, being the founding member.³¹ In 1958, African countries also become members of this group, and later this group came to be known as Asian–African Legal Consultative Organization (AALCO) with its primary objective being to act as an advisory body to member states on international law matters. At the fourth session of this committee, member countries adopted a document called '*Principles Concerning Admission and Treatment of Aliens*'.³² Article 11 of this document states '*Subject to local laws, regulations, and orders and subject also to the condition, imposed for his admission into the State, an alien shall have the right to acquire, hold and dispose of property*'. Further more, Article 12(1) states '*The State shall, however, have the right to acquire, expropriate or nationalise the property of an alien. Compensation shall be paid for such acquisition, expropriation or nationalisation in accordance with local laws, regulations and orders*'. This language clearly signalled that the treatment of an alien would be as per the national laws of the host country. Also, India rejected concepts such as 'state responsibility for injuries to aliens' and 'direct individual rights of investors to bring disputes against states' under the Convention on the Settlement of Investment Disputes Between States and Individuals of Other States of 1965 (ICSID Convention).³³

This endeavour to give primacy to national law over international law in regulating and protecting foreign investment was further bolstered by the effort of India and other newly independent countries to develop a New International Economic Order (NIEO).³⁴ Efforts were made to evolve a NIEO, in the words of an Indian diplomat, as '*a response to a position of political and economic dominance exercised by the metropolitan powers and their nationals over the natural resources, raw materials and labour in developing countries during the colonial era*' (Rao 2000).

As a part of this process, the United Nations General Assembly, on 12 December 1974, adopted the Charter of Economic Rights and Duties of States (CERDS).³⁵

³⁰Work of Indian scholars of that time reflect this – Anand 1962, Roy 1961.

³¹For more on ALCC (now called AALCO) see - <http://www.aalco.int/> accessed on 1 June 2017.

³²Principles Concerning Admission and Treatment of Aliens, Asian Legal Consultative Committee (ALCC) (Adopted in the fourth session) <<http://www.aalco.int/PRINCIPLES%20CONCERNING%20ADMISSION%20AND%20TREATMENT%20OF%20ALIENS.pdf>> accessed on 15 July 2017.

³³Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention') <http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf> Krishan (2008), Roy (1961), Anand (1962).

³⁴Lall (1978), Khan (1978), Agarwala (1977), Shukla (1978).

³⁵Charter of Economic Rights and Duties of States, UNGA, A/RES/29/3281, 12 December 1974.

India supported CERDS and took active part in every stage of its drafting.³⁶ Article 2(2)(a) of the Charter gives every state the right to regulate foreign investment in accordance with its domestic laws and national priorities. Ten developed countries (mainly capital-exporting countries) opposed this provision because they wanted the host countries to treat foreign investments as per what they thought to be their international obligations.³⁷ However, India and other developing countries maintained foreign investors should be subject to national laws of the country.³⁸

Similarly, Article 2(2)(b) of CERDS on transnational corporations (TNCs) gives every state the right to regulate and supervise the activities of the TNCs within its national jurisdiction in accordance with her laws and national priorities. An Indian scholar commenting on this in 1977 wrote that '*developed countries recognized that a state may control their entry and activities within its territory, they wanted the corporations to retain the protection of the international standards applicable to foreigners*',³⁹ which was not acceptable to India and other developing countries.

Article 2(2)(c) of CERDS gives every state the right to nationalise and expropriate foreign investment and decide the question of compensation as per its national laws and priorities. It further states that any dispute on the question of compensation shall be determined by the domestic courts applying the national law. On the demand of developed countries that the question of compensation should be decided as per the principles of international law, India and other developing countries denied the existence of any such principle in international law.⁴⁰

In sum, due to economic nationalism at home, India gave primacy to national laws over international law to regulate and protect foreign investment in India and thus didn't enter into any BITs in this period.⁴¹

³⁶Rao (1975), p. 369, Chatterjee (1991).

³⁷Rao (1975), p. 360.

³⁸Ibid, p. 360.

³⁹Agarwala (1977), p. 271.

⁴⁰Rao (1975), p. 361, Agarwala (1977), p. 267.

⁴¹A minor exception to this is that in 1957 and 1964 India entered into limited investment protection agreements with the US and West Germany respectively – for more on this See Rao 2000, 624. Also, in showing that India gave primacy to national laws over international law in protection and regulation of foreign investment, the focus is on giving primacy to national laws over international treaty law. Debatably, customary international law on protection of foreign investment applied on India even before India started entering into BITs although some part of it was challenged by India through the NIEO and CERDS. Further, India's approach towards foreign investment was different from international trade. In case of international trade, India was a founding member of GATT having signed the agreement on 8 July 1948 thus accepting international law as the basis to regulate international trade – The 128 Countries that had Signed GATT by 1994 - http://www.wto.org/english/thewto_e/gattmem_e.htm accessed on 10 July 2013.

3 Period from Early 1991 to 2010—The Phase of ‘Embracement’

India’s approach to economic policy started to change from 1991 when India decided to lift its self-imposed exile and insulation from the global economy. A severe Balance of Payment (BoP) crisis in 1990–91, with foreign exchange reserves worth only two weeks of imports,⁴² led India to unleash a major macro-economic consolidation programme and major structural economic reforms, of the kind never undertaken before, such as gradually dismantling quantitative restrictions on imports, bringing down tariff rates from a peak of 300% to a peak of 35%; comprehensive reform of the exchange control regime; and introducing measures aimed at liberalising FDI and Foreign Institutional Investment (FII) inflows to overcome the problem of over-dependence on debt (Ahluwalia 1991; Rangarajan 2010 [100]; Panagariya 2003). Bold measures aimed at liberalising FDI included automatic approval of FDI up to 51% in high-priority industries; 100% foreign equity in the energy sector; setting up of a Foreign Investment Promotion Board (FIPB) to act as a single window clearance for foreign investment proposals; opening up new sectors such as mining and telecommunications for foreign investment; amendment of the foreign exchange regulation act to treat foreign companies with more than 40% ownership at par with fully owned Indian companies.⁴³

These reforms of the external sector signalled a major change in India’s perception towards foreign investment and a paradigm shift in India’s economic thinking. India, slowly but surely, started to move from a close, inward-looking economic model to a liberalised and outward-looking economic model. The new industrial policy that India adopted in 1991 recognised that ‘*foreign investment would bring attendant advantages of technology transfer, marketing expertise, introduction of modern managerial techniques and new possibilities for promotion of exports*’.⁴⁴ The industrial policy of 1991 allowed investment through two routes—the automatic route (where no permission is needed from the government) and the approved route (where prior permission of the government is needed).

Post 1990s, many new economic legislations were introduced such as the Foreign Exchange Management Act (FEMA), which replaced FERA in order to consolidate and amend the law relating to foreign exchange and with the objective of facilitating external trade and payment.⁴⁵ Other key economic legislations introduced or amended post 1990s having direct or indirect bearing on foreign investment are—the amendment of the Indian Patent Act introducing product patent regime for pharmaceuticals due to WTO obligations; amendment of the Customs Tariff Act 1975 in order to introduce WTO-consistent provisions on anti dumping; enactment of a Competition Act in 2002 replacing the outdated MRTP Act; the enactment of the Special

⁴²Ahluwalia (1991), p. 67, Srinivasan and Tendulkar (2003), p. 9.

⁴³Kumar (1998), pp. 1323–1324, Bajpai and Sachs (2001), Nagaraj (2003), pp. 1701–1702.

⁴⁴New Industrial Policy (1991).

⁴⁵The need to have the new legislation was also because of India’s acceptance of Art. VIII of the International Monetary Fund (IMF) articles on 20 August 1994.

Economic Zone (SEZ) Act in 2005 aimed at establishment of special economic zones in order to boost exports; the enactment of a new Arbitration and Conciliation Act in 1996 aimed at consolidating and amending the law related to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards.

Since 1991, India's economic policy has continued to recognise the importance of foreign investment. The FDI policy of 2015 states the significance of FDI towards India in the following words—'*It is the intent and objective of the Government of India to attract and promote foreign direct investment in order to supplement domestic capital, technology and skills, for accelerated economic growth*'.⁴⁶ Recently, India launched a national programme called 'Make in India' to facilitate investment and foster innovation.⁴⁷ Since 1990s, India has also progressively liberalised the sectors in which FDI is allowed. Thus, barring activities like gambling, lottery business, chit funds, real estate, atomic energy, and railway transport, FDI is allowed in all sectors subject to sector specific conditions.⁴⁸ Thus, in last two decades, India's attitude to foreign investment underwent a paradigm shift from hostility in 1970s to *Embracement*. Today, in the quest to attain higher economic growth, foreign investment occupies conspicuous place in India's international economic policy for which India is willing to provide protection as per international treaty law. We next discuss this international legal framework, embraced by India, for protection of foreign investment.

The economic reforms unleashed in 1991 brought about a major change in India's approach towards protection of foreign investment. By entering into more than 80 BITs, out of which 72 were enforced in this phase, India has shown growing acceptance of international investment treaties as legal instruments for the protection of foreign investment.

The key characteristics of the '*Embracement*' phase of the India's approach to BITs are as follows—first, BITs as instruments to attract foreign investment; second, entering into BITs with strong 'capital-exporting' country features; third, marginal involvement of India with ISDS; and fourth, negligible discussion on the interface between BITs and the exercise of regulatory power in/by India. We discuss each of these characteristics.

3.1 BITs as Instruments to Attract Foreign Investment

As part of the overall strategy of economic liberalisation, India started entering into BITs with the clear objective of attracting foreign investment. The Ministry of Finance—the nodal body in India that deals with BIT policy and negotiations states—'*As part of the Economic Reforms Programme initiated in 1991, the foreign investment policy of the Government of India was liberalised and negotiations*

⁴⁶Consolidated FDI Policy (2015).

⁴⁷Make in India (2014).

⁴⁸Consolidated FDI Policy (2015).

*undertaken with a number of countries to enter into Bilateral Investment Promotion and Protection Agreement (BIPAs) in order to promote and protect on reciprocal basis investment of the investors’.*⁴⁹

This policy objective is also clearly reflected in the statements of different Indian Finance Ministers, from 1994 to 2011, in ‘compendiums’ of Indian BITs. In the first volume (published in 1996–97) Finance Minister, P. Chidambaram, wrote that after the adoption of liberal economic policies in 1991, India initiated the process of entering into BITs with a view to provide investor confidence to foreign investors⁵⁰ to attract foreign investment. Same view has been repeated in all subsequent volumes, by different Finance Ministers belonging to different governments.⁵¹ None of these statements talk about the relationship of investment flows with other non-investment issues, nor do they recognise that investment protection should be balanced with other legitimate non-investment objectives.

It is true that foreign direct investment (FDI) flows to India have increased in parallel with India signing BITs. For example, FDI flows to India increased massively from USD 4,029 million in 2000–2001 to \$55,457 million in 2015–16.⁵² However, in this phase, i.e. from 1991 to 2011, there was very little evidence available to show to what extent heightened FDI flows were due to India’s BITs barring one study that briefly looked at impact of BITs on FDI inflows to India.⁵³ However, this study looked at FDI inflows into 15 Asian countries, including India and hence is not India specific. Furthermore, this study is limited in offering guidance on the actual impact of BITs on FDI inflows to India because it looks at the effects of BITs on FDI inflows between the periods from 1980–81 to 1999–2000—when India had signed only 13 BITs as against more than 80 that have been signed so far.⁵⁴ In the absence of any evidence or study supporting the positive relationship between FDI and BITs during this phase, one can question the basis on which the Indian government made such an assumption.

Although, in this phase, India primarily looked at BITs as a tool to attract and protect foreign investment in India, towards the end of this phase, India started to emerge as an exporter of capital, which brought about a slight change in India’s perception towards BITs. India’s total FDI outflows (loans and equity) increased

⁴⁹Ministry of Finance (2011).

⁵⁰Chidambaram (1997).

⁵¹Sinha (1999), Mukherjee (2009).

⁵²Quarterly Fact Sheet, Fact Sheet on Foreign Direct Investment from April 2000 to December 2016, Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, http://dipp.nic.in/English/Publications/FDI_Statistics/2016/FDI_FactSheet_OctoberNovemberDecember2016.pdf accessed 7 June 2017. According to the Indian government, FDI inflows include equity inflows plus reinvested earnings plus other capital.

⁵³Banga (2003).

⁵⁴Recently more studies have emerged showing a positive relationship between FDI inflows and BITs during the embracement phase – See Bhasin and Manocha (2016), who examine the period from 2001 to 2013 to conclude that BITs had a positive impact on FDI inflows. Also see Nottage and Singh (2016).

from US\$7856.49 million in 2005–06 to US\$18506 million in 2008–09.⁵⁵ This increase didn't change India's character, overall, as a net capital-importing country. Nonetheless, because of such increase in foreign investment outflows from India, towards the end of this phase, India started looking at BITs as key instruments, not just to attract and protect foreign investment in India, but also to protect Indian investment abroad. This explains India's BITs with African countries like Mozambique, Senegal and Sudan post 2005 and also with other developing and least developed countries such as Bahrain, Trinidad and Tobago, Saudi Arabia, Myanmar and Bangladesh—countries where India has capital-exporting interest. For countries where India has a capital-exporting interest, the 'capital-exporting' Model BIT could be useful.

3.2 *BITs with 'Capital-Exporting' Country Features*

Despite being a 'capital-importing' country, India adopted a 'capital-exporting' country BIT model when it launched its BIT programme. A 'capital-exporting' country BIT Model means a Model developed principally by OECD countries where the balance is titled in favour of investment protection over host State's right to regulate (OECD 1967). Thus, India's 2003 Model BIT was based on the India–UK BIT⁵⁶ containing elaborate substantive and procedural assurances for protection of foreign investment, except right pertaining to establishments, with scant exceptions, reservations and carve-out provisions. The 2003 Model BIT recognises that foreign investment will enjoy the fair and equitable treatment and not just national treatment, the issue of compensation for expropriation will be decided as per the BIT and not by national laws, and investment treaty arbitration will have jurisdiction over all substantive rights in BITs—a clear departure from the principles contained in CERDS that India advocated as part of the NIEO in 1970s.

India adopted such a Model BIT in her eagerness and enthusiasm to signal to the outside world that she was ready to offer extensive treaty-based protection, both substantially and procedurally, to foreign investment, for the prospect to attract more capital.⁵⁷

⁵⁵Khan (2012).

⁵⁶The India-UK Model BIT is based on the British Model BIT developed in mid 1970s to safeguard British overseas investment due to threats of expropriation in developing countries posed by the new international economic order (NIEO) - Walter (2000).

⁵⁷This 'grand bargain' has been the basis of BITs between developed and developing countries – see Salacuse and Sullivan (2005).

3.3 *Marginal Involvement of India with ISDS*

A defining characteristic of this phase was India's marginal involvement with ISDS. Although nine BIT cases were brought against India,⁵⁸ they all pertained to just one project—the Dabhol power project,⁵⁹ and none of these challenges resulted in a BIT award although there were a couple of related commercial arbitral awards.⁶⁰ This related to an FDI project related to building an electrical power plant in India in early 1990s soon after the adoption of the liberalisation programme by India in 1991.⁶¹ Since this case has already been discussed in detail elsewhere,⁶² it will not be discussed here.

3.4 *Negligible Discussions on the Interface Between Indian BITs and Regulatory Power*

In this phase, there was hardly any discussion in India, on the interface between BITs and host country's power to regulate. None of the policy documents on BITs of the Indian government have any reference regarding the relationship between the protection of foreign investment under BITs with non-investment objectives. Negligible stakeholder consultations, aimed at identifying how a BIT might impact different sections of the Indian economy, were organised. The Indian Parliament debated BITs rarely.⁶³ This is in contrast to the WTO agreements, which have been often discussed in the Indian parliament.⁶⁴

Interestingly, there is a lack of discussion on the interface between BITs and regulatory power in India despite growing global evidence about the conflict between investment protection and host State's right to regulate coming to the fore. In the past two decades, there have been numerous BIT disputes between foreign investors and host States. These disputes cover a very wide array of regulatory measures such

⁵⁸UNCTAD, 'India – as Respondent State' *Investment Policy Hub* <<http://investmentpolicyhub.unctad.org/ISDS/CountryCases/96?partyRole=2>> accessed 17 April 2017.

⁵⁹For detailed facts of the case, see Preeti Kundra, 'Looking Beyond the Dabhol Debacle: Examining its Causes and Understanding its Lessons' (2008) 41 *Vanderbilt J Transnatl L* 908. See also 'GE settles Dabhol Issue' *The Indian Express* (3 July 2005), <<http://www.indianexpress.com/oldStory/73760/>> accessed 13 April 2017.

⁶⁰*Capital India Power Mauritius I and Energy Enterprises (Mauritius) Company v India*, ICC Case No 12913/MS, Award (27 April 2005); Bank of America, 'Memorandum of Determinations', OPIC, IIC 25 (2003) <<https://www.opic.gov/sites/default/files/docs/BankofAmerica-September30-2003.pdf>> accessed 17 April 2017.

⁶¹Kundra (2008).

⁶²Ibid.

⁶³One such occasion was when P. K. Javadekar, Member of Rajya Sabha, asked the government to explain why India has entered into BITs – see Javadekar (2010).

⁶⁴For example, the provisions of the WTO TRIPS agreement got attention of the Parliament when India was debating amendments to its Patent Act of 1970 due to the WTO obligations.

as environmental policy⁶⁵; public health⁶⁶; sovereign decisions regarding privatisation⁶⁷; urban policy⁶⁸; monetary policy⁶⁹; laws and policies related to taxation⁷⁰; financial services⁷¹; banking⁷²; energy⁷³; and regulatory measures related to affirmative action.⁷⁴ The central issue in all these cases was the interface between broad BIT provisions guaranteeing investment protection and host State's right to regulate. These cases demonstrate the tension in BITs between investment protection and host country's regulatory power. Many countries, both developed and developing, have responded to this interface differently. For example, some Latin American countries and South Africa have taken the extreme step to terminate the 'first-generation' BITs,⁷⁵ whereas some other countries such as the USA, Canada and Australia have started drafting their treaties in a manner that is supportive of their ability to exercise regulatory power.⁷⁶

There are three reasons for such little focus on the impact of BITs on India's regulatory power in this phase. First, the presence of the all-pervasive one-dimensional approach towards BITs—that these treaties are instruments aimed at attracting and protecting foreign investment alone—as discussed above. Thus, Indian government hardly considered that BITs could impact exercise of India's regulatory power. Second, due to lack of legal expertise in the field of international investment law in India a rigorous academic analysis focussing on the complete implications of BITs on India was rarely undertaken. Dearth of academic literature on Indian BITs proves this point. Third, in this phase, foreign investors rarely challenged Indian regulatory measures under BITs. This, in turn, created an impression in the minds of policy

⁶⁵*Metalclad Corporation v. United Mexican State*, ICSID Case No. ARB(AF)/97/1; *Methanex Corporation v United States of America* (2005) 44 ILM 1345.

⁶⁶*Biwater Gauff Ltd v United Republic of Tanzania*, ICSID Case No. ARB/05/22, 24 July 2008; *Philip Morris Brands Sarl et al. v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, 8 July 2016.

⁶⁷*Eureka BV v Republic of Poland*, ICSID Case No ARB/01/11, 19 August 2005.

⁶⁸*MTD Equity v Republic of Chile* (2005) 44 ILM 91.

⁶⁹*CMS Gas Transmission Co v Argentina*, ICISD Case No ARB/01/8; *Enron Corporation v Argentina*, ICSID Case No ARB/01/3; *Sempra Energy International v Argentina*, ICSID Case No ARB/02/16; *LG&E Energy Corporation v Argentina*, ICISD Case No ARB/02/1.

⁷⁰*Occidental Exploration and Production Co v Republic of Ecuador*, LCIA Case No UN 3467; *EnCana Corporation v Ecuador*, London Court of International Arbitration, 3 February 2006; *Feldman v Mexico*, ICSID Case No ARB(AF)/99/1.

⁷¹*Fireman's Fund Insurance Company v Mexico*, ICSID Case No. ARB(AF)/02/01, 17 July 2006.

⁷²*Saluka Investments v The Czech Republic* (Partial Award), UNCITRAL, 17 March 2006.

⁷³*Duke Energy Electroquil Partners v Republic of Ecuador*, ICSID Case No. ARB/04/19, 18 August 2008.

⁷⁴*Piero Foresti et al. v South Africa*, Case No ARB(AF)/07/1, 4 August 2010. Also see Leon (2008), p. 671.

⁷⁵Department of Trade and Industry (2013).

⁷⁶For more discussion on such state practices aimed at preserving policy space in BITs see Spears (2010). Jose Alvarez has argued that the change in the US approach to BITs was due to the realisation within US that it could be at the receiving end of foreign investment flows – See Alvarez (2011); On Canadian Model BIT see Newcombe (2004).

makers that there is no need to study the interface between BITs and regulation. In fact, policy makers cited absence of BIT claims as proof of lack of interface between Indian BITs and India's ability to adopt regulatory measures.

The only exception to this is that after the immediate aftermath of *Dabhol*, there were some indications that India realised, its BITs offer wide protection to investments and thus, there is a need to dilute some of these provisions.⁷⁷ For example, the investment chapter in India–Singapore FTA signed in 2005, just after the *Dabhol case*, depicted some change in India's approach to investment treaty practice. The provisions in the investment chapter of the India–Singapore FTA balance investment protection with regulatory power of the host State by providing national treatment protection to investments and covering wide assets under the definition of investment to provide a wider treaty coverage to investors, on the one hand; and by not having provisions such as MFN and fair and equitable treatment, by having a general exceptions clause designed to give leeway to countries to adopt measures for the protection of public health, environment and other regulatory objectives, on the other. This is a marked departure from India's Model BIT. However, this change was not evident from the BITs that India entered after 2005 with countries like China, Iceland and Syria, which continued to have same broad and ambiguous BIT provisions as found in India's earlier BITs. The only exception to this is the investment chapters in India's FTAs with Korea, Japan and Malaysia. Thus, the change after the *Dabhol* debacle was reflected only in investment provisions that were part of FTAs and not in stand-alone investment treaties. One key reason for this difference is that FTAs with investment chapters are negotiated by Ministry of Commerce, which has better capacity in negotiating economic treaties (because of its experience with WTO negotiations) than Ministry of Finance, which deals with stand-alone investment treaties, as mentioned above.

India, in this phase, was essentially a 'rule-taker' in international investment law by adopting the 'exporting-country' Model BIT. Further, by and large, the sanguine belief in India, in the first phase, was that BITs lead to more foreign investment and has very limited interface with India's regulatory power. This view became entrenched, over the years, because rarely India's regulatory measures were challenged under BITs.⁷⁸

In sum, in this phase, India gave up its inhibitions regarding use of BITs (international law) to protect foreign investment. It openly embraced the framework of BITs for the protection and regulation of foreign investments so much so that it agreed to give primacy to the protection of foreign investment over its right to regulate.

⁷⁷Peterson (2003).

⁷⁸Poulsen's study corroborates this point for many developing countries. See Poulsen (2011), pp. 216–256.

4 Post 2011—The Phase of ‘Hesitance’

Despite India’s mammoth BIT programme, BITs in India did not attract much critical attention from 1994 until the end of 2011.⁷⁹ This was mainly because of India’s marginal involvement with ISDS⁸⁰ as discussed before. However, things started to change from 2011. The statistical proof of this is that while in the period from 1994 to 2010, India’s annual BIT signing average was about four to five treaties; since 2011, India has entered into only very few BITs, out of which two have been enforced. The first BIT to be enforced is with Lithuania, which was signed on 31 March 2011 and enforced on 1 December 2011.⁸¹ The second BIT is with the UAE, which was signed on 12 December 2013 and enforced on 21 August 2014.⁸² The other two BITs are with Nepal, Slovenia and the ASEAN investment agreement which have been signed, but are yet to be enforced.⁸³ Apart from these four BITs, India, in 2011, enforced the BIT with Bangladesh that was signed in 2009.

India developed hesitance towards BITs which was clearly evident from India’s statement at UNCTAD’S World Investment Forum in 2014.⁸⁴ The statement reveals that India considers the current investment treaty regime to unfairly restrict her sovereign right to regulate⁸⁵ and that investment treaties have been used as tools for reviewing not just regulatory measures of general application such as environment and public health, but also decisions handed down by the highest court of the land.⁸⁶ The core reason for this changed attitude towards BITs is India’s increased involvement with ISDS post 2011 that we discuss next.

4.1 India’s Increased Involvement with ISDS

As opposed to the ‘Embracement’ phase, post 2010, there has been a significant increase in the numbers of BIT claims brought against India. Towards the end of 2011, a tribunal in *White Industries v India*⁸⁷ found that India violated its obligations under

⁷⁹Ranjan (2014), pp. 436–438.

⁸⁰Ranjan (2014), See Garg et al. (2016), p. 71.

⁸¹Ministry of Finance (2015).

⁸²UNCTAD IIA Database, India, Bilateral Investment Treaties <http://investmentpolicyhub.unctad.org/IIA/CountryBits/96#iiaInnerMenu> accessed 20 June 2017.

⁸³Ibid. Also see UNCTAD IIA Database, India, Treaties with Investment Provisions <http://investmentpolicyhub.unctad.org/IIA/CountryOtherIias/96#iiaInnerMenu> accessed 20 June 2017.

⁸⁴Statement by India (2014).

⁸⁵Ibid. Important to note that this has not been made available on the official website of Indian Government.

⁸⁶Ibid.

⁸⁷*White Industries Australia Limited v Republic of India*, UNCITRAL, Final Award (30 November 2011).

the India–Australia BIT.⁸⁸ This case originated from *White Industries* challenging the inordinate delay by Indian courts to enforce an international commercial award that *White* had obtained against an Indian company, Coal India. The ISDS tribunal held India guilty of not providing *White industries* with an ‘effective means’ of asserting claims and enforcing rights, despite the fact that the India–Australia BIT does not mention or include such a duty for host States. The tribunal got around that by holding that *White Industries* could borrow the ‘effective means’ provision present in the India–Kuwait BIT⁸⁹ by relying on the MFN provision of the India–Australia BIT.⁹⁰ This award is significant because it is the first-known ISDS adverse award against India. Much has already been written about this case⁹¹ and hence it will not be discussed in detail here.

This award was followed by a number of foreign corporations slapping ISDS notices against India: *Vodafone* has issued an arbitral notice to India under the India–Netherlands BIT for retrospective taxation measure⁹²; German’s *Deutsche Telekom* has issued a notice of arbitration to India under the India–Germany BIT over cancelled satellite venture⁹³; *ByCell*, another foreign investor, has issued an arbitral notice against India under India–Cyprus BIT for withdrawal of approval to grant telecom licences⁹⁴; France’s *Louis Dreyfus Armateurs* (LDA) brought a case against India under the India–France BIT challenging a series of measures adopted by the Indian government that allegedly prevented the implementation of a joint venture project to modernise the port in Haldia in Kolkata, India.⁹⁵ Last year, the Permanent Court of Arbitration (PCA), in a dispute between Devas multimedia’s Mauritian

⁸⁸Ibid para 16.1.1(a).

⁸⁹Art. 4(5) of the Agreement between the State of Kuwait and the Republic of India for the Encouragement and Reciprocal Protection of Investment (signed on 27th November 2001, entered into force 28th June 2003) (India–Kuwait BIT) provides that ‘each contracting party shall...provide effective means of asserting claims and enforcing rights with respect to investments...’.

⁹⁰Art. 4(2) of the Agreement between the Government of the Republic of India and the Government of Australia on the Promotion and Protection of Investments (signed on 26th February 1999, entered into force 4th May 2000) (India–Australia BIT) provides the MFN provision according to which, ‘a contracting party shall at all times treat investments in its territory on a basis no less favourable than that accorded to investments or investors of any third country’.

⁹¹Kachwaha (2013), Ray (2012), Sanan (2012), Nacimiento and Lange (2012).

⁹²*Vodafone v. India*, UNCTIRAL, Notice of Arbitration (not public), 17 April 2014 <http://italaw.com/cases/2544> accessed 7 July 2017.

⁹³*Deutsche Telekom v. India*, ICSID Additional Facility, Notice of Arbitration (not public), 2 September 2013 <http://italaw.com/cases/2275> accessed 7 July 2017.

⁹⁴*Bycell (Maxim Naumchenko, Andrey Polouektov and Tenoch Holdings Ltd) v. India*, Notice of Dispute (not public) <http://italaw.com/cases/1933> accessed 7 July 2017.

⁹⁵*Louis Dreyfus Armateurs SAS v The Republic of India*, <<http://investmentpolicyhub.unctad.org/ITA/Details/600>> accessed 20 February 2016. See also Bhushan Satish and Shreyas Jayasimha, ‘Indian Courts First Blush with Investment Treaty Arbitration: Taking Some Lessons from the Calcutta High Court’ <<http://kluwarbitrationblog.com/2016/03/16/indian-courts-first-brush-with-investment-treaty-arbitration-taking-some-lessons-from-the-calcutta-high-court>> accessed 20 February 2016. In this case, also an arbitration tribunal has been constituted.

investors and India,⁹⁶ concluded that India violated the India–Mauritius BIT.⁹⁷ While the award has not been made public, reportedly India has been found guilty of having violated the provisions on expropriation and fair and equitable treatment.⁹⁸

Rattled by these ISDS claims, India started the process of reviewing its BITs in 2012.⁹⁹ This review process led to the adoption of a new Model BIT on 14 January 2016.¹⁰⁰ This adoption was preceded by the circulation of the draft version of the Model BIT in March 2015,¹⁰¹ for comments.¹⁰² Following the adoption of the 2016 Model BIT, India issued notices of BIT termination to 58 countries.¹⁰³ The reason behind terminating these treaties is to negotiate new BITs based on the 2016 Model BIT.¹⁰⁴ India has also requested 25 of its BIT partner countries to issue joint

⁹⁶*CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India*, PCA Case No 2013-09.

⁹⁷‘Antrix-Devas Deal: Permanent Court of Arbitration rules against Indian government’ *The Indian Express*, (Bengaluru, 27 July 2016) <<http://indianexpress.com/article/business/business-others/antrix-devas-deal-hague-international-tribunal-rules-against-indian-govt/>> accessed 25 September 2016.

⁹⁸*Ibid.*

⁹⁹Garg et al. (2016), p. 71; Department of Economic Affairs, Ministry of Finance, Government of India, ‘Transforming the International Investment Agreement Regime: The Indian Experience’ (Presentation at the UNCTAD Expert Meeting on the Transformation on the International Investment Regime: The Path Ahead, 25–27 February 2015) <http://unctad-worldinvestmentforum.org/wp-content/uploads/2015/03/India_side-event-Wednesday_model-agreements.pdf> accessed 17 April 2017; See also, statement by India at the World Investment Forum 2014 (IAA Conference, 16 October 2014) <<http://unctad-worldinvestmentforum.org/wp-content/uploads/2014/10/Mayaram.pdf>> accessed 17 April 2017.

¹⁰⁰Model Text for the Indian Bilateral Investment Treaty 2016, <http://www.finmin.nic.in/reports/ModelTextIndia_BIT.pdf> accessed 17 April 2017 [‘2016 Indian Model BIT’]. The Indian Model BIT contains two dates – 28 December 2015 given in the letter accompanying the text, and 14 January 2016 on the website of the Ministry of Finance, Government of India as the date of adoption of the Model BIT. This chapter uses the 14 January 2016 date, and refers to the Final Indian Model BIT as the 2016 Indian Model BIT and *not* the 2015 Indian Model BIT. Also, critical to note that while the final Model BIT has been adopted, the draft Model BIT continues to be available online on the government website, without the word ‘draft’ being mentioned anywhere in the text.

¹⁰¹Draft Model Text for the Indian Bilateral Investment Treaty, https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf. [hereinafter, 2015 Draft Indian Model BIT].

¹⁰²Comments on the 2015 Draft Indian Model BIT, <https://www.mygov.in/group-issue/draft-indian-Model-bilateral-investment-treaty-text/>. The Law Commission of India prepared a detailed report on the Draft 2015 Model BIT, see Government of India, Law Commission of India, Report No 260, Analysis of the Draft Model Indian Bilateral Investment (August 2015), <http://lawcommissionofindia.nic.in/reports/Report260.pdf>.

¹⁰³D’Agostino et al. (2017). However, which these BITs are has not been made public by the Indian government. UNCTAD’s International Investment Agreements (IIAs) database states that India has terminated BITs with these 15 countries - Argentina, Australia, Austria, Croatia, Denmark, Egypt, Germany, Hungary, Indonesia, Italy, Malaysia, Netherlands, Oman, Switzerland, Spain – See UNCTAD IIA Database, India, Bilateral Investment Treaties <http://investmentpolicyhub.unctad.org/IIA/CountryBits/96#iialnnerMenu> accessed on 15 June 2017.

¹⁰⁴Press Information Bureau, Government of India, Ministry of Finance, <http://pib.nic.in/newsite/PrintRelease.aspx?relid=133412> accessed 1 July 2017.

interpretative statements in order to resolve, what India describes as ‘uncertainties and ambiguities that may arise regarding interpretation and application of the standards contained’ in India’s BITs.¹⁰⁵

The release of the new Model BIT reveals that India remains committed to BITs and the ISDS, though, as the provisions of the Model BIT show, in a hesitant manner. The release of this new Model BIT is a key development in India’s approach to BITs and thus, the Model BIT is discussed here briefly.

4.2 2016 Model BIT¹⁰⁶

The 2016 Model BIT¹⁰⁷ is a complete departure from the existing 2003 Model BIT—the 2016 Model contains 38 articles running into close to 30 pages as against the 15 articles in just seven pages of the 2003 Model. The new Model BIT heralds a new era in India’s investment treaty practice. Given the space constraints, we briefly examine some of the features of this Model BIT.

4.2.1 Definition of Investment

The definition of investment in a BIT plays an important role in determining the scope of application of rights and obligations under the treaty and for the establishment of jurisdiction of arbitral tribunals. Most Indian BITs provide a broad-asset-based definition of ‘investment’, where every kind of asset, established or acquired by the foreign investor, is an investment.¹⁰⁸

The 2016 Model BIT has moved away from a broad-asset-based definition of investment and provides for an enterprise-based definition of investment.¹⁰⁹ In the 2016 Model BIT, investment means an enterprise that has been constituted, organised and operated in good faith by an investor in accordance with the domestic laws of the country. It also includes the assets of the enterprise. Article 1.4 also provides a list of assets that an enterprise may possess.¹¹⁰ Further, certain characteristics of investment ‘such as’ commitment of capital or other resources, certain duration (the period is not specified), the expectation of gain or profit, the assumption of risk

¹⁰⁵Government of India, Ministry of Finance, Department of Economic Affairs, *Office Memorandum - Regarding Issuing Joint Interpretative Statements for Indian Bilateral Investment Treaties*, (Feb. 8, 2016), http://indianbusiness.nic.in/newdesign/upload/Consolidated_Interpretive-Statement.pdf accessed on 10 March 2017. As of today, Bangladesh is the only country that has accepted India’s joint interpretation – see Hepburn (17 July 2017).

¹⁰⁶For Full and Detailed Commentary on the 2016 Indian Model BIT See Ranjan and Anand (2017), Ranjan (2017), Hanessian and Duggal (2017), Rajput (2016).

¹⁰⁷Some parts of analysis of 2016 Model BIT here draw from Ranjan (2017).

¹⁰⁸See 2003 Indian Model BIT Art 1(b).

¹⁰⁹See 2015 Model BIT Art 1.4.

¹¹⁰See 2015 Model BIT Art 1.4(a) to (h).

and significance for the development of the country where the investment is made, should also be satisfied. However, there is no guidance given in the text as to how to determine that an investment has ‘significance for the development’ of the country to be eligible for treaty protection gives much discretion to ISDS tribunals.¹¹¹ As a result, it is quite possible that large chunks of lawful foreign investment in India might not enjoy treaty protection.

4.2.2 Most Favoured Nation (MFN)

The MFN clause obligates the States to grant MFN treatment, which extend to the beneficiary State the treatment accorded to a third state, in case this treatment is more favourable in comparison to the treatment under the basic treaty.¹¹² While there is largely an agreement that a properly worded MFN provision will allow for the importation of substantive protections from the secondary BIT into the primary BIT, controversy exists as to whether the MFN provision also applies to procedural issues of investor–state dispute settlement,¹¹³ including ‘admissibility-related access restrictions to investor–state dispute settlement’, such as a waiting period¹¹⁴ and incorporating the host State’s more favourable consent to arbitration.¹¹⁵

India, in its statement, at UNCTAD’s World Investment Forum stated that the MFN provision in BITs has proved to be disadvantageous because it disturbs the various strategic, diplomatic and political reasons behind negotiating bilateral treaties.¹¹⁶ The solitary ISDS ruling against India (*White Industries v India*), discussed before, involved a very important interpretation of the MFN provision due to which India lost the case. India’s major concern with the MFN provision is the use of this provision by foreign investors to borrow beneficial substantive and procedural provisions from third-country BITs. However, not having the MFN provision is not the right way to address this concern. This concern could have been addressed by limiting the scope of the MFN treatment in the BIT, i.e. by explicitly stating that the scope of the MFN treatment is restricted to the application of domestic regulatory measures (e.g. two foreign investors in like industries would be treated at par say as far as application of corporate tax is concerned). It could be further clarified that the scope of MFN treatment does not extend to procedural and substantive provisions given in

¹¹¹Dolzer and Schreuer (2012). This is evident from the fact that while some tribunals have included the ‘development to host country’ criterion in their assessment in determining whether an investment has taken place – see *Salini v Morocco*, *Joy Mining v Egypt*; some have not some have not considered the criterion important in making such determination – see *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award (July 14, 2010).

¹¹²Ustor (1997), Schill (2009).

¹¹³Salacuse (2010), p. 253.

¹¹⁴Cf *Emilio Augustine Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Award (13 November 2000) paras 38–64 and *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/04/14, Award (8 December 2008) paras 159–168.

¹¹⁵*Wintershall*, ibid, 163.

¹¹⁶Statement of India (2014).

third-country BITs. Not having the MFN provision will expose foreign investors to the risk of discriminatory treatment by the host State in the application of domestic measures.

4.2.3 Fair and Equitable Treatment (FET)

Fair and equitable treatment (FET) has emerged as the most important standard of treatment in BITs and has attracted considerable scholarly attention.¹¹⁷ FET provisions occur in almost all BITs often without much guidance about its meaning and content. This has made the FET provision expandable, which is evident from the fact that arbitral tribunals have made legitimate expectations an integral part of this provision, often without providing much doctrinal basis. Further, tribunals have not been consistent in what constitutes legitimate expectations of investors as part of the FET provision, which, in turn, implies that content of the FET provision, to a great extent, depends on the individual approach of a tribunal entrusted with the task of finding its content. Indeed, FET has become a catch-all provision capable of sanctioning many legislative, regulatory and administrative actions of host State.¹¹⁸

The 2016 Model BIT does not contain a FET provision. Instead, it contains a provision entitled 'Treatment of Investments'.¹¹⁹ As part of this, Article 3.1 prohibits a country from subjecting foreign investments to measures that constitute a violation of customary international law 'through' denial of justice or fundamental breach of due process or targeted discrimination on manifestly unjustified grounds such as gender, race or religious belief or manifestly abusive treatment.¹²⁰ In other words, Article 3 provides that foreign investors can complain only when the treatment meted out to them is not as per the customary international law. Also, only when the host State acts in violation of provisions given in Article 3.1(i) to (iv), mentioned above, would it amount to breach of customary international law.

4.2.4 Non-precluded-measures (NPM) Clauses and General Exceptions and Other Exceptions

NPM provisions in a BIT, also known as general exceptions-clauses, provide the regulatory latitude to host countries to deal with threats to important national interests.¹²¹ NPM provisions provide flexibility to countries to deviate from the substantive obligations in circumstances that warrant giving preference to non-investment policy goals over investment protection. An NPM provision has two main elements: first, the permissible objectives; and second, the nexus requirement. Permissible objectives

¹¹⁷Newcombe and Paradell (2009).

¹¹⁸Picherack (2008), Mayeda (2007).

¹¹⁹See 2016 Model BIT Art. 3.

¹²⁰See 2016 Model BIT Art 3.1(i) to (iv).

¹²¹Salacuse (2010), p. 343.

means those objectives, for which the host State can deviate from its treaty obligations.¹²² The nexus requirement means the link between the measure adopted and the permissible objective to be achieved. Words such as ‘necessary’ require a stronger connection between the regulatory measure and permissible objective compared to words like ‘related to’.

The 2016 Model BIT contains a separate chapter on exceptions covering both general and security exceptions. Article 32 contains general exceptions with a long list of permissible objectives, which includes health, environment, public order, public morals, ensuring compliance with domestic laws not inconsistent with the provisions of the treaty. Another interesting aspect of the NPM provision is that it contains ‘necessary’ as the only next requirement for all the above-mentioned permissible objectives. Furthermore, footnote 6 to the Model BIT provides that in considering whether a measure is necessary, the tribunal shall take into account whether there was no less restrictive alternative measure reasonably available to the country or not.

Another important exception is the complete exclusion of taxation measures from the purview of the Model BIT. Article 2.4(ii) states that the treaty shall not apply to ‘*any law or measure regarding taxation, including measures taken to enforce taxation obligations*’. Consequently, a foreign investor, no matter what impact a taxation measure has, cannot challenge it as a violation of the BIT.

4.2.5 Investor–State Dispute Settlement

The Indian Model BIT allows for ISDS. However, India has added many qualifications to its consent to allow investors to use the ISDS system. In terms of scope, ISDS shall apply to a dispute between the host State and foreign investor only if the dispute arises out of an alleged breach of an obligation of the host State under Chapter II of this Treaty, other than the obligation under Articles 9 and 10 of this Treaty.¹²³ A major qualification added is that the foreign investor must submit the dispute to local courts¹²⁴ and only after exhausting local remedies for at least a period of five years from the date when the foreign investor first acquired knowledge of the measure in question.¹²⁵

If no satisfactory resolution has been reached in five years, the foreign investor can commence the arbitral process by transmission of a notice of dispute to the host State.¹²⁶ This ‘notice of dispute’ will be accompanied by another six months of

¹²²For more discussion on this see Burke-White and Standen (2008). For a discussion on NPM provision in Indian BITs see Ranjan (2012).

¹²³Ibid., Art. 13.2.

¹²⁴2016 Indian Model BIT, supra note 4, Art. 15.1.

¹²⁵2016 Indian Model BIT, supra note 4, Art. 15.2. The requirement to exhaust local remedies shall not be applicable ‘*if the investor can demonstrate that there are no available domestic legal remedies capable of reasonably providing any relief in respect of the same measure*’ – see 2016 Indian Model BIT, Art. 15.1. For a detailed commentary on the ISDS chapter in the 2016 Indian Model BIT, please see Ranjan and Anand (2018)

¹²⁶2016 Indian Model BIT, Art. 15.2.

attempts by the investor and the State to resolve the dispute through meaningful negotiation, consultation or other third-party procedures.¹²⁷ In case there is no amicable settlement of the dispute, the investor can submit a claim to arbitration,¹²⁸ subject to the following additional conditions—first, not more than six years have elapsed from the date on which the investor first acquired or should have acquired knowledge of the measure in question¹²⁹; and/or, second, not more than 12 months have elapsed from the conclusion of domestic proceedings¹³⁰; third, before submitting the claim to arbitration, a minimum of 90-day notice has to be given to host State¹³¹; fourth, the investor must waive the ‘right to initiate or continue any proceedings’ under the domestic laws of the host State.¹³² In short, this multi-layered ISDS provision that requires exhaustion of local remedies for five years and other procedural conditions as a prerequisite for an investor to bring a treaty claim against the host State makes it very difficult for the investor to make effective use of the ISDS provision.

In sum, the 2016 Model BIT is a complete departure from BITs India signed during the ‘*Embracement*’ phase. The new Model BIT does not repose the same faith in international law to protect foreign investment as the BITs of the ‘*Embracement*’ phase did. The new Model BIT shows that while India is still interested in using the framework of BITs (international law) for the protection of foreign investment, it adds a large number of qualifications to be part of the system and thus creates a hitch in relying upon BITs and ISDS to safeguard foreign investment.

5 Conclusion

This chapter endeavours to trace and map India’s approach to BITs from 1947 till date by dividing the time period in three phases. In the first phase, from 1947 till end of 1990s, India rejected BITs as an instrument for the protection and regulation of foreign investment. Rooted in economic nationalism, India preferred to have domestic laws as the framework for the protection of foreign investment and not international laws.

However, advent of economic reforms in early 1990s changed this and India entered into her second phase in dealing with BITs. In her eagerness to attract foreign investment by signalling to foreign investors that their investment in India shall be protected as per international law, India ‘embraced’ BITs with open arms from 1994 till end of 2010. BITs signed by India, in this phase, placed the protection of foreign investment ahead of host State’s right to regulate. In this phase, there was hardly any discussion on impacts of BITs on India’s sovereign right to regulate.

¹²⁷2016 Indian Model BIT, Art. 15.4.

¹²⁸2016 Indian Model BIT, Art. 16.

¹²⁹2016 Indian Model BIT, Art. 15.5(i).

¹³⁰2016 Indian Model BIT, Art. 15.5(ii).

¹³¹2015 Indian Model BIT, Art. 15.5(v).

¹³²2015 Indian Model BIT, Art. 15.5(iii).

The Indian government presumed that BITs have no or minimal impact on exercise of India's right to regulate. The evidence of this comes from the fact that despite overwhelming global evidence showing close interface between BITs and host State's right to regulate, Indian government never bothered to review or revisit these treaties. The fact that, barring one instance, India's measures were never challenged by foreign investors under investment treaty arbitration, played a major role in cementing the presumption that there is not much link between BITs and host State's right to regulate.

However, many of the BITs claims brought against India post 2011 shattered this myth and forced India to revisit its approach of '*Embracement*'. These BIT claims against India should also be used by India to carefully understand the reasons behind these claims i.e. whether these claims were triggered because of India exercising its genuine right to regulate or whether these claims were triggered because of abuse of host State's right to regulate. Changing of tax laws retrospectively (that triggered cases brought by Vodafone and Cairn Energy) and cancelling of spectrum licenses without following due process (that triggered the case by Devas), arguably, fall in the category of bad regulation. While India revisiting its approach to BITs was a good thing to do, moving towards the other extreme in dealing with BITs, as the 2016 Model BIT shows, should be avoided. The developments in this phase reveal India's 'hesitance' in having BITs as effective instruments for protecting and regulating foreign investment.

BITs expose regulatory measures of the host State to international arbitration and thus, pose a challenge to India's regulatory sovereignty. At the same time, BITs, by providing treaty-based protection, act as a 'signalling device' to foreign investors about a government's benign intentions and the congenial investment environment. In fact, there is evidence now to show that BITs have played an important role in attracting FDI in India.¹³³ Thus, India's investment treaty practice needs to evolve in a manner that reconciles investment protection with the host State's right to regulate. This can be achieved by avoiding the extremes of both, the '*Embracement*' phase and the '*Hesitance*' phase. The third phase of India's approach to BITs, thus, needs to change from '*Hesitance*' to '*Recalibration*' of BITs aimed at restoring the balance between investment protection and host State's right to regulate. Lastly, given the emergence of India as an exporter of capital, the BITs should not be viewed by the Indian government merely from the standpoint of India being a capital-importing nation.

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¹³³Bhasin and Manocha (2016), Nottage and Singh (2016).

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Making International Tax Law: Analysing Tax Jurisprudence in India

Ajay Kumar

Abstract An analysis of the tax jurisprudence in India gives a feeling that the developing countries are fully aware of the revenue implications of the international tax rules. This thought is particularly important since the theoretical basis of international taxation (principles) remains unsettled. It would seem that the courts in India have been careful in working these principles—to balance the revenue interests with the inflow of FDI. On a closer analysis of some of these cases, it becomes evident that the national courts may be less cognisant about the principles and the role the courts are expected to play within the international tax regime.

Keywords Equity · Source · Residence · Permanent establishment

1 Introduction

Looking at the international law discourse in India, it is doubtful whether there is sufficient research rigour extending into international tax/fiscal law. Thus, to locate India in the legal order, it is important to pause and ponder about the present position of international tax law in India, to chart out the future direction. Although this chapter is intended to serve this purpose, a more immediate need would be to make the processes (tax administrators, treaties and judiciary) that create international tax law cognisant of the interconnectedness or the internal ‘coherence’¹ of law.

Making deductions about the understanding exhibited by the national processes, in creating international tax law and thereby ‘coherence’, is important for two reasons. First, because globalisation has led to enhanced interaction and integration of the national economies, leading to the conclusion of more Double Taxation Avoidance Agreements (DTAAs). This is partially driven by the belief that DTAAs bestow a nation with the ability to attract investments, and they also help enhance the success

¹Raz explained coherence as the justifications provided to the existing legal materials (statutes, decisions, and rules) by principles, policies and purposes; Raz (1992), p. 285.

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of trade agreements. It is therefore vital to inform the national processes about these arguments. Second, tax revenues affect economic growth and thereby development, and the tax laws can help achieve that; but when such laws are created, they ought to cohere with the laws of the 'tax regime'.²

Since international tax law is an unfinished business (as discussed in Sect. 2), the analysis of its growth in India is undertaken through the study of case laws. Case law has been chosen for a specific reason, because legal organisation largely makes explicit a tendency already immanent in practice.³ It is thought that by analysing the jurisprudence, it would reflect both the discourse and its impact on the practice. However, it is clarified that this is not an exhaustive analysis of the jurisprudence and does not attempt to analyse the other processes that shape the growth of international tax law in India. This chapter is divided into five sections. The second section gives a general idea about the international tax regime—working of international tax laws and the fundamental concepts and principles upon which the present tax laws are based. Incidentally, efficiency is left out, but the principle of equity is discussed for two reasons. First, that is more relevant to the interests of India and second, the present tax laws predicate efficiency.⁴ The third section looks at the unresolved issues within the international tax regime, for this would help to put the growth of Indian tax law in the right perspective. Section four, through case law, both traces and analyses Indian responses to the questions about international tax that have cropped up in the recent past. The final section draws on the responses of the Indian judiciary to questions of tax law to thereby draw useful conclusions for the future.

2 International Tax Principles and Issues

2.1 *The Tax Regime*

The oft spoken international tax regime is part of International Economic Law, which in turn is part of Public International Law but includes elements of national law as well.⁵ Admittedly, due to incoherence between the practice and the principles, questions could be raised about whether the tax regime could be called a regime in the proper sense. Except for the recently concluded Organisation for Economic Cooperation and Development (OECD) Multilateral Instrument (MLI) there exists no global tax treaty; hence international tax law has principally developed through bilateral treaties called DTAA's. However, even without delving into the reasons for this situation, it is safe to say that many local practices or norms could have

²Refers to the range of laws, rules and principles.

³Bourdieu (1987), p. 848.

⁴Ault (1992), p. 571.

⁵For a discussion on the narrow or broader definition of International Economic Law; Qureshi and Ziegler (2011) pp. 8–13.

gained acceptance internationally.⁶ Generally the DTAAs, in their structure, follow the Model Tax Conventions (MTCs); there exist two variants of the MTCs, one by the OECD and the other by the United Nations (UN). However, it is the former model that is followed more frequently,⁷ and it has been said that the MTC⁸ contains mere standards rather than rules. This implies that the meaning of the terms in these models is uncertain, and hence they have to be determined ex-post by case law or a functional equivalent of case law.⁹ Therefore, the process of interpreting these standards could be considered as being integrated into the MTCs.

Presently, bilateral tax treaties facilitate the division of taxes internationally, and it is no secret that ‘nations try to get the maximum revenue from an international division of taxes’.¹⁰ Since these bilateral tax treaties are the main mechanisms to divide taxes internationally, it is easier for a capital exporter (economically stronger nation) to exert its ‘hegemony’¹¹ on the weaker nation in the bargain,¹² and consequently a smaller share of international tax is distributed. Although this division is based on some much discussed concepts, their content remains contentious.

2.2 *Concepts and Principles in International Tax*

2.2.1 **Jurisdiction**

Importantly, first, one needs to have an idea of the concept of jurisdiction and how it is understood in tax law. Although in international law, jurisdiction is principally linked to sovereignty and territory,¹³ in the case of international taxation it has been extended to nationals abroad based on the principles of ‘benefits derived’¹⁴ and ‘genuine link’.¹⁵ Therefore, territorial jurisdiction has meant—the force of a State, exercised

⁶For example, Japan has made reservations to Art. 4 of the OECD model by stating that it reserves the right to decide the meaning of residency through negotiations while concluding the treaty; Refer, Commentary to Art. 4, OECD MTC 1977, Paragraph, 27. Also refer, Teruo Hirao, *Elucidation of The Tax Convention – OECD Draft Convention*, 1964, p. 27; cited in, Jones et al. (1981), p. 17. Also refer, Commentary to Art. 5 UN Model Double Tax Convention, 2011, Paragraph 10.2

⁷Jones (1999), p. 2.

⁸Baistrocchi (2006), p. 944 (the OECD MTC is just representative, the arguments apply to the UN MTC as well).

⁹Kaplow (1992), p. 557.

¹⁰Brunschot (2005), p. 6.

¹¹This refers to the international tax regime, including the processes through which tax laws are created and the laws/principles used to divide taxes.

¹²Lovett (2009), p. 819.

¹³Crawford (2012), pp. 456–459.

¹⁴This refers to the benefits a national derives from the state where the person is a national; this could be in the form of legal protection in the international forums, or the sunk capital by the state in creating a conducive legal and economic framework to create capital within its territory.

¹⁵Nottebohm (*Liech. v. Guat.*), 1955 I.C.J. 4 (Apr. 6).

due to the physical presence of a person within the territory of a State (theoretically this jurisdiction is absolute in international law), and this extends to a States' nationals abroad as well.¹⁶ Incidentally, although 'nationality' is also a basis for jurisdiction, it is quintessentially linked to the territorial connection. Hence, 'extra-territoriality' is not promoted in international law; yet with international taxation States have taken recourse to the 'passive personality' and 'effects doctrine'¹⁷ to exercise extra-territorial jurisdiction, and therefore this ban could not be said to be absolute.

Now relating these facts to the practices within international law, tax disputes are of a civil nature and States do not take notice of another States' civil laws.¹⁸ Also, 'jurisdiction'¹⁹ is seen as a concomitant of sovereignty and hence decided by international law. But, incidentally the concept of territory is not of primary importance within the tax regime as under international law; what is generally referred to as 'territorial' within the latter could be related to 'nationality' or 'residence'²⁰ in the former. Therefore, nations can tax their residents for income generated entirely through activities in another territory, and an outside investor (alien) can be taxed for economic activities carried on within their territorial bounds as well.²¹ But, a national abroad is subject to the tax jurisdiction of the other State, only if that person has been present in that other jurisdiction for a particular period of time or has some fixed place of business there—referred to as a 'Permanent Establishment' (PE) in the case of businesses. These methods are justified by the equity principle or called horizontal equity (treating similarly placed persons equally). Presently, the question about the right of a nation to tax income arising from business activities in another State is decided by jurisdictional rules/bases—'source' and 'residence'. Thus, it is but appropriate to analyse the bases of international tax division.

2.2.2 Residence

It is called the subjective criteria, or the jurisdiction of unlimited tax liability (world-wide taxation). In practice, this would mean domicile or nationality as well; whereby, the entire income that a person earns is subject to the taxing power of a State where the person is a national or resident. But these terms used to identify residence are not easy to define, hence practice is critical.²² Moreover, understanding the principle gets even harder, because States generally do not follow any one criteria to

¹⁶Schachter (1991), p. 254.

¹⁷Crawford (2012) Op. Cit., pp. 461–463.

¹⁸*Government of India V Taylor* [1955] A.C. 491

¹⁹For a discussion of this concept from the perspective of sovereignty, and idea that jurisdiction is deducible *a priori* from sovereignty; Martha (1989), p. 18.

²⁰For a general understanding about this treatment; Avi-Yonah (2008), pp. 471–473.

²¹For a legal discussion on the issues of reasonable link, the question of territoriality and the limiting of jurisdiction through DTAAs'; Qureshi (1987), p. 17, 19.

²²Schindel and Atchabahian (2005), p. 30.

define the principle of residence²³; and the problem is pronounced when questions of inter-jurisdictional taxation arise. However, it may be said that the residence of an individual is principally determined by the length of his stay in the country (main place of abode) and the location of their centre of vital interests (place of main business activities).

But, in the case of legal persons, residence is determined by the place of incorporation or even the seat of effective management. In the case of dual residence, it 'shall be deemed to be of the State in which its place of effective management is situated'.²⁴ Although these entail huge coordination in drafting of rules and exchange of information, generally it is accepted that the personal circumstances of the taxpayer are to be taken into account and thereby promote horizontal equity.²⁵ Importantly, the MTCs (Article 4) leave 'residence' to be decided by the local laws of a State or subject to bilateral negotiations between the State parties.

2.2.3 Source

Called the objective criteria of international tax jurisdiction, the 'source' principle relates income to the territory of a certain country from where it has been derived or the place where the investment is made²⁶ (situs). Therefore, it would be a State that is in some way or other connected to the actual activity related to the production of the income in question, or to the State where value is added to the good.²⁷ As this concept allocates primary and sometimes exclusive taxing powers to a State, it is seen as flowing from sovereignty and therefore more acceptable as a basis to divide international taxes.²⁸ Thus, although it could be seen as being easy to administer and generate competition leading to efficiency, opposite views also exist.²⁹ Generally, countries lack either a legal or case law definition of 'source', and yet some like the USA have an extensively regulated definition of the same as well.³⁰

Therefore, this has created difficulty in defining the concept and contained in the statement, '[s]ource is unambiguous only in what it excludes... [t]he only positive statement that can be made [is that], source refers to a State that in some way or other is connected to the production of the income in question, to the State where value is

²³40% of all tax disputes relate to the concept of residence; for a discussion on the practice of this concept; Refer, http://www.rashminsanghvi.com/downloads/taxation/international-taxation/Concept_of_Residence.html (Accessed, 24th May 2015).

²⁴Art. 4(3), OECD Model Convention on Income and on Capital, 2008, p. 24.

²⁵Schindel and Atchabahian (2005), p. 31.

²⁶Due to the fact that a final product is made after sourcing its components/ingredients from different places has made this concept less effective now; Schon (2009), pp. 67–68.

²⁷Vogel (1988), p. 225.

²⁸Schindel and Atchabahian (2005), pp. 29–30.

²⁹Avi-Yonah (1996), p. 1306.

³⁰Schindel and Atchabahian (2005), p. 29.

added to a good'.³¹ More importantly, it is to be noted that, 'although primary taxing authority is conceptually attributed to the source country, in practice the country of residence tends to prevail'.³² This means, 'source' as a principle of international tax division (distributive rule³³) remains unsettled, or less feasible. In actuality, it is only possible to conclusively say that a particular state is a residence, and this cannot be said in the case of source because the State of residence can be source as well.³⁴

2.2.4 Permanent Establishment (PE)

First used in the treaty between Austria and Germany,³⁵ it remains an important concept in international taxation, because the source rules could become complex when multi-jurisdictional taxation of business profits arise. The concept of PE is closely linked to the source and residence principles; because when an entity resident in one country does business in the other (source) country, it becomes taxable in the source country if it has a PE there. Therefore, if the residence country decides to tax the income derived in a source country, this could lead to double taxation. This is especially the case when the residence country does not give credit (crediting back the tax paid in a source country equivalent to its own tax rate) for the taxes paid, because according to the local (resident country) laws, a PE did not exist.

Therefore, a qualifying element in the traditional definition of PE becomes imperative. This has generally been 'physical presence'—fixed place of business through which the business of an enterprise is carried out in the source State. This could mean authority to operate on a stand-alone basis, or else with power to bind its parent company or head office.³⁶ But, a concept of PE is thought to facilitate an allocation of the latter type. Since there are two model tax treaties—the OECD and UN—only those provisions which differ or have relevance would be specifically mentioned. Under Article 5(2) of these two models, there is a 'list'³⁷ of examples (places of business) about what could generally be considered as a PE. Article 5(1) States '[f]or the purposes of this Convention, the term "Permanent Establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on'.³⁸ Taking this provision into consideration and the general view by States, it has

³¹Vogel (1988), p. 223.

³²Schindel and Atchabahian (2005), p. 29.

³³Basically, the principles of source and residence are rules of distribution and has consequences because it allocates the income to one state and prohibits the other. In that sense they are opposites, but in reality that would not be the case; Vogel (2005), p. 421.

³⁴Ibid., p. 422.

³⁵Gesetzwegen Beseitigung der Doppelbesteuerung. Vom 13 Mai 1870. Cited in, Vogel, (Part -I), p. 226.

³⁶Art. 5, OECD Model Convention on Income and on Capital, 2008

³⁷It includes – the place of management, a branch, an office, a factory, a workshop and a mine, an oil–gas well, a quarry or any other place of extraction of natural resources.

³⁸This applies to both - the UN and OECD Models.

been opined³⁹ that the list does not help to conclude (deem) whether a business is a PE, but any form mentioned in the list will have to meet the basic rule conditions of Article 5(1).

Hence, it is important to give a sampling of the global practices with respect to ‘physical presence’ or the ‘place of business’. Physical presence is understood as referring to tangible asset of a substantial nature, and the ‘place’, in place of business, is generally understood in its ordinary meaning. In fact, the place of business must be fixed and cannot be something that is regularly moved around; fixed meaning, there must be geographical nexus and commercial coherence; usually the later that is decisive.⁴⁰ Generally, a requirement of right to use the place (decided by looking whether it is at the disposal of the person concerned) and duration is necessary to call it a fixed place of business (minimum—6 months is recommended by the OECD). But, this requirement of time period could vary according to the jurisdiction and the nature of the activities. Similarly, it also has to be decided whether the business activity is one that fits the bill. This is determined by seeing whether the activity is a core business activity, and not preparatory; also, that activity is considered a business and that it is generally understood as such or mentioned in the treaty. However, in relation to construction activity, the UN Model considers a building site, construction, assembly or installation project or *even supervisory activities in connection therewith* to be a PE,⁴¹ if it lasts for more than 6 months. Whereas, the OECD Model does not include certain elements (emphasis added) and the time duration has to be 12 months. Finally, furnishing of services and consultancy is included in the UN Model.⁴²

Another factor important to work the PE concept has been the division of income—into active and passive. Accordingly, countries could allocate business profits either according to a single comprehensive source rule without distinguishing between different types of business profits, or split business profits and allocate them according to their respective character, e.g. profits from manufacturing, sales, loans.

An active income refers to a defined business activity (presence/direct control) in the source country, and in such cases, the primary taxing power rests with the source country. Passive income refers to the income generated otherwise than by a defined presence of the investor—portfolio investment.⁴³ Generally, taxation of passive income is taxed by the country of residence; however, even amongst the economically powerful nations ‘there is no consensus on which jurisdiction should have primary taxing claims on passive income’.⁴⁴ This is despite the fact that the League of Nations Experts had opined that source taxation would lead to effective collections and easier administration of taxes.⁴⁵ Also, importantly, this view has been

³⁹Sasseville and Skaar (2009), p. 32.

⁴⁰Commentary on Art. 5, UN Model Double Taxation Convention, 2011, Paragraph 5.3.

⁴¹Art. 5(3)(a) UN Model Double Taxation Convention, 2011; Also refer, Commentary Art. 5, Paragraph 11

⁴²Art. 5(3)(b) OECD Model Convention on Income and on Capital, 2008

⁴³Avi-Yonah (1996), pp. 1307–1308.

⁴⁴Schindel and Atchabahian (2005) p. 52.

⁴⁵Avi-Yonah (2000), p. 1674.

supported because it is where the wealth is created; but in the case of ‘interests’, it is thought such income creation takes place in the country where the funds are generated to service the interest.⁴⁶

Finally, for the Agency and Service PEs’, Article 5(5) of the Model Conventions state that persons not falling within paragraphs 1 and 2 of this article would be considered as independent agents. He/she is considered as such, while acting on behalf of an enterprise, and has habitually exercised in a Contracting State an authority to conclude contracts in the name of the enterprise. However as per Article 5(6), merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. In the case of a service PE (Article 5(2)/(3)), it becomes a reality if the foreign enterprise furnishes or performs services in India and not covered under Royalties or Fees for Technical Services for a specified period of time. Here, the length of time becomes crucial unlike the permanence.

However, to understand why these principles of international tax have remained unsettled, one has to understand the core principles that underlie them.

3 Fundamentals of Tax Distribution

As we have seen in the previous section, the basic principles that facilitate the division of tax revenues remain unsettled, and additionally much of the nations were not involved in the ‘negotiations’⁴⁷ for their creation. This reifies Harts’ metaphor—‘linguistic expressions have in addition to their core of well-established meaning a penumbra of uncertainty’.⁴⁸ Importantly, this causes normative language in international tax division to be loaded with expressions that are indeterminate.⁴⁹ This section looks into the principles of economic allegiance and equity that underlie the present concepts (discussed in the previous section) that divide international taxes, and thereby explain the reasons for the limitations and opportunities arising from this situation indeterminacy.

⁴⁶Kemmeren (2001), p. 434.

⁴⁷Here negotiation is used to refer to an agreement reached through a participatory process and thereby leading to cooperation from a game theoretical perspective.

⁴⁸Hart (1958), p. 607.

⁴⁹Koskenniemi (1989), p. 22.

3.1 *The Principle of Economic Allegiance*

Historically, only the current group of ‘developed’⁵⁰ countries had the capacity to raise investible resources, and thus the flow of investments was uni-directional in the past. If the current criteria to decide tax jurisdiction of a business, i.e. the place of management or incorporation, are followed, then only the place from where the investments flowed would have the right to tax, and this invariably would be the residence country. Since the country where the investment is made also plays a part in the creation of the income, such a formulation would be fiscally iniquitous to the source country. To counter this situation, the League of Nations Experts (Experts)⁵¹ came up with a connecting factor called ‘economic allegiance’ principle.

The ‘economic allegiance’ principle was explained by the Experts as a division of the total income between the competing States according to the investor’s economic interest under each authority. The Experts developed four considerations to decide the question of economic allegiance.⁵² Of these, the Experts gave ‘primacy’⁵³ to the place of origin of the wealth, and residence of the owner of the wealth in deciding the question of economic allegiance. Interestingly, apart from formulating these criteria, the Experts did not attempt or explain any theory behind their formulation. Also, there was no attempt to quantify⁵⁴ economic allegiance, whether it is a valuation of the goods and services used by the taxpayer, or to construe it as an economic relation between the taxpayer and a particular State. On the contrary, if one or more of the considerations relevant to ‘economic allegiance’ occurs within the boundary of a State, then that is sufficient to endow such a State with the competence to tax the income thus produced.⁵⁵

Importantly, the Experts knew that such a solution would not be fair⁵⁶ and recommended a reciprocal exemption⁵⁷ of each country’s taxpayers from paying tax in the other State. Also, they had cautioned that this would work only between countries with roughly equal capital flows. In other instances, the Experts suggested countries to develop ‘reciprocal rules’ of origin or source through treaty and to reciprocally apply only a percentage of their normal tax rates to such income.⁵⁸ Thus, it is visible

⁵⁰ Although the word developed and developing is subject to various interpretations, developed is used here only to refer to those countries which have, historically, been the main capital exporters.

⁵¹ Report on Double Taxation Submitted to the Financial Committee by Prof. Bruins, Einaudi, Seligman and Sir Josiah Stamp, League of Nations Doc. E.F.S. 73.F.19 18, (1923), p. 20.

⁵² Ibid., pp. 22–23; the place of - a) acquisition of wealth (where wealth originates); b) location of wealth (situs of wealth); c) enforceability of rights to wealth (place providing legal apparatus to rights regarding wealth) and d) consumption of wealth (place or residence/domicile of the investor).

⁵³ Ibid., p. 25.

⁵⁴ Ibid., p. 27.

⁵⁵ Kaufman (1997), p. 198.

⁵⁶ League Report, op. cit., pp. 48–51.

⁵⁷ Ibid., p. 42, 48.

that the principle of ‘economic allegiance’ that is supposed to tie together the laws for dividing international tax itself remains theoretically unsettled and not inherently fair.

3.2 *The Principle of Equity*

The bases of tax division (source and residence) also find their theoretical backing in another principle called equity. There are two variants of equity that are of relevance to international tax law: inter-individual and inter-nation equities. The former considers that for the burden of taxation to be equitable between two taxpayers (inter-individual equity); therefore, nations would tax the worldwide income of its nationals wherever earned. This means, nations would tax income generated extra-territorially, because only then would taxation be equitable between two individuals irrespective of where the income was generated. But, as only few nations had the economic might to raise investible resources, it would not be misleading to say that their practices gained prominence and ‘inter-individual equity’ became a predominant principle.

As for the latter (inter-nation equity), an international division of taxes would mean that the division should be equitable between the residence and source countries.⁵⁹ But since the capital-exporting nations view income as related to persons, they conclude that inter-nation equity leads to a tax loss.⁶⁰ If the opinion of the Experts are considered, they had called reciprocal exemption of each other’s taxes, or even the ‘maintenance of parity’.⁶¹ But, then this throws up the challenge of finding an acceptable formula to share the revenues.

The deduction from this discussion is that taxation based on ‘residence’ should not be as decisive as ‘source’.⁶² But the present state of affairs contradicts this because taxation at source is seen as a legislative decision (means the jurisdiction is divided in the DTAA, and the source State has willingly given up its right to tax such income) of the State where the investment is made. Thus, it is impossible to discard ‘source’ as a lesser tax base. However, deciding source is often a juristic decision (many States could have contributed to the value addition).⁶³ Similarly, the ‘benefits principle’ (value addition at situs) which supports source taxation is weakened due to the importance given to the physical presence, when the cost of the real economic activity should have been credited. For, in a purely commercial transaction based on decisions made for pure commercial reasons, the physical presence as the key

⁵⁸Ibid., p. 42, 48.

⁵⁹Musgrave and Musgrave (1972), pp. 68–69.

⁶⁰Brooks (2009), pp. 473–475.

⁶¹Ministry of Finance –India, Report of the High Powered Committee on E-Commerce and Taxation, (2001), pp. 20–21 (The Committee was of the view that the PE concept should be abandoned and a serious attempt should be made within the OECD or the UN to find an alternative to find an alternative to the concept of PE).

⁶²Ibid., p. 476.

⁶³Vogel (2005), p. 420.

aspect of economic allegiance has been a development that is inconsiderate to the dynamic nature of interstate economic interactions and thereby the economic needs of the State.

Thus, it is possible to say that it is the uncertainties arising from these core principles of international taxation that cause the principles derived from them to be uncertain as well.

4 Indian Responses

This section would discuss the Indian practise which has developed in relation to three concepts used for tax division, namely Permanent Establishment (PE), Treaty Shopping and Treaty Interpretation.

4.1 *Permanent Establishment*

As the national laws in India do not offer much guidance on the concept of PE (introduced in 2001), this concept has principally evolved through the decisions of courts. Due to this, reliance administrative practice (Report by Ministry of Finance) and the concept of Business Connection (BC)⁶⁴ (a relation between a business carried on by a non-resident which yields profits or gains and arises from some activity in India). But, though the threshold for taxing under the latter is much lower, reliance has been placed on the former because of the treaty override⁶⁵ (provisions of the Act apply only if they are more beneficial than the terms of the treaty to the assessee) provided in Section 90(2) Income Tax Act of 1961. As regards the concept of PE, it would be fair to say that the Indian practise has largely been influenced by the UN Model. For instance, many of the Indian treaties have a service PE, and adopt less than the 12 month period that is generally accorded to construction sites or perceives auxiliary activities quite widely to conclude a PE.

Here, it should also be noted that administrative practice⁶⁶ has also contributed to the development of this concept. First, the Ministry of Finance held the view that software downloads should be construed as being eligible to pay royalties and therefore taxed.⁶⁷ Based on this view, the courts/tribunals in India have held that internet servers constitute a PE. Simultaneously, administrative circulars on taxing Business

⁶⁴Goradia and Kapila (2009), p. 346.

⁶⁵Entries 10 and 14 of List 1 of the Seventh Schedule of Constitution of India whereby treaty provisions get precedence.

⁶⁶Report by Ministry of Finance mentioned earlier

⁶⁷Ministry of Finance (India), Report of the High Powered Committee on E-Commerce and Taxation, 11–12, 2001.

Process Outsourcing⁶⁸ were issued; whereby, India could tax profits attributable to sales generated abroad, but subsequently this stance was altered by deciding to tax these profits on the basis of arms-length prices. But as would be seen below, the adjudicatory process has played a significant role in clarifying and developing the Indian law on this. Perhaps, the growth of outsourcing and software-related services from India has enabled the Indian courts to make a real contribution to this concept. However, this also led to a lot of cases and at times leading to confusion.

Now to look at some of the key cases on this concept, in *CIT (Andhra Pradesh) v Visakhapatnam Port Trust*,⁶⁹ it was decided that only an activity of a substantial or permanent nature could truly project an enterprise, and only that would be construed as ‘fixed place of business’. Which means there must be a certain degree of permanence (at the disposal—has an element of ownership or management, either owned, rented or power to use a location)—*Nimbus Sport International Pte Ltd. v DDIT*.⁷⁰ In *CIT v R.D Aggarwal & Co.*,⁷¹ it was decided that a stray and isolated transaction would not be regarded as business connection. However, there had to be an element of continuity between the business of the non-resident and the activity in the foreign territory. Thus, in *UAE Exchange Centre LLC v CIT*,⁷² it was decided that liaison offices of a non-resident business would be considered as PE if the activities of that offices related directly to the core activity of the business. Also, in *eFunds Corporation v ADIT*,⁷³ it was decided by the Income Tax Appellate Tribunal (ITAT) that outsourcing of activities by a foreign enterprise cannot lead to a PE, as it cannot be regarded as carrying on a business. Similarly, in *DIT v Morgan Stanley & Co.*,⁷⁴ the Supreme Court held that providing support services (back office) to a non-resident company would not lead to a PE of the non-resident because this would not amount to the carrying on of a business. But, in *Rolls Royce Plc v DDIT*,⁷⁵ it was held that the Indian entity that provided Rolls Royce (non-resident) support services constituted a fixed place of business.

However, by relying on the BC concept, in *Poompuhar Shipping Corporation Ltd v ITO*, it was decided that Web sites, ICS equipment or even the software in them could constitute a PE.⁷⁶ Also, in *Convergys Customer Management Group Inc. v Assistant Director of Income Tax*,⁷⁷ it was decided that to constitute a PE, place of business could be construed to include all tangible assets (including equipment) taken together, whether or not they are used exclusively for the business. As long as

⁶⁸Central Board of Direct Taxes Circular No. 1/2004, 2nd Jan 2004. Also refer, Central Board of Direct Taxes Circular No. 5/2004, F.No. 500/67/2003-FTD, 28th Sept 2004, p. 8.

⁶⁹[1983] 144 ITR 146.

⁷⁰[2011] 12 ITR (Trib) 709 (Delhi).

⁷¹[1965] 56 ITR 20.

⁷²[2004] 268 ITR 9 AAR.

⁷³[2010] 42 SOT 165.

⁷⁴[2007] 292 ITR 416.

⁷⁵[2008]113 TTJ (Delhi) 446.

⁷⁶[2007] 109 ITD 226.

⁷⁷[2013] 34 taxmann.com 24 (Delhi).

the non-resident person could exercise control over the premises and assets, that was sufficient. Similarly, in relation to supervisory activities, in *SAIL Ltd v ACIT*,⁷⁸ it was decided that a building site or construction, installation or assembly project need not be that of the assessee and supervisory activities carried out in connection therewith becomes PE of the assessee if they continue for a period exceeding 6 months.

As for the Agency and Service PEs'; in *Nortel Networks India International Inc.*,⁷⁹ it was held that the subsidiary a foreign enterprise in India constituted a PE. If it secures orders solely for the foreign enterprise and if its accounts were unaudited and showed huge losses—it can be concluded that the entity in India was not involved in manufacturing. Similarly, it was held that the courts would be constrained to conclude a PE if the non-resident business did not maintain separate accounts for outsourcing, or a basis for computing the profits.⁸⁰ In *Varian India (P) Ltd v ADIT*,⁸¹ it was held that an 'agency PE'⁸² would not arise in an outsourcing activity, because outsourcing would not require the negotiation of contracts, nor would such activities require a dependence on the principal. However, in *Morgan Stanley & Co. Inc.*,⁸³ the Supreme Court held that back office functions performed by the Indian subsidiary were preparatory and auxiliary in nature and, therefore, did not constitute a fixed place PE.⁸⁴ However in *Centrica Offshore v. CIT* it was held that a service PE would be formed because the personnel deputed to the subsidiary/group company in India by the non-resident enterprise worked for the subsidiary and they were controlled (on the payroll); this created a lien on the non-resident enterprise. Hence the work of these deputed employees benefited the non-resident enterprise and constituted a service PE. In *ABB FZ-LLC v ITO*,⁸⁵ the court has decided that the presence of personnel in the other country is not required to constitute a service PE. Similarly, service could be provided from outside, and the presence of the personnel for a 9 month period is not the requirement, but only the fact that service was provided during a 9 month period. So any service provided beyond the time stipulated in the treaty is liable to be taxed. Finally, in *E-Funds IT Solution Inc. v. ADIT* the Supreme Court decided that a fixed place PE can be created only where the foreign entity has a physical location in the source state at its disposal, over which it exercises control, and which it uses to conduct its business. On the question of service PE, it exists only

⁷⁸[2007] 105 ITD 679.

⁷⁹[2014] TS-355/TII-71 (Delhi ITAT).

⁸⁰*Wellnix Inc v ADIT* [2013] 35 taxmann.com 420.

⁸¹[2013] 33 taxmann.com 249 (Mumbai).

⁸²When the business of an enterprise is carried on mainly by the entrepreneur or persons who are in paid-employment with the enterprise; including personnel receiving instructions from the enterprise. The powers of such personnel in its relationship with third parties is irrelevant; Refer, Commentary Art. 5, OECD Model Convention on Income and on Capital, 2008, paragraph 10.

⁸³[2007] 292 ITR 416 (SC).

⁸⁴346 ITR 336 (Delhi).

⁸⁵[2016] (11) TMI 368 (ITAT Bangalore).

if the services rendered by the entity in the source state are provided to customers located in that state, otherwise there cannot be a service PE.⁸⁶

4.2 Treaty Shopping

It is a practice where ‘some investors “borrow” into a tax treaty, by forming an entity (a corporation) in a country having a favourable tax treaty with the country of source i.e. the country where the investment is to be made and the income in question is to be earned’.⁸⁷

Various reasons have been adduced for classifying this practice as an improper use of the treaty system. But chiefly, it is seen as a method of tax avoidance, or as violating the principle of ‘economic allegiance’⁸⁸ used for dividing taxing rights between jurisdictions, or even leading to a breach of the ‘reciprocal concessions’⁸⁹ envisioned in tax treaties.

Incidentally, there remains no conclusive definition/s of treaty shopping, and hence the term treaty shopping could be used or may encompass a broad spectrum of structures, ranging from the purely abusive and artificial ones to others with more substance.⁹⁰ This poses a challenge because all these instances are not improper uses of tax treaties. Interestingly, the OECD response on this matter only adds to the confusion. For, the OECD refers to treaty shopping only in the discussions on anti-treaty shopping provisions, and references to ‘treaty shopping are first made in the commentary to Article 1, while discussing the Limitation of Benefits (LoB) provisions and how these provisions are meant to address treaty shopping.

On the issue of treaty shopping, the Indian position has been clarified in the much-discussed Supreme Court decision—*Union of India v Azadi Bachao Andolan*.⁹¹ In

⁸⁶364 ITR 256 (Delhi).

⁸⁷Rosenbloom (1994), p. 83.

⁸⁸Rosenbloom and Langbein (1981), pp. 359, 397–8.

⁸⁹Refer, the OECD Report on Conduit Companies (paragraph 7(a)) and the UN Report on the Prevention of Abuse of Tax Treaties. Conduit Companies Report, paragraph 7(a) in ‘International Tax Avoidance and Evasion.

⁹⁰Avi-Yonah and HJI Panayi (2010), p. 3.

⁹¹[2003] 56 ITR 563 The issue at the heart of the case was Circular No.682 dated 30.3.1994, issued by the CBDT in exercise of its powers under Section 90 of the Act, the Government of India – whereby ‘capital gains of any resident of Mauritius by alienation of shares of an Indian company shall be taxable only in Mauritius according to Mauritius taxation laws and will not be liable to tax in India’. But with some of the FIIs’ resident in Mauritius being taxed a further Circular No. 789 F. No. 500/60/2000-FTD GOVERNMENT OF INDIA, CBDT on the 13th of April, 2000 clarifying that wherever a Certificate of Residence is issued by the Mauritian Authorities, such Certificate will constitute sufficient evidence for accepting the status of residence and applying the DTAC accordingly. This circular was questioned by *Azadi Bacaho Andolan* to initiate a process whereby the terms of the Indo-Mauritius Double Taxation Avoidance Agreement are revised, modified, or terminated and/or effective steps taken by the High Contracting Parties so that the NRIs and FIIs and such other interlopers do not maraud the resources of the State.

this case, the Supreme Court said, ‘developing countries need foreign investments, and treaty shopping opportunities could be an additional factor to attract them’.⁹² It, therefore, refused to imply an anti-treaty shopping clause into the India–Mauritius Tax Treaty and said that the issue of treaty shopping had to be looked at holistically and had to be viewed as a tax incentive to attract scarce foreign capital or technology.⁹³

Thus, it is clear that the court while arriving at the decision had obviously done a cost–benefit analysis; for, it said that the ‘loss of tax revenues could be insignificant compared to the other non-tax benefits to their economy’.⁹⁴ Many of them do not appear to be too concerned unless the revenue losses are significant compared to the other tax and non-tax benefits from the treaty, or the treaty shopping leads to other tax abuses’.⁹⁵ So the general rule in India remains that unless there is a tax treaty prohibition like the LoB provision, treaty shopping is valid. Hence, it could be said that, the law remaining ambiguous, the Supreme Court has allowed for the national interests or economic development to take precedence. But unwittingly, this decision has also approved of double non-taxation schemes or has been referred to as ‘controversial taxpayer right’.⁹⁶

4.3 Interpretation: Form v Substance

A much-discussed case on this issue and decided by the Supreme Court is the *Vodafone International Holdings B. V. v Union of India and Other*⁹⁷ (Vodafone case), and it has given rise to both opposing and concurring views. Hence, it is but appropriate to recollect some of the key issues.

First, under Section 9(1) of the Income Tax Act 1961, income is deemed to accrue in India if it accrues, directly or indirectly (i) through or from any business connection in India; (ii) through or from any property in India; (iii) through or from any asset or source of income in India; (iv) through or from any money lent interest and brought into India in cash; in kind (deleted with effect from 1 June 1976); or (v) through the transfer of a capital asset situated in India. This means, even non-residents would be taxed upon the transfer of a capital asset situated in India when three elements are present—existence of a capital asset, transfer and the situation of such asset in India.

In this case (Vodafone), the shares of a Cayman Islands entity were transferred, and the transfer was recorded in the Cayman Islands where the Company Registers were maintained. Therefore, since the transfer of the shares was recorded in Cayman Islands, Vodafone contended that the *situs* of the capital asset could not be in India.

⁹²Avi-Yonah and Panayi (2010), p. 9.

⁹³Ibid., pp. 115–137.

⁹⁴Ibid., p. 135.

⁹⁵Ibid., p. 135.

⁹⁶Baistrocchi (2008), p. 363.

⁹⁷[2012] 6 SCC 613.

Second, without going into the description of the entire structure of how Vodafone came to acquire the assets of Hutchison in India, we address the question whether the courts could or should apply a look through provision to analyse whether the structure was incorporated only to evade taxes? It has been argued that the Supreme Court should not have followed⁹⁸ the decision of *The Commissioner of Inland Revenue v Duke of Westminster*⁹⁹, where it was decided; first, ‘every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be’. Second, the subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of the case. This means form was the more crucial element and not substance. But, instead the Supreme Court should have followed the arguments adduced in *Furniss (Inspector of Taxes) v Dawson*¹⁰⁰ and *W. T. Ramsay Ltd. v Inland Revenue Commissioners*¹⁰¹ (Ramsay principle), which enabled the courts to view a transaction from the perspective of its stated business purpose or even to reject structures which were designed for the sole purpose of tax avoidance.

But, this issue of look through became inconsequential in the Vodafone case because the court decided against the fundamental argument raised by the revenue. The latter had argued that under Section 9(1)(i), the court can ‘look through’ the transfer of shares of a foreign company holding shares in an Indian company, and treat the transfer of shares of the foreign company as equivalent to the transfer of the shares of the Indian company on the premise that Section 9(1)(i) covers direct and indirect transfers of capital assets.¹⁰² However, the Supreme Court held that as Section 9(1)(i) did not cover ‘indirect transfer’, i.e. capital asset situated in India and a transfer of that happening through a sale of shares elsewhere.¹⁰³

More importantly, in deciding as it did, the Supreme Court was in fact upholding the rationale arrived at in the *Azadi Bachao Andolan* case. First, it had justified the use of tax havens or even tax evasion and thereby gone against the existing consensus (amongst the principal capital exporters) within the OECD. Second, the court concluded in the Vodafone case that the investment transaction fell outside India’s territorial jurisdiction. Hence, it reiterated that unless there is a LoB provision in the treaty or a see-through provision in the law, the Supreme Court would be unwilling to introduce see-through provisions. This shows that there was only limited scope for the court to apply the substance over form test.

⁹⁸Kumar (2016), p. 526, 540.

⁹⁹[1936] A. C. 1, 24.

¹⁰⁰[1984] 1 All E.R. 530.

¹⁰¹[1982] A. C. 300.

¹⁰²Vodafone Case, Op. Cit., para 71.

¹⁰³Ibid, para 69–71.

4.4 Analysing the Indian Responses

First, the preceding section has discussed three instances where the courts have played an instrumental role in defining and refining an Indian response (in relation to PE, tax evasion and interpretation of DTAAAs), and thereby international tax law. Second, this also helps to create interpretative practise. As has been said, ‘the creative side of law making is relatively autonomous’ (being circumscribed by the specialised field only), and this gives an opportunity to the ‘rising or dominant groups to impose as official, the social world which sustains their own world view or that which favours their interests’.¹⁰⁴ This view seems to ring true when looking at the Indian responses on these three issues. But it is important to analyse these responses within the context of the international tax principles discussed earlier.

Starting with the decisions regarding PEs, a concept of PE is important because India has DTAAAs with many countries; minimally this concept facilitates a division of taxes embodying the spirit that underlies the taxing rights divided between the jurisdictions, if not fairness. Basically what a PE does is to say that a particular entity in the source State has some features that make the income generated in that PE State to be taxed there. But due to the economic condition, much of the States attract limited capital investments, and therefore the principles of tax division (as explained in the models) are limitedly used and developed in their domestic tax statutes. ‘[A] taxpayer cannot be worse off as a result of the operation of a DTC than it would be under domestic law; for those jurisdictions a DTC cannot impose a tax charge if there is none under the domestic tax law ... in the majority of jurisdictions surveyed the domestic law on the attribution of profits to a PE is closely tied—often entirely linked—to the same attribution rules as would apply under a DTC’.¹⁰⁵

As mentioned earlier, since the Income Tax Act did not have a provision for a PE, it was principally the growth of e-commerce and movement of personnel attached to them that presented an opportunity for the courts to develop the concept of PE. Parsing through the numerous decisions related to PEs, the courts have tried to interpret the phrases ‘fixed place of business’ and ‘business of an enterprise’ found in Article 5(1) of the Model Conventions to suit the Indian situation. This becomes a possibility, amongst other reasons, because Article 3(2) of the Model Conventions is entrusted with the responsibility of defining undefined terms in them. Article 3(2) states, ‘[a]s regards the application of this convention ... any term not defined therein shall, unless the *context* otherwise requires, have the meaning that it has at the time *under the law of that state* for the purposes of the taxes to which the convention applies’.

As can be gauged from the cases on PE discussed earlier, a PE could arise in multifarious ways, and it is industry-specific. Looking at the cases, it is possible to

¹⁰⁴This has been the case of International Tax Law and especially the actions of the OECD; hence there is an additional responsibility on a rising economy like India which is fighting its own battle in collecting revenues, it also has to act responsibly to other developing countries; Bourdieu (1987), p. 848.

¹⁰⁵Baker et al. (2006), p. 28.

say that the courts have been successful in clarifying the concept of PE consonant with the prevailing global reality. But, one key deduction is possible from these decisions; the courts have been cautious in their approach and have tried to balance the revenue needs with that of attracting investments. This is evidenced in the decisions relating to—PE for back-office activities, the ‘force of attraction’¹⁰⁶—unless mentioned in the DTAA or even the deputation of employees as in the Morgan Stanley case. Such a thinking by the courts is not to be seen as a teleological approach, but merely exerting the right to a share of the taxes.

Now looking at the decision of the *Azadi Bachao Andolan* case, the decision has tacitly or unwittingly approved of tax avoidance. In fact, on the question of ‘treaty shopping’, as explained earlier, the concept has elements that could not be strictly construed as illegal. Although this point could be used to justify the decision of the court, the pronouncements of the court would anyway automatically quash such arguments. The court by saying that treaty shopping could be used to attract investments by poor nations has not only approved of the illegal tax evasion, it has also denied some of the fundamental assumptions (reciprocity) on which tax treaties are founded. Perhaps, this provides an opportunity to argue that the court has not been prescient enough to understand the steady march of India to being a capital exporter. But, the more significant contribution of this decision lies in overriding the consensus (at least on paper) against treaty shopping. The court breached this consensus by using ‘developing country’, whereby the principle of ‘equity’ has been brought to life within international tax law.

Finally, moving on to the Vodafone case, it has been referred, in some quarters, as the use of corporate form for sham purposes and hence the corporate veil should have been lifted. A related argument would be that the courts should have looked into the substance of the transaction rather than its form, or how the transaction was constructed. It could also be perceived as a dispute that has a taxable asset in the territory of India, and hence taxable in India when transferred. In fact the technical argument on which Vodafone relied, and which the court accepted was territoriality. The transfer of the Indian asset had happened through an indirect (sale of shares in holding company) transfer outside India, and since such transfers do not find mention in the Indian Act, the court had to find in favour of non-taxation. Finally, it could also be viewed as the courts pursuing a consistent position, and that is something that deserves further elaboration and attention.

It is important for the reader to be cognisant of the theoretical factors that are involved in a tax dispute. As mentioned earlier, the current laws are based on principles and this means their content is unsettled. This gives rise to the argument of a reduced possibility to having a legalistic and objective method to settle international tax disputes, especially through national courts.¹⁰⁷ Incidentally, this argument arises due to the possible preferences for national laws, if such disputes were to be adjudi-

¹⁰⁶*Linklaters LLP* [2010] 40 SOT 51 (Mumbai) and *ADIT v Clifford Chance* [2013] 33 taxmann.com 200 (Mumbai).

¹⁰⁷Green (1998), p. 82.

cated in national courts.¹⁰⁸ Importantly, nothing in the Model Tax Conventions could prevent the application of domestic laws to a tax dispute, especially if the issue has not been dealt within the treaties. This position has been upheld in tax disputes in India—the case of Clifford Chance as discussed earlier points to this reality. Hence a question begs further elaboration; why did the court favour the position of Vodafone Holdings International and not the State?

The reasons for this should be traced to the less considered concept of ‘coherence’, and this is evident from a reading of Vodafone in conjunction with the *Azadi Bachao Andolan* decision. After the latter, the courts in India are now free to support any action that enables the inflow of investments, including treaty shopping through tax havens. Hence, there was nothing stopping the courts from using the ‘*substance*’ v ‘*form*’ logic to find in favour of the State, and yet the court refrained from using such a rationale. So the next task is to understand the real issues or the legal and moral questions involved in the said cases.

Hence, if at all there was a legal question to be answered, it was only in relation to following a precedent. This relates to the investment rationale propounded in the *Azadi Bachao Andolan* case and sugar-coated it using the national gains argument. The Vodafone case could also be viewed as a case of treaty shopping using the Mauritius route to invest into India. But the efficacy of justifying treaty shopping deviates from an international consensus (beneficial for all) and is perhaps where the moral element comes in. If the *Azadi Bachao Andolan* decision is reasonably thought of as having made a cost–benefit analysis, then it gave primacy to the interests of the State. In fact, the interventions of the International Chamber of Commerce¹⁰⁹ in the aftermath of the Vodafone decision (legislation with retrospective effect) certainly lends credence to such a deduction—some credible threat/sanction. Importantly, even if we were to buy into the rationale of the court in the Vodafone case (shares registered outside India), that should not have stopped the court from achieving the same result via the ‘*substance*’ v ‘*form*’ rationale. Therefore, it seems plausible that the rationale used to protect investments in the *Azadi Bachao Andolan* case was being reaffirmed in the Vodafone case as well.

Thus, in effect, overlooking the ‘*substance*’ v ‘*form*’ argument or upholding the interests of the investors/investments has amounted to the same. However, there is a substantial difference in the logic applied and the precedential value. The former is a more precise and clear challenge to the investor, one which the Supreme Court could have easily (relevant persuasive precedent available) applied in the *Vodafone case*, to find in favour of the State. Although all of these justifications lead to the increasing penumbra of the law, it substantiates the point made earlier about the fuzzy core of the law. However, since laws have a signalling effect, this decision would have at least clarified the question of equitable division—national revenue gain, the fostering of

¹⁰⁸McIntyre (2006), p. 626.

¹⁰⁹Sanctions or the threat of a drop in FDI was conveyed to the Indian government as they were planning to amend the Income Tax Act in India in 2012 in the wake of the *Vodafone* case. This threat came not only from the capital-exporting States, but also from Chambers of Commerce and business councils. Available at, <http://www.ft.com/cms/s/0/58f631d0-7c22-11e1-9100-00144feab49a.html#axzz2zdtsymYJ> (accessed 12/1/14).

the global economy or whether protecting the investor. Unfortunately, the Supreme Court decision is incoherent in relation to this question or a fundamental principle. In fact, it is this silence that has led to the arguments calling for a 'lifting the corporate veil' and the '*form v substance*' debate.

Arriving at this issue of 'incoherence', it is a point that needs further elaboration. As we saw earlier, the principles which are presently used in the division of international tax revenue are a work in progress. Partially this arises from the fact that the principle of 'equity' is yet to be realised in international taxation. Similarly, the principle of efficiency arises from an economic analysis (to achieve neutrality) of the allocation of taxing rights.¹¹⁰ So when a court in a developing country like India is called upon to adjudicate on an international tax dispute, it has to be aware of its role in the development of the international tax law, the revenue needs of the home State and the 'handed-down'¹¹¹ wisdom of investor protection (efficiency). Therefore, by comparing the *Azadi Bachao Andolan* and the *Vodafone* cases, it becomes clear that the court chose to base its decision in the former, on the principles of 'efficiency' and 'equity', and in the latter it relied only on 'efficiency'. However, efficiency ought to be seen not as a handed-down wisdom, but in relation to the goal to be achieved.¹¹²

5 Conclusion

Without delving into the merits or demerits of creating tax law/practice through jurisprudence, this discussion certainly highlights the potential of using courts for this purpose. This is happening more frequently in developing countries and adding to the practice and international tax law (penumbra). But three reasons help accord more importance to the decisions of the national courts. First, the Mutual Agreement Procedure (MAP) is generally considered an inefficient method to resolve tax disputes. Second, unlike in MAPs, the rationale of the courts are precedent for subsequent disputes. Third, as much of the international tax laws are based on principles (core is fuzzy), the DTAA's allow for national rules and courts to play a role in getting their interests accepted globally. However, the real reason for this development remains the inequitable principles that underlie the present tax division and no avenue to remedy it.

Importantly for the national courts in India, apart from the concerned DTAA and the commentary of the respective MTCs in question, there are no international rules that stop the courts from deciding cases in a particular way. Yet, it is important and

¹¹⁰In short this means coherence with efficiency is more a support for the position of a capital exporter.

¹¹¹Is used by the author to highlight the fact that it is not the single most important principle, and empirical support for it is far from robust; thus handed-down by the economists and other international bodies that support capital export.

¹¹²Mitchell (1999), p. 189.

imperative that the courts balance the interests of the home State revenues, the interest of the investors and support for the global economy.

As seen in the cases analysed, the domestic law is still developing and the courts have attempted to keep up with the need for the flow of investments, and especially the methods to minimise tax payments at source aided by technology. Therefore, the decisions of the courts on this front are in line with the global trends. Importantly, although the courts might be tempted to support the short-term revenue gains (bias), it is important to base such decisions on a firm or principled rationale; cognisant of the prevailing national economic reality and the present international tax principles. But as we have seen in the Vodafone decision, the courts in India do not seem to exhibit full cognisance of the fluid/nascent state of international tax law and the prescience required in such a context. It would therefore not be inappropriate for the courts in developing countries (India) to uphold the national interests, by creating practise that coheres with the principle of 'equity', rather than 'efficiency'. Importantly, this could encourage other countries to create practise supporting the 'equity' principle, and thereby aid in increasing the collection of taxes at source.

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Part III
Intellectual Property Regimes

Protection of Traditional Knowledge and Expressions of Folklore: Locating India in the Global Framework

R. Rajesh Babu

Abstract India is host to a rich source of traditional knowledge and folklore. India is also one of the countries which have been on the receiving end of misappropriation and patenting of traditional knowledge. There is no shortage of instruments to protect TK and folklore, both nationally and internationally. Most of these attempts are through using traditional intellectual property rights such as the copyright, patent, geographical indicators, or trademarks, and in some cases through the adoption of *sui generis* laws that applies specifically to TK. However, these protections are fragmented and have their share of drawbacks. Focussing on the role and experience of India, this chapter argues the need for a comprehensive international treaty for the protection of TK in all its dimensions supplemented by a model law for the States to emulate. In the interim, given the diverse approaches to TK protection and the lack of consensus on various issues, India and other developing countries efforts must equally be focussed on incorporating suitable amendments to existing norms, in particular, the TRIPS Agreement.

Keywords International protection of TK · Folklore · IPRs

1 Introduction

Traditional knowledge (TK) refers to “knowledge, innovations, and practices of indigenous and local communities around the world” developed “from experience gained over the centuries and adapted to the local culture and environment.”¹ They are “knowledge in one or more societies and in one or more forms, including, but not limited to, art, dance and music, medicines and folk remedies, folk culture, biodiversity, knowledge, and protection of plant varieties, handicrafts, designs, literature.”²

¹CBD, Introduction, <https://www.cbd.int/traditional/intro.shtml>.

²WIPO (1998–1999), p. 25.

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These knowledge, beliefs, customs, and practices form an integral part of culture and history of a local community and are collectively owned by that community. Folklore, which is TK in art form,³ is collectively owned and may be in the form of verbal expressions, musical expressions, expression by action, and tangible expressions.⁴

Traditional knowledge is transmitted orally and is passed on from generation to generation, which has evolved with time. What is “traditional” about TK “is not its antiquity but the way it is acquired and used is traditional.”⁵ TK and folklore represent a nation’s cultural heritage and a means of self-expression and social identity.⁶ TK and folklore are equally important for humans and the environment and have a major role to play in the preservation and sustainability of biodiversity. For many in the developing countries, TK is a source of income, food, and health care, and enables people to remain self-sufficient. The long-term economic development of many communities depends on their ability to harness their knowledge for commercial benefits.

The protection of TK has become a global concern because of its potential of being transformed into the commercial opportunities, providing useful leads for the development of products and processes. The commercial utility of the TK and folklore has made them vulnerable to widespread unfair and improper exploitation for commercial and business interests. TK is often misappropriated and patented by the researchers and vested interests, enabling them to exploit the knowledge for a profit, exclude others from freely accessing such knowledge, denying the proprietary rights and economic benefit of the community that developed the know-how.⁷ Given the presumption that TK is knowledge in “public domain” and has no individual ownership, or property rights are attracted, the exploitation continues unabated. This “rush to exploit” has been described as “the extravagant claims of ownership made by outsiders coming to the “new world” during the Age of Discovery.”⁸ Additionally, there is inadequate legal protection that bestowed ownership rights or prohibits exploitation. With globalization and development of technology, the abuse of TK

³Folklore or “Traditional Cultural Expressions (TCE)” has been defined as “productions consisting of characteristic elements of the artistic heritage developed and maintained by a community. It particularly includes- verbal expressions- (such as folk tales, folk poetry and riddles), musical expressions (such as folk songs and instrumental music), expression by actions (such as folk dances, plays) and tangible expressions (like drawings, paintings, carvings, terracotta, pottery, musical instrument and architecture).” See, Kutty (2002).

⁴Indigenous and Traditional Knowledge <<http://www.icimod.org/?q=1248>> accessed on 17 June 2015.

⁵Barsh (1999), p. 73.

⁶Arewa (2006), p. 164.

⁷Bratspies (2007), p. 6. See also, Varadarajan (2011), p. 379.

⁸Ibid. Exploitation of biological and genetic diversity has also been seen as a careful crafting of *res nullius* that advantages newcomers to the resource at the expense of traditional users.

and folklore has accelerated and has become pervasive,⁹ despite an increased global recognition of indigenous peoples' rights.¹⁰

There is no dearth of legal instruments that attempts to protect TK and folklore at the national, regional, and international levels from misappropriation and misuse. Most of these attempts are through using traditional intellectual property rights (IPRs) such as the copyright, patent, geographical indicators, or trademarks, and in some cases through the adoption of *sui generis* laws that applies specifically to TK. However, these protections are fragmented and have their share of drawbacks. Foremost is the fact that there is no uniform legal structure for the protection of different types of TK, and no one instrument could provide a comprehensive mechanism for the protection of TK and folklore. More importantly, even the best efforts at the national level shall have no effect beyond the countries' political borders in the absence of an appropriate international framework to complement the national framework. These considerations have pushed the need for a comprehensive legal protection of TK and folklore which could give more control and benefits to the traditional right holders and national governments.¹¹

In this context, this chapter shall critically analyze the nature of national and international frameworks and initiatives for the protection of TK and folklore with specific reference to India. Specifically, the chapter shall look at the existing IPR regime as a means to protect the TK and folklore; and critical examination of the international efforts toward protection of the TK and folklore, specifically under the WIPO, WTO, and CBD and finally, reflect on the role and experience of India. The paper argues the need for a comprehensive international treaty for the protection of TK in all its dimensions and for a Model Law for the States to emulate. In the interim, measures to ensure the protection of TK should be taken under the auspices of the WTO which has laid down general mandatory provisions to be complied by member countries. It is also argued that given the diverse approaches to TK protection and the lack of consensus on various issues, particularly between the views of the developed and the developing countries, India and other developing countries efforts must equally be focussed on incorporating suitable amendments to existing norms, in particular, the TRIPS Agreement, along with efforts toward new standards.

⁹"It has been estimated that of the 35 plant-derived drugs in the top 150 best-selling drugs, 94% contained at least one compound that has been used by indigenous and local communities." Ruiz (2002), p. 4.

¹⁰Varadarajan (2011), p. 379.

¹¹The legal and policy framework for such an international instrument has been discussed in a number of fora, such as the WIPO, WTO, FAO, CBD, UNCTAD, UNESCO, etc. In all the fora, the active participants have been the Developing countries, who are pushing for comprehensive an effective framework for the protection of traditional knowledge.

2 Select Instances of Misappropriation of Indian Traditional Knowledge

India has been one of the countries which have been on the receiving end of the misappropriation and patenting of its traditional knowledge. To highlight the extent of misappropriation, it would be pertinent to list some of the instances of misappropriation and biopiracy of TK with attempted patenting in other countries and efforts taken by the Indian authorities/communities.

In the case of basmati rice, a rice cultivated in India and Pakistan, the United States Patent and Trademark Office (US PTO) granted patents to “Rice Tec” for a strain of basmati rice in 1997. In this case, the basmati rice was crossed with a Western strain of grain to come up with an altered product (“Texmati”) over which they claimed patent. The basmati rice patent was, however, challenged by India as “prior art”—that is, “there was prior knowledge of the crop that the company simply appropriated.”¹² Eventually, the Indian government was successful in narrow down the patent but was not able to get a total withdrawal of patent protection from Ricetec’s products.¹³ In the context of Ayurveda, the plant *Phyllanthus amarus Schum.et Thonn* is used in Ayurvedic treatment of jaundice. The US granted a patent for use against Hepatitis B. Similarly, the molecule from the plant *Piper nigrum Linn* used for Ayurvedic treatment of vitiligo was granted patent by the UK.¹⁴

Similarly, the TK associated with the medical healing properties of the *Neem* was known since ancient times.¹⁵ However, a patent for a fungicide derived from seeds of the Neem tree was granted to the US Department of Agriculture (USDA) and the W.R. Grace Inc. The European Patent Office (EPO) revoked in entirety the patent granted based on the evidence of “prior art.”¹⁶ In 1993, the USPTO granted a patent for turmeric’s wound healing properties to the University of Mississippi Medical Centre. The Indian Council for Scientific and Industrial Research (CSIR) challenged the patent by providing evidence of “prior art” leading to its cancellation in 1998.¹⁷ In the case of Karela (Bitter gourd), Jamun (blackberry), and Brinjal which is known in India for their anti-diabetic characteristics, a patent was issued to three NRIs in the USA for their use as a cure for diabetes.¹⁸

A patent was granted to Colgate by the USA in June 2010 for their tooth powder made using Indian TK. Colgate came out with a red tooth powder that not only has iron oxide (which is the new additional ingredient) but also clove oil, camphor,

¹²Research Foundation for Science, Technology and Ecology, ‘Chronology of Events of Basmati Rice Battle’ <http://www.navdanya.org/articles/chronology_basmati_battle.htm> 8 November 2005.

¹³Freudenberg (2014), p. 164.

¹⁴“Biopiracy of Traditional Knowledge” available at <<http://www.tkdil.res.in/tkdil/langdefault/Common/Biopiracy.asp?GL=Eng.>> accessed on 20th June 2015.

¹⁵Chouhan (2012), pp. 35–42.

¹⁶IPPRO (2008).

¹⁷Chouhan (2012), pp. 35–42.

¹⁸Bhattacharya (2014), pp. 49–56.

spearmint, black pepper, etc., that have been traditionally used in India for cleaning teeth. This was challenged as an act of biopiracy.¹⁹ In the case of Yoga, a US-based NRI claimed copyright over his way of teaching Yoga. However, Indian Yoga Gurus and Yoga enthusiasts opposed it claiming Yoga as an ancient TK belonging to the human community at large. It was found that USPTO has filed 150 copyrights related to Yoga, 134 trademarks on Yoga accessories, and 2,215 Yoga trademarks. India has strongly opposed and has been taking initiatives to challenge patents filed by other countries on Yoga. In the case of the “Kani,” a tribe belonging to Kerala, the Tropical Botanical Gardens and Research Institute (TBGRI) discovered the tribal knowledge about the anti-fatigue properties in fruit. They developed medicines from that knowledge and gave the license to manufacture and market the same to Arya Vaidya Pharmacy Co.²⁰ TGBRI voluntarily agreed to benefit sharing, and a trust was set up for the tribals. The money deposited was to be used for the welfare and development of Kani tribes. The TGBRI also trained 25 tribal families to cultivate the medicinal plant in their dwellings. Soon the Forest Department restricted the use of forest land for commercial use by the tribal community and claimed that the plant species could be endangered. Right after the Forest Department imposed such restrictions, the knowledge became public, and the knowledge and plants were appropriated by outsiders, and within a few years, there were not enough plants left to produce the medicines. Later, Nutriscience Innovation, a US-based company, claimed patent over Jeevani—a medicine from the same plant.²¹

These are only few instance of misappropriation of the TK, genetic resources, and traditional cultural expressions of communities without their consent or benefit sharing. Some of this misappropriation of genetic resources is known as bioprospecting, that is, the collection of biological resources, such as plants, animals, or microorganisms from their ecological niche and analyzing it in vitro for the extraction of bioactive materials, such as active biochemical or genetic materials for the purpose of developing a commercial product. However, when bioprospecting is practiced without informing and taking free prior consent of the owners of the resources and without recompensing them—it is called *biopiracy*.²² This illegal accumulation of knowledge/biological substances is used by corporations for patenting and commercial development.

3 Protection of the TK and Folklore

The misappropriation of national cultural heritage and knowledge for commercial purpose has evoked considerable resentment among the developing countries which

¹⁹“Colgate accused of stealing 1000 year old Indian toothpaste recipe” Daily Mail (22nd October 2010) <<http://www.dailymail.co.uk/news/article-1322863/Colgate-accused-stealing-1-000-year-old-Indian-toothpaste-recipe.html>> accessed on 22nd June 2015.

²⁰Dewan (2010).

²¹Ibid.

²²Gupta (2013).

are host to 90% of the TK. Their two major concerns and primary challenges were, firstly, the inability to check misappropriation and commercialization of TK and folklore without prior consent and respect for their cultural and economic interests,²³ and secondly, “benefit sharing” of the returns to the communities who have developed and maintained it. They recognize that the exploitation of the TK and folklore would continue unabated in the absence of a proper legal framework for protection at both the national and international levels. Many potential benefits of IP protection deprived the traditional communities owing to inadequate laws and the inapplicability of existing systems to the characteristics and peculiarities of the knowledge, innovations, and practices of these communities.²⁴

At the national level, concerted effort has been made by several developing countries to protect TK and folklore from misappropriation and patenting. Many have amended the existing IPRs regime to suit the requirements of TK protection and also enacted *sui generis* legislations designed to prevent misappropriation of TK, suiting to individual needs. India, for example, has amended its Patents Act in 2002 and introduced the Geographical Indication of Goods (Registration and Protection) Act, 1999, the Plant Variety Protection and Farmers Rights Act, 2001, and the Biological Diversity Act, 2002 which has provisions that can be utilized for protecting certain dimensions of TK. Multiple legislations were necessitated because of the diverse nature of the TK and folklore. However, such legislative measures are not a complete answer for the effective international protection of TK. These legislations only provide for domestic violations and are not effective beyond the countries’ political borders without an international framework to back it. Though such misappropriation could be challenged through the courts of the third country, most often the developed countries don’t have domestic laws to protect TK, and the process becomes too costly and ineffective for the developing countries. Without a protective umbrella at the international level, cross-border misappropriation of TK and folklore cannot be contained effectively.

Thus, for an effective protection of TK and folklore, international cooperation and national initiatives are essential. The foremost fall back option for the protection of the TK is the effective use of IPRs regime itself which is comprehensive. The international treaties formulated by the World Intellectual Property Organization (WIPO) have enabled IP protection in almost all areas. The WIPO treaty regime is reinforced by the Agreement on Trade Related Intellectual Property Rights (TRIPS) under the Agreement Establishing the World Trade Organization (WTO) 1994, making the protection and enforcement of IPRs universal. Also, several states have also adopted the Convention on Biological Diversity (CBD) 1992 and the FAO International Treaty on Plant Genetic Resources for Food and Agriculture 2001 which has the objective of protecting the TK and folklore.

²³Ficsor (2005).

²⁴WIPO (2000).

3.1 Positive and Negative Protection

The protection of TK and folklore at the global and national levels takes different forms and diverse approaches. Broadly these approaches or legal protections could be classified as “positive protection” and “negative” or “defensive protection.”²⁵ Both types of protections are equally important and complementary each other. Positive protection would require the TK holders (the community) acquiring IPRs or any other rights provided by the legal mechanism, with consequence for third-party violations. This would “entail the active assertion of IP rights in protected subject matter, with a view to excluding others from making specific forms of use of the protected material.”²⁶ Positive protection recognizes the rights of TK holders and enables them to utilize the IPRs in TK more effectively and enforce their rights through IPRs or through *sui generis* systems.²⁷ A clear example of positive protection in Indian law would be the Geographical Indication Act, 1999, which provides the right holders the exclusive right to use their geographical identity of the product through a unique identification and registration process.

Negative or defensive protection, on the other hand, stems from the concern of misappropriation of TK through patenting/copyright. It does not entail the assertion of IPRs or other rights in TK, rather, aims at preventing “third parties from claiming rights in misappropriated subject matter.”²⁸ Defense protection enables “protection through legal or other means to *prevent* misappropriation or unauthorized use and claims to cultural expressions, knowledge associated with specific practices, products derived from TK and enclosing the TK that is in the public domain through patents and other IPRs.”²⁹ This would require specific measures within the IPR to prevent biopiracy acts, such as disclosure requirements in the patent filing process.³⁰ As mentioned above, in the case of *Neem* and *Turmeric*, the defense of “prior art” was used to revoke patent. “Prior art” is any evidence that the invention is already known, thus lacking “novelty” which is an essential condition of granting a patent.³¹ Prior art does not need to exist physically or be commercially available.

In the absence of specific domestic laws in developed countries to protect TK and folklore, the evidence of “prior art” has considerable values as a defense. The approach of most international and national instruments has been to provide positive protection for the TK and folklore. However, opinion has gained momentum to

²⁵WIPO (2002).

²⁶WIPO (2003a, b).

²⁷Ibid.

²⁸Ibid.

²⁹Srinivas (2008), p. 86.

³⁰“Seminar on the Protection of Traditional knowledge: The international dimension of TK protection”, <http://www.unctad.org/trade_env/test1/meetings/delhi/Countriestext/brazil.doc>.

³¹“It is enough that someone, somewhere, sometime previously has described or shown or made something that contains a use of technology that is very similar to your invention.” What is Prior Art? European Patent Office, <<https://www.epo.org/learning-events/materials/inventors-handbook/novelty/prior-art.html>>.

provide negative protection against misappropriation particularly in the context of the current IPRs which have inadequate recognition of the TK and folklore rights. The focal point of this discussion in the TRIPS Council was where the developing countries have sought an amendment to Article 27.3(b) of the TRIPS Agreement (discussed below).

4 International Protection of TK and Folklore

4.1 International Instruments that Protects TK and Folklore

Several international treaties and model laws have been formulated to provide substantial protection of the TK and folklore. Key among them are the WIPO Berne Convention for the Protection of Literary and Artistic Work, Convention on Biological Diversity 1992, the FAO International Treaty on Plant Genetic Resources for Food and Agriculture 2001, and the WTO TRIPS Agreement 1994. The Berne Convention for the Protection of Literary and Artistic Work discussed the idea of protection of folklore by applying copyright law in 1967 Stockholm Diplomatic Conference which included a provision providing that

In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.³²

Another early attempt was the Tunis Model Law on Copyright for Developing Countries developed by UNESCO and WIPO in 1976, with a specific provision for the protection of works of national folklore. The Model Law recognizes “national folklore,” and the works inspired by national folklore, and bestows the moral and economic rights of such “national folklore” on competent national authority.³³ It has also introduced the concept of “paying public domain” (“*Domaine Public Payant*”³⁴) and protection unlimited by time.³⁵ The Tunis Model Law was adopted into the national laws of around 30 countries.³⁶ It has not influenced India and the Western copyright regimes.³⁷ The WIPO/UNESCO efforts have also led to the Draft Treaty for the Protection of Folklore against Illicit Exploitation and Other Prejudicial Actions 1984

³²Art. 15.4(a), Berne Convention.

³³Art. 5, Tunis Model Law. See von Lewinski (2004), p. 341.

³⁴‘Domaine Public Payant’, system, “a work that has fallen into the public domain may be used without restriction, subjected to the payment of a fee calculated as a percentage of the receipts produced by the use of the work or its adaptations”. Sect. 17, Tunis Model Law. See also, the African Intellectual Property Organization (OAPI) Bangui Agreement 1977.

³⁵Bannerman (2015), pp. 90–91.

³⁶Lewinski, supra note 47, p. 341.

³⁷Kutty, supra note 3.

which also applied to folklore derived from one state and used in another, operating on a national treatment basis.³⁸

The Convention on Biological Diversity (CBD) 1993³⁹ has the objective of “the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.”⁴⁰ One of the key objectives of the Convention is to ensure “respect, preserve, and maintain knowledge, innovations, and practices of indigenous and local communities relevant for the conservation and sustainable use of biological diversity.”⁴¹ The CBD also provides for financial resources and mechanisms to assist the developing countries in meeting the costs of implementing the obligations of the Convention.⁴² The Convention has about 196 Parties, with the notable exception being the USA.⁴³ Similarly, the FAO International Treaty on Plant Genetic Resources for Food and Agriculture (IT PGRFA) 2001, compliments CBD and recognizes that the implementation of farmers’ rights requires the “protection of traditional knowledge that is relevant to plant genetic resources for food and agriculture.” The Treaty also provides for the rights of participation in the benefits and decision-making related to plant genetic resources.⁴⁴ The Treaty established a Multilateral System (MLS) for access and benefit sharing of the genetic materials.

In addition, the International Labour Organization (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries 1989⁴⁵ recognizes the right of “indigenous peoples” to “decide their own priorities for the process of development” and “to exercise control, to the extent possible, over their own economic, social and cultural development.”⁴⁶ The UN Declaration on the Rights of Indigenous Peoples 2007 provides that:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the

³⁸Bannerman, *supra note* 36, p. 91.

³⁹The Convention on Biological Diversity (CBD) entered into force on 29 December 1993.

⁴⁰Art. 1, CBD.

⁴¹Art. 8(j), CBD. See also Art. 10(c): “Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements”.

⁴²Ullrich (2005).

⁴³List of Parties, <https://www.cbd.int/information/parties.shtml>.

⁴⁴Art. 9.2, FAO International Treaty on Plant Genetic Resources for Food and Agriculture 2001.

⁴⁵Adoption in Geneva, 76th ILC session, 27 Jun 1989 and entry into force on 5 Sep 1991. The Convention revised the Indigenous and Tribal Populations Convention, 1957.

⁴⁶Art. 7(1), ILO Convention 1989.

right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.⁴⁷

Further, Agenda 21 Principle 22 recognizes the vital role that the “indigenous people” play in environmental management and development and their ability to provide alternative solutions to global problems.⁴⁸ Other initiatives include UNESCO Convention for the Safeguarding of Intangible Cultural Heritage (2003) and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005). The rights guaranteed under both these conventions are not limited to the indigenous people.

While these instruments ensure protection for the TK at different levels, they are not comprehensive or ineffective regarding implementation. For example, the CBD addresses many concerns of the developing nations, which have not been given protection under the IPRs. However, the major challenge with the CBD is that it lacks an effective enforcement mechanism. Whereas the IPRs and the TRIPS obligations are backed by the power of the WTO dispute settlement process, the CBD enforcement measures are quite weak. That makes it unlikely that a CBD ruling would be enforced at the expense of interests protected by TRIPS. Another major drawback with CBD is the failure of the USA and many other countries to ratify it.⁴⁹ Similarly, the FAO Treaty of 2001 is focused on establishing farmers’ rights, and the provisions of the treaty are aimed at preventing the loss of agro-biodiversity rather than biodiversity in general.⁵⁰

4.2 Protection Through TRIPS Regime

The WTO TRIPS Agreement is the most comprehensive multilateral agreement for the protection of trade-related aspects of intellectual property.⁵¹ The TRIPS Agreement sets the global minimum standards for protecting and enforcing nearly all forms of IP and imposes mandatory obligations on the 162 states, members of the WTO, to enforce IPRs within their domestic jurisdictions. The TRIPS Agreement is a Berne and Paris-plus agreement in the sense that in addition to compliance with the provisions of the Paris Convention⁵² and Berne Convention,⁵³ it imposes additional obligations on matters where these conventions were silent or were seen as

⁴⁷Art. 31, UN Declaration on the Rights of Indigenous Peoples 2007, A/61/L.67 and Add.1. 143 countries voted in favour of the Declaration, with Australia, Canada, New Zealand and the US voted against it.

⁴⁸Agenda 21, UN Conference on Environment and Development (UNCED), Rio de Janeiro, 3014 June 1992 (“The Earth Summit”) available at <http://www.un.org/geninfo/bp/enviro.html>.

⁴⁹Blakeney (1998), p. 986.

⁵⁰Ibid.

⁵¹The TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization signed in Marrakesh, Morocco on 15 April 1994.

⁵²WIPO Paris Convention for the Protection of Industrial Property (Paris Convention) 1967.

⁵³WIPO Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) 1971. See International Convention for the Protection of Performers, Producers of Phonograms

being inadequate.⁵⁴ Broadly, TRIPS obligates IP protection for patents; copyright and related rights; trademarks; geographical indications; industrial designs; the layout designs of integrated circuits; and undisclosed information including trade secrets and test data.⁵⁵

Acquiring protection through the traditional IPRs conferring on the owner exclusive rights over the TK is the best example of providing positive protection. Indeed, IP framework might provide some level of protection to TK. For example, copyrights, trademarks, and GIs could afford a certain level of protection against unauthorized appropriation of “folklore.” The level of protection that could be possible within the current IP framework is, however, limited. The IPRs in the current form are insufficient, inadequate, and unequipped to address all the issues involved in the positive protection for TK. For instance, in the case of patenting, the “novelty” required by patent laws many not be achieved for protecting knowledge of the communities as most often they are in the public domain or would be considered as “prior art.”⁵⁶ Moreover, the holders of knowledge are collectively held by members of one or more communities developed throughout generations. Also, patents confer only temporary protection for a definite period, meaning the generation’s worth of TK would be lost in 20 years as in the case of TRIPS.⁵⁷

Similarly, the protection of TK and folklore through copyright route can be difficult because the difficulty to identify the copyright owners and the copyright protection is extended only for original expressions, and not for actual concepts, ideas, or styles.⁵⁸ TK rarely has well-identified authors or inventors of creations, and the inventions and knowledge passed on and improved from one generation to the next. “The knowledge is sometimes amorphous and hard to circumscribe for the purposes of a patent application or to identify as one or more copyrighted works.”⁵⁹ Thus, TK and folklore would not fit well within the characteristics that are required to attract IPRs. Further, the current IPR regime is territorial in nature, meaning, it affords protection within the territory of a country. In other words, even if one country provides for a protection need not necessarily means that other country should follow suit. In other words, the major flaw of the existing international regimes is the refusal to permit indigenous communities to claim and enforce communal IP rights.

and Broadcasting Organizations, 1961 (Rome Convention) and Treaty on Intellectual Property in Respect of Integrated Circuits, 1989.

⁵⁴Overview: the TRIPS Agreement <https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm>.

⁵⁵Sects. 1 to 7, Part II, TRIPS Agreement.

⁵⁶Art. 27.1 of the TRIPs Agreement, provides that in order for the subject matter to receive patent protection the invention must be “new, involve an inventive step and capable of industrial application”.

⁵⁷Pacón (2000), p. 5.

⁵⁸“Traditional knowledge and the need to give it adequate Intellectual property protection,” *Documents prepared by the Group of Countries of Latin America and the Caribbean (GRULAC)* September 14, 2000, WO/GA/26/9.

⁵⁹Gervais (2005), p. 141.

4.3 *International Attempts to Strengthen the Protection of Traditional Knowledge and Folklore*

It is evident from the above discussion, most of the above-mentioned instruments lack a comprehensive approach to deal with the problem of TK protection. The responsibility of development of a sound system for the international protection of TK rests main with the developing countries. The UNCTAD communiqué of 2002 has listed a few elements that would be required for a long-term solution for the protection of traditional knowledge:

(i) local protection to the rights of TK holders through national level *sui generis* regimes including customary laws as well as others and its effective enforcement *inter alia* through systems such as positive comity of protection systems for TK (ii) protection of traditional knowledge through registers of TK databases in order to avoid misappropriation (iii) a procedure whereby the use of TK from one country is allowed, particularly for seeking IPR protection or commercialization, only after the competent national authority of the country of origin gives a certificate that source of origin is disclosed and prior informed consent, including acceptance of benefit sharing conditions, obtained (iv) an internationally agreed instrument that recognizes such national level protection. This would not only prevent misappropriation but also ensure that national level benefit sharing mechanisms and laws are respected worldwide.⁶⁰

As seen earlier, several international fora, within a treaty regime and outside, have been considering proposals for the establishment of norms for the protection of TK, from different angles. The most notable of these international efforts are the work of the WIPO and the TRIPS Council. The work of the WIPO though started as an initiative to provide a broad policy framework for the protection of TK, over a period of time, owing to pressure from developing countries, the search is now on for a legally binding instrument. In 2000, the WIPO established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) with the objective of formulating legal and policy options for the protection of TK and folklore and a possible international legal instrument.

The IGC's work programme has resulted in impressive background work and some practical outcomes. It has been able to consolidate different national experience and practices in the protection of traditional knowledge. However, the IGC has failed in concluding a legally binding international instrument.⁶¹ In other words, there is no consensus on several issues on the future international framework, and the IGC negotiations have reached a deadlock primarily due to the opposition of the developed countries.⁶² This only speaks volumes about the importance that has been given TK both by WIPO and by the States concerned. The choice of WIPO as a forum for discussions on the protection of TK and folklore also reflects the general lack of consensus about how they should be treated under existing IP frameworks. Some have also viewed that placing this forum "at WIPO may also represent a potential

⁶⁰See UNCTAD (2002).

⁶¹WIPO (2003a, b).

⁶²Mara (2008).

effort to divert discussion of TK from the WTO. This is particularly true because the WTO was chosen as a forum for TRIPS, at least in part because the WTO had greater enforcement power through international trade mechanisms than WIPO.”

The work of the TRIPS Council is less ambitious but could result in preventive protection of TK if the developed countries agree. The efforts in the WTO address the immediate concern of the developing countries, i.e., preventing misappropriation and patenting of TK by third parties. The Doha Ministerial Declaration adopted on 2001 instructed the TRIPS Council to examine the relationship between TRIPS and the CBD and the protection of TK and folklore.⁶³ The Doha Declaration mandate has given an opportunity for the developing countries to amend TRIPS Agreements to incorporate provision necessary for the protection of TK. The developing countries have put forward a range of proposals during the Doha review process arguing that the exclusions in Article 27(3)(b) of the TRIPS Agreement⁶⁴ “should be clarified or even extended to exclude all life-forms, that information relating to the origins of a biological invention become part of the patent application process and that the principle of informed consent should be incorporated into TRIPS Agreement.”⁶⁵ This was to make TRIPS Agreement compatible with the provisions of the CBD taking into account the conservation and sustainable use of biological diversity, and the protection of the rights and knowledge of traditional communities.⁶⁶

Specifically, Article 8(j) of CBD call for “respect, preserve, and maintain knowledge, innovations, and practices of indigenous and local communities” at the national level and under certain circumstances, prohibits the granting a patent if it has the effect of reducing diversity.⁶⁷ Further, Article 15(5) of the CBD requires that access to genetic resources will be subject to the “prior informed consent of the Contracting Party providing such resources.” The CBD also provides for the “fair and equitable sharing of benefits” which appears to arise out of a more general notion of fair treatment of the knowledge assets of all countries.⁶⁸ This appears to be inconsistent with Article 27.3(b) of TRIPS, which allows patenting of genetic materials.⁶⁹ The developing countries at the WTO have called for the harmonization of the TRIPS

⁶³See Para. 19, WT/MIN(01).DEC/1. Paragraph 19 of the 2001 Doha Declaration says the TRIPS Council should also look at the relationship between the TRIPS Agreement and the UN Convention on Biological Diversity, the protection of traditional knowledge and folklore.

⁶⁴Art. 27.3(b) of the TRIPS: “Members may also exclude from patentability: (b) plants and animals other than microorganisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.”

⁶⁵See, Drahos (2004).

⁶⁶Dutfield (2003).

⁶⁷Manley (2006), p. 113

⁶⁸See Da Costa, Mitzi Gurgel Valente Genetic Resources and Intellectual Property Rights *First Meeting of Like-Minded Megadiverse Countries*, in Drahos (2004).

⁶⁹Art. 27(3)(b) allows Members to exclude from patentability plants, animals, biological processes for the production of plants or animals and plant varieties. Gervais (2005), p. 141.

provisions with the CBD objective of protecting the genetic resources of traditional communities.⁷⁰ The USA has taken the view that there exists no conflict between TRIPS and the CBD, and the proposal for disclosure of the source of genetic materials and TK in the patent application form has been characterized as leading to a “legal and administrative nightmare.”⁷¹

A large group of developing countries, including India and supported by African Group, has demand (WIPO/WTO/CBD) that the TRIPS Agreement should be amended in order to provide that Members “shall require that an applicant for a patent relating to biological materials or to traditional knowledge shall provide, as a condition to acquiring patent rights:

- disclosure of the source and country of origin of the biological resource and of the traditional knowledge used in the invention;
- evidence of prior informed consent through approval of authorities under the relevant national regimes; and
- evidence of fair and equitable benefit-sharing under the national regime of the country of origin.”⁷²

These elements are critical to ensuring the defensive protection of TK. Not surprisingly, the developed countries have expressed reservation to this proposal with no consensus in sight.

5 Protection of TK and Folklore in India

India is a vast reservoir of traditional knowledge and folklore. India is also one of the few developing countries that have taken significant steps toward the protection of the TK and folklore. India has adopted various national legislations to provide protection for their TK and folklore. Most of these Acts are legislated to comply with its international obligations, which has been structured to provide some protection for some aspects of TK. India has employed both *sui generis* as well as the traditional IPR laws to ensure protection, both positive and negative, for TK. India has attempted to protect as well as share benefits of commercial exploitation of TK of indigenous people to whom such knowledge belongs. As part of its negative protection strategy, India has also established a Traditional Knowledge Digital Library (TKDL) to preserve and prevent misappropriation of TK by third parties. India has also taken steps toward Indian National Biodiversity Policy and Macrolevel Action Strategy following the Convention on Biodiversity and the Bonn Guidelines.

⁷⁰See WTO, IP/C/M/25, December 22, 1999.

⁷¹Drahos (2004).

⁷²WTO Trade Negotiations Committee, “Draft Modalities For TRIPS Related Issues,” Communication from Albania, Brazil, China, Colombia, Ecuador, the European Communities, Iceland, India, Indonesia, the Kyrgyz Republic, Liechtenstein, the Former Yugoslav Republic of Macedonia, Pakistan, Peru, Sri Lanka, Switzerland, Thailand, Turkey, the ACP Group and the African Group, TN/C/W/52, 19 July 2008.

Some of the laws which are used for the protection of TK in India include the traditional IP laws, such as the Copyright Act, the Patent Act, GI Act, and other statutes such as the Biodiversity Act, the Farmers Rights Act, and the traditional common laws protection. However, the India laws till lack a comprehensive framework and its laws are still not sufficient to offer a comprehensive protection for the TK and folklore. Some of the current protection mechanisms are mentioned and discussed below.

5.1 Protection Through Copyright Act

The Indian Copyright Act 1957⁷³ does not per se provide for any protection of TK. As far as positive protection is concerned, Section 31A (compulsory licensing) of the Act provides for protection of any written unpublished work of which the author is unknown would require license from the Copyright Board to publish such work or a translation thereof in any language.⁷⁴ However, a plain reading of the whole section reveals that the intention of the lawmaker was not to cover traditional knowledge or folklore within its ambit, rather only to cover contemporary cases of unknown authorships. The requirement for advertisement in the “daily newspaper in the English language having circulation in the major part of the country,” is by itself revealing. Even when one liberally interprets the provision, apart from written unpublished work with an unknown author, all other forms of TK will not fall under this section. Copyright is only provided for tangible, written works. Many forms of TK are not in written form and are intangible property (like stories or customs and practices) of the indigenous community. Further, the Indian law does not provide for unlimited protection, copyright protection as such is time bound, that is, copyright is only granted for a limited period of “60 years from the date of the death of the author.”⁷⁵ TK needs a protection in perpetuity and making it time bound does not solve the purpose of protection.⁷⁶

An interesting case from the Commonwealth jurisdiction Australia, of using copyright law for protecting traditional cultural expression, was the *Milpurrurru v. Indofurn Ply Ltd.*⁷⁷ In this case, aboriginal paintings—the artwork was reproduced on Vietnamese-made woolen carpets imported into Australia for sale without their permission. The Australian federal court found copyright infringement and awarded damages for the aboriginal artists, apart from granting an injunction against any further infringement. The court awarded damages amounting to approximately

⁷³As amended in 2012.

⁷⁴Sect. 31A. Compulsory licence in unpublished Indian works, Copyright Act 1957.

⁷⁵Sect. 52, Copyright Act 1957.

⁷⁶“Protecting Indian Traditional Knowledge as International Property” <<http://www.mondaq.com/india/x/344510/Trade+Secrets/protecting+indian+traditional+knowledge+as+intellectual+property>> (accessed on 22nd June 2015).

⁷⁷*Milpurrurru, G. & Ors v. Indofurn P/L & Ors*, [1994] FCA 975; 54 FCR 240; 130 ALR 659; (1995) AIPC 91-116; 30 IPR 209. See also Blakene (1995), p. 4.

Aus \$90,000. The court pointed out that the “unauthorized use of the artwork involved the pirating of cultural heritage.”⁷⁸ Indeed, the aborigines had the backing of the Australian Aboriginal laws that had bestowed on the traditional owners “the collective authority to determine whether these images may be used in an artwork, by whom the artwork may be created, by whom it may be published, and the terms, if any, on which the artwork may be reproduced.”⁷⁹ As Justice Kirby noted:

Difficulties with extending Australia’s intellectual property law to the styles and nuances of the artistic creations of Aboriginal and other indigenous people of Australia suggest that there may be a need to look specifically at the express adaptation of that law to the needs of indigenous peoples so that the law can respond to the problem and not simply impose its view of what the problem is upon all people uniformly.⁸⁰

A more effective way to ensure the protection of TK and folklore is to prevent others from claiming copyright over TK, through negative protection. This would mean that the state must proactively ensure identify the existence of TK and reject applications as not new thereby providing defensive protection. However, this approach may not benefit the indigenous owners of the TK. The 1976 UNESCO/WIPO Tunis Model Law which recognizes “national folklore” and the concept of “paying public domain” seems to have escaped the attention of the Indian lawmakers, for extending copyright protection of traditional cultural expressions. For example, in India, except for the national symbols, commercial exploitation of regional cultural expressions, be it Madhubani, Mysore, Rajput paintings, or folk dance (*Bharatanatyam*, *Kathakali*, *Thayyam*, etc.) and folklores, shall not attract any infringement in the current copyright regime. Moreover, most of the Indian traditional cultural expressions may not be recognized as “indigenous” cultural expressions according to the Indian and international standards, which further problematize the recognition of such rights.⁸¹

Many countries, specifically from Africa⁸², have innovatively used their copyright laws to protect folklore. Some of them have elevated folklore as part of the country’s heritage. Some states have protected folklore by granting rights to the State for its protection making the folklore the domain of the people.⁸³ For instance, Congo provides protection for folklore and works inspired by folklore, and there is no time limitation for protection of folklore. A society called the “Body of Authors” is made responsible for collecting royalties, representing authors’ interests, and overseeing the use of folklore.⁸⁴ Similarly, Ghana established a National Folklore Board, which

⁷⁸Traditional Knowledge, Berkman Center for Internet & Society, Harvard University, <https://cyber.harvard.edu/copyrightforlibrarians/Module_8:_Traditional_Knowledge>.

⁷⁹Janke (2003), p. 14.

⁸⁰Kirby (1998) in Janke (2003), p. 22.

⁸¹Goswami and Nandi (2008).

⁸²Algeria, Bolivia, Brazil, Burkina Faso, Burundi, Chile, Congo, Ghana, Kenya, Mongolia, Morocco, Namibia, Nicaragua, Niger, Nigeria, Papua New Guinea, Paraguay, Rwanda, Seychelles, Togo, Tanzania, Tunisia, and Zimbabwe.

⁸³Egypt, Jordan, Malawi, Saudi Arabia, Sudan, and Qatar.

⁸⁴Law on Copyright and Neighboring Rights (Congo) 1982.

governs the administration, preservation, registration, and promotion of expressions of folklore and attempts to control the adaptations, translations, and transformations the expressions of folklore.⁸⁵ In Saudi Arabia, the folklore is treated as the property of the state, and the “[t]he import or distribution of copies of folklore works, copies of their translations, or others which are produced outside the Kingdom without a license from the Ministry shall be prohibited.”⁸⁶ In many countries, the fees, royalty, and other money accruing from the use of folklore are used for social welfare benefits.

5.2 Trade Secret Law

Trade secret law is recognized as one of the most important and practical ways to protect TK.⁸⁷ A trade secret refers to “any data or information relating to the business which is not known to the public and reasonable attempts has been made to keep the information as secret and confidential.”⁸⁸ Article 39 of TRIPS Agreement provides that the Member States shall protect “undisclosed information” against unauthorized use “in a manner contrary to honest commercial practices” (this includes breach of contract, breach of confidence, and unfair competition). The information must not generally be known or readily accessible, must have value because it is secret, and must be the subject of “reasonable steps” to keep it secret.⁸⁹ Trade secrets could be used to protect a subset of TK that is relatively a secret⁹⁰ that is not in the public domain or the production and process is a secret. To successfully defend under the trade secret laws, the basic requirements are as follows:

- (a) Information should derive actual or potential economic value because it is generally not known.
- (b) Trade secret holder took reasonable precautions to keep the information secret.
- (c) Defendant has obtained the secret by violating an express or implied duty or by improper means.⁹¹

⁸⁵See also Nigerian Copyright Council.

⁸⁶“Folklore shall be the property of the state, and the Ministry shall exercise the copyright pertaining thereto.” Article 7(1) of the Copyright Law of 2003, Royal Decree No. M/41 (KSA).

⁸⁷Varadarajan (2011), p. 379.

⁸⁸Chhaba and Chhaba (2015).

⁸⁹Art. 39, Section 7: Protection of Undisclosed Information, TRIPS Agreement. Pooley (2013). The US Uniform Trade Secrets Act Sect. 1(4) defines “Trade secret” as: “information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”

⁹⁰Varadarajan (2011), p. 380.

⁹¹Ibid.

TK that are secret can, therefore, meet all the above requirements and hence protection of TK can be ensured under trade secrets law.

The biggest advantage of protection of TK under trade secrets law is that it is not essential that there is a single right holder. It can be granted to a community and be treated as a collective IP. It is also a more viable option because, unlike patent and copyright law, trade secret protection is not limited to a specific term of years and so need not be disclosed after a specified period. Even if the trade secret is sold under a licensing agreement, the licensee cannot exceed the purpose for which the information has been sold to him. If, however, the licensee does, it is considered a violation of the licensors right. And the protection is granted for perpetuity and not time bound. It does not even require an element of novelty, inventiveness/non-obviousness, etc.

However, there are considerable variations in the protection and enforcement of trade secret laws around the world.⁹² For instance, India does not have a specific law on trade secrets. Trade secrets are primarily protected under Sec 27 of the Indian Contracts Act.⁹³ The serious lack of legislation in this area is very detrimental to ensure protection of TK under trade secrets law. Moreover, India seems to have taken no major steps toward sensitizing the TK holders about “secrecy” as an option for protection of their knowledge. Nevertheless, Courts do apply common law principles to protect TK, however, the possibility of the matter reaching the court itself is slim.⁹⁴ To make the process easier, it is of paramount importance to lay down national legislations to the extent that measures can be taken to articulate TK as subject matter for protection through trade secrets.⁹⁵

5.3 Protection Through Patents Act

The primary requirement to qualify for a patent is that the invention must be new (“novelty”); must be an “inventive step” (must not be obvious); and must have “industrial applicability” (must be useful).⁹⁶ This implies that TK that has been passed down through generations will normally not be eligible for patentability. TK are most often in the public domain (unless maintained as secret) or would be considered as “prior art.” Moreover, the TK are often held collectively by members of one or more communities that have been developed throughout generations (community property rather than private property). Also, patents confer only temporary protection for

⁹²Pooley (2013).

⁹³Chhaba and Chhaba (2015).

⁹⁴“Protection of Traditional Knowledge as Trade Secrets” available at <<http://www.mondaq.com/india/x/279342/Patent/Protection+Of+Traditional+Knowledge+As+Trade+Secrets>> accessed on 17th June 2015.

⁹⁵*Ibid.*

⁹⁶Art. 27.1 of the TRIPs Agreement, provides that in order for the subject matter to receive patent protection the invention must be “new, involve an inventive step and capable of industrial application”.

a definite period, meaning the generation's worth of knowledge shall be open for exploitation after 20 years.⁹⁷ In short, the problem of providing protection to TK under Patents Act can be summarized in the following three points: Patent is granted for new inventions whereas, TK is neither a new invention nor is it novel; Patent is granted to an invention that is invented by a single act, whereas, TK has evolved and developed over the years by several persons.⁹⁸ Even if TK meet the standard of patenting, the cost of filing and maintenance a patent is enormous which makes it unaffordable for the indigenous community.

While positive protection of TK under the TRIPS Agreement is not encouraging, India has made suitable amendments to the Patents Act in 2005 to include a few defensive provisions to protect TK.⁹⁹ India modified Section 3, clause (d), of the Act, as follows:

(d) the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant.

Section 3(p) of the Patent Act further makes “an invention which in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components” also non-patentable.

Further, Section 25 of the Act was amended to grant a right to oppose a patent application if the “invention ... was publicly known or publicly used in India before the priority date of that claim” (Section 25(1)(d)). The patent application can also be rejected if there is non-disclosure or wrongly mentions of the source or geographical origin of biological material used in such invention (Section 25(1)(j)); and finally, if the knowledge, oral or otherwise, is available within any local or indigenous community in India or elsewhere (Section 25.1(k)). India has also made specific proposal in the international context that all national patent laws, like its Patent Act, must provide for (1) disclose the source of knowledge and biological material, and (2) give an undertaking that the “prevalent laws and practices of the country of origin have been fully respected.”¹⁰⁰

In short, the amended sections give the right to any person, before a patent has been granted, to challenge the application on the grounds of novelty, inventive step and industrial applicability, and on the grounds of wrongful disclosure or non-disclosure, where knowledge has been existing traditionally within an indigenous community. Such granting of the patent can also be challenged even after the granting of the patent but before one year from the date of publication of grant of a patent.¹⁰¹ All the above

⁹⁷Pacón (2000), p. 5.

⁹⁸“Protecting Indian Traditional Knowledge as Intellectual Property” <<http://www.mondaq.com/india/x/344510/Trade+Secrets/protecting+indian+traditional+knowledge+as+intellectual+property>> accessed on 20th June 2015.

⁹⁹Patents (Amendment) Act, 2005 (Act No. 15 of 2005).

¹⁰⁰See Ministry of Commerce and Industry (2006).

¹⁰¹Sect. 25(2), Patent Act.

provisions are defensive in nature and can only help to oppose patents that will be granted or have been granted on knowledge that originally belongs to a community in India. But there is no provision for the concept of “benefit sharing.” This means misappropriation may be prevented, but the development and commercialization of the TK cannot be guaranteed. Secondly, since TK is not defined under the Act, it raises doubts as to which of these provisions can defend TK.¹⁰² Therefore, this leads to a necessity of *sui generis* system for the protection of TK.

5.4 The Biodiversity Act 2002

India ratified the CBD in 1994 and became party to the 2003 Cartagena Protocol on Biosafety and 2014 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits. India being a contracting party to the CBD was expected to adopt National Biodiversity Strategy and Action Plans (NBSAPs) for implementing the Convention at the national level (Article 6). A total of 17 biodiversity-rich countries also formed Like Mined Mega Diverse Countries (LMCC).¹⁰³ India adopted the Biological Diversity Act in 2002¹⁰⁴ provides for protection of knowledge of local people relating to biodiversity through registration of such knowledge, and development of a *sui generis* system.¹⁰⁵ The Act reaffirms the CBD objective of conservation of biological diversity, sustainable use of its components, and fair and equitable sharing of the benefits arising out of the use of biological resources, knowledge.¹⁰⁶

The National Biodiversity Authority (NBA), an autonomous body, was established in 2003 to implement the BD Act. The NBA, at the central level, functions as regulatory and advisory body for Government of India on the issue of Conservation, sustainable use of biological resource and fair, equitable sharing of benefits of use.¹⁰⁷ The State Biodiversity Board (SBBs) focuses on advising the State Government and the Local Level Biodiversity Management Committees (BMCs) and is responsible for “promoting conservation, sustainable use, and documentation of biological diversity including preservation of habitats, conservation of landraces, folk varieties and cultivators, domesticated stocks and breeds of animals and microorganisms, and chronicling of knowledge relating to biological diversity.”¹⁰⁸

¹⁰²Venkataraman and Latha (2008).

¹⁰³Venkataraman (2009).

¹⁰⁴The Biological Diversity Act, 2002 (No. 18 of 2003)

¹⁰⁵Sect. 36(iv), Biological Diversity Act 2002.

¹⁰⁶Preamble, Biological Diversity Act, 2002.

¹⁰⁷‘Introduction’ <<http://nbaindia.org/content/16/14/1/introduction.html>>.

¹⁰⁸Sect. 41(1), Biodiversity Act. The BMC will be constituted by the local body with members of the Participatory forest/natural resources management committees members, including from members of horticulture/voids/foot botanists/tribal heads, etc., based on the local conditions. Guidelines

The term “biodiversity” is defined broadly under the CBD, and the Indian Act lays down that “biological diversity” to essentially mean the variability among species that exist and thus distinguishes one geographical area from the other.¹⁰⁹ It includes diversity within species and between species.¹¹⁰ The Biodiversity Act mainly deals with access to genetic resources by foreign companies, individuals, and organizations. The Act provides protection to TK by prohibiting certain people from gaining access to biological resources occurring in India or any knowledge that can be used for research or commercial utilization or biosafety and bio-utilization. The Act prohibits anyone from undertaking biodiversity-related activities (Section 3) and transfers the results of any research (Section 4) for commercial utilization without the permission of NBA.¹¹¹ The Act also prohibits applying for any IPRs inside or outside India for any invention based on research or information on a biological resource obtained from India without obtaining the prior approval of the NBA (Section 6.(1)).

The Act also aims to stipulate the concept of benefit sharing, and the NBA can lay down terms and conditions for “equitable sharing of benefits arising out of the use of accessed biological resources” (Section 21(1)).¹¹² For this purpose, “benefit claimers” are defined as conservers of “biological resources, their by-products, creators and holders of knowledge and information relating to the use of such biological resources, innovations, and practices associated with such use and application” (Section 2(a)). It provides that benefit sharing can mean to understand monetary payment, technology transfer, joint ownership of IP rights, facilitate better living standards to the benefit claimers, etc.¹¹³ A monetary payment by way of benefit sharing will be deposited in the National Biodiversity Fund or paid directly to such individual or group of individuals or organizations (Section 21(3)).

Farmers Rights Act

India has also established a *sui generis* legislation on the Protection of Plant Varieties and Farmers Rights Act in 2001 (PPVFR). The PPVFR Act protect the rights of these farmers over the evolved variety of crops essentially to protects farmers who have put in time and effort in the process of cultivation, conservation, techniques to bear different weather conditions, pest control, etc., have come up with a refined and reformed quality of produce. It recognizes a community of farmers efforts put in for a particular kind of crop, fruits, and vegetables and also provide for benefit sharing among those tribal farmers and the breeders who might be two different groups of

for Operationalization of Biodiversity, Management Committees (BMCs) National Biodiversity Authority (NBA), January 2013 <http://nbaindia.org/uploaded/pdf/Guidelines_BMC_1.pdf>.

¹⁰⁹Art. 2, CBD and Sect. 2(b), Act.

¹¹⁰Swamy (2014).

¹¹¹Sect. 3 of the DB Act provides that all foreigners must get prior approval of the NBA to “obtain any biological resources occurring in India or knowledge associated thereto, for research or for commercial utilization or for bio-survey or bio-utilization”.

¹¹²See also Art. 8(j) of the CBD.

¹¹³Sect. 21(2), Act. Venkataram K. and Latha S.S., “Intellectual Property Rights, Traditional Knowledge and Biodiversity of India” JIPR 13(4) 326–335, July 2008 <<http://nopr.niscair.res.in/bitstream/123456789/1781/1/JIPR%2013%284%29%20326-335.pdf>> accessed on 23rd June 2015.

people. However, it has been pointed out that the Protection of Plant Varieties and Farmers Rights Act 2001 (PPVFR Act) which also provides for access and benefit sharing, however, seems to conflict with the Biodiversity Act. Unlike the Biodiversity Act where the consent of the NBA is required, the PPVFR Act does not provide for prior consent for access to genetic resources.

Forest Rights Act 2006

Besides these two legislations, a certain level of protection is envisaged under the Forest Rights Act 2006, a landmark legislation to address historical injustice faced by forest-dwelling communities.¹¹⁴ The Act recognizes community rights over forest resources and in the process ensuring biodiversity sustainably and conserves it to maintain ecological balance. One of the biggest fears of the indigenous community is that if their knowledge is documented, it will be more susceptible to misappropriation. This fact is recognized by the Forest Act and recognizes the forest-dwelling people's community right to IP and TK related to biodiversity and cultural diversity.¹¹⁵ It provides a framework for the documentation of such knowledge and the nature of evidence required for recognition of rights (IPRs) of these communities. The Act tries to provide a shield for the traditional knowledge. It also acknowledges that TK of forest dwellers should be considered equal to that of documented technological/scientific information.¹¹⁶

5.5 Geographical Indications

Partial protection of TK could also be achieved through GI. GIs are indications which identify a good as originating in the "territory ... where a given quality, reputation, or other characteristic of the good is essentially attributable to its geographical origin."¹¹⁷ They are similar to trademark where a product is identified by an assurance of quality and distinctiveness which is essentially attributable to the fact of its origin in that defined geographical locality, region, or country. For instance, Kancheepuram Silk Saree is a particular mulberry silk saree woven in a traditional style of Kancheepuram, a city in Tamil Nadu, and is registered as GI in the name of Tamil Nadu Department of Handlooms and Textiles. It is weaved in a way such that three threads are twisted together. Such GIs are of particular importance to developing countries that might get a comparative advantage if they can ensure international GI protection.

¹¹⁴Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. At least 150 million people, including almost 90 million tribals, live in communities would benefit from CFR rights recognition. Potential for Recognition of Community Forest Resource Rights Under India's Forest Rights Act: A Preliminary Assessment, Rights and Resources Initiative, Vasundhara and Natural Resources Management Consultants July 2015.

¹¹⁵Sect. 3(k), Forest Act 2006.

¹¹⁶Dewan (2010).

¹¹⁷Art. 22.1: Protection of Geographical Indications.

Since geographical indications are based on the concept of collective rights and linked to traditional practices of a particular region, the GI has been viewed as a potential medium for the protection of a subset of TK. GI is protected as IPRs under Articles 1(2) and 10 of the Paris Convention for the Protection of Industrial Property and under Articles 22 to 24 of the TRIPS Agreement. According to TRIPS Agreement, States shall provide “legal means to prevent use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good.” Further, GIs, like a trademark, also guarantee the right in perpetuity as long as the distinctive link between the good and the place is maintained. India has provided statutory protection through the Geographical Indications of Goods (Registration and Protection) Act, 1999 and Rules, 2002. India has so far provided GI protection for around 275 GIs “goods” that are “agricultural, natural, or manufactured goods or any goods of handicraft or of industry and includes food stuff.”¹¹⁸ GI is also a preferred for TK protection as compared to others, as it provides protection for an indefinite time.¹¹⁹

The GI protection is aimed at protecting the names of goods and preventing misrepresentation and passing off, and not “knowledge” as such. In other words, the use of the GI marks may not prevent misappropriation of the TK if a third party uses the knowledge in different names and symbols that are not geographical indicators. Moreover, GI identifies a “good,” and “this would exclude all intangible forms of traditional knowledge such as methods of medical treatment, techniques for dyeing cloth, folk music, and dances.”¹²⁰ Further, in the international context, while GI appears to be an effective and beneficial way of TK protection in a limited sense, it might also create problems for the origin country, because local enterprises which exploit the produce of a particular GI will not be able to do so freely with increased protection. It will be an exclusive property of a particular community, and it might tend to reduce the individual value of the produce by limiting its use and marketing.

5.6 *Traditional Knowledge Digital Library (TKDL)*

TKDL is an initiative of India to prevent “misappropriation of country’s traditional medicinal formulations.”¹²¹ The database was established in the wake of mass misappropriation and wrongful patenting of TK at international level and India’s realization

¹¹⁸“Geographical Indications and Traditional Knowledge” (9th June 2015) <<https://ipsnipe.wordpress.com/2015/06/09/geographical-indications-and-traditional-knowledge/>> accessed on 6th July 2015.

¹¹⁹Ibid.

¹²⁰<http://shodhganga.inflibnet.ac.in/bitstream/10603/14514/13/12_chapter%205.pdf>.

¹²¹TKDL is a collaborative project of CSIR and Ministry of AYUSH, Government of India <<http://www.tkdil.res.in/tkdil/langdefault/common/Abouttkdil.asp?GL=Eng>>.

of the difficulty in getting a revocation of patent at the USPTO, in the turmeric case. The database now has about 34 million pages of information on some 2,260,000 medicinal formulations in multiple languages.¹²² TKDL was also able to set international specifications and standards for setting up of TK databases which got adopted in the fifth session of the WIPO IGC in 2003. Owing to TKDL, India was able to bring about the cancellation or withdrawal of several international attempts to patent traditionally known medicinal formulations.¹²³

Patented literature is usually found in several distinctive databases and can be more easily searched and retrieved, whereas non-patented literature such as TK (“prior art”) is often neither systematically documented nor made easily accessible to the patent examiner during a patent search. Therefore, some countries have granted patents on TK which are already in the “public domain.”¹²⁴ TKDL attempts to bridge this gap by creating a database which the patent examiners can easily access and prevent granting of patents for already known “knowledge.” In other words, TKDL strengthens the “defensive” protection of TK. According to the TKDL, their database is essentially based on 359 books of Indian systems of medicine available already in the open domain and can be sourced by any individual/organization at national/international level. “TKDL is only the bridge between these books (prior art) and international patent examiners.”¹²⁵ Again, the objective of TKDL “is not to restrict the use of TK, but to ensure that wrong patents are not granted due to lack of access to the prior art for Patent Examiners.”¹²⁶ The database is open to all patent office which has signed the TKDL Access Agreement which has built-in non-disclosure mechanisms to safeguard misuse.¹²⁷

However, the approach of collating and using that data for defensive protection has been criticized for the taken-for-granted-ness that these “knowledge” are generally available in the public domain, and “it is assumed that the indigenous communities have given up all claims over them thereby increasing the opportunity for misappropriation. Some fear that the codification of the community knowledge by the TKDL may increase the risk of exploitation because of easy accessibility “as opposed to no information leaked outside the indigenous community to which it belongs.”¹²⁸ Critics argue that the approach of conservation by documentation “will only lead to downfall of cultural and social richness,” since giving out otherwise unknown information on public domain would increase chances of exploitation. Thus, if the entire information about the TK or traditional medicinal formulation is disclosed to

¹²²Protecting India’s Traditional Knowledge, June 2011, <http://www.wipo.int/wipo_magazine/en/2011/03/article_0002.html>.

¹²³Ibid.

¹²⁴“Biopiracy of Traditional Knowledge”. <<http://www.tkdil.res.in/tkdil/langdefault/Common/Biopiracy.asp?GL=Eng>>. Accessed on 16th June 2015.

¹²⁵About TKDL, <<http://www.tkdil.res.in/tkdil/langdefault/common/Abouttkdl.asp?GL=Eng>>

¹²⁶Ibid.

¹²⁷India has signed TKDL Access Agreements with the EPO and the patent offices of Australia, Canada, Germany, the UK and the US. Protecting India’s Traditional Knowledge, June 2011. http://www.wipo.int/wipo_magazine/en/2011/03/article_0002.html.

¹²⁸Nandakumar (2015).

the patent office and patent applicant as “prior art”, even those TK that are not in the public domain becomes public leading to exploitation, with the TKDL as the facilitator.¹²⁹ An alternative proposed is a TK “Docketing System” “to indicate the location at which the knowledge is available, the community that possesses the traditional knowledge, the nature of TK and community protocol, if any.”¹³⁰ However, if the TKDL codified data are already in the public domain (as has been claimed by TKDL) and there is an in-built confidentiality clause for sharing of such data, such abuse may remain contained. Moreover, the proposal docketing system may not be sufficient for many patent offices to process and reject/cancel a patent application.

6 *Sui Generis* Protection for Traditional Knowledge

India is yet to think about a comprehensive *sui generis* protection of TK, including folklore and genetic resources. As per the National Knowledge Commission (NKC), the Department of Industrial Policy and Promotion (DIPP) is contemplating a *sui generis*. However, one finds no mention of the comprehensive law or adequate attention being given to TK even in the 2016 National IPRs Policy. As noted earlier, India has addressed the concern of protection of various dimensions of TK through incorporating international obligations and through *sui generis* legislations in designated areas. India has implemented the BD Act which protects TK associated with the use of biological resources. India has also incorporated an amendment which provides for negative protection of TK to the Patent Act. The Farmers Rights Act recognizes and protects the rights of farmers over the evolved variety of crops essentially.¹³¹ The GI Act serves to protect a certain section of TK from passing off. Also, the TKDL serves to protect the TK that are in public domain through defensive protection. However, these regulatory frameworks seem to fall short of the desired level of protection.

In India, the management of IPRs is fragmented, and the responsibility for the administration of the above-said legislations is with different Ministries. For instance, the Ministry of Commerce and Industry is entrusted with the responsibility of administering the laws relating to Patents, Designs, Trademarks, and GI within the territory of India. Copyrights are administered by the Ministry of Human Resource Development, and The Department of IT is responsible for Semiconductor Integrated Circuits Layout designs. The implementation of the BD Act 2002 is with the Ministry of Environment and Forests, and The Farmers’ Rights Act, 2001, operates under the under the aegis of the Ministry of Agriculture. The Controller General of Patents, Designs, and Trade Marks (CGPDTM) come under the DIPP, which is the nodal agency for matters concerning the specialized UN agency on IPRs, the WIPO, including coordination with other concerned Ministries or Departments.

¹²⁹Murthy (2015)

¹³⁰Ibid.

¹³¹Venkataram and Latha (2008).

The 2009 NKC's recommendations on IPRs stressed on creating an incentive for commercialization of TK for companies and allowed them to access the TKDL "upon payment of adequate user fees and subject to the condition that inventions arising out of the TKDL would require royalty sharing with the government", which shall be shared with the communities identified as the sources of the knowledge and creating a "Traditional Knowledge Development Fund."¹³² The NKC reasserts that TKDL must address the "ownership" issue for TK, and the "need is to create IPR systems that *knowledge remains in the public domain* and is "protected" for the communities of origin through mechanisms such as Geographical Indicators (GIs)."¹³³ However, one remains unsure of the rationale for a company to pay fee and royalty for accessing TK when the "knowledge" and the content of TKDL database are already in the public domain with the only defense offered by the government being defense protection as "prior art."

The 2016 National Intellectual Property Rights (IPR) Policy endeavors for a "Creative India; Innovative India."¹³⁴ The policy calls for "reaching out to the less visible and silent IP generators and holders," and emphasis "on creating awareness regarding the rich heritage of India in terms of our Geographical Indications, Traditional Knowledge, Genetic Resources, Traditional Cultural Expressions, and Folklore." It also calls for protection of medicinal knowledge from misappropriation, "while providing space and environment for the dynamic development of traditional knowledge for benefit of mankind." It calls for undertaking an in-depth study of "the existing laws to protecting TK, GR, and TCE, and to propose changes required, if any." In short, the solution for the TK protection for the Central Government is within the existing IP regime. The policy has failed to define and articulate any system for the protection of TK policy other than a meek call for "study" of existing IP laws, and suggest change "if required." In other words, the sui generis protection of TK is out of the policy framework.

A much more sophisticated alternative policy suggestion has come up from the government of Kerala, though may require more clarity in several areas. The Intellectual Property Rights Policy for Kerala 2008 deals directly with issues related to the protection of TK and genetic resources (biodiversity).¹³⁵ Though legislative power over IPRs in India is with the Central Government,¹³⁶ the Government of Kerala may have to contemplate a state amendment for implementing the policy. According to this policy, a TK belongs to "Knowledge Commons" and not to "Public Domain," with "Knowledge Commons" being defined as "the knowledge, which is the collectively produced sphere of ideas and which is left unencumbered for the greater benefit of all." Thus by categorizing TK as part of "Knowledge Commons" and not of "public domain," the State Government has taken the role of the custodian or trustee

¹³²NKC (2009).

¹³³Ibid., p. 146.

¹³⁴The National IPRs Policy May 2016. <http://dipp.nic.in/English/Schemes/Intellectual_Property_Rights/National_IPR_Policy_08.08.2016.pdf>.

¹³⁵<http://www.wipo.int/wipolex/en/text.jsp?file_id=200374>.

¹³⁶Art. 246, List I (Union List), Constitution of India.

of all TK in the state. In other words, the State Policy attempts a positive protection for TK rather than existing defensive protection of declaring TK as “prior art.” It further attempts to combine the GI-type protection along with the “knowledge” part of TK, which currently have not positive protection. The traditional right holders shall be deemed to have “commons license” to use the TK, whereas others must apply for such “commons license” for usage. Any developments made by the use of TK obtained under this license are added to the “Knowledge Commons.” This alternative model is much more poised for the protection of TK at the national level.

As has been noted elsewhere, *sui generis* laws for the protection of TK and the state ownership of TK, Folklore, and Genetic Resources are not an alien, novel, or an undefined concept. The 1976 Tunis Model Law for developing countries endorses the concept of national ownership over TK, “Domaine Public Payant,” and provides for protection unlimited by time, which has found a place in the national laws of many countries that adopted *sui generis* laws that create an entirely different sort of legal protection for TK. For instance, Philippines Indigenous Peoples Rights Act 1997 reaffirms the right of Cultural Communities/Indigenous Peoples to the “full ownership and control of their cultural and intellectual rights” and access to biological and genetic resources is permitted only after obtaining the free and informed consent of such communities. The Panama’s Act 2000 articulates folklore as “indigenous collective rights” and defines it as “indigenous intellectual and cultural property ... and manifestations that have no known author or owner” as “the heritage of an entire indigenous people” with the regulatory power with the DIGERPI or in the National Copyright Office.¹³⁷ Similar *sui generis* laws have been developed in Brazil, Colombia, Ethiopia, Egypt, Guatemala, Indonesia, Iran, Morocco, Peru, the Russian Federation, Thailand, and Venezuela.

Particular emphasis may be made on the 2002 Modal Law of the Pacific Islands Forum, a grouping of 16 independent and self-governing states,¹³⁸ which also proposes a similar concept of State as guardian and license holder of TK whose owners are unidentifiable.¹³⁹ The Pacific Model Laws established a “new range of statutory rights for traditional owners of traditional knowledge and expressions of culture”¹⁴⁰ and created inalienable traditional cultural rights for traditional owners¹⁴¹ of TK or

¹³⁷Panama’s Act No. 20 of 2000.

¹³⁸Members include Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Republic of Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. The following countries have associate membership: New Caledonia and French Polynesia.

¹³⁹The Pacific Model Laws on the Protection of TK & Expression Of Culture and Genetic Resources.

¹⁴⁰Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, http://www.forumsec.org/resources/uploads/attachments/documents/PacificModelLaw_ProtectionofTKandExprsrnssofCulture20021.pdf.

¹⁴¹Clause 7 of Part I of the Framework makes clear who owns the protected TCEs. Traditional owners are defined as: “a group, clan, or community of people, or the individual who is recognized by a group, clan, or community of people as the individual, in whom the custody or protection of the traditional knowledge or expressions of culture are entrusted in accordance with customary law and the practices of that group, clan, or community.”

expressions of culture, a right which shall continue in force in perpetuity.¹⁴² The rights framework fall into two categories: moral rights and traditional cultural rights, which are assumed by default without any registration requirement.¹⁴³ Moral rights include the right of attribution, the right against false attribution, and the right of integrity of indigenous work. The traditional cultural rights are “in addition to, and do not affect, any rights that may subsist under any law” including traditional IP laws.¹⁴⁴ Any prospective users, including non-commercial users, must obtain prior and informed consent of the traditional owners to use their TK or expressions of culture for a non-customary use. Those attempting to seek permission to use elements of protected expressions of culture have two options: (1) apply directly to the Cultural Authority or (2) communicate directly with the traditional owners. Valid TCE users must prove they have received consent from the traditional owners via an “authorized user agreement.”

If India is serious about the protection of the TK in all its dimensions, a combination of State ownership and State protection for the TK would be imperative. This must be backed by the recognition of the TK and its protection in the international instruments, specifically the TRIPS Agreement. India and other developing countries must ensure that the disclosure clause, prior informed consent, and benefit sharing of TK as part of the TRIPS Agreement. Without such recognition in the WTO framework, the protection would remain aspirational if those concepts are incorporated in the WIPO and non-WIPO instruments. For instance, the lingering debate on the conflict between CBD and TRIPS will continue, and with a strong enforcement provided by the WTO dispute settlement system, the TRIPS Agreement shall sway over other non-WTO agreements. Secondly, appropriate changes must be reflected in the existing laws and must reignite a debate on *sui generis* model law that has an international appeal. India has made changes to its Patent Act and provided requisite TK protection under GI Act, BD Act, Forest Rights Act, and Farmers Rights Act. However, India has consciously ignored similar amendments to copyright and trademark laws, despite prevalent and viable models available at its disposal.

Thirdly, an attempt must be made to categorize TK, and design protection strategy that suits the nature and type of TK. Currently, neither India nor the international community or the traditional IPR regime has espoused such a concept. Structuring individualized protection would mean, for instance, in the case of medicinal property of *neem*, defensive protection and keeping the knowledge public denying patenting by any particular individual. Whereas in the case of *Kancheepuram saree*, or *Kolhapuri chapel*, may demand positive protection from multiple IP laws. As a prerequisite, India and the like-minded countries must assert national ownership of all the TK, and the state must act as Trustee where the knowledge holder is unknown. The approach

¹⁴²Arts. 8 and 9, Pacific Model Law.

¹⁴³Copyright Amendment (Moral Rights) Act 2000 (Australia): The moral rights give creators the “right to protect the integrity of their works, the right to have their works attributed to them and the right not to have someone else’s work falsely attributed to them.”

¹⁴⁴Art. 11, Model Law. Clause 7(2) of Part I – “traditional cultural rights include the right to reproduce, publish, perform, make available online, and create derivative works, among many others. These are said to be both exclusive and inalienable.”

by TDLK or recognizing and defending the TK as in the “public domain” or “prior art” must be the minimum guaranteed protection that one must aspire for the TK thereby preventing exclusivity of TK through patenting. Defending TK as prior art or knowledge in the public domain is a “free for all” approach and would neither prevent misappropriation nor provides for benefit sharing. Therefore, there is a need to ensure that the use of TK by non-TK practitioners is either by the license terms or by obtaining a license for commercial use from the State.

India has already made limited assertion of state “ownership” over TK (biological resources) in the BD Act. The state provides positive protection for biological resources of India by imposing limitations on access or transfer of such “knowledge” to foreigners, non-resident Indians, and corporates with no Indian participation without the prior approval of the NBA. NBA can impose “benefit sharing fee or royalty” or “impose conditions including the sharing of financial benefits arising out of the commercial utilization of such rights.” NBA has been given the authority to oppose the grant of IPRs “in any country outside India on any biological resource obtained from India or knowledge associated with such biological resource which is derived from India” (Section 18(4)). In cases where the benefit claimers are unidentified (part of Knowledge Commons, as in the case of Kerala IPR Policy) NBA can claim “joint ownership” of IPRs (Section 21(2)(a)) and the amount accrued by way of benefit sharing shall be deposited in the National Biodiversity Fund (in cases of undefined benefit claimers) (Section 21(3)). However, this state “ownership” is not extended to other dimensions of TKs such as the traditional cultural expressions.

Finally, there is a need to redefine “indigenous people” in the context of Indian TK, as the international understanding of “indigenous people’s” traditional cultural expressions will not work for the Indian diversity and uniqueness. Though the UN has not adopted a formal definition,¹⁴⁵ in the context of traditional Indian knowledge systems and cultural expressions, the term “indigenous” people as primarily referring to “tribes, first peoples/nations, aboriginals, ethnic groups, Adivasi, Jana jati,” etc., would exclude large part of Indian TK from the protective preview.¹⁴⁶ For instance, *Theyyam*, a popular ritual form of worship of North Malabar in Kerala, is several thousand-year-old and are usually performed by those belonging to the lower caste community, however, may not get qualified to be called as “indigenous” as it is still very much part of the popular culture of northern Malabar, irrespective of cast/religion. Without such identification, most Indian TK would automatically fall out of the international understanding of the rights of the “indigenous people” and the national rights framework for indigenous people in other countries. The identity of indigenous culture/knowledge could also lead to extending and demanding national treatment for indigenous knowledge systems across jurisdictions, especially in the developed jurisdiction where indigenous laws are strongly embedded.

¹⁴⁵Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply. Art. 1.2, ILO Convention 1989.

¹⁴⁶One fruitful approach as stated by the UN, “is to identify, rather than define indigenous peoples. This is based on the fundamental criterion of self-identification as underlined in a number of human rights documents.”

The need of the time is to have country specific laws developed based on the country's specific requirements and the requirement of the "communities, their lifestyles and types of traditional knowledge and the way it is being protected or held by the traditional communities and the way it is being accessed for modern scientific purposes.... The need is for a system which recognizes such diversity."¹⁴⁷ In short, the international legal framework is inadequate to address the nuances of the diversity in the cultural heritage and cultural expressions in the Indian subcontext. Indian law-makers have been unmindful of the specificities the TK in India need and have put in place a system that is primarily IPRs based. Despite the inherent flaws of generalization and fragmentation of rules, the international framework offers a more advanced and articulated regime, for which India has not shown any keenness.

7 Conclusion

To conclude, India has failed to take a decisive stand toward the protection of its traditional knowledge and folklore at the national and international levels. While India has made piecemeal changes to its regulatory environment, the focus is more on the genetic resources and medicinal knowledge, targeting transnational misappropriation. Misappropriation within the national boundaries is least addressed specifically in the context of both tangible and intangible traditional cultural expressions leading to widespread commercial exploitation. The copyright and trademark laws are not suitably amended to the address this concern despite having several best practices world over. Practices such as nationalization of heritage and paying public domain seem to have found no place in the policy owing to domestic pressure. The comprehensive *sui generis* regime for the protection of TK seems to have found no place in the National IPR policy and seems to have been discarded altogether. This excessive focus on the TDKL for defensive protection may be suitable for that knowledge that is truly in the public domain and widely known. However, documentation and disclosure of the not so well-known knowledge and putting them in the public domain may do more harm than good.

In the international context, the last two decades had witnessed great momentum toward legal protection of TK and indigenous rights. India, on its part, had been making the right noises. However, consensus is still eluding. The CBD and FAO Treaties have provided a positive framework, however, if key State such as the USA is not a party to the same, the likelihood of success in the international processes is rather limited. The search for a comprehensive *sui generis* regime for the protection of TK has been met with constant deadlock at the WIPO IGC owing to opposition from developed countries. Efforts at the WTO Doha negotiations are yet to bear results. A few amendments or proactive interpretation of TRIPS agreement could be the best way forward. Given the current geopolitical scenario, it would be realistic for India and the developing country groupings at the WTO to focus on amending the

¹⁴⁷Protecting Traditional Knowledge, supra n. 96, p. 4.

TRIPS Agreement. TK in WTO would ensure protection against misappropriation, disclosure and could lead to “benefit sharing” in the case of legal appropriation. The WTO could also offer higher and better protection for TK regarding implementation and enforcement of norms than any current, or future international treaties framework could achieve.

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Transnational Influences in Trade Mark and Domain Name Protection: The Indian Experience

V. K. Unni

Abstract The last two decades have witnessed dramatic rise in the growth of legal protection for trade marks on a global scale. Before India liberalised its economy, the law safeguarding trade marks in India had a limited role because of its closed economy and monopolistic markets. Trade mark law has recently undergone major changes both nationally and internationally. In India, this change is a result of major international agreements like the TRIPS Agreement, Paris Convention, the opening up of Indian economy, widespread use of Internet, and developments in case-law. This chapter makes an attempt to cover the major international developments which have influenced the trade mark law in India.

Keywords Trade mark · Collective marks · Well-known trade marks · Deceptive similarity · Dilution · Cybersquatting · UDRP · Domain names

1 Brief History of Trade Marks

Trade marks have a very long history and are considered as one of the oldest established human practices.¹ During ancient days in countries like Egypt, responsibility was fixed for defective bricks by requiring that each one carries marks traceable to the brickyard and the particular slave who made it. The mark was very helpful in determining the physical origin or source of the brick.² Signboards were also used by ancient Greeks and Romans.³

During the medieval times, i.e. from the fourteenth to the sixteenth centuries, there was large-scale expansion of trade. Naturally, this led to an increased use of marks of many different kinds. As a result of common usage of mark, scholars categorised

¹Fletcher (1981–1982), p. 301.

²Rogers (1949), p. 173.

³Greenberg (1951), p. 878.

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them under two heads. First were the personal marks which identified individuals and included coats of arms and signets or seals. The second category was the proprietary marks which indicated the ownership of goods.⁴ The significant feature of medieval period was the rise of the guilds, which essentially were organisations that were closely controlled by groups of artisans. All the members of the guild had to use a compulsory production mark, and this was stipulated to fix the responsibility for low quality merchandise.⁵

In the medieval times, the use of marks to identify the source and origin took a completely different turn with the expansion of trade and the introduction of guild marks. Each guild group was forced by statutory regulations to fix a specific mark to all examples of a certain product. Such a measure would identify the source and origin of the goods to detect and penalize the manufacturer who is responsible for a defect or to facilitate the owner to identify and reclaim the goods in case of shipwreck or piracy of the goods.⁶

In the modern era, with the exponential growth of international trade and distribution of goods and services throughout the globe, the source and origin function of trade marks are undergoing some major conceptual changes. In the modern era, many trade marks are licensed, and that is something which the consumers are aware of. They do not want nor expect the product to have been manufactured by anyone in particular. At the same time, they expect some particular organization to ensure that it is of the same kind and quality as the product that they have purchased hitherto under that trade mark.⁷

2 Trade Mark Law in India

In India, the first law dealing exclusively with trade mark was enacted in the year 1940. Prior to the year 1940, there existed no exclusive statute to protect trade marks in India. The law applicable on the subject was based on common law as applied in England. Issues relating to infringement, passing off, etc., were decided by applying Section 54 of the Specific Relief Act, 1877, and issues relating to registration were decided by obtaining a declaration as to ownership of the trade mark under the Indian Registration Act, 1908. The Trade Marks Act, promulgated in 1940, which was essentially a copy of the UK Trade Marks Act, 1938, brought in an institutional mechanism for the registration and statutory protection of trade marks in India. The Trade Marks Act, 1940, was replaced by the Trade and Merchandise Marks Act, 1958 (Old TM Act). The Old Act in effect combined the provisions of Trade Marks Act, 1940, the Merchandise Marks Act, 1889, and some provisions relating to trade

⁴Diamond (1983), p. 230.

⁵Ibid., pp. 234–35.

⁶Schechter (1970 Reprint), p. 335.

⁷Shanahan (1982), p. 239.

marks contained in Indian Penal Code, 1860, Code of Criminal Procedure, 1973, and the Sea Customs Act, 1878.

Later on, the Trade and Merchandise Marks Act, 1958, was replaced with the new Trade Marks Act, 1999 (“New TM Act”), which came into force in 2003. The new legislation incorporates various new provisions so as to make it compatible with the provisions contained in the Trade Related Aspects of Intellectual Property Rights (“TRIPS”) Agreement of the World Trade Organisation (“WTO”).

3 TM Act 1999

The New TM Act which was passed by the Indian Parliament in 1999 and brought into force in 2003 contained all the recommendations of the parliamentary standing committee on industry including those relating to the concept of well-known trade marks. Trade Mark Law provides an excellent example of the manner in which international legal principles have influenced the domestic implementation of an Indian law. The main source of the Old TM Act was the corresponding trade mark legislation in UK.⁸ This meant that the Indian courts adopted the various principles and concepts of trade mark law which evolved in UK from time to time. Thus, the Registrar of Trade Marks and the courts in India accepted the interpretation and guidelines enunciated in various cases decided by the UK courts and adapted it to suit the local circumstances.

Interestingly in 1994, UK replaced its old legislation with the Trade Marks Act 1994. This was necessitated by UK’s adoption of the EU Trade Marks Directive.⁹ The new UK Act essentially implements the Directive and is fully based on it. Some of the salient features of the UK Act were: (a) comprehensive definition to trade mark; (b) adding new terms like “graphical representation” and “likelihood of confusion; (c) allowing shape marks; etc.

The new Indian law is structurally similar to the UK Act, but it has some differences with respect to certain definitions.¹⁰ According to the new law “*trade mark means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours ...*”.¹¹ This means that a trade mark can be given for shape of goods, packaging of a product or even a colour combination.

Following are the areas under Indian Trade Mark law where international principles have played a lead role.

⁸UK Trade marks Act 1938.

⁹Council Directive No. 89/104/EEC.

¹⁰Jamsandekar (2006), p. 518.

¹¹Trade Marks Act 1999, Sect. 2(zb).

1. Service Marks

The new law allows for the registration of trade marks for services, apart from goods. Thus, service marks can be registered for the following sectors like insurance, banking, consulting, construction, transport, education, hospitality, software services, entertainment, advertising. For example, Indian Hotels Ltd. can register the service mark Taj Hotels for its hospitality service. The international conventions like TRIPS Agreement have played a major role in the inclusion of service marks within the ambit of TM Act 1999.¹² TRIPS Agreement mandates that service marks shall be protected in the same way as marks that differentiate goods.

2. Collective Marks

The new law contains provisions for registration of collective marks which belong to an association or a group of persons, and the use thereof is reserved for the members of the group or associations. Examples of collective marks are marks like Confederation of Indian Industry (CII) which will in turn be used by any company which is a member of CII. The incorporation of the provision dealing with protection of collective marks clearly reflects the influence of international treaties in Indian trade mark law as collective marks are provided protection under Article 7 bis of Paris Convention.

3. Well-known Trade Marks

India was under an obligation to comply with the relevant provisions of Paris Convention on well-known trade marks.¹³ The new law has introduced provisions which define a well-known trade mark and also makes special provisions for such trade marks. These special provisions effectively remove the hurdle of fulfilling three important requirements of the absolute grounds of refusal for registration of trade mark/service mark and facilitate the registration of well-known trade marks in India.¹⁴ According to the new law

‘well-known trade mark’, in relation to any goods or services, means a mark which has become so to the substantial segment of the public which uses such goods or services that the use of such mark in relation to other goods or services would be likely to be taken as indicating a connection in the course of trade or rendering of services and a person using the mark in relation to the first-mentioned goods or services. (Section 2(zg))

Under the provisions of the new law, the registration of identical or similar marks is prohibited on identical or similar goods if there exists a likelihood of confusion on the part of the public, which includes likelihood of association (*provisio* to Section 11(1)). The new law clearly specifies the factors to be considered so as to find out whether the mark is a well-known trade mark (Sections 11(6) to (8)). Furthermore, it also lays

¹²TRIPS Agreement Art. 15 provides that any sign, or any combination of signs, capable of distinguishing the goods and services of one undertaking from those of other undertakings, must be eligible for registration as a trade mark, provided that it is visually perceptible.

¹³Paris Convention Art. 6 bis.

¹⁴Trade Marks Act 1999, proviso to Sect. 9(1)(c).

down factors or conditions which should not be considered to determine whether the mark is a well-known trade mark (Section 11(9)).

Under the new law (Section 11(1)(a)–(b)), the registration of a trade mark is not allowed under the relative grounds of refusal if,

1. the applicant's trade mark is identical with or similar to an earlier trade mark, and
2. the applicant wants his mark to be registered in respect of goods or services which are not similar to those for which the earlier trade mark is registered.

If the above two conditions are present, the applicant's registration shall not be allowed if or to the extent that the earlier trade mark is a well-known trade mark in India and to the extent that its use without due course would take unfair advantage of or be detrimental to the distinctive character or repute of the earlier trade mark (Section 11(2)).

The Registrar on his own may not be able to prevent registration as there is an express provision to the effect that the registration shall not be refused unless an objection is raised on this ground by the proprietor of the well-known trade mark (Section 11(5)). This calls for the proprietor of a well-known trade mark to remain very vigilant by keeping a close watch on the registry's journal and take immediate steps to oppose applications filed with respect to marks which are identical or similar to the well-known trade mark on dissimilar goods.

Terms like "likelihood of confusion on the part of public which includes likelihood of association" used as part of the well-known trade mark definition can be subject to various interpretations. The European Court of Justice (ECJ) while interpreting the term held that mere association alone was not enough to justify a finding of a likelihood of confusion and the concept of likelihood of association was not an alternative to that of likelihood of confusion.¹⁵ Indian courts can take help from the ECJ's judgment to resolve any confusion with respect to the usage of terms like likelihood of association.

It is heartening to note that many of the multinational companies have actually started to leverage the special protection given by well-known trade marks and have managed to stop third parties from using identical marks on dissimilar goods. For instance, the famous automobile manufacturer Ford was able to successfully restrain another firm based in Kolkata, which was using the Ford trade mark on footwear.¹⁶ Similarly the famous watch manufacturer Rolex was able to convince the court that its trade mark was well-known and thus was able to restrain the defendant from using the same mark with respect to artificial jewellery.¹⁷

4. Dilution Jurisprudence in Trade mark Infringement

The new Trade Mark law has provisions dealing with infringement of trade marks more or less similar to the old law (Section 29(1)–(9)). It provides that a registered

¹⁵*Sabel BV v. Puma AG* [1998] R.P.C. 199.

¹⁶*Ford Motor Company and Anr. v. C.R. Borman and Anr.*, 156 (2009) DLT 1.

¹⁷*Rolex Sa v. Alex Jewellery Pvt. Ltd. and Ors.*, IA. No. 279/2008 in CS (OS) 41/2008 (Delhi High Court).

trade mark will be infringed if any third party uses a mark in the course of trade which is identical or deceptively similar to the registered trade mark with respect to identical or similar goods/services covered by registration (Section 29(1)). Thus in ordinary cases, a person can use a mark which is identical or deceptively similar to the registered trade mark upon non-similar goods/services. But the law provides an important exception here. In case the registered trade mark is considered as a mark having reputation, then the unauthorised use of an identical or similar mark with respect to dissimilar goods/services also will be considered as an act of infringement (Section 29(4)).

Thus, the New TM Act has introduced the international principle of trade mark dilution. Dilution means any harm to a trade mark by lessening its ability to distinguish goods or services in the market and is considered as an exception to the consumer confusion test of trade mark infringement. Under the Old TM Act, the extent of protection was limited to the goods and services covered by the registration specification, whereas dilution extends this protection to dissimilar goods. The content of the relevant section has substantial overlap with one of the relative grounds for refusal of registration provided in the New TM Act (Section 11(2)). According to one renowned scholar, although the statutory language does not mention dilution by name, it mirrors an equivalent basis for infringement in Section 10(3) of the UK's Trade Marks Act of 1994.¹⁸

The judiciary has also dealt with the concept of trade mark dilution and the Delhi High Court in the year 2011 observed the following about the same.

The doctrine of dilution, which has recently gained momentum, particularly in respect of well known trade marks emphasizes that use of a well known mark even in respect of goods or services, which are not similar to those provided by the trade mark owner, though it may not cause confusion amongst the consumer as to the source of goods or services, may cause damage to the reputation which the well known trade mark enjoys by reducing or diluting the trade mark's power to indicate the source of goods or services.¹⁹

5. Amendments Made to Trade Marks Act

The Indian Cabinet approved the introduction of the Trade Marks (Amendment) Bill in February 2007. Thereafter, the Bill was introduced in the Lok Sabha in August 2007 and to the Parliamentary Standing Committee on Commerce, and the said Committee presented its report to both the Houses of Parliament in March 2008. The Committee agreed with the proposal and objectives of the Bill and was in agreement with most of the provisions of the Bill. However, the amendment could not be passed because of the elections and dissolution of 13th Lok Sabha in 2009. The modification in the Trade Marks (Amendment) Bill is primarily intended to help India in joining Madrid Protocol on Trade Marks.²⁰ In 2009 when the Parliament met again it had to

¹⁸Gangjee (2008), p. 623.

¹⁹*Tata Sons Ltd. v. Manoj Dodia and Ors.* ¶ 6 full text available at <http://delhicourts.nic.in/DEC%2011/Tata%20Sons%20Ltd.%20Vs.%20Hoop%20Anin.pdf>.

²⁰Financial Express dated November 22, 2008.

be reintroduced as Trade Mark (Amendment) Bill 2009.²¹ The lower house of Indian Parliament Lok Sabha passed the Bill in December 2009 and the upper house Rajya Sabha passed it in August 2010.²² Thereafter the amendment was notified in July 2013.²³

Madrid Protocol which was adopted in 1989 is one of the two treaties which form part of the Madrid System for International Trade Mark Registration.²⁴ The Madrid Protocol is an easy and cost-effective system meant to facilitate the international registration of trade marks.²⁵ It helps the nationals of member countries to obtain protection of their trade marks within the prescribed period of 18 months by filing a single application with one fee and in one language in their country of origin, which in turn is sent to other designated countries through the International Bureau (Article 5(2)). One of the major disadvantages of the Madrid Protocol is that if the basic application/registration is refused, withdrawn or cancelled within five years, then it would lead to the refusal, withdrawal or cancellation of the international registration to the same (Article 6(3)).

Thus in order to harmonise the Indian law on trade marks with the Madrid Protocol, the Trade Marks (Amendment) Act 2010 contains provisions to

1. prescribe a period of 18 months for the registration of trade marks in line with the provisions of the Madrid Protocol²⁶;
2. provide for an international application by a person holding an international registration through extension of protection under the Common Regulations (Section 36D.(1)–(5));
3. provide that the provisions of Sects. 9 to 21, 63 and 74 will apply *mutatis mutandis* in relation to an international registration, as if the international registration were an application for registration of a trade mark (Sect. 36E.(4));
4. provide that where a registered owner of a trade mark makes an international registration of that trade mark and designates India, the international registration from the date of the registration will be deemed to replace the registration held in India without prejudice to any right acquired under the previously held registration and the Registrar will, upon request by the applicant, make the necessary entry in the Register (Sect. 36E.(6)).

²¹ Full text of the Bill is available at <http://164.100.24.219/BillsTexts/LSBillTexts/PassedLoksabha/Trade%20Marks,%20106-C.pdf>.

²² Details about lower house passing the Bill at http://articles.economictimes.indiatimes.com/2009-12-19/news/27645512_1_madrid-protocol-trademark-trade-marks and upper house passing the Bill at <http://www.thehindu.com/business/Industry/article563015.ece>, full text of the Trade Marks (Amendment) Act, 2010 is available at http://www.ipindia.nic.in/tmr_new/tmr_act_rules/TM_Amendment_Act_2010.pdf.

²³ Full text of the notification is available at http://ipindia.nic.in/iponew/tmr_AmendmentRules_2013.pdf.

²⁴ Wojciechowski (2008). The other treaty is the Madrid Agreement drafted in 1891.

²⁵ Protocol *Relating to the Madrid Agreement Concerning the International Registration of Marks*, full text at http://www.wipo.int/madrid/en/legal_texts/trtdocs_wo016.html.

²⁶ Trade Marks (Amendment) Act 2010, amendment to Sect. 23(1).

5. time-period for filing a notice of opposition of published applications is increased from three to four months, however, the discretion which was earlier given to the Registrar to increase the time period has been removed²⁷;
6. simplify the law relating to transfer of ownership of trade marks by assignment or transmission and bring the law generally in tune with international practice and modern business needs²⁸;
7. delete Chapter X of the TM Act, which deals with special provisions for textile goods, because of redundancy.²⁹

4 Emerging Issues of Trade Mark Use in the Internet

The influence of international legal principles is not only restricted to trade mark law. It extends to the misuse of trade marks in the virtual world of Internet also. It is quite evident that trade marks have tremendous potential in the virtual world of Internet also. The popularity of trade marks in the virtual world has thus resulted in many disputes between the trade mark owners and people who used those trade marks in the virtual world without authorisation of the owner.

With the rapid growth of Internet, it became necessary to develop a language that would enable computers on the network to communicate with each other.³⁰ One language called Internet Protocol (IP) is a uniform naming system that points out to the server or network on which a particular computer is connected. IP addresses are essentially a universal numerical code designating the location of every computer on the Internet.³¹ Since these long strings of numbers were very hard to remember, the Internet engineers developed a shorthand device for IP addresses called domain names. Natural choices for domain names are those with importance for the entity attracting Internet users, like a product or company name.³² But when a trade mark is used as a domain name it can lead to serious conflicts.

²⁷Ibid., amendment to Sect. 21(1).

²⁸Ibid., Statement of Objects and Reasons.

²⁹Ibid., Cl. 7.

³⁰Barry M. Leiner et al., *A Brief History of the Internet*, Internet Society, at <http://www.isoc.org/internet/history/brief.shtml>.

³¹*The Domain Name System: A Non-technical Explanation--Why Universal Resolvability Is Important*, InterNIC, at <http://www.internic.org/faqs/authoritative-dns.html>.

³²Howard (2001), p. 638.

5 Domain Name Disputes and World Intellectual Property Organisation (“WIPO”)

Whenever a trade mark is used as a domain name it can lead to problems because there can be only one domain name for each website.³³ However under trade mark law, there can be a number of firms/companies with rights in the same trade mark. For example, an airline may trade mark the term “United” for air travel service. Other companies may use the name “United” for their products as long as there is little likelihood of confusing the source of the registered trade mark “United” Airlines with, for example, United Plumbing.³⁴ On the Internet, however, there can only be one “united.com”. United Airlines and United Plumbing cannot both use the domain name “united.com”.³⁵

The singularity of domain names essentially led to the practice of Cybersquatting.³⁶ Cybersquatting means the registering, trafficking in or using a domain name with bad faith to profit from the goodwill of a trade mark belonging to someone else. As the Internet grew more popular and larger companies sought to use their trade marks as domain names, many of these companies found that their trade marks had already been registered by cybersquatters.³⁷ In many cases, cybersquatters demanded money from trade mark owners as a consideration for handing over domain names.³⁸ The trade mark owner was left with only two options. They either had to pay the ransom to the cybersquatters and get the domain name back or to launch a costly litigation to recover the domain name.

Intellectual property organisations, trade mark owners, and legal experts joined to deal with this threat so that a solution could be found. Since the increase in cybersquatting was attributed to the lack of any regulatory control over domain names, a regulator to control the domain name system called Internet Corporation for Assigned Names and Numbers (“ICANN”) was formed in 1998.³⁹ ICANN had the authority to create a dispute resolution process for handling domain name disputes.⁴⁰ With the help of the World Intellectual Property Organization (WIPO), ICANN framed a dispute resolution policy that would help to decide disputes quickly and inexpensively while ensuring procedural fairness for all parties and coexisting with existing national courts as a solution to cybersquatting.⁴¹ This dispute resolution policy is known as the Uniform Dispute Resolution Policy (UDRP).⁴²

³³Ibid.

³⁴Meyers (2002), p. 1182.

³⁵Ibid.

³⁶Thornburg (2000), p. 160.

³⁷Ibid.

³⁸*Panavision Int’l, L.P. v. Toeppen*, 141 F.3d 1316 at 1319 (9th Cir. 1998).

³⁹*Management of Internet Names and Addresses: Intellectual Property Issues*, para. 14, (WIPO:Geneva: 1999).

⁴⁰Ibid., para 24.

⁴¹Meyer (2002), supra note 34, pp. 1185–86.

⁴²UDRP’s full text available at <http://www.icann.org/en/udrp/udrp-policy-24oct99.htm>.

Anyone who wants to register their domain names with ICANN are required to submit to the UDRP, in the event that a domain name dispute arises.⁴³ The UDRP enables trade mark holders to submit a complaint against the alleged cybersquatter to an ICANN-approved arbitration service. The respondent will be intimidated about the complaint and may give a reply to it within twenty days.⁴⁴ The arbitration panel then makes a determination within fourteen days.⁴⁵ The arbitration panel will decide whether the cybersquatter has registered the domain name in bad faith or not. In case the panel finds any bad faith registration the domain name shall be transferred to the trade mark holder.⁴⁶

Under the UDRP, three conditions must be satisfied before a domain name is transferred to a trade mark holder. Firstly, the domain name must be identical or confusingly similar to a trade mark or service mark in which the complainant has rights. Secondly, the domain name holder should not have any right or legitimate interest in the domain name, and thirdly, the domain name must have been registered and used in bad faith.⁴⁷

The UDRP also gives four examples of bad faith.⁴⁸ The first happens when an individual intends to sell or rent the domain name to a trade mark owner for more than the cost of registering the domain name. Second example covers a situation when an individual registers a domain name to prevent a trade mark owner from registering it; however, in this case, there must be evidence that the alleged cybersquatter has previously engaged in similar conduct. The third example involves registering a domain name for the purpose of disrupting the business of a competitor. Lastly, bad faith may also include using a domain name intentionally to attract Internet users to a website for commercial gain.

While dealing with a complaint, the arbitration panel must abide by the procedural requirements provided in the UDRP Rules.⁴⁹ The panel will decide the admissibility, relevance, materiality, and weight of the evidence.⁵⁰ The UDRP Rules, prohibit in-person hearings, including hearings by teleconference, video conference, and Web conference, unless the panel decides such a hearing is necessary.⁵¹ Since live hearings are not there, the panel decides the dispute on the basis of the statements and documents submitted in the complaint and answer.⁵²

⁴³Ibid., para 4.

⁴⁴UDRP Rules, para 5 (a), full text of UDRP Rules available at <http://www.icann.org/en/dndr/udrp/uniform-rules.htm>.

⁴⁵Ibid., para 15(b).

⁴⁶UDRP, supra note 44 para 4(i).

⁴⁷Ibid., para 4(a)(i)–(iii).

⁴⁸Ibid., para 4(b)(i)–(iv).

⁴⁹Ibid., para 1.

⁵⁰UDRP Rules, supra note 44, para 10.

⁵¹Ibid., para 13.

⁵²Ibid., para 15(a).

The UDRP contains some provisions dealing with domain name dispute resolution in fora other than its own.⁵³ The UDRP Rules provide that the panel shall decide the complaint in accordance with any rules or principles of law it deems applicable.⁵⁴ In case any legal proceedings were initiated prior to or during the UDRP proceeding, the panel can decide to suspend, terminate, or proceed to a decision.⁵⁵ More importantly, the UDRP never prevents the domain name holder or the trade mark holder from submitting the dispute to a court before or after the dispute is heard by the ICANN-approved arbitration service.⁵⁶

Many companies including those from India have utilised the UDRP of ICANN to get back the domain name variants of their precious trade marks. Among the reputed Indian trade marks that have been granted relief under the UDRP are Tata with respect to the domain name *tata.org*, The Economic Times with respect to the domain name *theeconomictimes.com*, Phillips India with respect to the domain name *phillipsindia.com*, Mahindra and Mahindra for the domain name *mahindra.com*, Trident Hotels of the Oberoi group for the domain name *tridenthotels.com*.⁵⁷

One of the first cases decided by a court in India was that of *Yahoo v. Akash Arora*.⁵⁸ In this case, the plaintiff who owned the domain name *yahoo.com* wanted to restrain the defendant from using the domain name *yahooindia.com*. Since the trade mark law did not contain provisions dealing with registration of domain names, the plaintiff sought an injunction to restrain the defendant under the doctrine of passing off.⁵⁹

Both trade mark law and passing off have common origins and are similar in many ways. Passing off is a tort or to put it differently, it is the common law form of trade mark law.⁶⁰ In the case of passing off it is the business goodwill that is being protected and such goodwill may be reflected in the form of a mark, sign, get-up, or anything.⁶¹ Many of the passing off actions will be for an unregistered trade mark, because the owner may be lethargic in registering the mark or it may not be registrable per se. This means that for a party to succeed in a trade mark infringement case his/her trade mark should be registered. However in the case of an action dealing with passing off even if the mark is not registered, he/she may win the case if the mark/business has got the requisite goodwill. An unregistered mark does not constitute a property right; in fact it is only the goodwill of the business which is protected by a tort of passing off. Such an action will be successful if the plaintiff demonstrates that the

⁵³Ibid., para 18.

⁵⁴Ibid., para 15(a).

⁵⁵Ibid., para 18(a).

⁵⁶UDRP, Supra note 44 para 4(k).

⁵⁷Basheer (2001).

⁵⁸[1999] F.S.R. 931.

⁵⁹Ibid., at 933.

⁶⁰Ibid., at 935.

⁶¹Ibid., at 936.

other party conducts its business in such a way as to mislead the public into thinking that one's goods or services are those of another.⁶²

Thus in the *Yahoo* case, the Court decided in favour of the plaintiff and held that a domain name served the same function as a trade mark and was therefore entitled to equal protection.⁶³ According to the court, as the domain names of the plaintiff and defendant were almost identical there was every possibility of an Internet user being confused and deceived into believing that the domain names had a common source or a connection.⁶⁴ The court thus restrained defendants and all others acting on their behalf from operating any business or selling, offering for sale, advertising and/or in any manner dealing in service or goods on the Internet or otherwise under the trade mark/domain name "Yahooindia.com" or any other trade mark/domain name which is identical with or deceptively similar to the plaintiff trade mark "Yahoo!"⁶⁵

The Supreme Court of India also had the occasion to deal with a case involving trade mark domain name conflict which was an appeal against the decision of the Karnataka High Court.⁶⁶ The appellant Satyam Infoway held several domain name registrations such as www.sify.net, www.sifymall.com, www.sifyrealestate.com. In the year 2000, the respondent, Siffynet Solutions Pvt. Ltd., began Internet marketing under the domain names www.siffynet.net and www.siffynet.com. Against this the appellant filed the case which finally reached the Supreme Court. The court allowed the contentions of the appellant and noted that a domain name in the present day context might have got all the characteristics of a trade mark and could be the subject matter of an action for passing off. Finally, the respondent was restrained from using the domain name www.sify.net.⁶⁷

In the last few years as a result of the increased use of Internet, disputes relating to cybersquatting have increased manifold. Various High Courts have consistently applied the law relating to passing off with respect to cybersquatting. These include *Rediff Communication Ltd. v. Cyberbooth*,⁶⁸ *Dr. Reddy's Laboratories Ltd. v. Manu Kosuri*,⁶⁹ *Tata Sons Ltd. v. Manu Kosuri*,⁷⁰ *Acqua Minerals Ltd. v. Pramod Borse & Anr.*,⁷¹ *Info Edge (India) Pvt. Ltd. & Anr. v. Shailesh Gupta & Anr.*,⁷² *Arun Jaitley v. Network Solutions Pvt. Ltd & Ors.*⁷³ etc.

⁶²Rosler (2007), p. 101.

⁶³Supra note 210, p. 936.

⁶⁴Ibid.

⁶⁵Ibid. at 939.

⁶⁶Satyam Infoway Ltd. v. Sifynet Solutions Pvt. Ltd., AIR 2004 SC 3540.

⁶⁷Ibid.

⁶⁸AIR 2000 Bombay 27.

⁶⁹2001 PTC 859 (Del).

⁷⁰2001 PTC 432 (Del).

⁷¹2001 PTC 619 (Del).

⁷²2002 (24) PTC 355 (Del).

⁷³Decided on 4th July 2011, full text available at <http://www.indiankanoon.org/doc/754672/>.

In US it is possible to register a domain name as a trade mark.⁷⁴ Applications for registration of marks consisting of domain names are subject to the same requirements as all other applications for trade mark registration.⁷⁵ To qualify as a trade mark or service mark, the domain name must serve as an indicator of source and not merely as an informational part of an Internet Web address.⁷⁶

In India also registration of domain names as trade marks shall be allowed by the Registrar if the domain name is being used as a trade mark or a trade name.⁷⁷ However, such registration will be subjected to the usual criteria being followed in the cases of other marks.⁷⁸

6 Future Developments and Challenges

As the Internet usage becomes more and more widespread, the issues pertaining to the use of trade marks as domain names, meta-tags, etc., will go up. Meta-tag or meta-data is a keyword or phrase embedded in a website's hypertext markup language code as a means for Internet search engines to identify and categorise the contents of the website.⁷⁹ Meta-tags are not visible to normal users on the website itself, however; a search engine seeking particular keywords will find and list that particular site. The more often a keyword appears in the hidden code, the higher a search engine will rank the site in its search results. In various jurisdictions including India, trade mark owners have challenged the unauthorised use of their trade mark as a meta-tag.⁸⁰

In the case of *Himalaya Drug Company v. Sumit*⁸¹ the Delhi High Court held that the meta-tag of the trade mark in the source code of the defendant's website was strong enough evidence to prove the ill-intention of the infringer who had replicated the database of the plaintiff's website and thus violated the rights of the plaintiff.

Even though the unauthorised use of a trade mark as a meta-tag can be generally considered unlawful, this approach is not universal.⁸² Numerous cases filed by Playboy Magazine demonstrate the complexity of the law in this area, and the diversity of outcomes even within one legal jurisdiction. In the US cases of *Playboy Enterprises*

⁷⁴Examination Guide No. 2-99, *Marks Composed, in Whole or in Part of Domain Names* (USPTO 1999) available at <http://www.uspto.gov/go/tac/notices/guide299.htm>.

⁷⁵*Ibid.*

⁷⁶*Difference Between Trade marks and Domain Names* at http://www.inta.org/index.php?option=com_content&task=view&id=196&Itemid=59&getcontent=1.

⁷⁷Draft Manual (Revised) for Trade Mark Practice & Procedure at 55, details at http://ipindia.nic.in/tmr_new/TMR_Manual/TMR_DraftManual_11March2015.pdf.

⁷⁸*Ibid.*

⁷⁹Paylago (2000), p. 471.

⁸⁰Chatterjee and Adams (2002), pp. 27–30.

⁸¹2006 PTC 112 (Del).

⁸²*Intellectual Property on the Internet: A Survey of Issues* at 68 (WIPO, Geneva 2002)

Full text at <http://www.wipo.int/export/sites/www/copyright/en/e-commerce/pdf/survey.pdf>.

*Inc. v. Calvin Designer Label*⁸³ and *Playboy Enterprises, Inc. v. Asia Focus International, Inc.*,⁸⁴ the respective courts have held in favour of the plaintiff Playboy and have restrained the defendants from using the marks ‘Playboy’ and ‘Playmate’ as meta-tags on their websites, as well as in related domain names. However, in the case of *Playboy Enterprises Inc. v. Welles*, the court held that use of the Playmate trade mark as a meta-tag by a former Playmate of the year, in order to help the consumers to locate her website amounted to fair use.⁸⁵

In another landmark case⁸⁶ a video rental company, West Coast Entertainment Corporation, planned to use the word “moviebuff.com” as a domain name for its website and using a similar term in the meta-tags for the site.⁸⁷ Brookfield who had trade marked the term “MovieBuff”, sued West Coast for trade mark infringement.⁸⁸ The court ruled in favour of Brookfield and reasoned that Internet users searching for Brookfield’s mark on search engines using meta-tags would find themselves at West Coast’s website.⁸⁹

Another issue which may arise in future is the protection of trade marks in the virtual world like Second Life.⁹⁰ Second Life is a 3-D virtual world, created by Linden Labs, where the residents can build and own property parcels.⁹¹ Furthermore, residents can craft virtually anything and own the intellectual property rights to their creations.⁹² Thus there can be a scenario when a resident has created a sports shoe with a famous trade mark on it and has started selling it in the virtual world under the said trade mark.⁹³ There are many stores in the virtual world which are selling many branded goods, although they may not have any connection whatsoever with the real-world owners of the respective trade marks associated with such goods.⁹⁴ The main question here is whether such an act can be considered as trade mark infringement under the existing law.

Yet another issue which may come before the courts is the one pertaining to trade mark infringement with reference to Internet keywords. Internet keywords are responses given to any search query which is put into the search box of any Internet search engine. The response given by the search engine involves two lists of uniform resource locators. The first list gives the natural results, which are responses to the search query terms and the second list provides sponsored results or spon-

⁸³985 F. Supp. 1220 (N.D. Cal. 1997).

⁸⁴1998 U.S. Dist. LEXIS 10459 (E.D. Va. 1998).

⁸⁵7 F. Supp.2d 1098, 47 U.S.P.Q.2d 1186.

⁸⁶*Brookfield Communications, Inc. v. West Coast Entertainment Corporation*, 174 F.3d 1036 (9th Cir.1999).

⁸⁷*Ibid.* at 1042.

⁸⁸*Ibid.* at 1043.

⁸⁹*Ibid.* at 1057.

⁹⁰More details at <http://secondlife.com/>.

⁹¹Galbraith (2009), para 1.

⁹²*Ibid.*

⁹³Mehra et al. (2008), pp. 122–124.

⁹⁴*Ibid.*

sored links.⁹⁵ The sponsored results are triggered as a result of an advertiser paying the search engine company for its advertisement to appear in response to certain search queries. This can raise questions about potential trade mark infringement. The issue which the court may have to decide is whether a sponsored link triggered by a keyword, which comprises of a registered trade mark constitutes trade mark infringement on behalf of the search engine company.⁹⁶

Internet technologies like hyperlinking help the users to access content stored in the files of millions of individual computers and facilitate them to use links to retrieve information from files on the same or other websites.⁹⁷ However, linking can also raise concerns of trade mark infringement if it explicitly or implicitly suggests an unwarranted association between the linking and linked sites, and induces a user to believe that an unassociated web page is affiliated, approved, or sponsored by the trade mark owner.⁹⁸ In the US case of *Ford Motor Company v. 2600 Enterprises*,⁹⁹ the court did not accept the claims made by the plaintiff for alleged unfair competition and trade mark dilution resulting from the act of linking as the defendants did not use the plaintiff's mark in commerce, nor in connection with the sale, or advertising for sale, of any goods or services. The decided cases in countries like UK and US should be of immense help to Indian judges in keeping themselves abreast of the developments in the field of Internet so that they can effectively deal with the challenges which the cyberspace pose to intellectual property owners.

7 Jurisdictional Issues in Cyber World

While dealing with disputes on cybersquatting or uses involving meta-tags and Internet keywords, courts in future may be confronted with a situation wherein the defendant is located in a foreign country and may not be amenable to the court's jurisdiction. In such circumstances, important questions can arise with respect to the jurisdiction of the court to decide the particular issue. The case of *(India TV) Independent News Service Pvt Ltd v. India Broadcast Live LLC*¹⁰⁰ involved a similar issue. In the said case, the Delhi High Court ("Delhi HC") had to decide whether the first defendant who was a US company that had no place of business in India would be amenable to an Indian Court's jurisdiction. The Delhi HC after satisfying three important requirements held that the court can validly exercise its jurisdiction and that the defendant was subject to the jurisdiction of the court. The requirements considered were whether:

⁹⁵Shemtov (2008), p. 471.

⁹⁶Ibid.

⁹⁷More details available at <http://www.bitlaw.com/internet/linking.html>.

⁹⁸Supra note 234, p. 71, para 137.

⁹⁹177 F. Supp. 2d 661, 2001 U.S. Dist. Lexis 21302 (E.D. Michigan, December 20, 2001).

¹⁰⁰[2008] F.S.R. 2.

- *the defendant's activities had a sufficient connection with India, and*
- *the cause of action arose out of the defendant's activities within India and*
- *the exercise of jurisdiction would be reasonable.*¹⁰¹

Finally, the court permitted the defendants to use the domain name which was involved in the dispute with the disclaimer that “*This website has no connection, affiliation or association whatsoever with India TV, the Indian Hindi news and Current Affairs television channel.*”¹⁰²

It is logical to expect a substantial increase in the number of disputes having an international connection. Recently the Delhi High Court had to deal with a similar issue in the case of *Banyan Tree Holding Ltd v. A. Murli Krishna Reddy*.¹⁰³ The plaintiff was part of a business group in hospitality business registered in Singapore, and it had adopted since 1994 the word mark “Banyan Tree” and also the Banyan Tree device.¹⁰⁴ The plaintiff maintained the websites www.banyantree.com and www.banyantreespa.com since 1996, and both the websites are accessible in India.¹⁰⁵

In October 2007, the plaintiff learned that the defendants had initiated work on a project under the name Banyan Tree Retreat. The plaintiff averred that the word mark and the device adopted by the defendants in relation to their retreat were deceptively similar to that of the plaintiff. The plaintiff alleged that the use of the said mark and device by the defendants was dishonest and was an attempt to encash on the reputation and goodwill of the plaintiff and was calculated to cause confusion and deception among the public by passing off the services of the defendants as that of the plaintiff. Accordingly, the present suit was filed by the plaintiff for an injunction to restrain the defendants from the use of the said mark and device.¹⁰⁶ However, it should be noted that the plaintiff did not have a valid trade mark registration in India.¹⁰⁷

According to the plaintiff, the defendants solicited business through use of the impugned mark “BANYAN TREE RETREAT” and the Banyan device in Delhi which was a very active website which not only provided contact information but also sought feedback and inputs from its customers through an interactive web page. Further, the plaintiff submitted that services of the defendants were being offered to the customers in Delhi because of the ubiquity, universality, and utility of the features of the Internet and the World Wide Web, and hence the cause of action had arisen within the jurisdiction of this Court.¹⁰⁸

Finally, the court held that it had the jurisdiction and in the process answered a very crucial question with respect to jurisdiction involving Internet transactions. It

¹⁰¹Ibid. at 29.

¹⁰²Ibid. at 59.

¹⁰³Full text at <http://www.indiankanoon.org/doc/1355583/>.

¹⁰⁴Ibid., para 3.

¹⁰⁵Ibid.

¹⁰⁶Ibid., para 4.

¹⁰⁷Ibid.

¹⁰⁸Ibid., para 5.

held that, with regard to passing off or an infringement action where the plaintiff is not carrying on business within the jurisdiction of a court, in order to satisfy the court that it had jurisdiction to entertain the suit, the plaintiff would have to show that the defendant “purposefully availed” itself of the jurisdiction of the forum court. This shall be demonstrated by proving that the nature of the activity indulged in by the defendant by the use of the website was with an intention to conclude a commercial transaction with the website user, and such activity resulted in an injury or harm to the plaintiff within the forum state.¹⁰⁹

8 Conclusion

Trade mark law has recently undergone major changes both nationally and internationally. In India this change is a result of major international agreements like the TRIPS Agreement, Paris Convention, the opening up of Indian economy, widespread use of Internet, developments in case-law.

From the earliest manifestation of primitive man in the form of a mark decorated upon some object for identification purposes, the system of trade marks has come to a complex marketing device symbolizing multiple functions which is an indispensable part of the modern day economic landscape. Trade marks are very essential to the operation of a competitive system of free enterprise, as they are the only possible means by which the consumer can choose the particular variety of product that he wishes to purchase from among the plethora of choices that manufacturers now make available to satisfy individual tastes and individual preferences among the purchasing public.¹¹⁰

Trade mark law seeks to safeguard the consumer’s association between product and producer. As noted earlier, trade marks can easily provide consumers with a clear visual or conceptual image that identifies the source of specific goods and services. Companies in the present times are spending billions of dollars with respect to advertising and branding so as to attract public attention and keep their goods distinct from those of competitors in the minds of consumers. The advent of Internet and the use of that medium as a marketing channel have brought new issues relating to cybersquatting, use of trade marks as meta-tags, internet keywords, etc.

The Indian Trade mark law from its very inception has tried to balance the interests of the trade mark owners and the general public. The new law which came as a result of India’s accession to WTO incorporates all the recent developments which have happened in the world of commerce. The Indian judiciary has also played a lead role in the development of the trade mark law and has performed a proactive role in imbibing new concepts relating to trade mark jurisprudence. For example, the concept of well-known trade marks was recognised by the Supreme Court even

¹⁰⁹Ibid., para 58.

¹¹⁰Diamond supra note 4, p. 247.

before the new law on trade marks incorporated the provision.¹¹¹ Similarly, many courts in India have given protection to companies whose trade marks have fallen prey to cybersquatters by relying upon the doctrine of passing off. The trade mark registry is also contributing very positively by allowing registrations of sound marks, and soon they may also have to deal with other non-conventional marks like smell marks, taste marks.

There is no doubt that India will continue to harmonise and streamline its trade mark law to keep pace with the developments happening across the globe. The necessity for reform in all fields of intellectual property law has been an important issue for at least a decade in India. Thus, it is hoped that India's accession to Madrid Protocol will lead to further harmonisation of trade marks laws and also enable Indian companies to protect their trade marks on a global level with minimum formalities. In the last seven decades or so, the Indian trade mark law has evolved in a systematic manner with all stakeholders contributing in a very positive way. With the growing awareness of various issues relating to trade marks among the stakeholders, the future prospects of trade mark protection in India looks brighter than it ever had been in the past.

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¹¹¹*NR Dongre v. Whirlpool Corporation* (1996) 5 SCC 714.

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India's Participatory Role in the Database Debate at WIPO

Indranath Gupta

Abstract The year 1996 at WIPO marked the beginning of a prolonged debate surrounding the proposal of an International Treaty protecting non-original databases. After a space of eight years, there was no consensus amongst the Member Countries of the WIPO and the proposal was finally removed from the agenda of the Standing Committee on Copyright and Related Rights. This proposal, which was largely based on the framework of the European Database Directive (96/9/EC), received severe opposition from countries who were not convinced with the requirement of a special protection for non-original databases. The opposition included countries like India who raised voice against the proposed International Treaty. In relation to the proposed International Treaty on non-original databases, this chapter intends to revisit the history of events that happened at the WIPO and the overall role that India played in the debates that lasted for almost nine years.

Keywords European database directive · WIPO International Treaty
India at WIPO · Non-original databases · Sui generis database right

Database technology has become one of the most efficient tools that allow for dissemination of huge amount of information in a systematic and methodical way. At the time when this tool was evolving, there was tremendous amount of anxiety and uncertainty in the European Community to understand the ways and means to maximize the potential of this tool. The Database Directive, which was adopted for the very first time in Europe, recognized the need to incentivize the production of special kind of databases that would fail to meet the prevailing originality threshold under the law of copyright in the European Union (EU).¹ Pursuant to the enactment of European Database Directive in 1996, there were similar considerations concerning protection of databases in the United States (USA) and at the World

¹Council Directive of 1996/9/EC of 27 March 1996 on the legal protection of databases [1996] OJ L 77 (hereinafter Council Directive (96/9/EC)).

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Intellectual Property Organization (WIPO).² This chapter examines the chain of events that happened at the WIPO surrounding the proposed International Treaty protecting databases that were non-original by copyright standard.

The proposal suggesting an International Treaty at the WIPO was initiated in 1994 as a result of continuous efforts on the part of European Community, and to some extent, as a result of the debates surrounding the possible enactment of a database legislation that were taking place in the USA. From the discussions contemplating the possibility of an International Treaty in 1994, it took two years before the first draft proposing an International Treaty was placed before the Standing Committee on Copyright and Related Rights (SCCR) in 1996.³ This draft proposal on a possible right protecting non-original databases or commonly known as the *sui generis* database right (*sui generis* right) and its requirement was debated until 2005 after which it was finally removed from the agenda list.⁴ Till date, it remains as a proposal that was not accepted by the Member Countries at the WIPO.⁵

The debates that happened at the WIPO over a period of nine years witnessed the voice of Member Countries who were not convinced with the proposal made by the European Community. These Member Countries were unified in their approach and led the force that opposed the framing of an International Treaty protecting non-original databases. India was one of the Member Countries that raised their concern and played a participatory role in this debate. This chapter looks at the nature of such participatory role that India had played. It concludes on a note that the issues raised by India in association with other Member Countries were extremely important and created enough doubts so much so that the proposal was discarded at the WIPO. The journey was not easy since India had to overcome conflicting ideas even within its national boundaries.

1 Background to the Proposed International Treaty

For the very first time in 1994, the Delegation representing the European Commission informed the Chairman of the Committee of Experts (COE) at the WIPO about the process that had been undertaken to enact a Database Directive in Europe.⁶ The proposed Database Directive would have a special provision for non-original

²Samuelson (1997), p. 369; Diplomatic Conference on Certain Copyright and Neighboring Rights Questions: Basic Proposal For the Substantive Provisions of the Treaty on Intellectual Property in Respect of Databases to be considered by the Diplomatic Conference (1996). [http://www.wipo.int/edocs/mdocs/diplconf/en/crn_dc/crn_dc_6.doc](http://www.wipo.int/edocs/mdocs/diplconf/en/crn/dc/crn_dc_6.doc). Accessed 14 April 2015 (hereinafter CRNR/DC/6(1996)).

³CRNR/DC/6 (1996).

⁴Standing Committee on Copyright and Related Rights: Report November (2005). http://www.wipo.int/edocs/mdocs/copyright/en/sccr_13/sccr_13_6.doc. Accessed 16 April 2015 (hereinafter SCCR/13/6).

⁵There has been a suggestion that the database treaty was in a limbo, Gervais (2007), pp. 1109–1139.

⁶CRNR/DC/6(1996), para 2.

databases that would remain unprotected under copyright. By virtue of the *sui generis* right under the Database Directive, a certain amount of right was conferred upon the database maker to protect his substantial investment towards the production of a database.⁷ As a result, a database maker would essentially exclude others from extracting substantial amount of data either quantitatively or qualitatively from the database.⁸ Following the preliminary information of 1994, in September 1995 the European Community and its Member States presented a paper titled “The *sui generis* right provided for in the Proposal for a Directive on the legal protection of databases” to the COE.⁹ Further, in February 1996, at the sessions of the COE, they proposed for an International Treaty that would harmonize protection for databases that are non-original as per the standard expected under law of copyright.¹⁰ After deliberating on the multiple proposals of database directive made by the European Community, the COE with the support of several delegations decided to study the possibility of enacting *sui generis* right at an international level.¹¹ Subsequently, they recommended that the decision on appropriate treaties, including the treaty on the subject matter of databases, should be taken at the Diplomatic Conference in December 1996.¹² This step, taken on the part of the WIPO, marked the beginning of the process of formulating an international database treaty. Europe, however, was not alone in promoting for a treaty mechanism covering the protection of databases. Following the European Community, the USA submitted a similar proposal to the COE in May 1996 drawing attention to the need of possible International Treaty protecting databases.¹³ These two proposals—one by the European Community and the other by USA—raised the issue of a *sui generis* protection of databases at the Diplomatic Conference of the WIPO in December 1996.¹⁴ Other than the text on the “Treaty on Intellectual Property in Respect of Databases”, two other treaties were proposed by the Chairman of the COE. They were: “Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works” and “Treaty for the Protection of the Rights of Performers and Producers of Phonograms”.¹⁵ The Diplomatic Conference, however, did not discuss the draft of what was proposed for an international protection on databases.¹⁶ At the Conference, however, there were recommendations

⁷Ibid.

⁸Art. 7, Council Directive (96/9/EC).

⁹CRNR/DC/6(1996), para 3.

¹⁰Committee of Experts on a Possible Protocol to the Berne Convention: Proposal Submitted by the European Community and its Member States (1996). http://www.wipo.int/mdocsarchives/BCP_CE_VI_1996/BCP_CE_VI_13_E.pdf. Accessed 13 April 2015.

¹¹CRNR/DC/6(1996), para 4.

¹²Ibid., para 6.

¹³Ibid., para 5.

¹⁴Ibid., para 1.11.

¹⁵Ibid., para 10.

¹⁶Information Meeting on Intellectual Property in Databases: Existing National and Regional Legislation Concerning Intellectual Property in Databases (1997). http://www.wipo.int/edocs/mdocs/mdocs/en/db_im/db_im_2.pdf. Accessed 14 April 2015, para 1 (hereinafter DB/IM/2). Due to paucity of time the treaty was not discussed, Reinbothe (1997), p. 175; Reinbothe and Lewin-

made to further discuss the protection suggested in the draft text in the subsequent meetings at WIPO.¹⁷

2 Proposed Structure of the International Treaty

Following the pursuits of the European Database Directive and an American endeavour, the COE proceeded with the preliminary draft text of the proposed International Treaty on databases. Starting with the scope of the proposed structure, the draft proposal was modelled on the existing European Database Directive.¹⁸ The draft that was shared at the Diplomatic Conference, however, was structurally different from the Database Directive in Europe. Although the Delegation of the USA suggested their endeavour in the form of “Database Investment and Intellectual Property Antipiracy Act” (H.R.3591 of 1996), this was very much at the stage of proposal at the USA Congress.¹⁹ Further, this bill followed the structure of the existing European Database Directive, thereby making the Directive as the only model that protected non-original databases in the world.²⁰

2.1 Arguments Favouring Worldwide Protection

With the existing model of protection in the EU, the WIPO proposal for an International Treaty towards the protection of non-original databases became a structured approach. This was not the situation when the proposal was made to enact a Database Directive in Europe. They had nothing as a reference at the time when the process of enacting the Database Directive began for the first time in 1988.²¹ The first draft proposal mentioned about the potential of the European database makers in the international market.²² With USA and Japan leading in various emerging technologies, the European Commission felt that it was time that the Database Directive should be enacted to support the European database makers in their endeavour of becoming

ski (2002), p. 207; It was suggested that the opposition against the International Treaty did not allow the discussion to happen, Davison (2003), p. 226.

¹⁷DB/IM/2.

¹⁸CRNR/DC/6(1996), para 1.11.

¹⁹CRNR/DC/6(1996), para 1.08; Davison (2003), p. 232; This act has been referred as the internationalization of the Database Directive, Oriola (2005), p. 201.

²⁰CRNR/DC/6(1996), para 1.10; Reinbothe (1997), p. 175.

²¹Commission, ‘Copyright and the Challenge of Technology (Green Paper)’ COM(88) 172 final.

²²Commission, ‘Proposal for a Council Directive on the legal protection of databases’ COM(92) 24 final, paras 1.1–2.1.24. (hereinafter COM(92) 24 final).

leading producer of databases in the world.²³ This was the overall idea that led to the first draft proposal.

As with the Database Directive in Europe, the argument favouring the draft proposal of an International Treaty began on a similar note. At the outset, unlike the EU, there were no competitive issues pertaining to the development of the worldwide database market.²⁴ The COE at WIPO suggested that with the rapid development of the “content industry”, the infrastructure that would allow dissemination of such content must be improved at the national and international level.²⁵ The infrastructure included databases as a tool and the delivery mechanism of the future. Even though the proposal mentioned about the need of improving the infrastructure, the problems pertaining to such infrastructure were not identified. There was no clear indication provided that it would essentially reflect upon the extent of improvement required to facilitate the growth of the content industry, although the use of the word industry would essentially give the idea of an already established framework. Further, there was no reference to any empirical evidence suggesting the existing challenges for the content producers.

Following the same incentive argument as it happened in case of the European Database Directive, the proposed International Treaty at the WIPO argued that while considerable investment is required for the development of databases, in the electronic age they can be reproduced, and the contents can be copied at a fraction of the cost incurred by the first producer.²⁶ The possible risk of unauthorized copying would be detrimental to the database producers, and as a consequence, there would be less incentive towards the production of newer databases.²⁷ This argument essentially attached the characteristic of a public good to a database. It is non-excludable and non-rivalrous meaning no one can prevent others from using it, and many can exploit it simultaneously without reducing the quality.²⁸

2.1.1 Copyright Protection Inadequate to Foster Investment

To correct the problem of public good, the COE responsible for drafting the text of the International Treaty decided to look into the existing legal framework in the Member Countries. They identified two-tier legal framework in their proposal. The first tier was the use of existing copyright protection that provided incentive by protecting against unauthorized copying and unauthorized use of a database.²⁹ For a database to be protected under copyright, it must exhibit sufficient amount of

²³Ibid.

²⁴The Commission compared the performance of the European market in comparison with the other leading producers of databases in the world.

²⁵CRNR/DC/6(1996), para 1.02.

²⁶CRNR/DC/6(1996), para 1.03.

²⁷Ibid., para 1.03.

²⁸Herr (2008), p. 46.

²⁹CRNR/DC/6(1996), para 1.04.

originality reflecting author's own intellectual creation towards the making of such database.³⁰ The standard envisaged was a reflection of Article 3 of the Database Directive in Europe.³¹ Similar to the Database Directive in Europe, the proposed protection under the International Treaty was limited to the structure of the database and not to the contents of such database. There is a distinct similarity in the way both the Directive and the proposed International Treaty apprehended the lacunae of the existing copyright system. On the first count, similar to the first draft proposal of the Database Directive, the COE suggested that the existing copyright framework may not be adequate to provide sufficient incentive to those databases that would fail to fulfil the threshold requirement of originality under copyright.³² It was further argued in the draft International Treaty that valuable databases may not qualify for protection under copyright.³³

Although similar argument was used in Europe and WIPO to question the use of copyright in providing protection to databases that are primarily non-original by copyright standard, they adopted different reasons to frame such argument. The first draft proposal of the Database Directive identified the differences in the threshold required for copyright protection in the Member States.³⁴ It was believed that the structure of copyright protection that existed before the passage of the Database Directive in Europe would not uniformly protect databases in the EU.³⁵ They went on to identify the differences that existed in the threshold of originality and formulated the argument that copyright was not the right kind of incentive to foster investment towards those databases that are unlikely to receive protection within the existing structure.³⁶ Subsequent to such analysis, the copyright protection to databases was harmonized in Europe with author's own intellectual creation towards the selection or arrangement of the contents as the only criterion for such protection.³⁷ This brought about uniformity in the threshold for protecting all databases under copyright in Europe.

As to the draft International Treaty, in 1997 the International Bureau (IB) of the WIPO was asked to make a report of the existing legislative structure including copyright and *sui generis* right in the Member Countries.³⁸ Further Member Countries were individually requested to submit a report of their respective legislative structure for a comprehensive understanding of the existing framework across the world.³⁹ At the time of proposing the International Treaty, it was merely suggested that the exist-

³⁰Ibid.

³¹Council Directive (96/9/EC).

³²CRNR/DC/6(1996), para 1.04.

³³Ibid.

³⁴COM(92) 24 final, paras 2.2.3–2.2.11.

³⁵Ibid.

³⁶Ibid.

³⁷Art. 3, Council Directive (96/9/EC).

³⁸DB/IM/2, para 3.

³⁹Ibid.

ing copyright protection would be insufficient to protect databases of future.⁴⁰ As such, there was no comparison to suggest or identify the differences that existed in the Member Countries to understand the impending problem and the extent of incentive that would be required for database makers. Further, there was no available evidence to suggest any existing or impending situations that would trigger the need to have an International Treaty protecting non-original databases. Without ascertaining the meaning associated with “valuable databases”, the draft proposal contemplated that such databases would not receive protection under the copyright protection that existed in the Member Countries.⁴¹ One would imagine that these databases would be essentially comprehensive without the required amount of creativity towards selection or arrangement of the contents to satisfy the threshold of copyright protection. The value attached to these databases would relate to their comprehensive nature and to the investment made towards the production of such databases. In comparison, the first draft proposal of the Database Directive in Europe referred to “useful databases” that would be comprehensive in nature and require substantial investment.⁴² In the context of the proposed *sui generis* protection for databases that remain unprotected under copyright, the term valuable or useful would essentially represent the same kind of database.

2.1.2 The Idea of a *Sui Generis* Protection

While the draft International Treaty identified copyright as an existing protection measure not suitable for incentivizing valuable databases, it did refer to the existing *sui generis* right in Europe.⁴³ The issue of having an international protection similar to the nature of a *sui generis* right was by far the most important argument raised at the WIPO. There was no substantial evidence provided in favour of enacting such a right in the form of an International Treaty, which had not been practiced anywhere in the world. It was enacted in Europe in 1996, and at the same time, the proposal of an International Treaty was taken up by the WIPO. Therefore, there was no realistic chance to assess the impact of the legislation that was enacted in Europe. Looking at the predicament of the European Database Directive almost ten years after its enactment, evidence suggesting the requirement of enacting the same protection at an international level was really important.⁴⁴ Instead, the discussion at WIPO that followed after placing the draft treaty was purely based on the notion that database

⁴⁰CRNR/DC/6(1996), para 1.04.

⁴¹Ibid.

⁴²COM(92) 24 final, paras 4.2.6–4.2.7.

⁴³CRNR/DC/6(1996), para 1.04.

⁴⁴DG Internal market and services working paper: First Evaluation of Directive 96/9/EC on the legal protection of databases (2004). http://ec.europa.eu/dgs/internal_market/evaluation/evaluationdatabasesdirective.pdf. Accessed 20 October 2008. (hereinafter First Evaluation of Directive 96/9/EC).

right was important and its enactment was imperative to increase investment towards the production of valuable databases in the Member Countries.

The situation was comparably different in the EU. Subsequent to the harmonization of copyright protection of databases in Europe, there was concern about the protection of databases that were previously protected in the Member States under different threshold arrangements.⁴⁵ As a remedial measure, a *sui generis* protection for those databases was conceived under Article 7, which formed the second tier of the Directive.⁴⁶ There have been existing debates about the utility of enacting a *sui generis* right and the complexities that it has created over a period of time.⁴⁷ After almost ten years, the Database Directive was evaluated for the first time in 2004.⁴⁸ Although the task was meant to evaluate the entire Directive, the report primarily focused on the outcome of enacting the *sui generis* right in Europe. It concluded on a note that the economic impact of the Database Directive was unproven.⁴⁹ It was doubtful whether creating incentive through the enactment of a special right was justified in Europe, although the results of the report have been questioned.⁵⁰ Further, the report also considered the option of repealing the *sui generis* part of the Directive, since it had shown signs of being monopolistic in nature.⁵¹

Looking at the experience of Europe, one would imagine taking cautious step before contemplating the requirement of a special right. In the quest of developing a global database market, the COE believed that a stable legal regime providing adequate incentive is imperative. This can be achieved through the process of harmonization, and an International Treaty towards that end was the desired approach. The proposed International Treaty extended protection to non-original databases with the intent to prevent misappropriation of the financial investments made by database producers.⁵²

2.2 *Scope of the Treaty*

Article 2 of the proposed International Treaty defined database as a "... collection of independent works, data or other materials arranged in a systematic or methodical

⁴⁵Ibid., para 1.1.

⁴⁶Ibid.

⁴⁷See generally First Evaluation of Directive 96/9/EC.

⁴⁸Ibid.

⁴⁹Ibid., para, 1.4.

⁵⁰This is in relation to the number of stakeholders that participated in the survey to assess the economic impact of the Database Directive. The questionnaire was sent to 500 respondents out of which only 100 responded to the questions asked as a part of the report. Therefore the sample size was questionable; Derclaye (2008), p. 272.

⁵¹First Evaluation of Directive 96/9/EC, para, 1.5.

⁵²CRNR/DC/6(1996), para 1.06.

way and capable of being individually accessed by electronic or other means".⁵³ This definition extended protection to a wide range of collection irrespective of the form or medium. Databases that represented substantial investment towards the collection, assembly, verification, organization or presentation of the contents shall receive protection under this framework.⁵⁴ This was not subject to protection that these databases or its contents may have received by virtue of copyright or any other rights granted under national legislation.⁵⁵ The definition excluded "any recording of an audiovisual, cinematographic, literary or musical work" from its scope, since these works were not individually accessible either by electronic or other means.⁵⁶ Substantial investment in this context meant and included quantitative or qualitative human, financial and technical resources but had to be significant in nature.⁵⁷ The proposal suggested that an objective approach should be followed while measuring such investment.⁵⁸

Going by the choice of words incorporated in the definition, human, financial and technical were essentially broad. The proposal pointed to the possibility that human resources could possibly include "sweat of the brow".⁵⁹ The threshold associated with this particular parameter was not particularly rigorous and can be illustrated using the case of *University of London Press v. University Tutorial Press* and other similar cases in the United Kingdom (UK).⁶⁰ Following the sweat of the brow argument, a work need not be novel, and use of skill, judgement and labour towards the creation of even a mundane piece of listing could possibly merit copyright protection.⁶¹ Examples of such listing included: alphabetic list of stations, chronological list of materials and football coupons.⁶² Following the same standard for the other two remaining keywords—financial and technical, one would imagine the expectation would not be too high and that a database maker can easily fulfil the threshold of investment. The proposal intended to include maximum number of databases, and creating a high threshold would have essentially excluded databases, thereby reducing the incentive for future database makers.

Article 3 of the proposed International Treaty allowed the database maker to prohibit extraction or utilization of the contents of a database protected under this

⁵³ Art. 2(5) of the Berne Convention uses the term "collection", Berne Convention for the protection of Literary and Artistic Works' http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html. Accessed 21 December 2008.

⁵⁴ CRNR/DC/6(1996), para 1.12.

⁵⁵ *Ibid.*, para. 1.14.

⁵⁶ *Ibid.*, para. 2.03.

⁵⁷ *Ibid.*, para. 2.07.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ [1916] 2 Ch 601.

⁶¹ *H Blacklock & Co Ltd. v C Arthur Pearson Ltd* [1915] 2 Ch, 376; *Football League v Littlewoods Pool* [1959] Ch, 637; *Ladbroke v William Hill* [1964] 1 WLR, 273.

⁶² *Ibid.*

proposed International Treaty.⁶³ Further, this protection did not prevent anyone from independently creating a database similar to the protected database as long as the source of materials collected for the second database was different from the protected database.⁶⁴ This provision could have created a possible monopoly situation, especially in the context of single-sourced databases.

Single-sourced database represents a situation where "... data were 'created' by the same entity as the entity that establishes the database ... [and] this entity [as a result] would have [dominant position] on data and information it 'created' itself ...".⁶⁵ Lessons learned from four cases decided by the European Court of Justice (ECJ) suggested serious concerns in relation to single-sourced databases. These cases involving football league and horseracing data were referred to the ECJ by the national courts in Sweden, Greece, Finland and the UK.⁶⁶ While giving the judgement in the case involving UK horseracing data, ECJ explained the scope of Article 7 of the European Database Directive. Article 7 reads:

Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.⁶⁷

In the context of substantial investment and more specifically in relation to the words "obtaining", the ECJ said that the resources used to draw the list of horses would not come under the scope of substantial investment required to protect a database under Article 7.⁶⁸ The ECJ in this decision differentiated substantial investment towards creation of data from substantial investment towards obtaining the same data. In situations where creation and obtaining happen simultaneously, the database maker needs to show a separate substantial investment at the time of obtaining.⁶⁹ Similar judgements were pronounced in cases involving football league data in Sweden, Greece and Finland.⁷⁰

Following the European Directive as a model for an International Treaty, one can observe similarities in the structure of the Directive and the proposed format of protection for databases at the WIPO. The definition of a database, the overall expectations surrounding the threshold required for substantial investment and the rights of the maker of a protected database are similar. A database under the Directive

⁶³CRNR/DC/6(1996), para 3.01.

⁶⁴Ibid., para 3.02.

⁶⁵First Evaluation of Directive 96/9/EC, para 4.1.4.

⁶⁶*Fixtures Marketing Ltd v. Oy Veikkaus Ab* (2004) C-46/02; *The British Horseracing Board Ltd and Others v. William Hill Organisation Ltd* (2004) C-203/02; *Fixtures Marketing Limited v. AB Svenska Spel* (2004) C-338/02 and *Fixtures Marketing Ltd v. Organismos prognostikon agonon podofairou AE - "OPAP"* (2004) C-444/02.

⁶⁷Art. 7, Council Directive 96/9/EC.

⁶⁸First Evaluation of Directive 96/9/EC, para 4.1.4.

⁶⁹First Evaluation of Directive 96/9/EC, para 4.1.4.

⁷⁰Cases C-46/02; C-338/02; C-444/02.

means a collection of materials arranged in a systematic way and where the materials are individually accessible by electronic or other means. Similar to the words “substantial investment” used in the proposed International Treaty, from what has been observed from various court decisions in the Member States, the threshold of substantial investment under the Database Directive in Europe is not particularly difficult to achieve for a database maker.⁷¹ It has been given a broad scope, although the Directive has not provided any indication as to the threshold of substantial investment. Contrary to the Directive, the proposed International Treaty at WIPO has illustrated the definition of substantial investment.⁷²

2.3 *The Structure of Exceptions*

Draft Article 5 of the proposed International Treaty provided the option for Member Countries to decide on the exceptions or limitations of the rights given to the database maker provided that such exceptions or limitations were not in conflict with the normal exploitation of the database or the legitimate interests of the database maker.⁷³ As an illustration, the Article further provided that in terms of exceptions, it would not object to the possibility of a Member Country to opt for stricter or narrower rules.⁷⁴

The exceptions that one comes across in the Database Directive are differently structured from what was proposed as a part of the International Treaty. Article 9 of the Directive as an exception to the *sui generis* right allows the Member States to stipulate a lawful user of a database to extract or re-utilize insubstantial parts of the contents of a non-electronic database.⁷⁵ Such extraction or re-utilization must be in relation to private use.⁷⁶ Further, for non-commercial purpose, Member States are given the opportunity to legislate allowing extraction for the purposes of teaching or scientific research.⁷⁷ In case of a database, which is available to the public, a lawful user of the database under Article 8 may either extract or re-utilize insubstantial parts of its contents for any purpose.⁷⁸ This use should not unreasonably prejudice the normal exploitation of the database or the legitimate interests of the database maker.⁷⁹ Any contractual provision contrary to Article 8 shall be null and void under Article 15.⁸⁰ The Database Directive in Europe has left the meaning of the word lawful

⁷¹First Evaluation of Directive 96/9/EC, para 4.1.2.

⁷²CRNR/DC/6(1996), para 2.07.

⁷³Ibid., para 5.01.

⁷⁴Ibid., para 5.03.

⁷⁵Council Directive 96/9/EC.

⁷⁶Ibid.

⁷⁷Ibid.

⁷⁸Ibid.

⁷⁹Ibid.

⁸⁰Ibid.

user undefined, and this has led to wide interpretations and ambiguities.⁸¹ From the comparison of the proposed International Treaty and the Database Directive, it is clear that the exceptions provided under the Treaty were broad. This difference stems from the objective. The primary objective of the Directive was to bring about uniformity in the Member States and to improve the functioning of the internal market,⁸² whereas, in case of the proposed International Treaty, the idea was to have a framework giving recognition to the database right at an international level as an important step for developing the content industry.⁸³

2.4 National Treatment and Reciprocity

Following Article 5 of the Berne Convention, draft Article 7 of the proposed International Treaty followed national treatment where a database maker gets protection in Member Countries under the treaty irrespective of his nationality.⁸⁴ Therefore, Member Countries were obligated to provide protection to a database maker as they would do in case of their nationals. The European Database Directive in this respect prefers reciprocity over national treatment. Recital 56 and Article 11(3) of the Directive refers to comparable protection before any protection under the database right (Article 7) is extended to databases where the database maker is not connected to the Member States.⁸⁵ It essentially means producers engaging in the production of databases cannot expect to receive protection in the EU unless similar comparable protection exists for European databases in their own countries. Reciprocity provision has an important role to play in situations where there are competing countries engaged in the production of similar databases. Depending on the market share, countries may be forced to incorporate similar legislation in their jurisdictions.⁸⁶

The basis of proposing an International Treaty was not free from ambiguities. Once the preliminary draft was placed before the SCCR, the process of deliberation began with a series of meetings at the WIPO. Starting from 1997 onwards, till the end of 2004, the prospect of having a right similar to the European Database Directive was debated amongst Member Countries. Finally, there was no consensus on the issue of an International Treaty protecting non-original databases and the idea of a *sui generis* database protection was dropped.⁸⁷ In all these years, India played a participatory and an interesting role that led the opposition involving a bloc of countries. These

⁸¹Derclaye (2008), pp. 124–126; Vanovermeire (2000), p. 63.

⁸²COM(92) 24 final, para. 1.4.

⁸³CRNR/DC/6(1996), para 1.04.

⁸⁴CRNR/DC/6(1996), para 7.01.

⁸⁵Council Directive 96/9/EC.

⁸⁶Commenting on the need of reciprocity to establish dominance, Narayanan (1993–94), pp. 457, 482; Hamilton (2000).

⁸⁷SCCR/13/6.

countries felt that the time has not come and there was no evidence to suggest that a *sui generis* kind of protection was required.⁸⁸

3 Future of *Sui Generis* Right: Difference of Opinion at Early Stages

As a follow-up step to the draft treaty proposal submitted in 1996, the IB of the WIPO was asked to prepare a document on the existing framework of national and regional laws governing the protection of databases.⁸⁹ For the meetings that were held in 1997, three documents were prepared by the IB. They were: Existing National and Regional Legislation Concerning Intellectual Property in Databases; Information Received from Member States of WIPO concerning Intellectual Property in Databases; and Information Received from Member States of WIPO and from the European Community and its Member States.⁹⁰ The third document included comments that were received after the deadline of 31 May 1997 but before 30 June 1997.

In the first document, although India's name was identified as a country having copyright protection for databases or compilation of facts, there were no comments recorded from the Delegation of India either in the second or the third document.⁹¹ The second document included comments of only eight Member Countries.⁹² The third document consisted of comments received from twelve Member Countries and the European Community. This document is particularly interesting where differences surfaced amongst the Member Countries on the issue of enacting a *sui generis* database protection at an international level.⁹³ While Algeria, Columbia, and the European Community and its Member States favoured the *sui generis* right, Thailand insisted on further study on the given issue before enacting any legislation.⁹⁴ Australia raised similar concerns questioning the need, appropriateness and structure of the proposed legislation.⁹⁵ Based on the aforementioned documents prepared by the IB, a report was filed which noted the opposition against the enactment of

⁸⁸Davison (2003), p. 231.

⁸⁹DB/IM/2.

⁹⁰Ibid.; Information Meeting on Intellectual Property in Databases: Information Received From Member States of WIPO Concerning Intellectual Property in Databases (1997). http://www.wipo.int/edocs/mdocs/mdocs/en/db_im/db_im_3.doc. Accessed 15 April 2015 (hereinafter DB/IM/3); Information Meeting on Intellectual Property in Databases: Information Received From Member States of WIPO and From the European Community and its Member States (1997). http://www.wipo.int/edocs/mdocs/mdocs/en/db_im/db_im_3_add-annex1.pdf. Accessed 15 April 2015 (hereinafter DB/IM/3 Add.).

⁹¹DB/IM/2.

⁹²DB/IM/3.

⁹³DB/IM/3 Add.

⁹⁴DB/IM/3 Add, para 11.

⁹⁵Ibid., para 6.

sui generis database legislation. It was felt by a number of delegations that a lot more deliberation was required, although there could be some form of protection required for non-original databases. Further, the existing legislative options had not been explored adequately and any new right must be balanced in a way keeping the interest of producers of databases, public and the scientific community in mind.⁹⁶

At the initial stages, there was no particular objection by India. However, it was clear that Member Countries of WIPO were not in agreement on the issue of *sui generis* database protection. There were differences, and in the absence of enough jurisprudence and empirical evidence identifying the need of a special protection in addition to the existing framework, it became really difficult for those who were in favour of a *sui generis* protection to convince others who were circumspect about any new kind of protection.⁹⁷ Other than the opposition against an International Treaty, there were observations submitted by World Meteorological Organization (WMO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO). These observations similar to those who dis-favoured the *sui generis* right questioned the need for an additional right in the context of greater need of dissemination of information.⁹⁸ With every meeting, the doubts in the minds of the Member Countries were not resolved with the gap between those in favour and those against the protection of databases became wider.⁹⁹

As an outcome of the meetings held in 1997, the IB prepared an analytical table of questions. They included: Need and Justification of a *sui generis* system of protection; Possible alternatives for a *sui generis* system; Nature and extent of a possible *sui generis* system of protection; The impact of a possible *sui generis* system on the access to databases; Main elements of a protection system; Right holder; Rights to be granted; Exceptions; Duration of Protection; National Treatment and Application in time.¹⁰⁰ These questions essentially sought to answer many relevant issues. The need of a *sui generis* database protection in addition to the existing framework of protection must be clearly established. The gap that *sui generis* right was meant to address must be identified so as to understand the amount of incentive required for the makers of databases that are non-original by copyright standard. Once the extent of protection required has been established, the task was to make an assessment of the structure of the *sui generis* right. While designing the structure, the questions identified the need for placing effective measures for balancing the rights of a database

⁹⁶Ibid.

⁹⁷Ibid.

⁹⁸Information Meeting on Intellectual Property in Databases: Observations – submitted by the World Meteorological Organization (WMO) (1997). http://www.wipo.int/edocs/mdocs/mdocs/en/db_im/db_im_4.pdf. Accessed 15 April 2015 (hereinafter DB/IM/4); Information Meeting on Intellectual Property in Databases: Observations – presented by the United Nations Educational, Scientific and Cultural Organization (UNESCO) (1997). http://www.wipo.int/edocs/mdocs/mdocs/en/db_im/db_im_5.pdf. Accessed 15 April 2015 (hereinafter DB/IM/5).

⁹⁹Davison (2003), pp. 231–232.

¹⁰⁰Information Meeting on Intellectual Property in Databases: Analytical Table of Questions Raised (1997). http://www.wipo.int/edocs/mdocs/mdocs/en/db_im/db_im_7.doc. Accessed 13 April 2015 (hereinafter DB/IM/7).

maker and access to information through the use of exceptions. Finally, the questions raised intended to decide on the duration of protection and application of national treatment of databases.

4 The SCCR Meetings: Greater Divide Amongst Member Countries and the Role of India

As a follow-up to the questions raised by the IB in 1997, starting from 1998 the issue of *sui generis* right was discussed before the SCCR.¹⁰¹ These discussions continued till 2002 when an expert report was presented that raised the need of a *sui generis* protection in India.¹⁰² Leading up to the report in 2002, there were progressive deliberations made by India.

4.1 No Consensus Amongst Nations

In the first session of the 1998 meeting, the Delegation of India raised concern that the proposal for an International Treaty on the protection of databases did not take into consideration the need for scientific development and education in the developing countries. There was no such evidence that existed in India favouring the enactment of *sui generis* protection for databases. Copyright in its present structure was providing enough incentive for investments to continue towards the production of databases. The Indian Delegation identified technical measures over new legislation to incentivize production of databases and suggested that deliberation should continue at national and international level.¹⁰³

Other than the European Community and its Member States, countries were hesitant in favouring the enactment of the *sui generis* right.¹⁰⁴ The European Community suggested that they expected positive economic impact subsequent to the enactment of the *sui generis* system.¹⁰⁵ The expectation expressed in the 1998 meeting did not prima facie match with the first evaluation report of the Database Directive. The report published in 2004 was circumspect about the economic impact of the right. Although the European Community referred to the avoidance of negative consequences of the

¹⁰¹Standing Committee on Copyright and Related Rights: November (1998). http://www.wipo.int/edocs/mdocs/copyright/en/scrr_1/scrr_1_9.pdf. Accessed 13 April 2015 (hereinafter SCCR/1/9).

¹⁰²Standing Committee on Copyright and Related Rights: A Study on the Impact of Protection of Unoriginal Databases on Developing Countries: Indian Experience May (2002). http://www.wipo.int/edocs/mdocs/copyright/en/scrr_7/scrr_7_5.doc. Accessed 14 April 2015 (hereinafter SCCR/7/5).

¹⁰³SCCR/1/9, para 139.

¹⁰⁴For instance the Delegations representing Japan, Egypt, Senegal, SCCR/1/9.

¹⁰⁵SCCR/1/9, para 131.

sui generis protection through the use of exceptions, it was not until the judgements delivered by the ECJ that the possible negative impact of the *sui generis* system was understood.¹⁰⁶ Germany and UK favoured the *sui generis* system and discarded the concern of negative impact that the new right might have on access to meteorological and scientific data. They further insisted that the proposal for a *sui generis* database protection should be discussed by the SCCR at subsequent meetings.¹⁰⁷

There were delegations that supported India's concern and suggested that more consultation at national and regional level should take place before enacting the *sui generis* system at an international level. For instance, the Delegation of Egypt cited the importance of development in the fields of education, culture and scientific research for developing countries.¹⁰⁸ On behalf of the African Group, the Delegation of Senegal reasoned that sufficient time should be allowed for national and regional consultations to happen. They further suggested that a study should be commissioned to assess the economic impact of the possible *sui generis* right.¹⁰⁹ Quoting the memorandum from the Kenyan Academy of Science, the Kenyan Delegation cited grave concern about supporting any specific legislation before substantial consultative process at the regional level.¹¹⁰ While supporting the Delegation of Egypt, the Delegation of Brazil raised the importance of reassessing the working of the existing legal structure before embarking upon a new protection. Similar to the other delegations, they also raised the importance of regional meetings to discuss the future of database right.¹¹¹ This position was also echoed by the Delegation of Argentina.¹¹² The Delegation of China was of the opinion that the discussion on the possible enactment of an International Treaty for the protection of non-original databases was premature. Similar to India and Delegations of Africa, they raised the importance of studies at the national level involving stakeholders like educational institutions, libraries and research institutions.¹¹³ Citing concerns about the impact of the proposed *sui generis* protection in developing countries, the Delegation of Jamaica called for WIPO to support a regional consultation involving the Caribbean and Latin American countries to discuss the impact of *sui generis* right on developing countries.¹¹⁴ The Delegation of Indonesia highlighted the need to carefully understand the problems surrounding the protection of databases. Interestingly, they suggested that the structure of the *sui generis* system should be based on the needs of developed and developing countries. Therefore, regional and national consultative process must happen comprehensively

¹⁰⁶Cases C-203/02, C-46/02; C-338/02; C-444/02.

¹⁰⁷SCCR/1/9, paras 133 & 142.

¹⁰⁸SCCR/1/9, para 140.

¹⁰⁹Ibid., para 141.

¹¹⁰Ibid., para 146.

¹¹¹Ibid., para 143.

¹¹²Ibid., para 156.

¹¹³Ibid., para 150.

¹¹⁴Ibid., para 151.

before deciding on the *sui generis* protection.¹¹⁵ The Delegation of Mexico supported all of the aforementioned views expressed by different countries.¹¹⁶

There were countries where adequate consultations had already taken place. For instance, the Delegation of Australia said that there was no consensus on the issue of *sui generis* right either domestically or internationally. There were concerns expressed by the scientific communities where possible monopoly situations may emerge with the proposed law in place. In the context of the views expressed by the European Community, the Australian industry did not ask for an additional right other than the existing structure of protection.¹¹⁷ Following the Australian argument, the Delegation of Philippines voiced serious concern about the impact of the new right.¹¹⁸

In some countries like Japan, the consultation process had just begun.¹¹⁹ There were number of ways identified to protect databases other than the *sui generis* right. Similarly, the Delegation of Switzerland expressed that there would be no single solution to bridge possible legal gaps.¹²⁰ The Russian Federation had started the consultation process with the industry sector, although it was felt that unauthorized use relating to commercial purposes should be tackled.¹²¹

There were others who extended their support to the discussion on *sui generis* right. Delegations of Ghana, Korea and Uzbekistan had extended support in this regard.¹²² Given the diverse views of nations and suggestions of regional consultations concerning the enactment of *sui generis* right, the Chairman suggested that the subject matter should be kept on agenda for the next SCCR meeting.

4.1.1 Divergent Views of Member Countries

At the early stage of discussion, Member Countries had positioned in diverse ways. As a result, contrary to agreeing to a basic structure of an International Treaty, Member Countries were pulling themselves away from the central idea of any additional legislation.¹²³ They suggested that the International Treaty should be balanced in a way to include the aspirations of developed and developing nations.¹²⁴ This suggestion, although ideal, would necessarily mean longer debates on the issue of an international protection with the final outcome of not having one without adequate balance. India as a country contributed to the cause of those nations who were not

¹¹⁵SCCR/1/9, para 154.

¹¹⁶Ibid., para 157.

¹¹⁷Ibid., para 144.

¹¹⁸Ibid., para 153.

¹¹⁹Ibid., para 135.

¹²⁰Ibid., para 134.

¹²¹Ibid., para 137.

¹²²Ibid., paras, 138, 147 & 152.

¹²³Davison (2003), p. 232.

¹²⁴Reinbothe and Lewinski (2002), p. 207.

sure of the outcome of a new legislation. However, there was no evidence to suggest that India was leading the way as the views expressed by the Delegation of India were similar to other Asian or African nations. India did refer to the use of technical measures to incentivize production instead of a new legislation. There were not enough details provided by the Delegation as to how these technical measures would protect the interests of database makers.

One thing all Member Countries agreed to was the need to protect databases. They were not very much sure of whether the existing legal framework would be sufficient and whether there was any justification for introducing a separate provision for databases in their national legislation. The Member Countries at least were open to the idea of regional and national consultation process and did not outright reject the proposal of an International Treaty.¹²⁵

4.1.2 Evidenced-Based Approach Favoured

Contrary to what was expressed by the delegation of countries having a *sui generis* protection, Member Countries were apprehensive of accepting that standard in the absence of evidence. In fact, there was no explicit evidence at the time of enacting the Database Directive.¹²⁶ Even with adequate consultative process in place, Member Countries were not sure of accepting the proposal of a new legislation without unanimous support in their home countries.¹²⁷ It was rather difficult to receive overwhelming support for a legislation which was completely new and has not been tried at other jurisdiction. Further, there would be always some opposition to the idea of a new legislation. It was a challenging task for a jurisdiction to brush aside those oppositions especially when evidence-based approach has been suggested as a *prima facie* requirement.¹²⁸ There was no explicit indication given as to the evidence they were expecting before deciding on the issue of legislation. Evidence of market failure was not observed by Member Countries, and therefore, the role of evidence as a determinant to decide on the future of legislation was critical. In the context of evidence, regional and national consultative approach followed by the Member Countries may not have answered the question of legislation but surely would have given the opportunity to learn from each other's experience.

India's contribution to the ideas of national and regional consultation and to the requirement of evidence prior to the introduction of new legislation was not unique. However, this contribution was important from the point of overall opposition that was created against nations interested in the passage of the *sui generis* right. In fact, this was one of the many initiatives put forth by India who continued to contribute in the subsequent meetings in 1999.

¹²⁵SCCR/1/9.

¹²⁶COM(92) 24 final.

¹²⁷For instance, this expressed by the Delegation of Australia, SCCR/1/9, para 144.

¹²⁸There were no issues raised by the industry in Australia. In other countries, they were serious apprehensions in the scientific and research community, *ibid*.

4.2 *Contradictory Ideas at the Stage of Consultation*

In the May 1999 meeting, India spoke on behalf of the group of countries in Asia and the Pacific.¹²⁹ The Indian Delegation said that the consultation meetings as suggested in the 1998 meeting were yet to happen. It was believed amongst the group of nations that the need for a special database right was not explicitly demonstrated and the existing copyright protection was working in an adequate manner. Similar to the meeting that happened in 1998, there was concern expressed about the effect of this proposed database protection on the development of science, technology, research and education.¹³⁰ Supporting the opinion of the Indian Delegation, the Delegation of Singapore pointed to the concern posed by the scientific community. They felt, with the emergence of the new right, access to information could be hampered on the Internet.¹³¹

Raising the cause of developing nations, the Delegation of Senegal stressed on the importance of carving out the exceptions. The process of consultation took into account the special requirements in the areas of health, education and research.¹³² Exceptions in the areas of private use, research and government use and education were echoed by the Delegation of Ghana. In the national consultative process, majority of the stakeholders supported the need for additional protection in Ghana.¹³³ Contrary to Ghana, the Brazilian Delegation believed that the existing structure was enough to have incentivized the production of databases.¹³⁴

The Chinese Delegation were not sure of the International Treaty but favoured special protection measures at the national level. Nonetheless, they supported the idea of consultation process.¹³⁵ Referring to the consultation process, the Delegation of Belarus representing the Commonwealth of Independent States shared that the proposed new protection should under no circumstances go against the educational, research and cultural interest of nations.¹³⁶

Favouring the *sui generis* right, the European Community suggested that their experience with the right had been good. There were no signs of concern with the incorporation of the right in the Member States.¹³⁷ The Delegation of Lithuania representing the Group of Central European and Baltic States supported this opinion.¹³⁸ While there was some concern with the complexity of the legislation in the UK,

¹²⁹Standing Committee on Copyright and Related Rights: May (1999). http://www.wipo.int/edocs/mdocs/copyright/en/sccr_2/sccr_2_11.pdf. Accessed 13 April 2015 (hereinafter SCCR/2/11).

¹³⁰SCCR/2/11.

¹³¹Ibid., para 105.

¹³²Ibid., para 97.

¹³³Ibid., para 98.

¹³⁴Ibid., para 99.

¹³⁵Ibid., para 108.

¹³⁶Ibid., para 107.

¹³⁷Ibid., para 101.

¹³⁸Ibid., para 103.

the situation remained under control.¹³⁹ The Delegation of Mexico referred to their inclusion of a *sui generis* system for databases that were non-original by copyright standard. The protection was extended for a period of five years with only one option of renewal.¹⁴⁰ The Delegation of USA could not add any substantive argument since the nature of the possible protection in the USA was still debated at their national level.¹⁴¹ At the end of the meeting, the Chairman commissioned the IB to study the economic impact of the protection of databases and planned for further regional consultations on the given topic.¹⁴²

Further to the meeting in May, two subsequent meetings of the SCCR took place in November 1999 and May 2001.¹⁴³ None of these reports featured any comments made by the Indian Delegation. In the 1999 meeting, the Delegation of Indonesia spoke on behalf of the group of countries in Asia and the Pacific. Referring to the document on regional consultation, the Delegation expressed that the need for an additional database protection was not established.¹⁴⁴ The concerns raised in this particular document resonated with the points of discussion in the May 1999 and 1998 meeting. It was felt that more information was required with respect to the enactment of the *sui generis* right and the countries would ideally like to refer to the study commissioned by the WIPO to study the economic impact of the protection of databases in the developing and the least developed countries.¹⁴⁵ The group of countries involved in the regional consultation process comprised of Bangladesh, China, Fiji, India, Indonesia, Mongolia, Pakistan, Philippines, Singapore, Sri Lanka, Thailand and Vietnam. There was no representation of this group in 2001 meeting.¹⁴⁶

4.2.1 Regional and National Consultations

Compared to the 1998 meetings, regional and national consultations began on a comprehensive note. There was a certain degree of similarity in how Member Countries concluded in those consultation proceedings. The major issues were about access to information specifically in areas of health, education and research.¹⁴⁷ This was a positive development since the proposed International Treaty itself would have

¹³⁹Ibid., para 106.

¹⁴⁰Ibid., para 111.

¹⁴¹Ibid., para 96; Davison (2003), p. 232.

¹⁴²SCCR/2/11, para 118.

¹⁴³Standing Committee on Copyright and Related Rights: November (1999). http://www.wipo.int/edocs/mdocs/copyright/en/sccr_3/sccr_3_11.pdf. Accessed 14 April 2015 (hereinafter SCCR/3/11); Standing Committee on Copyright and Related Rights: May (2001). http://www.wipo.int/edocs/mdocs/copyright/en/sccr_5/sccr_5_6-main1.pdf. Accessed 14 April 2015 (hereinafter SCCR/5/6).

¹⁴⁴SCCR/3/11, para 73.

¹⁴⁵Ibid.

¹⁴⁶Standing Committee on Copyright and Related Rights: November (1999). http://www.wipo.int/edocs/mdocs/copyright/en/sccr_3/sccr_3_6.pdf. Accessed 14 April 2015 (hereinafter SCCR/3/6).

¹⁴⁷Davison (2003), p. 233.

given the freedom to the Member Countries to draft exceptions as long as they were not against the normal exploitation of the database and rights of the database makers.¹⁴⁸ Even with this development, there were additional challenges in the context of specific aspirations of developed and developing nations involved in the debate. There were larger questions that remained unanswered in relation to the structure of exceptions that would be deemed appropriate by the Member Countries.

Although the exceptions offered under the Database Directive were there as a template before the WIPO, there was no additional guidance on how those exceptions would help in balancing access to information and incentive for database producers. The exceptions offered in the final version of the Database Directive were not welcomed by the research community, suggesting that they were tilted in favour of the database producer.¹⁴⁹ Although the European Community did try to assuage the developing countries, they could not come up with decisive evidence that would suggest that *sui generis* protection did not create any concern. Perhaps, it was too early even for the European Community to have understood the full implications of the right. In fact, we have observed this in the remarks made in the evaluation report about the monopoly concerns that are inherently present in the structure of the Database Directive.¹⁵⁰

4.2.2 Growing Importance of the Role of India

Compared to the situation in 1988, where India was in agreement with other Member Countries on issues concerning the impact of database right, in 1999 we see India in a leadership role. For instance, the position taken by India received support from the Delegation of Singapore. The views expressed by India and other countries were again well received at the November 1999 meeting. All these views in a comprehensive manner created enough doubts and created a space for discussion in a situation where the International Treaty proposal was only drafted purely on the presentation and deliberation made by the European Community and the USA. Further, it was not that the group of Member Countries including India outright opposed the International Treaty.¹⁵¹ On the contrary, they were supportive of the entire process but put forth their concerns that were not addressed at the stage when the proposal of the International Treaty was drafted. In fact, given the situation and looking at the gravity of debates that happened at the WIPO, starting from 1998 there were number of suggestions made to conduct a study on the economic impact of the protection of databases on developing countries, with a special emphasis on the impact on least developed countries including not just the economic aspects but social consequences, impact on science, teaching and research.

¹⁴⁸CRNR/DC/6, Para 5.01.

¹⁴⁹Leistner (2002), p. 458; Stamatoudi (1997), p. 50; Reichman and Samuelson (1997), p. 51.

¹⁵⁰First Evaluation of Directive 96/9/EC, para 4.1.4.

¹⁵¹Davison (2003), p. 231.

5 Increased Indian Participation at Later Stages

In the 2003 meeting, the Delegation of India made a statement on the protection of databases in the country.¹⁵² While original databases are protected under copyright, there was no clear indication about the protection offered to non-original databases that would not readily come under the purview of copyright. This was the first time that the Delegation had made any reference to the structure of protection existing in India. The existing structure of protection and the possible requirement of a *sui generis* right were further identified in a study commissioned by the WIPO.¹⁵³ This, which was reported in 2002, was one of the five studies that were given to experts to guide the Member Countries in their deliberations on the International Treaty.¹⁵⁴ Contrary to the study that discussed Indian position, the Delegation of India raised the issue that more time was required to understand the true requirement of a *sui generis* right over and above the existing legal structure in India. Further, the Delegation suggested that since there was no consensus on the protection of databases, the item should be removed from the agenda.¹⁵⁵

Similar to the opinion of the Indian Delegation, the Delegations of Senegal and Egypt voiced for its removal from the agenda in the background of no real progress made on the issue of an International Treaty on databases. With the possibility of dealing with the issue of non-original databases through other legal means, both Delegations insisted that the issue should be removed from the agenda list for the time being.¹⁵⁶ The Delegation of Brazil supported the views expressed by India, Senegal and Egypt. There was no clear indication in their country to suggest the requirement of a special right. As a supporting argument for removal of the item from the agenda list, they said that there was no consensus reached about the structure of the proposed International Treaty.¹⁵⁷

The support towards the possible International Treaty came from the European Community and its Member States. There was also support from USA and the Russian Federation. While the European Community did not favour the removal of the item from the agenda list, they did not say anything new in their support for an International Treaty. They continued to express that the *sui generis* right had been greatly beneficial for the European Community but did not get into details of the extent of such benefit.¹⁵⁸ The Delegation of USA continued to support the proposal, although they did not have a similar protection as a part of their national legislation.¹⁵⁹ Similar

¹⁵²Standing Committee on Copyright and Related Rights: Report June (2003). http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_11.pdf. Accessed 16 April 2015 (hereinafter SCCR/9/11).

¹⁵³SCCR/7/5.

¹⁵⁴Ibid.

¹⁵⁵SCCR/9/11, paras 12 & 20.

¹⁵⁶Ibid., paras 13 & 14.

¹⁵⁷Ibid., para 15.

¹⁵⁸Ibid., para 17.

¹⁵⁹Ibid., para 16; Davison (2003), p. 232.

to the European Community and the USA, the Russian Federation supported the non-removal from the agenda list.¹⁶⁰ With all these developments in the background, the Chairman suggested that the item need not be present in every SCCR meetings and the time has come to understand the developments on this issue through a proper framework.

5.1 Conflicting Position: Indian Delegation and Expert Report on India

The expert report that was submitted to the WIPO in 2002 recommended that *sui generis* database protection was necessary to harness the true potential of the Indian database market.¹⁶¹ In the background of commercialization of data, it was argued that India needs a separate protection that would incentivize production of databases.¹⁶² Although at the time Government was the biggest producer of data, commercialization of data especially in the field of remote sensing data provided support to the argument of enacting a special legislation in India.¹⁶³ The report saw enough potential for the Indian database market, although the Indian database industry was very fragmented in nature.¹⁶⁴ Referring to the Traditional Knowledge Digital Library (TKDL) Programme, the report contemplated the immense potential of it in the international market.¹⁶⁵ Even in the area of genomic data and bioinformatics sector, India could benefit out of commercialization.¹⁶⁶ Although Indian database industry was not an organized one, there were indications to suggest that the database industry business was lucrative. To support this argument, the report cited data provided by a Delhi-based market research company.¹⁶⁷ Looking at the strength of the Indian IT industry, a strong protection framework would not only incentivize the domestic market but would also increase the flow of data from foreign companies.¹⁶⁸ As a sign of encouragement, the report quoted Government's IT action plan of the IT Task Force.¹⁶⁹ With this potential in the background, it was suggested that there was no definitive legal framework in the country that would create an environment of certainty for makers of databases. Referring to the Delhi High Court judgement in *Eastern Book Company & Ors v Navin J Desai & Anr*, the report suggested that the threshold of copyright protection in the country has been raised to the extent

¹⁶⁰SCCR/9/11, para 18.

¹⁶¹SCCR/7/5.

¹⁶²Ibid.

¹⁶³Ibid., paras 1 & 1A(c).

¹⁶⁴Ibid., para 1B.

¹⁶⁵Ibid., para 1A(d).

¹⁶⁶Ibid., paras 1A(e) & 1A(f).

¹⁶⁷Ibid., para 1A(d).

¹⁶⁸Ibid., para 11C(a).

¹⁶⁹Ibid.

that most databases would fail to qualify under copyright protection.¹⁷⁰ Further, the protection offered under the Indian Contract Act, The Information Technology Act, and Misappropriation law was not considered adequate.¹⁷¹

There were certain challenges attached to the methodology that was followed in the report. There was no credible data available at the time of writing, and therefore, the industry data and perspectives were largely based on interviews with key personnel from the industry. The rest of the data was procured from the Internet.¹⁷² The sample size or the number of key personnel interviewed was not clear. Further, the interviews were limited to the personnel who belonged to the industry. The report was not specific about interviewing other stakeholders. There was not much said about addressing the concern of the scientific community where extensive rights were granted through the enactment of *sui generis* database protection. The market research conducted to assess the potential of the Indian database industry was not adequate. The methodology used to realize the true potential of the industry was not clear. Further, it was assumed that the threshold under the copyright protection would not actually protect most of the databases and therefore *sui generis* protection was necessary. There was no analysis to suggest the true impact of the *Eastern Book Company* case on the future database market. A similar argument was used in Europe to support the argument of including *sui generis* database protection in their legal framework. At the time, the first draft proposal feared the implication of *Feist Publications v Rural Telephone Service Company*.¹⁷³ It was believed that this decision would *dis*-incentivize production of databases.¹⁷⁴ This was a USA Supreme Court ruling, and at the time, this argument was not used to argue for a *sui generis* protection in the USA.¹⁷⁵ In fact, the report describing the Indian database market only said that the database created under the TKDL project would easily qualify for protection under the existing copyright regime. This shows that copyright protection can still incentivize production of databases.¹⁷⁶

In a contrasting way, the Delegation of India suggested that they were unsure of the requirement of *sui generis* right due to lack of evidence. Both the report and the Delegation, however, were in agreement with the copyright protection of original databases.

¹⁷⁰Ibid., para III(a); 2001 (58) DRJ 103.

¹⁷¹SCCR/7/5, paras III(b)–(e).

¹⁷²Ibid., p. 5.

¹⁷³COM(92) 24 final, para 2.3.3; 499 U.S. 340 (1991).

¹⁷⁴COM(92) 24 final, para 2.3.3.

¹⁷⁵First Evaluation of Directive 96/9/EC, para 2.4.

¹⁷⁶SCCR/7/5, para 1A(d).

5.2 *Signs of Removal of Sui Generis Proposal from Agenda List*

The 2003 meeting marked the exit process of the proposal that was discussed for a period of seven years. Member Countries including India opposed the International Treaty on the ground that there was not much progress even after all these years. Progress in the context meant reaching consensus on the issue of *sui generis* database protection.¹⁷⁷ The option of removal was seriously considered by the Chairman when he suggested that the issue of *sui generis* right may not feature in all SCCR meetings and as a part of their agenda items.¹⁷⁸ The two meetings that happened in 2002 never discussed the possible withdrawal of the item from the agenda list. In fact, the first meeting held in May 2002 discussed the five expert reports that were commissioned by WIPO in 2001.¹⁷⁹ Further, the Delegations also welcomed the reports of the experts, except the Delegation of China who raised doubt as to the protection of simple compilation of statistics like telephone directories or stock market prices.¹⁸⁰ The second meeting of November 2002 was a continuation of the first meeting, and there was no substantial discussion on the issue.¹⁸¹ However, the European Community was appreciative of the work done by WIPO in carrying out various studies.¹⁸² They were of the opinion that the country-specific reports showed that database protection was a global issue and there was a need for international protection. So far, the European Community in the previous meetings broadly spoke on the importance of the *sui generis* right and how Europe had greatly benefitted out of the protection. The country-specific and region-specific discussions in a way bolstered their argument of an International Treaty. Further, in 2002, Delegation of South Korea reported the introduction of the draft national law concerning the protection of non-original databases in the parliament.¹⁸³ Therefore, the radical approach by the Delegation of India including other Member Countries proposing for the removal of the item from the agenda list was at the crossroads of the developments post-2002. These developments were moving towards creating a favourable situation and a consensus towards an International Treaty.

¹⁷⁷Davison (2003), p. 231.

¹⁷⁸Standing Committee on Copyright and Related Rights: Report May (2002). http://www.wipo.int/edocs/mdocs/copyright/en/sccr_7/sccr_7_10.pdf. Accessed 15 April 2015 (hereinafter SCCR/7/10).

¹⁷⁹SCCR/7/10, para 10.

¹⁸⁰Ibid., para 16.

¹⁸¹Standing Committee on Copyright and Related Rights: The Impact of Protection of Non-original Databases on the Countries of Latin America and the Caribbean November (2002). http://www.wipo.int/edocs/mdocs/copyright/en/sccr_8/sccr_8_6.pdf. Accessed 15 April 2015 (hereinafter SCCR/8/6).

¹⁸²SCCR/7/10, para 12.

¹⁸³SCCR/7/10, para 17.

6 The End to the Treaty Proposal: Member Countries not Ready

In the June 2004 meeting, the International Treaty proposal for the protection of non-original databases was substantially discussed for the last time at the WIPO.¹⁸⁴ The Delegation of India in the opening remarks suggested that the allegation of widespread copying of valuable databases had not been proved.¹⁸⁵ Although there was every interest to create a favourable situation for the Indian database industry to flourish, this should not be achieved at the cost of having negative factors inhibiting growth of the future database industry. While they appreciate the pro-active position of the European Community, this issue was only suited for their region. To have an International Treaty at that moment of time would not be right and, therefore, should be removed from the agenda list.¹⁸⁶ Supporting the Delegation of India, the Chinese delegation suggested that the proposal should be dropped from the agenda.¹⁸⁷

Similar to the Delegation of India, Brazil suggested there had been no substantive discussion on the issue of database protection, although the issue has been on the agenda for a long time. They suggested that the report on the protection of non-original databases in Latin America indicated that it would be untimely to implement a treaty at the international level. Further, there were no clear indications to suggest the socio-economic impact of enacting the *sui generis* right. In the background of the growing anxiety in the developing and developed countries, the issue should forever be deleted from the agenda.¹⁸⁸ Without recommending the removal, the Delegation of Egypt, which represented the African Group, questioned the idea of continuing with the discussion. They were not sure whether progress could be achieved on this issue and the countries would still require more time to consider the issue of an International Treaty.¹⁸⁹

Supporting the *sui generis* system, the European Community referred to the submission made at the WIPO in 2002.¹⁹⁰ This submission suggested that the *sui generis* protection had been an important incentive for the European database industry. Furthermore, the balance that had been achieved through the enactment of the *sui generis* system had greatly benefitted the users and the investors. Similarly, a treaty at an international level would be beneficial for the overall economy.¹⁹¹ Although the USA

¹⁸⁴Standing Committee on Copyright and Related Rights: Report June (2004). http://www.wipo.int/edocs/mdocs/copyright/en/scrr_11/scrr_11_4.doc. Accessed 16 April 2015 (hereinafter SCCR/11/4).

¹⁸⁵SCCR/11/4, para 17.

¹⁸⁶Ibid.

¹⁸⁷Ibid., para 20.

¹⁸⁸Ibid., para 12.

¹⁸⁹Ibid., para 23.

¹⁹⁰Standing Committee on Copyright and Related Rights: The Legal Protection of Databases November (2002). www.wipo.int/edocs/mdocs/copyright/en/scrr_8/scrr_8_8.doc. Accessed 16 April 2015 (hereinafter SCCR/8/8).

¹⁹¹SCCR/11/4, para 11.

continued to support the framework of an International treaty, they were pushed by the fact that for the past eight years, the USA Congress had not agreed on a database protection for non-original databases.¹⁹²

The issue of protection of databases was recommended to be included for the thirteenth session of WIPO in 2005; however, there was not much discussion at the meeting.¹⁹³ The Delegation of the Islamic Republic of Iran questioned the justification of continuing with the issue in the list of agenda items in spite of repeated requests of the Member Countries.¹⁹⁴ This view was supported by Brazil, and there was an immediate request for the removal.

6.1 Issue of Evidence of Market Failure at Forefront

The debate at the final stages rested on the argument of market failure. India argued that there was no evidence of mass copying. This argument is similar to the fundamental argument posed at the beginning of this chapter. Essentially, we first have to identify the problem to understand the solution in a better way. Therefore, the problem about mass copying must be evidenced before drafting a new legislation especially in the context of a legislation surrounding which there were doubts posed by Member Countries. Referring to this point of contention, the first evaluation report mentioned that without a special *sui generis* right in place, USA was the market leader in the production of databases,¹⁹⁵ whereas, with protection, EU was still lagging behind.¹⁹⁶ Being a market leader would certainly give the impression that investment continued towards the production of databases. The expert report concerning India similarly did not identify the problem.¹⁹⁷ It merely highlighted the potential of the Indian database industry and suggested that protection was required to maximize such potential. This was somewhat similar to the argument made in the first draft proposal of the European Database Directive where no real evidence of market failure was identified. Instead, the true potential of the European database industry was identified in comparison with the USA database market.¹⁹⁸

¹⁹²Ibid., para 10.

¹⁹³SCCR/13/6.

¹⁹⁴Ibid., para 187.

¹⁹⁵First Evaluation of Directive 96/9/EC, para 4.4.

¹⁹⁶Ibid.

¹⁹⁷SCCR/7/5.

¹⁹⁸COM(92) 24 final, para 2.

6.2 *European Claim not Substantiated by the Evaluation Report*

The arguments posed by the European Community suggested that for the European database industry the presence of *sui generis* right had been a great incentive. Referring to the evaluation report, one can observe that the European database industry did not grow to the extent that was expected at the time of drafting the *sui generis* right.¹⁹⁹ Therefore, it is unlikely that both these arguments can stand together. The other issue that was referred to by the European Community was how this legislation in Europe had balanced the rights of the database maker and the user. This contention was again contested in the evaluation report that suggested that the right was essentially complex and not easily understood if not for the judgements of the ECJ.²⁰⁰ Further, the four decisions mentioned beforehand suggest that the database right is monopolistic in nature especially in the context of single-sourced database.²⁰¹ The differences that one can perceive in the evaluation report to what was said by the Delegation of the European Community showed the gap that existed in the understanding of the impact of Database Directive in Europe.

The debates that extended for little over eight years saw the Member Countries opposing the proposal of an International Treaty protecting non-original databases. One must say that those who were in favour of an International Treaty were limited to the European Community and its Member States²⁰² and to some extent received some support from USA and in the latter part from Russia and South Korea. USA did not have any legislation unlike EU and so was the situation with Russia and South Korea. They were very much at the consultative stage. Therefore, the opposition included rather large number of countries including Asia Pacific, Africa, Latin American countries and Australia. India's role was participatory in nature, and to some extent, they led the debate. There was the expert report in 2002 explaining the requirement of *sui generis* right in India, which was in conflict with the views expressed by the Delegation of India. Other than this one report, the Delegation of India voiced against the implementation of an International Treaty on the protection of databases.

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¹⁹⁹First Evaluation of Directive 96/9/EC.

²⁰⁰First Evaluation of Directive 96/9/EC, para 4.3.

²⁰¹Cases C-203/02, C-46/02; C-338/02; C-444/02.

²⁰²Winn and Tian (2009), p. 272.

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TRIPS and Public Health: Challenges for India and Its Response

Reji K. Joseph

Abstract Unlike many other countries, in India, there is a direct link between the price of medicines and the number of people falling into poverty. In 2004–05, 47 million people are pushed into poverty on account of catastrophic health spending, which is caused primarily by expenses on medicines. And the number of people in India who do not get treated on account of financial reasons is increasing, primarily attributed to cost of medicines. For India, therefore, it is a compulsion rather than a choice that TRIPS flexibilities such as compulsory license is exercised to bring down the cost of patented medicines. India has granted only one compulsory license, but it was met with severe resistance from pharmaceutical MNCs and the USA. However, the fact of the matter is that USA and other advanced countries rely extensively on compulsory license to meet their priorities such as promotion transfer of technology and restriction of anti-competitive practices. Another major challenge for India is arising from the obligations India has taken on itself in its numerous bilateral investment treaties (BITs). Intellectual properties, including patents, have been included within the purview of definition of investment which could subject issuance of compulsory license to international investment arbitration under the investor-state dispute settlement clause.

Keywords Patents · Cost of medicines · Compulsory license
Indian pharmaceutical industry · Healthcare financing

1 Introduction

The patent system in India was all set for a major overhaul since the mid-1990s, with India becoming a party to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of World Trade Organization (WTO). There were major concerns about the implications of the new patent system on public health. The most important concern was related to the price of medicines—would the patent monopoly

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Table 1 Pattern of health financing in India and selected other countries in 2012

Country	Total health expenditure % GDP	Public health spending % GDP	Private health expenditure % total health expenditure ^a	Out-of-pocket expenditure % private health expenditure	Out-of-pocket expenditure % total health expenditure ^a
India	4.0	1.3	67.5	86.0	58.1
Brazil	9.3	4.3	53.8	57.8	46.2
USA	17.9	8.3	53.6	20.7	46.1
S. Africa	8.8	4.2	52.3	13.8	45.0
China	5.4	3.0	44.4	78.0	38.2
Malaysia	3.9	2.2	43.6	79.0	37.5
Switzerland	11.3	7.6	32.7	73.4	28.2
Netherlands	12.4	9.9	20.2	41.7	17.3
UK	9.4	7.8	17.0	56.8	14.6
Bhutan	3.8	3.2	15.8	94.7	13.6
Global Average ^a	6.0	3.7	38.3	67.8	33.0

Source Computed by author based on World Bank data^a

^aThe World Bank, Total health expenditure (health expenditure %GDP), <http://data.worldbank.org/indicator/SH.XPD.TOTL.ZS> (accessed on December 14, 2014); Public health expenditure % GDP, <http://data.worldbank.org/indicator/SH.XPD.PUBL.ZS> (accessed on December 14, 2014); out-of-pocket expenditure in health care % of private expenditure, <http://data.worldbank.org/indicator/SH.XPD.OOPC.ZS> (accessed on December 14, 2014)

lead to a steep rise in prices? This concern was deep rooted in the bitter experience of India under the product patent regime existed under the Patents and Designs Act 1911 and the nature of health financing in India. Although India was able to incorporate important TRIPS flexibilities while amending its Patents Act 1970 in 2005 to qualify patents that are eligible for patent protection in the area of pharmaceuticals and to adopt policy measures to protect public interest such as health, huge pressure has been mounted on India by advanced countries to retreat from the use of these flexibilities. It is very ironic that while the same advanced countries use some of these flexibilities extensively to meet their economic and development objectives, the same policy space is being denied to poorer countries.

2 Healthcare Financing in India

The healthcare financing in India is characterized by large private expenditure. This is just opposite to the healthcare financing pattern observed in countries with better health indicators, where the public health expenditure has been on the higher side. Table 1 shows the healthcare financing pattern in India and a few selected other countries.

Table 1 shows that the out-of-pocket expenditure accounts for 58% of the total healthcare expenditure in India. This is much higher than the global average of 33%. The dominance of private health spending in the healthcare system and the very high share of out-of-pocket expenditure can result in a direct link between healthcare costs and poverty. The requirement of health care is inelastic to price and income—health care is not something which people would access when the price is low or income is higher, but determined by the incidents of illness. People will even mortgage their property to finance health care when they are ill. Studies have established that there is a direct relationship between health spending and poverty. Using national sample survey data, Ghosh (2011) estimates that the incidence of catastrophic health spending (defined as the incidence of catastrophic health spending among the households which spend more than 10% of their total consumption expenditure as out-of-pocket expenditure on health care) has increased from 13% in 1993–94 to 15% in 2004–05. The draft National Health Policy 2015 of Ministry of Health and Family Welfare, Government of India, states that this figure has increased to 18% 2011–12.¹ Expenses on medicines are the most important factor contributing to catastrophic health spending. Ghosh (2011) points out that out-of-pocket expenditure on health care has pushed 35 million people into poverty in 1993–94 and 47 million in 2004–05. The draft National Health Policy 2015 states that “almost all hospitalization even in public hospitals leads to catastrophic health expenditures, and over 63 million persons are faced with poverty every year due to health care costs alone.”² It admits that “incidence of catastrophic expenditure due to health care costs is growing and is now being estimated to be one of the major contributors to poverty.”³

The strong relationship between healthcare costs and poverty in India is further established by the fact that the number of people not taking treatment when they are ill due to financial constraints is on the rise in rural India. The national sample survey covering morbidity and health care at different time periods indicates that the share of ailments not treated on account of financial problems has been on the rise in rural areas (Table 2).

Table 2 shows that financial problem is the most important constraint preventing people with ailments from getting treated.⁴ With a very high share of out-of-pocket expenditure in health care, it is quite natural that the poor people will find it difficult to seek healthcare services when they are ill.

An interesting aspect of out-of-pocket expenditure in health care in India is that bulk of it is on medicines. The NSS on household consumer expenditure shows that expenditure on medicines constituted 66.4% of out-of-pocket expenditure on

¹Government of India (2014).

²Ibid., p. 8.

³Ibid., p. 3.

⁴‘Ailment not considered serious’ is not a constraint.

Table 2 Percentage of ailments not treated for their reasons during different rounds of NSS on morbidity and health care

Reasons for not treating ailments	2004 (60th round)		1995–96 (52nd round)		1986–87 (42nd round)	
	Rural	Urban	Rural	Urban	Rural	Urban
No medical facility available in the neighborhood	12	1	9	1	3	0
Facility available, but lack of faith	3	2	4	5	2	2
Long waiting	1	2	1	1	0	1
Financial problem	28	20	24	21	15	10
Ailment not considered serious	32	50	52	60	75	81
Others (including not reported)	24	25	10	12	5	6
	100	100	100	100	100	100

Source Compiled by author based on NSSO (1998, 2006)

Note Data of NSS 42nd and 52nd rounds is accessed from NSSO (1998) and 60th round from NSSO (2006)

health care in India in 2011–12; 68.6% in rural areas and 62.9% in urban areas.⁵ As medicines being the category accounting for a major share of out-of-pocket health spending, the relationship between cost of medicines and poverty is very straight forward. It has been found in India that poorer a household is, larger the share of expenses on medicines in total healthcare expenses. In 2009–10, the poorest quintile spent 75% of the out-of-pocket healthcare expenses on medicine, the second poorest quintile spent 72%, third quintile spent 70%, fourth quintile spent 67%, and the richest quintile spent 66%.⁶ Therefore, it is in the large public interest of India to ensure that the cost of medicines is affordable.

Given the nature of healthcare financing in India and the significance of expenses on medicines in total out-of-pocket healthcare spending, the patent monopoly would have a direct impact on public health in India. Any increase in price of medicines would further force many more people not to seek health care when they are ill. Similarly, any policy measure that would reduce the price of medicines would invariably lead more people seeking healthcare services. This is evident in the free medicine scheme launched in Rajasthan in 2011.⁷ Within one year of the launch of the scheme,

⁵Computed from unit level data of NSS 2011–12, Ministry of Statistics and Programme Implementation, Government of India, New Delhi. These figures have been computed and made available by Dr. Anup Karan, Associate Professor, Indian Institute of Public Health Gandhinagar, India.

⁶Selvaraj (2012).

⁷The free medicines scheme launched in October 2011 began with free supply of 200 generic medicines in public hospitals. The Rajasthan Medical Services Corporation is the nodal agency implementing this scheme. For more details, visit www.rmssc.nic.in.

the out-patient visits went up by more than 50%⁸ and in-patient admissions by 30%.⁹ Such strong is the relationship between cost of medicines and patients seeking health-care services in India.

India provides for the regulation of prices of essential drugs to ensure reasonable prices of medicines.¹⁰ It has greatly contributed in checking undue increase in prices. However, patented medicines do not fall under the purview of drug price control mechanism. It is estimated that patented medicines account for 42% of the domestic pharmaceuticals market in terms of turnover, and this share is expected to grow fast.¹¹ The report of the Committee on Price Negotiation for Patented Drugs points out that the “the prices [of patented medicines] are much beyond the reach of general masses of the country.”¹² Glivec, an anticancer drug of Novartis, which obtained exclusive marketing rights in 2003, was sold at USD 2500 (approximately Indian Rs. 1.5 million at current exchange rate) for one month. Only a very few Indians would afford to spend Indian Rs. 1.5 million per month on drugs. Although various mechanisms have been suggested for the regulation of prices of patented medicines (like reference pricing and price negotiation by government), the prices of patented medicines are yet to be regulated. Even if prices are regulated on the basis of reference pricing or price negotiation, the prices may not be still affordable for vast majority of the population. According to the report of the Committee on Price Negotiation for Patented Drugs, “it is felt that even after the prices of patented medicines are negotiated by a Government Committee, the same may remain unaffordable to the masses.”¹³

A negotiated price or a reasonable price to the originator will have to take into account the investments on research and development (R&D). The R&D investment statistics reported by pharmaceutical industry is not transparent and is contentious. According to Pharmaceutical Research and Manufacturers of America (PhRMA), the development of a new drug costs about USD 1 bn and efforts of about 15 years.¹⁴ This figure is based on an unrepresentative sample and excludes the majority of the new drugs which are extensions of existing ones and which have benefited from public funding. These estimates are also adjusted upwards to provide for opportunity cost of capital. The actual out-of-pocket expenditure per drug estimated by DiMasi et al. (2003) was only USD 403 million and when adjusted for opportunity costs, the estimate rose to USD 803 million. Other components involved in the R&D estimates

⁸During the first anniversary of the launch of the scheme, the Chief Minister of Rajasthan is reported to have stated about the increase in the number of patients visiting out-patient department. For details see ‘After generic medicine supply, Rajasthan may go for free diagnostic tests’, *The Hindu*, October 3, 2012.

⁹‘India poised to supply free drugs to 1.2 billion people’, *Inter Press Service*, (www.ipsnews.net), November 8, 2012.

¹⁰The Drug Price Control Order provides the mechanism for regulation of drug prices in India. The current mechanism is based on Drug Price Control Order of 2013.

¹¹Government of India (2013).

¹²*Ibid*, p. 26.

¹³Government of India (2013), p. 26.

¹⁴‘Drug Discovery and Development’, www.phrma.org (accessed on 16 November 2011).

are: (i) executive costs in finding and negotiating with other firms for new products, (ii) costs for medical writers and public relations to develop stories and market demand for products in trials as they progress, (iii) support for scientific journals and supplementary issues in which the results of industry-supported research get published, (iv) lectures and courses to inform physicians about current research, (v) legal fees devoted largely to patents and research-related issues, and (vi) land and costs for buildings in which some research is done. Surely, these are not the kind of “investments” that should be considered for the kind of statutory protection that the pharmaceutical industry is seeking.¹⁵ None of the pharmaceutical MNCs provided product-wise R&D expenditure. It appears that current innovation model in pharmaceuticals allows a lot of inefficiencies in the system and the companies are able to cope up with it due to the patent monopoly and evergreening.¹⁶ If the new products are not affordable to the society, it is high time that we think of alternate innovation models. Evolution of alternate innovation models will take time, and in the meantime, what India requires to ensure to facilitate access to medicines is exercise TRIPS flexibilities.

3 TRIPS and India

The most important policy reform in the post-1991 period concerning the pharmaceutical sector has been the modifications in the patent regime on account of India's obligations under the TRIPS Agreement. The process patent regime in drugs and pharmaceuticals under the Patents Act 1970, which paved the way for making Indian pharmaceutical industry globally competitive, has been replaced by a product patent regime (which includes process patents as well) through The Patents (Amendment) Act, 2005. There were a number of concerns on public health raised in the context of shifting to a new patent regime of which the price of medicines was the most sensitive one—whether the new patent regime would lead to rise in drug prices? This concern had its roots in India's own experience under the Patents and Designs Act of 1911 which provided for patent rights for inventions, for a period of 14 years (increased to 16 years in 1930).¹⁷ This Act provided that the person who introduced any manner of new manufacture (Sect. 1.8) would have exclusive rights to make, sell, and use the invention in the country (Sect. 12.1). The product patent regime existed at the time of independence had severely crippled the opportunities for

¹⁵For a detailed discussion, see Dhar and Gopakumar (2008) and Chaudhuri (2005).

¹⁶The term ‘evergreening’ in the literature on patents refers to the strategy often used by patent holders to extend the life of a patent by making minor modifications to the product. As a result, a number of patents are obtained at different periods to protect what is essentially the same product. This gives rise to a situation where the product continues to remain under patent protection long after the expiry of the initial patent. Evergreening is a strategy widely adopted by pharmaceutical MNCs to prevent generics firms from manufacturing and supplying generic drugs when the patent expires.

¹⁷Information available at <http://ipindia.nic.in/ipr/patent/patents.htm> (accessed on 9 July 2014).

accessing essential medicines due to very high cost and lack of availability. Report of the Kefauver Committee (US Senate Committee on the Judiciary) (Government of US 1961) very candidly pointed out how monopoly rights under product patent regime could be insensitive to the incomes of people in developing countries like India. It observed that “India which does grant patents on drugs provides an interesting case example. The prices in India for the broad spectrum antibiotics, aureomycin and achromycin are among the highest in the world. As a matter of fact, in drugs generally, India ranks among the highest priced nations of the world—a case of an inverse relationship between per capita income and the level of drug prices.”¹⁸

There were a number of cases which underscores the fact that MNCs, the patent holders, were neither willing to supply their patented medicines in India nor allowing Indian firms to market them in India. Beechem introduced ampicillin, semi-synthetic penicillin, in Europe in early 1960s. But it was unwilling to supply the drug in India. Similar was the case with propranolol, cardiac drug, introduced by ICI in mid-1960s.¹⁹ In many other cases, MNCs took a long time for the launch of new drugs in India. Keayla (1994) points out that many life-saving drugs took more than 15 years to reach India, after their introduction in the international market.

Having learnt lesson from India’s own experience from the 1911 patent regime, a number of members of the Parliament of India raised serious concerns during the deliberations on the Bill amending the Patents Act 1970 in 2005. One Member of the Parliament (MP) asked whether we would be “able to meet our own requirements at a cheaper rate after adopting this product regime? Can it be assured that we would be able to meet the requirements of medicine of our people? Because that was not our experience in the past ...”²⁰

However, the TRIPS agreement contains certain flexibilities which the member countries can exercise for protecting their interests. For example, TRIPS only requires that “patents shall be available for inventions” (Article 27), but does not define what an invention is: it is up to the member country to define what an invention is. If a country wants to define invention in a narrow manner so as to enhance the standard of innovations, TRIPS allows for that. Articles 30 and 31 of TRIPS agreement provide for exceptions to the monopoly rights granted to the patent holder and use of patented invention without the authorization of the patent holder. Member countries have the flexibility in framing the grounds for exercising these exemptions within the requirements of the TRIPS agreement. The Doha WTO Ministerial (2001) Declaration on the TRIPS agreement and public health (Doha Declaration) underscores the right of member countries to use the TRIPS flexibilities for the protection of public health. Paragraph 4 of the Declaration states that

We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and imple-

¹⁸Government of US (1961), p. 112.

¹⁹Hamied (1988).

²⁰Supreme Court of India 2013, para. 81.

mented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.²¹

Similarly, Article 8 of TRIPS agreement makes clear that while amending the laws and regulations, the member countries have the right to adopt measures necessary to protect public health and nutrition and to promote the public interest in any other sector of vital importance, provided that these measures are consistent with TRIPS provisions.

The impact of the change in patent law on access to affordable medicines depends to a great extent on the use of flexibilities inbuilt in the TRIPS agreement. Therefore, it is important to see how India has made use of the TRIPS flexibilities.

The Patents Act of 1970 of India as amended in 2005 (hereafter Patents Act) defines new invention and inventive step as “new invention means any invention or technology which has not been anticipated by publication in any document or used in the country or elsewhere in the world before the date of filing of patent application with complete specification, i.e. the subject matter has not fallen in public domain or that it does not form part of the state of the art” (Sect. 2L) and “inventive step means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both, and that makes the invention not obvious to a person skilled in the art” (Sect. 2Ja). In the case of pharmaceuticals, the Patents Act clarifies that “the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant. *Explanation*—For the purposes of this clause, salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy.”

The use of above-mentioned TRIPS flexibilities by Indian legislators is contributing significantly for preventing evergreening and frivolous innovations from obtaining patent protection. The “Novartis case” between Novartis and Government of India on the issue of what would qualify an innovation eligible for patent protection was a real test on the validity of the use of TRIPS flexibilities by India. The *Novartis* case is briefly described below.

3.1 *The Novartis Case*

The origin of the dispute *Novartis AG vs. Union of India and Others*²² is traced to the decision of the Assistant Controller of Patents and Designs of India, Chennai,

²¹WTO (2001).

²²*Novartis AG Vs. Union of India and Others*, Civil Appeal Nos. 2706-2716 of 2013; *Natco pharmaceutical Vs. Union of India and Others* Civil Appeal No. 2728 of 2013; and *M/S Cancer Patients*

on January 25, 2006, rejecting the application of Novartis for a patent on Imatinib Mesylate in beta crystalline form. The reasons for the rejection were: (a) invention was not new—invention was anticipated by the patent on the derivatives of *N*-phenyl-2-pyrimidine-amine (hereinafter Zimmermann patent)²³; (b) invention was obvious to a person skilled in the art in view of the disclosures made in the Zimmermann patent specifications; (c) invention did not meet the patentability criteria set by Sect. 3(d) of the Patents Act 1970 of India, as amended in 2005 (hereinafter Patents Act).

Novartis appealed against the decision of the Assistant Controller in the Madras High Court, but which was transferred to the Intellectual Property Appellate Board (IPAB) in April 2007.²⁴ Novartis, however, also challenged the constitutional validity of Sect. 3(d) in Madras High Court, wherein it argued that Sect. 3(d) of the Indian Patent Act is vague and ambiguous and therefore violates the equality provision under Article 14 of Indian Constitution and that it is not in compliance with the TRIPS Agreement; therefore Sect. 3(d) of the Patents Act should be declared unconstitutional. The Madras High Court upheld the validity of Sect. 3(d) and clarified that the patent applicant needs to show that the invention has resulted in the enhancement of the known efficacy of that substance. Efficacy in the context of pharmaceutical compounds has been equated with therapeutic efficacy on body. Regarding TRIPS compliance, the Court held that it has no jurisdiction to decide such matters as it relates to a multilateral international treaty and the proper forum for adjudication would be the WTO Dispute Settlement Body. Novartis did not file any appeal against this decision.

In IPAB, Novartis challenged the decision of the Assistant Controller on grounds of novelty, non-obviousness, and Sect. 3(d). IPAB overturned the decision of the Assistant Controller that the invention was not new and obvious and held that Novartis' invention meets the criteria of novelty and non-obviousness. However, IPAB upheld the decision of Assistant Controller that the patent application did not meet the criteria established in Sect. 3(d) of the Patents Act.

Novartis filed a Special Leave Petition (SLP) in the Supreme Court of India against the decision of the IPAB that its invention did not satisfy the patentability criteria of Sect. 3(d). The NATCO pharmaceutical and M/s Cancer Patients Aid Association²⁵ also filed SLPs challenging the findings of IPAB in favor of Novartis. So the *Novartis* case in the Supreme Court became a test on the validity of the patentability standards in the Patents Act—novelty, non-obviousness and Sect. 3(d).

Aid Association Vs. Union of India and Others, Civil Appeal no. 2717-2727 of 2013 in the Supreme Court of India.

²³Jurg Zimmermann obtained US patent on *N*-phenyl-2-pyrimidine-amine derivatives on May 28, 1996 under Patent No. 5521184. These derivatives were also granted a European patent later under Patent No. EP-A-0564409.

²⁴Originally the appeal was filed in Chennai High Court. Later when IPAB became functional, five writ petitions challenging five orders of Assistant Controller were transferred to IPAB. And two writ petitions on the constitutional validity and TRIPS compliance of Sect. 3(d) were heard by the High Court.

²⁵Nacto pharmaceutical and Cancer Patients Aid Association were among the five parties which had filed pre-grant oppositions in the Patent Office on the patent application of Novartis.

Novartis argued in the Supreme Court that Imatinib Mesylate beta crystalline form involved two inventions, beginning with Imatinib. First invention used methanesulfonic acid to produce methanesulfonic acid addition salt of the free base Imatinib in the base form. In the second invention, the beta crystal form of methanesulfonic acid is developed, which is suitable for administration in solid oral dosage form. Novartis held that these inventions were not obvious to a person skilled in the art: Zimmermann patent did not suggest the use of methanesulfonic acid in the first invention and the therapeutic application of the second invention. Novartis held that the Zimmermann patent only described how to manufacture Imatinib free base and it would have anti-tumor properties to the BCR ABL Kinase; but the arrival at the conclusion that the beta crystalline form of Imatinib Mesylate is effective in the treatment of chronic myeloid leukemia involves two inventions which are new and not obvious to a person skilled in the art.²⁶ The Supreme Court after examining the Zimmermann patent application and an article on anti-tumoral properties of Imatinib Mesylate published in the journal *Cancer Research* arrived at the conclusion that Novartis patent application does not contain anything new.²⁷ The Court held that the Zimmermann patent application explicitly states that the application covers the salts of the compound. The application states that "...any reference to the free compounds should be understood as including the corresponding salts, where appropriate and expedient."²⁸ The application also highlighted the therapeutic application of the compound as anti-tumoral drugs. The article in the *Cancer Research* co-authored by Jurg Zimmermann himself discusses in detail about the anti-tumoral properties of Imatinib and its methanesulfonate salt, i.e., Imatinib Mesylate and states that "the reported findings with CGP 57148 suggest that it may be a development candidate for use in the treatment of Philadelphia chromosome-positive leukemias."²⁹ The Court concluded that "in the face of the materials referred to above, we are unable to see how Imatinib Mesylate can be said to be a new product, having come into being through an invention that has a feature that involves technical advance over the existing knowledge and that would make the invention no obvious to a person skilled in the art."³⁰

The most contentious issue among the patentability standard has been Sect. 3(d). Novartis argued that Sect. 3(d) does apply only when the product is a new form of a known substance having known efficacy; since Imatinib or Imatinib Mesylate did not have any known efficacy, the beta crystalline form of Imatinib Mesylate cannot be considered to be an improvement upon the efficacy over Imatinib or Imatinib Mesylate. Therefore, Sect. 3(d) cannot be applied to the beta crystalline form of Imatinib Mesylate. The Court after examining the new drug application that Novartis had filed in US Food and Drug Administration (FDA) for Imatinib Mesylate for the

²⁶See, *Navartis* case, para. 107.

²⁷Article entitled 'Inhibition of the Abl Protein-Tyrosine Kinase in Vitro and in Vivo by a 2-Phenylaminopyrimidine Derivative' was published in the January issue in 1996. See, *Navartis* case, para. 127.

²⁸*Ibid*, para 109.

²⁹*Ibid*, para 129.

³⁰*Ibid*, para 109, para. 131.

treatment of patients with chronic myeloid leukemia held that Imatinib Mesylate which was a known substance from the Zimmermann patent had undergone pre-clinical, technical, and clinical research.³¹ Therefore, the beta crystalline form of Imatinib Mesylate is a new form of a known substance the efficacy of which was well known. And therefore, Sect. 3(d) would apply. Novartis also argued that beta crystalline form of Imatinib Mesylate shows a definite and tangible enhancement of efficacy as compared to Imatinib in free base form as it is highly soluble and therefore very suitable for administration in human beings. The Court held that the test of efficacy required under Sect. 3(d) in the context of medicines is nothing but “therapeutic efficacy.” Different forms of compounds listed under the explanation of Sect. 3(d) have some properties inherent to that form, e.g., solubility to salt and hygroscopicity to polymorph and “mere change in the form with properties inherent to that form would not qualify as enhancement of efficacy of a known substance.”³²

The impact of Sect. 3(d) on drug prices has been tremendous. Novartis had charged Rs. 120,000 for a one-month course of the drug when the company had exclusive marketing rights in India. With the rejection of Novartis’s patent application, Indian pharmaceutical companies made the drug available in the market at a cost of Rs. 8,000–10,000 for a one-month course.³³ Now there are at least 11 companies in India manufacturing drugs based on the imatinib molecule.³⁴

Checking of evergreening and frivolous patents has undoubtedly facilitated the access to medicines by way of allowing more generic drugs through restricting patent protection only to meritorious innovations. But as patented medicines constitute a significant share of Indian pharmaceutical market, India needs to exercise another important TRIPS flexibility—compulsory license, to reduce the cost of treatment.

3.2 Exercise of Compulsory License in India

Another crucial mechanism provided by the TRIPS Agreement to check the adverse effects of patent monopoly is compulsory license (Article 31). It provides for compulsory licenses for the use of the Government or for the use of third parties. The Doha Declaration underscores the right of member countries to use the TRIPS flexibilities, including the right to grant compulsory licenses, for the protection of public health.

The Patents Act provides for compulsory licensing. There are three clauses under which compulsory license can be granted in India—Sects. 84, 92 and 92.A. Section 84

³¹Novartis had filed an investigational new drug application for Gleevec on April 19, 1998 and new drug application on for Imatinib Mesylate on February 27, 2001 in US FDA. Novartis sells the drug Imatinib Mesylate under names Gleevec and Glivec.

³²*Navartis* case, para 181.

³³Kannan (2013).

³⁴Based on information available at <http://www.medindia.net/drugprice/imatinib.htm>, and <http://www.medindia.net/drug-price/imatinib-mesylate.htm> (accessed on 27 December 2014).

of the Act provides that anyone can apply for compulsory license after the expiry of three years of grant of patent on any of the following grounds: (a) the reasonable requirement of public with respect of the invention has not been met with, (b) patented invention is not available to public at reasonably affordable prices, and (c) patented invention is not worked within the territory of India. Compulsory license under Sect. 84 requires that the applicant for compulsory license should have made an attempt to secure a license from the patentee on reasonable terms and conditions (Sect. 84.6(iv)). The Act restricts the period for the successful negotiation for obtaining licenses to six months.

Section 92 provides that the Central Government may grant compulsory license in circumstances of national emergency, extreme urgency, and for public non-commercial use. This clause requires that products manufactured under compulsory license “shall be available to the public at lowest prices consistent with the patentees deriving a reasonable advantage from their patent rights” (Sect. 92.1(ii)).

Section 92.A of the Patents Act provides for export of medicines to those countries having insufficient manufacturing capacity in pharmaceuticals.

The Patent Office of India has granted first compulsory license in the country to NATCO pharmaceutical over Bayer’s patented cancer drug Nexavar on March 9, 2012. This compulsory license was issued under Sect. 84 of the Patents Act. Nexavar is used in the treatment of kidney and liver cancer, and patients need to take it lifelong. The cost of drug was Indian Rs. 280,428 per month, and Bayer’s supply was meeting only 2% of the total requirement of the drug in the country.³⁵ Bayer also chose to import the drug rather than manufacturing it in India. The Controller of Patents found that all the three grounds for issuing a compulsory license was applicable in the case of nexavar. The reasonable requirement of the public with respect to the invention was not met as only 2% (8842 patients) of the total eligible patients was accessing the drug. The patented invention was not available to public at reasonable price as 98% of the patients were not able to buy the medicine. The patented invention was not worked in within India as the company did not have any manufacturing facility in the country. Under the compulsory license, Natco agreed to supply the drug at Indian Rs. 8,800 per month (pack of 120 drugs), which is 3% of the price of Bayer’s drug, and also to give the drug at no cost to at least 600 patients every year. The Order issuing the compulsory license also stated that the license (Natco pharmaceutical) would pay a royalty of 6% of the net sales to Bayer. Bayer’s appeals in the IPAB and the supreme court of India seeking the stay of the operation of compulsory license were rejected.

There have been criticisms against India’s compulsory license that it violates the rules of WTO. The Deputy Director of US Patents and Trademark Office (USPTO) Teresa Stanek Rea is reported to have said that she was “dismayed and surprised” when she heard about the Indian act. She also characterized the compulsory license

³⁵All information in this paragraph is sourced from the Compulsory License Order issued on 9 March 2012 http://www.ipindia.nic.in/iponew/compulsory_license_12032012.pdf (accessed on 14 April 2014).

as “an egregious violation of World Trade Organization treaties.”³⁶ The PhRMA had taken the view that compulsory license by India on grounds affordability of medicines would not be in compliance with the TRIPS provisions. PhRMA in its Special 301 Submission 2012 stated that “at a minimum India should ensure that the compulsory license provisions comply with TRIPS by clarifying that importation satisfies the working requirement and eliminating price as a trigger to compulsory license.”³⁷

The United States International Trade Commission (USITC) has already initiated investigation against India on trade, investment, and industrial policies especially on protection of IPRs. USTR has already been asked by US industry associations such as PhRMA, National Foreign Trade Council, Biotechnology Industry Association, etc., to include India as a priority foreign country in the Special 301 Report for 2014.³⁸ Under the Special 301 provision of the US Trade Act of 1974, if a country is designated as a priority foreign country, that country will face unilateral trade sanctions by US unless it engages in the negotiation with US or makes significant progress in areas of US concern. USA has earlier used Special 301 provisions to change the IPR laws in countries such as Taiwan, Thailand, and South Korea.³⁹ Despite the pressures from industry bodies, the United States Trade Representative (USTR) has not categorized India under the priority foreign country in its latest Special 301 Report (2015). USTR did not do this probably due to the concern that it would lose the case if India takes up this issue with WTO dispute settlement body. The fact is that the TRIPS Agreement does not limit the circumstances under which compulsory licenses can be issued and a number of developing countries have exercised this right to protect public health (Table 3). The fact that no dispute, alleging compulsory licenses as a violation of WTO rules, has ever been brought to WTO dispute settlement mechanism by advanced countries against any of the developing countries which exercised compulsory licenses rights underscores the legality of such measures. But US has been pressuring India to amend its patent laws so as to accommodate the interests of pharmaceutical MNCs.⁴⁰

As Table 3 shows, countries use compulsory licenses for a variety of purposes. For developing countries like India, price of medicines is an important factor influencing peoples’ decision on whether or not to seek healthcare services when they are ill and hence compulsory licenses on health grounds are very much justifiable. For advanced

³⁶<http://genericlicensing.com/news/view/159> (accessed on 15 November 2012).

³⁷PhRMA 2012, p. 35.

³⁸South Centre (2014).

³⁹Doane (1994).

⁴⁰The USTR began an out-of-cycle review (OCR) of India’s intellectual property (IP) laws on 14 October 2014 to mount pressure on India. For details see *USTR’s Investigations On IP Rights Against India: Is There A Tenable Case?*, <http://www.ip-watch.org/2014/10/20/ustrs-investigations-on-ip-rights-against-india-is-there-a-tenable-case/> (accessed on 14 January 2015).

Table 3 Details of compulsory licenses issued by some countries

Country	Details of compulsory license	Objective of compulsory license
Thailand ^d	In 2006—issued compulsory license to import from India the HIV-AIDS drug Efavirenz, for which Merck held patent In 2007—Issued two compulsory licenses to Government Pharmaceutical Organization of Thailand on the HIV-AIDS drug Kaletra and heart disease drug Plavix ^e	To protect public health
Taiwan ^a	In 2005—issued compulsory license to manufacture and sell generic version of Tamiflu, for which Gilead Sciences held the patent	To protect public health
Malaysia ^b	In 2003—issued compulsory license to local firm to import from India (Cipla) three drugs to treat HIV-AIDS ^f	To protect public health
Indonesia ^a	Indonesia issued compulsory license (under government use, by presidential decree) three times: 2004—to manufacture and supply generic versions two HIV-AIDS drugs (Lamivudine and Nevirapine) 2007—to manufacture and supply the AIDS drug Efavirenz, patented by Merck 2012—to make, import, and sell generic versions of seven patented drugs used in the treatment of HIV-AIDS and hepatitis B ^{b, g}	To protect public health
Ghana ^a	In 2005—issued government use compulsory license for the importation of generic HIV-AIDS from India ^a	To protect public health
Eritrea ^a	In 2005—issued government use compulsory license for the importation of HIV-AIDS drugs	To protect public health
Ecuador ^c	In 2010—compulsory license issued to Eskegroup SA on the HIV-AIDS drug Ritonavir, patented by Abbot	To protect public health
Italy ^d	In 2006, The Italian Competition Authority (AGCM) granted compulsory license to Fabbrica Italiana SpA (FIS) on Glaxo’s Sumatriptan Succinate, an active ingredient used in the production of migraine medicine. Glaxo had initially refused the request of FIS to license the technology. AGCM also ordered Glaxo to grant a number of additional procedural licenses to allow FIS to save the time otherwise required to research and test an efficient manufacturing process for Sumatriptan Succinate	To facilitate licensing of technology To compensate for the time lost by refusing to license a technology
US ^a	In 2001, the Secretary of Department of Health and Human Services (DHHS), USA, threatened to exercise compulsory license (for government use ^h) to authorise imports of generic ciprofloxacin for stockpiles against possible anthrax attack. DHHS wanted to stockpile 1.2 billion pills. Bayer who held the patent on ciprofloxacin could not meet the demand in a timely fashion	To protect public health

(continued)

Table 3 (continued)

Country	Details of compulsory license	Objective of compulsory license
US ^a	In 2006, Johnson & Johnson was granted CL on three patents held by Dr. Jan Voda related to guiding-catheters medical devices for performing angioplasty. This case was decided under the new US Supreme Court standard for granting injunctions on patents ⁱ	To facilitate licensing of technology
US ^a	In 2007, the Federal Trade Commission found that Rambus had monopolized markets for four technologies in violations of section 2 of Sherman Act. The Commission ordered Rambus to compulsorily license the four patented technologies to anyone interested in the technology. This compulsory license was a remedial measure against illegal exercise of monopoly rights	To remedy illegal monopoly created
US ^a	In 2005, the Federal Trade Commission issued compulsory license to Abbot on Guidant's patent over RX delivery system for drug-eluting stents. This compulsory license was granted while considering the anti-competitive effects of Boston Scientific's takeover of Guidant	To avoid anti-competitive effects of mergers and acquisitions

Source Love (2007), Khor (2012), Correa (2013), and KEI Online

^aLove (2007)

^bKhor (2012)

^cCorrea (2013)

^dKEI Online^j

^eAbbot holds the patent over Kaletra and Sanofi Aventis over Plavix

^fThe three drugs are Didanosine (patented by Bristol-Myers Squibb), Zidovudine (GlaxoSmithKline (GSK)), and Lamivudine+Zidovudine combination (GSK). This compulsory license was for two years commencing from November 1, 2003

^gSeven drugs are Efavirenz, Abacavir (patent held by Glaxo), Didanosine (Bristol-Myers Squibb), Lopinavir+Ritonavir combination (Abbot), Tenofovir (Gilead Sciences), Tenofovir+Emtricitabine combination (Gilead Sciences), and Tenofovir+Emtricitabine+Efavirenz combination (Gilead Sciences). The 2012 compulsory license will enable the supply of better first line and second line anti-retroviral treatment (Khor 2012)

^hSection 1498 of Title 28 of the US Code provides for authorization by Government for third parties for manufacture or user of a product or intellectual property without the permission of the right holder. In such cases, remedy shall be by action against the USA in the US Claim Court for the recovery of his/her compensation for such use

ⁱIn May 2006, the US Supreme Court issued an opinion in *eBay V. MercExchange*, which set the standards which courts to resort to which considering requests for injunctions to enforce a patent owners' exclusive right to authorise the use of a patented invention. The standards are: (a) that it has suffered an irreparable injury; (b) that other possible legal remedies, including the payment of royalties, are inadequate to compensate for the injury; (c) that considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (d) that the public interest would not be disserved by a permanent injunction (Love 2007)

^jKEI Research Note: *Recent European Union Compulsory Licenses*, http://keionline.org/sites/default/files/Annex_B_European_Union_Compulsory_Licenses_1Mar2014_8_5x11_0.pdf (accessed on December 27, 2014)

countries, the out-of-pocket expenditure in health care is relatively low,⁴¹ and there is a well-established system to ensure that the burden of cost of medicine is not directly passed on to the patients. So compulsory licenses on public health grounds are not very common in advanced countries. For them, concerns arising out of intellectual property are related to the anti-competitive practices emerging out of the monopoly rights, and therefore, the compulsory licenses are mostly on competition grounds.

The policy space for the granting of compulsory licenses for India seems to be constrained by provisions in the Bilateral Investment Promotion and Protection Agreements (BIPAs) it has signed with more than 80 countries.

4 Challenges from India's Bilateral Investment Promotion and Protection Agreements⁴²

The definition of investment in India's BIPAs is very broad in nature and covers every kind of assets including intellectual property rights (IPRs), technical process, know-how, and goodwill. India's most recent BIPA, the one with *Lithuania*, which came into force on December 1, 2011, defines investment as

every kind of asset invested, established or acquired, including changes in the form of such investment, by an investor of one Contracting Party in the territory of the other Contracting Party, provided that the investment has been made in accordance with the laws and regulations of the other Contracting Party, and shall include in particular, though not exclusively: i) movable and immovable property, such as mortgages, liens, pledges and similar rights; ii) shares, bonds, debentures and other forms of participation in an entity; iii) claims to money or to any performance under a contract having an economic value; iv) intellectual property rights, goodwill, technical processes and know-how, in accordance with the relevant laws of the respective Contracting Party; v) right to engage in economic and commercial activities conferred by law and by virtue of a contract, including concessions to search for and extract or exploit natural resources. (Article 1)

IPRs are explicitly recognized as an investment in BIPAs, and compulsory licenses can be considered as expropriation of investment. The BIPA with France states that "Neither Contracting Party shall take any measure of expropriation or nationalization or any other measures having the effect of dispossession, direct or indirect, of investors of the other Contracting Party of their investments in its area, except in the public interest and provided that these measures are not discriminatory or contrary to a specific obligation entered into by Contracting Party not to take a measure of dispossession" (Article 6.1). Due to the most favored nation (MFN) clause in all BIPAs, investors are able to resort to the most favorable provision from among more

⁴¹Private expenditure as percentage of total health spending in high income countries is 38%, out of which 37% is out of pocket spending. In lower middle income countries, private expenditure accounts for 61% of total health care spending out of which 88% is out of pocket spending. In low income countries 61% of total health spending is private spending of which 78% is out of pocket spending (WHO 2012).

⁴²This section is drawn from Dhar et al. (2012).

than 80 BIPAs. India–France BIPA defines expropriation in a very broad manner, and it is very easy to prove that compulsory licenses by India are having the effect of dispossession.

Although expropriation is generally understood in investment contexts to mean acts having the effect of nationalization, this term is used in different contexts. According to UNCTAD (2012), there can be three broad categories of expropriations: (i) direct expropriations—actions those include nationalization, outright physical seizure of the property, etc., (ii) indirect expropriations—those actions resulting in decline in the economic value of the investment or deprivation of the owner of its ability to manage, use, or control its property in a meaningful way; and (iii) regulatory measures—those actions of states aimed at protecting public interest, but have the same effects as an indirect expropriation.⁴³ Although the compulsory licenses do not transfer the intellectual property of the investor, this may not be sufficient to disregard it as an act of expropriation. According to Correa, an expert on this issue, “the concept of expropriation is generally broadly construed and investment agreements do not only include direct and full takings of property but also de facto or indirect expropriation.”⁴⁴ Whether the act amounts to indirect expropriation will be determined by the tribunal. The indirect expropriation, however, is very controversial as no parameter has been prescribed to judge whether an expropriation has taken place.

Given the provisions of BIPAs, Bayer has the right to invoke the investor-state dispute settlement provision provided in BIPAs. The investor-state dispute settlement provision permits the investor to initiate legal proceedings against a state in international investment tribunals. Bayer has been advised by leading global law firms to initiate a dispute against India. The client alert issued by White and Case stated that “affected parties may be able to seek relief under applicable bilateral investment treaties with India depending on the residence of the affected parties and the language of the relevant treaties. Patentees should pay particular attention to structuring their activities in India so as to benefit from the protections afforded by numerous bilateral investment treaties that India has entered into.”⁴⁵ Although the patent rights of Bayer over Nexavar has been intact, the fact that its patent rights would now be circumscribed because of Natco’s presence in the market for the product may be regarded by the patent owner as an act of expropriation.⁴⁶ If Bayer decided to approach a tribunal, there will be questions on the extent to which Indian authorities were justified granting the compulsory license to protect public interest.⁴⁷ In the arbitration process, India would have a tough time to prove that the price offered by

⁴³Dhar et al. (2012).

⁴⁴Correa (2004), p. 15.

⁴⁵*Indian Patent Office Grants Compulsory License for Bayer’s Nexavar: Implications for Multinational Drug Companies*, at <http://www.whitecase.com/files/Publication/f1e2ff33-cc55-40d6-938c-bc77146b782b/Presentation/PublicationAttachment/0d511714-843f-4641-b961-cea6117bc185/alerts-Indian-Patent-Office-Grants-Compulsory-License.pdf>.

⁴⁶Dhar et al. (2012).

⁴⁷Ibid.

Bayer is not reasonable (reasonable to whom—the patients, the company, or reasonable price that balances the interests of the patients as well as the company?) and Natco's price is reasonable and whether all patients will be able to afford the price under compulsory license are some of the issues that the Government of India will have to prove in the arbitration process.

Though the mechanisms for compulsory licenses are established within the purview of the TRIPS Agreement, investment treaties provide patent owners with tools to bypass TRIPS mechanism to verify the legality of compulsory licenses. The investor-state dispute settlement mechanism in the investment treaties poses huge challenge to India for following reasons.

The investment treaties that most of the advanced countries have entered into have explicitly excluded compulsory licenses from the purview of expropriation clause. For example, the Model BIT 2012 of US states that "This Article [on expropriation and compensation] does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement." Similar provisions are there in the NAFTA, US–Australia BIT, and ASEAN–Australia–New Zealand FTA. Disputes on compulsory licenses in these countries cannot be subjected to international investment arbitration but will have to be sorted out either through domestic judicial/administrative process or through WTO's dispute settlement process.

India has recently brought out the "Model Text for the Indian Bilateral Investment Treaty" which provides the framework for future bilateral investment treaties.⁴⁸ The model treaty provides for no MFN and investor-state dispute settlement provisions. It is yet to be seen if India will be able to strictly follow the model text in its future bilateral investment treaties. The USA is negotiating hard with India on a bilateral investment agreement. Its expectations from India has been made public by its Ambassador to India, Richard Verma, that "a high standard bilateral investment treaty," one in the line of the investment agreement India had signed with Japan in 2010.⁴⁹ The investment chapter of the Comprehensive Economic Partnership Agreement between India and Japan (2010) contains MFN as well as investor-state dispute settlement provision. To what extent India will be able to withstand the US pressure to have MFN and investor-state dispute settlement provisions in the proposed Indo–US bilateral investment treaty is to be seen in the course of time.

⁴⁸The Model text is available at https://mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf (accessed on 19 July 2015).

⁴⁹India, US Negotiating High-Quality Bilateral Investment Treaty, *Indian Express*, <http://www.newindianexpress.com/business/India-US-Negotiating-High-Quality-Bilateral-Investment-Treaty/2015/04/28/article2787562.ece> (accessed on 19 July 2014).

5 Conclusion

It is a well-established fact in India that there is a direct relationship between the out-of-pocket expenditure on medicines and poverty in India. In this context, it is in the public interest of India to ensure that the patent system does not result in exorbitant price of medicines. India has used the TRIPS flexibilities to strike balance between providing incentives for innovations on the one hand and protecting public interest on the other—ensure that meritorious inventions in the pharmaceutical are entitled for patent right protection and that patent rights do not result in harming public interests. Though India was fully compliant with WTO rules while incorporating the TRIPS flexibilities in its Patents Act, the advanced countries have been finding ways to pressurize India to do away with the exercise of such flexibilities. It is to be seen in the course of time that whether India would be able to withstand the pressure of advanced countries.

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Part IV
Nature, Resources and Rights

India and International Environmental Law

Shiju Mazhuvanchery

Abstract India has played a major role in the development of International Environmental Law (IEL). Indian Prime Minister Indira Gandhi was one of the two heads of states who participated in the United Nations Conference on Human Environment (Stockholm Conference 1972). Since the days of Stockholm Conference, India has been an active participant at the multilateral environmental negotiations. India's engagement with IEL has been mutually beneficial. The leadership position that India assumed at the multilateral environmental negotiations has helped in including provisions in treaties that better reflected the realities of the developing countries. This in turn has helped IEL to gain wider participation and acceptability among the developing and under-developed countries. On the other hand, IEL has helped in the shaping and development of Indian environmental law. The influence of IEL on Indian law has been most visible in the following two ways: helping the enactment of legislations in the field of environment and in the development of a robust environmental jurisprudence. This chapter focuses on the influence of IEL on Indian law and concludes that without the influence of the developments at the international level Indian environmental law would have remained much poorer.

1 Introduction

India has played a major role in the development of International Environmental Law (IEL). India's engagement with IEL has been long and consistent. Indian Prime Minister Ms. Indira Gandhi was one of the two heads of states who participated in the United Nations (UN) Conference on Human Environment (Stockholm Conference 1972).¹ Since the days of Stockholm Conference, India has been an active participant in the multilateral environmental negotiations. India has always argued for an international environmental regime that takes the developmental needs into account

¹UNCHE was one of the first major UN initiatives in the field of environment.

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while ensuring that environment is protected for the present and future generations. This stand has remained constant over the years. Such an approach has in many ways strengthened IEL and has made the participation of developing countries in multilateral environmental treaties possible and meaningful.

The negotiations leading up to the UN Framework Convention on Climate Change (UNFCCC) can be cited as an example of India's leading role in articulating the views of the developing countries. Article 4.7 of the treaty can be a testimony to this. Article 4 speaks about the commitments of parties and recognizes the immediate concerns of the developing countries.² By endorsing that "economic and social development and poverty eradication are the first and overriding priorities of the developing countries," this provision makes it amply clear that an international legal regime that does not recognize the special needs of developing countries will not be acceptable to them.

Along with India's engagement with IEL and strengthening the content of it, there is a simultaneous process that is taking place. IEL is having a huge impact on India's municipal laws in the field of environment. IEL has been instrumental in the development and strengthening of its domestic environmental laws. This has happened in many ways. The first was the influence it had in the enactment of these laws. Enactment of many of the Indian laws has been in response to the developments at the international level. At another level, IEL has influenced the judicial decision-making process in India. Many emerging concepts in IEL helped the Indian judiciary in deciding many a complex environmental issue. In this chapter, an attempt is made to map these influences. The chapter is divided into four parts. The first part provides a brief introduction. The second part maps the influence of IEL on law making in India. The third part attempts to analyze the impact of IEL on Indian judiciary, and the last part provides the conclusion.

2 IEL and the Growth of Indian Environmental Law

As already mentioned, IEL had a huge impact on the development of Indian environmental law. In this respect, the influence of IEL has been threefold. Firstly, it has acted as a trigger in the enactment of national laws. Secondly, it has conferred legislative competence on the Indian Parliament (Federal Legislature) to enact uniform national laws. And thirdly, it has informed the content of these laws.

²The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that *economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties.* (Emphasis added)

2.1 *As a Trigger for the Development of Environment Law*

India boasts of a rich and well-developed environmental law. The Indian Constitution is one of the few Constitutions in the world that has provisions on environmental protection.³ However, the development of Indian environmental law has been piecemeal and responsive to certain trigger events. At least three major trigger events could be discerned in this development. Of these, two trigger events are international environmental conferences in which India participated. The UN Conference on Human Environment held at Stockholm in 1972 led to the enactment of many laws in the field of environment. The enactment of the *Water (Prevention and Control of Pollution) Act, 1974*, the *Water (Prevention and Control of Pollution) Cess Act, 1977*, the *Air (Prevention and Control of Pollution) Act, 1981*, the *Forest (Conservation) Act, 1980*, and the inclusion of provisions relating to the environment in the Constitution are examples of this. The salient feature of this era was the recognition of the fact that environmental issues needed legal attention. A close scrutiny of these legislations reveals that they were not fully geared up to meet the challenge of protecting the environment from ever-increasing human activities. The second trigger event, Bhopal Gas Tragedy of 1984, exposed the limitation of many of these laws. A number of statutes were enacted in the wake of the tragedy, the *Environment (Protection) Act, 1986* being the most important. Recognition of the need to have comprehensive laws covering all aspects of the environment, ample enforcement powers to the authorities, flexibility given to the executive to meet the emerging challenges were some of the features of the legislations enacted during this period. The *United Nations Conference on Environment and Development, 1992* (Rio Conference) was the third trigger event that led to the development of Indian environmental laws. Enactment of laws like the *Biological Diversity Act, 2002* and the *National Green Tribunal Act, 2010* happened during this period. The assertion of permanent sovereignty over natural resources as a developing country and the anxiety to protect its biological resources are visible in the *Biological Diversity Act, 2002*. Many legislations and rules formulated during this period emphasized the need for local participation in environmental protection. In this way, one can see that developments at the international level acted as a trigger for the development of Indian environmental law.

2.2 *Conferring Legislative Competence*

India has a federal Constitution in which the power is divided between the union and the states. There are elaborate provisions in the Constitution for the division of legislative power between them. As per Article 246, Union Parliament has the exclusive power of legislation on matters in the Union List in the Seventh Schedule, the State Legislatures on matters in the State List and concurrent jurisdiction for

³Arts. 48A, 51A(g), 243ZD and 243ZE are examples of the provisions that directly address the issue of environmental protection in the Indian Constitution.

both on matters in the Concurrent List. A perusal of these three lists shows that even though Union Parliament has power on more fields, when it comes to the field of environment most of the powers lie with the State Legislatures. The 42nd Constitutional Amendment in 1976 conferred concurrent jurisdiction on the Parliament on the subjects of forests and wildlife, by transferring these items from the State List to the Concurrent List. However, still a number of subjects in the field of environment are outside the purview of Parliamentary power. It is in this context that Article 253 becomes relevant. It empowers the Parliament to enact laws for implementing any treaty, agreement or convention, or any decision made at any international conference, association, or another body. Many laws in the field of environment are enacted in pursuance of this article. A list of some of the prominent laws enacted under this article and the corresponding treaty or the international conference is given below:

Legislation	Treaty/Conference
The Air (Prevention and Control of Pollution) Act, 1981	UN Conference on Human Environment, Stockholm (1972)
The Environment (Protection) Act, 1986	UN Conference on Human Environment, Stockholm (1972)
The National Environment Tribunal Act, 1995	UN Conference on Human Environment, Stockholm (1972) and the UN Conference on Environment and Development, Rio de Janeiro (1992)
The Biological Diversity Act, 2002	Convention on Biological Diversity, 1992
The National Green Tribunal Act, 2010	UN Conference on Human Environment, Stockholm (1972) and the UN Conference on Environment and Development, Rio de Janeiro (1992)

In that way, decisions taken at the international environmental conferences and multilateral treaties have conferred on the Parliament the power to enact laws in the field of environment. Without the influence of this power, it would have been very difficult to enact uniform standards all over the country on environmental matters.

2.3 Informing the Content of Law

In addition to being a trigger for the development of national laws and conferring jurisdiction on the Parliament to enact laws in the field of environment, IEL has helped in informing the content of Indian environmental law and thereby strengthening it. There are many concepts like precautionary principle, polluter pays, and sustainable development that have become part and parcel of Indian environmental law. It was first through judicial interpretation that these concepts were brought into the Indian law. Later, the Parliament crystallized them by incorporating them into

the legislations. Section 20 of the *National Green Tribunal Act, 2010* is an example of such an approach. This section provides:

The Tribunal shall, while passing any order or decision or award, apply the principles of sustainable development, the precautionary principle, and the polluter pays principle.

Even before the enactment of this legislation, these concepts were part of Indian law through judicial interpretation.⁴ In this section, an attempt is made to show how the emerging concepts in IEL have become part of Indian lexicon. The emerging concept of public participation in environmental decision making is taken as an example in this attempt.

2.3.1 Public Participation in Environmental Decision Making

Public participation in decision making is a recent development in IEL. It was especially after the UN Conference on Environment and Development (Rio Conference 1992) that this concept gained global currency. Principle 10 of the Rio Declaration speaks about it.

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Principle 10 contains three important principles: appropriate access to information, opportunity to participate in decision-making processes, and access to environmental justice. Some treaties that were concluded after the UNCED made elaborate provisions for the implementation of Principle 10. The Convention for the Protection of the Marine Environment of the North-East Atlantic (OPSAR Convention) 1992 imposes an obligation on the contracting parties to make available information in written, visual, aural, or database form on the state of the maritime area, on activities or measures adversely affecting or likely to affect it and on activities or measures introduced in accordance with the Convention.⁵ The importance of this Convention lies in the fact that this is the first international treaty to contain detailed rules on access to information.

The Convention on Access to Information, Public Participation in Decision Making, and Access to Justice in Environmental Matters (Aarhus Convention) 1998 is the most comprehensive treaty covering all the three areas addressed in Principle 10. Article 1 contains the objective of the treaty and provides a jurisprudential basis for access to information, public participation in decision making, and access to justice

⁴*Vellore Citizens Welfare Forum v. Union of India*, AIR 1996 SC 2715.

⁵Article 9, OPSAR Convention 1992.

in the context of environmental law. They have been understood as rights essential for the enjoyment of the right to a clean environment. Article 1 provides:

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

The understanding that these three elements of Article 10 are enabling rights for the better enjoyment of the right to clean environment of the present and future generations have gained much emphasis in contemporary international law.

As mentioned earlier, one of the trigger events that led to the development of environmental law in India has been the UNCED. The post-Rio legislations had an imprint of Principle 10. Some of the legislations that were enacted post-Rio try to ensure these rights. A brief analysis of some of these laws is attempted here.

The Wildlife (Protection) Amendment Act, 2002

The *Wildlife (Protection) Act* was enacted in 1972 in the wake of a growing concern of the dwindling wildlife population especially tigers in India. It adopted a two-pronged approach toward wildlife protection. By imposing a nationwide ban on hunting, it protected wildlife wherever it was found. At another level, it adopted the protected area approach (Sanctuaries and National Parks), where wildlife and its habitat were protected from human interference and activities. In this approach, local people were seen as adversaries who had to be evicted from the protected areas and did not figure in the conservation efforts. Management of the protected areas was the prerogative of the state, and the local people had no role to play in it.

The 2002 amendments introduced two more categories of protected areas in addition to the existing two categories of Sanctuaries and National Parks: Conservation Reserves and Community Reserves. As per the amendments, the State Government can declare adjoining areas of National Parks and Sanctuaries, and corridors connecting one protected area with another as Conservation Reserve.⁶ However, consultation with the local communities is a mandatory prerequisite for such a declaration (Sect. 36A). Such consultations were not mandated in the case of Sanctuaries and National Parks. It also provides for the representation of local communities in the management of Conservation Reserves. The Conservation Management Committee includes, in addition to the representatives from the Wildlife Department and other government departments, representatives from the Village Panchayats (rural local self-governing bodies) and NGOs working in the field of wildlife conservation (Sect. 36B).

The concept of Community Reserve represents a paradigm shift in wildlife conservation in India. Hitherto, protected areas were declared by the government and local communities were seen as adversaries in the conservation efforts. On the contrary, Community Reserve is an individual or community-driven conservation effort. The amendment allows the State Government to declare a Community Reserve on the

⁶Sect. 36A, Wildlife (Protection) Act, 1972 as amended in 2002.

request of an individual or community for the protection of fauna, flora or cultural conservation values and practices (Sect. 36C). The Community Reserve Management Committee entrusted with the task of managing the reserve mainly consists of the representatives of the local community.

The National Green Tribunal Act, 2010

Access to environmental justice is one of the important pillars of Principle 10. The *National Green Tribunal Act, 2010* is an attempt at the national level to attain that objective. The preamble to the Act refers to Principle 10 and mentions that the Act is an attempt to achieve that objective. National Green Tribunal (NGT), entrusted with the task of adjudicating disputes in the field of environment, is set up by this legislation. Section 16 of the Act is very relevant from access to environmental justice point of view. It provides for the appellate jurisdiction of the NGT. It empowers a “person aggrieved” by an order issued or a decision taken under a number of environmental statutes to approach the NGT by way of an appeal.⁷ Some of the very important environmental decisions like environmental clearance, forest clearance, consent to establish an industrial unit are appealable under this provision.

⁷Tribunal to have appellate jurisdiction. -Any person aggrieved by,

(a) an order or decision, made, on or after the commencement of the National Green Tribunal Act, 2010, by the appellate authority under section 28 of the Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974);

(b) an order passed, on or after the commencement of the National Green Tribunal Act, 2010, by the State Government under section 29 of the Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974);

(c) directions issued, on or after the commencement of the National Green Tribunal Act, 2010, by a Board, under section 33A of the Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974);

(d) an order or decision made, on or after the commencement of the National Green Tribunal Act, 2010, by the appellate authority under section 13 of the Water (Prevention and Control of Pollution) Cess Act, 1977 (36 of 1977);

(e) an order or decision made, on or after the commencement of the National Green Tribunal Act, 2010, by the State Government or other authority under section 2 of the Forest (Conservation) Act, 1980 (69 of 1980);

(f) an order or decision, made, on or after the commencement of the National Green Tribunal Act, 2010, by the Appellate Authority under section 31 of the Air (Prevention and Control of Pollution) Act, 1981 (14 of 1981);

(g) any direction issued, on or after the commencement of the National Green Tribunal Act, 2010, under section 5 of the Environment (Protection) Act, 1986 (29 of 1986);

(h) an order made, on or after the commencement of the National Green Tribunal Act, 2010, granting environmental clearance in the area in which any industries, operations or processes or class of industries, operations and processes shall not be carried out or shall be carried out subject to certain safeguards under the Environment (Protection) Act, 1986 (29 of 1986);

(i) an order made, on or after the commencement of the National Green Tribunal Act, 2010, refusing to grant environmental clearance for carrying out any activity or operation or process under the Environment (Protection) Act, 1986 (29 of 1986);

(j) any determination of benefit sharing or order made, on or after the commencement of the National Green Tribunal Act, 2010, by the National Biodiversity Authority or a State Biodiversity Board under the provisions of the Biological Diversity Act, 2002 (18 of 2003), may, within a period of thirty days from the date on which the order or decision or direction or determination is communicated to him, prefer an appeal to the Tribunal:

The term “person aggrieved” can have a very liberal or restrictive interpretation. The NGT had occasion to interpret this term on a couple of times. In *Vimal Bhai v. Ministry of Environment and Forests* (2011)⁸ taking a very liberal view, the Principal Bench held that “every citizen” was a person aggrieved in an environmental issue. The constitutional mandate contained in Article 48A, which imposed a duty on the state to protect and improve the environment and Article 51A(g) that imposed a fundamental duty on every citizen of the country to protect and improve the natural environment guided the Tribunal in its interpretative journey.

[I]t is clear that the State shall endeavor and safeguard the environment and wild life and it is the fundamental duty of the citizen to improve the natural environment including forests, lakes, rivers, and wildlife and also to have compassion for living creatures. Once, the protection and improving the natural environment is the fundamental duty of a citizen, any person can approach this Tribunal and agitate his grievance as to protection and improvement of the natural environment. The statutory provisions are subservient to the constitutional mandates. The person as defined or person aggrieved as occurs in Section 2(j), 16 and 18 (2) of the NGT Act cannot be placed above “every citizen” as appears in Article 51A of the Constitution of India. Once the mandate is of every citizen, any person can approach this Tribunal complaining environmental threat in the activities of the State or any organization or individual.

The Tribunal was categorical in rejecting a conservative interpretation of the term restricting it to the people residing in the project affected area or in its vicinity.

In a given case, the person living in the area or vicinity of the proposed project may not know about many intrinsic scientific details and effects of the ultimate project and any disaster, it may cause. The safety of the dam and the likely devastation and loss of properties and lives of the people in the downstream, if the dam, being situated in a highly earthquake prone area, bursts or leaks - the structural flaws of the demand rehabilitation policies, etc. Therefore, it may not be proper for this Tribunal to reject an Application on the ground that the applicant/appellant as the case may be, is not the resident of the area or not directly injured or aggrieved. The nature has been created over lakhs of thousands of years and such nature cannot be allowed to do away with one stroke of pen, in the guise of development, without properly examining the environmental and ecological impact of the project proposed.

This view was reiterated in *Jaya Prakash Darbalv. Ministry of Environment and Forests* (2011).⁹ This liberal interpretation is significant from access to justice point of view. Such an interpretation has enabled activists and NGOs working in the field of environment to approach the NGT against decisions that have an irreversible adverse impact on the environment. The high-quality research and materials produced by them have helped the NGT to ensure that the processes enshrined in environmental statutes are complied with while taking decisions.

Provided that the Tribunal may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed under this section within a further period not exceeding sixty days.

⁸Appeal No. 5 of 2011, decided on 14 Dec 2011.

⁹Application No. 12 of 2011, Decided on 14/12/2011.

The Right to Information Act, 2005

The *Right to Information Act, 2005* (RTI Act), is not a legislation specific to the field of environment. The basic objective of this legislation, which is one of the most progressive legislations in Indian history, is to empower the citizens by promoting transparency and accountability in the working of the government. It also aims at containing corruption and thereby making democracy work for the people. As this is a general legislation applicable to all fields of government activity including environmental governance, it is an important milestone in providing access to environmental information.

The Act mandates two simultaneous approaches to access the information. Section 4 directs a proactive *suo moto* disclosure of information by public authorities. Section 6 supplements this flow of information by empowering the citizen to seek specific information from a public authority as defined under the Act. The mandated *suo moto* disclosure by public authorities has helped in bringing accountability and transparency in environmental decision making. Central Information Commission in an order had directed the Ministry of Environment and Forests to disclose relevant information relating to forest clearances on its Web site.¹⁰ The Web site of the Ministry now contains all the relevant information on environmental matters. This has brought out many anomalies in decision making. As a result, many Environmental Impact Assessment (EIA) reports that were plagiarized were detected, and the Ministry had to issue an order that if the reports were found to be plagiarized, the environment clearance would be canceled.¹¹

EIA Notification (2006)

In addition to these legislations, there are rules and regulations issued by the executive branch that contain provisions for public participation in environmental decision making. The EIA Notification, 2006¹² is an example of this. This notification mandates an environmental clearance procedure for a set of projects. Even the construction for these projects could commence only after an environmental clearance is obtained from an appropriate authority. The notification establishes a four-stage clearance procedure: screening, scoping, public consultation, and appraisal. Public consultation is an important step in the granting of environmental clearance and is defined as “the process by which the concerns of local affected persons and others who have plausible stake in the environmental impacts of the project or activity are ascertained with a view to taking into account all the material concerns in the project or activity design as appropriate.”¹³ There are two components to public consultation: public hearing and written responses. Detailed procedures have been prescribed for the public perception of the project to be captured and to ensure that the public

¹⁰*Shibani Ghosh v. Shiv Pal Singh*, Decision No. CIC/SG/C/2011/00149/17503, decided on 29/2/2012.

¹¹O.M. [05/10/2011] - Ownership of EIA report and other documents by the project proponent.

¹²EIA Notification, S.O. 1533 dated 14/9/2006.

¹³*Ibid.*

gets a chance to understand the nature and magnitude of the project and its impact on the environment. With the establishment of the NGT, many a case had come before it that demonstrated the dubious manner in which the public consultation was conducted.¹⁴

Environment (Protection) Rules, 1986

The Environment (Protection) Act, 1986, was enacted in the wake of the Bhopal gas disaster. The enormity of the tragedy might have led the Parliament to enact this legislation which conferred absolute power on the Central Government to protect the environment.¹⁵ Some commentators have observed that this type of sweeping power was found only in wartime legislation.¹⁶ Exercising this power, the Central Government has issued a number of rules (delegated legislation) in almost all fields of environment. Environment (Protection) Rules, 1986, is one such measure that contains detailed standards on industrial activity. Even though the Central Government is conferred with absolute power to protect the environment, these rules ensure public participation in environmental decision making. Rule 5 lays down procedural safeguards in the exercise of power by the Central Government in imposing restrictions or prohibitions on the locations of an industry or the carrying on of processes and operations in an area. One of the safeguards is that it should issue a notification in the Official Gazette explaining its intention along with reasons for imposing such restrictions. The interested persons have the opportunity to file their objections. This safeguard has been used by environmental activists and other interests groups to advocate their viewpoints. For example, the Coastal Regulation Zone Draft Notification in 2008 had to be dropped due to opposition from the fishermen groups.

This brief discussion shows the impact of IEL on the development of Indian environmental law. Influencing the lawmaking at three distinct levels of acting as a trigger, conferring legislative power and informing and strengthening the content of the laws, IEL has played a crucial role in the Indian environmental governance.

3 Indian Judiciary and IEL

Any discussion on Indian environmental law is incomplete without examining the role of judiciary. Judiciary has played an important role in the development of environmental jurisprudence in India. Public interest litigations (PILs) became an effective tool in the hands of creative judges to impart justice in the field of environment. It

¹⁴For example see, *Adivasi Majdoor Kisan Ekta Sangathan v. Ministry of Environment and Forests*, Appeal No. 3/2011 decided on 20 April 2012.

¹⁵Sect. 3(1), The Environment (Protection) Act, 1986, "Subject to the provisions of this Act, the Central Government, shall have the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing controlling and abating environmental pollution."

¹⁶Leelakrishnan (2005), p. 172.

would appear that it is in the field of environment that the Indian judiciary has been most active. In ordering the cleaning up of rivers, restoring monuments, cleaning up the pollution caused by hazardous substances, restoring the altered course of rivers, conserving forests, and in addressing the problem of vehicular pollution in cities, the courts adorned many roles ranging from that of a policymaker to that of a super administrator. In one of its judgments, the Supreme Court explained the rationale for such an active involvement¹⁷:

If the mere enactment of the laws relating to protection of environment was to ensure a clean and pollution free environment, then India would, perhaps, be the least polluted country in the world. But this is not so. There are stated to be over 200 Central and State statutes which have at least some concern with environment protection, either directly or indirectly. The plethora of such enactments has, unfortunately, not resulted in preventing environmental degradation which on the contrary, has increased over the years. The courts are ill – equipped and it is not their function to see day to day enforcement of law. This is an executive function which it is bound to discharge The effort of this court while dealing with PILs relating to environmental issues is to see that the executive authorities take steps for implementation and enforcement of law.

In addressing complex problems of environment, the existing laws were found inadequate, and the judiciary had to look for alternative sources for guidance. International environmental law provided the perfect referral point in such a situation. Well-known principles and concepts in IEL like the polluter pays, precautionary principle, the concept of sustainable development, and the notion of inter-generational equity were used by the courts to wake up a lethargic executive to deal with many an environmental crisis. In this section, an attempt is made to discuss two such principles which influenced the Indian judiciary: States' sovereign rights over natural resources and the concept of sustainable development.

3.1 States Sovereign Rights Over Natural Resources

Principle 21 of the Stockholm Declaration (1972) contains the principle of sovereignty over natural resources. It provides:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

This principle contains two seemingly opposing concepts. On the one hand, it asserts the sovereign right of the state to exploit their natural resources in accordance with their own environmental policies. On the other, it imposes a duty on the states not to cause transboundary environmental damage. This apparent contradiction has been resolved by looking the second leg as a manifestation of the sovereignty of other

¹⁷*Indian Council for Enviro-Legal Action v. Union of India* (1996) 5 SCC 281.

states to exploit their natural resources in accordance with their environmental laws. In other words, all other states have a duty to respect that sovereignty by not causing damage to the natural resources of another country. UNCED in 1992 reiterated this principle and made only a cosmetic change to the language of Principle 21 by adding the word “developmental” after the words environmental policies.¹⁸

However, the roots of this principle in contemporary international law discourse lie in the 1950s and 60s. The discussion about this principle emerged in the wake of the attempts by the newly independent states to establish a new international economic order. Power to decide about the natural resources according to their own economic policies was considered as an important aspect of sovereignty. In 1952, the General Assembly recognized that “the rights of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty.”¹⁹ A further fillip to this concept was given when in 1958 when the Commission on Permanent Sovereignty over Natural Resources (PSNR) was established to conduct a full survey and recommend measures to strengthen the principle.²⁰ The work of the Commission resulted in the adoption of the UN General Assembly Resolution on the Permanent Sovereignty over Natural Resources in 1962.²¹ It reiterated the rights of peoples and nations to permanent sovereignty over their natural wealth and resources.

But these were in the form of soft law instruments and did not confer rights or impose binding treaty obligations on the states. It did not take much time for the treaties to mention this principle. Nowadays almost all multilateral environmental treaties recognize this principle.²² In addition, the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (1996) by the International Court of Justice (ICJ) elevated it to the status of a customary principle of international law.²³ This principle is considered as an important one in international environmental law and is often described as the ‘cornerstone of international environmental law.’²⁴

The application of this principle in municipal law is beyond dispute. As each state has the sovereign right to enact laws within its Constitutional limits, the relevance of this principle in domestic law is limited but undisputed. In that context, it is unusual for the judiciary to discuss and apply this principle. However, in a recent case, the Indian Supreme Court (SC) used the sovereign right of the state to exploit natural

¹⁸Principle 2 of Rio Declaration on Environment and Development 1992: “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and **developmental** policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.” (Emphasis added).

¹⁹UNGA Res. 626 (VII), 21 December, 1952.

²⁰UNGA Res. 1314 (XIII), 12 December, 1958.

²¹UNGA Res.1803 (XVII), 14 December, 1962.

²²For example, Art. 3, Convention on Biological Diversity (1992), Preamble, Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable sharing of benefits arising from their Utilization to the Convention on Biological Diversity (Nagoya Protocol).

²³(1996) ICJ Reports 226.

²⁴Sands et al. (2012), p. 191.

resources as a ground for invalidating a governmental action. In *Centre for Public Interest Litigation v. Union of India* (2012),²⁵ the SC had to deal with the issue of corruption in frequency allocation by the Department of Telecommunication (2G spectrum scandal). The petitioners in this PIL challenged the allocation of spectrum in 2007 because of the alleged corruption involved in the process. The government justified its action as the allocation was done on the basis of ‘first come first serve’ policy. In India, policy formulation is considered as an executive function and prerogative. The judiciary in a number of cases has accepted this position and has refused to interfere in the policy domain. However, in this case, the SC struck down this policy as unconstitutional and ordered the cancellation of all the licenses issued under this policy. The Court concluded that ‘first come first serve’ policy was in violation of the Constitution, and fresh licenses had to be issued by following the process of public auction.

In reaching this conclusion, the Court mainly relied on two principles from the field of environmental law: state’s sovereign right over natural resources and public trust doctrine. Dealing with the first principle, the Court held:

The ownership regime relating to natural resources can also be ascertained from international conventions and customary international law, common law and national Constitutions. In international law, it rests upon the concept of sovereignty and seeks to respect the principle of permanent sovereignty (of peoples and nations) over (their) natural resources as asserted in the 17th Session of the United Nations General Assembly and then affirmed as a customary international norm by the International Court of Justice in the case of Democratic Republic of Congo v. Uganda. Common Law recognizes States as having the authority to protect natural resources insofar as the resources are within the interests of the general public. The State is deemed to have a proprietary interest in natural resources and must act as guardian and trustee in relation to the same. Constitutions across the world focus on establishing natural resources as owned by, and for the benefit of, the country. In most instances where Constitutions specifically address ownership of natural resources, the Sovereign State, or, as it is more commonly expressed, ‘the people’, is designated as the owner of the natural resource.²⁶

The Court’s understanding of the principle is interesting on two counts. First of all, the Court takes a literal interpretation of UNGA Resolution 1803, wherein in Paragraph 1, it speaks about the ‘rights of peoples and nations’ and concludes that it is the people who are the real owners of natural resources. The second point worth mentioning is the way in which the principle of trusteeship has been used in conjunction with the principle of permanent sovereignty. The Court circumscribes the right of the State as that of a trustee and mandates that the natural resources have to be used for the benefit of the general public. Even though the Court has made pronouncements to this effect earlier also, it was for the first time that the principle of permanent sovereignty had been invoked to limit the power of the state. For example, in the *Gujarat Gas case*,²⁷ on the issue of legislative competence over natural gas,

²⁵WP (C) 423/2010, decided on 2nd February 2012.

²⁶Ibid., para 64.

²⁷Special Reference Case 1 of 2001.

the Court held that the Parliament had the power as the people of the entire country had a stake in it and its benefit had to be shared by the whole country.²⁸

The interpretation of the Court is refreshing as it limits the power of the State to that of a trustee while dealing with natural resources. The Court could have reached the same conclusion by following the public trust doctrine, which is well founded in Indian environmental jurisprudence.²⁹ Even in this case, the Court attaches great importance to that doctrine. However, by asserting that permanent sovereignty over natural resources rests with the people, the Court was giving a Constitutional twist to a principle of international law. Modern Constitutions are drafted on the assumption that all the power belongs to the people and people in turn confer power on the State. Bringing in an element of constitutionalism, the idea of limited state, the Court was emphasizing the need to protect and conserve natural resources. The relevance and future of such an approach have to be seen in the light of new goals of legal reform. When the purpose of legal reform is to ensure the ease of doing business than to ensure constitutionalism, environmental protection, and conservation of natural resources would be one of the first causalities.

3.2 Sustainable Development

Sustainable development has emerged as a major principle in international environmental law in recent times. It is believed that the term was coined by the Brundtland Commission in its report *Our Common Future* (1987). The definition given by the Commission, “development that meets the needs of the present without compromising the ability of future generations to meet their own needs,” has received universal recognition. It is the ICJ decision in the *Gabčíkovo–Nagymaros Dams* case (1997) that formally incorporated this concept into international law.³⁰ According to the Court, the “need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.”

Though the ICJ recognized the existence of Sustainable Development as a principle of international law, its definition and content had to be developed. The New Delhi Declaration of Principles of International Law relating to Sustainable Development (2002)³¹ adopted by the International Law Association brought some clarity to its content. The declaration called for the development and consolidation of the following seven principles for pursuing the objective of sustainable development: The duty of States to ensure sustainable use of natural resources; the principle of equity and the eradication of poverty; the principle of common but differentiated

²⁸Ibid.

²⁹*M. C. Mehta v. Kamal Nath*, (1997) 1 SCC 388; In *M.I. Builders v. Radhey Shyam Sahu*, AIR 1999 SC 2468, the SC held that the doctrine has its source in Art. 21 which guarantees right to life and personal liberty.

³⁰(1997) ICJ Reports 7.

³¹ILA (2002), pp. 211–216.

responsibilities; the principle of the precautionary approach to human health, natural resources and ecosystems; the principle of public participation and access to information and justice; the principle of good governance; and the principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives.

Even though sustainable development is emerging as a separate branch of International Law, there are doubts expressed about its utility in protecting the environment. Prof. Chimni calls it as “an empty concept filled with the greed of the global capital.”³² The Indian experience of working with this concept shows that when it came to the protection of the environment, the principle was found to be wanting. As a balancing concept, the scales were always tilted in favor of one vision of economic development advocated by the State.

It was in *Vellore Citizens Welfare Forum v. Union of India* (1996)³³ that the SC addressed the issue of Sustainable Development. This case was concerning tanneries polluting a river and the groundwater leading to a decline in agriculture yield and contamination of drinking water sources. While ordering the closing down of polluting units, the Court relied on the concept of Sustainable Development and explained its components in the Indian context. The Court held that Sustainable Development was part of Indian law as it was a customary principle of International law.

The traditional concept that development and ecology are opposed to each other is no longer acceptable. “Sustainable Development” is the answer. (It) came to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting eco-systems. . . . We have no hesitation in holding that “Sustainable Development” as a balancing concept between ecology and development has been accepted as a part of the Customary International Law though its salient feature have yet to be finalized by the International Law Jurists.

Some of the salient principles of “Sustainable Development”, as culled-out from Brundtland Report and other international documents, are Inter-Generational Equity, Use and Conservation of Natural Resources, Environmental Protection, the Precautionary Principle, Polluter Pays principle, Obligation to assist and cooperate, Eradication of Poverty and Financial Assistance to the developing countries. We are, however, of the view that “The Precautionary Principle” and “The Polluter Pays” principle are essential features of “Sustainable Development”.

³²Chimni (2007). “Unsurprisingly, international environmental law is unable to seriously respond to the global ecological crisis. It works with an empty concept of sustainable development that is filled with the greed of global capital. International environmental law cannot therefore bring about change in skewed global consumption patterns, which is so necessary if genuine sustainable development at the global level is to be pursued. For otherwise, as has been observed, two more planet earths will be needed to provide development for all. But consumption has paradoxically become, as I shall note presently, a principal way to overcome alienation in the age of globalisation. In the event, international environmental law cannot actualise the principle of common but differentiated responsibility to ensure that the poor in the third world realise their aspirations of a minimum standard of life. International environmental law, to put it differently, is today subordinated to corporate interests, which dictate the high consumption patterns in rich countries. It cannot, therefore, bring about an accordant relationship between humankind and nature.”

³³AIR 1996 SC 2715.

The Court proceeded to assert that precautionary principle and polluter pays principle are part of Indian legal system and decided the case on the basis of these principles. It was held that the polluting industries should not only compensate the victims but also bear the cost involved in reversing the environmental damage. The central government was directed to constitute an authority to implement the decision.

But in the cases following *Vellore*, one could see that the concept of Sustainable Development has been used as a tool to take a hands-off approach by the Court. The Court has consistently taken the stand that it would not interfere in the development projects initiated by the government. In taking such a stand, Sustainable Development has become a convenient peg to hang its decision. Such an approach was clearly visible in the *Narmada* case. In *Narmada Bachao Andolan v. Union of India* (2000), the construction of the terminal dam (Sardar Sarovar dam) in the river Narmada was challenged. The main argument for the challenge was the inadequacy or rather the lack of rehabilitation and resettlement of the project affected people. The scant regard for environmental concerns was also raised to stall the construction. Pertinent questions were raised about the environmental compatibility of large dams.

The petitioners argued for the application of precautionary principle (one of the components of Sustainable Development according to the *Vellore* Court). On the basis of that principle, it was argued that the burden of proof was on the project proponents to show that their actions were environmentally benign. The predisposition of the Court toward 'development' is evident in its rejection of that plea. The Court maintained that the precautionary principle is applicable only in cases of scientific uncertainty and in the case of large dams there was no uncertainty about their impact on the environment. The Court held:

In the present case we are not concerned with the polluting industry which is being established. What is being constructed is a large dam. The dam is neither a nuclear establishment nor a polluting industry. The construction of a dam undoubtedly would result in the change of environment but it will not be correct to presume that the construction of a large dam like the Sardar Sarovar will result in ecological disaster. India has an experience of over 40 years in the construction of dams. The experience does not show that construction of a large dam is not cost effective or leads to ecological or environmental degradation. On the contrary, there has been ecological up-gradation with the construction of large dams. What is the impact on environment with the construction of a dam is well-known in India.

As per the Court, the principle of Sustainable Development would be applicable when the effects of a project were known.

It is when the effect of the project is known then the principle of sustainable development would come into play which will ensure that mitigative steps are and can be taken to preserve the ecological balance. Sustainable development means what type or extent of development can take place which can be sustained by nature/ecology with or without mitigation.

The new definition of Sustainable Development seems to pit it against the precautionary principle. They are constructed as two opposite principles that are applied in cases where there is certainty and uncertainty, respectively. *Narmada* was not an isolated case in the annals of India's judicial history. From the Tehri Dam³⁴ litigation

³⁴*N. D. Jayal v. Union of India*, AIR 2004 SC 867.

in 2003 to Kudamkulam Nuclear Power Plant³⁵ case in 2013, Sustainable Development has become handy for the SC to uphold mega developmental projects initiated by the Government. What is surprising in all these cases is that a similar pattern is followed. One could find a discussion about Sustainable Development running into a number of pages and reaching a conclusion that the project in question satisfies its definitional criteria.

However, one could observe a completely different approach in the application of this principle when it comes to pollution cases by individual industrial units or otherwise. *Vellore* (1996), *A.P. Pollution Control Board v. Prof. M. V. Nayudu* (1999 and 2000)³⁶ and *Intellectuals Forum, Tirupathi v. State of A.P.* (2006)³⁷ are examples wherein the concept of Sustainable Development has been used to discipline polluting units. A discussion of the application of the concept of Sustainable Development shows that it is mainly used as a balancing concept between environmental conservation and economic development, where the balance is heavily tilted in favor of economic development. It also shows that the application of this concept by the Indian judiciary can be criticized for the same reasons for which its application is criticized at the international level.

4 Conclusion

India's engagement with IEL has been mutually beneficial. The leadership position that India assumed at the multilateral environmental negotiations has helped in including provisions in treaties that better reflected the realities of the developing countries. This in turn has helped IEL to gain wider participation and acceptability among the developing and under-developed countries. On the other hand, IEL has helped in the shaping and development of Indian environmental law, the focus of this chapter. The influence of IEL has been most visible in two ways: helping the enactment of legislations and in the development of a robust environmental jurisprudence. Without the influence of the developments at the international level Indian environmental law would have remained much poorer.

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³⁵*G. Sundarrajan v. Union of India*, (2013) 6 SCC 620.

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Implementation of the Convention on Biological Diversity and Its Protocols in India

Pushpa Kumar Lakshmanan

Abstract The Convention on Biological Diversity (CBD) is one of the successful international treaties that is steadily progressing with the realization of its stated objectives. Conservation of biological diversity, sustainable use of biological resources and equitable sharing of benefits with the people for utilization of their traditional knowledge and resources are gaining global acceptance. When the CBD addresses the larger issues of global biodiversity conservation and utilization of biological resources for developmental purposes, the specific problems concerning biosafety brought out by biotechnology, and access and benefit sharing are left to the Cartagena Protocol on Biosafety and the Nagoya Protocol on Access and Benefit Sharing, respectively. The Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress emerging out of living modified organisms is the latest addition under the CBD. India, being one of the oldest surviving civilizations with indigenous people and their wisdom and as one of the megadiverse countries, has high stakes in conserving biological diversity and protecting the traditional knowledge base of its indigenous and local communities. India has many domestic legal and policy instruments to govern biodiversity and biosafety issues. This chapter critically looks at the international legal obligations for India under the CBD as well as the Cartagena Protocol, Nagoya Protocol and the Nagoya-Kuala Lumpur Supplementary Protocol and evaluates the level of their domestic implementation in India. Recently, the Government of India has ratified both the Protocols under the CBD, and many changes are expected in the domestic regulatory frameworks. This chapter will examine the effectiveness of existing domestic regulatory mechanisms and the alternative options available to India in implementing the CBD and its Protocols.

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1 Introduction

The global community has realized the value of biodiversity¹ in the last quarter of twentieth century more than ever before for the sustainability of life on earth. The pace of destruction of biological diversity due to different anthropogenic reasons and rapid advancements in bioprospecting has triggered countless concerns amongst the conservationists, global leaders and policy makers. The Convention on Biological Diversity (CBD)² was negotiated at a time when the loss of species, pollution levels and climatic changes were reported to be alarmingly high, and when biotechnology was demonstrating its new possibilities and biopiracy had become the order of the day.³ Against this background, the CBD brought a new perspective to global biodiversity governance. The CBD is claimed to be ‘one of the most widely ratified international treaties on any environmental issue’.⁴ Unlike the hitherto species-specific or habitat-centred international instruments, the CBD sought to address the issue of biodiversity conservation with the holistic approach. The CBD looks at biological diversity in a comprehensive manner that includes terrestrial, marine and other aquatic ecosystems covering diversity within and between species and the diversity of ecosystems.⁵ The CBD also incorporates for the first time the principles of ethics and equity in the conservation of biological diversity as well as in both access to genetic wealth and sharing of its benefits with the traditional knowledge holders.⁶

The CBD is not the first international instrument to protect different forms of lives on the earth. Since the last quarter of the twentieth century, various efforts have been made to conserve specific species such as waterfowls and migratory species, and to selected ecosystems like wetlands. These include, *inter alia*, the two habitat-specific

¹It is widely believed that the term ‘biodiversity’ was first used by W.G. Rosen in 1985 during his planning for the ‘National Forum on Biodiversity’ in United States and later the noted biologist E.O. Wilson published the proceedings of the Forum in the form of a book entitled ‘Biodiversity’ in 1988. See, <http://www.biodiversitya-z.org/content/biodiversity> and also see, Stanford Encyclopedia of Philosophy <http://plato.stanford.edu/entries/biodiversity/>. Accessed 21 October 2015. The terms ‘biodiversity’ and ‘biological diversity’ are interchangeably used to mean one and the same.

²The Convention on Biological Diversity (CBD) was adopted in the Nairobi Conference on 22 May 1992 and released for signature on 5 June 1992 at the United Nations Conference on Environment and Development at Rio de Janeiro. The CBD entered into force on 29 December 1993. Almost all countries in the world (196 State Parties) are Party to the CBD except only the Holy See (Vatican City) and the United States. 31 ILM 818 (1992). Also available at <https://www.cbd.int/convention/articles/default.shtml?a=cbd-02>. Accessed 15 January 2016.

³For a detailed commentary of the CBD provisions and to understand the background history of the CBD, see Glowka et al. (1994), p. 161. In order to understand the characteristics and complexities of the CBD and the future challenges for biodiversity conservation, see McNeely et al. (1995), McGraw (2002), Hill et al. (2013).

⁴Glowka et al. (1994), p. x.

⁵See Art. 2, CBD defines the term “Biological diversity” as the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.

⁶Swaminathan (2002), p. 31.

legal instruments such as the Convention on Wetlands of International Importance especially Waterfowl Habitat 1971 (Ramsar Convention)⁷ and the Convention Concerning the Protection of the World Cultural and Natural Heritage 1972 (World Heritage Convention)⁸ and two species-specific instruments, the Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 (CITES)⁹ and the Convention on the Conservation of Migratory Species of Wild Animals 1979 (Bonn Convention).¹⁰ Besides these, there have been some regional arrangements that conserve nature and natural resources, notably the Convention on the Conservation of Nature in the South Pacific 1976 and the ASEAN Agreement on the Conservation of Nature and Natural Resources, 1985. These two instruments provide for the creation of protected areas and the protection of species. The Bern Convention on the Conservation of European Wildlife and Natural Habitats, 1979, is another regional Convention to protect regional flora and fauna found within the region. Shortcomings of these international legal instruments could be attributed to their limited awareness and selective approach in dealing with specific species of flora and fauna and their natural habitats. These instruments unquestionably contributed to the conservation of different species but lacked the farsightedness to look at the role played by the ecosystem as a whole and to protect varied forms of lives in an all-inclusive manner and failed to recognize the modern needs of biological resources and their sustainable utilization.

Since the United Nations (UN) Conference on Human Environment in Stockholm in 1972, the international community commenced concerted efforts to address environmental issues including conservation of biological diversity through 'soft law' instruments such as declarations and principles with the hope that they may influence the national policies to protect environment and biodiversity. Principles 2, 4 and 6 of the Stockholm Declaration included provisions for safeguarding flora and

⁷The Convention on Wetlands of International Importance especially Waterfowl Habitat, 1971. 11 ILM 963 (1972). This Convention came into effect on December 21, 1975. The objective of this convention is conservation and sustainable utilization of wetlands. As of now 169 States are Party to this convention. India became a Party to this Convention on 1 February, 1982. www.ramsar.org. Accessed 20 October 2015.

⁸The UNESCO World Heritage Convention formally known as The Convention concerning the Protection of the World Cultural and Natural Heritage was adopted by the General Conference of UNESCO on November 16, 1972. 11 ILM 1358 (1972). The distinctive feature of this Convention is that it links the concepts of natural conservation and the preservation of cultural properties. At present there are 191 parties to the convention. India ratified the Convention on 14 November 1977. whc.unesco.org/en/Convention/. Accessed 21 October 2015.

⁹The CITES is formally called the Convention on International Trade in Endangered Species of Wild Fauna and Flora. The CITES was concluded on 3 March 1973 and entered into force on 1 July 1975. The objective of this convention is to ensure that international trade in specimens of wild animals and plants does not threaten their survival. Currently 181 States are Party to it. India became a Party to this Convention on 18 October 1976. www.cites.org. Accessed 21 October 2015.

¹⁰The Bonn Convention or the Convention on the Conservation of Migratory Species of Wild Animals was adopted in 1979 and entered into force in 1983. 19 ILM 15 (1980). The objective of this convention is to conserve terrestrial, aquatic and avian migratory species throughout their range. Currently 121 States are Party to it. India became Party to this Convention in 1983. www.cms.int. Accessed 21 October 2015.

fauna and preserving natural ecosystems. The World Conservation Strategy 1980, a joint effort of the IUCN, UNEP, WWF for Nature and UNESCO, strived to motivate the people and to develop positive attitudes towards conserving nature. The World Charter for Nature, 1982, advocated that conservation of nature should be an integral part of planning and implementation of social and economic developmental activities.¹¹ The Rio Declaration 1992 and the Agenda 21 offered detailed provisions and strategies to protect flora, fauna and ecosystems of the world. Subsequently, consistent efforts have been made at the international level such as the Johannesburg Plan of Implementation 2002, the Millennium Development Goals 2010, the Future We Want of Rio+20, to protect biological diversity at the global and national levels. The Sustainable Development Goals (SDGs) is the youngest child in this lineage to consolidate the conservation ideals.¹²

The CBD emerged as a turning point in the international biodiversity discourse that redefined the concern and commitment of world community in dealing with biological diversity. It recognized the significance of global biodiversity conservation and utilization of biological resources for developmental purposes.

Unlike many other multilateral environmental agreements (MEAs), the CBD assumed a larger task for itself in the framework treaty.¹³ Since its adoption, the CBD has been gaining global acceptance and steadily progressing towards the fulfilment of its objectives. The CBD has two Protocols attached to it, firstly, the Cartagena Protocol on Biosafety,¹⁴ which specifically deals with the biosafety concerns triggered by rapid advancements in biotechnology, and secondly, the Nagoya Protocol on Access and Benefit Sharing,¹⁵ which establishes a global legal framework to regulate access and benefit sharing on the occasion of utilization of genetic resources and traditional knowledge. The recent addition to the CBD family has been the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress emerging out of living modified organisms (LMOs) to the Cartagena Protocol on Biosafety.¹⁶ This

¹¹ Article 7, the World Charter for Nature, 1982, UNGA Resolution A/Res/37/7. <http://www.un.org/documents/ga/res/37/a37r007.htm>. Accessed 21 January 2016.

¹² See Transforming Our World: The 2030 Agenda for Sustainable Development (Sustainable Development Goals), <http://www.un.org/pga/wp-content/uploads/sites/3/2015/08/120815>. Accessed 22 January 2016. [outcome-document-of-Summit-for-adoption-of-the-post-2015-development-agenda.pdf](http://www.un.org/pga/wp-content/uploads/sites/3/2015/08/120815). Accessed 21 October 2015. Goal 15 stresses on sustainable management of forests, combating desertification, restoring land degradation and conserving biodiversity. It contains specific targets to reduce biodiversity loss and to conserve different ecosystems. For further details see www.un.org/sustainabledevelopment/biodiversity/ Accessed 21 January 2016.

¹³ McGraw (2002), p. 18.

¹⁴ The Cartagena Protocol on Biosafety, adopted at Cartagena on 29 January 2000, entered into force on 11 September 2003. 39 ILM 1027 (2000). <http://bch.cbd.int/protocol/text/> Accessed 21 January 2016.

¹⁵ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, 2010. www.cbd.int/abs/text/. Accessed 24 August 2015.

¹⁶ The Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, reprinted in 50 ILM (2011). https://bch.cbd.int/protocol/NKL_text.shtml. Accessed 25 January 2016.

Supplementary Protocol strives to provide relief and redress in the wake of damage arising out of LMOs.

This chapter critically looks at the legal obligations for India under the CBD¹⁷ as well as the Cartagena Protocol on Biosafety¹⁸ and evaluates the level of domestic implementation in India. India has ratified the Nagoya Protocol on Access and Benefit Sharing¹⁹ and the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress²⁰ under the CBD. Many changes are required in the domestic legal and regulatory frameworks to meet the legal obligations created under these Protocols. Against this background, this chapter shall also examine the effectiveness of existing domestic regulatory mechanisms and the options available to India in implementing these Protocols.

2 The Convention on Biological Diversity

2.1 *CBD and Conservation of Biological Diversity*

The loss of biodiversity is happening at an alarming rate due to deforestation and destruction of ecosystems for many developmental activities, overexploitation of biological resources, and devastation of species due to varied forms of pollution.²¹ Considering the developmental pressures on biological resources and growing need for innovations in biodiversity conservation, the CBD initiated radical changes in the thinking of global biodiversity conservation and bioresource utilization. It introduced the concept of ‘common concern of humankind’, deviating from the earlier understanding that the global biodiversity was a common heritage of mankind.²²

The CBD strives to address the interrelated issues of biodiversity, developmental needs and the dependence of people on the biological resources for their livelihood. To capture these problems strategically, the CBD came out with three objectives, namely conservation of biological diversity, sustainable use of its components and equitable sharing of benefits arising out of the utilization of genetic resources with the indigenous and local communities (Article 1). It provided for *in situ* and *ex situ* conservation methods besides other mechanisms to protect biodiversity.

¹⁷India signed the CBD on 05 June 1992 and ratified it on 18 February 1994. <https://www.cbd.int/information/parties.shtml>. Accessed 21 January 2016.

¹⁸India ratified the Cartagena Protocol on Biosafety on 17 January 2003. <https://bch.cbd.int/protocol/parties/>. Accessed 21 January 2016.

¹⁹India ratified the Nagoya Protocol on Access and Benefit Sharing on 09 October 2012. <https://www.cbd.int/abs/nagoya-protocol/signatories/default.shtml>. Accessed 21 January 2016.

²⁰India ratified the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress on 19 December 2014. <https://bch.cbd.int/protocol/parties/#tab=1>. Accessed 21 January 2016.

²¹Leary and Pisupati (2010), p. 3.

²²See Preambular para 2 of the CBD. See also, Glowka et al. (1994), p. 2.

The CBD also recognizes the sovereign rights of States over the resources found within their jurisdictions (Article 3).²³ The States can exploit their resources as per their environmental policies.²⁴ This move, for the first time, gives substantial rights to the States to regulate biological resources available within their jurisdiction. Most of the Parties to the CBD have enacted laws to conserve biodiversity and to regulate access to biological resources and traditional knowledge. India responded to this call by enacting the Biological Diversity Act in 2002.

The CBD incorporates important guiding principles such as prevention of trans-boundary harm that will have potential to affect the biodiversity of other States,²⁵ the principle of cooperation (Articles 5 and 18) and the responsibility of the States to conserve (Articles 1, 8 and 9).

The CBD obligates the member States to cooperate with other States and international organizations for conservation and sustainable use of biological diversity (Article 5). It also suggests measures and incentives be devised for conservation and sustainable use of biodiversity (Articles 6, 8, 9 and 11).²⁶ For this purpose, the CBD seeks the member States to develop suitable national strategies, plans or programmes for conservation and sustainable use of biological diversity. It also suggests the need for integration of conservation and sustainable use of biodiversity into sectoral and cross-sectoral plans and policies. Through these measures, the CBD creates an obligation for the member States to introduce conservation ideals in national planning and to integrate conservation with diverse sectors such as health care, development, trade and economic policies.²⁷ The CBD calls for monitoring the components of biological diversity through sampling and other techniques and insisted on conducting environmental impact assessments on the projects that may have adverse effects on biodiversity.²⁸

²³Also see Principle 21 of the Stockholm Declaration that has a similar provision to recognize sovereign rights of States to exploit their own resources. Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/Conf.48/14/Rev. 1(1973); 11 ILM 1416 (1972).

²⁴*Ibid.*

²⁵See Art. 3, CBD. This principle traces its origin in the maxim *sic utere tuo ut alienum non laedas* which indicates that 'the use of property should be in such a manner that shall not injure another's property'. In the context of the CBD, this principle signifies that the developmental activities and utilization of biological resources by one country should not adversely affect the environment and biodiversity of other countries. The Trail-Smelter Arbitration case established this principle by holding that no State has a right to use or permit the use of its territory in such a manner that harms the property of other States. See, Trail Smelter Arbitration, 33 *AJIL* (1939), 182; 35 *AJIL* (1941) 684. Principle 21 of the Stockholm Declaration and the Principle 2 of the Rio Declaration reiterate the principle of prevention of trans-boundary harm. See, Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992).

²⁶Art. 11 specifically provides for appropriate economically and socially sound measures to be adopted by the States as incentives.

²⁷See Article 6(b), CBD. Glowka et al. (1994), p. 32.

²⁸See Articles 7 and 14, CBD.

2.2 Conservation of Biological Diversity in India

India is one of the megadiverse countries in the world. It is a home to 7–8% of all recorded species of the world comprising nearly 45,000 plant species and 91,000 animal species with its meagre 2.4% of the world's land area.²⁹ The United Nations Education Scientific and Cultural Organization (UNESCO) has declared 32 sites in India as the World Heritage Sites although several other sites can qualify this status.³⁰ Presence of four global biodiversity hot spots of the world in India strengthens this view.³¹

India, being one of the oldest surviving civilizations of the world, has a wealth of experience and high stakes in conserving biological diversity and protecting the traditional knowledge base of its indigenous and local communities. India is a home to about 84.3 million indigenous peoples³² from roughly 635 tribal groups living with the help of their vibrant traditional knowledge and time-tested wisdom. Some estimates say that they comprise approximately 8.2% of the total population of India.³³ This is, however, a very conservative estimate. Many people living in urban and rural areas, having their historical roots with nature and native peoples, possess traditional knowledge in one form or the other that could contribute to biodiversity conservation, environment protection and modern industrial needs in various spheres including drug development, eco-friendly technologies and other industrial applications.

It is very convenient to say that biodiversity conservation and environmental protection have been an age-old concept to Indians.³⁴ The CBD is not the starting point of biodiversity conservation in India. Strong cultural and religious ethos guided the people of India in conserving biodiversity and environment since time immemorial.³⁵ Environment protection and conservation of biodiversity have been a way of life for most of the Indians. Repeated conquests by foreign rulers and their exploitative tendencies have heavily ruined the cultural rubric and conservation commitments that prevailed amongst the people. When the long cherished conservation ethos was shackled for centuries, it is challenging for the new generation of people to realize their old traditions and connect with their roots of conservation in this modern, globalized and materialistic era. Conscious and concerted efforts have to be taken by the

²⁹India's Fifth National Report to the CBD submitted in 2014, p. 18. <https://www.cbd.int/doc/world/in/in-nr-05-en.pdf>. Accessed 21 January 2016.

³⁰This includes 7 natural ecosystems and 25 cultural sites. <http://whc.unesco.org/en/statesparties/in>. Accessed 10 July 2015.

³¹*Ibid.*

³²Referred to as 'adivasis' generally in Indian context and mentioned as scheduled tribes in Articles 46 and 342 of the Constitution of India.

³³Cæcilie Mikkelsen (ed) 2015, p. 328. http://www.iwgia.org/images/stories/sections/regions/asia/documents/IW2015/India_IW2015_web.pdf. Accessed 20 August 2015.

³⁴Lakshmanan (2015), p. 316.

³⁵Jariwala (1992), p. 2. Also see generally Pant (2002). All these studies show how intricately people have been involved in conservation of environment and biodiversity since time immemorial at the local level with the help of their traditional wisdom and customary practices.

government to infuse conservation values in the daily lives of the people through new policies and programmes to revive these cultural values.

The Constitution of India incorporates environmental protection and conservation of biological diversity as national agendas in the Directive Principles of State Policy and Fundamental Duties part.³⁶ In addition to the constitutional prescription, India has enacted specific laws to protect and improve the environment in the country, including conservation of biological diversity.³⁷ The Indian Forest Act 1927, the Forest (Conservation) Act 1980 as amended in 1988 and the Wildlife (Protection) Act 1972 as amended in 2006 also contribute significantly to protect flora and fauna in the forests and protected areas.³⁸ The institutional mechanisms to implement the obligations under the CBD include the Ministry of Environment, Forests and Climate Change, National Biodiversity Authority, National Tiger Conservation Authority, National Afforestation and Eco-Development Board, and the National Medicinal Plants Board.³⁹

On the policy front, there is a continuous effort to upgrade the existing policies to meet the present-day demands. India introduced a National Policy and Macro-level Action Strategy on Biodiversity (NPMASB) in 1999. Later, the Government of India launched a project to develop a National Biodiversity Strategy and Action Plan (NBSAP) from 2000 to 2004 with the involvement of a civil society organization named Kalpavriksh.⁴⁰ Subsequently, the National Environment Policy 2006⁴¹ introduced wide-ranging strategies for conserving biodiversity and protecting the environment as a whole. Based on the National Environment Policy and the inputs of NBSAP Project, the Government of India updated the NPMASB and formulated a National Biodiversity Action Plan (NBAP) in 2008. This NBAP focused on the sectoral threats and constraints in biodiversity conservation and provided a broad action plan to further *in situ* and *ex situ* conservation in the country with the involvement of governmental and non-governmental organizations and through community

³⁶Arts. 48-A, 51 A(g), Constitution of India envisages a collaborative effort between the State and the citizens to protect and improve the environment and to safeguard the forests and wildlife of the country.

³⁷Biodiversity and environment specific laws include: The Biological Diversity Act, 2002 (18 of 2003); the Wildlife (Protection) Act, 1972 as amended in 2002; the Indian Forest Act, 1927; the Forest (Conservation) Act, 1980; the Water (Prevention and Control of Pollution) Act, 1974; the Air (Prevention and Control of Pollution) Act, 1981; the Environment (Protection) Act, 1986; the Public Liability Insurance Act, 1991; the National Green Tribunal Act, 2010.

³⁸This chapter does not dwell upon the forest and wildlife laws.

³⁹Desai et al. (2011), p. 18.

⁴⁰Kalpavriksh conducted a massive consultative process to shape the National Biodiversity Strategy and Action Plan and submitted its draft Plan to the Ministry of Environment and Forests, Government of India in 2005.

⁴¹Earlier India had a Policy Statement on Environment and Development and a Policy Statement on Abatement of Pollution that indirectly contributed to biodiversity conservation. Now the National Environment Policy 2006 subsumes all other previous policies and provides an all-encompassing roadmap for environment protection and biodiversity conservation. Other pertinent policies include, the National Water Policy 2012, the National Forest Policy 1988, and the Wildlife Conservation Strategy 2002.

efforts. Based on the decisions made at Conference of Parties (COP 11) to the CBD in 2012, the NBAP was upgraded in 2014 to incorporate the new elements reflected in the Strategic Plan for Biodiversity (2011–2020)⁴² and Aichi Biodiversity Targets.⁴³ The revised NBAP enhanced the conservation commitments of India and introduced twelve national biodiversity targets along with indicators and monitoring frameworks. These national biodiversity targets will also pave the way for achieving the newly ordained Sustainable Development Goals.

India has rolled out some initiatives to create awareness amongst different strata of people on environmental education and biodiversity conservation. Environment Studies has been introduced as one of the subjects at school and college level.⁴⁴ Additionally, programmes such as the National Green Corps, Paryavaran Mitra (Friends of the Environment), National Environment Awareness Campaign contribute to the spread of environmental and biodiversity conservation awareness amongst the students and youth.⁴⁵

A programme called Environment Education in School System (EESS) imparts capacity building in the form of conducting teacher's training programmes and encourages writings on environment textbooks and developing curriculum for environmental studies.⁴⁶ The Biodiversity Management Committees functioning under the Biological Diversity Act, 2002, have been given the mandate to prepare and maintaining a People's Biodiversity Registers (PBRs) consisting of information related to biodiversity, traditional knowledge about medicinal plants and local biological resources. The PBRs are prepared in consultation with the local and indigenous people.⁴⁷ The Traditional Knowledge Digital Library (TKDL) serves as a database of Indian systems of medicine such as Ayurveda, Siddha, Unani and Yoga.

Also, the Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (MNREGA), is being utilized to promote activities such as horticulture, afforestation, soil conservation and irrigation. This in turn adds strength to India's efforts of conserving its flora and fauna.⁴⁸ Being aware of the benefits of organic farming for the environment, the Government of India through its programme called the National Project on Organic Farming (NPOF) has introduced incentives to farmers to pursue organic farming on their land. As a result of this initiative, the land area under organic farming in the country has more than doubled in six years' time from 42,000 ha in

⁴²In the tenth meeting of the Conference of the Parties (COP 10) during 18–29 October 2010, in Nagoya, Aichi Prefecture, Japan, the international community adopted a revised and updated Strategic Plan for Biodiversity as well as the Aichi Biodiversity Targets, for the period 2011–2020 (decision X/2).

⁴³*Ibid.*

⁴⁴India's Fifth National Report to the CBD 2014, *supra* n. 30, p. 56.

⁴⁵*Ibid.*

⁴⁶*Ibid.* p. 56.

⁴⁷*Ibid.* p. 57.

⁴⁸*Ibid.* p. 58.

2003–04 to 10,50,000 ha in 2009–10.⁴⁹ This is quite a remarkable development promoting conservation.

Another initiative, the Green India Mission, aims to raise 5 m ha of tree cover on forest or non-forest lands and to improve the quality of forest cover on another 5 m ha of land.⁵⁰ In this way, direct pressure on biodiversity will be reduced, and sustainable use of biological resources will be encouraged. These efforts to safeguard the biodiversity at genetic, species and ecosystem level through public participation and knowledge management will further enhance the richness of biodiversity in the country.

With the view to have a proper legal mechanism for regulating access to genetic resources and traditional knowledge for research purposes and commercial utilization, India enacted the Biological Diversity Act, 2002. This law establishes a three-tier regulatory structure for access and benefit sharing relating to biological resources and traditional knowledge.

2.3 The Biological Diversity Act, 2002, and Conservation

The Biological Diversity Act (BD Act) is the key legislation dealing with regulation of access to biological resources and traditional knowledge in India. The Act contains certain provisions to protect biodiversity by declaring heritage sites (Sect. 37). The Act also empowers the authorities to refuse approval for access to biological resources if such activity has the potential of causing an adverse impact on biodiversity or contrary to the objectives of conservation and sustainable use of biodiversity or equitable sharing of benefits arising out of such activity (Sect. 24(2)).

The BD Act prescribes a detailed framework of regulatory agencies responsible for conservation and sustainable use of biodiversity in the country. The National Biodiversity Authority (NBA) is the apex body whose primary function is to regulate access to biological resources and to ensure equitable sharing of benefits arising out of utilization of such resources. The NBA has the power to grant approval to entities or persons who have non-Indian status seeking access to the biological resources in the country for research, commercial utilization, biosurvey or bioutilization (Sect. 3). Without such approval, access to biological resources are not allowed. The NBA has the power to formulate guidelines for access to biological resources and its fair and equitable benefit sharing.⁵¹ It is an advisor to the Central Government on matters concerning conservation of biological diversity, sustainable use of its components and equitable sharing of benefits arising out of utilization of biological resources (Sect. 18). On behalf of the Central Government, the NBA can move against the grant of IPR in any country outside India on any biological resource

⁴⁹*Ibid.* p. 59.

⁵⁰*Ibid.* p. 62.

⁵¹The NBA has issued Guidelines on Access to Biological Resources and Associated Knowledge and Benefit Sharing Regulations, 2014. See G.S.R. 827 dated 21 November 2014.

obtained from India or knowledge associated with such biological resource which is derived in India (Sect. 18(4)). It is the responsibility of the NBA to determine equitable sharing of benefits arising out of the use of accessed biological resources, their by-products, innovations and practices associated with their use and applications as well as the associated knowledge in accordance with mutually agreed terms and conditions between the person applying for such approval, local bodies concerned and the benefit claimers (Sect. 21). The BD Act also provides for setting up of State Biodiversity Boards at the State level and Biodiversity Management Committees at the local level (Sects. 22, 41).

India has a robust biodiversity conservation mandate and has been one of the pioneers of biodiversity conservation at the international platform. A substantial amount of financial resources are invested to realize the goals of conservation. During 2013–14 alone, approximately INR⁵² 9200 crores (US\$1483 million) was spent for conservation of biodiversity.⁵³ When the records of the year 2013 were compared with those of 2010 regarding number and status of plant species in India, it was found that the number of threatened species remained almost equal, thereby depicting no increment in number of threatened species that is indeed remarkable. The Government of India also took significant steps for biodiversity conservation not only by way of *in situ* methods but also collaborated with major international organizations to ensure *ex situ* conservation.

India added around 3 million hectares of forest and tree cover during the last decade.⁵⁴ India's efforts towards biodiversity conservation can be understood with the increased strength of the protected areas in the country. Since 1988, the number of National Parks has nearly doubled from 54 to 102.⁵⁵ There has also been a substantial increase in the number of Wildlife Sanctuaries from 373 to 527.⁵⁶ In addition to this, the country maintains 23 marine protected areas. All these factors have collectively resulted in an increase in the total protected area from 3.34% in 1988 to 5.07% of the country's geographical area in 2014.⁵⁷ It is indeed a remarkable achievement in India's biodiversity conservation history.

Although these positive developments support an argument that India has endeavoured its best to conserve biodiversity, there are some concerns about giving away of forest clearances and environmental clearances for large patches of biodiversity-rich forest areas for mining and other developmental projects. Given these clearances, India's biodiversity conservation strategies have come under sharp criticism in the recent times. The Ministry of Environment, Forests and Climate Change constituted the Western Ghats Ecology Expert Panel (WGEEP) headed by Professor Madhav

⁵²Indian Rupees (INR).

⁵³India's Fifth National Report to the CBD 2014, *supra* n. 30, Preface.

⁵⁴Number and Area of National Parks and Wildlife Sanctuaries in India. https://data.gov.in/catalog/number-and-area-national-parks-and-wildlife-sanctuaries-india#web_catalog_tabs_block_10 Accessed 14 August 2015.

⁵⁵India's Fifth National Report to the CBD, 2014, *supra* n. 30, p. xiii.

⁵⁶*Ibid.*

⁵⁷*Ibid.*

Gadgil in March 2010 to, inter alia, assess the status of ecology of the Western Ghats region,⁵⁸ to demarcate ecologically sensitive areas in the region, to make recommendations for conservation, protection and rejuvenation of the region. After a detailed study and stakeholder interactions, the Expert Panel submitted its report to the government in August 2011 and recommended several measures for protecting and conserving the natural environment in the Western Ghats region, along with a recommendation for strict control of mining in the Western Ghats and closing of all mines that extracted ores beyond the limits permitted by environmental clearance, and cancellation of all working mineral extraction leases by 2016 and non-working leases immediately in ESZ1.⁵⁹ The Expert Panel also recommended termination of all mining leases in the catchment areas of dams used for drinking water.⁶⁰

The subsequently constituted High-Level Working Group on the Western Ghats also recommended termination of mines in the similar vein in its report to the government in April 2013. Amongst other recommendations, the Working Group recommended that 'there should be a complete ban on mining, quarrying and sand mining in ecologically sensitive areas' and 'all the present mining areas should be phased out in the next five years or at the time of expiry of mining lease, whichever is earlier'.⁶¹ This shows that the policy of granting environmental clearance for mining and other developmental projects in the forest and ecologically sensitive areas needs rationalization.

The key reasons for such threats to biodiversity are due to the lack of coordination amongst the administrative authorities while sanctioning approvals or clearances for developmental projects. The forest laws, wildlife laws and BD Act do not work in tandem. Conservation mandate is not coordinated well amongst these statutes. It would not be wrong to say that the BD Act has lost a golden opportunity to infuse conservation elements in the Act as its primary objective. The BD Act does not provide ample regime for the conservation of biological resources but focuses rather more on providing access to biological resources and associated knowledge.⁶² Even access to biological resources is not linked with any environmental or social impact study. It only provides certain duties to the Central as well as State Governments to take some steps for conservation of biodiversity without offering a clear set of rules as to how to do so. Under the BD Act, the State Governments have notified only seven Biodiversity Heritage Sites so far.⁶³ Considering the number of sacred groves

⁵⁸Western Ghats are considered to be a World Heritage Site. UNESCO World Heritage List. <http://whc.unesco.org/en/list/>. Accessed 22 January 2016.

⁵⁹Ecological Sensitive Zone 1.

⁶⁰Government of India (2011).

⁶¹Government of India (2013).

⁶²Barring certain provisions such as Sects. 24, 36, 37, 38 of the BD Act, conservation of biodiversity is not standing out as the prime focus of the BD Act.

⁶³These include four sites in Karnataka (Nallur Tamarind grove, Devnahalli; Hoglekal, Kadur, Chikmagalur; University of Agricultural Sciences, GKVK Campus, and Ambaraguda, Shimoga), two sites in West Bengal (Tonglu and Dhotrey BHS under the Darjeeling forest division) and one in Maharashtra (Glory of Allapalli, Gadchiroli). National Biodiversity Authority, Biodiversity Heritage Site. <http://nbaindia.org/content/106/29/1/bhs.html> Accessed 22 January 2016.

and heritage sites available in different States, this is less than a minuscule number of sites that have been recognized by the States. The States may identify many more ecologically important sites and sacred groves and declare them as heritage sites. This will give legal status to the sites and recognize community efforts.

The following sections deal with the Protocols adopted under the CBD to address access and benefit sharing (ABS), biosafety issues and their implementation in India.

3 The Nagoya Protocol on Access and Benefit Sharing

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their utilization to the Convention on Biological Diversity (the Nagoya Protocol)⁶⁴ is an instrument to implement the access and benefit sharing provisions of the CBD.⁶⁵

The principal objectives of the Nagoya Protocol are to facilitate access to genetic resources and traditional knowledge and to ensure equitable sharing of benefits arising from the utilization of genetic resources with a larger aim of contributing to the conservation of biological diversity and the sustainable use of its components. The broad scope of Nagoya Protocol extends to the genetic resources covered under Article 15 of the CBD and to the benefits arising from the utilization of such resources. It also gives life to Article 8(j) of the CBD by ensuring benefit sharing for the utilization of traditional knowledge associated with genetic resources held by indigenous and local communities.⁶⁶

Articles 5 and 6 of the Nagoya Protocol reflect the CBD's approach to access and benefit sharing based on prior informed consent (PIC) and mutually agreed terms (MAT). Under the Nagoya Protocol, PIC is not mandatory to regulate access to genetic resources. It is up to the Party, whether or not, to provide for PIC procedure through domestic legislation. According to Article 6, if a Party decides to regulate access to genetic resources for their utilization subject to the PIC, it has to provide for necessary legislative, administrative or policy measures that ensure legal certainty, clarity and transparency. In that event, access to genetic resources shall be subject to the PIC of the Party providing such resources that is the country of origin of such resources or a Party that has acquired such resources in accordance with the CBD. This should be implemented by the domestic ABS legislation or other regulatory requirements of the Party.

Article 7 of the Nagoya Protocol seeks each Party to establish national measures to ensure that traditional knowledge associated with genetic resources held by indige-

⁶⁴The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity was adopted on 29 October 2010 under the CBD. <https://www.cbd.int/abs/> Accessed 22 January 2016.

⁶⁵Arts. 8(j) and 15, CBD.

⁶⁶Art. 5, Nagoya Protocol on Access and Benefit Sharing. <https://www.cbd.int/abs/text/>. Accessed 22 January 2016.

nous and local communities should be accessed with their involvement and PIC, and based on a properly executed MAT.

The domestic measures of the Parties should provide for fair and non-arbitrary rules and procedures for accessing genetic resources and traditional knowledge. The procedures should establish the criteria for prior informed consent, processes for obtaining prior informed consent or approval and rules for establishing MAT. The terms should set out a dispute settlement clause, terms on benefit sharing, including about IPR, terms on subsequent third-Party use and the terms of changes of intent. The domestic law should also provide for a written decision or certification by a Competent National Authority, in a cost-effective manner and within a reasonable period.

One of the important features of the Nagoya Protocol is the establishment of an ABS clearing-house mechanism (Article 14). It will provide access to information made available by each Party about the implementation of the Nagoya Protocol. The Competent National Authority should notify all details of PIC and MAT to the Access and Benefit sharing Clearing House.

The Nagoya Protocol also provides for technology transfer (Article 23), capacity building (Article 22) and financial mechanism (Article 25) to further strengthen and facilitate the process of ABS in its member countries. The Annex to the Protocol lists ten forms of monetary benefits and seventeen forms of non-monetary benefits but does not limit the scope of benefits with those mentioned in the Annex. The Parties are at liberty to apply any other type of benefit sharing.

Adoption of the Nagoya Protocol is undoubtedly a much-awaited milestone achievement of the international community, particularly the developing countries where biodiversity is enormously present. The Nagoya Protocol has given life to the provisions of the CBD dealing with ABS through an internationally legally binding instrument. There are high expectations on the outcome of the Nagoya Protocol amongst the biodiversity-rich countries and the dependent communities. The victory of this Protocol will depend on how the State Parties and different stakeholders give effect to these provisions by their compliance and implementation. The success of benefit sharing could also herald global justice while ensuring conservation and sustainable utilization of genetic resources provided the bureaucratic hurdles to use the resources do not hamper.⁶⁷

3.1 Implementing the Nagoya Protocol in India

At present, there are several laws in India that directly or indirectly regulate access and benefit sharing of genetic resources. The primary law amongst these is the BD Act 2002, which establishes the National Biodiversity Authority (NBA), State Biodiversity Boards (SBBs) and Biodiversity Management Committees (BMCs) for implementing ABS. In addition to the BD Act, the Biological Diversity Rules 2004

⁶⁷Schroeder and Pogge (2009), pp. 269–280.

prescribe the procedure for access to biological resources and associated traditional knowledge as well as the criteria for equitable sharing of benefits. Similarly, enactments like the Protection of Plant Varieties and Farmer's Rights Act 2001, the Patents Act 1970 and the Wildlife (Protection) Act 1972, the Indian Forests Act 1927 and the Forest (Conservation) Act 1980, the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, and the Drug and Cosmetics Act 1940 are some of the laws that are closely related to the regulation of ABS process, determination of the rights arising out of it and biodiversity conservation.

As discussed earlier, the NBA is the apex body in the BD Act constituted by the Government of India in October 2003 at Chennai, Tamil Nadu (Sect. 8). NBA grants approval to the biological resources and knowledge as per Sects. 3, 4 and 6 of the BD Act for persons who are non-Indians. It also grants approvals to applications connected with intellectual property rights involving biological resources or traditional knowledge. It advises the State Government on the selection of areas of biodiversity importance to be notified as heritage sites and devising strategies for their management. It coordinates with the State Biodiversity Boards (SBBs) and Biodiversity Management Committees (BMCs) in the process of approving access and determining terms of benefit sharing. NBA is also empowered to take necessary measures to oppose the grant of intellectual property rights in any country outside India on any biological resource obtained from India or knowledge associated with biological resource derived from India.

The SBBs advise the State Government on matters relating to conservation of biodiversity, its sustainable use and benefit sharing aspects (Sect. 22). It grants approvals to the request for commercial utilization or biosurvey or bioutilization of any biological resource by Indian applicants.

In every State, the local bodies constitute the BMCs to promote conservation, sustainable use and documentation of biological diversity (Sect. 41). The BMCs also engage in preservation of natural habitat, conservation of land races, folk varieties and cultivators, domesticated stock and breeds of animals, micro-organisms and documenting of knowledge associated with biodiversity. The BMCs prepare, maintain and validate People's Biodiversity Registers (PBRs) in consultation with the local people. Each BMC maintains a Register giving information about the details of access to biological resources and traditional knowledge and the particulars of the collection fee imposed by BMC and the details of benefits derived from each case and the mode of sharing. The BMCs also advise on any matter referred to it by the SBB or NBA.

It is identified that 37,769 BMCs have been constituted in 29 States as on 02 September 2015.⁶⁸ About 1900 People's Biodiversity Registers (PBRs) have been prepared to document the biodiversity and traditional knowledge in 14 States.⁶⁹

⁶⁸National Biodiversity Authority, Biodiversity Management Committees <http://nbaindia.org/content/20/35/1/bmc.html>. Accessed 18 January 2016.

⁶⁹Annual Report 2014–2015, Ministry of Environment, Forests and Climate Change, Government of India at 29. <http://envfor.nic.in/sites/default/files/Environment%20Annual%20Report%20%20Eng..pdf>. Accessed 22 January 2016.

Since the coming into force of the BD Act, the NBA has given 220 ABS approvals in all as on 31 December 2015. This includes 116 approvals for obtaining IPR, 59 approvals for access to biological resources for research and commercial purpose, 27 approvals for third-Party transfer and 13 approvals for transfer of research results. These 220 approvals have been granted out of 1145 applications. Furthermore, about 232 applications are under process at different levels.⁷⁰

According to the available data, the monetary benefit received by the NBA amounts to INR 4.3 million as of April 2014.⁷¹ This amount seems to be too meagre when compared to the number of ABS Agreements India has entered into and also when compared to the cost that country has incurred in establishing a legal and institutional set-up for access and benefit sharing. Out of this amount, NBA has shared the royalty amount of INR 20,000 with Amarchinta BMC in Andhra Pradesh for export of neem.⁷² The NBA is working out the modalities of distributing the rest of the royalties to the benefit claimers.

Even though Section 21 of the BD Act and Rule 20 of the Biological Diversity Rules (BD Rules) provide broad parameters for determining benefit sharing, they have not given any specific guidelines to guide and finalize the quantum of benefit sharing in different situations. There has been a long felt need for a detailed guideline to determine benefit sharing. The Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, 2014 (hereafter ABS Guidelines), fulfils this gap and now provides detailed guidelines on ABS.⁷³ As per these ABS Guidelines, the NBA enters into benefit sharing agreements with the applicants which are deemed as the grant of approval for access to biological resources for research.

The ABS Guidelines prescribes parameters for benefit sharing for different purposes. If the biological resource has high economic value, the agreement may contain a clause to the effect that benefit sharing shall include an upfront payment of an identified amount, as agreed between the NBA and the applicant. In cases of biological resources having high economic value such as sandalwood, red sanders and their derivatives, the benefit sharing may include an upfront payment of not less than 5% on the proceeds of the auction or sale amount as decided by the NBA or SBB. Where an applicant or trader or manufacturer has not entered into any prior benefit sharing negotiations with the Joint Forest Management Committee or a forest dweller, tribal cultivator or the Gram Shaba for the purchase of any biological resource directly from these persons, the traders shall share the benefit in range of 1.0–3.0% of the purchase price of biological resources. The benefit-sharing obligations on the manufacturers shall be in the range of 3.0–5.0% of the purchase price of the biological resources.

⁷⁰National Biodiversity Authority, Approvals granted to the Applicants. <http://nbaindia.org/content/683/61/1/approvals.html>. Accessed 18 January 2016.

⁷¹RIS (2014), p. 3.

⁷²*Ibid.* p. 30.

⁷³The Access and Benefit Sharing Guidelines was issued by NBA on 21 November 2014 by a Gazette notification. http://nbaindia.org/uploaded/pdf/Gazette_Notification_of_ABS_Guidelines.pdf. Accessed 22 January 2016.

When the biological resources are accessed for commercial utilization, or biosurvey and bioutilization leading to commercial utilization, the applicant has an option of paying the benefit sharing ranging from 0.1 to 0.5% based on the annual gross ex-factory sale of the product. If the ex-factory sale is up to INR 1 crore (approx. US\$166,666), the applicant has to pay 0.1% of the annual gross ex-factory sale amount as benefit sharing component. If the sale is more than INR 1 crore and less than INR 3 crores (approx. US\$500,000), the benefit sharing component is 0.2%. If the sale amount exceeds INR three crores, the benefit sharing component is 0.5%.⁷⁴ The collection fees levied by BMC, if any, for accessing or collecting any biological resources for commercial purpose from areas falling within the jurisdiction of BMC, such collection fees shall be in addition to benefit sharing payable to NBA or SBBs.⁷⁵

If anyone intends to obtain any intellectual property rights in or outside India for any invention based on research or information on any biological resources obtained from India, prior approval of NBA is required, and the applicant has to pay such monetary or non-monetary benefits as agreed between applicant and NBA. If the applicant himself commercializes the process or product or innovation, the monetary sharing shall be in the range of 0.2–1% based on sectoral approach, which shall be worked out on the basis of annual gross ex-factory sale minus government taxes. When the applicant assigns or licenses the process or product or innovation to the third Party for commercialization, the applicant shall pay 3.0–5.0% of the fee received and 2.0–5.0% of royalty amount received annually from assignee or licensee based on sectoral approach.⁷⁶

In the case of transfer of results of research, the applicant shall pay to the NBA such monetary and/or non-monetary benefits, as agreed to between the applicant and the NBA. If the applicant receives any monetary benefit on such transfer, he shall pay to NBA 3.0–5.0% of monetary considerations. If there is a transfer of accessed biological resource and/or associated knowledge to a third Party for research or commercial utilization, the applicant shall pay to the NBA 2.0–5.0% of any amount or royalty received from the transfer as benefit sharing throughout the term of the agreement.

Whenever the benefit sharing has been determined by NBA while according approvals of any type, 5.0% of the accrued benefits will go to NBA, out of which NBA shall retain half of the amount and the other half will be passed on to their concerned SBBs for administrating charges. The rest of 95% of the accrued benefits shall go to concerned BMCs and/or benefit claimers.⁷⁷ If the biological resource and knowledge is sourced from individual or group or organization, the amount received will directly go to such individual or group of individuals or organizations. If the benefit claimers are not identified, such fund shall be used to support conservation

⁷⁴Rule 4, ABS Guidelines, 2014.

⁷⁵*Ibid.* at Rule 5.

⁷⁶*Ibid.* at Rule 8 and 9.

⁷⁷Rule 15, ABS Guidelines, 2014.

and sustainable use of biological resources and to promote the livelihood of local people from where biological resources are accessed.⁷⁸

As far as India is concerned, the BD Act and the ABS Guidelines take care of most of the provisions of the Nagoya Protocol. Instead, it needs to introduce certain provisions to enforce user country measures and check points to fruitfully implement the Nagoya Protocol.

With regard to the regulation of benefits arising out of the utilization of genetic resources, the Indian BD Act contains sufficient provisions to meet the requirements of Nagoya Protocol. As a provider country, the first and foremost thing that India needs to set out is to clarify the criteria for prior informed consent (PIC) in relation to biological resources and traditional knowledge associated with the biological resources. There is no mention of PIC in the BD Act. The NBA and SBBs grant prior approval 'in consultation with local bodies' wherever required.⁷⁹ Direct involvement of local communities is not adequately ensured in obtaining PIC or MAT as expected under the Nagoya Protocol. A State can 'theoretically negotiate and conclude' MAT which subsumes PIC too, but that is not the spirit of the Nagoya Protocol and the 'legitimate expectations' that the States have created at the time of negotiation of the Protocol.⁸⁰ Community PIC or their approval and involvement are separate from the additional PIC or approval of the State for genetic resources and traditional knowledge because the State exercises its power based on the principle of national sovereignty over natural resources and the community PIC for traditional knowledge is premised on international human rights law.⁸¹ To fill this gap, the larger involvement of local communities has to be encouraged under the BD Act.

The BD Act is silent on PIC or MAT of SBB as far as the traditional knowledge of local communities when Indian applicants access it. Perhaps the legislators wanted to promote Indian researchers to boost the indigenous industry. However, this is not a right approach because misappropriation or exploitation knows no nationality or citizenship.

The Nagoya Protocol demands that the user State should enact a law to ensure that the users have complied with the provider country requirements while obtaining the genetic resources or traditional knowledge. The BD Act does not have any provision to check the compliance of a provider country rules in India. The BD Act should incorporate adequate provisions to check that the genetic resources and traditional knowledge brought from other countries into India for research or commercial purposes have complied with regulatory requirements of the provider countries. To broaden the scope of the forms of benefit sharing provided under the BD Act, the ABS Guidelines has introduced additional forms of monetary and non-monetary benefits as envisaged under the annex to the Nagoya Protocol.⁸² As per Articles 8(a) and (b) of the Nagoya Protocol, the ABS Guidelines also introduced special provi-

⁷⁸ *Ibid.* at Proviso to Rule 15.

⁷⁹ Rule 14(3), Biodiversity Rules, 2004.

⁸⁰ See Nijar (2013), p. 256.

⁸¹ See Morgera et al. (2014), pp. 170–171.

⁸² Annexure I, ABS Guidelines, 2014.

sions to provide for simplified measures to encourage non-commercial research and research for emergency purposes outside India by Indian researchers or government institutions.⁸³ Likewise, to implement Article 8(c) of the Nagoya Protocol and also to meet the increasing demand for food in India due to the steady increase of its population, it would be advantageous to introduce some safeguard provisions in the BD Act while providing access to genetic resources for research on food and agriculture. This safeguard provision can be incorporated as one of the grounds for refusal or restriction of access to biological resources in the BD Act (Sect. 34).

In addition to this, India needs to designate appropriate checkpoints and ensure their efficient functioning and monitoring of the flow of biological resources and ensuring compliance of the national legal and regulatory framework. India, in the light of MAT and PIC requirements under the Protocol, should review its model ABS Agreements and bring it in conformity with the Protocol. Such Agreements should significantly balance the interests of the providers and users while keeping conservation and sustainable use of biodiversity as guiding principles.

Whether a biological resource found in the forest area could be accessed for commercial utilization is a tricky issue in India. The NBA or SBB may give approval, but the forest authorities could stop access to the biological resources found in the forests. In fact, one of the reasons for the failure of the Kani-TBGRI case was due to the prohibition made by the forest for the cultivation and supply of 'aarogyapaccha' on a regular basis and a large scale.⁸⁴ If India wants to implement ABS and get benefit out of it, sincere efforts have to be made to revisit the forest and wildlife laws of the country to enable ABS to happen under the BD Act smoothly.

Legislative changes, by themselves, will not be sufficient to implement the Protocol. A well-designed website with interactive information retrieval system is required to guarantee transparency and to provide all the information required to be provided by the National Focal Point and Competent National Authority. Initiatives need to be taken to involve the participation of relevant stakeholders for successful realization of the objectives of the Nagoya Protocol.

Also, depending upon its current economic, social and technical capabilities, India should consider strengthening its institutional capacities with regard to ABS, focusing on capacity building, training, conducting awareness programmes for the stakeholders including indigenous communities, and develop education materials for ensuring better implementation of the ABS laws in the country. Doing these activities would be in line with its commitments under the Protocol.

With the legal mechanism in place, India is truly in an advantageous position to implement the Nagoya Protocol, but it needs to focus on efficient implementation and regulatory aspects of the ABS process. The current system of ABS and the mechanisms under the BD Act for conservation of biological resources as well as

⁸³*Ibid.* at Rule 13. Under this Rule, the NBA has to give approval within 45 days in cases of non-commercial research and research for emergency purposes.

⁸⁴Even before the coming into force of the BD Act, the concept of ABS pertaining to genetic resources and traditional knowledge was experimented in India in the case of Kani-Tropical Botanic Garden and Research Institute (TBGRI) model of benefit sharing. For details of *Kani-TBGRI* case, see Lakshmanan (2005), p. 61.

the associated knowledge in India could be improved in certain ways. For example, documentation of biological resources and traditional knowledge at the BMC levels should be done by sufficiently trained people with the involvement of ecologists, academia and scientists available in the nearby higher educational institutions. Participation of local people in deciding access and determining benefit sharing should be encouraged even though the BMCs consist of representatives of local people. Such direct participation of the local people will enhance their sense of conservation and community decision-making in cases that affect biodiversity, ecological balance and livelihood security of the people. Insufficient fund flow from the benefit sharing process and the difficulties of actual collection of monetary benefits, etc., have to be looked at the institutional level. Very scanty amount of benefit sharing is prescribed under the ABS Guidelines. A gradual increase in the quantum of benefit sharing has to be considered by the NBA in suitable cases in future.

A trend has also been noticed in the current ABS procedure in the country that the benefit that is being agreed in various ABS Agreements is largely monetary in nature. This undermines the potential of non-monetary benefits. The options such as joint ownership of intellectual property rights, joint ventures with Indian institutions, location of production or research in the areas from where biological resource is accessed, technology transfer have to be explored and encouraged while determining benefit sharing. The cost–benefit analysis of the current ABS system shows that India has invested more in building the framework for ABS than the benefits it has reaped out of it. Therefore, suitable changes are required to be introduced in the current ABS legal framework, especially in the manner in which it is being implemented in the country, to maximize the utility of benefit sharing and to boost conservation and livelihood improvement of the local communities.

4 The Cartagena Protocol on Biosafety

Another important Protocol within the CBD family is the Cartagena Protocol on Biosafety. Utilization of biological resources in developing living modified organisms (LMOs) through genetic engineering triggers many biosafety concerns. The CBD mandated its member countries to consider the modalities of adopting a Protocol with the objective of safe transfer, handling and use of any LMOs resulting from biotechnology that may have adverse effect on the conservation and sustainable use of biodiversity taking also into account risks to human health (Article 19). As a sequel to this, the Cartagena Protocol on Biosafety⁸⁵ to the CBD (hereafter the Cartagena Protocol) was adopted in 2000 to focus on the transboundary movement, transit, handling and use of all LMOs that may adversely impact conservation and sustainable use of biodiversity, taking also into account risks to human health (Article 4). It does not apply to the transboundary movement of living modified organisms that are pharmaceuticals for humans addressed by other relevant international agree-

⁸⁵The Cartagena Protocol on Biosafety. <https://bch.cbd.int/Protocol>. Accessed 22 January 2016.

ments or organizations (Article 5). Each Party is obligated to take necessary legal, administrative and other measures to ensure that the development, handling, transport, use, transfer and release of any living modified organisms are undertaken in a manner that prevents or reduces the risks to biological diversity, taking also into account risks to human health (Articles 2(1) and (2)).

Advanced Informed Agreement Procedure (AIA) is one of the key features of the Cartagena Protocol.⁸⁶ A detailed procedure is laid down for obtaining prior agreement for transfer of LMOs from the jurisdiction of one State to that of the other.⁸⁷ AIA procedure will apply to the first intentional transboundary movement of LMOs for intentional introduction into the environment of the Party of import. The Cartagena Protocol makes several reservations to the applicability of AIA procedure to many cases, namely the LMOs in transit (Article 6(1)), the transboundary movement of LMOs for contained use (Article 6(2)) and the LMOs intended for direct use as food or feed, or for processing (FFP) (Article 7(3)).⁸⁸ The AIA procedure will not also apply to the cases, if in a decision of the Conference of Parties serving as the meeting of the Parties to this Protocol, decided that such transboundary movement of LMOs are not likely to have adverse effects on the conservation and sustainable use of biological diversity and human health (Article 7(4)). It establishes a biosafety clearing-house (BCH) as a part of the clearing-house mechanism under Article 18(3) of the CBD to facilitate the exchange of scientific, technical, environmental and legal information and experiences concerning LMOs and for assisting the Parties to implement the Protocol (Article 20).

The Cartagena Protocol is mainly built on precautionary principle. It mentions precautionary approach in many places and reiterates the same in the preamble itself referring to Principle 15 of the Rio Declaration on Environment and Development. The precautionary approach is stressed in Article 10 while taking a decision under the AIA process in connection with intentional introduction into the environment and also in Article 11 that deals with the procedure for LMOs intended for direct use as FFP.⁸⁹

In case the transboundary movement of LMOs is intended for direct use as food or feed, or for processing (FFP) a separate simplified procedure is advocated in the Protocol (Article 11). Prior to the first transboundary movement of LMOs for direct use as FFP, a country that makes a final decision regarding domestic use, including placing on the market, of an LMO that may be subject to transboundary movement shall inform the parties through the BCH within fifteen days of making such decision. This information shall contain, at the minimum, the information required in Annex II.⁹⁰ It contains a specific provision to deal with unintentional transbound-

⁸⁶The AIA procedure draws inspiration from the procedures laid down in the Basel Convention.

⁸⁷*Supra* n. 85, Art. 7.

⁸⁸LMO-FFPs refer to living modified organisms intended for direct use as food or feed, or for processing. *See* Art. 7(2), Cartagena Protocol on Biosafety.

⁸⁹Mackenzie et al. (2003), pp. 13–14.

⁹⁰Annex II of the Protocol specifies the information required concerning LMOs intended for direct use as food, feed or for processing under Article 11.

ary movement and emergency measures⁹¹ and prescribes specific steps for handling, transportation, packaging, and identification of LMOs to avoid any possible adverse effects of mishandling (Article 18).

Keeping in mind the socio-economic conditions of a number of developing and least developed countries, the Cartagena Protocol also contains provisions for capacity building in biosafety, access to and transfer of technology for effective implementation of the Protocol in these countries (Article 22).

4.1 Implementation of Cartagena Protocol in India

India has been one of the pioneering countries that have acted cautiously and at the same time proactively in tackling the issue of biosafety. The Environment (Protection) Act 1986 is an overarching legislation in India that regulates every aspect of environment protection. With the emergence of modern biotechnology and the potential of bioprospecting in India, a need was felt for a regulatory framework to deal with activities related to biotechnology. As a result, the Rules for the Manufacture, Use, Import, Export, and Storage of Hazardous Micro-organisms/Genetically Engineered Organisms or Cells, 1989, (hereinafter referred to as the 1989 Rules), was promulgated which was much before the adoption of the Cartagena Protocol.

The 1989 Rules cover all genetically engineered organisms, micro-organisms, cells and the substances, products or foodstuff in which such cells, tissues or organisms find a place.⁹²

The 1989 Rules apply to (i) sale, offers for sale, storage for the purpose of sale, offers of any kind of handling over with or without consideration; (ii) exportation and importation of genetically engineered cells or organisms; (iii) production, manufacturing, processing, storage, import drawing off, packaging and repackaging of the genetically engineered products; and (iv) production, manufacture, etc., which make use of micro-organisms/genetically engineered micro-organisms in one way or the other.⁹³

The 1989 Rules are implemented by the Ministry of Environment, Forests and Climate Change (MoEF&CC) and Department of Biotechnology (DBT), Government of India, with the help of Genetic Engineering Appraisal committee (GEAC). The regulatory system and assessment mechanism is heavily dependent on scientific inputs. In the opinion of Ian Scoones, '[t]he assessment is based on objective science and expert guidance, using the best experimental and monitoring information available. It is a technocratic system *par excellence*'.⁹⁴

⁹¹*Supra* n. 85, Art. 17.

⁹²Rule 2(2), Rules for the Manufacture, Use, Import, Export and Storage of Hazardous Micro-organisms/Genetically Engineered Organisms or Cells, 1989. <http://envfor.nic.in/legis/hsm/hsm3.html>. Accessed 22 January 2016.

⁹³*Ibid.* Rule 2(4).

⁹⁴Scoones (2005), p. 247.

Six competent authorities take care of implementing the Rules 1989.⁹⁵ These competent authorities are constituted as committees consisting of scientific experts and bureaucratic representatives from different ministries and departments.

At the apex level, GEAC is responsible for the approval of large-scale field trials and proposals for the release of genetically engineered organisms into the environment. It takes care of approval of activities involving large-scale use of hazardous micro-organisms and recombinants in research and industrial production from the environmental angle. The approval of the GEAC is mandatory for production, sale, import or use of any substance or products that contain genetically engineered organisms or cells or micro-organisms.⁹⁶ Its approval is also required for the production, sale, import or use of any foodstuffs, ingredients in foodstuffs and additives including processing aids containing or consisting of genetically engineered organisms or cells.⁹⁷ The GEAC is empowered to supervise the implementation of the terms and conditions laid down by it while granting the approvals.⁹⁸ The supervision may be carried out through the State Biotechnology Coordination Committee/District Level Committee or through any of its authorized personnel.⁹⁹ Approvals will be given by the GEAC for a period of not exceeding four years at the first instance and can be renewable for two years at a time.¹⁰⁰ The GEAC may revoke such approvals if there is any new information as to the harmful effects of genetically engineered or cells; or if the GM organisms or cells cause damage to the environment, nature or health; or on the ground of non-compliance of any conditions stipulated by the GEAC.¹⁰¹

The Review Committee on Genetic Manipulation (RCGM) is comprised of the representatives from the Department of Biotechnology, Indian Council of Medical Research, Indian Council of Agricultural Research, Council of Scientific and Industrial Research and other subject experts. It can constitute subgroups for working on specific issues. The RCGM brings out manuals of guidelines specifying procedures for regulatory process and lays down procedures for restricting or prohibiting production, sale, importation and use of genetically engineered organisms or cells. It also accords short-term approvals for confined field trials of transgenic varieties.

The Recombinant DNA Advisory Committee (RDAC) acts as the advisor to the central government. Its mandate is to review the developments in biotechnology at national and international levels and recommend suitable and appropriate measures for adopting new safety regulations in the recombinant research, use and applications from time to time.

The Institutional Biosafety Committee (IBSC) is the institutional advisory body. Any person or any research institution, handling micro-organism/genetically engineered organism, should constitute an IBSC in the institution. The head of the

⁹⁵*Supra* n. 92, Rule 4.

⁹⁶*Ibid.* Rule 10.

⁹⁷*Ibid.* Rule 11.

⁹⁸*Ibid.* Rule 14.

⁹⁹*Ibid.* Rule 14(2).

¹⁰⁰*Ibid.* Rule 13(2).

¹⁰¹*Ibid.*

research institution, the scientists engaged in DNA work, a medical expert and a nominee of the DBT will form part of the IBSC. With the assistance of IBSC, the occupier or any person handling micro-organisms or genetically engineered organisms should prepare a current on-site emergency plan as prescribed in the manuals or guidelines of the RCGM.

At the State level, the State Biotechnology Coordination Committee functions as a monitoring and prosecuting committee.¹⁰² The SBCCs are empowered to inspect, investigate or take punitive actions in case of violations of statutory provisions through the Nodal Department and the State Pollution Control Board or Directorate of Health or Medical Services. It will also review periodically safety and control measures to be observed in industries or institutions handling genetically engineered organisms or hazardous micro-organisms.¹⁰³

At the bottommost level, the District Level Committees (DLCs) function under the District Collector to monitor safety regulations in installations engaged in the use of genetically modified organisms or hazardous organisms and its application in the environment.¹⁰⁴ The DLC has to regularly submit its report to the SBCC or GEAC.¹⁰⁵

In addition to these six committees, the 1989 Rules also have provisions to deal with the emergency situations.¹⁰⁶ Any interruption of operation or accidents that may lead to the discharge of genetically engineered organisms or cells which could be harmful to environment, nature or health should be informed by the occupier to the DLC/SBCC and the concerned State medical officer. However, such notification will not lessen the obligation of the person who is responsible for trying effectively to minimize or prevent the effects of interruptions of operations or accidents.¹⁰⁷

Article 15 of the Cartagena Protocol suggests the obligations of risk assessment by the importing Party based on scientific manner as provided in its annex III. Article 16 of the Cartagena Protocol deals with risk management and calls upon the parties to establish and maintain an appropriate mechanism to regulate, manage and control risks identified in the risk assessment. The biosafety guidelines issued by the Department of Biotechnology in India fulfil the obligation of risk assessment and risk management as required in the Cartagena Protocol.

The Cartagena Protocol contains provisions to deal with the unintentional transboundary movement of LMOs and emergency measures (Article 17). Whenever a country becomes aware of any incidents within its jurisdiction resulting in a release of an unintentional transboundary movement of an LMO, and that affects conservation and sustainable use of biodiversity and human health in such a country, the country should take necessary measures to notify the affected or potentially affected States, to the BCH and relevant international organizations. In India, the 1989 Rules

¹⁰²*Ibid.* Rule 4(5).

¹⁰³*Ibid.*

¹⁰⁴*Ibid.* Rule 4(6).

¹⁰⁵*Ibid.*

¹⁰⁶*Ibid.* Rule 17.

¹⁰⁷*Ibid.* Rule 16.

prohibit unintentional or deliberate release of genetically engineered organisms or hazardous micro-organisms or cells, including deliberate release for the purpose of experiment.¹⁰⁸

As obligated under Article 20 of the Biosafety Protocol, India has established the India Biosafety Clearing House (IND-BCH) for the purpose of exchange of scientific, technical, environmental and legal information on LMOs. The Cartagena Protocol requires periodical reports from the contracting parties.¹⁰⁹

Although the 1989 Rules provide for regulation of manufacture, use, import, export and storage of GMOs in a broad manner with the help of competent authorities, there have been criticisms against the efficiency of working of these rules.

In response to these criticisms, the Government of India set up two task forces (Task Force on Application of Agricultural Biotechnology, 2004, and the Task Force on Recombinant Pharma, 2005) to review the shortcomings of the existing system of regulation of biotechnology and invited suggestions for its improvement. Based on the recommendations of these two task forces and the later developments in India's increased international obligation in the light of its signing the Cartagena Protocol, the Department of Biotechnology, Ministry of Science and Technology came out with a new draft law, the National Biotechnology Regulatory Authority (NBRA) Bill, 2008. This Bill proposed to establish an independent National Biotechnology Regulatory Authority (NBRA) to regulate health and safety aspects of biotechnology and protection of environment. If enacted, this Authority was supposed to take appropriate measures to regulate the importation of GM organisms in India, develop and implement guidelines for risk-assessment methodologies, monitor and conduct studies on safety of biotech products. Due to various criticisms and concerns about scope of the power given to the Authority and the nature of its functioning, the Bill was opposed by many sections of society and stakeholders and sent to the parliamentary committee for its recommendations. As the term of Lok Sabha¹¹⁰ ended, the Bill could not see the light of the day. Again, the Bill was modified and the revised version of the Bill, the Biotechnology Regulatory Authority of India Bill, 2013, was introduced in Lok Sabha on 23 April 2013. Once more, the Bill could not be taken up for the discussion due to lack of consensus amongst the political parties and opposition from different stakeholders. The Bill was sent to the Standing Committee on Science and Technology for its inputs, but without any development, the Bill lapsed once again with the end of the term of Lok Sabha.

India has taken a middle path between a precautionary approach and proactive approach adopted by different countries in regulating biotechnology. Though India

¹⁰⁸*Supra* n. 92, Rule 9.

¹⁰⁹So far the Government of India has submitted two national reports to the Conference of Parties to the Protocol (i) Interim National Report on Implementation of the Cartagena Protocol on Biosafety on 10 January, 2006 and (ii) First Regular National Report on the Implementation of the Cartagena Protocol on Biosafety in February, 2008. Available at <http://www.cbd.int/biosafety/parties/reports.shtml?report=NR-CPB-01>. Accessed 30 July 2009.

¹¹⁰The House of People or Lower House.

strives to promote biotechnology,¹¹¹ it has not been at the cost of environment and human health. Many environmental considerations have been evaluated before the approval of GMOs by the GEAC. During the public consultations on Bt-brinjal, it has become more evident that the government was receptive to the health and environmental concerns of the public.¹¹² Even though the 1989 Rules do not have any explicit provision to take care of socio-economic considerations resulting out of GMOs, the regulatory authorities seem to have taken cognizance of these considerations in the Bt-brinjal case.¹¹³ It is time that India introduced some legally binding provisions into the 1989 Rules to address the socio-economic issues emerging out of GMOs.

5 The Nagoya-Kuala Lumpur Supplementary Protocol

Even though the Cartagena Protocol strived to regulate transboundary movement of LMOs, there has been a long wait for the international community to deal with liability and redress in the global biosafety regime. The Cartagena Protocol gave a mandate to its member countries to adopt a process to negotiate and elaborate appropriate international rules and procedures in the field of liability and redress for damage resulting from transboundary movement of living modified organisms (LMOs) (Article 27). The Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Bio-safety (hereafter ‘the Supplementary Protocol’) was adopted in 2010 to address this issue. The foremost objective of this Supplementary Protocol is to contribute to the conservation and sustainable use of biological diversity, taking into account risks to human health.¹¹⁴ In furtherance of this objective, it provides for international rules and procedures for liability and redress in the event of damage caused due to transboundary movement of LMOs. The Supplementary Protocol is applicable to the damage that occurs in areas that lie within the territorial limits of parties (Article 3(5)).

The Supplementary Protocol envisages an ‘administrative approach’ to deal with the issues of liability and redress through a designated competent authority by parties within their jurisdictions. The Competent Authority is expected to look at the implementation of various obligations enshrined under the Supplementary Protocol and to undertake preventive, restorative and response measures in the case of damage occurring due to LMOs (Article 5). One of the striking features of the Supplementary Protocol is that it allows the applicability of domestic laws to address response measures (Article 12). Thereby, the Supplementary Protocol gives the parties much-

¹¹¹National Biotechnology Development Strategy, Department of Biotechnology, Ministry of Science and Technology, India. http://www.dbtindia.nic.in/wp-content/uploads/DBT_Book-_29-december_2015.pdf. Accessed 22 January 2016.

¹¹²Lakshmanan (2010–2011), p. 166.

¹¹³See generally, *Ibid.* pp. 145–166.

¹¹⁴Art. 1, Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, https://bch.cbd.int/protocol/NKL_text.shtml. Accessed 22 January 2016.

required flexibility to frame the law associated with response measures in accordance with their needs. This flexibility, in turn, ensures proper and smooth implementation of the Supplementary Protocol. The Supplementary Protocol does not cover the situations arising out of damage caused by domestically developed LMOs. In such cases, the parties need to develop domestic legal framework to address the damage, if any, caused due to locally developed LMOs within the jurisdiction of that Party.

Another major drawback of the Supplementary Protocol is that it does not cover any damage that occurs in transit or beyond the national jurisdiction of the parties, i.e. spaces of international jurisdiction like high seas.

5.1 Options for Implementing Supplementary Protocol in India

India became a signatory to the Supplementary Protocol on 11 October 2011 and ratified it on 19 December 2014. This created a legal obligation for India to provide a legal framework in the country to address the response measures for damage caused by LMOs originating from transboundary movement.

Currently, in India, there are some legal instruments in place that are relevant for the issue of liability and redress involving LMOs.¹¹⁵ The existing laws that come close to the Supplementary Protocol are the 1989 Rules, the law of torts and the National Green Tribunal Act, 2010 (NGTA). Therefore, India has an option of applying the existing domestic laws with required amendments in order to conform to its international obligations under the Supplementary Protocol. As the 1989 Rules were framed before the adoption of the Supplementary Protocol, it does not contain provisions to completely fulfil the obligations under the Supplementary Protocol. However, these Rules can be used to address some of the response measures, though they are not based on civil liability rules. In case India exercises this option, it may have to amend the 1989 Rules. In addition to this, the NGTA and the law of torts shall supplement implementation of the Supplementary Protocol in the country.

Rule 7 of the 1989 Rules provides powers to the GEAC to give direction to the occupier to determine or take measures concerning the discharge of micro-organisms or genetically engineered organisms or cells mentioned in the schedule from the laboratories, hospitals and other areas including prohibitions of such discharge and laying down measures to be taken to prevent such discharges. Under Rules 15(1) and (2), the District Level Committees and State Biotechnology Coordination Committees are clothed with the powers to take certain measures. Rule 15(1) provides that if an order of a competent authority is not complied with, the District Level Committee or State Biotechnology Coordination Committee may take measures to remedy the situation at the expenses of the person who is responsible for the problem. Rule 15(2)

¹¹⁵The Environment (Protection) Act, 1986, the Rules for the Manufacture, Use, Import, Export and Storage of Hazardous Micro-organisms/Genetically Engineered Organisms or Cells, 1989, the National Green Tribunal Act, 2010, the Biological Diversity Act 2002 and the law of torts.

addresses the situations where immediate interventions are required to prevent any damage to the environment, nature or health. The District Level Committee or State Biotechnology Coordination Committee may take the necessary steps immediately without issuing any orders or notice. The person responsible for such damage shall pay for the expenses incurred for this purpose. These rules are basically preventive measures and do not address liability and redress for damage. Rule 15(1) only partially satisfies the response measures in the event of damage. It applies only if the person responsible fails to comply with an order of a competent authority. Damage can happen even after fulfilment of all the conditions by the operator. This situation is contemplated in the Supplementary Protocol. Rule 7 of the 1989 Rules may be utilized to some extent by the GEAC in such cases where there is a need to prohibit discharges or release of micro-organisms or genetically engineered organisms. The GEAC may also lay down measures that may include guidelines to deal with prevention of damage and activities to be taken in the event of any damage.

Another way to implement the Supplementary Protocol is through the BRAI Bill though its future is still uncertain as the BRAI Bill has to be reintroduced in the parliament. BRAI may not be a feasible option as both the versions of the earlier Bills did not contain even a single provision to address response measures or liability and redress in the event of damage caused due to LMOs. The whole idea of liability and redress will have to be introduced in the BRAI Bill afresh. In that event, it will be necessary to include the definition of damage, response measures through administrative approach, etc., in the Bill.

Apart from these possibilities, India has an option of enacting a new parliamentary law that may incorporate civil liability rules and procedures specifically for the purpose of implementing the Supplementary Protocol. Though this will be an attractive option, the exercise of this option may turn out to be a time-consuming process besides getting caught in a political wrangling.

The most practical option for India to implement the Supplementary Protocol could be to issue a new notification under the Environment Protection Act (EPA) 1986 to constitute a competent authority for implementation of various obligations enshrined in the Supplementary Protocol, along with the procedure for response measures and liability and redress. The EPA empowers the Central Government to take all measures necessary to protect and improve the quality of environment and for preventing, controlling and abating environmental pollution.¹¹⁶ The Central Government in exercise of this power could issue a notification for the constitution of the aforementioned competent authority (Sect. 3(3)).

Issuance of a notification under the EPA could appear to be available option for India mainly for three reasons. Firstly, the EPA empowers the Central Government to issue such notification. Secondly, being an executive act, it shall not be a lengthy process as compared to passing a new law by the parliament or amending the existing legislation. Thirdly, by issuing a new notification under the EPA, linkages can be created with the other statutes such as the National Green Tribunal Act and the Rules, 1989.

¹¹⁶Sect. 3(1), Environment (Protection) Act of India, 1986.

The effective implementation of the Supplementary Protocol both at the central level and State level will benefit conservation and sustainable use of biodiversity and also will protect human health in the country. A timely step on the part of the government for the implementation of this Supplementary Protocol would undoubtedly be in the best interests of the people of the country.

6 Conclusion

The above assessment shows that the Indian narrative about the implementation of the CBD and its Protocols is, for the most part, a success story. It is quite evident that the CBD has undoubtedly played a catalytic role in shaping and consolidating the biodiversity agenda of the country. While implementing the CBD, the BD Act and the forest and wildlife laws of India and the national action plans play a major role in conserving the biological diversity of the country. The NBAP and its recent upgradation to make it in line with the Strategic Plan for Biodiversity and Aichi Targets give more hope about its lead role in bringing efficiency in biodiversity conservation.

The administrative agencies in India should make efforts to tap the strength of local communities and integrate that for augmenting conservation ideals. This will pave the way for sustainable use of biological resources, sustainable living and nation-building. As already pointed out, biodiversity conservation has been an integral part of the life of Indians for centuries, but the lack of respect and recognition of their efforts have led to the erosion of conservation values. It will be easy to revive the support and confidence of people by supporting their religious and community practices for conservation through small grants. Integration of peoples' participation in the planning process and execution of schemes with their involvement will once again reestablish their constructive support for conservation. This has been happening in India to some extent and has contributed considerably in protecting and conserving forests, protected areas and biological diversity in the country. The success stories of Joint Forest Management and Biodiversity Management Committees, for example, are proving this point. Unquestionably, more efforts are needed to integrate people in conservation schemes. In fact, more public participation and less governance will make conservation a reality.

Instead of primarily facilitating access and benefit sharing in the context of genetic resources and traditional knowledge, the mandate of the BD Act should be enlarged to engage in conservation of biodiversity in a greater way. The power of the State Biodiversity Boards under Sect. 24 of the BD Act to restrict or prohibit access to biological resources if the access has the potential of affecting conservation and sustainable use of biological diversity or equitable sharing of benefits needs to be the guiding yardstick of approving ABS applications. Monetary considerations should not dominate environmental sustainability and livelihood security of local communities. Similarly, the duties of the Central and State Governments under Sections 36 and 37 of the BD Act have high potentials of taking conservation measures. Proactive

steps should be taken to make use of these limited provisions under the BD Act to recognize more environmentally significant sites as heritage sites. Declaration of a very few heritage sites in selected areas will not firmly contribute towards conservation in a large country like India. Community efforts of protecting sacred groves in different States can be legally protected under the label of heritage sites. Legal status for sacred groves and heritage sites will give greater impetus to protect them from encroachments and other threats. Instead of taking over of these heritage sites in the hands of government, if the community effort is recognized with the involvement of local people and if a small financial support from the government is provided annually to the trustees of such communities for organizing local festivals, keeping the sites clean and encouraging some afforestation programmes in such sites, it would strongly contribute towards conservation as well as revival of age-old traditions.

The country is indeed in an advantageous position with the BD Act already in place that could implement provisions of the Nagoya Protocol. It is very encouraging to see the successful implementation of ABS by the NBA with the involvement of SBBs and BMCs within its limited infrastructure. The challenges of implementing ABS in a country like India are huge due to the lack of understanding of the concept of ABS itself amongst the local communities, BMCs and the research community. Extensive capacity building is required for different stakeholders. In most of the cases, the genetic resources are found in the forest areas. Even though the local communities conserve and produce vital biological resources and have traditional knowledge about the use of those resources, the forest laws prohibit the supply of such resources for commercial utilization. In a country where a significant amount of biological resources are locked in forests and protected areas, if the forest laws do not enable access to those resources, the ABS system will not succeed under the BD Act. There is a need to revisit the forest laws of the country in the light of ABS under the BD Act and the Nagoya Protocol. The forest laws urgently require appropriate amendments to support ABS process, of course, without diluting the main mandate of forest and wildlife protection. The BD Act also should be amended or supported by administrative orders or guidelines to give effect to the crucial provisions of the Nagoya Protocol such as user country measures, notification of checkpoints.

The above analysis also shows that India has established a relatively strong biosafety legal framework to meet the legal obligations created under the Cartagena Protocol on Biosafety. The Central Government has been cautious in approving the genetically modified varieties of plants due to stiff public resistance as the Bt-brinjal case has demonstrated. Indian regulatory approach to biotechnology appears to be promotional and at the same time precautionary. The 1989 Rules have, thus far, effectively regulated the approval of genetically modified organisms and averted any kind of untoward incidents or damage. India will have to introduce legal, administrative or policy measures to implement the Supplementary Protocol on Liability and Redress in order to introduce administrative approach and civil liability in the event of damage arising out of LMOs. The coming into force of the National Green Tribunal has been timely in the country as that could take care of the cases pertaining to biosafety and liability.

Being one of the megadiverse countries of the world and sharing four important biodiversity hot spots with its neighbours, India has a lot to offer to the global community in terms of conservation and sustainable living practices if only it can act proactively with the help of community involvement winning their confidence and support. This will also accomplish the constitutional aspiration of involving the State and citizens under Articles 48-A and 51-A(g) to protect and improve the natural environment and to have compassion for all living creatures.

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Indian Civil Nuclear Liability Law (CNLD Act): An Adventurism or Exceptionalism in International Legal Discourse

M. P. Ram Mohan

Abstract International law relating to nuclear liability has been on a continuous development over the last five decades. On the specific issues of transboundary nuclear liability law and its applicability, the Hiroshima and Nagasaki bombings in Japan and the Chernobyl accident in 1986 steered the international community to address many of the gaps and inconsistencies. The 2011 Fukushima accident in Japan again highlighted the importance of a robust liability regime, both domestically and internationally. Though the effectiveness of these initiatives is still questionable on the issues of universal applicability, quantum of compensation and exceptions, however, countries accepted the basic founding principles as the foundation of the nuclear liability law. India, an established nuclear power country, while re-engaging with world nuclear community subsequent to the 2005 India–United States Nuclear Cooperation, enacted its own nuclear liability law. The Civil Nuclear Liability for Nuclear Damage Act 2010 which was passed after extensive discussion in the Parliament interestingly has both critiques and admirers. Many in India maintain that its liability law reflects Indian public interest and should be seen as a step toward modernizing the nuclear legal regime. Internationally, many argue that the law deviates from the established principles. The chapter undertakes historical evaluation of the development of hazardous liability law in India through tort jurisprudence, maps the civil nuclear liability law making process both at international level and in India and how Indian law stands today, and concludes with the observation that Indian law is an exceptional law.

Keywords Civil nuclear liability for nuclear damage act 2010
International nuclear liability law · Right of recourse · Nuclear insurance
Nuclear energy in India

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307

1 A Brief History

India-United States (US) Civil Nuclear Energy Cooperation, initiated through a joint statement between President Bush and Prime Minister Manmohan Singh on July 18, 2005 (Department of Atomic Energy 2005), culminated in lifting four decades of India's nuclear isolation.

Historically, India was quite integrated with the nuclear community playing a major role in international nuclear affairs.¹ As early as in 1944–1945, Homi Bhaba the founder of the Indian nuclear program established the Tata Institute of Fundamental Research (TIFR) and with its creation began India's research in nuclear technology and science. On April 15, 1948, the government enacted the Atomic Energy Act and established the institution of Atomic Energy Commission of India (AEC) which reports directly to the Prime Minister, a deviation from the traditional structure of reporting to a Minister. Commenting on the commitment of political leadership of that time, President Pranab Mukherjee in his speech at DEA on November 15, 2013, observes, "At the inauguration of India's first nuclear reactor in Trombay in 1957, he (*Prime Minister Nehru, emphasis added by the author*) observed that the "atomic revolution" was as seminal an event as the industrial revolution, Pt. Nehru said "either you go ahead with it, or you succumb and others go ahead, and you fall back and gradually drag yourself along in the trail." Similarly, at the opening of the CIRUS research reactor at Trombay in 1961, he commented "if you have the picture of the future of India ... you will come to the conclusion of the inevitability of our building up atomic energy for peaceful purposes."²

In 1957, the first nuclear reactor in Asia—Apsara was dedicated to the nation.³ Within a year, i.e., 1955, India negotiated with Canada for 40 MW reactors. Under the "Atoms for Peace" program the US supplied heavy water and the reactor was named the 'Canada-India Reactor, the US' otherwise called as CIRUS.⁴ CIRUS became operational in 1960. In the following years, India entered into several bilateral agreements with the US, the UK, France and the USSR and also enhanced its relationship with Canada. This extensive international cooperation came to halt when in 1974 India tested its nuclear device named "Smiling Buddha." Following the second tests in 1998 "Operation Shakti or Pokran II" additional sanctions were imposed. These two sanctions slowed down Indian civilian nuclear energy considerably. Today after 50 years of nuclear energy technology program, India could achieve only close to 5000 MW of nuclear power explains lost years of collaboration. However importantly, even under sanctions, India committed enormous resources and manpower in developing full nuclear fuel cycle facilities is a major achievement. As on date, India has close to 21 operating nuclear power plants, while also pursuing a variety of indigenous and imported reactor technologies, and pushing world-class research in nuclear medicine, agriculture, and related fields.

¹Fischer (1997).

²Mukherjee (2013), <http://dae.nic.in/writereaddata/sp151113.pdf>.

³Chidambaram (2006).

⁴Hunt (1977).

The importance of 2005 joint statement lies in the fact that India and USA laid out a comprehensive plan to achieve a clear course correction in bringing in fairness to international nuclear legal architecture by accepting India's nuclear non-proliferation record and high technology competence. President Bush in the statement conveyed "his appreciation to the Prime Minister over India's strong commitment to preventing WMD proliferation and stated that as a responsible State with advanced nuclear technology, India should acquire the same benefits and advantages as other such States. The President told the Prime Minister that he would work to achieve full civil nuclear energy cooperation with India as it realizes its goals of promoting nuclear power and achieving energy security. The President would also seek agreement from Congress to adjust U.S. laws and policies, and the United States will work with friends and allies to adjust international regimes to enable full civil nuclear energy cooperation and trade with India."⁵ Such an elaborate and comprehensive nature of engagement for a nuclear outlier, India and for USA that invested in half a century of non-proliferation efforts through Nuclear Non-Proliferation Treaty (NPT) was unprecedented. India always maintained that the international nuclear governance was unfair in respect to classification of India and also obligations of parties under NPT.

In the Joint Statement, India obligated itself to work with USA to become a partner and party to international nuclear community and legal regime wherein Indian interest would be protected and status would be unique. Prime Minister Singh conveyed "India would reciprocally agree that it would be ready to assume the same responsibilities and practices and acquire the same benefits and advantages as other leading countries with advanced nuclear technology, such as the United States. These responsibilities and practices consist of identifying and separating civilian and military nuclear facilities and programs in a phased manner and filing a declaration regarding its civilians facilities with the International Atomic Energy Agency (IAEA); taking a decision to place voluntarily its civilian nuclear facilities under IAEA safeguards; signing and adhering to an Additional Protocol with respect to civilian nuclear facilities; continuing India's unilateral moratorium on nuclear testing; working with the United States for the conclusion of a multilateral Fissile Material Cut Off Treaty; refraining from transfer of enrichment and reprocessing technologies to States that do not have them and supporting international efforts to limit their spread; and ensuring that the necessary steps have been taken to secure nuclear materials and technology through comprehensive export control legislation and through harmonization and adherence to Missile Technology Control Regime (MTCR) and Nuclear Suppliers Group (NSG) guidelines."⁶

Taking this initiative forward, intense negotiations followed with USA and international community till 2008 to facilitate India's engagement and acceptance within the US legal system, Nuclear Suppliers Group and also with IAEA for India specific safeguards. Specifically commenting on the IAEA Safeguards Agreement, the then Director General Mohamed ElBaradei spoke,

⁵DAE (2005) <http://www.dae.gov.in/indous.pdf>.

⁶Ibid.

“The Board of Governors this afternoon adopted by consensus the agreement to apply safeguards to civilian nuclear facilities in India. I believe the agreement is good for India, is good for the world, is good for non-proliferation, is good for our collective effort to move towards a world free from nuclear weapons. What the agreement does is bring India closer to the debate on our ultimate goal, which is the goal of the Nuclear Non-Proliferation Treaty (NPT) - to establish a world free from nuclear weapons”. Further, he added, “India has 1.1 billion people. They need a tremendous amount of electricity for development. India is the fifth largest consumer of energy, and will be the third largest consumer of energy by 2030. The option of not making full use of nuclear energy is to continue to rely even more heavily on coal and gas and oil, with the impact of course on climate change. Allowing India to make full use of nuclear energy and State of the art technology, is also again good for the world. It ensures safety, security and development.”⁷

With the IAEA Agreement in place, Nuclear Suppliers Group (NSG), a group of 45 countries that tightly control nuclear materials, equipments, and resources, was tasked to take up and provide a “waiver” exempting India from the NSG Guidelines governing international civilian nuclear commerce. The waiver was unanimously (a requirement under NSG rules) concluded in September 6, 2008, removing nuclear trade embargo against India, thereby allowing India and NSG countries to undertake nuclear commerce.

NSG in its “Statement on Civil Nuclear Cooperation with India” conveyed that India has voluntarily taken steps that are in line with IAEA Safeguards agreement and other agreed commitments, and participating governments have adopted and would implement the following policies on civil nuclear cooperation with IAEA-safeguarded Indian civil nuclear program⁸:

- a. Notwithstanding paragraphs 4(a), 4(b) and 4(c) of INFCIRC/254/Rev. 9/Part 1, Participating Governments may transfer trigger list items and/or related technology to India for peaceful purposes and for use in IAEA-safeguarded civil nuclear facilities, provided that the transfer satisfies all other provisions of INFCIRC/254/Part 1, as revised, and provided that transfers of sensitive exports remain subject to paragraphs 6 and 7 of Guidelines.
- b. Notwithstanding paragraphs 4(a) and 4(b) of INFCIRC/254/Rev. 7/Part 2, Participating Government may transfer nuclear-related dual-use equipment, materials, software, and related technology to India for peaceful purposes and for use in IAEA-safeguarded civil nuclear facilities, provided that the transfer satisfies all other provisions of INFCIRC/254/Part 2, as revised.

India is not a party to the Nuclear Non-Proliferation Treaty (NPT) 1974. All these engagements facilitated India’s entry into the international civil nuclear commerce and provided a space to be recognised as a nuclear weapon State without being party to NPT and without dismantling military infrastructure as required for any new entrant. With the conclusion of these international legal formalities and domestic commitments, India planned its expansion of civilian nuclear program in a major way through high capacity imported reactors and also through indigenous program (Banerjee 2011). India concluded agreements with many NSG countries for both

⁷IAEA, 01 August 2008 <https://www.iaea.org/newscenter/news/iaea-chief-addresses-india-safeguards-agreement>.

⁸IAEA 2008 <http://www.iaea.org/sites/default/files/publications/documents/infcircs/2008/infcirc734c.pdf>.

fuel and technology supply; they include France, Russia, USA, Canada, Kazakhstan, Australia. The Government of India emphasised that any international collaboration will be only through joint ventures, with majority shareholding by government owned and controlled, Nuclear Power Corporation of India (NPCIL).⁹ The Atomic Energy Act 1962 (Atomic Energy Act or AEA) currently does not permit other than Central Government or government owned companies to undertake commercial production of nuclear energy (Sect. 3, AEA). Foreign and domestic companies becoming stakeholders in the joint ventures will have a pre-determined role, such as technology and equipment providers, and fuel Suppliers. NPCIL will remain as the “operator” in the foreseeable future.¹⁰

With the prospects of nuclear trade with India, foreign suppliers wanted a liability regime that is in tune with the international nuclear liability principles. For India, enactment became a good chance to incorporate its own failing in the aftermath of Bhopal industrial disaster—how legal and political institutions failed in all levels including liability responsibility of the company and actual payment of compensation to victims. One of the key arguments was The Civil Liability for Nuclear Damage Act, 2012 (Act No 38 of 2010) (Civil Liability Act or The Act), would provide a predictable civil nuclear liability regime that addresses the Supplier countries demand that a liability regime should be based on established principles of international nuclear liability law. And for public such codification could help access compensation faster. It is to be noted that other than Public Liability Insurance Act 1981, which exempts war and radiation, there is no codified liability law that addresses industrial liability and compensation in India. Liability and compensation from industrial accidents are currently based on tort jurisprudence.

The chapter covers the international legal principles on nuclear liability, discusses the tort jurisprudence in India, the law making and unique features of Indian nuclear liability law, and finally undertakes how Indian law should be seen as a modernisation effort in an antiquated legal regime. In all probability the law is there to stay even under extreme international pressure to change.

2 Events Leading to Internationalization of Nuclear Liability Law

The “Atoms for Peace” speech by the US President Eisenhower on December 8, 1953, before the UN General Assembly facilitated a collaborative effort toward setting up International Atomic Energy Agency under the UN.¹¹ Eisenhower spoke on the peaceful use of the proposed atomic energy agency:

⁹Parliamentary Standing Committee (2010) <http://www.prsindia.org/uploads/media/Nuclear/SCR%20Nuclear%20Liability%20bill.pdf>.

¹⁰Lok Sabha (2010a, b, c).

¹¹IAEA transcript (1953).

The more important responsibility of this Atomic Energy Agency would be to devise methods whereby this fissionable material would be allocated to serve the peaceful pursuits of mankind. Experts would be mobilized to apply atomic energy to the needs of agriculture, medicine and other peaceful activities. A special purpose would be to provide abundant electrical energy in the power-starved areas of the world.

In 1954, the USA amended its Atomic Energy Act, 1946 providing a legal basis for “Atoms for Peace” thereby facilitating series of international nuclear cooperation, leading to bilateral agreements with a number of States.¹² The amended Atomic Energy Act, 1954 (US AE Act 1954), allowed private participation in the development of atomic energy (Sect. 3). Facilitating private enterprises became tricky especially on the question of liability. When the activity has shifted to private enterprises, liability and compensation also shifted to them due to the then existing tort principles; liability could fall on any of the stakeholders: that is, Suppliers, designers, contractors, and manufacturers.¹³ Hiroshima and Nagasaki bombings in Japan during 1945 exposed what would be devastation in terms of nuclear energy. To bring the military run program to civilian use, i.e., developing nuclear energy on a commercial scale, by 1950s, it became necessary to establish the scale of a probable accident and to determine the amount of liability insurance that would be required to cover the cost of an accident.¹⁴ There were a series of technical studies conducted by US AEC in estimating the probable consequences of an accident from a nuclear power plant. The March 1957 risk assessment study titled “Theoretical Possibilities and Consequences of Major Accidents in Large Nuclear Power Plants: A Study of Possible Consequences of Certain Assumed Accidents, Theoretically Possible but Highly Improbable, were to Occur in Large Nuclear Power Plants”—commonly called Brookhaven Report or WASH-740,¹⁵ hypothetically analyzed the extent of damages from a 500 MW reactor located about 50 km away from a city of 1,000,000 population. The results shocked everyone. It predicted an accident could cause deaths and injuries up to 3,400 and 43,000 people and also USD 7 billion as property damages. USAEC maintained that such a probability of an accident is extremely rare.¹⁶ Another study in 1957, “Report on the possible effects on the surrounding population of an assumed release of fission products into the atmosphere from a 300 MW Enrico Fermi plant located at Lagoona Beach, Michigan”¹⁷ reported similar results. The report said, “in case of Enrico Fermi plant experiences a core meltdown and releases 50% of its fission products, with weather conditions carrying radioactivity to the most heavily populated areas of Detroit, there will be an estimated 133,000 deaths, 181,000 immediate injuries and 245,000 long-term injuries.”¹⁸

¹²Fischer (1997).

¹³Abraham (2014), <https://www.amacad.org/multimedia/pdfs/publications/researchpapersmonographs/nuclearLiability.pdf>.

¹⁴Ram Mohan (2011).

¹⁵USAEC (1957).

¹⁶USAEC WASH-740 (1957).

¹⁷USAEC APDA-120 (1957).

¹⁸USAEC APDA-120 1957 in Fuller (1975).

Further, the updated Brookhaven report in 1965 that took into account later-model reactors estimated 45,000 deaths, 100,000 injuries, and \$17 billion to \$280 billion in property damage and suggested a long-term contamination of an area to the size of Pennsylvania.¹⁹ Anderson (1978) state that the updates were kept confidential and it was only after a threat through a Freedom of Information suit that the working documents of the 1965 the updates of WASH-740 were released. Following this, there were significant public concerns about the safety of nuclear energy. Nader and Abbots (1979) state “though the report was intended to calm fears by showing the rarity of such accidents, in reality, it created more alarm and distrust toward nuclear energy.” Further studies were carried out like the 1974 Rasmussen Report or WASH 1400²⁰ and the 1990 USNRC study “Severe Accident Risks: An Assessment for Five US Nuclear Power Plants”—NUREG-1150.²¹ NUREG 1150 replaced all the earlier WASH 1957 and WASH 1975 reports.²²

These studies forced major technical, financial, and legal discourse on the viability of nuclear energy in the hands of private sector. The assumption is even though the risk is remote, there have been considerable improvements in technical safety of nuclear reactors due to intense scrutiny by lawmakers, private industry, and also public. These reports together with the full understanding on the human and environmental impact as witnessed in Japan, nuclear industry panicked on the probable legal consequences arising out of remote accidents. Supplier countries ring-fenced while entering into a range of agreements for international technology transfer through the concept of channeling of liability to operator alone. The concerns arose from both the liabilities arising from the technology supplied and also from transboundary consequences in the aftermath of a nuclear accident. In terms of international ramification, countries were concerned about the State liability in the event of a possible atomic reactor accident abroad.

In 1957, Organization for European Economic Cooperation (OEEC)—an organisation established in 1948 for post-war European reconstruction efforts set up a Working Group on Harmonization of Legislation— established to examine third party liability for damage caused by the peaceful use of nuclear energy.²³ Any growth of nuclear energy especially through private sector would require sufficient financial protection to industry from massive litigation for claims leading to large-scale compensation payments. This was lobbied hard by the private industries. For public, sufficient, transparent, and faster compensation, pay out was deemed to be a prerequisite against the probable risks arising from nuclear energy production.

Traditionally, it was tort rules that governed liabilities arising from hazardous activity in many countries, requiring establishment of proof of fault and causation. Under tort law, any entity or person and any number of them can be held liable. Most problematic was its enforcement of tort law by the courts; compensation becomes

¹⁹Anderson (1978).

²⁰USNRC (1975).

²¹USNRC (1990).

²²Ibid.

²³Marcus (2008).

unpredictable and discretionary. It was argued, “traditional tort liability compensation presupposes not only that a certain act caused harm, but also that the harm is due to fault.”²⁴ These rules were seen as inadequate for nuclear industry since nuclear technology development represents the efforts of a large number of entities and countries. Here, pinning fault to any single person is almost impossible (IAEA 2007). As an example of Westinghouse, Raju and Ramana (2010) detail, “Westinghouse was purchased by British Nuclear Fuels in 1998, which then sold it to Japan’s Toshiba in 2006. In 2007, Toshiba sold 10% of the company to Kazatomprom, the national uranium company for the Republic of Kazakhstan. Besides these, the Shaw group, based in Louisiana, US, owns 20% of the company and the Japanese IHI Corporation a 3% share.”

This being the structure, the victims of an accident would find it difficult to establish fault of an entity, which could then be held liable. In case fault is established, the victims may have to ensure jurisdictional competence of the national courts.²⁵ Under these circumstances, call for special regime as new arrangement became necessity—large and prompt compensation for the victims without any technicalities of tort, and full protection for industry through liability backed by insurance and governments.²⁶ This initiative led to the development of the unique principles of nuclear liability law.

2.1 Principles of International Nuclear Law

The Organisation for Economic Cooperation and Development (OECD) conceived the adoption of The Convention on Third Party Liability in the Field of Nuclear Energy 1960 (Paris Convention), establishing a pan Western European regime. The Paris Convention was supplemented by the 1963 Convention Supplementary to the Paris Convention of July 29, 1960 (Brussels Supplementary Convention), providing enhanced compensation. Based on the principles of the Paris Convention, in 1963, the International Atomic Energy Agency (IAEA) sponsored the Vienna Convention on Civil Liability for Nuclear Damage (Vienna Convention).

The Paris and Vienna Convention principles are now considered as founding principles of international nuclear liability law. Countries across the world adopted these principles in their own domestic legislations. They are:

1. the Conventions have a no-fault liability (absolute liability);
2. the Conventions channel liability exclusively to the operator of the nuclear installation (legal channeling);
3. the Conventions mandate, only courts of the State in which the nuclear accident occurs have jurisdiction (exclusive jurisdiction);

²⁴Radetzki (1999).

²⁵Schwartz (2006).

²⁶Ram Mohan (2011).

4. the Conventions provide limitation of the amount of liability and the time for claiming damages (limited liability);
5. the Conventions provide limitation of time for claiming damages (limitation in time);
6. the operator must secure insurance or financial guarantee to the extent of his liability amount.

Nuclear energy adoption by many countries in the last decades is based on these principles. Three Mile accident in 1979, the 1986 Chernobyl accident and the 2011 Fukushima accident, however, became a test case for these principles. Even today, after all these years of principles operation, it was realized the amount is still too low, there exist jurisdictional issues, and most importantly, countries are still not party to the conventions or are party to different conventions.

Chernobyl accident in 1986 led the European Union (EU) to revise the Paris and Brussels Conventions. The “2004 Protocol to Amend the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960” (2004 Protocol) amended both the Paris and Brussels Conventions. The 2004 Protocol extended the geographic coverage, raised the compensation amount to victims, and importantly expanded the definition of the nuclear damage. The Protocol recognised very importantly the co-existence of limited and unlimited liability regimes. Similarly, significant changes were brought to the Vienna Convention as well. By 1997, over 80 States adopted the Protocol to amend the 1963 Vienna Convention (1997 Protocol) which came into force in 2003. The 1963 Vienna Convention which had aimed for universal adherence attracted only 40 memberships till date. And ratification of 6 States out of 40 came only after 2011 Fukushima accident.

Having been independent of each other, the Paris and Vienna Conventions left it to the State’s choice to adopt either of these conventions which led to a parallel regime without any coordination. Rectifying defect, in 1988, the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention (1988 Joint Protocol) came into force in 1992 acted as a link between the two main conventions. Separately, in 1997 with US backing, IAEA introduced Convention on Supplementary Compensation (CSC). CSC in effect aligned the US Price–Anderson Nuclear Industries Indemnity Act 1957 (The Price–Anderson Act) with international law. As a framework convention, CSC offered a new arrangement in the form of additional amounts through contributions by the State parties on the basis of installed nuclear capacity. With Japan’s deposit of its instrument of acceptance on January 15, 2015, the CSC entered into force. India ratified in February 4, 2016. Now, States that adhere to the Convention are: Argentina, Morocco, Ghana, Montenegro, Romania, the United Arab Emirates, USA, Japan, and India. It is often argued that the advantage CSC offers is that States could adhere to CSC regardless of they are already parties to any nuclear liability convention or irrespective of existence of nuclear installations. Important requirement though is that the countries should have national liability laws which are consistent with the CSC annex (model law) (Table 1).

Table 1 Nuclear power states and liability conventions to which they are party

Countries	Conventions party to	Countries	Conventions party to
Argentina	VC; RVC; CSC	Lithuania	VC; JP; (CSC signed)
Armenia	VC;	Mexico	VC
Belgium	PC; BSC; RPC; RBSC	Netherlands	PC; BSC; JP; RPC; RBSC
Brazil	VC	Pakistan	
Bulgaria	VC; JP	Romania	VC; JP; RVC; CSC
Canada	(CSC signed)	Russia	VC
China		Slovakia	VC; JP
Czech Republic	VC; JP; (CSC signed)	Slovenia	PC; BSC; JP; RPC; RBSC
Finland	PC; BSC; JP; RPC; RBSC	South Africa	
France	PC; BSC; RPC; RBSC	Spain	PC; BSC; RPC; RBSC
Germany	PC; BSC; JP; RPC; RBSC	Sweden	PC; BSC; JP; RPC; RBSC
Ghana	(CSC signed)		
Hungary	VC; JP	Switzerland	PC; RPC; BSC; RBSC
India	CSC	Taiwan	
Iran		Ukraine	VC; JP; (CSC signed)
Japan	CSC	UAE	RVC; CSC
Kazakhstan	RVC	United Kingdom	PC; BSC; RPC; RBSC
Korea		United States	CSC

PC Paris Convention (PC), RPC 2004 Revised Paris Protocol. Not yet in force

BSC Brussels Supplementary Convention, RBSC 2004 Revised Brussels Supplementary Convention. Not yet in force

VC Vienna Convention. RVC Revised Vienna Convention 1997 (in force 2003)

JP 1988 Joint Protocol

CSC Convention on Supplementary Compensation for Nuclear Damage (CSC), in force from Apr 15, 2015

Source <http://www.world-nuclear.org/info/Safety-and-Security/Safety-of-Plants/Liability-for-Nuclear-Damage/>

3 Tort Liability Jurisprudence in India

India's liability law before the enactment of the CNLD Act evolved primarily through tort law and courts applied these principles liberally to dangerous and hazardous industrial activities. In the aftermath of Bhopal disaster, we have seen Supreme Court expanding the scope and coverage of industrial responsibility for liability. "Strict liability" (*Ryland vs. Fletcher*²⁷ concept was broadened to "absolute liability" by Supreme Court in *M C Mehta v. Union of India*.²⁸ In *Oleum Gas Leak* case Supreme Court Stated:

²⁷L.R. 3 H.L. 330; [1861–73] All E.R.

²⁸*Oleum Gas Leak Case*: AIR 1987 SC 1086.

an enterprise which is engaged in a hazardous or inherently dangerous activity that poses a potential threat to the health and safety of persons and owes an *absolute and non-delegable duty* to the community to ensure that no harm results to anyone.

Unlike strict liability, absolute liability operates without any exceptions. The Supreme Court has reiterated this in the *Indian Council of Enviro-Legal Action v. Union of India*.²⁹ Here, the court observed, “industry alone has the resources to discover and guard against hazards, and dangers caused by its actions.” This expansive interpretation was part in the background of judicial activism in the post-emergency era (Government of India suspended Constitutional rights under the Article 352 of the Constitution from June 26, 1975–March 21, 1977).³⁰ Most importantly is the fact that the higher judiciary in India expanded the scope of Article 21 of the Constitution of India which guarantees the right to life and personal liberty. Divan and Rosencrantz (2002) argue that the court did this through subjecting a law restricting life and personal liberty to non-arbitrariness and reasonableness contained in Articles 14 and 19, respectively, and reading of un-enumerated rights into Article 21. Fundamental Right to Environment thus became a part of the right to life. This gave sweeping powers to the Higher Courts in India to intervene on any matters relating to environment and life.

The difficulty with this development of the principle of “absolute liability” is on the question of predictability of the legal regime and to what extent companies should be held liable financially was always open for the court to determine. Such a possible expansive interpretation was too risky for any companies to rely on, and this in many ways may open for a call for “unlimited liability” regime. For nuclear Suppliers who want to invest in India, this became a point of concern; they called for a regime that is practised in the western world based on the historical principles, where none of the developing countries were party to its development. The Environmental Protection Act, 1986, of India was enacted to provide adequate legal safeguards to protect and preserve the environment, but the law did not dwell into compensation regime. Concerning liability and compensation regime, in the aftermath of Bhopal accident, the Public Liability Insurance Act, 1991 (PLIA), provides legal remedy for immediate relief to the persons affected by an industrial accident. However, PLIA clearly exempts “war” and “radioactivity” from its scope (Sect. 2 (a)).

With the nuclear re-engagement, India had to provide a predictable liability legal regime within which companies could undertake business. This necessitated India to draft a first of its kind of industrial liability law. The Civil Liability for Nuclear Damage Act is the result of extensive Parliamentary debate, public discussion and international lobbying. The following sections discuss how the law was made and a few important provisions of law that set India apart from the well-established international nuclear legal principles.

²⁹AIR 1996 SC 1466.

³⁰Ram Mohan (2012).

4 Civil Liability for Nuclear Damage Law

The Civil Liability for Nuclear Damage Bill, 2010, as a legislative business was introduced in Lok Sabha on May 7, 2010, and was referred to the Parliamentary Standing Committee on Science and Technology, Environment and Forests (hereinafter “The Standing Committee”) for detailed examination. The Standing Committee presented the report on August 18, 2010, with a unanimous view that the “Bill being a domestic legislation should reflect Indian interests.”³¹ The report sought government to make several changes to its original law to make the law stronger and acceptable to a wider section of Indian society. As a procedure, though the Parliamentary Standing Committee recommendations are not binding on government, however, recommendations are always considered in good faith since the committee is composed of diverse political groups.

On CNLD Bill, a lot of the Committee’s suggestions were accepted by the government. They range from, increasing the compensation amount from INR 500 crores to INR 1500 crores; empowering Central Government to take additional measures beyond the capped amount if the amount of compensation exceeds SDR 300 million; time limit increase for filing claims for injury from 10 to 20 years; right of recourse provisions against Suppliers; and upholding the victims Constitutional right to approach the Supreme Court and the High Courts other than the Claims Commissioner.

The Parliament passed The Civil Liability for Nuclear Damage Bill and received the Presidential approval on September 21, 2010.³² It was notified almost a year later on November 11, 2011. The Civil Liability for Nuclear Damage Rules, 2011 (referred to as “Civil Liability Rules” or “The Rules”), were notified on the same day along with the Act.

Immediately after the enactment, the law was subjected to criticism both by the international community and domestic commentators. International community was furious with India in tampering with decades old principles. Nationally, many commentators observed the present law is still weak in the light of Bhopal accident and needs to be further strengthened. When in 2010 India signed the Convention on Supplementary Compensation for Nuclear Damage, 1997 (Compensation Convention or CSC), government faced further criticism both domestically³³ and from international experts.³⁴ USA has even asked India to “engage with IAEA to ensure that the Indian nuclear liability law fully conforms to the Compensation Convention.”³⁵ In December 2012, a senior US government official said, “India’s nuclear liability law is not in line with the international nuclear liability principles reflected in the Convention on Supplementary Compensation for Nuclear Damage.”³⁶

³¹ Standing Committee (2010).

³² Act No 38 of 2010.

³³ Gopalakrishnan (2011), Ramachandran (2010), Chellaney (2011).

³⁴ Curtis (2010) and Pelzer (2011).

³⁵ Dixit (2011).

³⁶ PTI (2012).

Ameye (2014) wonders how USA could possibility force India to change the law either through amendment or interpretation when their own law is very similar to India, observing,

both States are almost the only nuclear power States worldwide that allow the operators of nuclear power plants to sue Suppliers and designers. These laws are undoubtedly superior to protect victims in case of a nuclear accident. Whilst still allowing a one-stop shop for victims, who can limit their legal actions to suing the operator, they allow the operator to turn to wider pockets and sue nuclear equipment Suppliers and designers, mostly huge multinational corporations with a solid financial structure, possibly also reducing his own risk of going bankrupt”.

Ameya further States, “The lack of liability of Suppliers and designers in case of a nuclear accident has consistently been justified by a need to protect victims, who will not need to sue various parties, but only the operator. Yet the exceptions built in the US and Indian law still provide that the victims should only sue the operator, sparing him costs and time. The only twist is that they allow the operator to sue the Suppliers and designers. Yet this does not affect the victims’ one-stop shop and may even imply that the operator can seize their damages from wider pockets. And in the experience of this author as a lawyer, with all due respect to the international Conventions, no other laws in other sectors ban the possibility to sue liable parties for the sake of ‘protecting victims’ against the time and the money that suing the liable parties would cost them”.

India maintained its position that it is a duly enacted Parliamentary law. However, it did attempt to address concerns of international community through clever usage of diplomatic efforts (discussed in later section). It would be unfathomable for government to change the law that has seen wide political acceptance. Table 2 provides a comparison of international principles and enacted Indian law.

Any discussion on Indian law requires a comparative understanding of international liability regime that is in existence. The questions that many commentators raise are, does Indian law differ from established international practise; if yes, in what way and is this allowed? By expanding on these the chapter also covers the contentious issues of limited liability regime and right of recourse.

4.1 CNLD: Liability Limited or Open-Ended

The Paris Convention, 1960, Vienna Convention, 1963, CSC 1997 and all its amendments all provide for limited and also unlimited liability in amount.

Consolidated text of 1963 and 1997 Vienna Convention

Article V:

1. The liability of the operator may be limited by the Installation State for any one nuclear incident, either
 - a. to not less than 300 million SDRs; or
 - b. to not less than 150 million SDRs provided that in excess of that amount and up to at least 300 million SDRs public funds shall be made available by that State to compensate nuclear damage; or

Table 2 Indian law and international principles: a comparison

International principles	Indian law
Absolute (strict) liability	No fault liability. Sect. 4(4)
Legal channeling	Liability channeled to the Operator. Sect. 4(1) Provision of right of recourse (Sect. 17) and also citizens right under tort (Sect. 46)
Exclusive jurisdiction	Nuclear Claims Commissioner. Constitutional right to approach High Court and Supreme Court exist in parallel
<i>Limited liability in amount</i>	
Operator liability: option of both limited and unlimited liability	Section 6 Operators of nuclear installations producing more than 10 MW of energy shall be liable up to Rs 1,500 crore; Research and spent fuel reprocessing plants will have different liability amount Through a notification, central government has the power to increase operator’s liability
Government liability: option of both limited and unlimited liability	Section 6 & 7 The total liability for a nuclear incident capped at 300 million Special Drawing Rights. Provision for additional relied if the cap of 300 million SDR is insufficient The government may assume the liability of a nuclear installation by notification if it feels that doing so in the public interest
No other remedies for victims (mostly)	Section 46 Provides, that the provisions in the Act shall be in addition to, and not in derogation of, any other law for the time being in force, and nothing contained herein shall exempt the operator from any proceeding which might, apart from this Act, be instituted against such operator
Operator’s right of recourse: Restricted right Vienna Convention and CSC text: The operator shall have a right of recourse only—(a) if this is expressly provided for by a contract in writing; or (b) if the nuclear incident results from an act or omission done with intent to cause damage, against the individual who has acted or omitted to act with such intent	Section 17 The law provides operator after paying the compensation for nuclear damage shall have a right of recourse against the supplier under the following conditions: such right is expressly provided for in a contract in writing the nuclear incident has resulted as a consequence of an act of supplier or his employee, which includes supply of equipment or material with patent or latent defects or sub-standard services the nuclear incident has resulted from an act of commission or omission of an individual done with the intent to cause nuclear damage”

(continued)

Table 2 (continued)

International principles	Indian law
Limited liability in time	Section 18 For damage to property, the time limit is ten years For personal injury to any person, the time limit 20 years
Financial security	Section 8 All operators (except the central government) need to take insurance or provide financial security to cover their liability Currently, only Central Government is allowed

Source Mohan (2015)

- c. for a maximum of 15 years from the date of entry into force of this Protocol, to a transitional amount of not less than 100 million SDRs in respect of a nuclear incident occurring within that period. An amount lower than 100 million SDRs may be established, provided that public funds shall be made available by that State to compensate nuclear damage between that lesser amount and 100 million SDRs.

Article VII:

- (1) (a) The operator shall be required to maintain insurance or other financial security covering his liability for nuclear damage in such amount, of such type and in such terms as the Installation State shall specify. The Installation State shall ensure the payment of claims for compensation for nuclear damage which have been established against the operator by providing the necessary funds to the extent that the yield of insurance or other financial security is inadequate to satisfy such claims, but not in excess of the limit, if any, established pursuant to Article V. Where the liability **of the operator is unlimited (emphasis added)**, the Installation State may establish a limit of the financial security of the operator liable, provided that such limit is not lower than 300 million SDRs. The Installation State shall ensure the payment of claims for compensation for nuclear damage which have been established against the operator to the extent that the yield of the financial security is inadequate to satisfy such claims, but not in excess of the amount of the financial security to be provided under this paragraph.

CSC, 1997

Article 4 (Annex) Liability Amounts

1. Subject to Article III.1(a)(ii), the liability of the operator may be limited by the Installation State for any one nuclear incident, either: (a) to not less than 300 million SDRs; or (b) to not less than 150 million SDRs provided that in excess of that amount and up to at least 300 million SDRs public funds shall be made available by that State to compensate nuclear damage.

Article 5 Financial Security

1. (a) The operator shall be required to have and maintain insurance or other financial security covering his liability for nuclear damage in such amount, of such type and in such terms as the Installation State shall specify. The Installation State shall ensure the

Table 3 Types of liability internationally

Country	Operator liability	Government liability
United States	Limited	Unlimited
France	Limited	Limited
Japan	Unlimited	Unlimited
Russia	Not specified	Unlimited
South Korea	Limited	Unlimited
United Kingdom	Limited	Limited
Germany	Unlimited	Limited
India	Limited	Unlimited

Source Nuclear operator Liability amounts and financial security limits. OECD-NEA (2011) and Compiled by the Researcher

payment of claims for compensation for nuclear damage which have been established against the operator by providing the necessary funds to the extent that the yield of insurance or other financial security is inadequate to satisfy such claims, but not in excess of the limit, if any, established pursuant to Article 4. Where the liability of the operator is unlimited (emphasis added), the Installation State may establish a limit of the financial security of the operator liable provided that such limit is not lower than 300 million SDRs. The Installation State shall ensure the payment of claims for compensation for nuclear damage which have been established against the operator to the extent that yield of the financial security is inadequate to satisfy such claims, but not in excess of the amount of the financial security to be provided under this paragraph.....

It is very clear from the wording “may” that both the conventions provide the State to fix liability as per own State practice. This principle is part of many national legislations, with varying amounts and sharing of responsibility between the government and the operator in various forms. Table 3 provides a few examples.

The Civil Liability Act of India, in Sect. 6(1), limits the liability to 1500 crore on the operator; however, under Sect. 6(2) provides for the enhancement of the liability amount. A joint reading of these provisions and parliamentary debates on CNLD Bill; it could be interpreted as liability limit cannot be limited *forever* to Indian Rs. 1500 crore. The liability of the operator can also be increased by a notification of the Central Government (Sect. 6(2) proviso). Though the Sect. 6(1) maintains that any incremental change is subject to a ceiling of 300 million Special Drawing Rights (approximately Indian Rs. 2050 crore), the proviso to Sect. 6(1) clearly states the ceiling of 300 SDR can be raised.

The Parliamentary Standing Committee during the discussion on the question of maximum amount of liability (Clause 6(1) of the Bill) felt the Clause needs to be modified. It recommended “The maximum amount of liability in respect of each nuclear incident shall be the rupee equivalent of three hundred million Special Drawing Rights or such higher amount as may be notified by the Central Government from time to time.” A clear indication of a possible future increase. Moreover, neither the Atomic Energy Act, nor Civil Liability Act currently allows private NPP enterprise

(Sect. 1(4) and Sect. (1) of AEA). The role of Private NPP as a concern was raised before the Parliamentary Standing Committee. The report of the Standing Committee suggests “some of the experts who appeared before the Committee expressed their apprehensions that private operators may enter into nuclear energy sector sooner or later. It was also stated by them that Government should not give subsidy to the private nuclear operators. The Committee has taken their suggestions into account.” It is very important to note the point that some of the experts who were called before the Standing Committee expressed a view that in case private sector is allowed they should not be given or they should enjoy any subsidy as it is now provided to government entities. The view is pertinent on the issue that there is no requirement to subsidize a private industry, a similar observation that is held by IAEA in Vienna Convention Explanatory Texts (2007) and others that time is right to have a directional change in terms of legal channeling. The Standing Committee responded in clear terms, “The Bill applies only to nuclear installations owned and controlled by the Central Government either by itself or through any authority or corporation established by it or a government company, as defined in the Atomic Energy Act, 1962.” The Committee suggested inclusion of such a provision “will make the position clear that there will be no private operator of nuclear installation.”³⁷

Presently, NPCIL is alone authorized to undertake the business of nuclear energy with respect to PHWRs or imported LWRs. In any international or domestic joint ventures, NPCIL will hold a majority stake. As on today, the Civil Liability Act applies solely to a Government Company (Sect. 6(1)). Under Sect. 7(1), the Central Government will take over the liability if it exceeds the amount specified in the Act. The combined reading of the provisions conclude that though statutorily there is cap on operator liability on account of nature of Company under Indian Companies Act (being a Public Sector limited liability company), a liberal interpretation would term it as unlimited liability regime, since operator is a government company.

All the three international liability conventions do not strictly impose limitation on liability. It is open to member countries to legislate the extent of liability. Paris Convention through Article 7(a) though provides for a maximum liability, however, Article 7(b)(i) provides “any Contracting Party, taking into account the possibilities for the operator of obtaining the insurance or other financial security required pursuant to Article 10, may establish by legislation a greater or lesser amount.” The Paris Convention allows OECD countries to customise in Article 15, “Any Contracting Party may take such measures as it deems necessary to provide for an increase in the amount of compensation specified in this Convention.” The 2004 Amended protocol which has not yet been adopted by Paris Convention also retains the same “intent” provisions with minor changes. IAEA’s Vienna Convention conveys that “the liability of the operator may be limited by the Installation State to not less than USD 5 million”; the 1997 Protocol increased it not less than 300 million SDRs for any one nuclear incident. The Vienna Convention thus leaves it to the Installation State

³⁷Standing Committee (2010).

(Operator State). The only requirement is that there should be a minimum amount of 300 million SDR that should be available for providing compensation.³⁸

The CSC also does not in any way limit the liability (Article 3). The only requirement for CSC is that the domestic laws should specify a minimum amount leaving it to the states to provide for a maximum or “greater amount” (Article 3(a)(1)). As McRae (2007), suggests, “The CSC focuses on making an assured amount of compensation available. Accordingly, the CSC does not establish either a floor or a ceiling on the liability of the operator or require an Installation State to limit the liability of the operator.” All in all, all the conventions including CSC give installation State the choice. On the question of higher amount, CSC states amount is required to be provided from public funds. In India’s case, as discussed above, no private nuclear operators are conceived of or anticipated to act as operators. Any accident and its consequences will have to be borne entirely by the government—through government owned operator and by the government if the funds are inadequate (Sects. 6 and 7).

One could recall that during the intense Parliamentary discussion, there was a view that the amount of Indian Rs. 1500 crore was itself too low. The Communist Party of India (Marxist) [CPI (M)] suggested the liability be increased to Indian Rs.10,000 crore.³⁹ Looking back, the clarification and insertion of Sect. 6(1) conveying this law applies only to government owned and controlled companies are a remarkable achievement for the future liability law discourse. It can be recalled, the IAEA has also supported debate on the concern that the capping of liability in effect provides an additional subsidy to the operator.⁴⁰ If one looks at the legal provisions carefully, a view may be taken on the existence of compatibility of the Civil Liability Act with India’s judicial precedent—the concept of liability to “absolute” and “unlimited.” The law further allows the operator to seek liability from errant Suppliers through its right of recourse, which is discussed in a different section below.

After the enactment of the law, series of Public Interest Litigation (PIL) have been filed across many High Courts arguing that the liability cap in the law is against the precedent established by the Higher Courts of the country, which is absolute liability and company’s responsibility is cleaning up. Supreme Court took all the cases together and is examining the constitutional validity of the Act that limits the liability of an operator to Indian Rs. 1,500 crore.⁴¹ By arguing on the “polluter pays principle” and “absolute liability principle,” petitioners state that capping of liability at Indian Rs 1500 crore is ultra vires Article 21 of the Indian Constitution.

The first successful legal test came from Kerala High Court, when it dismissed a PIL challenging the constitutional validity of certain Sections of CNLD Act.⁴² Supreme Court is yet to take up the matter for a conclusive argument even when

³⁸Ram Mohan (2011).

³⁹The Hindu (2010).

⁴⁰IAEA (2007), Currie (2006).

⁴¹Special Leave Petition (C) No. 27335 of 2012 along with SLP(C) 29121 of 2012 and WP(C) 407/2012.

⁴²*Yash Thomas Mannully vs Union Of India* on 21 October 2011.

this paper is been written and the decision of the Kerala High Court is also being appealed by the same petitioners.

4.2 Citizens' Right to Have Tort Remedy

Section 46 that provides Constitutional remedies has been another contentious provision to many supplier countries and companies. The question that was asked is on the extent of Citizen's right to tort remedy by way of his constitutional right under Articles 32 and 226 of the Indian constitution. Section 46 states, "that the provisions in the Act shall be in addition to, and not in derogation of, any other law for the time being in force, and nothing contained herein shall exempt the operator from any proceeding which might, apart from this Act, be instituted against such operator."

Interestingly, this provision is one of the least contested before the Standing Committee and in the Parliament. While presenting the view, Secretary, Ministry of Law, and Justice made a forceful submission on the Constitutionality of citizens' right to approach High Court and Supreme Court. The Secretary stated "While contesting the legal position of clause 35, Secretary, Legislative Department deposed before the Committee by saying that whenever a particular specialized body or a tribunal adjudicates in many of the Acts the appeal is provided to the High Court or the Supreme Court. The difference between the appeal and the writ petition is that writ petition can be dismissed *in limini*, whereas, the right of appeal cannot be dismissed and has to be adjudicated. He further mentioned that whenever any legislation is brought and any special mechanism is created it is because there is a lot of pendency in the courts. Thus for the adjudication of the cases, either tribunal or a commission is created for the purpose of the adjudication of a particular matter being technical in nature. This is the usual clause which is found there which debars the jurisdiction of the civil courts. So far as the jurisdiction of the High Courts and the Supreme Court under Articles 226 or 32 of the Constitution is concerned, nobody can debar that. Anybody can go to the High Court and Supreme Court, and this is the usual provision which is found."

The Secretary, repeated his argument by saying, "that no separate clause is necessary to amplify the fact that appellate jurisdiction always remains in-vogue vide Articles 226 and 32 in the Constitution since it finds a place in a large number of statutes and it has been existing for a very long time. However, he agreed to the fact that if the Committee insists, a separate provision invoking the application of judicial review could be incorporated in a suitable place in the legislation."⁴³

The Standing Committee acknowledged the constitutional right of Indian citizens to approach the Supreme Court and High Courts under writ jurisdiction. This provision in the comparative international nuclear liability discourse is unique. Government of India is clear that the section allows for the fixation of liability through both tort and criminal action, in addition to any other statutory claims. The issue is

⁴³Standing Committee (2010).

whether Suppliers will be subjected to this provision. The official position of Government of India is that Suppliers are not subjected to Sect. 46, the position which is also strongly supported by primary authors of the legislation.⁴⁴ Abraham (2011a, b) argues “even when the right of recourse is not pursued by the operator, i.e. NPCIL under Sect. 46, any other affected individual or entity can seek tortious remedies against any supplier whose actions, equipment or material may be responsible for a nuclear incident.”

According to Grover (2017), this is not the case. Grover brings the point that “As a result of this debate (on Sect. 46, *emphasised by author*) in the Standing Committee, clause 35 was amended and the words “Save as otherwise provided in Sect. 46, no Civil Court (except the Supreme Court and a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution)” in place of the words “No civil court” appearing at the beginning of the clause 35 of the Bill and the Section 35 of the Act now reads as follows. “Save as otherwise provided in Sect. 46, no Civil Court (except the Supreme Court and a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution) shall have jurisdiction to entertain any suit or proceedings in respect of any matter which the Claims Commissioner or the Commission, as the case may be, is empowered to adjudicate under this Act and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.” It is also to be noted that amendments similar to that proposed by Shri Pathak were moved in Rajya Sabha by a Member of Parliament belonging to CPI (M) and were not accepted.”

Grover (2017) further argues “A harmonious reading of the debate in the Standing Committee, Notes on Clause 46, paragraph 6 of the Statement of Objects and Reasons and amendments moved and rejected in the Rajya Sabha brings one to the conclusion that Section 46 is directed only towards the Operator, no other law in India provides for a strict and no fault based liability against the Operator for a nuclear incident as defined in the Civil Liability for Nuclear Damage Act, 2010 (CLNDA), and provision of remedy under Articles 226 and 227 of the Constitution against the operator is available to the victims.”

In 2015, Ministry of External Affairs (MEA) was tasked to sort out interpretational issues and facilitate understanding with Americans on all outstanding issues on liability law. On February 8, 2015, MEA issued Frequently Asked Questions clarifying many of these understandings. On the specific issue of whether Sect. 46 applies to Suppliers and the provisions compatibility with CSC, MEA FAQs state, which is reproduced below,

Does Section 46 permit claims for compensation for nuclear damage to be brought under statutes other than the CLND Act?

Ans. Concerns over the broad scope of Section 46 have been raised by Suppliers, both domestic and foreign. Section 46 of the CLND Act provides that “the provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being in force, and nothing contained herein shall exempt the operator from any proceeding which might, apart from this Act, be instituted against such operator”. The language in section 46

⁴⁴MEA (2015), Grover (2017).

of CLND Act 2010 is similar to such language in several other legislations such as Telecom Regulatory Authority Act, Electricity Act, Securities and Exchange Board of India (SEBI) Act, Insurance Commission Act. Such language is provided routinely to underline that other relevant laws continue to be operable in their respective domains.

Q12. Does Section 46 extend to Suppliers in violation of the CSC?

Ans. No. The CLND Act channels all legal liability for nuclear damage exclusively to the operator and Section 46 does not provide a basis for bringing claims for compensation for nuclear damage under other Acts. That this section applies exclusively to the operator and does not extend to the supplier is confirmed by the Parliamentary debates at the time of the adoption of this Act. It may be noted that the CLND Bill was adopted by a vote. During the course of the vote on various clauses of the Bill, in the Rajya Sabha two amendments were moved for clause 46 that finally became Section 46 of the CLND Act that inter-alia sought to include Suppliers in this provision. Both those amendments were negated. A provision that was expressly excluded from the statute cannot be read into the statute by interpretation. It is well-settled principle of law that every statute is to be interpreted in accordance with the intention of the legislature or maker of the Statute (*M/s. Turtuf Safety Glass Industries V Commissioner of Sales Tax U.P.*, 2007(9) SCALE 610, and *State of Kerala & Anr V P.V. Neelakandan Nair & Ors*, 2005(5) SCALE 424).

Q13. Does Section 46 allow victims to go to foreign courts against the operator or the supplier?

Ans. Section 46 exclusively covers the remedies that are available against the operator. It does not exempt the operator from any other proceedings instituted against him, apart from this Act, nor derogates from any other law in force in India. The provision “in addition to and not in derogation of” has to be given its normal plain meaning. Section 46 does not affect the applicability of other laws. Therefore it does not exempt the operator from application of other laws covering matters other than the civil liability for nuclear damage. At the same time it does not create the grounds for victims to move foreign courts. In fact that would be against the basic intent of the law to provide a domestic legal framework for victims of nuclear damage to seek compensation. The fact that a specific amendment to introduce the jurisdiction of foreign courts was negated during the adoption of the CLND Bill buttresses this interpretation.

The statements subsequent to MEA FAQs gave satisfaction to Indian policy makers that USA has accepted Indian position. CNLD Act is fully compatible with CSC without requiring any changes. The author believes India gained a major diplomatic victory. Knowing well how Indian courts function may expose this political understanding to a future legal scrutiny.

4.3 Legal Channeling and Operator’s Right of Recourse Under Indian Law

The international nuclear law channels all the liability to the operator. This is reflected in all the three liability conventions. The history of channeling to operator and operator’s restricted right against the Suppliers and to what extent are these relevant today has become a major national and international debate subsequent to the CNLD Act.

Hariharan (2011) in her paper on India’s nuclear liability bill covers how historically burden shifted and states, “The idea of shifting all liability in the event of a

nuclear accident or disaster was a product of the dominant lobbying power of the American nuclear industry in the late 1940s and 1950s.” When the technology was developed, it was fully a governmental activity, largely for military purposes and liability from any accident also rest with the US Government. This changed with private industry was invited to participate and according to Hariharan this shift “came with a heavy price, as it meant the liability of third party actors (Suppliers, designers, contractors, and manufacturers) would also shift toward the private sector.” This means private sector requires adequate insurance in case they are subjected to exposures subsequent to an accident. Private industry argued this to be a disincentive and lobbied for ring fencing themselves through what we know as legal channeling and limited liability.

They did this through the principle of legal channeling and limited liability. The principle that is now considered as a foundation is to ensure that in case of an accident, only the operator will be solely liable and that too on a limited financial liability model. None of the others in the chain in the industry-supplies and vendors will be held liable. One of the most contentious provisions of Indian Civil Liability Act pertains to expansive provisions of supplier’s liability—operator’s right of recourse against the supplier and also citizen’s right for tort remedy.

In the words of Ameye (2014), “The most glaring exception of nuclear law is that it generally allows Suppliers and designers of defective reactors to escape any responsibility in case of a nuclear accident. This implies that even if a meltdown is due to a defective reactor design, the designer will never bear any liability for an ensuing nuclear accident. Or if a supplier provides defective emergency equipment, he will not be held liable if these technological flaws lead to a nuclear accident. In both cases, the nuclear power plant operator will be exclusively liable for a nuclear accident.”

The operator is allowed to seek remedies against its supplier under special circumstances by the three international nuclear liability regimes (Table 4).

Right of recourse under CNLD Act reads,

Section 17: The Operator of the nuclear installation after paying the compensation for nuclear damage in accordance with Section 6, shall have a right to recourse where: –

- a) Such right is expressly provided for in a contract in writing;
- b) The nuclear incident has resulted as a consequence of an act of Suppliers or his employees, which includes supply of equipment or material or patent or latent defects or sub-standard services;
- c) The nuclear incident has resulted from the act of commission or omission of an individual done with the intent to cause nuclear damage.

As an explanation, the above provision says, in the event of an accident, first, the operator will have to pay the compensation. Once compensation is paid and on the conclusion of the investigation, if the report concludes that the accident is a result of supplier’s fault, then the operator has a right of recourse against any such supplier. The section under CNLD Act literally does not have any time limit for operator to seek recourse. A question can be asked to the appropriateness of such a right.

Table 4 Right of recourse—a comparison

Vienna Convention, 1963	Only, (a) if it is fully expressed in writing, and (b) if the damage results from an act or omission done with intent to cause damage, against the person who caused the damage
Paris Convention, 1961	Only, (a) against someone for an act of commission or omission with intent to cause damage, and (b) if there is a clear contract giving such a right
Convention on Supplementary Compensation, 1997	National law may provide that the operator shall have a right of recourse only: (i) if this is expressly provided for by a contract in writing; or (ii) if the nuclear incident results from an act or omission done with intent to cause damage, against the individual who has acted or omitted to act with such intent
Brazil, Canada, France	There is no provision giving a right against the supplier
Japan	Right of recourse exists against third party causing damage
South Korea	Provides for recourse against supplier in case of willful act or omission
Russia (<i>Russian Federal Act on Atomic Energy</i>)	No limit is imposed on operator's right of recourse

Source Compiled by the Researcher, PRS Legislative Research, Legislative Brief: The Civil Liability for Nuclear Damage Bill, 2010 and Matveev (2006)

How does internationally accepted practice work? Under the conventions, this is a restricted right.

Ramachandran (2011) observes, Indian law under Sect. 17(b) indicates an expansive domestic law than that is provided in the Compensation Convention. It can also be seen that such rights exist in many domestic jurisdictions as well including, USA, Russia. Even when USA objects Indian law, Varadarajan (2012) points out that “the U.S. system of economic channelling of liability allows tort claims as well as an unrestricted right of recourse for the operator.” Further, practise of international law by many Western Countries in the last few decades conveys a message that India can very well go beyond the international norm and strengthen its domestic legal regime, taking into account its domestic interest. Does strengthening of outdated law/particular provision mean inconsistency? The answer could probably be no. Many authors believe such an extended right of recourse is a significant achievement in international legal discourse. Gruendel and Kini (2012) view that “it is quite apparent that the discussions pertaining to the operator’s right of recourse did not take the existing international liability regime as a starting point.” Hariharan (2011) views India’s position as one in the right direction—reforming the out dated interna-

tional nuclear liability regime. However, on practicality, this extensive right may be difficult to implement, i.e., suing supplier(s) who may be dispersed across the world.

The Civil Liability Rules have sought to clarify some of the interpretational issues. Chapter V, Rule 24: Right of Recourse states:

A contract referred to in clause (a) of section 17 of the Act shall include a provision for right of recourse for not less than the extent of the operator's liability under sub-section (2) of section 6 of the Act or the value of the contract itself, whichever is less.

The provision for right of recourse referred to above sub-rule (1) shall be for the duration of initial license issues under the Atomic Energy (Radiation Protection) Rules, 2004 or the product liability period, whichever is longer.

Rule 24 defines "Product Liability Period" and "Supplier." "Product Liability Period" means the period for which the supplier has undertaken liability for patent or latent defects or sub-standard services under a contract [Rule 24 Explanation 1 (a)]. The term "supplier" has been given a broad definition [Rule 24 Explanation 1(b)].

"Supplier" shall include a person who-

Manufactures and supplies, either directly or through an agent, a system, equipment or component or builds a structure on the basis of functional specification; or

Provides build to print or detailed design specifications to a vendor for manufacturing a system, equipment or component or building a structure and is responsible to the operator for design and quality assurances; or

Provides quality assurances or design services.

The operator according to the Rules is entitled to sue any or all Suppliers for damages under a "right of recourse" claim. At the same time, the Rules also limit the claim against the supplier both in amount and time. Five year is the period of the initial license, and accordingly, liability is limited to five years [the Atomic Energy (Radiation Protection) Rules 2004: Rule 24(2) and Rule 9], The Rules thus restrict the right of recourse to either the duration of the initial license or the product liability period, whichever is longer.

There have been many interpretations on the exact nature and meaning of Rule 24 of the Civil Liability Rules. The five year limitation that has been brought in by the Rule in respect to supplier's liability clearly seems to deviate from the original intent of the Act. Sorabjee⁴⁵ in his opinion stated, "Rule 24(1) is clearly inconsistent with Section 6 of the said Act read with Sect. 17 inasmuch as it scales down and reduces the liability prescribed by the said Act. Consequently, the said proposed Rule is ultra vires the said Act and is invalid." Reacting to Sorabjee's opinion, Abraham (2012) argues, "Rule 24 would have absolutely no application in cases falling under Sections 17(b) and (c), i.e. where the nuclear incident has resulted as a consequence of an act of a supplier or his employee which includes supply of equipment with patent or latent defects or sub-standard services or if it is done by an individual with the intent to cause damage. Therefore, it would not be accurate to State that the supplier's liability has entirely been limited by virtue of Rule 24. In the event the

⁴⁵Greenpeace (2010).

circumstances under Sections 17(b) or (c) are made out, the operator would clearly have a right of recourse against the supplier.”

The liability rules revived few more fundamental questions that were raised during the enactment of liability law. Many researchers have questioned both legality and technicality of the rules.⁴⁶ The Chairman of the subordinate legislation committee of the Lok Sabha that reviewed for conformity of the rules to the parent act, also reportedly remarked on the issue of quantum and period of compensation; stating that “The Rules have gone beyond the intent of the Act, which in effect limit the supplier liability.”⁴⁷

The Indian government was asked to clarify the position in the Lower House of the Parliament (the Lok Sabha). The question raised was, “whether the new rules are in conformity with the Nuclear Liability Act passed by the Government or a dilution of the Act and violation of the spirit of the Act.”⁴⁸ In response the government stated “The Civil Liability for Nuclear Damage Rules, 2011 are in conformity with the Civil Liability for Nuclear Damage Act, 2010.”⁴⁹

It took several years to sort out this complexity at a diplomatic level. The legality of the 2015 Ministry of External Affairs (MEA) Frequently Asked Questions (FAQs) clarification discussed in detail below is still open for the court to determine. As the deal has gone into limbo, MEA’s 2015 FAQs provide the nature of trust that has been placed on the position and interpretation of Indian Government that Indian law is fully compatible with CSC. The relevant FAQs are re-reproduced below

Q8. What about Section 17 and the right of recourse against the supplier in Sect. 17(b)? Are they not going beyond the Annex to the Convention?

Ans. Section 17 of the Act provides that the operator of the nuclear installation, after paying the compensation for nuclear damage in accordance with Sect. 6, shall have the right to recourse where-

- a. Such right is expressly provided for in a contract in writing;
- b. The nuclear incident has resulted as a consequence of an act of supplier or his employee, which includes supply of equipment or material with patent or latent defects or sub-standard services;
- c. The nuclear incident has resulted from the act of commission or omission of an individual done with the intent to cause nuclear damage.

Article 10 of the Annex to the CSC covers situations envisaged in Sections 17(a) and 17(c); Section 17(b) is ostensibly in addition to situations identified for the right of recourse provided in Article 10 of the Annex to the CSC. However, the situations identified in Section 17(b) relate to actions and matters such as product liability stipulations/conditions or service contracts. These are ordinarily part of a contract between the operator and the supplier. This situation is not novel but is rather a normal element of a contract. Thus this provision is to be read along with/in the context of the relevant clause in the contract between the operator and supplier on product liability. It is open for the operator and the supplier to agree on the terms of their contract relying on the applicable law. The parties to a contract generally elaborate

⁴⁶Sengupta and Sanhita (2011), Gopalakrishnan (2011).

⁴⁷Jigeesh (2012).

⁴⁸Lok Sabha (2011).

⁴⁹Ibid.

and specify the extent of their obligations pursuant to warranty and indemnity clauses that are normally part of such contracts.

Article 10(a) of the CSC Annex does not restrict in any manner the contents of the contract between the operator and the supplier including the basis for recourse agreed by the operator and supplier. Therefore, in view of the above, in so far as the reference to the supplier in Section 17(b) is concerned, it would be in conformity with and not in contradiction of Article 10(a) of the CSC Annex. Its operationalization will be through contract conditions agreed to by the operator and the supplier.

Q9. Does Section 17 establish a mandatory statutory right of recourse?

Ans. Section 17 states that the operator shall have a right of recourse. While it provides a substantive right to the operator, it is not a mandatory but an enabling provision. In other words it permits but does not require an operator to include in the contract or exercise a right of recourse. However, even though there is no mandatory legal requirement under the CLND Act to provide for a right of recourse in a contract, there may be policy reasons for having a risk sharing mechanism including a right of recourse. As a matter of policy, NPCIL, which is a public sector undertaking, would insist that the nuclear supply contracts contain provisions that provide for a right of recourse consistent with Rule 24 of CLND Rules of 2011. Article 10 of the CSC Annex does not specify what position either the operator or the supplier can take in contract negotiations. In this regard, the India Nuclear Insurance Pool has been instituted to facilitate negotiations between the operator and the supplier concerning a right of recourse by providing a source of funds through a market based mechanism to compensate third parties for nuclear damage. It would enable the Suppliers to seek insurance to cover the risk of invocation of recourse against them.

Q10. Who is the 'supplier'? Is the supplier always a foreign company?

Ans. Rule 24 of the CLND Rules explains that 'supplier' shall include a person who:

- (i) manufactures and supplies, either directly or through an agent, a system, equipment or component or builds a structure on the basis of functional specification; or
- (ii) provides build to print or detailed design specifications to a vendor for manufacturing a system, equipment or component or building a structure and is responsible to the operator for design and quality assurance; or
- (iii) provides quality assurance or design services.

The supplier may not always be a foreign company; there may be domestic Suppliers who fulfill the above criteria and in some cases the operator (NPCIL) itself may be a supplier as it provides build to print or detailed design specifications to a vendor.

This has found lot of support by government agencies and backers of the CNLD act. Grover (2017) in his seminal article argues the correct way to look at CNLD act and rules is through an engineering perspective, and argues,

explanation about the word "supplier" has remained under-examined in the literature on India's nuclear liability legislation and despite debate on nuclear liability in the media, has remained under-reported. Sutaria (2014), Ram Mohan (2014) and Ameye (2015) have analysed Section 17 and the Rule 24, but have not included implications of the explanation in their analyses. Ignoring the explanation has resulted in Heffron et al. (2016) calling section 17 vague and ambiguous, and opining that a victim will have to resort to a multitude of court cases. This paper examines this issue in detail and presents basis for designating individuals as Suppliers or vendors based on engineering practices followed by nuclear industry.

Taking the discussion forward on the specific issue of Supplier and vendor, Grover (2017) by emphasising MEA FAQs further states,

... in some cases the operator (NPCIL) itself may be a Supplier as it provides build to print or detailed design specifications to a vendor.” This is also incorporated by the NPCIL in its General Conditions of Contract as given in Annex 2 (NPCIL, 2017). Extending this logic, for the Prototype Fast Breeder Reactor being set up at Kalpakkam, Bharatiya Nabhikiya Vidyut Nigam Limited (BHAVINI) is the Supplier and for reprocessing facilities, Bhabha Atomic Research Centre is the Supplier

As an academic view, the author of the paper believes the jury is still out on the exact interpretation of the CNLD Act and rules. Knowing well how Indian higher judiciary has acted liberally in the past relating to PILs and torts law cases, without a definite ruling on the constitutionality cases that are currently in the Supreme Court, we are unsure the direction the court may take in the event of an accident.

5 Conclusion

The CNLD Act reflects India’s Parliamentary wisdom, consequent to extensive consultations, and debate within the country. The significance of this legislative activity is in the background of Bhopal, an industrial disaster of epic proportions both in terms of impact on human and environment, and also how political and legal institutions were incompetent in providing justice. Parliamentarians are fully aware that though nuclear energy industry in India may be one of the few islands of excellence in industrial operation and management, nevertheless, the experience of earlier disaster was clearly in their minds while drafting this legislation. As a result, we had an opportunity to draft a liability legislation that incorporates decades of international and domestic legal learning on industrial disasters and fully utilises the inherent flexibility that exists in international nuclear liability conventions and treaties. Varadarajan (2010a, b) summarises that “the primary motive of liability legislation in a democracy ought to be reassuring people that their interests would be fully looked after in the unlikely event of an accident.”

The law that exists today will be tested before Indian courts. However, successive governments’ ability in maintaining the position that the 2010 law is not amenable for any legislative change is significant. The explanation that was given by MEA FAQs may have had a diplomatic satisfaction, but the real test will be when courts determine its legality.

On the question of Indian exceptionalism, one may take the position that strength of Indian nuclear energy program, both the non-proliferation record and technology competence, supported such a strong Indian diplomatic position in various negotiations starting from the 2005 deal to IAEA safeguards and to liability law. Across the world, there is momentum on formally replacing some of the outdated concepts of nuclear liability law. Indian law provides an impetus for such a reform, a reform even IAEA in 2007 asked for. Importantly it would be interesting to see Indian position when it also starts exporting its own reactors. The author hopes that India will maintain what it held for long, that it is ready to take part in world commerce based

on reformed principles of Indian law, and not the traditional law where protection of industry was the primary concern.

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