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MESSAGE FROM THE CHAIRMAN

Research forms the foundation of legal profession. Amity Law School, Delhi has always encouraged its students to develop research oriented legal acumen. In furtherance of the said objective, the Student Journal Society of ALSD publishes a theme specific annual journal, which has been aiming to be platform of generation of ideas, creating pathways for innovations and discourses on contemporary issues from across the country. It is overwhelming to see young minds contributing towards effective legal narrations in the form of research papers, notes and case comments based on analysis. The journal has been successful in ensuring exchange of academic and legal knowledge amongst students of ALSD with other students of Indian law colleges and universities.

I congratulate all the student authors who have contributed in this volume of this journal, and the members of the Student Journal Society who have worked intelligently and diligently over the past few months to publish the journal. Wish everyone all the best for their future endeavours to make India the best country of the world.

Prof. (Dr.) Dilip Kumar Bandyopadhyay
Patron, ALSD Student Journal
Chairman, Amity Law Schools

MESSAGE FROM THE ACTING DIRECTOR

It gives me immense pleasure to state that ALSD Student Journal has completed its ninth volume of publication. Over the years, the journal has strived to bring together students across India to contribute towards contemporary legal discourse. The themes of the journal have been such that it accommodates the socio-legal issues of the particular year. This journal has always provided a platform to the student researchers in law to bring forth their strength of generating ideas and research-based views on theme specific issues. No doubt, the ALSD Student Journal Society has gone extra mile during the current pandemic to accomplish their task of e-publication of their journal.

The current volume of the journal focusing on 'Ease of Doing Business' received several innovative contributions, the best of which have made it to the final content of the journal. It is indeed gratifying to see the students, future leaders of legal field engage in fruitful research and articulate the same in the form of research papers, notes and case comments. The ALSD Student Journal Society has been at the forefront of the process of publishing the

journal and has efficiently worked reviewing, editing the papers and interacting with authors to make the journal paramount amongst its contemporaries.

I am sure the journal would be a delightful read among students, academicians and professionals alike, initiating a healthy debate and discussion on the matter of 'Ease of Doing Business'. Congratulations to all the student authors and the ALSD Student Journal Society.

Prof. (Dr.) Arvind P. Bhanu
Faculty Supervisory Editor, ALSD Student Journal
Acting Director, ALSD

MESSAGE FROM THE FACULTY

Scope of research has no end. It has always been an inspiration for students and academicians to work and bring out unique and inimitable results. Being a corporate law teacher, I have always found 'spaces' and 'gaps' in the key areas which requires exploration and in-depth study. We at Amity Law School Delhi always encourages our students to understand the purpose and manner of doing an ethical research.

In order of doing so, we are publishing ALSD Student Journal and Amity Law Review every year. Currently, we are coming out with our Vol. 9 of the Student Journal which is based on a very interesting theme that is "*Legal Framework in India and Ease of doing Business".* For this issue we received huge contributions from the authors who are currently pursuing their studies either from the Indian Universities/Institutions or from Foreign Universities/Institutions.

Our editorial team which is headed by our student Editor-in-Chief has carefully chosen the best papers out of the whole lot after doing plagiarism

check and double peer review. I am glad to share my appreciation with the readers of this journal that our editorial team has worked very hard even during the tough time of pandemic and has carried out their duties being a part of the editorial society simultaneously with their Dissertation and Internship work. I wish them good luck for their future.

Dr. Swati Bajaj
Assistant Professor, ALSD
Faculty Advisor, Student Journal ALSD

MESSAGE FROM THE EDITOR-IN-CHIEF

With this issue, *Amity Law School, Delhi Student Journal (ALSD Student Journal)*, enters its ninth year of publication, with the efforts of the editorial board constituted of the students of Amity Law School, Delhi working under the guidance of the members of the Advisory Board.

I am delighted to present to you the journal based on the theme *"Legal Framework in India and Ease of Doing Business"*. This Journal comes at a strategic time when COVID-19 has prompted global firms to look for new manufacturing centres to expand their geographic spread, and reduce dependency on a single country. Bearing in mind this moment of opportunity for India, the Journal invites research literature that explores the implications of the recently undertaken legal reforms and assesses how India can become a more attractive destination for business.

Building upon the legacy of the predecessor volumes of our journal, the editorial philosophy for this publication has been to identify and encourage original contribution of the authors to the research literature.

I am thankful to the Editorial Board and the authors who have materialized this Volume into what it is today.

Tanya Aggarwal
Editor-in-Chief

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INDEX

ABOUT THE THEME OF THE JOURNAL

Volume IX of the ALSD Student Journal seeks to augment the discussion on ***Legal Framework in India and Ease of doing Business***.

Ease of Doing business is an index which is published by the World Bank every year. A high ease of doing business ranking means that the regulatory environment of that particular country is more conducive to the starting and operation of a local firm. The index assesses the measures and regulations which impact a business during its entire life cycle.

In recent times, various companies have started exiting China, however, India has not been considered as a preferred place for relocation of these companies. In this light, various legal reforms and measures have been undertaken by the Indian government to promote ease of doing business. These include reforms across various sectors of the Indian legal regime, including company law, IPR, Labour law.

This Journal explores the existing legal framework and comprises submissions which assess how India can become a more attractive destination for business. Exploring the implications of the recently undertaken legal reforms which seeks to promote the ease of doing business in India, the Journal invited contributions on the following sub-themes: -

- Analyses of the role and impact of existing Government Policies on Ease of Doing Business; Make in India, Skill India, Start-Up India.
- Changing landscape of Insolvency laws.

- Stimulation of innovation in India through relaxation of existing IPR norms.
- Enhancement of the Arbitration ecosystem in India through technology.
- Impact of Blockchain Technology and Smart Contracts on the Indian Arbitration regime.
- Analyses of the reforms brought in Company Law in the area of Starting a Business.
- The Paradoxical Rights of Labour vis-a-vis Employers: what makes India a global hub for investment.
- Probe into the merits and demerits of Tax reforms to improve Ease of Doing Business.
- Introduction of Fast Track Approval Systems for issuance of Construction Permits.
- 'Indian Customs Single Window Project' and digitization in Trading Across Borders.

ABOUT THE AUTHORS

Vinayak Sankaranarayanan has completed 3 years of Law in King's College London and is doing his last couple of years of Law school at National Law University Delhi. He has interned with White and Case in London and Khaitan & Co in Mumbai. Vinayak is passionate about the law with regards to gender equality, human rights and labour rights because he feels for Indians to call themselves truly modern, these are the most important aspects to address. At university, he is a member of the Cricket and Politics societies. Vinayak hopes to start his own social enterprise or business in the future.

Dyuthi Sutram is a third year BB.A. LL.B. student at Symbiosis Law School, Pune. She is interested in commercial dispute resolution (arbitration) and capital markets. She also enjoys university level debating.

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Aditi Tripathi and **Aditi Singh** are fourth year undergraduate law students currently pursuing B.A. LL.B. (Hons.) from Maharashtra National Law University, Nagpur. Aditi Tripathi is an avid reader skilled in public speaking and legal writing. She has profound interest in International Law, Arbitration and Constitutional Law. She is a member of the Debating Society and also Associate Editor at Contemporary Law and Policy Review, the Student Journal of MNLU, Nagpur. She has also participated in various moot court competitions and debates. Aditi Singh is currently a Senior Member of the Alternative Dispute Resolution Society at the University and is an Associate Editor at Contemporary Law and Policy Review, the Student Journal of MNLU, Nagpur. Her interest areas include Arbitration, Mediation, Space Laws and Taxation Laws. She has interned at various distinguished law firms, like Khaitan & Co. and HSA Advocates. Further, she has participated in various international and national moots, mediation competitions and parliamentary debates.

Karan Kataria is a fourth-year law student at The Northcap University; he is the batch topper and Dean list Scholarship holder. Karan serves as the Secretary to NCU-Legal Aid Society and President of the University Heritage Club. He is a student by day and a writer by night. He has authored a book- *'Black Stigma on Indian Democracy'* and various research papers published in reputed national and International Journals, including Indraprastha law review, Haryana Police Journal, and various other reputed journals. He has also served as a student editor for NCU Law review. Karan has presented several research papers at various national and international conferences, and he has presented a paper on *'Access to Education in India'* at the Global Goals Summit in Kuala Lumpur, Malaysia. He has a keen interest in Public International law and aims to pursue his LLM in Public International Law.

Ishita Singh and Mudassir are 4th year law students at KIIT School of law, KIIT University, Bhubaneshwar. They share a passion for research, reading, writing, mooting, trials and have a deep interest in Business and Mercantile laws as well as International laws.

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Riddhi Jain, a fourth year B.A. LL.B. (Hons.) student from Amity Law School, Delhi (GGSIPU) with a predilection in Taxation Law, Corporate Law and Constitutional Law. She has participated in plethora of Moot Court and ADR competitions and she exhibits passion for reading, writing, and researching.

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IMPROVING INDIA'S EASE OF DOING BUSINESS WORLD BANK INDEX - AN ANALYSIS

Vinayak Sankaranarayanan[*]

ABSTRACT

The "Doing Business" report produced by the World Bank aims to measure the costs to firms of business regulations in 190 countries, as well as the requirements and procedures[1]*. These regulations are outlined under the following criteria: Starting a business, Dealing with Construction Permits, Getting Electricity, Paying Taxes, Getting Credit, Registering Property, enforcing contracts, Trading across borders and lastly, Resolving Insolvency. This essay concerns the possible ways in which India can improve its World Bank Ease of Doing Business Ranking. Specifically, this author is interested into specific criterion of the ranking- firstly, access to electricity and secondly, access to construction permits. Importantly, this author considers "tried and tested" reforms that have succeeded in countries having similar economic structures like China. Moreover, the solutions suggested are economically sustainable as a source of tax revenue for the government and are environmentally friendly. The author does not propose any*

*** LL.B. Student at Kings College London.**

[1]World Bank Group, 'DOING BUSINESS 2019' 16th Edition p.18 Washington DC <https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf> (accessed 7 April 2020).

one solution because all the reforms are together required to have any substantial effect on India's poor ranking. In examining the possible solutions in improving access to electricity, this author moves from a basic hypothesis. It is necessary to create a suitable financial and business structure to protect electricity utilities from illiquidity and near bankruptcy in order to re-invest into solving problems of access such as electricity theft and poor credit control. Therefore, solutions presented aims identify ways to make Energy generation and transmission more efficient in what is right now a loss-making industry.

Keywords: *ease of doing business, access to electricity, access to construction permits*

I. IMPORTANCE OF IMPROVING THE "DOING BUSINESS" RANKING IN THE AREAS OF 1) ACCESS TO ELECTRICITY AND 2) ACCESS TO CONSTRUCTION PERMITS

India is likely to attract more investment, if it offers reliable and cheaply supplied electricity. If electricity prices are made transparent, the business will be able to plan their expenses better to adapt their finances accordingly and predict fixed costs; Capital tends to go to countries offering a reliable and competitively priced supply of electricity. The lack of reliable electricity and high tariffs can disincentives investors because according to the 2017 World

Bank Enterprise Survey business owners find electricity as the fourth biggest obstacle to growing a business.[2].

Economies that score well on Dealing with Construction Permits have tough but quick and accountable permitting process. A study in the United States showed that speeding the permit process by 3 months could increase property tax revenue by 15% and increase construction spending.[3]. Since we are looking at India, KPMG study suggested that construction permit processes are the top factor in considering the location of a start-up because construction permits are the biggest regulatory barrier in Asia to do business.[4].

A. Access to Electricity-Ease of Doing Business

i) Solutions to making India more business friendly in terms of "Access to Electricity."

1. Renewable Energy and China

One good model to work towards is China's use of renewable in achieving 100 % electrification. This is because China faced many of the same constraints that India faces today such as having a large rural population. The Brightness electrification Programme, successfully provided electricity to 23

[2]*Doing business 2017 : equal opportunity for all (English).* Doing business 2017 Washington, D.C. : World Bank Group. http://documents.worldbank.org/curated/en/172361477516970361/Doing-business-2017-equal-opportunity-for-all.

[3] Project Management Institute and KPMG, 2019. Revamping Project Management. (online) Mumbai, p.190.: <http://mospi.nic.in/sites/default/files/Kpmg1.pdf> (Accessed 22 February 2021).

[4] Ibid.

million people in remote areas through the use of solar and wind energy.[5]. The project installed 518 solar hybrid systems and 5515 Solar Home Systems. Similarly, the Township Electrification Programme is the largest renewable electrification programme in the world, spending 4.7 billion Renmibi to access a thousand provinces.

The Township Electrification scheme was financed partly by regional Governments and partly by the central, Beijing-based government. Generally, the regional government is expected to spend more money on the more developed regions. [6]. In some provinces like Tibet, all finance come from the centre. Since 1987, the government has created a special interest loan for rural electrification used for solar and wind projects of which 50% was subsidized by banks.[7]. The liberalization of the agricultural sector combined with infrastructure pricing based on cost recovery principles shows that China always prioritized growth. This has led to a fall in poverty from 60% to 7%[8]. However, China's strong manufacturing base enabled high manufacturing capacity in renewable energies. Given the still agrarian economic structure of India, as well as the fact that China benefitted from local supply of renewable energies and economies of scale, India might not have the capability to depend on renewable.

2. Autonomous Regulator

[5] Bhattacharyya S, and Ohiare S, 'The Chinese Electricity Access Model For Rural Electrification: Approach, Experience And Lessons For Others' (2012) 49 Energy Policy
[6] Ibid.
[7] Ibid.
[8] Ibid.

Tariffs are considerably higher under an autonomous regulator –which indicates a commitment to make the tariffs more cost-reflective. Specifically, electricity tariffs under autonomous regulators have been 64% higher than where there is no autonomous regulator. A counter argument, however, could be any long-term initiative in India to have cost-reflective tariffs are likely to be futile, given that Section 90 of the Electricity Act 2003, permits the removal of the Chairman of the Commission the basis of "consumer interest misconduct.[9]." A white paper published under the AAP government recommended the dismissal of the then head of DERC for continuous price increases.

The number of documents to be submitted to regulators can be reduced to two- an identity proof and a proof of ownership/occupancy.[10]. Other documents such as Certificate of Incorporation as evidence of the company legitimacy need not be necessary. Furthermore, online applications have no cost and facilitate immediate communication of data. An immediate receive of the application will permit the Utility to inspect on the same day. Thus, this procedure is reduced by a minimum of 3 days.

3. Prepaid Electricity

Pre-paid electricity works on a debit basis- until the meter balance is no longer positive, electricity is interrupted. By generating revenue in advance

[9] *The Electricity Act, 2003*.Sections 81(iv) and 90.
[10] Instruction Kit for eForm,INC-22
(http://www.mca.gov.in/MCA21/dca/help/instructionkit/NCA/Form_INC-22_help.pdf

of consumption- the malaise of non-payment of bills is controlled. A study in South Africa demonstrated that non-payment of bills reduced by 13 percent and by 7$ per consumer.[11]. Secondly, it eliminates the need for meter readers, and therefore confronts bribery, in addition to labour costs and safety issues. However, this reform is not without costs. There is a substantial initial cost of developing a vending network to track consumers. However, this solution might be difficult to integrate given that India's present internet penetration is only 20% amongst rural inhabitants. Nevertheless, the number of Internet users is projected to reach 500 million by 2022 making it a choice of the future.

4. Co-operatives

The use of co-operatives in the liberalization of the electricity sector is not new, and was pioneered with extraordinary success in the USA, in large part due to the Rural Electrification Act of 1936[12]. Although before the USA's Rural Electrification Act only 10% of rural households had electricity, by 1953, this figure rose to 90%. The Rural Electrification Act of 1936 enables the borrowing of funds at a miniscule interest rate to provide electricity on a non-profit basis. Cooperatives have used fewer subsidies than electricity

[11]SzabÛ, A., 2021. *Reducing Nonpayment for Public Utilities: Experimental Evidence from South Africa*. (ebook) Houston: University of Houston, p.36. <https://uh.edu/~gujhelyi/africaeducation.pdf>

[12]NATIONAL BUREAU OF ECONOMIC RESEARCH, 2021. *FLIP THE SWITCH: THE SPATIAL IMPACT OF THE RURAL ELECTRIFICATION ADMINISTRATION 1935-1940*. (online) Cambridge, Massachusetts: NBER WORKING PAPER SERIES, p.50. <https://www.nber.org/system/files/working_papers/w19743/w19743.pdf>

utilities despite servicing a market as small as that of 7 people a mile.[13] Cooperatives should be an example for India given that the Rural Electrification Act succeeded, despite America being much larger in size and having one of the world's lowest population densities. A problem with Cooperatives, and the Rural Electrification Act in particular, is the need for financial and administrative skill. Section 3 requires the complete repayment of the loan within a possible span of 10 years. Section 3 (a) also permits the grant of as much as 50 Million Dollars.[14]. A possibility is for local Panchayats to be ex-officio heads of the local cooperative. This would accord with the democratic ideals of Co-operatives as a business structure. A further reform would be the creation of a commission to assess the feasibility of repayment of loans- by assessing the success of local industry, integrity and skill of local leadership, population growth, and the feasibility of electrification to lead to company investment.

B. Access to Construction Permits-Ease of Doing Business

i) Solutions to making India more business friendly in terms of "Access to Construction Permits."

1. Performance Based Codes

Performance-based codes have several advantages as a basis for risk approval. First, the objectives are clearly stated. Performance based codes outline

[13] Ibid.
[14] Ibid.

requirements for health and safety through flexibly defined performance objectives and requirements. Business-friendly regulation starts with establishing a coherent body of rules for builders. A lack of clarity can lead to delays, disputes and any uncertainty. New Zealand was ranked number 2 under the business-friendly metric of "Construction Permits". This is largely due to New Zealand's Building Act 1991 which incorporated the performance-based approach to regulate construction.[15]. The Act created a Building Authority for verifying compliance with performance provisions. The authority is funded by developers who pay fees for their permits to be observed. Approval of building permits is in the hands of local authorities with little government interference, and these authorities retain ability to issue waivers for specific buildings. Importantly, unlike in legal jurisdictions, the Building Act does not require building inspections to be conducted during the construction stage of the building. As a substitute, owners only need to acknowledge in writing that they will provide monetary protection and legal protection to stakeholders if the building is found to have deficiencies once it has been fully constructed.[16]. In a separate study of performance-based solution, overwhelmingly, the greatest reason businesses preferred a performance-based solution is the lower cost of building as a result of the flexible standards permitted.

[15]Inter-jurisdictional Regulatory Collaboration Committee, 2021. *Performance-Based Building Regulatory Systems Principles and Experiences*. (online) pp.68-75. <https://www.wpi.edu/sites/default/files/docs/Departments-Programs/Fire-Protection/IRCC_Final_PDF.pdf>

[16] May P, 'PERFORMANCE-BASED REGULATION AND REGULATORY REGIMES' (*Iitk.ac.in*, 2004) <https://www.iitk.ac.in/nicee/wcee/article/13_3254.pdf>

2. Increasing the Floor Space Index

The FSI in India, which is lower than most other major world cities, has caused land prices to increase drastically. In Hong Kong increase in FSI helped to increase household space without relocation The FSI of housing was 3 during the 1970s but was increased to 5 in the 1980s leading to an increase in per capita space from 3.2 square meters to 5.4 square meters.[17]. In Singapore the Housing Act permitted a higher FSI for those builders that would re-develop obsolete buildings in corporation areas. This led to one of the biggest booms in land space from 3.6 square meters to 34 sq. meters in 1984 or a ten-fold increase. Cities like New York, Seoul and Singapore are like Mumbai and other Indian cities not only in population but also since they all share a compact spatial structure where expansion in restricted by hills or water bodies. However, New York's FSI is 15 times more.[18]. Nevertheless, importantly, the lack of FSI liberalization can be defended on the basis that India, as a developing country could not be supported by existing infrastructure. Although it is argued that cities in India like Mumbai cannot have the infrastructure to balance increased FSI, an increase in FSI will improve infrastructure. An increase in FSI would be needed to upgrade infrastructure. This infrastructure would be redesigned in areas where a large FSI is projected more to correspond to modern standards of construction than due to density. This infrastructure can be financed by an impact fee imposed on developers. Thus, the cost of additional infrastructure will be borne by

[17]Cui L, and Shi J, 'Urbanization and Its Environmental Effects In Shanghai, China' (2012) 2 Urban Climate
[18] Ibid.

those benefitting from an increased FSI but will not affect unsuitable buildings. Historical buildings may be protected by trading their FSI with non-historical buildings in the same area.

Thus, even if the FSI legislation reduces the floor size of buildings, inhabitants would simply use less space than earlier to make up for the rise in rent prices caused by from a greater scarcity of land space. FSI does not appear to have much correlation with reducing population density. Population density can only increase when a lesser amount of land is developed every decade than decadal increase in population within that same area. A higher floor space index leaves more open spaces vacant in residential areas. This is because a higher FSI means that more floor space can be built on the same piece of land. In industrialized, modern cities like New York or Singapore, the FSI is 4 due to which more than half of these cities area comprises of public spaces.

The Urban Land Act of 1976 imposed a ceiling on vacant land in urban areas and provides for the acquisition of land in excess of the ceiling limit.[19]. In large cities like Delhi and Mumbai, the ceiling was 500 square meters per owner and land owned above this limit could only be used if houses for the poor were built on a part of it. The repeal of the act will release 18000 acres of land for development. The Maharashtra Chief Minister has estimated that land prices in Mumbai will go down by 30 to 40 %[20]. One of the problems for businesses is the inherent uncertainty and possibility of corruption caused by

[19]Vidyadhar K. Phatak. "Regulating Urban Land: Future of ULCAR in Maharashtra." *Economic and Political Weekly*, vol. 40, no. 43, 2005, pp. 4585–4587. *JSTOR*, www.jstor.org/stable/4417317. Accessed 22 Feb. 2021.
[20] Ibid.

the arbitrariness of Section 20 and 21 which granted exemption on the grounds of "public interest" and "undue hardship". This discretionary power breeds a nexus of corruption between big business and politicians and eventually leads to more litigation. Another problem with the act, for which it should be repealed, is that the compensation provided cannot extend beyond 10 rupees per square meter and the overall compensation is limited to Rupees 2 Lakh.

3. Procedural Reforms

Until 1978, the French government had little regulatory influence in construction as it never stipulated the types of inspections to be done for each category. Builders simply required 10-year warranty insurance.[21]. The Spinetta Law permitted only private state licensed agencies to inspect construction sites. These agencies can only be accredited based on technical competence and conduct for 5-year terms. In doing so, it must verify buildings strength, safety, compliance with building regulations –including for the disabled and for protection against natural disasters. Construction Inspections are undertaken for buildings having 300 residents or more. These buildings are only non-residential such as malls, office buildings and theatres are categorized based on Safety and Legal compliance. The Inspection on safety looks at the safety of all stakeholders, meaning not just employees and construction workers but also any negative externalities like traffic, pollution

[21] The World Bank Group, 2013. *Good Practices for Construction Regulation and Enforcement Reform*. (online) Washington DC, p.45. Available at: <https://www.doingbusiness.org/content/dam/doingBusiness/media-api/topicsconfig-assets/docs/Construction-Regulation-Reforms-Guidelines-for-Reformers.pdf.

etc. The legal aspect examines the roofing, structural strength and equipment used.

Various states in the United States formed a partnership called the Regional Plan Review Group[22]. Members adopted identical building codes and plan review checklists to streamline the building process. A plan approved in one municipality would receive approval elsewhere, saving time and money for applicants and planning agencies. Developers were also able to choose the jurisdiction with the shortest approval time- thereby balancing work amongst inspection committees elsewhere.

[22]National Association of Home Builders, 2015. *Development Process Efficiency: Cutting Through the Red Tape*. (online) Washington DC, p.18. <http://www.localhousingsolutions.org/wpcontent/uploads/2018/10/NAHB-ABT-full-report.pdf>

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(RE)EDITING THE STOCK MARKET: AN ANALYSIS OF THE SHORT SELLING FRENZY AND THE GOVERNING REGULATORY FRAMEWORK

Athul Roshal Kumar and Dyuthi Sutram[*]

ABSTRACT

The recent "GameStop Trading Frenzy of 2021" has generated discourse regarding short selling. The present paper analyses short selling, along with the evolution of events which led to the GameStop Trading Frenzy. It compares the various regulatory approaches adopted by the markets and sheds light on concepts such as Short Squeezes and Gamma Selling. The regulators which fall within the purview of the present study are that of the US and of India – the former promoting a laissez faire system while the latter plays a more dynamic role in the day-to-day market transactions. Additionally, the present paper examines the impact of privatisation of depositaries and clearing houses; linking the variations between the two countries to gauge the probability of a situation like that of GameStop happening in India. Furthermore, the study analyses, the regulations put in place to protect investors against malpractices in the market and high vitality in trade. It also focuses on the Indian regulatory framework, and the features which protect investors

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in the Indian stock market from unnecessary market volatility. The study concludes by examining the impact of the 'frenzy' on common investors by relying primarily on secondary data sources such as the US Senate hearings and other reports on the present matter.

Keywords: *Short Squeeze, Gamma Squeeze, GameStop, market manipulation, retail investors, investor protection, trade halt, short ladder, naked shorts.*

I. INTRODUCTION

It is a rather interesting event to analyse. The members of an obscure reddit-forum caused a frenzy across Wall Street. It had major financial ramifications on large hedge funds, and short sellers. Losses ran into billions of dollars for some funds, while profits of millions were distributed across the spectrum. While the phenomena in the stock market are largely relegated to Big-Finance, it is important for us to be able to identify the legal print regulating such actions. The 2008 financial crash has imprinted how deeply the consequences of trading on the stock market, impact the general populace.

The present paper analyses various market functions such as short squeezes and gamma squeezes, which enabled the high volatility of GME stock. Additionally, it examines the interplay between regulatory agencies, trading platform and investors – emphasising the shifts of the market current that have empowered the retail investors to higher degree. Finally, it examines the possibility of similar occurrence in the Indian market and the corresponding regulatory norms that influence market movements; concluding with

recommendations that the present authors put forward to deter high volatility in the open market and, measures to contain the same to ensure that ripple effects across the market are minimised.

II. BACKGROUND

A. GAMESTOP CORPORATION

Since its inception in 1984, the GameStop Corporation has spearheaded the retail segment of the video game industry by introducing unique programmes such as the buy-back of old games and facilitating the trade of games.[1] Its legacy of making games available to the gamers and enabling the use of its stores as a social hub for gamers has doubled the company's goodwill in the American populous.

Despite its humble origins in Dallas, Texas the company flourished throughout the early 2000s through its numerous franchises encompassing the globe from Australian continent to the EU marketplace.

However, the rise of the internet age spelled trouble for the company as it failed to the digital landscape. The market capitalisation of the company has been on a decline ever since digital sales started to eat into the sales of physical sales. The declining trend of the company is evident from its financial statements, as summarised below:

[1]Reuters, "GameStop Corp. GME"(12 February, 2021) , available at: https://www.reuters.com/companies/GME/profile (last accessed: 12th February, 2021).

GAMESTOP – A FAILING COMPANY[2]			
Sr No.	**Particulars**	**2016**	**2020**
i.	Revenue	9.3 Billion	6.4 Billion
ii.	Net Income	402.8 Million	(470.9) Million
iii.	Current Assets	-	1.6 Billion
iv.	Current Liabilities	-	1.5 Billion

B. R/WALLSTREETBETS

R/WallStreetbets is a sub-reddit that sees its genesis in 2012. Although it has been used primarily to shares memes pertaining to the Wall Street, it does encompass posts which contain meticulous research into market positions and advice on investment. However, finding these posts is akin to looking for a needle in a meme haystack.

III. THE GAMESTOP SAGA

The GameStop saga sees its genesis in mid-2019 where a member of R/WallStreetbets, Keith Gill, bought GME shares and subsequently made posts explaining why the share value would increase. Although the posts were initially met with ridicule, a few scattered posts expressed support for this

[2] Finance Yahoo, "GME Financials" (9th February, 2021), available at: https://finance.yahoo.com/quote/GME/financials?p=GME (last accessed: 9th February, 2021).

thesis. These posts on the sub-reddit, in the month of December 2019, pointed to the beginning of a novel gaming console cycle and a new management which seemed to place the required emphasis on the online gaming segment.[3]

The discovery that the shares of GME had been floated more than the free float acted as the much-needed catalyst for the subsequent short squeeze and gamma squeeze; a short squeeze occurs when the price of a share that was shorted rises and a gamma squeeze is when the price of a share, which is shorted, increases due to the large volume of call option purchases.

In the case of GameStop (GME), the number of available shares were 64,300,000 and the short position was for 68,130,000 shares (as of December 2020).[4] The short exceeds the available pool of shorts in the market making the same a naked short (also the largest relative short). Additionally, it is to be noted that 13% of the GME stock belongs to the current management whereas approximately 40% of the stock was held by institutions.[5] These stocks are not actively traded in the markets lowering the available stock for trading to approximately 25 million. The naked short which appeared to be just north of 100% now, technically, becomes over 200%.

[3] D Peter, Hutcheon, McLauglin, Norris, The National Law Review, "Inciting to Rupture: Keith Gill and the GameStop Surge", available at https://www.natlawreview.com/article/inciting-to-rupture-keith-gill-and-gamestop-surge (last accessed: 9th February 2021).
[4] MarketBeat, "GameStop Short Interest Ratio and Short Volume", available at https://www.marketbeat.com/stocks/NYSE/GME/short-interest/ (last accessed: 2nd February, 2021).
[5]GameStop, "Ownership Summary" (2021), available at https://news.gamestop.com/stock-information/institutional-ownership (last accessed 2nd February 2021).

A. SHORT SQUEEZE

"*A short squeeze occurs when a stock or other asset jumps sharply higher, forcing traders who had bet that its price would fall, to buy it to forestall even greater losses. Their scramble to buy only adds to the upward pressure on the stock's price*."[6] In essence the jump in the share's price is caused due to the sudden high demand for the share.[7] The funds that occupied a short position is inclined to exit the position as the share price soars as they have to pay interest on the borrowed shares irrespective of the variation in the share price of the shorted stock – which is why share positions are usually lesser in time.[8][9]

B. GAMMA SQUEEZE

Gamma squeeze occurs when a large amount of people buys a call option for stock. An option is the right to purchase a lot of 100 shares at a pre-determined price (strike price). The market makers and the brokers who offer the call option, often, do not hold the shares. Therefore, with the intention of hedging themselves against the risk of the share value increasing the

[6]Mitchell, Cory, Investopedia, "Short Squeeze", available at https://www.investopedia.com/terms/s/shortsqueeze.asp#:~:text=A%20short%20squeeze%20occurs%20when,pressure%20on%20the%20stock%27s%20price (last accessed 28th January, 2021).

[7]Dechow, Patricia and Hutton, Amy P. and Meulbroek, Lisa K. and Sloan, Richard G., " Short Interests, Fundamental Analysis, and Stock Returns" (May 1999), available at SSRN:< https://ssrn.com/abstract=167154 or http://dx.doi.org/10.2139/ssrn.167154>

[8]Finnerty, John D., "*Short Selling, Death Spiral Convertibles, and the Profitability of Stock Manipulation*" (March 2005). Available at SSRN: https://ssrn.com/abstract=687282 or http://dx.doi.org/10.2139/ssrn.687282

[9] Liu, Baixiao and Xu, Wei, "Short Squeezes", available at: https://ssrn.com/abstract=2019361.

brokerages are forced to buy the underlying shares – which further drives up the price due to increased demand. In the case of GME the shares were shorted more than the actual float which parallelly caused the short squeeze in the open market. Coupled with the hype-momentum buying and traders holding the stock caused the valuation for the same to skyrocket.

IV. LEGALITY OF NAKED SHORTS AND THE ROLE OF MARKET REGULATORS

"*Short selling is an investment or trading strategy that speculates on the decline in a stock or other security's price*."[10] Short selling is the practice of borrowing stock and selling them in the market today in the belief that the value of the stock will fall – enabling the traders to pocket the difference while returning the stock. However, there arises situations wherein the short position exceeds the available stocks in the market, (i.e.) the seller does decide for the making delivery of the securities to the buyer within the standard delivery period.[11] A prominent example being the Volkswagen short squeeze.[12]

The use of naked shorts has been discouraged by the SEC after the 2008 financial crisis. Nevertheless, isolated cases have continued to exist. [13] In

[10] Supra note 5.
[11] U.S. Securities and Exchange Commission, The Office of Investor Education and Advocacy, "Key Points About Regulation SHO" https://www.sec.gov/investor/pubs/regsho.htm#_ftn3
[12] Allen, Franklin, Marlene, Tengulov, Angel, "*Market Efficiency and Limits to Arbitrage: Evidence from the Volkswagen Short Squeeze"* (April 14, 2019). Journal of Financial Economics
[13]Daouk, Hazem, A Aida, *"A Study of Market-Wide Short-Selling Restrictions"* (February 2005). Available at <https://ssrn.com/abstract=687562 or http://dx.doi.org/10.2139/ssrn.687562>

India the practice of shorting is done in the Futures and Options (F&O) market and the SLB market (generally in the F&O market due to more liquidity), however neither market has the required maturity to sustain volumes like its US counterparts. In India, SEBI has placed a maximum limit on the short position that can be taken up viz. 20% of free float. This maximum net position is termed as market-wide position limit (MWPL) which is applicable in both the F&O and in SLB. The maximum allowed per-client is 5% of open interest or 1% of total free float. Such position limits ensure that the chances of anomalies in the price of stocks are reduced.[14]

V. CONTENTIONS BY THE PARTIES INVOLVED

A. ACCUSATIONS AGAINST R/WALLSTREETBETS

The members of this sub-reddit were among the first to figure out the naked short and the possibility of a squeeze with GameStop stock. The posts had been building up since last year but were able to take off after gaining traction in mid-January; with celebrities such as Elon Musk chiming into the hype across platforms – propelling r/WallStreetBets into the limelight of mainstream media.[15]

Once the squeeze started to take effect the Wall Street was levying accusations one after the other against r/WallStreetBets – most of them revolving around

[14]Zerodha, "Shorting and Indian Capital Markets, (28 January 2021), available at https://zerodha.com/z-connect/trending/shorting-and-indian-capital-markets (last accessed: 3rd February, 2021).
[15] https://twitter.com/elonmusk/status/1354174279894642703?lang=en

market manipulation. However, the accusation of market manipulation is hard to contend in the present scenario as the members of r/WallStreetBets make sure that they are primarily represented as members and not as traders, although most of the group consists of traders. Moreover r/WallStreetBets keeps community guidelines against market manipulation, which has prevented prima facie fabricated data from being circulated. In the end the Wall Street would find it near impossible to initiate action against traders who buy a stock because "I like this stock" or adhering to the expert advice of a Magic 8 Ball.[16]

Contrarily, an argument can be made that r/WallStreetBets was in public interest. It aided in increasing access to information and championing retail investors. However, the same position does not hold for the sub-reddit's Discord server. It is not as accessible as a social media platform and facilitates the promotion of select stocks. The line between market manipulation and market participation is extremely blurry too.

Courts have frequently recognised that people invest in the stock market - with the hope that the value of the stock would increase – this is not market manipulation in any sense; the corollary would apply to short sellers i.e., hoping that the value of the stock would plummet. However, if one were to buy stocks with the intention of increasing its price, such that the public would believe it's increasing value, that would constitute market manipulation.

[16] Popper, Nathaniel, Browning, Kellen, " The 'Roaring Kitty' Rally: How a Reddit User and His Friends Roiled the Markets" (29January 2021) , available at https://www.nytimes.com/2021/01/29/technology/roaring-kitty-reddit-gamestop-markets.html (last accessed 3 February 2021).

However, short sellers publish elaborate reports explaining why the stock would fall in value. While it is protected by the freedom of speech and expression, it only extends to mere analytical pieces and not pieces advocating for a particular course of action. The differences between these instances are minute; due to which courts have devised the "traditional four-part test" to determine whether market manipulation has taken place. The ingredients to be satisfied are:

i. the accused is capable of influencing market prices.
ii. the accused acted with the purpose of effecting a price, or price trend, that does not reflect genuine forces of supply and demand.
iii. such artificial prices existed in the market; and
iv. the accused himself, or by authorising others, caused such artificial prices.[17]

With the value of $GME being both overpriced and under-priced during the course of the frenzy – both the r/WallStreetBets and the institutional investors the first three conditions. The matter hinges on the fulfilment of the fourth condition by a party; the same can only be ascertained by an SEC investigation – as such investigation has not transpired the present author shall not raise any speculations regarding the same.

[17] Matt Levine, Bloomberg "GameStop is Just a Game" (26 January 2021), available at https://www.bloomberg.com/opinion/articles/2021-01-26/will-wallstreetbets-face-sec-scrutiny-after-gamestop-rally (last accessed on 4th February 2021)

Moreover, Reddit is financially incentivised to promote this behaviour and r/WallStreetBets as the sub-reddit is a huge money maker. Most of the posts on r/WallStreetBets are bestowed awards by its members. These reflect purchases made using real currency from Reddit.

B. ACCUSATIONS AGAINST THE WALL STREET

The major blow for the Reddit traders came when Robinhood halted trading – more specifically the buying of certain stocks was prohibited whereas selling was allowed. GME was included in the list of shares who trading was restricted.[18]

Robinhood justified the halting of purchases for certain stocks, as it had to meet the statutory requirements required as a clearing house. This stems from an investing decision by Robinhood in 2018 where it decided to cut the middle clearing house and expand into the same.[19] However, the same brings forth certain requirements such as depositing certain amounts with the Depositaries – which can change over time. The volatility present in the market due to the GME short squeeze has led to an increase in the amount of the money required to deposited.

[18]Smith, Kelly Anne, Forbes Advisor, "Robinhood Halts GameStop Trading, Angering Lawmakers And Investors" (28 January, 2021) available at https://www.forbes.com/advisor/investing/robinhood-gamestop-trading/ (last accessed 2 February, 2021).

[19]Robinhood, "What happened this week" (29 January 2021) available at: https://blog.robinhood.com/news/2021/1/29/what-happened-this-week (last accessed 3rd February, 2021).

The SEC has begun to scrutinise the trade halt imposed by brokerage firms with added emphasis on protecting retail investors if the halts imposed were of a nature that impeded the ability of traders to transact in certain securities. "We will act to protect retail investors when the facts demonstrate abusive or manipulative trading activity," the SEC said in a release.[20]

Nonetheless, customers of Reddit have rushed to the Courts calling foul of this restriction via class action lawsuit.[21]; as class action lawsuits help circumvent mandatory arbitration clauses that has been set in the contract drawn between Robinhood and its users.[22]

However, the principal disadvantage of the US (United States) securities market is the absence of governmental oversight as the SEC does not oversee the clearing houses and depositories. The Depository Trust & Clearing Corporation (DTCC), National Securities Clearing Corporation (NSCC) and allied institutions in the US are owned and operated by private institutions. It is a distinct red flag, however, that a vital segment of the national financial landscape is owned by the private sector.

[20]Thomas Franck, CNBC, "SEC reviewing volatility amid GameStop frenzy, vows to protect retail investors" (29 January 2021), available at <https://www.cnbc.com/2021/01/29/sec-reviewing-recent-trading-volatility-amid-gamestop-frenzy-vows-to-protect-retail-investors.html (last accessed on 5th February 2021)

[21]*Brendon Nelson v. Robinhood Financial LLC, Robinhood Securities LLC And Robinhood Markets Inc.* (Civil Docket No.: 21-Cv-777).

[22]Andrew Keshner, MarketWatch, "Some furious Robinhood traders are suing — but they face two big road blocks." (30 January 2021) available at https://www.marketwatch.com/story/some-furious-robinhood-users-are-suing-but-theres-potentially-a-big-road-block-in-their-way-to-court-11611950777 (last accessed 3 February, 2021).

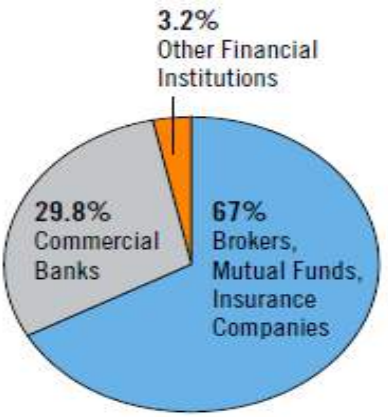

Fig 1: Shareholding pattern of DTCC[23]

The ownership pattern of the DTCC makes its personal stake in favour of the established financial institutions clear. The increase in the deposit requirement placed on brokerages visibly assisted in reducing the losses of the short sellers; the close connection between the depositary and the hedge funds opens the floor for speculations of bias. Furthermore, the private nature of the entity allows it to avoid the scrutiny of the SEC. Such a lackadaisical approach to governmental intervention is unfathomable in India.

In India, if the volatility of share were to affect the BSE Sensex or the Nifty 50, the same would trigger a circuit breaker which would halt trading for a pre-determined amount of time.

[23] DTCC, "Financial Market Infrastructures - Building Strength And Resilience For The Future Report" (2014)

Trigger limit	Trigger time	Duration of market halt	Pre-open call auction session (post market halt)
10%	Before 1:00 pm.	45 Minutes	15 Minutes
	At or after 1:00 pm up to 2.30 pm	15 Minutes	15 Minutes
	At or after 2.30 pm	No halt	Not applicable
15%	Before 1 pm	1 hour 45 minutes	15 Minutes
	At or after 1:00 pm before 2:00 pm	45 Minutes	15 Minutes
	On or after 2:00 pm	Remainder of the day	Not applicable
20%	Any time during market hours	Remainder of the day	Not applicable

VI. SHORT LADDER ATTACKS

By far the most controversial accusation made against the Wall Street hedge funds by the retail traders is that of "Short Ladder Attacks"; the entire Wall Street community has plead ignorance to the existence of such a tactic.

The term was coined by Gerald Klein in 2014 in a blogpost[24] referencing an interview by Jim Crammer shedding light on the concept (the video has now been taken down due to copyright infringement). The short ladder attack is, a coordinated short selling tactic by a consortium of short sellers; such coordinated trading, if implemented, could fall under the purview of market manipulation.

The tactic calls for trading between a group of hedge funds while holding short positions to artificially drive down the prices of a stock; with the end goal of making the share price hit zero to avoid paying taxes on the same.

As Klein explains, "*Short A will sell a counterfeit share at $10. Short B will purchase that counterfeit share covering a previously open position. Short B will then offer a short (counterfeit) share at $9. Short A will hit that offer, or short B will come down and hit Short A's $9 bid. Short A buys the share for $9, covering his open $10 short and booking a $1 profit. By repeating this process, the shorts can put the stock price in a downward spiral*."

[24] Seeking Alpha, "Anatomy of a Short Attack" (25 July 2014) available at https://seekingalpha.com/instablog/11442671-gerald-klein/3096735-anatomy-of-a-short-attack (last accessed: 1 February 2021).

This ceaseless short selling and trading between funds overwhelms the demand side and causes the share price to plummet as traders with long positions exit the market by noticing the falling value of the stock. Due to the lack of any prior academic works covering this topic the r/WallStreetBets community have theorised their own methods of ascertaining the existence of this tactic. The most credible among the same is the Price-Volume discrepancy theory. As per this theory, if the value of a share were to drastically change without a proportional activity in the volume of the share the same indicates the presence of a Short Ladder.

The primary example advanced by Klein in support of the Short Ladder attack was that of Global Links Corporation. GLC was an IT service provider to many companies in the real estate sector. As illustrated by Klein, "*By early 2005, their stock price had dropped to a fraction of a cent. At that point, an investor, Robert Simpson, purchased 100%+ of Global Links' 1,158,064 issued and outstanding shares. He immediately took delivery of his shares and filed the appropriate forms with the SEC, disclosing he owned all the company's stock. The day after he acquired all the company's shares, the volume on the over-the-counter market was 37 million shares. The following day saw 22 million shares change hands - all without Simpson trading a single share.*"

Carson Block, founder of Muddy Waters, replied, "*Put it up there with California wildfires are started by space lasers".*[25] to the allegations of short

[25] Alicia McElhaney, Institutional Investor, "Wallstreetbets Conspiracy Theorists Claim a 'Short Ladder Attack' Brought Down GameStop. Short Sellers Have No Idea What They're

ladder. At present the existence of such tactics cannot be neither accepted nor denied – only a SEC investigation into the matter shall shed light on the matter.

VII. COMPARATIVE ANALYSIS

A. Regulatory Framework for Short Selling in the United States

The regulatory framework for short selling in the United States has been covered by Regulation SHO.[26] The first instance of regulating short selling by the Securities and Exchange Commission can be traced back to 1938. The over-arching guidance for the rules are through the Securities Exchange Act of 1934.

i. General Requirements for Short Selling Under Regulations SHO

Rule 200 of SHO[27] defines the term "Short Sale" and any marking requirements which need to be fulfilled. It categorizes the meaning of ownership or deemed ownership of securities. However, the most important aspect of this rule is encapsulated in Rule 200(g). A requirement is imposed on brokers to mark all sell orders of any security as "long", "short" or "short

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Talking about" (3 February 2021) available at<.https://www.institutionalinvestor.com/article/b1qdq0y5b79rzb/Wallstreetbets-Conspiracy-Theorists-Claim-a-Short-Ladder-Attack-Brought-Down-GameStop-Short-Sellers-Have-No-Idea-What-They-re-Talking-About (last accessed 5 February 2021)

[26] U.S. Securities and Exchange Commission, The Office of Investor Education and Advocacy, "Key Points About Regulation SHO" https://www.sec.gov/investor/pubs/regsho.htm#_ftn3

[27] Securities and Exchange Commission, 17 CFR § 242, Rule 200(a), Securities and Exchange Act, 1934 (Release No. 34-50103; File No. S7-23-03) (RIN 3235-AJ00) < https://www.sec.gov/rules/final/34-50103.htm>

exempt", to ensure adequate disclosure on the trades being made.[28]. An explanation of the terms is provided below:

Term	Meaning
Long	Seller owns / Deemed to Own Security (Security is in possession or control of broker; reasonably expected that security will be in control of the broker prior to date of settlement)
Short	Where seller not in possession of security or does not own it.
Short-Exempt	If the broker identifies the order as being at a price above the current national best bid at the time of submission.[29]

"National Best Bid" refers to the best bid or offer for a security calculated on a current basis via a national market system plan.[30]

Rule 201[31] or Short Sale Price Test Circuit Breaker, establishes, maintains, and enforces a written policy to prevent the short sale of a security at an

[28] Securities and Exchange Commission, 17 CFR § 242, Rule 200(g), Securities and Exchange Act, 1934 (Release No. 34-50103; File No. S7-23-03) (RIN 3235-AJ00) < https://www.sec.gov/rules/final/34-50103.htm>
[29] Securities and Exchange Commission, 17 CFR § 242, Rule 200(1)(c)(1), Securities and Exchange Act, 1934 (Release No. 34-50103; File No. S7-23-03) (RIN 3235-AJ00) available at:< https://www.sec.gov/rules/final/34-50103.htm>
[30]§ 242.600(b)(48)

impermissible price. It acts as a circuit breaker, where the trigger is a decline in the price of a security by 10% or more in one day. However, it also aims to permit the execution of a short sale if the order at the time of initial display was above the price of the national best bid.

Rule 203[32] sets out the borrowing and delivery requirements for each type of sale. 203(B)[33] specifically lists the requirements for short sales. It mentions the "Locate" rule or that the broker to have borrowed the security or have a rational basis to have confidence in the security being borrowed.

It is interesting to note that the criteria for determining the Locate Requirements relies on *bona fide* intention, which has a wide ambit of proof. The requirement to borrow the securities prior to the short sale is not mandatory. Furthermore, Rule 203(B) mandates the creation an operation of threshold securities list, wherein, securities which have an aggregate Fail to Deliver position of at least ten thousand shares for five consecutive settlement days and is equal to at least 0.5% of the issuer's total shares outstanding are added. This list serves as a warning system for exchanges and other traders to note.

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[31] Securities and Exchange Commission, 17 CFR § 242, Rule 201, Securities and Exchange Act, 1934 (Release No. 34-50103; File No. S7-23-03) (RIN 3235-AJ00) available at:< https://www.sec.gov/rules/final/34-50103.htm>

[32] Securities and Exchange Commission, 17 CFR § 242, Rule 203, Securities and Exchange Act, 1934 (Release No. 34-50103; File No. S7-23-03) (RIN 3235-AJ00) available at: < https://www.sec.gov/rules/final/34-50103.htm>

[33] Securities and Exchange Commission, 17 CFR § 242, Rule 203(B), Securities and Exchange Act, 1934 (Release No. 34-50103; File No. S7-23-03) (RIN 3235-AJ00) available at: < https://www.sec.gov/rules/final/34-50103.htm>

Rule 204[34] necessitates that brokers and dealers who are participants of a registered clearing agency take action to close out failure to deliver positions. If a participant fails to deliver and can show that that the failure resulted from a long sale, or from *bona fide* market making activities, then an extension of three days from the original ate of settlement may be granted.

If the position is not closed out, the broker **shall be barred from further shorting the security sans borrowing or effecting an agreement to borrow the security** until the broker purchases shares to close out the position and the purchase clears and settles.

A. REGULATORY FRAMEWORK FOR SHORT-SELLING IN INDIA

i. Broad Principles

Short selling in India, has had a long and controversial history. Due to the absence of a clear policy[35], SEBI had often banned the practice as a reaction to market volatility.[36].

However, a primary background regarding the current framework and principles prioritized by SEBI, can be gathered from the SMAC Discussion

[34] Securities and Exchange Commission, 17 CFR § 242, Rule 204, Securities and Exchange Act, 1934 (Release No. 34-50103; File No. S7-23-03) (RIN 3235-AJ00) available at: < https://www.sec.gov/rules/final/34-50103.htm>

[35]Joint Parliamentary Committee, "Report on Stock Market Scam and matters relating thereto" (2002), ¶ 9158, available at: <https://www.watchoutinvestors.com/JPC_REPORT.PDF>

[36]Secondary Market Advisory Committee of SEBI, "Discussion Paper on Short Selling and Securities Lending and Borrowing" (2006), para 3.5, <https://www.sebi.gov.in/sebi_data/commondocs/rep40_p.pdf>

Paper on Short Selling[37]. It is notable that at the time of its publication, short selling by FIIs (financial institutions) and mutual funds were expressly prohibited.[38] However, the paper concluded that internationally, most jurisdictions recognized short selling as a legitimate activity.

It also examined the position of the United States. However, the position of the US was also often referred to as too tolerant.[39] Attention may be drawn to the legality of "naked short selling".[40] or the position where a failure to deliver is only penalised after five instances.[41] While the overarching principles of the legality of short selling were adopted, distinctions between the "quote" driven market of the US, and the "order driven" market of India were highlighted.[42]

Although the US position was not adopted, the committee laid down the following principles which are reflected in the Indian context. It recommended, *inter alia,* that:

a) The creation of a level playing field, where the prohibitions on institutional investors be removed.[43]

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[37] Ibid.
[38]*See* 15(3)(a), SEBI (Foreign Institutional Investors) Regulations, 1995 (as of 2006);*See also* 45, SEBI (Mutual Funds) Regulations, 1996 (as of 2006).
[39] Supra note 37 at 4.2.3.
[40] Supra note 37, 4.2.5
[41] Supra note 37, 4.2.3
[42]Supra note 37, 5.1; *See also* SEBI, "Discussion paper on Margin Trading and Securities Lending",(December 28, 2002) available at:< https://www.sebi.gov.in/reports/reports/dec-2002/discussion-paper-on-margin-trading-and-securities-lending-pdf-file-_13312.html>
[43] See SEBI, "Short selling and securities lending and borrowing " MRD/DoP/SE/Dep/Cir- 14 /2007, (20 Dec 2007); See also, RBI,(RBI/2007-08/219), "Permission for Shortselling of

b) Day trading by institutional investors should not be allowed, as all transactions would be required to fulfil their obligations on a gross basis.

c) Settlements of short selling ought to be on a delivery basis, therefore, naked short selling would not be appropriate in the Indian context.

d) A penalty structure was also devised by the Committee, wherein, a sufficient deterrence could be established.

The policy released by SEBI pursuant to the 2005 SMAC report explicitly allowed short selling of securities on the SLB and the F&O markets.[44] The policy also dealt with the requirements for lending and borrowing of securities under the Securities Lending Scheme, 2007[45]. The provisions also included the agreements and required the mapping of the PAN Number of the Clients to the transaction ID, to provide for easy disclosure. [46]

However, the most pertinent portion of the policy was the erstwhile position limits which limited the risk to market associated with shorting. It established then that the market wide position limit for any clearing entity would be 10%

Equity Shares by SEBI registered FIIs" (31 Dec 2007), available at< https://www.rbi.org.in/SCRIPTS/NotificationUser.aspx?Id=3990&Mode=0#:~:text=It%20has%20now%20been%20decided,equity%20shares%20of%20Indian%20companies.

[44] P.6,7,Annexure 1, SEBI "Short selling and securities lending and borrowing " MRD/DoP/SE/Dep/Cir- 14 /2007, (20 Dec 2007);

[45] Securities Lending Scheme, 2007

[46]Id. at Annexure 2, Point 6,7.

of the free-float capital or more than 50 crore base value. The client level position limits were fixed at 1% of the MWPL.[47]

Such a precedent was especially useful in preserving the stability of the market while allowing for the benefits of liquidity and appropriate price determination. Therefore, in line with the objectives pursued with SEBI, a ban on naked shorting was deemed appropriate, and was corroborated by the UKs Financial Services Authority.[48]

ii. Eligibility Criteria for the Futures and Options Markets

In 2018, the framework for the Derivatives segment of stocks was reviewed. Essentially, in order to protect the investors against severe market volatility, the eligibility criteria for getting listed on the segment was enhanced.[49]. It included:

- Amongst top 500 stocks (average daily market capitalization or average daily traded value in past 6 months)
- Median quarter sigma order > 25 Lakhs
- Market wide position limit on the stock > 500 crore on daily basis
- Average delivery value > 10 crore on a rolling basis in past 6 months

[47] Supra note 45 at Annexure 2, Point 12.
[48] Annexure-5, Financial Services Authority, "Discussion Paper on Short Selling" 09/1, February 2009 available at: < https://www.sbai.org/wp-content/uploads/2016/04/fsa_short_selling_2009.pdf>
[49]See SEBI, "Review of Framework for Stocks in Derivatives Segment " SEBI/HO/MRD/DP/CIR/P/2018/67, (11 April 2018);

It also clarified the position on naked shorting in the F&O Market, by explicitly mandating physical settlement of stocks.[50] Physical delivery though, has wider a wider ambit of impacts. Analysts have determined that when contracts mandate physical delivery, the short sellers must borrow stocks first from the SLB Market, which is still undeveloped in India.[51]

The combined Position limit, which was released in 2006, was further updated in 2016. The circular established that a 20% MWPL would be applicable.[52] This increased the accessibility of liquidity in the market. However, the cap was not as liberal as to allow for excessive volatility, even in a bear market.

iii. Penalties for Failing to Deliver

To actively deter the non-collection or short collection of margins, SEBI has routinely decided upon frameworks.[53] The applicable guidelines were set forth in 2019.[54], reflecting the nature of regular updates which, when contrasted with the SEC's approach indicates more accountability.

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[50] Supra note 50.

[51]Economic Times, "How physical settlement of stock derivatives is going to impact you"(2 January, 2019) available at <https://economictimes.indiatimes.com/markets/stocks/news/how-physical-settlement-of-stock-derivatives-is-going-to-impact-you/articleshow/67350347.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (last accessed 3 February, 2021).

[52] See SEBI "Review of the position limits available to Stock Brokers/ Foreign Portfolio Investors (FPIs)-Category I & II / Mutual Funds (MFs)for stock derivatives contracts" SEBI/HO/MRD/DP/CIR/P/2016/143, (27 December 2016).

[53]*See SEBI,* "Short-collection/Non-collection of client margins (Derivatives Segments)", CIR/DNPD/7/2011(10 August 2011).

[54] SEBI, "Mechanism for Regular Monitoring of and penalty for short-collection or non-collection of margin from clients", SEBI/HO/CDMRD/DRMP/CIR/P/2016/80, 7thSepember 2019, available at: <https://www.sebi.gov.in/legal/circulars/sep-2016/mechanism-for-regular-

iv. Summary of Monitoring Scheme

The circular[55] requires that initial margins, as appropriate, be collected upfront from the clients by the clearing houses or the approved intermediaries. The members are then to report all short / non- collections to the Exchange on the T+5 day. The remainder of the margins will have to be collected by the members, from their clients, within a period of three days (i.e., deadline is T+2 days).

A penalty was also imposed on the short/non-collection. If collection was not complete by T Day, the penalties would be applicable. It was structured in the following manner:

For each member's short/non-collection of margins from clients per day	Penalty as percentage of the amount of short/non-collection of margins (per client per day)
(<₹ 1 lakh) and (< 10% of the applicable margin)	0.5
(>= ₹ 1 lakh) and (>= 10% of the applicable margin)	1.0

A supplementary penalty was also imposed on not reporting the information to the exchanges. It amounted to 100% of the short/non-collection, in addition to the penalties prescribed above. Thus, SEBI had access to the disclosures on a

monitoring-of-and-penalty-for-short-collection-non-collection-of-margins-from-clients_33145.html>

[55] Supra note 51.

timely basis. In the event of a repeated default, 5% of the shortfall was to be collected. The threshold for the repeated offences in any of the above, was greater than three instances of offence.

Only in exceptional circumstances were exemptions granted to the members. These exceptional stances were also not discretionary decisions of SEBI, unlike the SEC. The Indian framework lays down two pre-conditions of either "*lack of adequate liquidity*" or "*excessive market volatility"* to be present. SEBI may then, on facts and circumstances, allow members to avoid the levy for penalties.

v. SEBI's Risk Averse Nature

However, in times of expected volatility, SEBI has nonetheless moved forward with banning or restricting shot selling. The period between March 2020 to November 2020 being a prime example of it.[56] While alternate measures like a Circuit-Breaking approach was considered by international regulators[57], India has remained risk-averse to protect the potential fluctuations.[58] likely to arise in the market.

[56]Talin Bhardwaj, IndiaCorpLaw, "Banning Short Selling During Financial Crises- An Optimal Approach?" (5 September 2020), available at < https://indiacorplaw.in/2020/09/banning-short-selling-during-financial-crises-an-optimal-approach.html (last accessed 29th January, 2021).

[57] European Securities and Markets Authority, "Opinion of the ESPA on the proposed emergency measure by the Financial Securities and Markets" (15 April 2020), available at https://www.esma.europa.eu/sites/default/files/library/esma70-155--833_opinion_on_fsma_emergency_ measure_under_the_ssr.pdf (last accessed 29 January 2021).

[58]Shah, Palak, The Hindu Businessline, :Massive Short-Selling Prolongs Market Agony"(16 March 2020) available athttps://www.thehindubusinessline.com/markets/stock-markets/massive-short-selling-prolongs-market-agony/article31084600.ece (last accessed 29th January, 2021).

Furthermore, the position on short selling by mutual funds has remained unchanged since 1996. Unlike the United States' SEC, SEBI has often remained active in protecting the interest of layman investors. Therefore, the prohibition of shorting by mutual funds[59], remains in place. A restriction on insurers has also been placed. However, they may lend up to 10% of their securities to short sellers as per IRDA Regulations.[60]

Another instance of the prioritization of this resolution, can be drawn from the transfer of all penalties collected from the Short/Non-Collection scheme to proceed to the Core Settlement Guarantee Fund[61], a corpus which settles trades during defaults.[62]

VIII. CONCLUSION

A. IMPACT ON COMMON INVESTORS

[59] Regulation 45, SEBI (Mutual Funds) Regulations, 1996

[60] Shilpy Sinha, The Economic Times, "IRDA allows insurers to lend securities to the maximum extent of 10%" (16 July 2013), available at https://economictimes.indiatimes.com/irda-allows-insurers-to-lend-securities-to-the-maximum-extent-of-10/articleshow/21083824.cms?from=mdr (last accessed 27th January 2021).

[61] See, SEBI, "Credit of Penalty for short-collection/non-collection of Margins on Commodity Derivatives Segments to Core SGF" SEBI/HO/CDMRD/DRMP/CIR/P/2019/73 (June 20th 2019), available at https://www.sebi.gov.in/legal/circulars/jun-2019/credit-of-penalty-for-short-collection-non-collection-of-margins-on-commodity-derivatives-segments-to-core-sgf_43350.html (last accessed 29 January, 2021).

[62] Economic Times, "SEBI issues new framework for core settlement guarantee fund, non-defaulting members"(3 January 2020), available at: https://economictimes.indiatimes.com/markets/stocks/news/sebi-issues-new-framework-for-core-settlement-guarantee-fund-non-defaulting-members/articleshow/73086550.cms?from=mdr (last accessed 27 January 2021).

The common investors who sought to stay away from the highly volatile market have found little success as the ripple effect have become visible over the market indices. As the hedge funds that were shorting GME were facing unprecedented losses they were forced into selling some of the portfolio in the open market which in turn lowers the value of the stocks that have been sold. This massive selling of stocks to cover their short positions have resulted in a dip in indices such as the S&P 500 and the DOW.[63] The investors who were passively investing in such indices have seen the value of their portfolio fall (ignoring the effects of Dollar Cost Averaging).

B. IMPACT ON INSTITUTIONAL LONG TRADERS

The mainstream media has often reported the GameStop frenzy, as a battle of retail investors against the big wall street where small investors were able to beat the hedge funds at their own game and gain profits in the millions. Although there is some merit in that narrative, it fails to paint reality as is.

Institutional investors made huge gains too; excluding Citron research and Melvin Capitol who lost billions. BlackRock Inc, the world's largest asset manager, is rumoured to have made profits of about $2.4 billion as retail

[63] Levisohn, Barron's, How GameStop's Surge Caused the Stock Market to Drop" available at https://www.barrons.com/articles/how-gamestops-surge-caused-the-stock-market-to-drop-51611772532 (last accessed 26 January, 2021).

investors pushed up the value of $GME.[64] Such institutional traders might have not held the stock as their retail counterparts did causing the value of the stock to fall; this sale would be in addition to the scattered sale of the $GME by the directors of the company – signalling the lack of trust of the management in the company.

C. COMPARATIVE ANALYSIS

Even a brief perusal of the two regulatory frameworks (between the United States and India) makes clear that India enforces more rigorous standards with respect to short sales. The penalties are more stringently applied and are heavier. Investor protection has been granted a higher threshold of importance. The monitoring scheme is more pervasive. But the most significant difference, is the absolute ban on naked shorting in India. This sort of mechanism ensures that the inequities present in the US market do not have scope in India.

D. RECOMMENDATIONS

The current study into the GME short stop frenzy categorically points to the inefficiencies in the US Regulatory system which with its limited resources was not able to sufficiently monitor the proliferation of naked shorts in the open market. In contrast the Indian regulatory authorities can deter short

[64]Reuters, "*BlackRock may have raked in $2.4 bln on GameStop's retail-driven stock frenzy*" (27 January 2021)., available at: <https://www.reuters.com/article/blackrock-investment-gamestop-idUSL4N2K23QG (last accessed 28 January 2021).

squeezes due to the presence of multiple safeguards that ensures that a situation like that of GameStop would not occur in India.

Certain countermeasures that regulatory agencies across the globe could put in place to deter such high degrees of market volatility include:

i. Imposing a blanket ban on the practice of naked shorts. The shorting of a particular stock should in no circumstance exceed 100% of the free float. Regulatory authorities may fix the threshold at a lower rate but should be careful to not reduce the same below the 20% mark to not restrict organic market corrections.

ii. Strengthening the existing circuit breakers in the stock market to minimise the effect of the volatility in a particular stock from having a ripple effect on broad market indices.

iii. Increasing the transparency of the operating procedure of online trading platforms with the objective of preventing trade halts that benefit a party to the detriment of another – as observed in the buying halt imposed by Robinhood.

iv. Imposing mandatory disclosure requirements on online trading platforms. Any conflicting interest of online trading platforms against that of its retail customers, including but not limited to the existence of payment for order flow (PFOF) contracts should be disclosed in a clear and conspicuous manner.

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HOW THE INSOLVENCY AND BANKRUPTCY CODE CREATED A SANCTUARY FOR START-UPs & BUSINESSES IN INDIA

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ABSTRACT

India's Insolvency regime has seen a significant shake-up with the forthcoming of the Insolvency & Bankruptcy Code. The code was an attempt to revive the realm of commerce in India and to do so, it envisioned to strike a balance in the concerted interests of all the stakeholders that are tied to and form a part of a corporeal-commercial entity. This paper aims to highlight how the code, by balancing the interests of various stakeholders, has managed to not only improve the realm of doing business in India but also contribute towards creating a more pro-business and entrepreneurially inclined environment. It will do so by highlighting how smooth transfer of value from dying businesses to new viable ventures has been enabled, how creditors are more ready than ever to fulfil the credit requirements of budding businesses, how promoters are willing to undertake the creation and long-term growth of new businesses, and how employees are committed towards the revival of distressed businesses.

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I. INTRODUCTION

Traditionally 'Insolvency' & 'Bankruptcy' were shallowly understood as the opposite of a booming business; the term was believed to signal the end of someone's commerce who happened to become financially incapacitated to continue his endeavours. The origins of such interpretation can be traced back to Italy, where, according to Justice Heath[1], after a person's vocation that involved money ran out of the "*monie"* or means to run, then that person's occupation was deemed 'broken' and they were prevented from continuing their busted business and had to wind it up[2]. Lord Coke accorded this term to a condition where though one's bank is exhausted; a mark is still left in the form of creditors who then scourge the remnants of the swindler's venture.[3]. Legally speaking, Insolvency simpliciter is the financial state of one's inability to pay off their debts on time.[4] while Bankruptcy is its by-product; the legal process of resolving the Insolvency.[5].

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[1]Judine v. Da Cossen, NR (1805) 1 234.
[2] Barnhart Robert, Etymology: Bankruptcy available at: <https://www.etymonline.com/word/bankrupt> (last visited on Dec 15, 2020) *see also;* Wyzant, Etymology & History: Bankruptcy available at: <https://www.wyzant.com/resources/lessons/english/etymology/words-mod-bankrupt> (last visited on Dec 15, 2020).
[3] William Cooke, A Compendious System of Bankruptcy Laws 1 (Gale Ecco Print Editions, 2nd edn. 1778).
[4]Henry Campbell Black, Black's Law Dictionary 938 (Thomson Reuters West, 14 ed. 1968).
[5]*Id.* at 186.

It is amply clear from above that conventionally Insolvency & Bankruptcy have been juxtaposed with the process of bringing an end to businesses, but this attribution of 'Insolvency' is almost antithetical to the seam of 'doing business', is a huge misconception. Insolvency Laws are not merely to provide for the liquidation of businesses to absolve the undischarged debt, but rather its focus is to create a more robust and productive economy within which not only more new businesses can thrive but also where existing ones can survive. The Insolvency & Bankruptcy Code[6] was enacted as a brainchild of various recommendations & models on this very exact impetus; to eviscerate distressed businesses and maximize the interests of the caught-up creditors and at the same time providing a more conducive and business-friendly environment.

Ease of doing businesses is the penultimate benchmark of any Insolvency Law[7] as it ascertains whether expectations of stakeholders are being met if the economy is productively utilizing its potential and whether a favourable and prosperous environment for businesses is being maintained, and there is no iota of doubt that the code has been a watershed moment in realizing all of that within the Indian economy.

Start-ups or the sensation of new businesses ushering in the market does not just indicate an entrepreneurial trend but also signifies a well-rounded business environment where credit is handily available due to creditors confidence,

[6]The Insolvency & Bankruptcy Code, 2016 (Act 31 of 2016).
[7]Aastha Dass, New Bankruptcy Law to improve ease of doing business available at: <https://www.indiatoday.in/india/story/new-bankruptcy-law-to-improve-ease-of-doing-business-278253-2015-12-21> (last visited on Dec 15, 2020).

promoters are committed to their stakes due to certainty in the survival of their businesses and productivity is maximum due to efficient procedures & high-returns in the reallocation/repurposing process of economic resources i.e., a business environment where interests of all stakeholders are perfectly balanced such that people are inclined to enter and engage into new businesses; thus, start-ups are a demonstrable measurement of ease of doing business.

It is this premise of start-ups/pro-business regime which the essay undertakes with the aim to highlight the "breeze of doing business in India" through the lens of Insolvency Laws and showcase how the Insolvency & Bankruptcy Code has played a key role in promoting entrepreneurship, how it has kept existing businesses intact and how it has been preserving the interests of various stakeholders to facilitate a pro-business economy; all three of which are the facets of the code's objective & purpose[8].

II. EASE OF DOING BUSINESS

In this section, the essay will briefly touch upon how the Insolvency schemes prior to the code were befuddled, making the prospect of carrying business a contrived process and how the code changed the landscape of doing business.

A. Background

The volatility & dynamism of today's business environment demands that businesses keep pace with the changes if they are to subsist in it. Capturing

[8] *Supra* note 6, Preamble.

opportunities is as important as pulling out of threats for businesses to thrive, and to facilitate this, the exit procedures must be as adept as the start-up process, and this necessitates a robust Insolvency scheme[9]. Primordially, the law governing the exit process was as sick as the companies it sought to cure. The regiment of Insolvency Law in India prior to the code was a scattered hotchpotch of several outdated and inordinate legislations with multiple constituted *foras*, all of which unsuccessful. The Board for Industrial & Financial Reconstruction ("**BIFRs**") established under SICKA[10] were narrow in scope & applied only to sick industries with the conclusion of resolution process in a staggering 5.8 years because it lackadaisically left the control of the 'Sick Industry's affairs in the same hands that mismanaged it[11]. The Debt Recovery Tribunals('DRTs') established under the RDDFBI[12] were overwhelmed with the number of pending cases to such a degree that the conversion rate of NPAs was only 14% in 2013[13]. Though the SARFESI[14] incorporated certain extraordinary provisions for better recovery of debts, but they were only limited to Banks & NBFCs and further the realization of NPAs from Asset Reconstruction Companies ("**ARCs**") was just not adequate[15].

[9] Ministry of Corporate Affairs, Report of the Expert Committee on Company Law: Restructuring & Liquidation (2009).
[10]The Sick Industrial Companies (Special Provision) Act, 1985 (Act 1 of 1985).
[11]Rajeswari Sengupta, "Evolution of Insolvency Framework for Non-financial firms in India"6, IGDR WP No. 016-018 (2016).
[12]Recovery of Debts due to Banks & Financial Institutions Act, 1993 (Act 51 of 1993).
[13] Reserve Bank of India, Report on Trends & Progress of Banking in India 2008-2013 (2013).
[14]The Securitization & Asset Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 (Act 54 of 2002).
[15]*Supra* note 9 at 14.

The procedures were so tedious & lengthy that the mismanaged & distressed businesses were left worse off than they were at the initiation of their bankruptcy[16]. Even the Madras High Court in the case of *Bharat Heavy Electricals Ltd. v. Arunchalam Sugar Mills*[17] resounded its resentment with the prevailing Insolvency regime; it attributed its failures to the conflicting parallel schemes of Insolvency & their lack of pro-rehabilitation attitude. And so, the Insolvency & Bankruptcy Code ("**IBC**" or "**the code**")[18] was enacted to sweep in and clean the slate of this marred insolvency regime. Its salience was to provide an umbrella legislation that consolidates the various fragmented Insolvency aws and streamlines the process of debt recovery & restructuring to facilitate timely maximization of everyone is attached interests[19]. Its primary focus was to provide a set of tools to enable rehabilitation & revival as a suitable form of resolving insolvency to keep the spirit of entrepreneurship alive and preserve the maximum value of all enterprises driving the economic wheel.[20]. And the IBC achieves these objectives by adopting a different approach than that of the other Insolvency frameworks[21]; it does not prescribe what the resolution scheme should be, and instead, it shapes and designs what the resolution process ought to be. Instead of controlling the substance of resolution, the IBC controls the institutions facilitating the resolution like the Insolvency Professionals ("**Ips**"), Insolvency

[16]Nimrit Kang &Nitin Nayar, "The Evolution of the Corporate Bankruptcy Law in India"37 I.C.R.A. Bulletin: Money & Finance (2003).
[17](2011) O.S.A No. 58 Mad. 51.
[18]*Supra* note 6.
[19]*Supra* note 8.
[20]Ens Economic Bureau, Insolvency & Bankruptcy Code: A Legislation to promote investments, develop credit markets available at:< https://indianexpress.com/article/india/india-news-india/insolvency-and-bankruptcy-code-a-legislation-to-promote-investments-develop-credit-markets/> (last visited on Dec 16, 2020).
[21]*Supra* note 11.

Professional Agencies ("**IPAs**"), etc. through the Insolvency & Bankruptcy Board of India ('IBBI') and designates the National Company Law Tribunals ("**NCLTs**") to manage & maintain compliance & fairness in the insolvency ecosystem[22].

B. Motility of the Insolvency & Bankruptcy Code

A business entity is an amalgam of numerous stakeholders, all of whom depend on the success and productivity of the enterprise; any negative impact on its existence can set in motion a chain reaction that may have a two-fold negative impact on the linked stakeholders. Up until the enactment, there was no possibility of either an effective revival or an efficient and speedy exit[23]. This meant that distressed businesses under the previous Insolvency regimes instead of being saved were not only wound-up, but the tedium of the winding process also dwindled its value. This wastage of economic value of businesses at two forefronts adversely affected both the businesses and their stakeholders and has only now been ousted by the IBC.

The World Bank's report on Ease of Doing Business showed that India's rank rose from 134th to 130th position in 2016[24] and then again leapt by 71 spaces to

[22] Department of Economic Affairs – Ministry of Finance, Report of the Bankruptcy Law Reforms Committee: Vol 1(2015).
[23] *Supra* note 9 at 10.
[24] World Bank Group: Doing Business Index, 208th Measuring Regulatory Quality & Efficiency (2016) *see also*; Siddharta Srivastava & Kanika Kadam, Bankruptcy Code's Impact on Ease of Doing Business available at:<https://law.asia/bankruptcy-codes-impact-on-ease-of-doing-business/> (last visited on Dec 16, 2020).

63rd position in 2019[25]. This improvement of India's ranking is a demonstration of the code's positive outreach in the Indian economy. The code has sown the seeds of confidence in investors and creditors, thereby significantly improving the financial stability[26]. The code has also ensured that the productivity of enterprises is preserved & restored by focusing on the outlet of maximization of value; this has helped India's resources to always be rechannelled to productive means[27].

The code has also immeasurably overhauled the Insolvency regime in India. Insolvency earlier took an average of 4.3 years for a measly recovery rate of only 20%[28], the code since coming in force has addressed this issue; the recuperation process on average takes 1.6 years with a recovery yield of 49%[29] and the cost of resolution has also been brought down from 9% to 1%[30]. While the span of the insolvency process is still more than the statutory time of 330 days (about 11 months)[31]It, however, cannot be denied that significant ground has been made in the right direction[32]. But the most crucial aspect of the code is that it has cleaned up the convoluted mess of existing

[25]Dipak Mondal, How IBC helped improve India's ease of doing business rankings available at: <https://www.businesstoday.in/current/economy-politics/how-ibc-helped-improve-india-ease-of-doing-business-rankings/story/386544.html> (last visited on Dec 16, 2020).
[26]*Supra* note 20.
[27] Manish Sharma, Moving-up in the Ease of Doing Business available at: <https://www.thehindubusinessline.com/opinion/columns/moving-up-the-ease-of-doing-business-rankings/article24691865.ece> (Dec 18, 2020).
[28]Siddharta Srivastava & Kanika Kadam, Bankruptcy Code's Impact on Ease of Doing Business available at: <https://law.asia/bankruptcy-codes-impact-on-ease-of-doing-business/> (last visited on Dec 18, 2020).
[29]*Supra* note 24.
[30]Dr. Binoy J. Kattadiyil & Prashant Kumar, "Future Path of Pre-Packaged Insolvency Resolution in India" 3(9) IJMER 9 (2020).
[31] The Insolvency & Bankruptcy Code, 2016 (Act 31 of 2016), s. 12(3).
[32]*Supra* note 29.

insolvency provisions by providing a one-stop solution[33]. Multiplicity has been done away with by replacing dozens of laws with this new law, and the courts have also lent a hand by according primacy to the code. The Apex-Court held that the code is an umbrella legislation having an overriding effect on all other legislations and recovery proceedings[34]. This is a significant departure from the old regime; the decision of supremacy of the code ensures that all the hindrances of the previous legislations do not get in the way of the enhancements the code intends to bring.

It is very evident from above that the code has had a positive outlook on the Indian market that has reinforced insolvency framework, as can be seen from the four-places leap in India's rank to 52nd place in the index of Resolving Insolvency[35]. The code thus is a golden reform marking a progressive step in ease of doing business in India.

III. A CODE OF CONCERTED INTERESTS

In the previous section, the essay showcased how the code has created a viable insolvency regime in India. Now the essay will help visualize what utility businesses and their stakeholders have derived from this viability and enhancements in the Insolvency process. Its outlook would be first, on the business entity itself, then on its creditors, thirdly on the debtors and

[33]Divyesh Goyal, Insolvency & Bankruptcy Code 2016 – Ease of Doing Business available at:<https://taxguru.in/corporate-law/insolvency-and-bankruptcy-code-2016-ease-of-doing-business.html> (last visited on Dec 18, 2020).
[34]Innoventive Industries Ltd. v. ICICI Bank, (2017) SC 255.
[35]*Supra* note 24.

promoters, the economy & market itself and lastly, on employees, professionals and other stakeholders.

A. Early Market Exit Strategy

An efficient entry-exit system is paramount for the smooth and steady flow of funds in the economy with minimal wastage of productive resources during the transference[36]. If the stretch of the insolvency process is too long; then the outcome or the recovery would be low because of the loss of value of assets over time.[37]. Freedom in the market is an essential pillar of the economy encompassing the freedom to start a business ('Entry'), to continue the business ('Competition') and to discontinue one ('Exit')[38]. All three enable entrepreneurs to allocate their resources in new ventures; to keep them engaged in productive means, and to remove and reallocate them from unviable businesses, thus ensuring that the country's economic resources are continuously put to efficient use[39].

'Start-ups' are small economic entities that are a result of an innovation with the object to expand that novel idea, but given their nascent stage, they are more exposed to the vulnerability of incurring losses and debt distress due to

[36]Omkar Goswami, The Urgent Need for Fast Bankruptcy available at:<https://indianexpress.com/article/opinion/columns/the-urgent-need-for-fast-bankruptcy/> (last visited on Dec 18, 2020).
[37]*Ibid.*
[38] Insolvency Bankruptcy Board of India - Eco Survey, Freedom to Exit: The Insolvency & Bankruptcy Code builds the third essential feature of Economic Freedom (2017).
[39]*Supra* note 9 at 2.

numerous factors[40]. In such an event, if there is no proper plan to leave in place, there can be severe repercussions on the macroeconomy. If the exit process for a distressed business is a never-ending tedium, then the value of its assets will continue to be shaved off over time and it would be incapable of preserving most of its worth, resulting in less recovery at the end of the resolution[41]. The low yields from the recovery process would severely disincentivize creditors and angel investors from seed funding and entrepreneurs from undertaking new ventures.[42].

"Where I can't exit, I shan't enter"; the purpose of any business is profit turnover, but if the resolution process is such that it practically guarantees low rehabilitation, then so will be the resultant downfall in investments as no rational person would want to engage in business.[43]. The IBC has played a significant role in addressing this. An efficient plan to leave is, in fact, one of its cadres; it offers a market directed timely resolvent of Insolvency by revival or exit. Under the code, a hassle-free expedient insolvency process has been created by eliminating the issue of the previous regime of 'which legislation would be applicable? and in which forum?'[44]; the IBC provides a universal

[40] Department of Industrial Policy & Promotion – Ministry of Commerce & Industry, Annexure – I - Start-up India Action Plan(2017).
[41] Economic National Bureau, Govt. for Simpler entry & exit norms for start-ups, available at: <https://www.thehindu.com/business/Govt-for-simpler-entry-and-exit-norms-for-start-ups/article14001576.ece> (last visited on Dec 27, 2020).
[42]Preeti Balwani, Law & Start-up India Story available at: <https://economictimes.indiatimes.com/small-biz/legal/law-startup-india-story/articleshow/50713362.cms> (last visited on Dec 27, 2020).
[43] Rajeev Chandrasekhar, With the right set of policies, Start-up India can change India's business landscape available at: < https://indianexpress.com/article/blogs/start-up-india-business-entrepreneurs-private-investment/> (last visited on Dec 27, 2020).
[44] India Juris, The Insolvency Bankruptcy Bill available at: <https://www.manupatrafast.in/NewsletterArchives/listing/India%20Juris/2015/Nov/16%20n

insolvency process for all types of business entities under the roof of one single legislation and adjudicatory authority[45]. The resolution period provided has been mandated for competition within 180 days (about 6 months), extendable up to 90 days from the filing the application[46]which is already a considerable improvement from 4.3 years, as seen previously[47]. To ensure that businesses are not trapped in the market due to their failure to register growth, the code has also included the option of a voluntary winding-up process[48]. To further alleviate the market standing of start-ups, the code has special provisions for their easy and early market exit by fast-tracking their winding-up process to only 90 days from filing of application[49] which can be extended by a maximum of 45 days[50]. This has facilitated a speedier market exit, and this easement is bound to increase investments as firms grow more comfortable in this conducive business environment.

B. Satiating the Capital Appetite & Crystalizing the Creditors Rights

The use of credit is a common phenomenon in the landscape of business; today, no one business can survive on its own[51]. Businesses need money now more than ever to withstand the cutthroat competition; there is no single

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ovember%202015-The%20Insolvency%20and%20Bankruptcy%20Bill,%202015.pdf > (Dec 27, 2020).

[45] The Insolvency & Bankruptcy Code, 2016 (Act 31 of 2016), s. 2.

[46]*Id.*, s. 12.

[47]*Supra* note 25.

[48]*Supra* note 45, s. 59.

[49]*Id.*, s. 56(1).

[50]*Id.*, s. 56(2).

[51]Mahua Venkatesh & Jimsy Tapuria, The New Bankruptcy Law will be yielding benefits in the long run available at:<https://www.hindustantimes.com/business/the-new-bankruptcy-law-will-yield-benefits-in-the-long-run/story-ibrKpuU6ehXtcCKuOHwrdI.html> (last visited on Jan 3, 2021).

economy in this world that is not capital-starved or capable of sustaining the requisite financial requirement on its own. And this where credit helps businesses by bridging this gap of funds by uniting the investors with investment to ensure funds are always mobilized and use[52]. Creditors occupy an excessively important role in facilitating the continued survival and running of the business; thus, it becomes necessary for any economy to ensure that the confidence of its creditors is always maintained by ensuring timely repayments and adequate returns on their investment to keep the cycle of credit formation in motion.[53].

It falls on the Insolvency laws to ensure that not only the creditor's rights are properly protected but also translated into adequate realization or returns; if creditors interest and safeguards are in place, not only will it result in more creditors willingly extending financial aid but if the recovery ratio from Insolvency is high it would also make available more funds to be rechannelled in the economy.[54]. Thus, insolvency laws play a huge role in bolstering the capabilities of a market.

In the earlier regime of insolvency laws; even after a firm incapable of repaying its borrowers was successfully declared 'insolvent' or 'sick', the control over the assets of the distressed business remained in the hands of the

[52]Remya Nair & Anil Padmanabhan, Bankruptcy Law will change how business is done: T.K Vishwanathan available at:<https://www.livemint.com/Politics/y2D3JhMNSPKxxS74p1KZCP/Bankruptcy-code-will-change-how-business-is-done-TK-Viswana.html> (last visited on Jan 3, 2021).
[53]Christopher J. Cowton, "Putting Creditors in their Rightful Place – Corporate Governance & Business Ethics"102 J. B. E. 21 27 (2011).
[54]*Supra* note 9 at 2.

debtors who were responsible for that mismanagement in the first place[55]. But under the new code, there has been a considerable power shift; from 'debtors in possession' to 'creditors in control'. After the initiation of insolvency resolution, a committee of creditors ("**CoC**") is constituted, and the code automatically transfers the helm from the erstwhile management to the CoC (to be discussed later), who then call the shots.[56]. This has instilled a significant sense of confidence in the minds of creditors, giving them the assurance that their interests will be intact and not severely affected by the default.

Earlier, as noted by Lord Coke, Bankruptcy was almost synonymous with the phenomenon of deceiving the creditors into believing that the debtor has no means to meet his obligations[57]. It was common for unscrupulous debtors to misappropriate the company's assets right before Insolvency is instituted. The IBC has a crackdown on this mischief as well. The resolution professional has now been empowered to seek redressal from the NCLT when a transaction appears or is asserted by the CoC to have been executed to defraud the creditors.[58]. The code has also fastened Civil[59]& Criminal Liability[60] for directors who execute such fraudulent transaction when they ought to have known that Insolvency was inevitable.

[55]*Supra* note 16.
[56]*Supra* note 45, s. 21.
[57]*Supra* note 3.
[58]' *Supra* note 45, s. 66.
[59]*Ibid.*
[60]*Supra* note 45, s. 69.

Another major improvement of the code is the widened scope of creditors that it protects. The code entitles both operational creditors ('to whom liability arises from a business activity') and financial creditors ('to whom liability is created from an owed debt or loan') to initiate the insolvency process[61]; a welcomed departure from the earlier position under the Companies Act[62]. This inclusion has enabled the supply of unsecured credit in the economy to provide businesses with an easy credit facility for their day-to-day operations[63]; operational creditors provide businesses with short-term unsecured credit at nominal rates to facilitate their operations, thereby providing them with more resources and putting them in a better position to thrive in the market.

It is visible how the enactment of the code has improved the versatility of credit in the market and made it more attractive for investors & creditors. The cocooned protection provided to creditors have made them more willing to advance loans and credit, the safeguards in place by the code has provided much-needed security to the credit advanced, the procedural improvements in the insolvency process have also assured a better recovery of investment resulting in less wastage of capital and more inflow of funds in a market which is saturated with credit requirement.

C. Rescue Culture to Maximize Value

[61]Vatsal Khullar, Report Summary Bankruptcy Law Reforms Committee available at: <https://www.prsindia.org/sites/default/files/bill_files/Report_Summary_-_BLRC_0.pdf> (last visited on Jan 11, 2021).
[62] The Companies Act, 2013 (Act 13 of 2013), s. 254.
[63]*Ibid.*

"Corporate insolvency law is not merely concerned with the death and burial of the company"[64]; the aim of start-ups and in general of businesses is to survive the market; thus, the foremost action of any Insolvency Law should not be liquidation but an attempt to bring the distressed business back to life[65]. As discussed earlier, a business has attached to it the interests of many stakeholders, and any negative action on the business can trigger a domino effect[66].

Promoters and shareholders are the ones responsible for the inception of a company; shouldering all responsibility and extending all efforts and resources to undertake the steps to bring the company into existence[67]. Undoubtedly Insolvency is tough on the debtors who lose control over their business and have their assets liquidated[68] thus the primary concern of any insolvency process should be to see through the possibility of revival. Usually, default by businesses is due to bad judgement call or poor management on the part of promoters and directors; in such a case, the Insolvency can be resolved simply by reorganizing without going into liquidation[69]. Liquidation of the business disintegrates its capacity to create and add value in the future; businesses add to the economy's growth through production & distribution, but if the very

[64] Vanessa Finch, Corporate Insolvency Law: Perspectives & Principles 4 (Cambridge University Press 2nd edn. 2009).
[65] *Ibid.*
[66] Dr M Sahoo, Insolvency and Bankruptcy Code: Why creditors panel must act in best interest of all stakeholders available at: <https://www.financialexpress.com/opinion/insolvency-and-bankruptcy-code-why-creditors-panel-must-act-in-best-interest-of-all-stakeholders/914659/> (last visited on Jan 11, 2021).
[67] *Supra* note 9 at 14.
[68] Douglas G. Baird, "An Overview of the Law & Economics of Financially Distressed Firms"17 Coase-Sandor Institute for Law & Economics, WP: No. 43 (1997).
[69] *Supra* note 22.

soul responsible for creating the productivity is shredded (liquidated), then the substantial future creation of value is foregone to realize the marginal value of today to meet its debt obligations. Thus, any insolvency process should aim for resolution at a low cost by attempting to restore productivity instead of liquidation[70]. This is precisely what the code brings to the table.

As mentioned before, one of the criticisms of the earlier insolvency regimes was its lack of focus on rehabilitation and revival.[71]. Under the code, liquidation has taken a backseat and is sort of a lender's last resort in the spirit of the IBC[72]. The provisions of the IBC do not make revival to be the first option before liquidity but instead make it one of the options to resolve Insolvency; this was due to the opinion that revival is a gamble and not a probable form of resolution and should be mandated only when there appear fair chances of rehabilitation.[73]. Usually, the mode of resolution selected by the CoC is in the domain of commercial wisdom, i.e., presumed to be commercially sound as the aim of creditors is always to maximize recovery value and they know best and will act in that interest thus authorities should cede interference.[74]. The apex court, however, in a subsequent matter, took a more viable approach in the matter of *Arcelor Mittal India Pvt. Ltd v. Satish Kumar Gupta*[75] and stressed that if there is a resolution applicant who can continue to run the corporate debtor's ("**CDs**") business, every effort must be

[70]*Supra,* note 9 at 2.
[71]*Supra* note 16, *see also;* Bharat Heavy Electricals Ltd. v. Arunchalam Sugar Mills, (2011) O.S.A No. 58 Mad 51.
[72]*Supra* note 45, s. 33(1).
[73]*Supra* note 22.
[74] Maharashtra Seamless Limited v. Padmanabhan Venkatesh, (2019) CA: 4242 (SC).
[75]IBJ 2018 1 JP 563 (SC).

made to try and see that this is made possible by the passing on judicially authority. And following this, the courts and NCLTs have repeatedly placed their reliance on this judgement to mandate that CoC's commercial wisdom should be in the interests of all stakeholders, including the CD, and the plan must strike an equitable balance.[76].

The IBC also brings another way to ensure that CDs through Insolvency become exposed by overhauling when an application can be made to initiate Insolvency. Earlier to bring about an application to initiate Insolvency, the sick company must have first accumulated losses matching or exceeding its total value[77]. This meant that by the time defaults had to be absolved, the company was already in an unfitting position for revival, leaving the liquidation as the only viable solution. Whereas under the Companies Act[78] the litmus of Insolvency was a default on the payment of debt exceeding a sum of Rs. 500[79]; this pro-creditor approach was at the expense of the CD, who could face a slew of frivolous claims[80]. The IBC squares off this position harmoniously by fixing the threshold for initiation at a default exceeding 1 Lac in a single debt which is right in the middle of both creditors and debtors' interests[81]. Further to prevent malicious filling, it has also empowered the NCLT to impose penalties[82].

[76] Committee of Creditors of Essar Steel Ltd. through Authorized Signatory v. Satish Kumar Gupta, (2019) CA: 8776-67.
[77] The Sick Industrial Companies (Special Provision) Act, 1985 (Act 1 of 1985), s. 3(1)(ga).
[78]The Companies Act, 1956 (Act 1 of 1956).
[79]*Id.,* s. 434.
[80]*Supra* note 22.
[81]*Supra* note 45, s. 4.
[82]*Id*, s. 65.

Another way the code sees through that the insolvency results in the preservation of the promoter's business is through the exclusivity of the CoC. Under the code, only the financial creditors can be part of the CoC; this is a deliberate move for two reasons: Firstly, the operation creditors are less acquainted with the intricacies of Insolvency and secondly, the incapability of operational creditors to favourably compromise for the benefit of all stakeholders; a bank is more palpable to reduce its interest rate for the CD than a supplier to reduce its pricing feasibly for the goods consigned[83].

Thus, the code, while overtly for the benefit of creditors, nevertheless has taken several measures to protect the debtors to the extent of making it a responsibility of the resolution professional to ensure that the intrinsic value of the debtor's business is preserved[84]. It has ensured that the value of all stakeholders is maximized in the long run. It has also minimized the insolvency costs making entrepreneurs more inclined to enter and set up new businesses[85].

D. Securing the Associated Interests

The employees and workers often share a common interest with the business; their relationship is almost symbiotic; both are dependent on each other. Insolvency disturbs this process and often results in loss of employment and

[83]Shubham Patel &Shikhar Tandon, "Corporate Rescue Regime: Perspective, Analysis & Lessons" 4(1)RFMLR (2017).
[84]*Supra,* note 22.
[85]Leora Klapperet et.al, "Entry regulation as a barrier to entrepreneurship"82 JFE 591, 608 (2006).

abdication of due wages. It is true that a business's success is attributed to the efforts and challenging work of its employees; but if the insolvency process is such that it does not take into consideration the interests of the employees, then it can have a negative impact on all the other stakeholders[86]. If employees feel their jobs and remuneration are not secured, they would be less inclined to work when they expect their organization to be at the brink of Insolvency, which would only further accentuate distraught for the distressed business resulting in even more falls in its value.

This is exactly why the code also weighs the employees and workers' interests in its framework. It declares employees with outstanding wages as operational creditors of the company to ensure that their claims and interests are also reflected and resolved from the resolution plan.[87]. It also accords priority to payment of wages of employees & workers of the preceding 24 months (about 2 years) as on par with the debts of the secured creditors.[88]. And even the courts have given their interests primacy by declaring that pleas challenging the employees' claims as alien to the (Corporate Insolvency Resolution Process ("**CIRP**") is not maintainable and that employees are on par with operational creditors with the same rights and powers.[89].

[86] *Supra* note 22.
[87] *Supra* note 45, s. 5(20).
[88] *Id*, s. 53(1)(b).
[89] Mr. N Subramanian v. M/s Aruna Hotels Limited, (2018) CP 597.

IV. CONCLUSION

It is very evident that the IBC has embarked on an attempt to balance the interests of all stakeholders in cooperation. The code has carefully weighed in the interconnected relationship between a business, its creditors, its promoters, employees & workers, and the economic wellbeing of the state and imbued the legislation with provisions that seek to cater and protect their linked stake. Not only does the code have remedial measures for the concerted benefit of all, but it has also significantly overhauled the milieu of doing business in India.

It can be inferred that the code was formulated with twin objects in mind; to undo the problems of the previous Insolvency regime and to further inject rampant development in the economy and its various institutions. It is undoubtedly clear that the provisions of the code have kept the ordeal of eradicating the infirmities of the prior insolvency legislations in its closed fists and provided a viable one-stop solution to the plaquing problem of Insolvency & Bankruptcy. The statement of objects of the code states that its purpose is to bolster entrepreneurship, expand investment, develop a conducive credit market and sow the seeds of ease in doing business and presently the legislation provides enough reasons and routes to realize the same; it would indeed be an understatement to say that the code has in fact revitalized the economy and the start-up regime within it.

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THE CONUNDRUM OF ENFORCEABILITY OF INVESTMENT ARBITRAL AWARDS – ANALYSING INDIA'S POSITION THROUGH THE LENS OF VODAFONE CASE

Aditi Tripathi and Aditi Singh[*]

ABSTRACT

Vodafone announced that it had won an arbitration dispute against India in September 2020. The tribunal has ordered India to stop its demand for retrospective tax from Vodafone and to pay Rs. 80 Crores as costs. However, considering India's long-standing unwillingness to enforce investment treaty awards, Vodafone might need to enforce the award. Hence, the limelight has shifted onto the law concerning enforcing investment arbitral awards in India. Considering these events, the paper seeks to discuss three key issues. The first issue deals with the current status quo regarding the enforcement of investment arbitral awards. The second issue deals with the applicability of the Arbitration and Conciliation Act, 1996 to enforce investment treaty awards. The third issue analyses the diverse ways in which Vodafone can enforce the award against India. It also seeks to discuss the difficulties and advantages of the many ways it can employ to enforce the award. The paper concludes by charting the treacherous and

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tumultuous road ahead for the Indian enforcement regime regarding investment arbitral awards.

Keywords*: Investment Treaty Arbitration, Enforcement, Vodafone, International Investment Court, Arbitration.*

I. INTRODUCTION

Investment Treaty Arbitration ("**ITA**") is a disputed field of law because it is regulated by the state's sovereign power. Investment Treaty often shifts the power of scrutiny of the national policies of the government from the national courts to an international tribunal. This shift of power is the prime reason governments drift away from an investor-oriented approach.[1] To regulate the investment from foreign entities and to resolve conflicts, states opt for a Bilateral Investment Treaty ("**BIT**"). A BIT is rightly regarded as "the most important protection" that can be provided to the investor for bearing the risk. It works as an international regulatory mechanism for sustaining corporate governance across several jurisdictions.[2] BITs often prove effective in settling investor-state disputes.[3] However, problems arise when an award from such a mechanism is to be enforced in a domestic jurisdiction, like, India.

[1] Prabhas Ranjan, "Definition of Investment in Bilateral Investment Treaties of South Asian Countries and Regulatory Discretion", 26(2) J. Int'l Arb.217, 225-226 (2009); Gus Van Harten & Martin Loughlin, "Investment Treaty Arbitration as Species of Global Investment Law", 17(1) Eur. J. Int'l Law Rev. 121, 145-148 (2006).

[2] Rudolph Dolzer & Christopher Schreuer, "Principles of International Investment Law 20" (Oxford University Press, 2nd ed. 2012).

[3] Bilateral Investment Treaties 1959-1999, UNCTAD (September 26, 2020 11:00 am) https://unctad.org/en/docs/poiteiiad2.en.pdf.

The "recognition and enforcement of foreign arbitral awards" is effectively regulated by the provisions of the Arbitration and Conciliation Act, 1996 ("**the Act**").[4] The Act covers "international commercial arbitration" ("**ICA**") but the Act stands at crossroads when it comes to ITA.[5] An investment regime that fails to recognize the rights and duties is futile. This problem is further exacerbated when India's ambiguous history while enforcing ITAs is considered. This grey area of investment law requires urgent attention considering the unrest and unwillingness of foreign investors to invest in India.[6]

To emphasize the abovementioned issue, the paper consists of the ensuing parts. In **Part II** of the paper, the authors aim to retrace the few instances of the rendezvous of the national courts with enforcement of investment treaty awards. This part deals with the reasoning expounded by the Indian Courts and their effect on the law regarding enforcement of the investment awards. Having analysed the status of India concerning the judicial application of mind and the objective of the executive, the authors have turned to the Act in **Part III** wherein the question regarding whether the Act applies towards enforcement of investment treaty awards is answered. The Section also analyses how can we extend the ambit of the Act to include investment treaties in its ambit and the difficulties that will be faced even if the investment awards

[4] Arbitration and Conciliation Act, 1996 (Act 26 of 1996), s. 44.
[5]Prabhas Ranjan& Deepak Raju, "The Enforceability of Investment Treaty Arbitration Awards in India", 6 AsJCL (ii) (2011).
[6] "COVID- 19: Foreign Investors rush to exit India; withdraw USD 6.4 billion in March quarter", Indian Express, May 19, 2020, https://www.newindianexpress.com/business/2020/may/19/covid-19-foreign-investors-rush-to-exit-india-withdraw-usd-64-billion-in-march-quarter-2145343.html.

are included in the gamut of the Act. **Part IV** is a case study of the recent Vodafone award passed by the Permanent Court of Arbitration and analyses the potential course of actions for the parties involved. **Part V** examines the future of enforcement mechanisms by breaking down the idea of how enforcement mechanisms could flourish under the auspices of an International Investment Court. Part **VI** concludes with the discussion on the road which lies ahead regarding the issue of enforcement of investment treaty award in India.

II. CURRENT STATUS QUO OF THE ENFORCEMENT REGIME OF INDIAN INVESTMENT LAW

It is imperative to understand that India relies on the BITs for the resolution of investment disputes. Beginning from the late 1990s till the early 2010s, India signed and enforced 81 BITs.[7] In the year of 2015, the Indian Government released a new Model BIT, which was made enforceable in 2016 ("**Model BIT 2016**"). Thereafter, it terminated 59 of the previous BITs and entered negotiations with the other 25 countries to release joint interpretative texts to remove ambiguity from the text of the previous BIT. India's stance to take such a hasty step was due to the case of *White Industries,*[8] wherein due to the inordinate delay caused by Indian courts, the Court enforced the arbitral award granted in favour of White Industries. The Supreme Court of India, in this case, enforced an arbitral award directing India to pay compensation.

[7] India, Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india.

[8] White Industries Australia Limited v. The Republic of India, Final Award, https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf.

Therefore, to avoid paying such a huge amount of compensation again, India propounded the new Model BIT.

Having regard to the BIT regime, the disputes that arose out of these treaties have been settled out of court. The others which are or will be awarded against India, there arises a need to enforce them in the territory of India. The Apex Court of the country did not have an opportunity to rule anything concrete, therefore contradictory High Court judgments exist on this issue.[9]

In the judgment of the *Board of Trustees of the Port of Kolkata v. Louis Dreyfus SAS,*[10] the French investor, Louis Dreyfus signed a contract with the Port Trust of Kolkata to operate and maintain certain berths in Kolkata Port. Apart from initiating proceedings under this contract, Louis Dreyfus commenced a distinct investment treaty dispute as per the India-France BIT of 1997 which was administered by UNCITRAL Rules. The case was filed at Calcutta High Court ("**HC**") to obtain an anti-arbitration injunction concerning the proceedings initiated by LDA under the BIT.[11]

This case validated the application of the Act on ITAs on the reasoning that the Act was founded on the "United Nations Commission on International

[9]Siddharth S. Aatreya, "Can Investment Arbitral Awards be Enforced in India?", Kluwer Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2019/04/04/can-investment-arbitral-awards-be-enforced-in-india/ (last visited on Oct 1, 2020)
[10] Board of Trustees of the Port of Kolkata v. Louis Dreyfus SAS, G.A. 1997 of 2014, CS No. 220 of 2014, 29 September 2014.
[11]Ibid.

Trade Law"[12] ("**UNCITRAL Model Law**") and it considers all the treaty arbitration disputes irrespective of their nature. Respecting the principle of minimal interference, the Court refused to interfere in the investment claims.[13] If we give regards to this ruling and incorporate investment disputes within the Act, then that would eventually lead to enforcement of ITAs under the Act.

However, there is a contrasting decision of *Khaitan Holdings*[14] delivered by the Delhi High Court, where they refused to incline with the rationale adopted by the Calcutta High Court and held that the proceedings under the BITs are different from commercial arbitrations and therefore, they must not be governed on the same pedestal and thus, they fail to fall under the Act.[15] This case reaffirmed the stance taken in *Vodafone's Case*[16] where the Court stated that *"though the BIPA constitutes an arbitration agreement between a private investor on the one side and the host State on the other, yet it is neither an International Commercial Arbitration governed by the Arbitration and Conciliation Act, 1996 nor a domestic arbitration.*"[17]. The reasoning behind denying the applicability of the 1996 Act was due to the nature of the

[12]United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, G.A. Res. 40/72, U.N. Doc.A/RES/40/72 (Dec. 11, 1985), as amended by G.A Res. 61/33, U.N. Doc.A/RES/61/33 (Dec. 18, 2006).
[13]Bhushan Satish &Shreyas Jayasimha, "Indian Court's First Brush with Investment Treaty Arbitration: Taking Some Lessons from Calcutta High Court", Kluwer Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2015/03/16/indian-courts-first-brush-with-investment-treaty-arbitration-taking-some-lessons-from-the-calcutta-high-court/ (last accessed on Oct 5, 2020).
[14]Union of India v. Khaitan Holdings (Mauritius) Ltd. CS (OS) 46/2019 I. As. 1235/2019 & 1238/2019, 29 Jan 2019.
[15]Ibid.
[16] Union of India v. Vodafone Group PLC United Kingdom, CS (OS) 383/2017 & I.A. No. 9460/2017, 7 May 2018.
[17]Id. at ¶89.

relationship between the parties involved in investment arbitration, that is, an investor and a State. Such relationships are regulated by treaties and fall within the domain of 'Public International Law'. Investor-state arbitration does not consider the relationship between two private individuals but only considers a state's breach of its treaty obligation. Thus, it cannot be termed as 'commercial' in nature and it is not within the ambit of the Act.[18]

Interestingly, in the *Vodafone* case, when the defendant had contended that the Courts had no jurisdiction over matters arising out of BIT, the Court gave jurisdiction to itself on the basis that it could only enforce the awards under the BITs if it had jurisdiction to hear the disputes arising out of the BIT. Therefore, though the Courts opposed the application of the Act to investment arbitration, yet they have not ruled out the possibility of enforcing the awards in some other manner.[19]

Therefore, we see that the High Courts in India have not agreed on adjudicating the application of the Act to a dispute relating to an investment treaty. This has led to a lacuna of law and uncertainty with regards to enforcing investment awards. Both the High Courts have also failed to give concrete reasons as to why the investment arbitrations can be included or excluded from the ambit of the Act.

[18]Kshama A Loya & Moazzam Khan, "Enforcement of BIT Awards at Bay in India as the Courts rule out the Applicability of the Arbitration and Conciliation Act, 1996", Asian Dispute Rev. (Jan 2020).
[19] Supra note 16.

Even though the decision delivered by the Calcutta HC was "pro-arbitration" in general and "pro-investment arbitration", yet it provided no clear picture as to whether the Act would include the enforcement stage of ITA within its ambit. Further, it failed to analyse the subsequent challenges the award can encounter while being enforced, like that of public policy. Contrarily, the Delhi High Court failed to appreciate the broad ambit of the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards."[20] ("**New York Convention**" or the "**NYC**") and failed to give regards to the investor's rights and fill the vacuum in law.

Having analysed the judicial precedents in India, it is safely concluded that the position concerning enforcement of investment awards is nebulous.

From an international perspective, it can be observed that Britain has undertaken a markedly contrary perspective from the Delhi HC and is like the Calcutta High Court's approach. In *Occidental Exploration and Production Company v. the Republic of Ecuador*,[21] the Court ruled that the national courts exercise jurisdiction to adjudicate on the challenges about ITAs under the English Arbitration Act, 1996, which were previously only held applicable to commercial arbitrations. This was further acknowledged in the case of *GPF GP S.à.r.l. v. Republic of Poland*.[22]

[20]Convention on Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 38 (1959).
[21]The Republic of Ecuador v. Occidental exploration & Production Co., (2005) EWHC 774 (Comm.).
[22] GPF GP S.à.r.l. v. Republic of Poland, SCC Case No. V 2014/168.

The judiciary in Singapore has given similar judgments to the Calcutta HC and has proceeded to exercise jurisdiction over ITA under the International Arbitration Act, which is the domestic arbitration act of the country.[23]

Hence, it can be observed that internationally several jurisdictions have resorted to their domestic commercial arbitration mechanism and have recognized and enforced the awards accordingly. It is therefore imperative that India should also explore the possibility of using its domestic regulatory arbitration mechanism to give effect to the investment awards.

III. ARBITRATION AND CONCILIATION ACT – AN INCLUSIVE APPROACH

A. Application of the 1996 Act to ITAs

It is noteworthy that India is not a State party to the "Convention on the Settlement of Investment Disputes between States and Nationals of Other States" ("**ICSID Convention**"). Consequently, India has no obligation to recognize and enforce ICSID Awards and treat them like final judgments of their courts.[24] In such a scenario, NYC remains the only multilateral treaty through which foreign arbitral awards can be enforced and to which India is a party. Consequently, investors can only enforce ITA awards against India with the help of the NYC under Part II of the 1996 Act.

[23]Kingdom of Lesotho v. Swissbourgh Diamond Mines (Pty) Ltd, (Cap 143A, 2002 Rev Ed).
[24] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159, art. 54(1).

The Act comprises of two parts. Part I is applied to domestic arbitrations,[25] and is inapplicable to foreign awards.[26] Thus, it is not within the scope of this paper. Part II elucidates regarding the enforcement of Foreign Awards.

Section 44 of the Act provides that Part II exclusively pertains to foreign arbitral awards wherein the association of the parties must be "commercial" within the meaning of the prevailing Indian Law.[27] This requirement under Section 44 arises because India opted for the "commercial reservation" when acceding to NYC. The reservation postulates that the NYC will be applicable "*only to differences arising out of legal relationship.... that is considered commercial under the national law*".[28] Thus, to enforce an ITA under the Act, it is imperative to prove that the investment dispute arises out of a commercial relationship.

In this part of the paper, the co-authors posit that considering numerous factors, as discussed below, it can be concluded that investment disputes fall within the ambit of a commercial relationship. The consideration factors are:

i) Interpretation of "commercial" within Indian Law

The term "commercial" is not defined in the 1996 Act. Thus, we may refer to judicial precedents and other legislations to ascertain the connotation of the word "commercial" as seen under the prevailing Indian law.

[25] Arbitration and Conciliation Act, 1996 (Act No. 26 of 1996), s. 2(2).
[26] Bharat Aluminium Co v. Kaiser Aluminium Technical Services, (2012) 9 SCC 552 (India).
[27] Arbitration and Conciliation Act, 1996 (Act No. 26 of 1996), s. 44.
[28] India, Declarations and Reservations, Contracting States, New York Arbitration Convention (June 10, 1958), available at http://www.newyorkconvention.org/countries.

In *Union of India v. Lief Hoegh & Co. (Norway),* the Gujarat High Court held:

> *"(The term 'commerce') is a word of the largest import and takes in its sweep all the businesses and trade transactions in any of their forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of different countries."*[29]

Therefore, it is observed that a wide interpretation has been given to encompass all types of commercial transactions. Yet, a criticism can be raised that such a definition only includes "*citizens of different countries*" and does not talk about States as a party. To ascertain whether a State can be a party to a commercial transaction or not, we may refer to the only place under Indian Law wherein the phrase "commercial dispute" has been defined, i.e., Section 2(1)(c) of the Commercial Courts Act, 2015.[30] This section has enumerated numerous types of disputes which qualify to be a commercial dispute. The Explanation to Section 2(1)(c) has stated that if a party to a dispute is a State, even then it will still be a commercial dispute. Thus, in investor-state arbitrations, merely because a country is a party will not annul the element that the dispute stems from a commercial relationship.

[29]Union of India v. Lief Hoegh & Co. (Norway), AIR 1983 Guj 34.
[30] The Commercial Courts Act, 2016 (Act No. 4 of 2016), s. 2(1)(c).

Additionally, it is noteworthy that the parties to an investor-state arbitration satisfy the requirements under Section 2(1)(f) of the Act to be considered as an "International Commercial Arbitration" ("**ICA**") as per the Act.[31] Section 2(1)(f) provides that at least one party to an ICA must be either an individual or a body corporate or the Government of any foreign country. It can be observed that an investor-state arbitration when it comes to enforcement in front of Indian Courts will invariably have one of the parties as an individual or a body corporate or a Government of a foreign nation. Thus, investor-state arbitrations can fit within the definition of ICA under the Act.

Moreover, it is noteworthy that the Act is founded upon the Model Law, and the Apex Court has often referred to the definitions in Model Law to interpret the Act.[32] For example, in *RM Investment & Trading Co Pvt Ltd (India) v. Boeing Company,* the Apex Court had considered the interpretation of the word "commercial" as per Article 1(1) of the Model Law to hold that the word 'commercial' must be "*construed broadly having regard to the manifold activities which are an integral part of international trade today".*[33] Thus, it will be helpful to refer to the meaning of "commercial" under the Model Law. This definition includes "investment" within the scope of being regarded as a commercial relationship, irrespective of whether it is contractual or not.[34] Hence, even the scheme of the Act and past judicial interpretations support the

[31] Arbitration and Conciliation Act, 1996 (Act No. 26 of 1996), s. 2(1)(f).
[32]Reliance Industries Ltd. v. Union of India, (2014) 11 SCC 576.
[33]1994 SCC (4) 541.
[34]United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, G.A. Res. 40/72, U.N. Doc.A/RES/40/72 (Dec. 11, 1985), as amended by G.A Res. 61/33, U.N. Doc.A/RES/61/33 (Dec. 18, 2006).

proposition that an investment dispute emanates out of a commercial relationship as per Section 44 of the Act.

ii) "Commercial reservation" under the BIT

It is imperative to consider the scope of "commercial reservation" under the NYC through its usage by other countries. For example, Norway has also opted for the "commercial reservation" while clarifying that the NYC would be inapplicable to disputes where the subject matter is related to immovable property.[35] This shows that the intent behind Norway choosing for the commercial reservation is to exclude non-commercial disputes from the ambit of the NYC.

Further, the drafting history of the NYC shows that the "commercial reservation" was brought forth for civil law countries where it is important to differentiate between commercial and non-commercial transactions.[36] This indicates that the purpose of the "commercial reservation" was not to exclude investment disputes from its ambit.

It is noteworthy that Article 27 of India's Model BIT 2016, titled "Finality and Enforcement of Awards", states that whenever a dispute is submitted to arbitration under the BIT then it would be held as arising out of a "commercial relationship for Article I" of the NYC. This is done to fulfil the terms of the

[35]Dispute Settlement: Commercial Arbitration, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Status of Signatories, http://www.sice.oas.org/dispute/comarb/uncitral/nysig3_e.asp.
[36]Dr. Reinmar Wolff (ed.), New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary 81 (Hardback, 2012).

"commercial reservation" under NYC.[37] This Model BIT has been followed by India while signing the Belarus-India BIT[38] and India- Kyrgyz BIT[39] and is also like the Cuba-Mexico BIT[40] and the United States Model BIT.[41] Hence, any award passed under the BIT will be enforceable under the Act (read with NYC) as Article 27 lends the presumption that the investment disputes will be considered a commercial relationship. Thus, the objective of the Indian Parliament is to equate investment disputes to commercial disputes for enforcement.

iii) Flawed Basis of differentiating between commercial and investment disputes in Vodafone

The Court in the *Vodafone* case has pointed out:

> *"Investment Arbitration disputes are fundamentally different from commercial disputes as the cause of action (whether contractual or not) is grounded on State*

[37] India Model BIT, Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download.

[38] Belarus-India BIT (2018), Investment Policy Hub, https://investmentpolicy.unctad.org/international-investmentagreements/treaty-files/5724/download.

[39] India - Kyrgyzstan BIT (2019), Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5993/download.

[40] Cuba - Mexico BIT (2001), Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/909/download.

[41] United States Model BIT (2012), Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2870/download.

> *guarantees and assurances (and are not commercial). The roots of Investment Arbitrations are in public international law, obligations of State and administrative law."*[42]

While the authors do not deny that State guarantees and assurances are the basis of investment arbitration, yet it cannot be denied that investments comprise huge amounts of money[43] and are often made according to an underlying investor-state commercial relationship.[44] For example, in the Constitution of India, Article 298 empowers the Union of India or the States to enter into contractual obligations to carry out trade and business.[45] Giving due regard to Article 298 of the Constitution of India, India can contract commercially wherein the State assurances offered by India are in the form of commercial obligations domestically, which may appear to be treaty obligations internationally.[46] Therefore, the authors posit that the differentiation offered in the *Vodafone* case is flawed and the Act should be held applicable to investment arbitrations.

Having analysed the application of the Act to the investor-state dispute enforcement mechanism, we shall now investigate the underlying problems that India will encounter even if the Act is held to apply to the enforcement system.

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[42] Supra note 16.
[43]N. Rubins, "The Allocation of Costs and Attorney's Fees in Investor-State Arbitration", 18 ICSID Foreign Invest. LJ 109, 125 (2003).
[44]Prabhash Ranjan & Deepak Raju, "The Enigma of Enforceability of Investment Treaty Arbitration Awards in India", 6 AsJCL (ii) (2011).
[45] The Constitution of India, art. 298.
[46]Supra note 44.

B. The Problems with the application of the Act - The unruly horse of Public Policy

Even if the investment disputes come within the ambit of being commercial, certain problems will persist. Section 48 of the Act (inspired by Article V of the NYC) lays down the "Conditions for Enforcement of Foreign Awards".[47] This Section provides the grounds to challenge the enforcement of the Foreign Award. Section 48(1) discusses jurisdictional issues, procedural irregularity, and issues related to fair proceedings and compliance of the parties with the terms of the arbitration agreement between them. Section 48(2) provides that a foreign award can be held to be non-enforceable on the rationale of public policy and non-arbitrability of the subject matter.

We shall focus on the issue of public policy as a judicial intervention has widened its scope by complicating the law surrounding non-enforcement in a complicated web of conflicting judicial decisions and legislative amendments. In investment treaty awards, there is always a possibility of huge economic loss for the host state if the award is rendered against them and therefore, the host state can resort to public policy to resist the enforcement of such awards.

The test for public policy was propounded in the landmark *Renusagar* case. The Court laid down three grounds on which a foreign award could be said to be in opposition to the public policy of India: "(*i) Fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality"*.[48] The first and third grounds of the *Renusagar* test have since been adopted verbatim

[47] Arbitration and Conciliation Act, 1996 (Act No. 26 of 1996), s. 48.
[48]Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644 (India).

in Explanation 1 to Section 48(2) of the Act. In the absence of any authoritative definition of public policy in the Act, the *Renusagar* test acts as the cornerstone for challenging the enforcement of any foreign arbitral award.

After *Renusagar,* the real problems with the public policy doctrine became apparent. Due to the unstructured nature of the doctrine, it was left open for the judiciary to play around with the meaning, nature, and scope of the doctrine according to their wishes. This downward spiral into the misuse of the public policy exception started with the case of ONGC *v. Saw Pipes,*[49]where the Apex Court defined the ambit of public policy to encompass the ground of 'patent illegality. Thereafter, the tale of the evolution of public policy took a dark turn with Bhatia *International v. Bulk Trading SA,*[50]wherein the Court's decision to effectively dissolve the difference between national and international arbitration meant that the expanded public policy doctrine as used in domestic awards would now also be used in foreign awards. These decisions opened the doors to oppose any and every foreign award on the of public policy, which sometimes even led to legitimate foreign awards being held unenforceable in India.[51] Another case that widened the usage of the doctrine and negatively impacted the enforcement regime of foreign awards in India was the case of *Oil & Natural Gas Corporation Ltd. v. Western Geco International Ltd*.,[52] wherein the Court added the 'Wednesbury principle of reasonableness' as being one of the grounds of the doctrine. Even after these judgments were rectified through legislative amendments (like the 2015

[49](2003) 5 SCC 705.
[50](2002) 4 SCC 105.
[51] Venture Global v. Satyam Computers Services Ltd., AIR 2008 SC 1061.
[52](2014) 9 SCC 263.

Amendment Act[53]) and further judicial pronouncements,[54] yet as the clarifications were only prospective many cases are ongoing in the domestic Courts wherein the expanded definition of public policy is still in use.

However, a transformation in the approach of the Indian legal circle towards the public policy doctrine has been observed in the past few years. The Indian Courts have adopted a pro-arbitration and a pro-enforcement stance beginning from the time of *Shri Lal Mahal Ltd. v. Progetto Grano Spa*.[55] The Court followed *Renusagar* to hold that public policy can only be read narrowly within the contours of the Act. In February 2020, in *Vijay Karia,*[56] the judiciary expanded the jurisprudence on Article V of the NYC by stating that a certain judicial discretion exists with the Courts to enforce foreign awards even if certain grounds of non-enforcement have been established. It was further held that a mere law cannot be said to be equivalent to the public policy of India. Thus, it can be said that *Karia* cautions against using the public policy exception indiscriminately.

After the *Karia* case, it would be easy to assume that all the problems regarding the public policy exception have been resolved. Yet, that was not the case. This is because the meaning of "public policy" is not codified, as of yet. This results in the occasional case wherein the Courts do not enforce an award on the reason of public policy due to their own perceived belief about the

[53]Arbitration and Conciliation (Amendment) Act, 2015 (No. 3 of 2016).
[54] Bharat Aluminium Co. v. Kaiser Aluminium Technical Services, (2012) 9 SCC 552.
[55]Shri Lal Mahal Ltd. v. Progetto Grano Spa, (2014) 2 SCC 433 (India).
[56]Vijay Karia & Ors. v. Prysmian Cavi E Sistemi Srl & Ors., 2020 SCC OnLine SC 177 (India).

meaning of the phrase. This has been exemplified in the case of *NAFED v. Alimenta*.[57] This case came a mere two months after *Vijay Karia's* judgment, and yet its ratio was completely different from *Karia*'s. Firstly, the Court completely ignored *Karia* and only referred to cases that came before *Karia*. Secondly, the Court held a foreign arbitral award to be unenforceable on the rationale of public policy by stating that the case involved the export of a particular commodity and the government did not permit the export, thus, the enforcement would be against the public policy of India. Herein the Court has equated any Indian law as being equivalent to the public policy of India, which is inherently a wrong position and is in direct opposition to *Karia's* judgment.

Interestingly, after *NAFED*, the Supreme Court went back to the Vijay Karia position in *Centrotrade Minerals & Metals Inc. v. Hindustan Copper Limited*[58] wherein they reiterated the judgment of Karia and enforced the foreign arbitral award. This shows that *NAFED* could be a one-off judgment. However, considering the economic aspects involved in investment treaty arbitration, the risk posited by the unstable meaning of public policy could scare off the investors and be a detriment to the economic condition of India.[59]

[57]National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A, (2020) SCC Online 381 (India).
[58]Centrotrade Minerals & Metals Inc. v,\. Hindustan Copper Limited., Civil Appeal No. 2562 of 2006, decided on June 2, 2020.
[59] Supra note 44.

IV. CASE STUDY – THE FUTURE OF ENFORCEMENT IN RENUSAGAR CASE

The question of enforcement becomes pertinent due to the latest case of *Vodafone.* The infamous 'retrospective taxation case'[60] was finally decided by the Permanent Court of Arbitration and announced by Vodafone on September 25, 2020.

The PCA, in a unanimous decision, ruled that the retrospective imposition of a tax of Rs. 22,100crores as capital gains and withholding of the tax imposed on Vodafone was in breach of the 'fair and equitable principle' and ruled that India should not pursue the tax demand anymore and was liable to pay Rs. 85 crores as the costs, Rs. 45 crores for the tax collected by Vodafone and Rs. 40 crore as administrative charges of the Tribunal.

The historical background of this matter is traced back to 2007 when Vodafone bought 67% shares in Hutchison including its business and other assets in India. In the same year, the Indian Government enlarged the tax demand and withheld the tax by pointing out that Vodafone should have deducted TDS before making payment to Hutchison Whampoa. This notice was challenged by Vodafone in a petition at Bombay High Court which ruled against it. This decision was however overruled by the Apex Court in 2012 when Vodafone challenged the order given by the Bombay High Court. The

[60] A. Keyal & P.R. Advani, "The Vodafone Judgement – Wider Concerns of Withholding Tax Under the Income Tax Act", 3 NUJS L. Rev. 511 (2010).

Apex Court ruled that Vodafone was not liable to pay taxes for stake purchases.[61]

In an interesting turn of events, the Government amended the Finance Act in 2012 itself giving powers to the Income Tax Department to retrospectively impose a tax on such stake purchases and deals. This led to the liability once again being shifted upon Vodafone to pay taxes. After this, all attempts between the Government and Vodafone to settle the dispute were in vain. Vodafone then resorted to the India-Netherlands BIT of 1995 and invoked Clause 9 of the BIT.[62] The arbitration proceedings commenced at the Hague, where the Tribunal decided in favour of Vodafone.

The ruling in the case is significant for primarily two reasons. *Firstly*, it is indicative of the setback that the retrospective taxation policies may encounter because the decision raises the possibility that similar cases pending under arbitration may be decided similarly. *Secondly*, the enforcement of this award shall be significant while determining the future of India's stance while enforcing ITAs.

[61]Aashish Aaryan, Aanchal Magazine & Pranav Mukul, "Rs. 22,100 crore tax: Hague courts back Vodafone, govt eyes legal options", Indian Express, Sept 26, 2020, https://indianexpress.com/article/business/companies/vodafone-wins-arbitration-against-govt-in-rs-22100-crore-retrospective-tax-case-6610623/.

[62]Netherlands-India BIT (1995), Investment Policy Hub, art. 9, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1940/india---netherlands-bit-1995-

Article 9 of the BIT says that "any dispute between an investor of one contracting party and the other contracting party in connection with an investment in the territory of the other contracting party shall as far as possible be settled amicably through negotiations".

The Government of India's stand adds to the precariousness regarding the future of the case. The Government is unwilling to pay back any amount and implement the ruling and thus, it is highly likely that Vodafone will have to go to the Indian Courts to enforce the award.

In this section, we shall analyse the future of enforcement of the Vodafone Case in the light of the various viable options that can potentially be relevant.

A. An Analysis of enforcement under Arbitration and Conciliation Act, 1996

Considering the unwillingness of the Government of India to back off from its position of imposing the taxes to the tune of Rs 22,100 crores, the most probable outcome is that Vodafone will need to approach Indian courts for enforcing the award. The Court will need to decide if the Act will be applicable on investment arbitrations or not. Two situations arise. Firstly, the Court establishes that it could be held applicable, and second, the Court holds that the Act will not be applicable. In this part of the paper, we will be dealing with the former situation by taking the presumption that the Act applies to ITAs. We will elaborate upon the latter option in the next part of the paper.

Under the present Indian arbitration regime, the application of the Act will be the most favourable outcome for Vodafone as they can use the pro-arbitration and pro-enforcement precedents of the Supreme Court, such as *Vijay Karia*[63],

[63] Supra note 56.

which are commercial arbitration cases. Additionally, Vodafone could take advantage of the *Renusagar* judgment which states that:

> *"Act is calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration and any expression or phrase occurring therein should receive, consistent with its literal and grammatical sense, a liberal construction."*[64]

Thus, applying the ratio of *Renusagar* to the instant case of Vodafone, it follows that as the deal between Vodafone and Hutchinson was towards the benefit of international trade, then the Act should provide for a speedy dispute settlement through enforcing it quickly.

Yet, the "unruly horse" of public policy could stand as a hurdle in Vodafone's enforcement battles. Considering the economic downturn caused by COVID-19, depriving India of more taxes by Vodafone could be seen as being against the public policy of India.

In *NAFED*, the Court has in effect held a mere export policy equivalent to the "fundamental policy of India".[65] In Vodafone, the enforcement of the award would in essence mean violating the provision of the Income-tax Act, 1961 through which the retrospective tax liability was imposed on Vodafone. If we

[64] Supra note 48.
[65] Supra note 57.

apply *NAFED's* ratio to the Vodafone case, then there is a possibility that the Court might hold the Income-tax Act, 1961 to be equivalent to the fundamental policy of India.

Further, in *Renusagar's* case, the Court held a foreign arbitral award to be unenforceable on account that such enforcement would violate the provisions of the Foreign Exchange Regulation Act, 1973 which was enacted by the Legislature to serve "national economic interest" through the process of conservation of foreign exchange.[66] Similarly, in *Vodafone*, the Court might hold the Income-tax Act, 1961 to constitute as serving "national economic interest" as it is fiscal legislation that directly affects the revenue of the Government. The situation could even be exacerbated by the fact that due to COVID-19. India is experiencing an economic downturn. Hence, the Courts might consider this factor as well that enforcing the award could be held to be against India's welfare.

Such a situation might unfold if the Courts in India use the provisions of the Act to enforce investment arbitral awards. However, considering the history of Indian Courts with the enforcement mechanism, there is a possibility that the Courts might not interpret the Act accordingly. Therefore, the rest of the headings hereinafter explore the avenues for Vodafone if the Act is held to be inapplicable.

[66]Supra note 48.

B. Resorting to the Code of Civil Procedure, 1908

It is often asserted that if not through the Act, other legislations can offer relief to the investment award holder, like, the Code of Civil Procedure, 1908 ("**CPC**").[67] The Code provides for the execution of foreign judgment or decree by a foreign court. But it is plain that BIT awards do not qualify to be considered as 'judgment or decree' as defined under the Code, nor can the arbitrational tribunal delivering the judgment be classified as 'Court' in India.[68] Due to the absence of a judgement to date giving such an expansive interpretation to the provision, it is unlikely that such interpretation will be produced by the Courts. However, to accord a relief in the presence of the legal vacuum, a beneficial interpretation of this procedural law is required. Consequently, it would potentially open doors for a way to enforce the awards.

C. Targeting Assets outside India

If the Courts hold the Act and CPC to be inapplicable, then the award holder will have to resort to other alternative means by which the award can enforce in India. One of the most legitimate avenues for a BIT award holder is to locate the assets of the losing party outside the jurisdiction of that party in another jurisdiction, which has a positive record regarding enforcement of BIT.[69] Investors can look for Indian assets in countries with robust

[67]Code of Civil Procedure, 1908 (Act No. 05 of 1908), ss. 2(5), 2(6), 13, 14, 44, 44A.
[68] Supra note 16; Supra note 14.
[69]Kshama A Loya & Moazzam Khan, "Enforcement of BIT Awards at Bay in India at the Bay as the Courts rule out the Applicability of the Arbitration and Conciliation Act, 1996", Asian Dispute Rev. (Jan 2020).

mechanisms for arbitration like Australia, France, Japan, etc, given that the states are signatories to the NYC.[70]

However, if India does not decide to appeal, it will need to give a payment of an amount of Rs. 85 crores. The substance of the award lies in prohibiting the Indian Government from demanding taxes. In such a case, where the award requires affirmative or cooperative conduct of the party, it becomes difficult to avail such an option for enforcement and payment of damages that can be done by locating the assets of India outside the jurisdiction of India. It becomes imperative to explore other ventures through which the future of the enforcement regime can be ascertained.

D. Creating International Obligations

One way to enforce the awards, though a harsh step, is to impose liability under the "Draft Articles for Responsibilities of State under for Internationally Wrongful Acts, 2001" ("**ARSIWA**").[71] The states who have ratified the NYC allow the foreign awards to be recognized and enforced in the local courts, which leads to the efficient execution of the awards.[72] If we accept the proposition that investment awards are included within the domain of foreign awards and the domestic courts are disinclined to enforce it, then under ARSIWA the countries can be liable for the conduct of its domestic courts.

[70]Ibid.
[71] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, art.4, Supplement No. 10, A/56/49(Vol. I)/Corr. 4.
[72]Convention on Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 38 (1959).

Therefore, if the judiciary in the domestic jurisdiction is unwilling to comply with obligations to adhere to the principles of NYC and recognize the foreign award, then in such a scenario the state can be responsible for violating the standards of the NYC, the international treaty in question.[73]

One may argue that according to the principle of Separation of Power, the conduct of one organ of the State (here, the judiciary) cannot be attributed to the other organs.[74] The twentieth-century international scholars argued that since the national courts or judiciary do not represent the will of the state, they cannot be considered on the same pedestal as the legislation and they must be exempted from the scope of ARSIWA.[75] However, the current position is that a State's judiciary is an instrumentality of the State and is indistinguishable from it.[76]

To ensure fair, just treatment and ensure equality to foreigners in a country is a duty under customary international law.[77]Therefore, the duty to provide justice through a proper judicial system is the responsibility of the state. Extending

[73]Claudia Prem, "International Investment Treaty Arbitration as a Potential Check for Domestic Courts Refusing Enforcement of Foreign Awards"10 N.Y.U. J. L. & Bus.189 (2013).
[74] Responsibility of the States for Internationally Wrongful Acts, Report of the Commission on its 56th Session, April 23- June 1, July 2- Aug 10, 2001, U.N. Doc. A/56/10; UN GAOR, 56th Session, Supp. No. 10 at 43 (2001); Jan Paulsson, Denial of Justice in International Law 39 (Cambridge University Press, 2005).
[75]Thomas Baty, The Canons of International Law 127-128 (1930).
[76] Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62, 87 (April 29).
[77] Gus Van Harten, Investment Treaty Arbitration and Public Law, (Oxford University Press, 2007).

the analogy, the Courts in India must foster a proper judicial environment to provide a platform for enforcement of investment awards.

However, such a claim requires an extremely high threshold. For instance, in White *Industries,*[78] the Tribunal ruled that there is a high threshold to establish that there has been 'denial of justice' than a claim under 'effective means' standards. The tribunal noted that in addition to exhaustion of local remedies, there must be "*a demonstration of a particularly serious shortcoming and egregious conduct that shocks, or at least surprises, a sense of judicial propriety.*"[79] Hence, it is problematic to prove the presence of denial of justice by the behaviour of domestic courts.

Though attributing liability to the state in this manner is indeed a harsh and unconventional step but attaching an international obligation can make domestic jurisdictions act fairly while dealing with the interests of the investors.

Having studied the various routes available for Vodafone to enforce the award, we can ascertain that the future of the enforcement regime in India and the Vodafone case is nebulous. A study of the award shall have to wait until it is made publicly available. Whether India will appeal, or will it struggle against the enforcement of awards on public policy is yet a question that future

[78]White Industries Australia Limited v. The Republic of India, Final Award, https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf; Patricia Nacimiento& Sven Lange, *"*Case Comment- White Industries Australia Ltd. v. The Republic of India*"*, 27(2) ICSID REV. 274, 279-280 (2012).
[79]Id. at ¶5.2.12.

beholds but the key takeaway is that India being a country that values rule of law must honour its international obligations regarding this. It is important that the era of 'tax terrorism' should end and government policies must aim at creating investor-friendly conditions so that the taxpayer is not directed to pay reimbursement costs or damages for such awards.

V. INTERNATIONAL INVESTMENT COURT - AN ANSWER TO THE QUESTION OF ENFORCEMENT

Scholars like Gus van Harten have propounded the proposition of an international investment court.[80] The idea was mooted on the basis that international investment law forms a part of "Public International Law" and therefore arbitration based on a treaty-based model is a form of public law adjudication falling under the umbrella of public law.[81] In our opinion, the rationale behind such an idea is that there is an apparent bias in the construction of BITs in the first place. The Model BIT 2016 is accused of being more favourable to the state than to that of the parties. Secondly, there is also an apparent bias regarding the structure or the conduct of the arbitration proceedings wherein the arbitrators are usually labelled as biased and in favour of the investors, which further shakes the faith of the state in such institutions.[82] Lastly, the lack of enforcement mechanism in many developing

[80]Gus Van Harten, "Investment Treaty Arbitration and Public Law", (Oxford University Press, 2007).
[81]Ibid.
[82]Aravamudhan Ulaganathan Ravindran, "International Investment Law and Developing Economies: The Good, Bad and Comme CI, CommeCa", 2(1) IJAL (2013).

countries makes it difficult for the investor to have certainty with regards to the protection of their rights and interest.

These components bring forth the loopholes in the current model of dispute resolution mechanism. In this light, the investment court can become a centralized institute for the above-mentioned purpose.

However, this model too suffers from certain flaws. Firstly, the model makes a narrow distinction between the role of judges and arbitrators. In the ever-growing commercial world, corporations look for speedy and flexible methods for the resolution of disputes. The establishment of a court that works on the lines of a litigating forum may discourage investors to opt for such forums.

Secondly, the success of international courts and bodies is contingent on the cooperation of States.[83] When the states are already reluctant to enforce the awards in their national territory because of reason that it is detrimental to their domestic affairs and economy, it is unlikely that they might concede to an institution giving away the share of their sovereignty. The non-binding nature of international institutions is another reason the scheme of international investment courts might not work out. The formation of an investment court would not accelerate the pace of enforcement of the awards until and unless the governments accept such a framework.

[83]Van Harten, G, *"*A Case for an International Investment Court", Society of International Economic Law, Inaugural Conference Paper 22/08 (2008).

Furthermore, pertinent questions like structure and skeleton of the Court, whether the Court will be multiregional or regional, whether it would be an appellate body to hear matters from the tribunals or a court of the first instance, whether the institution would be an autonomous body, or it will be created within the scope of existing institutions are difficult to be agreed upon and might takes years to be decided. It is considering the urgent demands that we need a robust mechanism that can ingeniously counter contemporary problems.

Therefore, the idea of a separate international investment court will not address the problem of enforcement of awards completely.

VI. CONCLUSION – THE ROAD AHEAD FOR INDIA

The investment regime in India after the Model BIT 2016 presents an interesting situation for India concerning the investor-state dispute resolution mechanism.[84] Even though the treaty provides for an enforcement mechanism, it is argued by many to be a less investor-friendly treaty. India has also been reluctant to enter BITs with other jurisdictions further shaking the faith of the investors regarding the policies of India.[85]

[84]Prabhas Ranjan & Pushkar Anand, "The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction", 38 NW J. Int'l L. & B. 1-2 (2017).

[85]ShrutiIyer, "Redefining Investment Regime in India: Post White Industries", 14 J. World Invest. & Trade 595 (2013).

Since India has around 17 pending investment arbitrations[86] against it which includes some cases like *Cairn Energy*[87] and *Vedanta*[88] that involve the issue of imposition of retroactive taxes which can adversely impact the reserves of India if the awards are passed against India.

In this background, it is essential to define the future of the Indian investment regime. However, what we need to consider first is whether India requires an investment regime considering the current situation. India has acquired the status of an economic hub that offers a very lucrative market for investors to come and invest in the country to earn humongous profits. There is no denying the fact that since the pandemic, developing countries have been facing a slowdown in their economic growth, and therefore they are wary regarding the kind of protection they must grant to the investors, and more emphasis is paid on promoting the local products and services. In these times, inspiration can be drawn from the Brazilian Model. Brazil has invited a lot of foreign investment without being a part of the traditional investment regime.[89] Another example could be China, which invests and receives investments from the United States without having a BIT signed between the two.[90] Australia has singled out of

[86]India's Portfolio regarding Investor-State Dispute, https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india.

[87]Crain Energy PLC and Crain UK Holdings Limited (CUHL) v. Government of India, PCA Case No. 2016-7, https://www.italaw.com/cases/5709.

[88]Resources PLC v. India, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/733/vedanta-v-india.

[89]Jeswald W Salacuse, "BIT by BIT: The Growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries", 24 Int'l Law. 655, 673-675 (1990); *See Also*: Hallward-Driemeier, World Bank, *"*Do Bilateral Investment Treaties Attract FDI? Only a BIT… and they could bite*"* (2003).

[90] Ibid.

the mechanism and has nullified all the treaties and has decided that the domestic court shall be the last resort.[91]

However, India cannot extract itself completely from the existing investment regime as the disputes pending before the institutions based on the older BITs will anyway have to come to their fate. The existence of the 'sunset clause' in the older BITs further complicates the issue.[92] However, the cautious nature of the Indian Government while entering BITs signals towards a drift of India from the established investment arbitration regime.

Having said that, the shift might not be as smooth as one might expect. India is now a capital-exporting country apart from just being a capital-importing country. A shift in India's position is bound to impact the Indian investors in foreign countries. Also, this shift does not help India regarding the pending disputes in previous BITs. In case India opts for such a withdrawal in the future, it has to make sure that the primary and domestic legal framework for regulating investor-state relations must be based on a strong moral and policy basis.[93] The legislature also must provide a certain level of clarity and certainty to the investors by providing a stable legislative and supervisory

[91] Ibid.
[92]Netherlands-India BIT (1995,) Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1940/india---netherlands-bit-1995-.
[93]"Public Statement on the International Investment Regime" (31 August 2010), Osgoode Hall Statement.

framework for the investment to flow in the country.[94] The domestic justice system must be for benefit of not only domestic but foreign investors as well.

[94]Anujay Shrivastava & Kaustaubh Kapoor, "Significance of International Investment Arbitration in India's Effort toward instituting a robust regulatory regime", 11 Indian J. Int'l Econ.82 (2019).

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THE PARADOXICAL RIGHTS OF LABOUR vis-a-vis EMPLOYERS: WHAT MAKES INDIA A GLOBAL HUB FOR INVESTMENT

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ABSTRACT

This paper aims to comprehend the various aspects of labour laws in the country by determining and analysing its pros as well as cons. The authors discuss how India has the potential to rise as a global manufacturing hub by attracting investments from companies and players from around the globe. Due to the onset of Covid-19 and major disruptions in the global supply chain, many countries are planning to reduce their dependency on China, and this is a great opportunity for India to become a manufacturing hub by attracting innovations and start-ups globally. An examination into the initiatives and measures taken by the Indian government in boosting the investment levels in the country is undertaken by the authors. The paper also goes around discussing the new labour regulations 2020 and how it was the best opportunity for the government to amend the loopholes in the previous act and include the vulnerable informal sector groups into some

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chapter of social security and benefits and how the government missed and made the situation even worse in some aspects either by exclusions or by tweaking the already weakly implemented. The authors also examine the recent migrant crisis which had become global news. Lastly, the authors go on to discuss the plight of these workers and how the pandemic affected and impacted them the most in all aspects of life.

Keywords: *Global manufacturing hub, investments, labour regulations, informal sector, migrant crisis.*

I. INTRODUCTION

India is one of the fastest-growing economies in the world and is only second to China when it comes to favourite investment destinations for other companies as well as countries. This growth pattern in the economy has opened new avenues and ventures for all kinds of new small and big business ideas and innovations. With abundant resources in the country along with cheap and easily accessible labour, India has now become the hotspot for foreign investments. Several big companies have already set up their manufacturing unit in India and this is also aided by the policies and measures taken by the Indian government like the ease of doing business, 100% FDI and open regulatory environment. With a constant flow of investment along with an abundant and skilled workforce as well as a huge domestic market, India ticks all the boxes for being the next industrial powerhouse when its true potential is tapped.

II. POTENTIAL GROWTH OF THE INDIAN MARKET

India was touted as an emerging market in the previous decade, with a population of one billion-plus citizen calling it their home, the potential for consumption that exists remains untapped and the prospects of growth, because of this consumption is limitless. With the recent changes brought about in the labour regulations in India in 2019 and middle of 2020, differing views and opinions have been forwarded by eminent economists and analysts regarding the new opportunities, either hailing it as the platform that will enable India to become a hub for investment and global business ventures or the view that such dilution of labour laws would shift the balance in favour of the employers which might worsen the situations of skilled as well as daily wage labourers, inadvertently worsening the economic situation by a stagnating workforce ailed by numerous afflictions. Although the risks abound, Foreign Direct Investment (FDI) flow into the country has increased from the same time in the last quarter to 13%, stumping other countries, whose FDI flows have seen lows like that of the 90s[1].

India faced an economic downturn after the pandemic and its woes beset the world and the global economy at the beginning of 2020. The prospects of a recession seemed very high after the first quarter, Q1 of the GDP showed a contraction of -23.9%[2] but the contraction in the Gross Domestic Product (GDP) figures of the second quarter, Q2, at -7.5%[3], which indeed looks like

[1] Kirtika Suneja, FDI into India rose 13% in 2020 while global inflows sunk to lows seen in the '90s, ET Bureau available at: http://www.ecoti.in/-0dxMY20 (last visited on Jan 26, 2021).

[2] Ministry of Statistics & Programme Implementation, Estimates of Gross Domestic Product for the First Quarter (April-June) of 2020-21 available at: https://pib.gov.in/PressReleasePage.aspx?PRID=1650021 (last visited on Jan 5, 2021).

[3] Ministry of Statistics & Programme Implementation, Estimates of Gross Domestic Product for the Second Quarter (July-September) of 2020-21 available at: https://pib.gov.in/Pressreleaseshare.aspx?PRID=1676486 (last visited on Jan 5, 2021).

a V-shaped recovery, seem to indicate that such fears were unsubstantiated and reaffirmed the attraction of the Indian market as a highly profitable investment opportunity.

A. Factors affecting Investment in India

As we know, multiple factors need to be considered while setting up a business, such as proximity to source materials or the final market, infrastructure for logistics, and so on. The labourer-Employer relationship is not the sole factor that affects investment in India[4]. Therefore, domestic and foreign investors consider all the varied factors before investing in a market since each factor has its own set of repercussions that weigh in on the final product or service so being delivered in the form of increased costs, which are either borne by the business or the consumer, or sometimes in the form of decreased quality, as a form of cost-saving measure to keep the prices low to make it more accessible to the consumer. Sometimes the cost-cutting measures are insignificant but in certain circumstances stand out as glaring omissions. For instance, many automobile companies preferred removing airbags from entry-level variants of their vehicles, cutting costs and making them affordable but at the same time endangering their customers, albeit in rare circumstances.

Let us investigate some of the factors and analyse them according to their availability or non-availability in the Indian Market:

[4] World Bank Enterprise Surveys (ES), Enterprise Surveys data for India available at: https://www.enterprisesurveys.org/en/data/exploreeconomies/2014/india (last visited on Dec 12, 2021).

i. Infrastructure

Good infrastructure is the driving fuel of a country's economic growth. It boosts the supply capacity of the market or an economy. Infrastructure refers to the basic needs and facilities which are essential for the smooth process of production, distribution, manufacturing, and supply of goods and services in an economy or a market. Infrastructure can broadly be divided into 5 main categories.[5], namely:

i. Rural Infrastructure: Irrigation, Canals and Mandis, etc;
ii. Urban Infrastructure: Telecom, Internet, Sanitization, Sewerage, etc;
iii. Core Infrastructure: Roads, Railways, Ports, etc;
iv. Social Infrastructure: Basic healthcare, education, and housing facilities.
v. Land Intensive Infrastructure: Facilities like Special Economic Zones (SEZs), Townships, and IT Parks.

Indian Infrastructure was dismal at the beginning of the 21st century but now it has seen a marked improvement. The nationwide power outages that still plague our neighbour Pakistan are things of the past; imagine running an establishment that needs to make the most of a single day's work with fixed wages, being forced to suspend work due to energy being unavailable. Although it cannot be said that infrastructure has been fully developed, but the

[5] NPTEL Courses, Module 1: Introduction to Infrastructure Economics available at: https://nptel.ac.in/content/storage2/courses/109106089/module%201.pdf (last visited on Jan 28, 2021).

government has realized its importance and made it its priority by allocating funds. Private players, both international as well as domestic, have been awarded contracts in India. By 2022, India is eyed at becoming the third largest construction market at the global level[6].

The costs of manufacturing include the price of the raw materials as well as the costs incurred in transporting them to the manufacturing plant, the cost of labour, taxes, and finally costs associated with transporting the goods to the marketplace. Better transport and logistics will also bring into the workforce more labourers when their area comes into the sphere of the company, expanding the pool of available workforce. Further, the setting up of SEZs and IT parks where companies are exempted from certain taxes is attractive to investors and compels companies to set up establishments there.

Infrastructure has now become one of the keys focuses of the Indian Government. According to the Union Budget of 2020-2021[7], Rs. 72,216 Cr was allocated to the Ministry of Railways to network throughout the country. In 2017, 9%[8] of India's GDP was due to the construction industry.

ii. Skilled Workforce:

[6]Navadha Pandey, India to be the 3rd largest construction market by 2030, Hindu Business line Report available at: https://www.thehindubusinessline.com/news/real-estate/india-to-be-3rd-largest-construction-market-globally-by-2030-report/article9008113.ece (last visited on Jan 28, 2021).

[7] Ministry of Finance, Union Budget available at: https://www.indiabudget.gov.in/ (last visited on Jan 28, 2021).

[8]Statista, Share of Construction Infrastructure spending as a part of India's GDP in FY 2008-17 available at: https://www.statista.com/statistics/726485/india-share-of-construction-infrastructure-spending-in-gdp/ (last visited on Jan 22, 2021).

A stable government with strong economic growth and robust domestic demands along with the abundance of a young and skilled workforce is one of the reasons for the growth of local investments and FDI in the country.

India is the most populated country in the world after China and hence has large manpower. The prestige of Indian colleges and the skilled workers they churn out is an accepted fact. Most companies find it profitable to invest in India, the biggest factor behind it being cheap labour (cheap even compared to China's), while IT companies also employ a large number of graduates. Every year India adds 4.7million people to its workforce[9]. A productive workforce helps in making a business strong and reliable and the resources can be allocated in a better manner with performance trackers and quality interactions.

iii. Domestic Market

India is the only market that is open to every company, provided they conform to regulations, with a population of over a billion. Facebook[10] and WhatsApp have their largest user base in India[11].It is by far safe to say that India provides a particularly good blend of a promising domestic market opportunity. The Indian economy has been amongst the fastest growing economies of the world over the last decade and with more people entering the middle class,

[9] Sabina Dewan, Only 4.75 million join the workforce annually in India, not 12 million as claimed, The New Indian Express available at: https://www.newindianexpress.com/nation/2018/may/22/only-475-million-join-workforce-annually-in-india-not-12-million-as-claimed-1817846.html (last visited on Jan 22, 2021).

[10]Statista, Leading countries based on Facebook audience size as of January 2021 available at: https://www.statista.com/statistics/268136/top-15-countries-based-on-number-of-facebook-users/ (last visited on Jan 22, 2021).

[11]Statista, Leading countries based on number of WhatsApp users in 2019 available at: https://www.statista.com/statistics/289778/countries-with-the-most-facebook-users/ (last visited on Jan 22, 2021).

consumption has increased, particularly in FMCG and consumer goods. The government's objective now is to make India a 5 trillion-dollar economy by 2025[12]. The high growth of the Indian market has increased the purchasing power of the country. Companies from all around the world are now finding it profitable to invest in the Indian market and to tap into the full potential of this rapidly growing market and economy. With good international relations with world economies, India is a hub for investments from other nations and companies.

iv. Open Regulatory Environment

When it comes to openness and accessibility, the Indian market can be said to be the most attractive hotspot for start-ups from all around the world. According to the World Investment Report 2020 of UNCTAD[13], India was spotted in the 9th position in the list of top 20 global recipients of FDI. The present government has made ease of doing business a centre point of their focus and such steps and initiatives are helping India to achieve the status of being an economic powerhouse around the globe. The digital revolution taking place in India along with the implementation of GST in 2017, which is a uniform indirect tax system launched in India, has accelerated the growth of start-ups since businesses now have to conform to a single regulatory framework for taxes. According to the Global Start-up Ecosystem Report

[12] Viral Jani, India Inc: A One-stop for Global start-up, Entrepreneur India available at: https://www.entrepreneur.com/article/323614 (last visited on Jan 28, 2021)

[13] M.M Sury, Why are foreign investors making a beeline to invest in India : 10 reasons, Times Now News available at: https://www.timesnownews.com/business-economy/economy/article/why-are-foreign-investors-making-a-beeline-to-invest-in-india-india-10-reasons/692238 (last visited on Jan 28, 2021).

(GSER) 2020[14], two of the Indian cities were named among the top 100 most favourable ecosystems globally to build and expand a start-up venture.

Thus, India's massive workforce along with demographic, infrastructure, and economic functioning suggest that the future of the labour-intensive industry lies here and it will aid India in attracting massive amounts of investments, domestic as well as international.

B. Government Initiatives to attract Investments

The Indian government had early on realized the potential of its market and had started several programs or initiatives to enable an ecosystem that makes it easy to conduct business in the country and to attract investments. It was helmed by investor summits, CEO meetings on foreign trips, and regulatory changes. After Huawei fallout with the US and its allies along with the trade war, investors had already been wary about China and its totalitarian government. On account of the Covid-19 crisis and the accompanying fallout against China, the huge disarray in the global supply chain made companies realize their dependency on China and have hence sought alternative destinations, offering a golden opportunity for India to attract potential investors around the globe. The government initiatives can now help in capitalizing on this opportunity to boost capital flow into the country. Some of the illustrious initiatives that can help attract investments are;

[14] Startup Genome, The Global Startup Ecosystem Report 2020 (GSER 2020), Top 100 Emerging Ecosystems available at: https://startupgenome.com/report/gser2020) (last visited on Jan 4, 2021).

i. *Make in India*

This program was initiated by Prime Minister Narendra Modi in September 2014 as a part of a nation-building policy. The main concept of this program is to transform India into a global manufacturing hub. India has been recognized as an emerging market and this initiative seeks to aid India and its growth along with the expansion of the economy. The main objectives of this campaign are to create more employment opportunities in the country, to facilitate investments from around the world, to enhance developmental skills, and enable the transfer of value, providing India with the cutting-edge technology of contemporary times. This would in effect impart skill and value to the workforce, improve wages and augment social mobility. The program covers 25 sectors of the economy with key sectors being, the automotive sector wherein many global carmakers such as Suzuki, Honda, Volkswagen have set up their manufacturing units in India[15]. This sector contributes to over 12% of India's total GDP[16]. The next main sector of focus is the Electronics system design and manufacturing which aids the Digital India campaign. The National Policy on Electronics aims to improve the quality of design `to compete globally and produce a billion handsets for companies like Panasonic and Mitsubishi by 2025[17]. The third most important sector in Renewable energy. India's vast potential for renewable energy is still untapped and it has been pledged that about 40% of energy needs will be derived from renewable

[15]AyushVerma, Success of Make in India, Ipleaders blog available at: https://blog.ipleaders.in/success-make-in-india (last visited on Jan 28, 2021).
[16] Make in India, Six superstars boosting Make in India available at: http://www.makeinindia.com/six-superstar-sectors-boosting-make-in-india (last visited on Jan 28, 2021).
[17]Tojo Jose, What is NPE 2019?, Indian Economy available at: https://www.indianeconomy.net/splclassroom/national-policy-electronics-npe-2019/ (last visited on Jan 28, 2021).

sources by 2030[18]. The next focus sector is the Roads and Railways sector wherein the year 2018-19 was said to be the "year of construction" and various landmark projects like Eastern and Western Peripheral Expressway, Setu Bharatam, and Bharatmala Pariyojana, etc were undertaken. The fifth most important sector was Pharmaceuticals and Food Processing. India is one of the biggest producers of Pharmaceuticals and exports nearly 50% of its produce. Food processing under the Make in India campaign has assisted 135 cold chain projects and 7 major food parks are in operation[19].

ii. Skill India

This was an important initiative by the Indian Government to boost investment levels in the country by providing adequate training to 40 crore youth in different market-relevant skills to open up more job opportunities in the country and turning the unskilled abundant workforce into skilled labourers. It has been observed that companies that recruit graduates still end up providing them training to adjust better to their work demands. This has provided skill courses that can be classified into 5 main categories, namely: management and development programs, entrepreneurship, skill development, and promotion of micro-enterprises. With proper skill development, the youth of India can have access to better paying and more promising job opportunities

[18]NitiAayog, Reports of the expert group on 175 GW RE by 2022 available at: https://niti.gov.in/writereaddata/files/writereaddata/files/document_publication/report-175-GW-RE.pdf (last visited on Jan 28, 2021).

[19] Sector survey food processing, Make in India available at: https://www.makeinindia.com/article/-/v/sector-survey-food-processing (last visited Jan.28, 2021).

and can ultimately give optimum outcomes at a quicker pace, improving the wage per capita, and increasing demand as a result of expenditure.

Several other programs like Digital India, Vocal for Local, Housing for all, Smart cities among numerous others have been initiated by the government to double up the investments in India and to make the country a hub for manufacturing and innovations as well as small start-ups. To facilitate it all, specific focus has been placed upon the technology and infrastructure of the country to reach its long-term goals.

III. LABOURER-EMPLOYER RELATIONSHIP, ITS IMPACT & THE NEED FOR CHANGE

The integration of India in the world economy after the economic reforms in 1991 had a significant impact on the world labour market. Along with China, India represents a third of the world's labour workforce.

While clarity on the regulations that govern businesses is necessary for an investor seeking to invest, unfortunately when it comes to labour laws, there existed certain ambiguities that governed the relationship between an employer and an employee since around 44 Central labour laws were in existence that covered this relationship, along with the numerous amendments made to the central codes by the states since labour regulations are a subject in the concurrent list of the Constitution. Certain ambiguities that existed such as the ambiguity in the definition of ‘worker’ or even ‘wages’ which differed in 100 different State laws, inhibit investment since it required being adequately well versed with the different regulations and reduced transparency making it

difficult to figure out which laws apply where, which in turn would require companies to resort to legal consultants, consequently driving up costs incurred while setting up a business. Contrast this with China, where the national law is universally applied. Although provinces can make their laws in China, they have to conform to the national policy, therefore company strategists have a basic idea about what to expect while formulating their business idea[20].

To bring about parity and consistency in the different laws, the Government of India helmed by the NDA, sought to ambitiously consolidate the different laws into four distinct codes, namely (i) The Code on Wages 2019, (ii) Industrial Relations Code 2020, (iii) Occupational Safety and Hazards Code 2020 and finally the Social Security Code, 2020, which bring under their umbrella all the 1,458 laws about these subjects, covering them under 480 laws[21].

A. Patchy legislation

While other economies have updated their labour laws from time to time to keep up with contemporary practices, India's labour laws are decades old and take a piecemeal approach while approaching various aspects of the labour-employer relationship. This patchy framework enables businesses to take advantage of the loopholes and arbitrary exclusions that are a result of lax policy-making on part of the lawmakers, some of which still stand

[20] A Guide to China's Labour Law available at: https://www.hrone.com/china-labour-law/ (last visited on Jan 18, 2021).
[21] Labour reforms: Future-ready but devils of detail lie in states available at: https://www.orfonline.org/expert-speak/labour-reforms-future-ready-but-devils-of-detail-lie-in-states-74490/ (last visited on Jan 21, 2021).

unaddressed in these new codes. For instance, excluding the law's application to labourers in certain fields, like section 2(6) of the Code of Social Security, which retains the previous threshold of a minimum of 10 workers on-site for its application, while at the same time excluding "personal residential construction work" from its purview, which employs a large share of labourers. Similarly, section 2(82) retains the definition of a waged worker, which even the Standing Committee had suggested be removed. Another aspect that has not been addressed is maternity leave which was not and is still not universal. Also, the Code on Occupational Safety, Health, and Working Conditions has excluded agriculture labourers who constitute 50% of the workforce[22] and excluded establishments employing less than 10 workers. The government had provided toll-free numbers, PDS systems for food, and other work benefits to workers, although it mitigates some issues, they are not by themselves sufficient. Therefore, some observers have alleged either the dilution of pre-existing labour protections by arbitrary exclusion or non-legislation of more efficient laws. The new laws made certain significant changes which many observers argue, has altered the very dynamic of employer-employee relationships, for instance directing cab providers and aggregators such as Uber and Ola to provide minimum social security to their staff under the new code on social security, which extends social security to gig workers. It is to be noted though that all the laws previously enacted had been discussed by a tri-partite commission, according to the conventions of the International Labour Organization (ILO) to which India is a party but in the

[22] Agriculture in India - statistics & facts available at: https://www.statista.com/topics/4868/agricultural-sector-in-india/ (last visited on Jan 25, 2021).

drafting of the new codes, ironically the Government has not yet consulted the other two stakeholders.

IV. DOES A PRO-LABOUR POLICY EXIST?

The objective of labour laws has been to ensure that employment growth is facilitated while making it easy at the same time for enterprises to establish themselves, expand and grow, whose aim should be, from the point of economics, to attain economies of scale that churn out more services and products at a more efficient rate with higher productivity, while adhering to all the norms and regulations for carrying out business.

While an influential survey by Besley & Burgess, which concludes, based on econometric evidence, that pro-labour regulations have inadvertently hurt economic output, investment in the manufacturing sectors, and productivity, was conducted only about the Industrial Disputes Act 1947 (IDA 1947)and covers only the industrial sector employing formal workers[23]. Only around 9.98% of the total workforce is employed in the formal sector[24]. It has been argued by others similarly that pro-labour regulation inadvertently 'destroy the very jobs created for these labourers[25]. These papers argue that pro-labour reforms have inhibited investments and that labour policies should be

[23]Besley, Timothy, and Robin Burgess. "Can Labour Regulation Hinder Economic Performance? Evidence from India." The Quarterly Journal of Economics, vol. 119, no. 1, 2004, pp. 91–134. JSTOR, (www.jstor.org/stable/25098678.) (last visited on Dec 22, 2020).
[24]Table 2, Principal Characteristics by Major Industry Group for the year 2017-2018, (http://mospi.nic.in/asi-summary-results/844) (last visited Jan 21, 2021).
[25]Forteza, Alvaro and Rama, Martin, Labour Market "Rigidity" and the Success of Economic Reforms Across More than One Hundred Countries (November 30, 1999). Available at SSRN: (https://ssrn.com/abstract=632591) (last visited on Jan 10, 2021).

subject to free-market fluctuations uninfluenced by a pro-labour stance by the government. These would in effect increase productivity and improve competition. Therefore, successive governments have found reasons for diluting the labour regulations and intervene less in labour policies citing 'archaic & outdated' provisions and practices based on a study of these reports[26].

Others have taken a different view arguing that since the labour-employee relationship is an unequal relationship, with the labourer being invested with little bargaining power, the government or State should keenly observe and intervene only if it is necessary to prevent the exploitation of labourers or workers and balance out the asymmetry[27]. This had been the policy of Indian governments post-independence. This was followed keeping in mind the susceptibility of workers to market fluctuations especially in an emerging market economy like India. Though the intention was noble, it has failed to dramatically improve incomes unfortunately and sometimes excessive intervention has ended up hurting investor sentiments especially about their capacity to lay-off workers, though it is more a case of non-application that ails these laws than non-performance by either employers or labourers.

[26] Blanchard, Olivier &Wolfers, Justin. (2000). The Role of Shocks and Institutions in the Rise of European Unemployment: The Aggregate Evidence. Economic Journal available at: https://www.jstor.org/stable/2565720) (last visited on Jan 22, 2021).
[27]Feickert, D. (1995) 'Book review: W. Sengenberger, D. Campbell (Eds.), Creating economic opportunities - the role of labour standards in industrial restructuring, IILS , Geneva, 1994', Transfer: European Review of Labour and Research, 1(1), pp. 144–145 (https://journals.sagepub.com/doi/abs/10.1177/102425899500100118) (last visited Jan 22, 2021).

A comparison of the existing labour laws in China and the USA with the laws in India lends support to some of the arguments against government intervention. One glaring example was the procedures to be followed while dismissing a workman employed for over a year which requires permission from an appropriate government agency under the IDA 1947, with a minimum wait period of at least two months else it would qualify as an unfair dismissal[28]. Similarly, for companies employing 100 workers or more, prior government approval is required for either their dismissal due to redundancy or closing down, which is seldom granted[29]. In China & the US, neither the dismissal of a single workman nor dismissal due to redundancy requires approval irrespective of the size of the enterprise. The only way to dismiss an employee in India is for proven misconduct or habitual absence. Even then a right to appeal exists for which numerous adjudicating bodies exist, with the final appeal resting in the Supreme Court. A nefarious example is the case of *Bharat Forge Co Ltd v. Uttam Manohar Nakate*[30], the matter was in court for 17 years, with the Supreme Court of India eventually upholding the dismissal. It should have been well within the rights of the employing company in the aforementioned case to dismiss such an employee, considering that the facts of the matter mentioned that the employee was found sleeping for the third time in a row. What necessitates a mention is a time taken for resolution of such

[28] Terminating an Employee in India: Understanding Key Provisions, Challenges available at: https://www.gpminstitute.com/publications-resources/Global-Payroll-Magazine/december-2017/terminating-an-employee-in-india-understanding-key-provisions-challenges (last visited on Jan 20, 2021).
[29]Basu, Kaushik& Fields, Gary & Debgupta, Shub. (1996). Retrenchment, Labour Laws and Government Policy: An Analysis with Special Reference to India available at: https://www.researchgate.net/publication/242075939_Retrenchment_Labour_Laws_and_Government_Policy_An_Analysis_with_Special_Reference_to_India (last visited Jan.29, 2021)
[30]Bharat Forge Co Ltd v. Uttam Manohar Nakate, (2005) INSC 45.

disputes and adjudicating bodies to conclude. It is obvious certain businesses might be discouraged especially if we take into account the arrears in Indian courts which compounds the already existing issues associated with setting up a business. The new Industrial Code makes it easy now for companies to lay off their workers, though this may lead to exploitation but will also designate tribunals for speedy and efficient trials in case of a dispute.

Another aspect ailing industrial relations is the existence of multiple unions which leads to the fragmentation of workers unions based on their political leanings or due to patronage by political parties. This has in effect established contradictory demands and needs on the part of the labourers belonging to the same class, with the result being a rivalry between them and no real change being achieved as a result. This rivalry spills over in strikes or bandhs, with some for and some against, diluting the movement but since demands stand unaddressed, it leads to lower outputs, lower growth, and productivity. Therefore, the new code on industrial relations, mandating membership of a union at 51% to be recognized is advantageous for the companies as well as workers who will now pitch issues that are general to all workers, this would consequently increase the effect of their collective bargaining and lead to better working conditions and investing opportunities, initiating a scenario for companies that employ a larger workforce to invest more.

A reading of the different laws leads one to conclude that all aspects of industrial relations had been addressed, albeit with a few inconsistencies,

contrary to popular perception[31]. Unfortunately, legislating is simply the first step and the main step is the implementation of the laws legislated. It is also apparent that there exists, significant government involvement in the labour regulations which has been an argument by capital-exporting countries and companies[32] and nullifies one of the three basic theories of Eyck[33], which is little to no government intervention, though he argues for no union interferences as well while espousing a free market economy.

The wage of a worker is a single input in the whole expenditure incurred for delivering a service or end product. It is well established that costs incurred while the delivery of a product or service has to be minimized to maximize profits, which is the sole aim of a business company. That profits are generated to acquire competitors or expand the company, technically speaking, is a foregone conclusion. The person running the business is naturally expected to pocket a significant sum of the profit so made. Unfortunately, it is well known that the pay gap between workers and their CEOs is sometimes more than 200 times their workers' pay, with the USA

[31]Mukhopadhyay, B., Liu, C., & Heymann, J. (2012). The Work, Family, and Equity Index Setting the Global Floor: a comparative study of labour standards in India and China available at: https://www.mcgill.ca/ihsp/files/ihsp/world_equity_india_and_china.pdf (last visited on Jan 29, 2021).

[32] David T. Coe, *Globalization and Labour Markets: Policy Issues Arising from the Emergence of China and India*, (OECD Social Employment and Migration Working Papers No. 63, 2007) available at : https://www.oecd-ilibrary.org/social-issues-migration-health/globalisation-and-labour-markets_057638253043) (last visited on Jan 29, 2021).

[33]Flexibilizing employment: an overview, Kim Van Eyck, SEED Working Paper No. 41, InFocus Programme on Boosting Employment through Small Enterprise Development Job Creation and Enterprise Department, ILO available at: https://www.ilo.org/empent/Publications/WCMS_117689/lang--en/index.htm (last visited on Jan 29, 2021).

leading and India closely following behind as number two on the list[34]. Since delving into the idea of wealth redistribution is another aspect of discussion altogether, what is being made apparent here is that in many cases, companies can afford to pay their workers well over industry standards but why this hasn't happened yet is not obvious. While certain studies have sought to portray regulations as either pro-employers or pro-companies, very few have sought to strike a balance between the two. Employers by default seem to exercise asymmetrical power over their employees and a harmonious balance needs to be eked out between the two for sustainable development and progress.

V. THE CURRENT STATE OF LABOUR RELATIONS AND ITS FISSURES

The viral images of thousands of labourers and migrants walking down towards their homes or villages with plight and desperation in their eyes showed the cosmic and colossal nature of the crisis. The plight and fragility of the vulnerability being exposed with the stringent country-wide lockdown imposed by the government of India can be counted as the only positive outcome of the pandemic. With all the economic and social activities coming at a halt except for the essential services, these vulnerable groups of people had no option but to walk down to their villages where they would at least have shelter over their head as they had lost their jobs and all sources of livelihood due to the ongoing pandemic situation all around the globe.

[34] The ratio between CEO and average worker pay in 2018, by country available at: https://www.statista.com/statistics/424159/pay-gap-between-ceos-and-average-workers-in-world-by-country/ (last visited on Jan 26, 2021).

A. Who were these migrants?

The migrants were the people who are essential for conducting day-to-day activities in the normal phase of life. They included daily domestic workers, rickshaw pullers, taxi drivers, street vendors, etc. The loss of jobs and no other source of livelihood was just the beginning of their plights, to double up their betrayal, they were seen as 'potential carriers' of the disease and were even stopped from entering their respective villages or native places. They were subjected to hostile behaviour and alienation from their people which had a huge impact on the mental health of these groups of people.

Although it was the duty of the government to arrange for the minimum required amenities instead valuable time was spent debating under whose jurisdiction do these migrants fall, as labour is a concurrent subject in India. The Code on Social Security[35] was a missed opportunity for the government to address their plight but they were excluded altogether. Interstate migrants should have had a provident fund created for them by both the sending state and the receiving state. Given that migrants had to face onerous odds, that too just recently, the government has missed an opportunity to include these interstate migrants in the security net of the new Code on Social Security. Employers employing such workers did so without signing any contract and when the pandemic came, simply dismissed them with utmost disregard. The interstate migrant crisis has displayed the imbalance of bargaining power between an employer and his employee.

[35]The Code on Social Security, 2020 no. 36 of 2020.

B. Impact of the crisis

Since most of these migrants were those people who worked on a daily wage basis for the informal sector which is not included in many labour protection laws and neither was there the existence of the employee-employer relationship, they were subject to exploitation even before the onset of the pandemic. The informal workers in India are unprotected and unrecognized by any labour laws or legislation. There exists little protection for these workers who work in poor and hazardous conditions with low wages and no security of job and benefits.

Around 50% of India's national income is accrued from the informal sector[36]. In the Agricultural Sector, which is the primary source of employment and income in India, almost 97% of the employment is informal. The main reason for such informalization of the workforce in a country like India is the already existing rigidities in the labour market and to top, it is the increasing competition from imports. That the majority of the workforce in India can also be classified under the poorly skilled category and lack of employment opportunities is just another factor to the list.

Similarly, the formalization of informal workers in India by inducting them into the formal workforce has been rather slow which leads to India missing out on its opportunity to capitalize on the growing world economy. In contrast

[36] A. Srija and Shrinivas v. Shirke, An analysis of the informal labour market in India available at: https://www.ies.gov.in/pdfs/CII%20EM-october-2014.pdf (last visited on Jan 28, 2021).

with China, the Draft Labour Law, 2007 makes it mandatory for employees to sign a contract with their workers, which provides workers with an avenue to claim their rights. Compared to China, the formalization of workers employed in India seems to have passed the notice of the establishment with no clear distinction between formal and informal workers being included in any code. In the past, labour commissions had recommended the development of uniform codes applicable to both formal and informal workers[37]. This needs to be addressed immediately to enable the participation of a greater workforce with skills suitable for companies willing to invest in India.

The most relevant question that arises out of this crisis is that why is it essential for the inclusion of the informal workforce in the labour legislation? To answer this let us start with the trend that's been going on in India for a long, migration, which has now become a way of life for most of the rural people. Due to a lack of exposure, resources, and opportunities, these vulnerable groups move to the cities with a ray of hope in their eyes. The crisis amidst the national lockdown has amplified the need to include the informal workforce into some chapter of legislation which would mention the responsibility and accountability, about the education of their children, pensions, healthcare, and other benefits, that must be taken into consideration by the different systems of the government and their employers to grant them a dignified life. The new Labour Codes passed by the Parliament was a golden opportunity to make amends and give a place to these labourers who are in a

[37] Second National Commission on Labour, *The Second National Commission on Labour Report (2002),* available at: https://labour.nic.in/lcomm2/nlc_report.html (last visited on Jan 20, 2021).

state of apathy which is amplified to a great extent during times of recession or pandemics and provide them which social and welfare security but instead the miserable condition of these workers stands unaddressed.

VI. CONCLUSION

The authors examined whether the new laws are revolutionary and also compared the previous laws and observed the inadequacies which led to the call for reforms in the first place and concluded that it was both consolidation and amendment that was called for, while at the same time confirming that existing laws were a hindrance to investment and economic growth of the country in certain aspects.

Labour laws in India have always faced the issue of accountability and responsibility as it comes under the concurrent list and when things go downhill neither the Centre nor the State government is willing to take up the responsibility of these poor and vulnerable groups. New legislations with better wage rates, working hours and conditions, and social security schemes and benefits are the need of the hour. What India witnessed during the lockdown with migrants and labourers walking down thousands of kilometres without any source of food, shelter, and livelihood is one of the greatest crises of recent times and reveals a lot about the weak labour regulations in India and how this issue had been side-lined for years and decades. Although the future of India as an industrial powerhouse does seem to be very promising if supplemented by proper implementation of pre-existing laws and the new code with a code for the informal labourers, it would be a big boost to the economy and the market in general.

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INTERFACE BETWEEN TRADE SECRET AND EASE OF DOING BUSINESS: A STUDY OF NATIONAL AND INTERNATIONAL LEGAL FRAMEWORK AND ITS EVOLUTION

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ABSTRACT

The article is a brief analysis of current legal regimes concerning trade secrets. What gives the trade secret law a unique edge is, it finds a place into the broad framework of competition, contract, intellectual property rights and innovation. The trade secret precepts are firmly connected to the area of criminal law and tort although susceptible to various rationalisations. The remedial or corrective part of the law is conflicting with the actual cause. The different nature of trade secret exclaims it is all encompassing comprehension to be a type of intellectual property. An approach that is purely incentive based on granting legitimate insurance to trade secret helps in harnessing the inventions, utility patents and ideas. This is most appropriate for the various categories of investors and innovators in the Indian economy post

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liberalisation and the TRIPS compliances. With the fresh advancement in technology, and ease of copying, storing and sharing information by digital means, businesses have to tackle the challenge of protecting confidential information that gives them a competitive edge. This data can be a varied collection of business proposals, client database, strategies and compilations, programmes, designs, devices, drawings, compositions or formulae. Not every kind of information meets all requirements to be given shade and protection under the copyright and patent laws; further, various data and information is shared by the organisation and also emerges out while performing everyday's formal tasks for which security is not looked for, however which might be of confidential nature. Several organisations are thinking that it's difficult to shield their vital data, because of the difference on the web and actual apparatuses accessible to facilitate the exchange of information. A need is felt in India to have a formal legal framework for the protection of trade secret so that it can supplement not only to ease of doing business but also greatly to Indian markets and economy. This paper critically analyses the Interface between the trade secret and ease of doing business, further it attempts to analyse the national and International legal framework

Keywords: *trade secret, GATT, TRIPS.*

I. INTRODUCTION

Modern life is just not controlled by the laws of nature, but it is influenced and driven by human interactions by way of on-going technological advancements & inventions. Due to an increase in technological advancement, new ideas of making a product and providing any services, there is a rapid increase in trade and commerce. The modern economy's success depends on the value of tangible assets and depends on the value of assets of intangible nature when viewed as Intellectual Property (IP). The protection of IP is equally crucial as it has become an integral part of businesses worldwide.[38] The legal regime of a particular country in this respect is also related to ease of doing business and protection of the business which relates to its crucial knowledge with respect to product or services offered. Now, these techniques or formulas need to be protected so that businesses can take a competitive advantage over others. Further, the new laws are evolving every day with the onset discerned wrongs that may lead someone to file a lawsuit alleging harm, followed by society's decision to provide one or more remedies. Therefore, a well-structured legal regime is required to ensure the ease of doing business in the respective country.

Intellectual property rights play a paramount role in safeguarding trade & commerce and the essential tools in protecting information and knowledge in innovative and creative goods and services.[39] Trade secrets in terms of

[38] MdZafar Nomani & Faizanaur, "Intellection of Trade Secrets and Innovation Laws In India" 16 J. of Intellectual Property Rights 344-347 (2011).
[39] Michael Risch, "Why Do We Have Trade Secrets?" 11(1) Marquette Intellectual Property L. REV 5-9 (2007).

intellectual property hold the embryonic capability to convert intangible value into monetary growth of the economy. Crucially, the law relating to trade secrets is to protect, preserve, and encourage the principles of business and unprejudiced dealing standards, and it encourages innovations as well.[40] The law regarding the trade secret's protection has emerged from the common law of preferential competition and evolved in the 19th century by the English Courts.

Trade secrets help any enterprise or business commercially exploit with the help of formulas or methods and are always confidential. It helps employers earn out of this secret and disclose the same to some employees or partners. This is when the need to safeguard trade secrets comes into the picture and prevents them from disclosing and maintaining secrecy.[41] Despite this, even though trade secrets may not be completely "secret" in true sense of the term, they must, be made known and public only to a handful of individuals.[42] Foundation of trade secrets is founded on the relationship of faith and certitude. Secrecy in trading is not a new practice; instead, it was used since the inception of trade.[43] For instance, the Chinese excellent measures in safeguarding the secret of silk production had led to a flourishing economy as

[40]Almeling, David S. "Seven Reasons Why Trade Secrets Are Increasingly Important." 27(2) Berkeley Technology L. J. 1091–1117 (2012).

[41] European Commission, "Proposal for a Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure" SWD (2013) 471.

[42] Id.

[43] Katherine Linton, "The Importance of Trade Secrets: New Directions in International Trade Policy Making and Empirical Research" US Int. Trade Comm. J. of Int'l Comm. and Eco (2016).

there was a global demand for Chinese silk.[44] After that, in the era of industrialisation, which experienced changes, there was a need to regulate trade secrets as numerous small & medium businesses were establishing businesses based on secrets having a competitive advantage over the others.

This paper shall attempt to locate the concept of trade secret rooting it from the eyes of history, boiling down to its origin in Indian trade and business. Further the paper shall also attempt to relocate and analyse the International treaties with respect to trade secrets protection. It shall also briefly discuss the legal regime in various countries with respect to trade secrets and its protection and finally would analyse and evaluate efficiency and effectiveness of the legal regime and judicial activism in India with respect to trade secret protection and how trade secret is one of the core elements for ease of doing business in India.

II. CONCEPT OF TRADE SECRET

For the success of any enterprise, there are both external and internal components that are responsible. A trade secret is one of such internal components through which an enterprise enjoys strength over the other competitors.[45] Recognition of trade secrets can be traced long back during Roman law, where if any slave discloses the confidential information of their master to competitors was liable to be punished. As per the present modern legal system, which evolved from England during industrialisation, a trade

[44] Sofia Baruzzi, "Trade Secrets Protection in China: What is Changing?" China Briefing Sep 21 2020 available at https://www.china-briefing.com/news/trade-secrets-protection-in-china-changes-expected/ (last visited on Jan 29, 2021).
[45] John R. Thomas, "The Role of Trade Secrets in Innovation Policy" Cong.Research Service (2014) available at www.crs.gov (last visited on Jan 29, 2021).

secret is such knowledge and particulars that is not available in the public domain relating to industrial and commercial practices whose confidentiality needs to be maintained.

The legal system providing the safeguard not only allows the new firm to gain confidence in the local market of the respective country but also instils a regime that would help ease in doing business, wherein the information is protected.

Even in India in the historical times in order to make the country an epicentre for trade and commerce and visionary actions were taken in order to make the market easily accessible and for foreign traders to consider ease of doing business the king Porus allowed Persian traders to protect their confidential information with respect to products they were willing to sell in Bharat. Therefore, this protection granted by king Porus indirectly helped ease of doing business in Bharat.[46]

It is relevant and apropos to note that often the terms 'confidential information', 'trade secret' and 'know-how' are used interchangeably. However, each of these terms denotes a slight difference in their meaning and the organisations have different levels of control over this information. In simple terms, for a business organisation, 'confidential information' is such information that is confidential to it. The 'know-how' is the information with an understanding of how to do something and is generally gained through experience, say knowledge, and experience gained during employment. The

[46]Sanujit, "Cultural links between India & the Greco-Roman world" Ancient History Encyclopaedia (2011) available at https://www.ancient.eu/article/208/cultural-links-between-india--the-greco-roman-worl/ (last visited on Jan 21, 2021).

'trade secret' is such valuable information relating to the commercial activities that advance competitive advantage to an organisation over others, and if such confidential information is revealed will cause harm to the business and suffer economic losses.[47] The famous trade secret examples can be a recipe of Coca-Cola and the secret formula of Listerine. Crucially, to protect trade secrets, an organisation needs to maintain secrecy through reasonable efforts.[48]

Notably, the trade secrets can be categorised as subset of confidential information. However, all confidential information cannot be referred as trade secret. Practically, all confidential information is protected if not specifically through trade secret protection; it is safeguarded through common law and contract law. Under the Restatement of Torts, an attempt is made to define 'trade secret' – a trade secret may consist of any device, formula, pattern or assemblage of data which is utilised in one's sphere of business, and which permits concerned individual to acquire a favourable position over other players in the market who don't have access to it. It could be an equation for a synthetic compound, a manufacturing process, preserving materials, the design of a machine, or a rundown of clients.[49]

In order to exactly determine the meaning of 'Confidential Information' it is worth mentioning the landmark case of *Saltman Engineering Co Ltd v. Campbell Engineering Co Ltd.*[50]. In the above-mentioned case, the Lord Greene observed that for the purpose to consider some information as

[47]WIPO, https://www.wipo.int/tradesecrets/en/tradesecrets_faqs.html (last visited on Jan 25, 2021).
[48] David E Nevins, "Trade Secrets – A Detailed Analysis of Domestic and Global Challenges" SSRN (2015).
[49] See Section 757.
[50]Saltman Engineering Co Ltd v. Campbell Engineering Co. Ltd., (1948) 65 RPC 203.

confidential it is crucial to ascertain whether it is something which is not already pre-existing or not a public knowledge or property. It is totally possible to hold private data that is the aftereffect of efforts and toil done by the creator upon materials which might be accessible for the utilisation of anyone. What introduces the confidential element to it is the way that the creator of the record has used his mind and subsequently delivered an outcome which must be delivered by someone who experiences a similar interaction.

From the above definitions, it is clear that one of the points of difference between Confidential information and Trade secret is the specificity of such knowledge. In trade secrets, such confidential information should be specifically related to business affairs whereas 'confidential information' can be of any kind. Further, for better understanding of 'trade secrets' it has been defined in a legal context at both International and National frameworks. The international TRIPS (Trade-related Aspects of Intellectual Property Rights) Agreement focuses on protecting undisclosed information to prevent unfair competition.[51] Unfair competition means when any action is dishonest in commercial and industrial practices. Therefore, the member nations need to protect the information which is not disclosed. However, not all the members protect 'undisclosed information' through a separate law. Some protect it through common law or contract law.

The USA was the first country that came with a sui generis law to safeguard trade secrets by prohibiting the unauthorised use of trade secrets by legislating '*Uniform Trade Secrets Act'* ("**UTSA**"). The Act defines a trade secret as "any

[51]Kunal Arora, Trade Secrets- As an intellectual property and its protection available at http://www.legalserviceindia.com/article/l123-Trade-Secrets.html (last visited on Jan 23, 2021).

information that has economic value independently, including pattern, formula, computer program, processes, or technique, and unknown in the public domain". The trade secret owner has taken some reasonable efforts under the circumstance to keep the secret aspect intact. It is apparent from the above definitions that the information need not be 'novel' to qualify as a trade secret. The criteria required to be satisfied is inaccessibility. The trade secrets must hold a potential value to its holder.[52]

Despite the proper definition, it is still unclear what would constitute a trade secret, and it can be any information about any company developed by efforts that are unknown and non-public. Sometimes, a company may develop something through which it can exploit the market. It needs to be decided that whether such information is novel and unique, as it would become a subject matter of patent. Thus, any confidential information that does not qualify a patentability test and is non-public may be categorised as 'trade secret'.[53] Further, the trade secret, like other intellectual property, does not afford a monopoly right, and if a person develops the secret based on its research will not be liable for infringement.[54] The trade secret is not protected for the specific time period and is given lifetime protection until the secrecy is maintained predefined term, and can be maintained for an indefinite period.

Furthermore, the trade secrets may be categorised as,

[52]S K Verma and Raman Mittal (eds.), Intellectual Property Rights: A Global Vision, pp.518-521 (Indian Law Institute, New Delhi, 2004).
[53]http://www.idma-assn.org/patents.html (last visited on Jan 23, 2021).
[54]S K Verma and Raman Mittal (eds.), Intellectual Property Rights: A Global Vision, pp.518-521 (Indian Law Institute, New Delhi, 2004).

Technical trade secret: It is related to the production of goods and services and a process in the invention. It includes a manufacturing process, any chemical formula, any design, and the know-how techniques. It also includes ingredients used in making any product, say Coca-Cola and salts used in pharmaceuticals etc.

Business trade secret: It comes under broad ambit and generally generated by the companies about its activities. It includes various marketing, financial, sales, and administrative data required to manage a business's day-to-day operation. It can be in the form of customer lists, marketing plans, employees' information etc.

III. THE INTERNATIONAL TREATIES ON TRADE SECRET PROTECTION

As a result of globalisation in trade and commerce, business activities are increasing both domestically and internationally. Thus, the companies need to protect their trade secrets even if they wish to operate internationally to maintain their competitive strength. There are various treaties and agreements for the protection of IPRs, including trade secrets. During the Uruguay round of GATT negotiation, there was a need felt for the protection of trade secrets/confidential information, which led to the ratification of two major Agreements, the North American Free Trade Agreement (NAFTA) and TRIPS.[55] The NAFTA is the first international Agreement to afford protection

[55] Zhang, Du, and Park, "How Private Property Protection," 2015, "The Impacts of Post-TRIPS Patent Reforms," April 2013.

to IPRs, including trade secrets. The signatories of this Agreement are United States, Mexico, and Canada, and it was signed on December 17, 1992, even before the GATT 1994 came into existence. [56]It is considered one of the most comprehensive multilateral Agreement ever and with the highest standard ever negotiated. Under NAFTA, each member is under an obligation to prevent the unauthorised disclosure of trade secrets (tangible) through some law and has advised not to determine any fixed period of protection and not to promote the transfer of trade secrets.

Pertinently, the member countries of the WTO are also bound under TRIPS. One of the objectives of this Agreement is protected against unfair competition includes protection for undisclosed information. The member countries are obliged to protect the undisclosed information in their respective countries. The prior-existing protection accorded by the Paris convention regarding an unfair competition for protection of industrial property, the reference of this is mentioned under the TRIPS Agreement.

A. The International GATT Negotiations on IPRs

The crucial decade of the 1930s-1940s era of the great depression' and after World War II, most countries were in a devastating condition. There was a need for an open international trade system by reducing the dark episode of protectionism, removing the trade barriers imposed by the United States, and retaliatory measures by other countries, which lead to the virtual halting of

[56]https://courses.lumenlearning.com/boundless-business/chapter/international-trade-agreements-and-organizations/ (last visited on Jan 27, 2021).

International trade. This had led to the beginning of a new era for the world economy. To shift from nationalism to international cooperation in the year 1948, GATT[57] as an Agreement came into force. The purpose of this Agreement was to expand international trade and bring about economic prosperity.

Initially, the GATT agreement primarily focused on manufactured goods and raw materials, at least in theory, and did not cover the other aspects of the trade, for instance, trade in services, IPRs, etc. After that, the nineteenth-century treaties, particularly the Paris Convention 1883 (Protection of Industrial Property) and the Berne Convention of 1886 (Protection of literacy and artistic work), came into force to protect the author's and inventor's rights over their creative work and invention. It aimed to protect the states' rights other than the State where the creation was first protected.

The GATT was established to conduct a multilateral round of negotiations to reduce trade barriers and enhance international trade. The last round was the Uruguay round (1986-1994), which had introduced discussions on IPRs and other aspects of the trade. As a result, the TRIPS Agreement was adopted to regulate the IPRs. [58]

B. The TRIPS Agreement: An Overview

[57] *Id*.
[58] General Agreement on Tariffs and Trade, Multilateral Trade Negotiations –The Uruguay Round–Ministerial Declaration on the Uruguay Round Sep 1986.,
available at https://docs.wto.org/gattdocs/q/UR/TNCMIN86/MINDEC.PDF (last visited on Jan 25, 2021).

It is essential to understand the TRIPS Agreement's negotiating history for the better clarification of the intent and purpose behind the present provisions. From 1987 to 1989, there were various negotiating participants who were working on IPRs issues and aimed to come up with a proposal highlighting the standards for protection.

Further, in the year 1990, the United states of America, Switzerland, European Community, Japan and a group of developing countries came up with a proposal highlighting their suggestions regarding specific test data that needs to be protected against 'unfair exploitation.' The United States suggested the non-use of such data by any person, the government without permission of the owner that could cause harm the competitive advantage of the owner of such data, and the State should protect such disclosure certain exceptions. On the other hand, the Swiss proposed that governments be restrained from using the data for commercial purposes.

The proposals were then taken up in the Ministerial Conference in Brussels based on the views of the United States of America, Switzerland and European Community wherein the members were required to protect data against 'unfair commercial use', including the protection against disclosure. However, the developing countries refused to the data protection as other IP but agreed to protect the data from disclosure through the common law. Due to this, the negotiations could not be concluded.[59]

Later, in the year 1991, the director-general of the GATT 'Arthur Dunkel' came up with comprehensive wide text for the protection of data is the form of

[59] https://www.pc.gov.au/research/supporting/intellectual-property/trips.pdf , (last visited on Jan 27, 2021).

'Dunkel text' on the basis on which the present text of TRIPS under Article 39.3 was drafted. The Dunkel text provided for the test for protection and retained the proposal that the member nations must provide a form of protection including protection from disclosure, however, due to developing countries' objections did not specify which form of protection. The term "unfair commercial use" is confined to "unfair exploitation," as recommended by the European Community, and other detailed texts were deleted.

So, the undisclosed test or data in the pharmaceuticals and agricultural chemical product needs to be protected from disclosure by the government of member nation to whom it is submitted as a condition to approve, except when such information is necessary for public.

Therefore, it can be observed that the developed countries like the US, European Union wanted more detailed protection for their data, but at the very same time, the developing states refused by stating the detailed and in-depth protection was irrelevant to them. Hence, the developing countries could protect themselves by choosing their own form of protection that is suitable—the current TRIPS agreement is drafted with the consensus of both developing and developed nations.

i) Trade Secrets vis-a-vis TRIPS Agreement

Antecedent to TRIPS Agreement, the Paris Convention under Article 10bis introduced the provisions for the protection of Unfair Competition by providing international standards and protecting foreign rights, but there was a

lack of a comprehensive international treaty on IPRs. Article 10bis (2)[60] defines unfair competition where any act which against the honest practices in industrial or commercial matters. This interpretation was drawn in GATT negotiation that the unauthorised use of undisclosed information owned by others would constitute unfair competition.

Further, the Act of 'Unfair Competition' may be any act by any competitor or concerned market participant to deliberately exploit another person's business's success by gaining advantage with dishonest intention. However, nowhere does the Paris convention expressly emphasise, mention or define the trade secrets beyond the ordinary safeguard against any conduct which might be against the common commercial practices and in a way fails to bring within its purview wrongful misappropriation. Therefore, in pursuance of the above approach of the Paris Convention on unfair competition, the TRIPS Agreement came up with Article 39 as a mandate for the member nation to protect the undisclosed information. Even if the term 'trade secret' has not been defined under the Article, it laid down the requirements or criterion of what would constitute undisclosed information.

As per TRIPS Agreement[61], it mentions that both the legal person, i.e., 'company' and a natural person can protect their undisclosed information only if they lawfully own it. If such undisclosed information was acquired without consent by another person, contrary to honest commercial practice, protection would be granted. Further, the condition of reasonable effort, commercial value and secrecy to maintain such secrecy need to be fulfilled to avail

[60]Christian Riffel, 'The Protection against Unfair Competition in the WTO TRIPS Agreement' World Trade Institute Advanced Studies 2 (2016).
[61]See Article 39(2).

protection for the undisclosed information. Further, the TRIPS Agreement does not protect the third parties. However, the member countries need to include such protection under their national laws for safeguarding against unfair competition as to prevent the exploitation by the third party with respect to undisclosed information.

The TRIPS Agreement entrusts a duty on the member countries to implement trade secrets by enacting legislation in their respective nations. If any individual or enterprise's trade secret is misappropriated or disclosed without consent, they cannot directly rely on TRIPS provisions in trade secret litigations. The member nations must have a law protecting trade secrets or undisclosed information, which should be in consensus with the TRIPS Agreement provision as it works as a framework for legislating laws by putting binding obligation at least to provide a degree of trade secret protection.

VII. JUSTIFICATION OF TRADE SECRET PROTECTION AS IP RIGHT

Process of propertisation is an important phenomenon that has expanded the property's ambit to include intellectual property by recognising it as intangible property due to technological advancement and modernisation. The process has helped cover different areas of law under the ambit of property by analysing whether any area of law could be justified as a property right. For instance, the protection of trade secrets as an intellectual property could be justified by this process.

The propitiation of the trade secrets can be beneficial for the relationship of employer and employee. The mobility of employees from one job to another has become a trend to gain more knowledge and experience. However, from the employer's perspective, departing employee mobility could be risky as the employee could leak the confidential information of the employer to others. Therefore, it is vital to safeguard the confidential information through trade secret protection by punishing the employee for disclosing the same. Further, the safeguard of the trade secrets under the IP regime can provide better protection to both employer and employee by defining the boundaries of the protection with greater specificity, which can be better than the traditional approach through common law.[62]

Importantly, from a perspective of former employees, trade secret protection as property rights can provide benefit to them. This happens when the employers widen the ambit of trade secret protection by themselves and bring trade secret accusation claims in courts even if such information lacks secrecy and is already in the public domain. While deciding, the courts would not know the complex nature of the law and technology and may not be in a condition to reduce the level of the claim even if required. The employers continue to enjoy the overprotection of trade secrets, and employees cannot have the freedom to learn and use non-secrecy information in future employment. Therefore, it is important that the employees should not be accused of violations of trade secrets if the secrecy lacks.

[62]The Wire, https://thewire.in/ (last visited on Jan 26, 2021).

VIII. TRADE SECRET AND VARIOUS COUNTRIES

Under various national laws, trade secret protection depends upon the approaches undertaken by them in considering trade secrets as a tortious liability, criminal liability, or violations of IP right. Therefore, the manner adopted by various jurisdictions across the world varies according to the varying national legal traditions. Consequently, the protection may be granted under civil & common law, contract law, common law, unfair competition, IP law, or criminal law. It is therefore viable to compare the trade secret protection stances under different jurisdiction to understand which laws are best suitable in providing strengthening trade secret protection and to understand the problems faced in implementation of trade secret protection, keeping in mind the changing nature of wrongful conduct due to the modernisation and technological advancement.

Importantly, for some small and medium businesses, the trade secret is considered the most valuable intangible assets as their success, and competitive advantage depend on trade secrets whether such businesses operate in underdeveloped or developing countries. It is a few countries' view to protect the businesses secret information as intellectual property as it promotes innovation. The USA is the first country to accord trade secret protection under IPR and has sui generis legislation on the same.[63] In my view, it is essential to highlight the legal regime followed in the USA as it is comprehensive and specific in protecting trade secrets as an IP through a sui generis legislation at both state and federal level. Further, it is imperative to

[63]Jayashree Watal and Antony Taubman, "The Making of the TRIPS Agreement Personal insights from the Uruguay Round negotiations" (2015) available at www.wto.org (last visited on Jan 28, 2021).

observe the position in the United Kingdom (UK) with strong trade secret law which is on a similar footing as of India which also follows the English law system of protection through common law and comparing the protection regime of both the countries to find out the point of differences.

Lastly, it is important to highlight the stance of a developing country 'China' that pro-actively works to strengthen their trade secret law by amending their laws to broaden the scope of trade secret litigation and recognise trade secret as an IPR. It is submitted that by taking the USA, UK, and China's legal position regarding the trade secret protection.

IX. TRADE SECRETS PROTECTION – LEGAL POSITION IN INDIA

After Independence, India retained the legal framework and judicial pronouncement provided by the British, including English law. India continued to bank upon the remedies available in common and equity law. The subject matter of information that is confidential under English law is safeguarded under Equity and Common law. India has adopted the same approach while protecting confidential information.

In India, trade secret protection was initially not considered of great importance and did not reflect in the national agenda. However, there was a need felt for protection in 1977 when the Indian government asked the famous Coca–Cola company to surrender the formula for the Cola drink, and the company refused to disclose their secret & exited from the Indian market which reflects how ease of doing business was affect at that time. The Coca –

Cola Company again stepped into the Indian market after a decade when the new government came into force. Further, the economic policy of 1991 came into force in India to bring liberalisation, privatisation, and globalisation to the Indian economy and make India the biggest developing economy. There was a rapid growth in the businesses and the creation of Intellectual property rights with financial implications, which also developed the jurisprudence of 'Trade secrets' as it was crucial for businesses to keep their information secret of attaining competitive strength over the others.

As a consequence, the Indian courts faced disputes about confidential & undisclosed information protection. The interpretation of these disputes led to the understanding of the intangible hidden information and how it should be protected under the existing laws by observing their legal implications & impact on the businesses. It is pertinent to mention India's meticulous discussion paper in the rounds of negotiations of GATT held at Uruguay. As per the discussion, India clearly expressed its opinion regarding "trade secret" wherein the trade secret was not treated as part of IPR because IPRs must be disclosed and publicised to obtain the registration. Therefore, due to this fundamental reason, "Trade Secrets" cannot be protected under IPRs based on secrecy and confidentiality. However, according to the Indian perspective, the contractual obligations enshrined under Indian Contract Act and common law principles should govern "Trade Secrets". [64][65]

[64]Priyanka Rastogi, "Trade Secrets Protection" available at https://www.mondaq.com/india/trade-secrets/394018/trade-secrets-protection (last visited on Jan 27, 2020).

[65] Manfred Elsig, "The World Trade Organization at work: Performance in a member-driven milieu" The REV. INT'L ORG. 5 (2010).

The growing business in India and the setting up of Multinational Corporations by various foreign companies for achieving growth perspectives had put the Indian government under pressure to protect their interests. Therefore, the Indian government appointed an inter-ministerial committee known as the Satwant Reddy Committee in February 2004 by the Ministry of Chemicals and Fertilisers to examine the requirements of TRIPs. [66]

The committee was responsible for giving recommendations on data exclusivity policy, and committee, in their final report, submitted that there was a need for separate data exclusivity policy for protecting the interests of the agro-chemical industry. The reason was that various agro-chemical companies wished to invest in India and was interested in conducting the trials to examine the success. To ensure that these MNCs invest, there was a need to establish the agro-chemicals' safety and efficacy and a limited term of data exclusivity for tests generated by them. Unfortunately, the opposition party raised objections, and the recommendation was suspended. Further, it is crucial to note that though India has always played a significant role in protecting every form of IPRs by enacting legislation. Unfortunately, it failed to bring any law for protecting "trade secret." Also, most of the TRIPS Agreement member countries have already laws for the protection of a trade secrets. [67]This has a great impact on ease of doing business in India because it destabilises the trust of foreign players in the Indian markets.

[66] See Article 39.3.

[67] S K Verma, "Protection of Trade Secrets under the Trips Agreement, and Developing Countries", J. of World Intellectual Property, (1998) available at https://heinonline.org/HOL/ (last visited on Jan 29, 2020).

Due to the absence of specified act with respect to safeguarding trade secrets, it is currently protected under various statutes by the Indian courts pro-actively. The Indian Courts have tried to address broad areas of trade secrets while providing protection, such as should the term 'trade secret be defined, grounds for misappropriation, and the availability of remedies in the protection system.

In India, trade secret protection is still emerging and developing as compared to other IPs. The concept of trade secrets is a recent phenomenon, and earlier it was protected as undisclosed information. Trade secrets in India is not protected under any specific law, and it still protected by contract and common law principles, which are interpreted by Indian courts to protect confidential and undisclosed information. Thus, the legal system that has developed in India relating to trade secrets is mainly by way of judgments and case laws. But it is a high time that Indian Legislature should consider this an important aspect and legislate upon the said issue, if due consideration is not granted on time to trade secrets this would adversely affect the Indian markets and ease of doing business.

The Judicial activism has also played a crucial role in the protection of trade secrets, and this activism becomes very important when there is dichotomy in the legislations governing the same. In the case of *Burlington Home Shopping Pvt. Ltd. v. Rajnish Chibber,*[68] the Delhi High Court upheld that a trade secret happens to be data that would make genuine or critical damage to the owner whenever uncovered to a contender. It can incorporate formulae for the

[68]1995 PTC (15) 278.

assembling of items as well as, in a proper case, the names of the clients and the products which they purchase.

In India, an individual can be legally bound by way of a contract not to reveal data that is uncovered to the person in trust.

Be that as it may, in *Richard Brady v. Chemical Process Equipments Pvt. Ltd*[69] the court went further by conjuring a more extensive even-handed locale and granting an injunction without there being a contract. The claimant had originated a unit for the production of fodder and, for the purpose of indigenously producing the same, had attempted to seek a supply of solar collectors from the respondent. The claimant shared material of technical subject matter, point by point knowledge, specifications and drawings concerning the built of the unit with the respondent. An accord was set out amongst both the parties for supplying an inventory of specialised solar collectors; nonetheless, the claimant later found that the respondents couldn't supply the necessary solar collectors and didn't submit a request. In the wake of finding out about the respondent's own fodder creation unit, the claimant filed a case for misappropriation of blueprints , know-how, plans and determinations unveiled to the defendant.

In *Ritika Pvt Ltd v. Biba Apparels Pvt. Ltd.*[70], where a suit was petitioned for encroachment of the claimants clothing styles, the court took the view that if an order of injunction was to be sought in regard to trade secret, the particular trade secrets would need to be referenced, also how the claimant held its ownership; only then would the court think about granting an order of

[69]AIR 1987 Delhi 372.
[70]Del HC DE 0784 2016.

injunction. An overall request in regard to a vague trade secret couldn't be passed against the respondent . Further, no consolation under the Copyright Act can be accorded, since Section 15(2) of the said act specifies that once a configuration, sketch or drawing has been utilised for creating an excess of 50 pieces of clothing items, no copyright can endure in it.

In *Genetics India Pvt Ltd v. Shailendra Shiv*[71], the court was of observation that: "Pleadings of the nature and nature of data which is private are vital and, in the nonappearance, thereof there is no doubt of secrecy." Hence, a suit of trade secret should make adequately certain that the subject data is secret. Aside from arguing that the data is private, the claimant should demonstrate that a fair share of efforts have been made to keep it secret. On the off chance that the owner of the data can't demonstrate so a lot, the data hazards losing the nature of privacy.

Indian tribunals and courts have made it colossally certain that without a proper legal framework , they will protect trade secrets by implication of common law for the advancement of organisations in India. In the case of *Daljeet Titus, Advocate v. M Alfred A Adebare and Ors.*[72] held that in concurrence with *the Duchess of Argyll and Ors.*[73], the court should venture into control of contravention of trust autonomous of another side. Eventually, while conceding order by the court, it administered that the defendant would not be qualified for utilising the material of the claimant which they approached after breaching the confidentiality. The defendants that happened to work with the claimant can't utilise the client contact records, due diligence

[71](2011 (47) PTC 494).
[72]2006 (32) PTC 609 (Del).
[73](1967) CH 302.

plans, agreements and other such material that came into their insight through secret connections. Concerning trade secrets of bank organisations, the Delhi High court in respect of secrecy policy of banks towards their clients took into observation that banks owe an obligation of privacy to clients which arises through their financial relations in this manner in the event that somebody takes such data that is guided by secrecy between such a bank and the client, it will be at a risk of hampering such secret information.

The protection of trade secrets is exceptionally significant for the key reason that it energises developments and innovations, it helps promote trade ethics and improves the quality of IP systems yet concocting more makes the competition strong in the field of IP.

The circumstance that exists in India is troublesome that without a proper legislation in force for Trade Secret, the thought as to shielding of trade secrets can't be accomplished as expected. Trade secrets in India still stand at an embryonic/undeveloped stage and the laws regulating the trade secret are also not very stringent, the judiciary aims at opting an approach of applying the common laws for the governance of trade secrets however, this is discovered to be not in consonance and reliable by and by. Numerous schemes of approaches are applied and various cases with the same realities are yielding diverse outcomes. In this manner, just a statutory framework is in the need of most extreme regularising the unjust rivalry and controlling the circumstance. It isn't argued to the assemblies all together to get another enactment, it is pleaded that to get back the already existing draft into the scenario, so the Foreign investments by companies will be broadened and the region of Intellectual Property Law will evolve, this is the thing that India

needs and furthermore the National IPR Policy, 2016 focused on this in particular.

After the TRIPS stage, India has definitely changed its IPR laws, at this point Indian Patents Act, Section 3(d), stands as of the exceptional segments, similar to savvy it is additionally mentioned to bring back the 2008 drafted enactment for the Trade Secrets assurance.

X. CONCLUSION

The legal protection to trade secret is a prospective arena which is capable to revolutionise the Indian markets and improve ease of doing business, by the means of business segment sectors where trade secrets is very crucial. Various sectors a case in point being the biotech is accompanied by the potential to generate approximately 5 million US dollars and bringing in around one million employment opportunities. These recent developments represent the activism of judiciary with respect to protection and providing a systematic framework for trade secrets. No dichotomy prevails that with the assistance of TRIPS Trade secrets has been gleamed and bringing more area within the purview with a vision to grant them protection. The member nations need to protect the information which is not disclosed. However, not all the member protects 'undisclosed information' through a separate law. Some protect it through common law or contract law. TRIPS has given a basic ingredient and now it is the duty of the member states how they use these basic and essential ingredients, because non protection of these trade secrets will greatly impact the ease of doing business.

A specific exclusion under Indian law is the inability to warrant the theft of the trade secrets by disconnected outsiders or unconnected third parties as they

may be called, like corrupt contenders. Alternatively, Indian courts follow a more seasoned, English principle which requires an earlier connection between the two parties that makes an obligation to perceive the theft of trade secret.

In the absence of a prior relationship, there is no obligation to stay discreet. For instance, contenders may wiretap or perform other unscrupulous, yet not illicit, types of monitoring to get insider facts. Likewise, a business that enlists another organisation to perform or outsource work may catch that its insider facts are not shielded from the worker for hire's representatives or subcontractors, due to there being no agreement or other connection between the owner of trade secrets and these different parties.

Other jurisdictions that abide by the common law practice have deserted the relationship prerequisite for the security of trade secrets. Countries such as Canada, UK, Hong Kong, Malaysia and different nations hosts advanced to deny third-party corporate reconnaissance. Paradoxically, the owners of trade secrets in India still actually should show the presence of an agreement or other earlier relationship for the breach of trade secrets. This necessity makes it difficult to address the developing issue of corporate secret activities.

India has a chance to turn into a kingpin in protection of trade secrets for the advantage its own residents and organizations. Explaining enactment and following the methodology taken by different nations with English origins in the legal field could vault our country to the cutting edge.

In the present day and age, Trade secrets have become an integral part of business and is an essential part that form their unique selling proposition. India can lead the world and strengthen its economy and protecting trade

secrets could bring in trust and believe of investors in the Indian Markets. Though Indian intellectual property laws are progressive and in consonance with recent developments, it is important for India to take necessary legislative measures in order to grant protection to trade secrets and prevent its piracy. In this regard, extending protection to trade secrets under IP still need to travel a long path. Post 1990's development with respect to trade secrets have indeed travelled a long path but still it far away from being properly structured and this in turn brings an obstacle in ease of doing business and impact the Indian markets and competitive spirit.

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TRADE SECRETS AND COSMETICS INGREDIENT DISCLOSURE: A COMPARATIVE STUDY OF LEGAL FRAMEWORK OF INDIA WITH USA

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ABSTRACT

Cosmetic ingredient disclosure is mandatory in most countries but often it can infringe the trade secrets rights of the producer and curtail his/her ease of doing business. This research paper embarks upon a comparative study of the legal framework of India and USA to find out how the two countries balance the conflicting rights of consumers and producers with regard to ingredient disclosure and to recommend ways to relax the current laws. This leads to considering the introduction of the concept of a trade secret status for cosmetic ingredients in India which is already present in the USA. This study also analyses the reason behind the difference in the management of the conflicting rights by the two countries. The research being a doctrinal one, research findings have been arrived at by utilizing both primary and secondary sources of law such as legislations, scholarly articles etc. References to case laws also helped in developing the researcher's understanding on the stand taken by the courts on the matter. The paper

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concludes by highlighting the need to balance the consumer right to information and producer's right to trade secrets in India.

Keywords: *Cosmetics, ingredients, trade secrets, rights, consumer, producer*

I. INTRODUCTION

It is said that the success of a business is to know something that nobody else knows. This is the basic idea behind the concept of 'Trade Secret' which has been recognized internationally as an Intellectual Property Right, defined and granted protection by Article 39(2) and 39(3) of Agreement on Trade Related Aspects of Intellectual-Property Rights ("**TRIPS**"). The definition of 'Trade Secret' for the purpose of this paper has been taken from the Restatement of Torts, S. 757 Comment (b) (1939) and is as follows:

> *"A trade secret may consist of any formula, pattern, device, or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."*[1]

Both India and United States of America, the two countries under study in this research paper, are parties to the TRIPS Agreement but India has not enacted a separate legislation for trade secrets. This is because trade secrets are regarded as an equitable right rather than a property right in India. But this is not to mean that trade secrets are not protected in India. Indian courts have upheld trade secret protection by relying on the laws of contract, unfair

[1]Restatement of Torts, S. 757 Comment (b) (1939).

competition and other common laws to decide cases where the matter of dispute pertains to trade secrets.[2] On the other hand, trade secret in USA is governed by the Uniform Trade Secrets Act, 1979.

It is well known that quite often, different laws conflict each other. But the lawmakers must strive to strike a balance between the conflicting laws. The conflict of laws that forms the central theme of this paper is the conflict between the trade secret rights of producers and the right to information of the consumers. *Prima facie* it looks as though one of these rights infringe upon the other as one is all about divulging a piece of information and the other is about keeping that piece of information a secret, which are simply opposites. Most often, it is the innovation in the ingredients of a product that gives a producer a competitive advantage over other producers in the same business. Hence, the producers would be inclined towards maintaining their key ingredients as trade secrets. But if the consumer right to information requires the disclosure of these ingredients as well, it can lead to hardships to the producers who have spent huge amounts in research and development to innovate and bring out the better-quality product. But doing away with ingredient disclosure is not an option as well, keeping in mind the safety of the large population of consumers, which cannot be compromised at any cost. This paper thus studies the co-existence of the two abovementioned rights, through a comparative lens to find out how the two different countries with different perspectives on trade secrets, finds a balance through the

[2] Kamakhya Srivastava, India: Trade Secrets in Indian Courts, Mondaq, https://www.mondaq.com/india/trade-secrets/204598/trade-secrets-in-indian-courts (last visited on 3rd Nov., 2012).

means of reasonable restrictions. For the ease of conducting research, this paper has been restricted to cosmetic products' ingredient disclosure.

RESEARCH QUESTION

This research paper is driven by the question – *"How do India and the USA find a balance between the consumer right to information with regard to cosmetics ingredients on one hand and the trade secrets rights of producers on the other hand?"*

II. LITERATURE REVIEW

Heinz J. Eiermann, in his paper[3], talks about how mandatory ingredient labelling comes in way of confidentiality. He defends the legislators by pointing out that it is only a factor of human error to leave some circumstance uncovered by regulation. Greggory Keith Spence, in his paper[4], talks about the modified procedures in USA and the need for a due process while granting trade secret status for ingredients. A research from India[5], on studying the cosmetic market and regulatory scenario of India and USA, finds variations in the regulations of the countries and calls for harmonization. Another research article from India[6] demarcates the challenges in harmonization of global

[3] Heinz J. Eiermann, "Cosmetic Ingredient Labeling", 29 Food, Drug, Cosmetic Law Journal 68, (1974).

[4]Greggory Keith Spence, "FDA Trade Secret Procedures and Standards", 35 Food, Drug, Cosmetic Law Journal 362, (1980).

[5] Manish Ruhela, Lovedeep Nagar, Aayushi Gupta & Harvinder Popli, "Cosmetics: Regulatory and market scenario for USA and India", 7 The Pharma Innovation Journal 164, (2018).

[6]Brij Mohan Singh, Ayushi Jain &Anoop Mishrv.a, "Cosmetic Regulations in India v. Globally and Challenges in Harmonization", 10 International Journal of Pharmaceutical Sciences and Drug Research 150 (2018).

cosmetic regulations while supporting the same. Yet another research article[7] from India confirms the gap existing in the Indian legislation and comes up with workable amendments.

This literature review reveals that there have been prior comparative studies conducted between cosmetic regulations of India and USA and attempts to harmonize it but none that specifically calls for a trade secret status and due process for cosmetic ingredients in India.

III. THEORETICAL BACKGROUND

A. Hohfeld's Theory of Jural Correlatives

Hohfeld's analysis of rights and duties say that rights and duties are correlatives, that is, they always exist together[8]. Every right has a corresponding duty to be performed by someone other than the person having the right. In the subject matter of study of this paper, we can see that the consumers have rights. Their rights arise both from the Constitution and the Consumer Protection Act, 1986 in India. Among the many rights they are entitled to, is the right to be informed, that is, to be provided with enough information of the good or service so that they can make a rational decision or informed choice to buy or not to buy. This would thus also mean that the consumers are entitled to the information regarding the ingredients used to

[7] Kumar Sujit and Gupta R N, "Required amendments in the cosmetic products legislation in India", 3 4th International Conference on Pharmaceutical Regulatory Affairs 113, (2014).

[8]Hohfeld, Wesley Newcomb, "Fundamental Legal Conceptions as Applied in Judicial Reasoning", Yale University Press (1946).

make a product. Going by Hohfeld's analysis, this right of consumers imposes a correlative duty upon the producers to disclose the ingredients used in the product. This is why cosmetics ingredient disclosure has been made mandatory under both the Indian laws and American laws.

B. Theory of Ownership

According to Holland, an owner of a property has three kinds of rights; possession, enjoyment and ownership. The right of enjoyment implies the right of the owner to acquire the fruits out of the property.[9] Ownership may be corporeal or incorporeal. In this paper, we are concerned with incorporeal ownership or the ownership over a right which includes ownership over intellectual objects. It is not a material object, but things produced through human skill and labour recognized as property. The incorporeal property being studied in this paper is 'trade secrets' which is recognized as an intellectual property by the World Intellectual Property Organization and many countries such as the USA. According to the theories of Holland and Hibbert as above, the owner of a trade secret has the right to acquire benefits from it and to exclude others from using it. From this, it can be derived that a producer who maintains an ingredient used in a cosmetic product as a trade secret must be allowed to exclude others from knowing it and to obtain benefits from doing so. This theory has been incorporated in Article 39(2) of Agreement on TRIPS which allows owners of trade secrets to exclude others from using it, and in Section 1454(c)(3) of the US legislation Fair Packaging

[9]V. D. Mahajan, Jurisprudence and Legal Theory, 327 (Eastern Book Company, Lucknow, 5thedn. 1987).

and Labelling Act, 1966 that exempts producers from disclosing an ingredient that is protected as trade secret. Hence, a mandatory ingredient disclosure of cosmetics could possibly violate the incorporeal ownership of a producer over trade secrets. The clash between the information rights of a consumer and the ownership rights of a producer must be resolved and a balance found.

IV. THE LEGAL FRAMEWORK AND THE BALANCING ACT

A. The Indian Legal Framework

In India, the legislations that undertake cosmetics regulation are the Drugs and Cosmetics Act, 1940 and the Drugs and Cosmetics Rules, 1945. The regulatory authority is the Cosmetics Division of the Central Drugs Standards Control Organization ("**CDSCO**") which functions under the direction of the Drugs Controller General of India. The ingredients used in the cosmetic products have to conform to the Bureau of Indian Standards' stipulations[10]. A comprehensive list of ingredients which are unsafe to be used in cosmetics and hence must not be a part of it and those ingredients and preservatives which can be used in a restrictive manner are provided under the different annexures to the Indian Standard Classification of Cosmetics Raw Materials and Adjuncts (IS 4707 Part– II) which was adopted to ensure safe formulations of cosmetic products in the country. The

[10]*Supra* note 7.

ingredients used in the product are mandated to be disclosed in the labelling of the product by section 148(7) of the Drugs and Cosmetics Rules, 1945. The disclosure as required by this Section is a hundred percent disclosure with no exceptions other than that ingredient disclosure is not mandated for small quantity packs which are lesser than 60 ml of liquid or 30 gm of solid/ semi solid. There is no exception given to trade secret ingredients as such in any of the Indian legislations and hence all the ingredients are expected to be disclosed. Thus, the legislative framework in India regarding ingredient disclosure is more consumer friendly than producer friendly.

Cases in India such as the *Indian Soaps and Toiletries Makers v. Ozair Husain & Ors.*[11] decided by the Supreme Court of India have reaffirmed that the right to information of the consumers arise from the very Constitution of India itself, i.e., from Article 19(1)(a) that provides for the freedom of speech and expression from which right to information is implicit. But there are also cases in which court has recognized the right to maintain trade secrets such as *Desiccant Rotor International Pvt. Ltd. v. Bappaditya Sarkar and Ors.*[12], decided by the Delhi High Court which upheld the validity of non-competition clauses used in employment contracts to maintain trade secrets. The case of *Escorts Construction Equipment Ltd. v. Action Construction Equipment P. Ltd.*[13]recognized trade secrets right even in the absence of a contract, by relying on the common law principles.

[11] Indian Soaps and Toiletries Makers v. Ozair Husain and Ors., (2013) 3 SCC 641.
[12] Desiccant Rotor International Pvt. Ltd. v. Bappaditya Sarkar and Ors., CS (OS) No.337/2008.
[13] Escorts Construction Equipment Ltd. v. Action Construction Equipment Pvt. Ltd., AIR 1999 Delhi 73.

Though the laws look unjust towards the producers, surprisingly, there have not been much cases filed by the producers in India praying for a trade secret status for their ingredients. This is not to mean that the producers have accepted the mandatory ingredient disclosure rule positively. The Economic Times in 2018 reported that many producers in India do not disclose all the ingredients on the pack as a matter of their policy[14]. They are not worried about the repercussions of not doing so because all their products have already received approval from the Drugs Controller General of India.

Hence, there is an alarming inconsistency between what is prescribed by the laws in India and what is being practiced in India by the producers, regarding cosmetics ingredient disclosure. This is a typical scenario of people taking laws in their own hands when the laws do not cater to their needs. Thus, the Indian legal framework does not balance well the information rights of the consumers and the trade secret rights of the producers regarding ingredients but is more preferential towards the consumer rights. This has led to agitated producers evading the law by simply not disclosing all ingredients, which can be prevented if India too, like other countries, brings in an exemption clause for trade secret ingredients, exempting them from the mandatory disclosure. Such a measure could accommodate the interests of the producers as well and bring about better abidance of law from their side, providing a route to higher efficiency of regulation. But at the same time, care must be taken to ensure that before this exemption is granted, it is evaluated through a due process and procedure so that the consumers' safety is not compensated for the ease of doing business.

[14]Prerna Katiyar , Are herbal products really that natural as advertised in India?, The Economic Times (2018).

B. The American Legal Framework

In the USA, it is the Fair Packaging and Labelling Act, 1966 that mandates ingredient disclosure but Section 1454(c)(3) states that nothing in the Act can force the divulgence of an ingredient protected as a trade secret. Further, Title 21, Code of Federal Regulations ("**CFR**"), Part 701.3(a) states that fragrance and flavour ingredients may be listed as 'fragrance' or 'flavour' itself because most of the times these are trade secrets. Part 720 of this Code provides for voluntary filing of cosmetic product ingredient composition statements which is a mechanism to request trade secret status for cosmetic ingredients under the Food and Drugs Administration's Voluntary Cosmetic Registration Program. Such a system is laid down so that the producers do not abuse the protection given by trade secrets and do not endanger the lives of consumers. The mechanism scrutinizes the ingredient before granting it the trade secret status. Once the FDA is satisfied that the ingredient qualifies for a trade secret status and grants it, the producer may simply add the phrase "and other ingredients" at the end of the ingredients instead of revealing the trade secret ingredient.[15].

In case the trade secret status is denied, the requester of confidentiality is entitled to take the matter to court under the Administrative Procedure Act. One such case was that of *Zotos Intern., Inc. v. Kennedy*[16] in the US District Court, District of Columbia, where the court found that the procedures used by the FDA to evaluate trade secret requests violated the Due Process Clause of the Fifth Amendment and held that the present procedures do not allow a fair

[15]*Supra* note 5.
[16]Zotos Intern., Inc. v. Kennedy, 460 F. Supp. 268 (DCC 1978).

chance to the petitioner to prove his claim of trade secret and hence changes must be made to make the system fairer. The FDA's procedures were then modified after this decision. In another case in the following year (1979) called the *Carson Products Company v. Califano*[17] in the Court of Appeals for the Fifth Circuit, the court found FDA to have acted upon substantial evidence and that their assessment of the ingredient was rational and not arbitrary, hence, upheld FDA's decision of denying the trade secret status. Thus, we find that in USA, the courts have upheld that a claim of trade secret status for ingredients is worthy of a due process evaluation.

The Fair Packaging and Labelling Act calls for ingredient disclosure respecting the right of information of the consumers but the Trade Secret status for ingredients that allows producers to not disclose as discussed above is a statutory exemption in a bid to protect the rights of producers as well. But enjoyment of this exemption is dependent upon whether the person claiming the same is able to prove that the ingredient satisfies the prerequisites of the special status. This is a reasonable restriction that can be imposed on the consumer right to information. Hence, this research finds that the USA weighs the two conflicting rights on equal footing.

V. ANALYSIS & RECOMMENDATION

The research finds that while the US displays a proven capacity to balance the two conflicting rights, India lags behind by preferring consumers' right to information over producers' right to trade secrets. The hundred percent

[17] Carson Products Company v. Califano, 594 F.2d 453 (5th Cir. 1979).

disclosure of ingredients mandated by the Indian law can force the divulgence of a trade secret ingredient, causing inconvenience and loss to the producers as it could mean that the very secret of their business' success is to be let out in public. But the US provision of granting trade secret status to ingredients protects the trade secret of a business while the provision for voluntary filing of cosmetic product ingredient composition statements ensures the safety of the consumers and the provision for due process of evaluation before granting the status confers the producers with a fair chance to present their case and express why their ingredient is deserving of the trade secret status.

The cause of these different outlooks is rooted in the difference in the regard given to trade secrets in the two countries. According to the 1989 General Agreement on Tariffs and Trade discussion paper on India, India does not consider trade secrets as an Intellectual Property right because intellectual property rights are usually disclosed and published whereas the very existence of a trade secret depends upon its secrecy and confidentiality.[18] Hence in India, trade secrets are considered as equitable rights and there is no legislation enacted for the same but is heavily dependent on the precedents laid down and on principles of common law. On the other hand, the importance given to trade secrets in USA is very evident. They have a legislation enacted for trade secrets and their definition of trade secrets is broad enough to include reasonable efforts to maintain secrecy under circumstances. Even their Freedom of Information Act which was enacted to facilitate public access to information specifically exempts trade secrets.[19] The

[18]Ranjan Narula and Rachna Bakhru, Protecting trade secrets in India, Lexology.

[19] *Supra* note 5.

USA considers trade secret protection to increase competition and encourage innovation, thereby bringing about better solutions and better-quality products and services. Thus, it is this difference of perspective on trade secrets that result in one country placing consumer rights above trade secret rights while the other country balancing the two.

But the status quo cannot be maintained as such in India regarding this matter. The gap in the law is being misused by the producers who do not disclose all the ingredients even when the law mandates hundred percent disclosure. This paper recommends that the inconsistency between the law and practice in India regarding cosmetic ingredient disclosure be removed by amending the law to bring about a provision to grant exemption from mandatory disclosure, in the form of trade secret status, to those cosmetic ingredients that are protected as trade secrets, through a due process evaluation much like the system followed in USA. Such an amendment has many positive socio-legal implications; it will accommodate the interests of the producers by protecting their trade secrets, facilitate ease of doing business, stimulate and reward innovation and increase foreign investment in India as many foreign businesses seem to be sceptical of setting up business in India fearing the low protection offered to their trade secrets. Providing for a trade secret status for ingredients can also give better recognition to trade secrets in general in India especially in a scenario where there is no formal legislation governing the same.

However, incorporating any change in the law is not a smooth road. There could be certain challenges in adopting the US system of trade secret ingredients as the due process of evaluation stands in need of more hands at work. The change in law could also be possibly met with opposition from the

consumers as the trade secret status is a restriction on the information right they have relished and benefitted from.

But there is hope for change as the concept of trade secret is gaining more popularity in India in the recent times, which is evident from the constant appeals to enact legislation for trade secrets, displaying a positive sign of openness to change. To conclude, balancing consumer rights and producer rights is important for the general welfare of people and not just for private benefit. If the balance still has not been found, then the laws must be changed at the earliest to strike a balance.

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LEGALLY UNRECOGNISED: THIRD PARTY FUNDING IN INDIA

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ABSTRACT

Third Party Funding is used typically where the funder regularly supports the gathering's in and thusly get a portion of the arbitral award. In India, this concept is not much in existence as it is emerging trend and there are less crowd funding platforms which provides for TPF. Singapore and various other countries have legalised this concept successfully which permits TPF in foreign as well as domestic arbitration. India, in recent times, has been an important place for international arbitration where various institutions like MICA, DIAC, IIAC has been set up. This paper aims at studying about the concept of third-party funding in India and the issues which India may face while legalising this concept under the current Arbitration law. This paper also places various recommendations on how India can successfully implement this concept while observing the existing laws of TPF in various foreign jurisdictions.

Keywords: *TPF, Arbitration, Arbitral award.*

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I. INTRODUCTION

Third party subsidizing likewise called as litigation financing is an interaction wherein funding who is not associated with the question gives assets to the funding associated with case in return for agreed returns. It is utilized in assertion where the funder commonly finances the gathering's legitimate charges and costs brought about in that intervention. In recent arbitration matters many international arbitration institutes such as SIAC, LIAC, MIAC are providing options to parties to prepare for third party financing. Apart from insurance companies, specialised third-party funders, law firms, banks and have also set foot in this field. TPF is used in various types of disputes like commercial contracts, international commercial arbitration, class action suits, tortious claims, insolvency proceedings and other claims that have chances of resulting in a substantial monetary award. Funders typically fund the proceedings in order to get a portion of such monetary award passed. In India, this concept is not much in existence as it is emerging trend and there are very few crowd funding platforms which provides for TPF. In past few years market has witnessed an elevation in the funding activity which initially focused on investor state arbitrations but now it's also much focused on international commercial arbitration.[1] There are certain factors by which a funder decides as to how fund the arbitration matters. In India we don't have a particular legislation for third party funding under Arbitration and Conciliation

[1] Matthew, Emmanuelle, Jeremy, Tom Third party funding in international arbitration, available at: https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/ (last visited 20 Sept, 2020).

Act, 1996 but this concept can be found under Civil Procedure Code, 1908 in states such as Gujarat, Maharashtra, Uttar Pradesh and Madhya Pradesh. Under Order XXB Rule 1 of CPC as amended by these states provides that courts have power to secure costs for litigation by asking the financer to become a party and depositing the costs in court.[2] Arbitration is said to be an effective means of dispute resolution as compared to litigation process but the cost attached with such process can't be ignored. The concept of TPF has helped financially weaker claimants to successfully go after their legitimate interest without putting their businesses at stake. On 10 January 2017 the parliament of Singapore has successfully passed the Civil Law (Amendment) Act which permits third party funding in international arbitration.[3] Similarly, third party funding by adopting the Arbitration & Mediation legislation bill was approved by Hong Kong on 14 June 2017.[4]But there are certain issues which need to be addressed and this paper would deal with such issues and also recommendations.

II. INDIAN CONTEXT

In Indian scenario there are no explicit laws which bars or allows third party funding in arbitration but it is statutorily recognized under Order XXV Rue 1 of Civil procedure code amended by the states of Maharashtra, Gujarat, Madhya Pradesh and Uttar Pradesh. We can say that the concept of TPF is not

[2] Sameer, Jayashree, Anant India: Third party funding in International Arbitration: An Indian perspective available at: https://www.mondaq.com/india/trials-appeals-compensation/875506/third-party-funding-in-international-arbitration-an-indian-perspective (last visited 20 Sept, 2020).

[3] Ibid.

[4] Ibid.

new under the existing laws but there are no laws provided under the Arbitration & Conciliation Act, 1996. Third party funding can be said to be an emerging trend in the field of International Arbitration and India is said to be the growing international hub for arbitration in South Asia. There have been a few legal decisions in field of third-party funding where courts have talked about this concept but none of the judgements have talked about the validity of an award obtained by TPF. In India there is no specific body that governs the third-party funding but instead the contract terms are governed by the Indian Contract Act, 1872 and further it can be scrutinised by the courts of India. There have been number of cases where courts have talked about the TPF. In case of Bar Council of India v/s AK Balaji[5] the Apex Court has explicitly permitted the use of third-party funding in litigation and held that "There appears to be no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of litigation"[6]. This judgement clearly states that outsider parties can be third party financer but lawyers cannot be third-party funders and it clearly bars lawyer from funding the litigation process. Similarly, in case of In re 'G' Senior Advocate case[7] apex court reiterated that lawyers are not permitted to fund litigation, but there is no bar on third parties to fund the litigation process.

The Law Commission of India has a lot of importance in bringing reforms to the legislations in India and also plays an important role in facilitating a public

[5] (2018) 5SCC 379.
[6]Sumedha Dang, Vaibhav Garg, Litigation funding in India available at https://www.lexology.com/library/detail.aspx?g=f13ae227-6f19-4d86-b40e-f6e520c2cb50 (last visited 23rd Sept, 2020).
[7] AIR 1954 SC 557.

consultation process on third party funding. This commission is neither a statutory or constitutional body. It is however an advisory body which is constituted by the Government of India. It is empowered to make recommendations. The law commission should be directed to discuss the third-party funding and examine it from the Indian scenario and provide necessary guidelines as to how to incorporate the same in Indian arbitration laws. Another current problem which exists is that parties who are outside India and become third party funders would be subject to Foreign Exchange Management Act. FEMA consists of two types of transactions namely- current and capital account transactions.[8] FEMA does not explicitly consider third party funding under any of the two transactions so it is uncertain as to how treat such transactions.

A petition was filed before the Hyderabad High Court[9] where the respondents challenged the award passed by Sir Phillip Otton in London seated arbitration subjected to ICC rules. The award was challenged on the ground that petitioners had entered into third party funding agreement and such award cannot be enforced as India does not have a legal framework for third party funding. This matter is still pending. Therefore, it is still a matter of question as to how foreign arbitral awards that involve third party funding would be enforced in Indian courts.

[8] Foreign Exchange Management Act, 1999, ss. 5,6.

[9]Anish Wadia and Shivani Rawat, "Third-Party Funding in Arbitration - India's Readiness in a Global Context" Vol 15 TDM. 1(2018).

India has been a valuable trading partner and also there has been an increase in cross border commercial transactions and disputes arising through such transactions are resolved through international commercial arbitration. The MIAC was set up in October 2016 and also the recently passed NDIAC Act, 2019 calls for setting up of international arbitration centre in Delhi which will facilitate the international arbitrations in India. According to a report [10] Indian companies account for over 30% of total arbitration cases handled by SIAC Singapore and Hong Kong International Arbitration Centre. This clearly depicts that how India could be a growing hub for international arbitrations and why we need to have an effective framework for third party funding in arbitration. Lawyers and firms should advise their clients as to the concept of third-party funding. The Srikrishna Committee (high level committee constituted to review the institutionalisation of arbitration in India) report clearly signifies that this is the right time to formally permit the third-party funding in international commercial arbitration in India.[11] In India access to justice is recognized under Article 14 and 21 of the Indian constitution as a fundamental right and is guaranteed to every citizen of the country. In this context third party funding would provide access to justice to everyone and would allow the weaker parties to get every means of justice. Third party funding would also help in the resolution of backlog of cases by diverting the traditional litigation approach towards other dispute resolution techniques. India can very well learn from the Dutch system of third-party funding where there are no specific regulations for third party funding but there are notable

[10] Ibid.

[11] Srikrishna committee: Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017).

companies that provide finance to claims entering the Dutch market.[12] The law in Netherlands does not explicitly permit the third-party funding but still there is a practice for third party funding in litigation and arbitration and the government also praises such efforts. India is a growing hub for international arbitration and third-party funding should be included in international arbitration. Although there are various issues in implementing such process but what we need to do is first enact a proper legislation and try to adopt such process in this growing market for arbitration.

III. INTERNATIONAL SCENARIO

International arbitration nowadays is the most appropriate form of dispute resolution process in solving disputes at international level either between companies or between states. There has been an increase in commercial relations between companies and also between different nations and generally disputes which arise due to such relations are resolved through commercial arbitration. Third party funding is the emerging trend in international commercial arbitration and various nations have provided specific legislations for such funding. The position of third party in various countries has been discussed below:

[12] Marc Krestin, Rebecca Mulder, Third party funding in international arbitration: to regulate or not to regulate available at: http://arbitrationblog.kluwerarbitration.com/2017/12/12/third-party-funding-international-arbitration-regulate-not-regulate/ (last visited 24th Sept, 2020).

A. AUSTRALIA

TPF in Australia is much developed as compared to the other nations and courts have recognized the importance of third-party funding in both arbitration and litigation.[13] Courts in Australia have recognized this process in context of cost and efficiency where the claimant is not in a disadvantage position to get access to justice[14]. According to a report[15] there are about 25 active litigation funders and a company named IMF Bentham is the very first of its kind which is a public listed company on Australian Securities Exchange in 2001. Law firms have also offered clients for third party funding. Some of the key regulations on third party funding are that third-party funders are free from mandatory licensing, financial disclosure unless they are listed on Australian Securities Exchange. Also, third party funders should demonstrate as to how they will manage conflicts of interest and they are also subject to Australian Securities and Investment Commission Regulatory Guide 248 which provides that funders should make arrangements for addressing various issues. The funding agreement need not to be disclosed to the opposite party or tribunal. So, third party funding is very well practiced in Australia and India should also try to inculcate such process.

[13]Gitanjali Bajaj, Ernest Yang & Queenie Chan, Third party funding in the Asia-Pacific region available at: https://globalarbitrationreview.com/chapter/1227826/third-party-funding-in-the-asia-pacific-region#endnote-001 (last visited 25th Sept, 2020).

[14] QPSX Ltd v. Ericsson Australia Pty Ltd., (No 3) ((2005) FCA 933).

[15] *Supra* note 13.

B. HONG KONG

A legislation for TPF in arbitration was passed in 2017 to boost and uphold the status as an international arbitration centre was passed by the government[16]. The two acts which govern the third- party funding namely Arbitration Ordinance & Code of Practice for Third Party Funding of Arbitration. The vital provisions related to third party funding are that funder must have the capacity to pay all debts and aggregate funding liabilities for a minimum period of 3 months and should maintain a minimum of HK$20 million of capital[17]. Funder shall also maintain procedures for managing conflict of interest[18] and should also have a mandatory complain addressing procedure[19]. There is additionally a required revelation technique wherein the funder party will give composed notification of the presence of third-party arrangement and name of the third-party funder. Hong Kong has very good procedure and legislations for third party funding and also the disclosure procedure is clearly mentioned under acts passed by the government. India should try to adopt such provisions into its arbitration laws.

C. SINGAPORE

A bill which expressly allowed the TPF for arbitration in Singapore was passed by the parliament of Singapore, Civil Law (Amendment) Bill

[16] Law Reform Commission: Final Report on Third-Party Funding for Arbitration (October 2016).
[17] Ibid para 2.5.
[18] Ibid para 2.5-2.7.
[19] Ibid para 2.18-2.19.

(38/2016) on 10th January 2017. The new law is applicable for international arbitration, court proceedings and mediation proceedings. This amendment came into force on 1st March 2017. The legislations and regulations which govern the third-party funding are Civil law act (chapter 43), Civil law (third party funding) Regulations 2017, Legal Professionals Act (chapter 161) and Legal Professional (Professional Conduct) Rules 2015[20]. Main provisions for third party funding are that a third-party funder must have a share capital or assets not less than S$5 million and also, he must be a person who carries out business of funding all or part of the costs of dispute resolution proceedings[21]. The guidelines issued by Singapore Institute of Arbitrators clearly states that funding shall not give rise to conflict of interest. Lawyers are restricted from holding any share or interest in a third-party funding and should not take any commission or fee for such reference[22]. Legal practitioners including both of Singapore and registered foreign lawyers while conducting any arbitration proceedings have to mandatorily disclose the TPF agreement to the Court or Tribunal[23]. Since the parliament of Singapore has made provisions of third-party funding the market has witnessed a sharp increase in the number of third-party funders. The Singapore Ministry of law on 10th October 2019 has extended the scope of third-party funding in domestic arbitration and is also considering the introduction for conditional fee arrangements for domestic as well as international arbitrations[24].

[20] *Supra* note 13.
[21] The Civil law (third party funding) regulation 2017, Regulation 4(1).
[22] Singapore, The Legal Profession (professional conduct) Rules 2015, Rule 49B.
[23] Ibid, Rule 49A(1).
[24] Speech by Minister (Law and Home Affairs) K Shanmugam at the Opening Ceremony of Law Society at Maxwell Chamber Suites available at :

Australia, Hong Kong and Singapore have explicit laws for third party funding but we shall also look onto other Asian countries as to their legislations and position of third-party funding in their countries as well.

In **China** TPF is not specifically prohibited by the law but they do not have any explicit provisions to deal with the same[25]. Also, there are no restrictions for Chinese lawyers to enter into conditional or contingency fee arrangement for international arbitration cases.

In **Japan** the Japan Arbitration Act (law 138 of 2003) does not explicitly prohibit or allow third party funding in arbitration. The contingency fee is not specifically prohibited but such lawyer's fees should be actual and adjustable and also attorneys cannot lend money to clients[26]. In **Malaysia** the Arbitration act 2005 does not allow or prohibit the third-party funding. The proposed amendments which allow third party funding are yet to be passed by the parliament.

There were various questions which remained unanswered related to third party funding in foreign arbitration such as privilege, conflict of interest, disclosure of information and other issues. To address these issues a task force was constituted by ICCA-QMUL and the report was presented on 17th April 2018. The task force constituted of over 50 leading experts from over 20 jurisdictions. The key points as mentioned in the report are discussed below:

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www.mlaw.gov.sg/news/speeches/speech-by-minister-k-shanmugam-at-opening-ceremony-of-lawsoc-at-maxwell-chambers-suites (Last visited 26th Sept, 2020).

[25] *Supra* note 16.

[26] Ibid.

i. The committee considered that conflict of interest is the prominent issue in third party funding and came to the conclusion that funder party shall disclose the funding agreement and identity of funder and they are not bound to provide the details of financial arrangement. The main idea of the committee to this conclusion was to identify the conflict and avoid challenges to arbitral award without delay[27].

ii. The report also suggested that the successful party shall not be denied the recovery of costs on the basis that they funded by the third-party funder. The application for security of costs should be determined without regarding to existence of funding agreement.

iii. Report suggested that law firms should maintain distance from funders as there might situation arise where there might be conflict of interest and it would be really difficult to manage those problems[28].

iv. The committee report also suggested that funding agreement shall provide as to how to resolve differences of opinion arising from conduct of cases.

v. Finally, the task force drafted an appendix which contained principles regarding disclosure and conflict of interest, professional secrecy and privilege, allocation of costs and security for costs.

[27] Verity Jackson, Grant, ICCA-Queen Mary Task Force publishes its report on third party funding in international arbitration, available at: https://www.thejudgeglobal.com/icca-queen-mary-task-force-publishes-its-report-on-third-party-funding-in-international-arbitration/ (last visited 26 Sept, 2020).

[28] Christine Sim, 8 key points from the ICCA-QM Task force's 2018 third party funding report available at: http://arbitrationblog.kluwerarbitration.com/2018/05/28/8-key-points-icca-qm-task-forces-2018-third-party-funding-report/ (last visited 26th Sept, 2020) .

IV. ISSUES, OBSERVATIONS AND RECOMMENDATIONS

It was once thought, that the concept of third-party funding is illegal in India, and that remains a question whether this perception, in any manner is correct as there's a very thin line in between information and misinformation. With passage of time, this approach has undergone a fundamental change. According to two recent judgements by the Supreme Court, the concept of TPF is considered to be legal. The contemporary notion is that the funders are financing the litigation costs in order to get the monetary benefits out of the award passed by the court, if successful. Hence, TPF is designed in such a manner that it does not go against the public interest and also the party which is claiming something from the claimant does not get any undue benefit.

There are certain summarized findings and specific recommendations to lead to a successful TPF in India. Three areas are explored. First, where does India stands and what is required to make TPF successful. Second focus is mainly on, is it the laws which is not made or existing laws or is it the enforcement, the delays or is it something else that is discouraging the funders. Lastly, it identifies some of the key issues that is of utmost importance and needs to be addressed i.e., the issues pertaining to considering of TPF for disputes in India. Certain issues pertaining to it are herein under mentioned:

i. The very first issue revolves around the aspect of implementation i.e., can TPF be implemented merely by interpreting the existing position of law by the courts.
ii. Whether the key challenges lie in the lack of transparency in the arbitration proceedings, actual recovery of money and the enforcement of awards in order to implement TPF in India?
iii. The issues related to regulations, regulated and unregulated markets.
iv. Whether the FEMA Act,1999 will be attracted in case where an arbitration is funded by the third party and the seat is in India?

When we look into the present legislations in India then we can see that there is no such law which is either barring or permitting or even regulating the TPF. There is absolutely no bar on the legality of funding. Then taking into consideration the formulation of arbitration framework it can be ascertained even the act does not restrict the legislative mechanism for TPF. In fact, several amendments of 1996 Act have been done and all of them lead to giant stride into the international world of arbitration. Further, in the current scenario TPF cannot be merely interpreted just by interpreting the existing legal pronouncements. However, there are two approaches which can be taken into consideration for TPF to take off in India. Firstly, it could the self-regulation model as UK already has where there is neither any legislative body nor any judicial guidance but the standards are carried forward by the professionals. Secondly, clear regulatory approach i.e., nothing but the legislative acknowledgement, which is indeed the need of the hour. The reason behind bringing a regulation is to pave a way for funders to interfere as they will no longer have any doubts as their paths will be cleared, there will be

certainty, confidentiality, transparency as well as no issues in regard to conflict of interest will exist. It is of utmost importance to come up with regulatory legislative changes for TPF to be successful.

The lacking transparency in arbitration proceedings, the enforcement of awards and actual recovery of moneys are some of the main issues for implementing TPF in India. Like in the current scenario where there is an issue pertaining to jurisdiction and the issues are not very certain then an enforcement of award becomes a challenge in that particular jurisdiction. It gets very difficult for the funder to take a view wherein there is public policy issues as defence in those jurisdictions. The concern of the funder is not specifically on the successful claim rather it is on successful recovery of claim. It is paramount importance for any funder to take any decision after having a crystal and clear picture because of the reason that why would a funder opt to fund in any litigation for somebody who is not in a position to pay it back or where the funder is not clear about the time frame. Meanwhile, it is pertinent to note that when we talk about enforceability, the Indian courts, depending upon the facts and where the judge consider to grant any security, if it deems fit, where successful award has been granted, then the person inevitably steps in that position to obtain the security. Several Indian Acts specifically allows to grant certain security, the only condition is that the facts must qualify for the security.

Taking into account the fourth issue, if an arbitration is being funded by a third party and it is seated in India or if the funder is in India, then the provisions of the Foreign Exchange Management Act, 1999 ('FEMA')

would be attracted. FEMA classifies all transactions involving foreign exchange and/or non- residents into two primary categories – current and capital account transactions. Since FEMA does not explicitly classify third-party funding as either a current or capital account transaction, it is uncertain as to how such funds would interact with the regulatory regime, especially since both these transactions are viewed very differently under FEMA rules and regulations.

V. CONCLUSION

Third party funding is not a new concept but it is also used in litigation in different civil cases and is known as litigation funding. In the field of arbitration this concept has very much relevance where weaker parties who cannot afford arbitration can be funded by third parties and in turn, they take share from the award passed. In Indian scenario this concept is not used much in arbitration rather in several states CPC has been amended and third parties can fund in litigation of cases. India is a growing hub for international arbitration where various Institutions like MIAC, DIAC, IIAC and many other has been established which clearly shows that various parties have shown interest in conducting their arbitral proceedings in India. This concept can be instituted in India by addressing issues which has been discussed above. The legislature needs to make various amendments in the current arbitration law and the concept of TPF shall be inserted as various other countries have addressed this issue and have incorporated the concept of TPF in their arbitration law.

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THE CONUNDRUM OF EASE OF DOING BUSINESS AND RETROSPECTIVE TAXATION

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ABSTRACT

The taxation is the prominent source of revenue to provide basic utilities to citizens and also, means in the hands of the Government in precarious and perilous times. India has nimiety of resources for allocation and with an escalating economy the Government was perceptive to come up with policies and reforms to reap higher GDP and for attracting investments. For attracting Foreign Investments its vital to furnish them with incentives and to enact laws for effortless establishment and conduct of business. Ergo arises the need for simplification of taxation, incorporation, contract, and insolvency laws in addition to procedural requirements. The Indian Government has amended Section 9 of the Income Tax Act, 1961 numerous times with retrospective effect that can even render judicial pronouncement to nullity. In the lights of validity clause an amendment was made in 2012 rendering Supreme Court's judgment of 2012 negated. This unanticipated step by the Government led to plethora of cases, suggestions, and comments of innumerable jurists at national

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and international level thus dampening prospective investment goals.

The authors attempt to explore numerous instances of the Business Enterprises and Companies whose fate was decided by this amendment and the contours of Retrospective Taxation.

Keywords: *Tax law. Retrospective Taxation, Income Tax Act.*

I. INTRODUCTION

The World Bank Group established ranking system to organise and adjudge 190 economies of the world in a hierarchy on the basis of their regulatory environment which is conducive to various stages of a business from starting a business to resolving insolvency. A Country's economy is adjudged on ten parameters and one of the criteria is 'paying taxes' which implicates the recording of the mandatory contributions that an assessee has to succumb to in a given year to the Government.

In a developing country such as India which has surplus of resources for allocation and with an escalating economy the Government was astute to come up with policies and reforms such as Make in India to garner higher GDP as it will act as a catalyst for attracting investments. However, the need for simplification of taxation, incorporation, contract, and insolvency laws in addition to procedural requirements also requires utmost attention for successfully implementing the policies and boosting the economy.

The Indian Government over the period of time has amended Section 9 of the Income Tax Act, 1961 ("**Act**") numerous times with retrospective effect leading to plethora of cases and inviting suggestions and comments from innumerable jurists both at national and international level thus grasping limelight and further on dampening its prospective investment goals. The present paper attempts to explore the implications and the constitutionality of Retrospective Taxation with the aid of landmark judgments and how the Indian Government's resolute stand with the said law will in turn disrupt the Ease of Doing Business rankings and ultimately the Indian economy and all the Government Policies for inviting Foreign Investments.

II. MEANING

A. Ease of Doing Business

In common parlance, the Ease of Doing Business Index is the measure of how effortless it is to operate business in a specific country. It is an aggregate index that includes different parameters which explains the ease of establishing and doing business in a country. The index is published by the World Bank in its 'Doing Business Report'[29] and is used to rank 190 countries on the basis of the relaxations accorded by the Government to enterprises. A country's ranking turns up or down the hierarchy depending on its Government Policies which

[29]World Bank, Doing Business Measuring Business Regulations available at: https://www.doingbusiness.org/en/reports/global-reports/doing-business-2020 (last visited on Jan 29, 2021).

constitutes establishment of operations of an enterprise either simpler or more conducive correspondingly.

Ease of doing business ranks economies from 1 to 190 ranks. Essentially in this system a country with a high rank, which is one with a low numerical rank i.e.- close to rank 1, has a regulatory environment that is conducive to business operation. On the other hand, a country with a low rank, one with high numerical rank is home to the unfavourable regulatory environment. This index is used to contrast economies with one another by benchmarking them with respect to superlative regulatory practices, so as to show the absolute distance to the finest regulatory performance on Ease of Doing Business Indicator. By employing such comparison of ranking economies, this index can unveil how much the regulatory environment of a country has performed over the years and to compare its position for different years and to apprehend whether the policies are for better or not and exhibit a hierarchical table to prospective foreign investors.

The components which gather data from 10 fields of business regulation emphasise on:

- Setting up a Business
- Ease in acquiring Construction Permits.
- Availability Electricity Supply
- Documentation and Registration of Property
- Securing Credit
- Safeguarding Minority Investors
- Paying Taxes

- Cross Borders trading.
- Enforcement of Contracts
- Resolving Insolvency

Among the chosen 190 ranks of this index, India was ranked 63rd in Doing Business 2020 - World Bank Report.[30] The Government of India in the year 2014, launched an ambitious program of regulatory reforms aimed at creating trouble free environment to do business in India. The program had a goal to create a more business-friendly or favourable environment for business entrepreneurs.

India has justifiably emerged as one of the most alluring destinations not only for investments but also for doing business. India took a leap of 79 positions from 142nd in the year 2014 to 63rd in the year 2019 according to the 'World Bank's Ease of Doing Business Ranking 2020'.[31]

After witnessing such a great leap, the Government is making concerted and strenuous efforts to enhance its business competitiveness ranking and aims India to be within the top 50 countries by 2021. The Government functionaries were quick to latch on to this straw and proclaim to the world as to how effectively and efficiently the Indian economy is performing and will reach even more heights in the coming years.

[30] Make in India, Ease of Doing Business available at: https://www.makeinindia.com/eodb#:~:text=INDIA%20%E2%80%93%20EASE%20OF%20DOING%20BUSINESS,Business%202020%3A%20World%20Bank%20Report.&text=India%20jumps%2079%20positions%20from,of%20Doing%20Business%20Ranking%202020' (last visited on Jan 26, 2021).

[31] The World Bank – Ease of Doing Business in India available at: https://www.doingbusiness.org/en/data/exploreeconomies/india (last visited on Jan 26, 2021).

B. Retrospective Taxation and Constitutionality

In order to persevere the dynamic societal changes, the society calls for amendments in the existing statutes thereby, implementing the essential requirements. These Amendments may be Prospective or Retrospective in nature. While prospective amendments are enforced on the day of its promulgation or a future date as specified. The retrospective amendments are enforced from the backdate and are denoted as ex-post facto law.

Article 20(1) of the Indian Constitution empowers the legislature to enact both prospective and retrospective laws nonetheless; a restriction is imposed to enact criminal laws with retrospective effect, the principle which is ingrained in Article 15 of The International Covenant on Civil and Political Rights[32] as well. The Constitution additionally circumscribe this power of the legislature in civil liabilities, when: -

a) In violation of Part III of the Constitution.
b) It does not fall under the legislative competence as enshrined under Article 246.

The earliest challenge to retrospective laws was identified in *Chhotabhai Case*[33] wherein, the 1951 retrospective amendment made in The Central Excise and Salt Act, 1944 was challenged which imposed duty on manufactured tobacco on the grounds that tax was of indirect nature and the retrospective effect would thwart it. Herein, the Supreme Court held that tax

[32] The International Covenant on Civil and Political Rights, 1966 (into force 1976), art. 15.
[33]Chhotabhai Jethabhai Patel and Co. v. Union of India, (1962) AIR 1006.

laws were subject and at the mercy of Part III of the Constitution but abstained from contemplating laws as arbitrary merely on their retrospective effect.

The courts did acknowledge tax laws under the purview fundamental rights to carry any occupation, trade or business as espoused under Article 19(1)(g) of the Indian Constitution. However, there are handful of cases wherein the Courts strike down the tax laws when they were blatant, iniquitous, palpably arbitrary[34] and discriminatory. The criteria for a valid retrospective law are based on the series of events when they are made and if they are clarificatory in nature or not.[35] While determining the arbitrariness and harshness in the light of Article 19(1)(g) the period for which the amendment will be extended, and the unanticipated onus on the assessee implicated shall be taken into consideration.[36]

The Indian Constitution acknowledges separation of powers and in the lights of the said principle the constitutional validity of the retrospective statutes that were enacted in order to invalidate the consequences of a court were subjected to test. Thereby, the Supreme Court in *Misrilal Jain v. State of Orissa*[37] with respect to validating clause observed that there are plethora of cases in sustenance of validating clause and the legislature in no manner intrudes and encroaches on the functions of judiciary and the validity of a validating taxing law is dependent upon the competence of legislature over the subject-matter of the law or whether in creating the validation the defect was eradicated from which the earlier enactment or law suffered and lastly, whether the legislature

[34]R.K. Garg v. Union of India, (1981) 4 SCC 675.
[35]Lohia Machines Ltd. and Anr. v. Union of India, (1985) 152 ITR 308.
[36]Ujagar Prints v. Union of India, (1989) 3 SCC 488.
[37]Misrilal Jain v. State of Orissa, AIR 1977 SC 1686.

has made requite and adequate provision in the validating law for an effective imposition of the tax.

Since 1976 series of amendments were introduced in the extent of income deemed to accrue in India in an endeavour to garner tax in India from non-residents. In the landmark case[38] one such category of taxation under Section 9(1)(vii) of the Income Tax Act, 1961 was construed and it was held by the Supreme Court that the for the income/fees to be taxable the services rendered must be utilized and rendered in India. Thereby, leading to retrospective amendment for computation of total income of the non-resident. However, the principle laid down in *Ishikawajima case*,[39] was again amended by the parliament making those principles invalid.

Ergo, it can be squarely deduced that a retrospective assertion cannot invalidate or quash any amendment by the legislature if it is in support and benefit of the assessee or of clarificatory nature unless the said law is palpably arbitrary and in clear violation of Article 14 and 19 of the Indian Constitution creating unanticipated burden of tax on assessee. Furthermore, the laws should be enacted while paying utmost attention and earnestness as it will stimulate reopening of various settled cases.

[38]Ishikawajima-Harima Heavy Industries Ltd. v. Director of Income Tax, (2007) 288 ITR 408 (S.C.).
[39]Ibid.

III. CASE STUDIES

A. Vodafone Case

The Hutchison Telecommunications International Limited ("**HTIL**") is a telecommunication giant based in Cayman Islands. It had been offering mobile and internet services in countries like Indonesia, Sri Lanka, and India. The Cayman Islands are one of the most famous tax havens in the world, making it an ideal place for Multi-National Companies to base their subsidiary entities in order to safeguard their incomes from taxation. This company was the original brainchild but did not explicitly intervene in matters. Alternatively, they used Intermediary like CGP Investments Limited. CGP Investments was a company based in the Cayman Islands but HTIL owned it fully. The company owned shares in several Mauritius-based entities who in turn owned stake in certain Indian Companies and ultimately held 67% stake in Hutchison Essar Ltd which was joint venture between Hutch and Essar, one of the leading giants in the telecom industry of India. Therefore, HTIL was managing its operations in India through a web of companies which were based in Mauritius and the Cayman Islands. They were looking for a buyer when they decided to exit the country altogether and Vodafone International Holdings - the Dutch-Based Company answered the call. The company paid $11.1 billion in return to HTIL and obtained CGP Investments in a bid to take control of Hutchison's India functioning. Subsequently, Hutch Essar became Vodafone Essar.

In May 2007, Vodafone bought 67% stake in Hutchison for $11 billion which encompassed the mobile business and other assets of the Company based in India. The Indian Government for the very first stint in September that year

upraised a demand of Rs 7,990 Crores as Capital Gains intended for withholding tax from the company and raised queries from the Company as they should have deducted the tax at source before proceeding for the clearance of payment to Hutchison. Since, as per the Indian law, the buyer is required to deduct tax at source while making payment to the non-resident seller. In response, Vodafone challenged the demand notice of Income Tax Department in the Bombay High Court, which ultimately pronounced its judgement in the favour of Income Tax Department.[40] After this, Vodafone challenged the High Court judgment in the Apex Court and in 2012 the Supreme Court pronounced the landmark judgement in the favour of Vodafone Group as it observed that their interpretation of Section 9 of the Income Tax Act of 1961 was accurate and therefore no taxes were required to be paid for the stake purchase.[41]

Further on, the Indian Government did something rather unforeseeable as they introduced a new provision in the Income Tax Act, 1961 by virtue of Finance Act of 2012[42] amending all existing protocols in an endeavour to establish burden and pressure on Vodafone to pay up their "alleged" dues. It was in the spirit of retrospective legislation as it gave tax authorities the leeway to re-evaluate transactions dating back to 1962. And the Amendments only affected parts of the tax code that allowed the Supreme Court to interpret the matter the way they had already did. Ergo, the Company was only left with an option now, so as to pursue this case in the International Court as after the Parliament

[40]Vodafone International Holdings BV v. Union of India & Anr., (2009) 179 TAXMAN 129 (SC).
[41]Vodafone International Holdings BV v. Union of India & Anr,.(2012) 6 SCC 613.
[42]The Finance Act, 2012 (23 of 2012).

passed the amendment to the Finance Act in the year 2012 and yet again the duty to pay the taxes fell back on Vodafone. The Amendment was criticised by global investors, who said the change in law was "irrational" in nature as this amendment of retrospective nature that capsized the decision of the Supreme Court of the land was ill drafted in its wide generalities and one could sense some kind of vindictiveness.

Vodafone approached the Permanent Court of Arbitration at the Hague challenging that the amended tax law amounted to gross abuse and violation of fair and equitable treatment promised under two separate Bilateral Investment Treaties ("**BIT**") i.e. The India-Netherlands BIT[43] and the India-UK BIT. Vodafone Group had invoked Clause 9 of the BIT signed between India and the Netherlands in the year 1995.

Since India and the Netherlands had signed a treaty for promotion and protection of investment by corporations of each country in the other's jurisdiction on 06/11/1995.[44] The treaty was aimed to encourage and stimulate favourable conditions for potential and existing investors of the other country. The two countries would under this treaty safeguard that the Companies present in each other's jurisdictions would be at all times be bestowed fair and equitable treatment and shall enjoy complete security and safety in each other's territory. As the treaty was between India and Netherlands, Vodafone

[43] Agreement between the Republic of India and the Kingdom of Netherlands for promotion and protection of investments available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1584/download (last visited on Jan 26, 2021).

summoned it as its Dutch based unit, Vodafone International Holdings BV which had acquired the Indian business operations of Hutchinson Telecommunication International Ltd. Hence, this was a transaction concerning a Dutch based firm and an Indian firm. Later, this treaty between both countries expired on 22/09/2016.

Vodafone Group in the year 2014 had initiated arbitration against India at the Court of Arbitration, which was filed under Article 9 of the BIT between India and the Netherlands. The Article 9 of this Treaty states that any dispute between "an investor of one contracting party and the other contracting party in connection with an investment in the region of the other contracting party" shall as far as possible be sorted out through the process of cordial negotiations. Additionally, Article 3 of the arbitration rules of UNCITRAL[45]states that "Constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the sufficiency of the notice of arbitration, which shall be finally settled by the arbitral tribunal".

In the month of September 2020, this case before the Permanent Court of Arbitration[46] at The Hague was concluded, wherein, the International Court decided the conduct of Indian Tax Department of imposing the alleged tax liability along with all the interest & penalties levied on the telecom company was a breach of Article 4(1) of BIT. In the judgement against Indian Government, the arbitration tribunal said that since it had been recognised that India had breached the terms of the agreement, it must further on not make

[45] UNCITRAL Arbitration Rules, 1976 (31/98 adopted by General Assembly).
[46] Vodafone International Holdings BV v. Government of India PCA Case No. 2016-35.

any exertions to reclaim the alleged taxes from Vodafone. One of the major factors for the Court of Arbitration to rule in favour of Vodafone was the violation of the BIT which existed already and the United Nations Commission on International Trade Law.

Lastly, the Indian Government was not asked to pay any compensation to the telecom Company, but it has been asked to pay partial compensation for the legal representation and the fees paid by the giant to the arbitration court which approximately is estimated at Rs. 40 Crores, and also to refund the tax amount which has been collected.

Also, it must be noted that before this amendment to taxation policy retrospectively, they were under no obligation to pay any taxes and hence, this may be a compelling reason for creating an adverse effect on the company's business. It can be concluded that there is nothing worse than a government amending laws retrospectively to nullify adverse judgements as it totally defeats the purpose of rule of law. The individual who is an expected investor will have a legitimate expectation that the legal system will remain consistent and foreseeable. Such expectation is anticipated as the minimum standard under the Customary International Law.

B. Cairn Energy Case

In a landmark judgment of Vodafone International Holdings,[47] the Supreme Court while analysing Section 9(1)[48] of the Act appropriately established the generally recognized principle of International taxation regime pertaining to cross border mergers and acquisition. Therefore, the Government of India amended Section 9(1) of the Act vide Finance Act of 2012[49] with retrospective effect from 01/04/1962. The amendment introduced was alleged to be of clarificatory nature affirming that indirect transfers deriving substantial value from Indian assets will be subject to taxation in India.

Cairn UK Holdings Limited ("**CUHL**") is one of Europe's leading independent gas and oil reserves development and exploration companies headquartered at Edinburgh, Scotland. The CUHL had a wholly owned subsidiary Cain India Holdings Limited ("**CIHL**") which was incorporated outside India in Jersey in the year 2006. Under an internal share arrangement between the two the CUHL transferred shares to CIHL which comprised of issued share capital of 9 subsidiaries of CUHL that were engaged in the aforementioned sector in India. Whereafter, Cairn India Limited ("**CIL**") was incorporated in 2006 as a wholly owned subsidiary of CUHL for oil and gas reserves exploitation and development headquartered at Gurgaon, India. As a part of internal rearrangement or reorganisation CUHL transferred 100% of issued share capital of CIHL to CIL against cash and shares of CIL to CIHL

[47] *Supra* Note 13.
[48] The Income Tax Act, 1961 (43 of 1961).
[49] *Supra* Note 14.

and further on, CIL divested its shareholding by Initial Public Offer which gave rise to the question as to whether the UK based company made Capital Gains by virtue of internal arrangement.

Many years after the transaction was concluded the Assessing Officer (AO) in 2014 commenced Re-assessment Proceedings under Section 147 and 148 of the Act. The aforesaid Sections apply in the cases when the AO has reasons to believe that the income which should have been charged to tax has been escaped. Against such orders of the AO an objection was filed by the CUHL under Section 144C of the Act before Dispute Resolution Panel. However, the final assessment order drafted by the AO in 2016 determined the taxable income amounting to Rs. 24,500 Crores approximately as short-term capital gains on which the tax will be charged at 40% rate and additionally surcharge and cess. The CUHL was subjected to pay interest under Section 243A and 243B of the Act, which incorporates levying interest in case of default in payment of taxes.

In 2011, CUHL intended to sell CIL to mining conglomerate Vedanta Group however, it was averted by the Income Tax Authority to sell it entirely and a minor stake of roughly 9.8% was preserved as untouched.

Distressed and wronged by such orders the CUHL appealed against such orders before Income Tax Appellate Tribunal's Delhi bench ("**ITAT**")[50] on the grounds that:

[50] Cairn UK Holdings Ltd. v. Deputy Commissioner of Income Tax, ITA No. 1459/Del/2016.

- The Indirect Transfer introduced vide Finance Act 2012 is ultra vires the Fundamental Rights enshrined under Indian Constitution,
- The Tax Treaty of 1994 between India and the United Kingdom aims at avoidance of double taxation,
- The internal re-constitution did not lead to any expansion in wealth.

The ITAT held that Indirect Transfer were of clarificatory nature, thereby making the income as taxable in India even before Finance Act of 2012. Under the Tax Treaty of 1994[51], Article 14 the capital gains are to be taxed as per the domestic laws of each country. The same was also distinct from the Vodafone case as in the present case the transfer was from non-resident to resident.

In pursuance of recovering the dues the Income Tax Authorities in 2014 attached CIL's shares and even sold 5% out of 9.8% of them in 2018.

In 2015 March, the Cairn Energy Plc and CUHL commenced International Arbitration Proceedings against the Republic of Indian in the Permanent Court of Arbitration at Hague, Netherlands.[52] The Tribunal comprised of comprising Mr. Laurent Levy, Mr. Stanimir Alexandrov and Mr. J. Christopher Thomas. The proceedings were initiated by the Cairn Plc under the terms of the India-UK Bilateral Tax Treaty. The Indian Government challenged by claiming that the there is a distinction between tax and investment and the instant case or issue entails to taxation, which is a sovereign right and hence, out of the

[51]UK-India Double Taxation Convention, 1993 (effective 1994)available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/498363/india-dtc_-_in_force.pdf (last visited on Jan 26, 2021).
[52] Cairn Energy Plc and Anr. v. The Republic of India, PCA Case No. 2016/7.

purview of International Law. The Court asserted that the said dispute is not tax dispute rather a tax related investment dispute. Thereby, it will squarely fall under its jurisdiction. On 22/12/2020 the Indian Government endured yet another setback after Vodafone wherein, the court held that the India's Retrospective demand was in breach of the Tax Treaty of 1994. Hence, the damages of approximately Rs. 8,840 Crores were awarded to the Cairn which also included its shares which were attached by the Income Tax Authorities in 2014 and were sold in 2018 to recover the dues, dividends and tax refunds that were confiscated.

IV. IMPLICATIONS OF RETROSPECTIVE TAXATION

Heretofore, a considerable disquiet was present both at national and international level by the amendment of 2012 leading to critical blows to Foreign Direct Investments, a committee of experts was formulated and was headed by Mr. Parthasarthy Shome[53] one of the most respected economists of India. The Committee correctly pointed out that Retrospective Taxation should be applied in rarest of rare cases -

A. To rectify anomalies in the statute, or
B. To matters which are legitimately of clarificatory nature, or
C. To protect tax base from schemes aimed at abusing and avoiding tax.

[53] Expert Committee, Final Report on General Anti Avoidance Rules (GAAR) in Income-tax Act, 1961 available at: https://www.finmin.nic.in/sites/default/files/report_gaar_itact1961.pdf (last visited on Jan 26, 2021).

Then another committee headed by Mr. Damodaran[54] pointed out that this tax regime had the detrimental effect in the business environment owing to major uncertainties.

The Former Finance Minister, Late Mr. Arun Jaitley stated that "No retrospective tax creating fresh liabilities will be imposed"[55] and admitted that it had an adverse effect on India's growth and development. And yet, the Vodafone case was carried forward.

Nevertheless, the scars of Vodafone and Cairn are going to haunt Indian business environment time and again. As recently, the US Auto maker Tesla incorporated in the state of California, the United States of America chose its subsidiary located in the tax friendly country - Netherlands to route its investments in India to avail tax benefits from the India-Netherlands Treaty which has not been renegotiated and has stood the assessment of time. Moreover, the Netherlands domestic laws favour Multinational Corporations and has a strong Intellectual Property structure.[56] It clearly exhibits the conundrum among the investors to directly invest in India owing to harsh and volatile taxation policies which in long term can affect their business. Thereby, convoluting the practice of establishing and doing business in country because of the inconsistent and unforeseeable legal system as aforementioned that taxation policies of a country are one of the essential criteria in determining the Ease of doing and establishing business.

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[54] Ministry of Corporate Affairs Government of India, Report of the Committee for Reforming the Regulatory Environment for Doing Business in India available at: https://www.mca.gov.in/Ministry/annual_reports/DamodaranCommitteeReport.pdf (last visited on Jan 26, 2021).

[55] Raghuvir Srinivasan "Disappointment on retrospective tax" The Hindu, July 11, 2014.

[56] Tesla Detouring its India Investment through Netherlands available at: https://www.fdi.finance/news/tesla-detouring-its-india-investment-through-netherlands (last visited on Jan 26, 2021).

V. COMPARATIVE ANALYSIS – PERU AND UGANDA

The Indirect transfers as observed in the cases of Vodafone or Cairn are aimed at abusing the tax regulations of a country as the fundamental asset does not change its position by this means capital gains are not realised on the face of it or directly. Nevertheless, the gains are yielded without any alteration in the ownership. Ergo, such chargeability is questioned for its uncertainty. Besides Vodafone and Cairn cases there have been other cases of Offshore Indirect Transfers.

In the interesting case of Acquisition of Petrotech[57] in Peru where a Company named called Ecopetrol Colombia and Korea National Oil Corporation purchased an Offshore International Company based in Houston whose main asset constituted of Petrotech Peruana a company incorporated and resident in Peru from Petrotech International incorporated in Delaware. The shareholders of Petrotech International would be liable in their place of residence's jurisdiction on the related capital gain, if subject to tax. The case triggered a parliamentary investigation in Peru that finally led to a change in the law since; the income tax law of Peru did not have any definite provision for taxing offshore indirect sales transactions, and consequently this transaction remained untaxed too. This transaction of tax revenue for Peru was estimated at US$482 million. Presently, as per Article 10 of The Income Tax Act of Peru all transactions relating to offshore indirect sales of resident companies are

[57] The Platform for Collaboration on Tax, The Taxation of Offshore Indirect Transfers- A Toolkit available at: https://www.tax-platform.org/sites/pct/files/publications/PCT_Toolkit_The_Taxation_of_Offshore_Indirect_Transfers.pdf (last visited on Jan 26, 2021).

taxed in Peru. There are some limitations to apply i.e., firstly, the portion of the parent company subject to sale must derive its value at least 50 percent from Peruvian assets, and secondly at least 20 percent of the Peruvian assets must be transferred in order for the transaction to be taxable in Peru.

Both India's Vodafone and Peru's case have a lot of parallels, the countries which lost where the one where the alleged underlying assets were situated, and both the cases had a common thread which was with respect to the insufficiency of municipal tax laws to assess such transactions. Both the countries countered to such loss or defeat in their own fashion. On one hand, Peru amended their domestic laws to incorporate offshore transfer under the purview of tax and on the other hand, India issued a clarificatory amendment with retrospective effect.

In 2010, a subsidiary Dutch based of the Indian Bharti Airtel International BV purchased the shares of Zain Africa BV (Dutch Based) for US$10.7 billion from Zain International BV, a Dutch company too. This Company owned in turn the Kampala-registered mobile phone operator called Celtel Uganda Ltd. The Uganda Revenue Administration detained Zain International BV liable for the capital gains tax on the corresponding transaction which approximately amounted to US$85 million. Uganda's Appeals Court gave its judgement in sharp contrast to the verdict of the Supreme Court of India in the Vodafone Case that the URA does have the jurisdiction to assess and tax the offshore seller of an indirect interest in local assets (overruling an earlier decision by the Kampala High Court. Although, the taxpayer who interprets the tax treaty concerning Uganda and the Netherlands as protecting the Netherlands absolute

right to tax such transaction. This is an issue of some potential significance since some anti-avoidance rules in municipal law could be viewed as supplementary to the treaty but cannot have an overriding effect; therefore, it is currently unsettled.[58]

The instant case of Uganda is not indistinguishable with India's Vodafone however, the same jurisprudential tools are being employed by Uganda in order to tax the transaction which took place offshore through holding companies.

Internationally, the Offshore Indirect Transfer is recognised by handful of emerging countries like China, Brazil and Israel and developed countries do not tax capital gains of a non-resident in the source country and hence, follow residence based taxation.[59] In June 2020, the Platform for Collaboration on Tax[60] in their report squarely concluded that the location countries like- India in Vodafone Case and Peru in Petrotech Case have the right to tax the Offshore Indirect Transfers only on the specific provisions but it still refrains from employing taxes retrospectively.

Majority of Bilateral Investment Treaties entails the principle of "Fair and Equitable Treatment" casted on the host countries. The United Nations Conference on Trade and Development in 2012 interpreted the minimum standards for General International Law and Hence Obligation of caution and

[58] Ibid.
[59] Expert Committee, Draft Report on retrospective Amendments relating to Indirect Transfer available at: https://www.internationaltaxreview.com/pdfs/Report_on_Retrospective_Amendments.pdf (last visited on Jan 26, 2021).
[60] *Supra* Note 29.

protection, Due process, Transparency, Good faith, and Autonomous fairness components were carved out to eradicate the ambiguous situation. In a case it was observed that in order to establish the breach of fair and equitable treatment the investor requires to corroborate that the alteration in taxes inflicted a drastic and discriminatory consequences.[61]

In both the cases of Peru and India, the right to tax the offshore Indirect Transfer limited to certain provisions is recognised however, the employing of taxation retrospectively was condemned and the same must be refrained in all prospects.

VI. CONCLUSION

Globally all states are majorly dependent on taxation as it is leading and eminent source of revenue to provide basic utilities and amenities such as security, shelter, health, education, and other amenities to its citizens. Consequently, it acts as a tool in hands of the Government in precarious and perilous times to diminish the skyrocketing inequality and poverty. The tax collected by Companies and the taxation of Capital Gains in often regarded as the definitive and one of the weightiest sources of revenue.

The Indian Constitution empowers the legislature to enact retrospective law for taxation purposes if it is in support and benefit of the Assessee or is of clarificatory nature and the law in question is not palpably arbitrary and in apparent violation of Articles 14 and 19. At this juncture it is imperative to glance at the principles of taxation which were articulated by Adam Smith in

[61]Toto Costruzioni Generali S.P.A. v. Republic of Lebanon, ICSID Case No. ARB/07/12.

The Wealth of Nations in 1976 which contended that taxation should adhere to Equity, Certainty, Convenience and Economy.[62] The principle of certainty aims at ensuring that the tax payer is informed unambiguously as to when and in what manner the tax will be levied. However, retrospective taxation is in coherent contrast with the tenet as the retrospective amendments are enforced from the back date and are denoted as ex-post facto law which may or may not be of certain nature.

In the case studies on Vodafone-Hutch and Cairn Energy the measures employed by Indian Government were rather unforeseeable as the introduction of a new provision in the Income Tax Act, 1961 by virtue of Finance Bill of 2012 amending all existing regulations by means of validity clause and to put Companies at the grace, generosity and subject to tax demands was arbitrary. Nevertheless, the Indian Government was ridiculed by various national and international jurists for retrospective taxation and it further witnessed a back-to-back misfortune and defeat at the Permanent Court of Arbitration at The Hague.

Recently, in the previous year 2020 the Platform for Collaboration of Tax in their report correctly deduced that for the Offshore Indirect Transfers the location country has aggregate of rights to impose taxes, but this should not amount to retrospective applicability. Moreover, innumerable times various Tribunal and Courts have held that palpable alteration in the dynamic environment or conditions of the host country leads to the breach of Fair and Equitable Treatment principle of Bilateral Investment Treaties. Herein, the

[62]The Institute of Company Secretaries, Tax Laws 5 (ICSI, 2018)

Indian Government by resorting to validity clause constituted an unfair and arbitrary provisions and ergo denying justice to Companies as it failed to realize while amending Section 9 of the Act that it has to be applied in rarest case scenario.

Even after the botch at the Permanent Court of Arbitration many news articles have cited the Indian Government's yearning for challenging the validity of Vodafone - Hutch award at the recommendation of the Solicitor General of India, which would be mockery as Vodafone won the taxation dispute in 2012 and there is an extremely bleak likelihood of succeeding in Singapore and it was evidently an opportunity for India to establish that it will welcome well-reasoned arbitral awards. It is imperative for the Indian Government to accept both the arbitral awards or otherwise it will transmit a downbeat message to potential investors consequentially, it will clearly exhibit the conundrum among the investors to directly invest in India owing to harsh and volatile taxation policies which in long term can affect their business as taxation policies of a country constitute one of the determining components of Ease of Doing Business. Thereby, convoluting the practice of establishing and doing business in a country because of the inconsistent and unforeseeable legal system.

Nevertheless, India is in a dire need to embrace taxation friendly measures and incentives in order to attract Foreign Investors and to assure itself a better ranking at the ease of doing business index as in the recent case of Tesla, Netherlands was approached for establishing its plant in India as its domestic

laws favour Multinational Corporations and has a strong Intellectual Property structure.

Therefore, emphasising upon the present scenario Indian Government urgently needs to take proper measures and capitulate its resolute stand in order to support Companies and foreign investors to secure better ranking at the index by eliminating such dilemmas surrounding the taxation policies and keeping its promise for non-adversarial tax regime.

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About Amity Law School

The School has been consistently ranked as one of the Top Law Schools in the Country since 2006. In the survey of the India's Best Law Colleges by India Today (THE INDIA TODAY- NIELSEN SURVEY), the National Magazine, Amity Law School Delhi (ALSD) bagged 4th rank in India in 2017 moving up in ranks from Rank 11 in the same in 2016. In THE WEEK (HANSA RESEARCH SURVEY) ALSD was ranked at 12th in 2016 and 11th in 2015. THE OUTLOOK (OUTLOOK GFK MODE SURVEY), ALSD was ranked 10th in 2016.

The Amity Law School, Delhi (ALSD) has the unique distinction of being the first Law School in Delhi to start a 5-year integrated LL.B (H) programme in 1999. The School was established under the Ritnand Balved Education Foundation (RBEF) to achieve world-class legal education in the country. Dr. Ashok K. Chauhan, the Founder President of the Law School is a great philanthropist and a man of extraordinary vision. This great vision has been translated into practical reality through the establishment of various educational institutions including the Amity Law School. His vision for the Law School is to provide excellence in legal education and to produce quality lawyers with good moral principles and great human values. The President RBEF, Dr. Atul Chauhan has been providing dynamic leadership intervention in strengthening the vision of the Founder President. Presently the academic values are being inculcated by Prof. (Dr.) D. K. Bandyopadhyay, (Former Vice-chancellor, GGSIPU) Chairman, Amity Law Schools.

Amity Law School Delhi has been granted affiliation by the Guru Gobind Singh Indraprastha University, Delhi for running a 5-year Integrated LL. B (H) programme and the affiliation has been approved by the Bar Council of India. The programme is designed to incorporate teaching methods for realizing holistic legal education.

The programme offered by Amity Law School Delhi seeks to promote multi-disciplinary analysis of the socio-legal problems by designing/pursuing/giving effect to its course-structure and teaching methods to realize these objectives. The methods of teaching in the Law School include lecture, discussions, case law analysis, moot court training, project assignment and placement programmes. In addition, the School organizes seminars on contemporary legal issues, conducts clinical courses and train students in legal research and legal writing. By the time a student completes the 5-year programme he/she will be fully equipped with the required theoretical knowledge and practical experience in the field of law to become a full-fledged responsible member of the legal profession.

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