Foreword

"Our dilemma is that we hate change and love it at the same time; what we really want is for things to remain the same but get better."

—Sydney J. Harris

Having published *Scholasticus* successfully for a decade, National Law University, Jodhpur has now sought to bring about a new outlook to the flagship journal of the University, renamed as NLUJ Law Review. With one of its main aim being to increase student involvement, the journal seeks to maintain its earlier objective of becoming a formidable instrument in taking the standard of legal research in India up by several notches, while broadening its platform for legal discpurse.

At a time when people's faith in the legislature and executive is dwindling and the country is looking to the judiciary to bring about some semblance of order in the society, we have decided to dedicate the maiden issue of this journal to the different perspectives on the role of judiciary. Various nuances of this issue have been discussed through the articles, notes and book reviews.

The articles published in this edition discuss the reactions of judiciary to the contours of 'bolar exemption', taxing foreign investments, elements of Trias' in evidence law and the regulation of international commercial arbitration. The first article titled "The Billion Dollar Saga: A Study of the Vodafone Judgment and Its Policy Implications' is about the Vodafone Judgment and discusses the recent judicial interventions with respect to tax laws in India. The distinction between tax evasion and tax avoidance is brought out by tracing the history of the issue from the McDowell and the Azadi Bacaho Andolan judgment to the recent Vodafone judgment. The next article 'Bolar Exemption Law in India: An Analysis in Light of Current Trends in Pharmaceutical Market' deals with the popular dichotomy of patent protection versus societal welfare in the pharmaceutical research industry. It brings to the fore the difficulty in achieving a balance between the two objectives in light of the 'bolar exemption'. Our third article is a study of the recent Bharat Aluminium judgment and discusses the trends and developments in the Indian legal system with respect to the jurisdiction of Indian Courts over international commercial arbitration held outside India. The last article analyses the evolution of the different tests of bias developed by the Courts both in India and the UK, and urges the Courts to develop some semblance of standardization.

Our notes section has also received some interesting contributions. Our Vice-Chancellor Justice N.N. Mathur has also made a contribution by authoring the piece titled 'Globalization and the Legal Profession' wherein he discusses this relationship by emphasizing on the recent increase in economic activity, which demands the extension of international law to the business world. Another note deals with 'International law on attribution' as well as 'BIT jurisprudence on liability for judicial action' in its scope and extent before arriving at a conclusion that favours interests of the investors. The third piece in this section critically analyzes the recent decision of the Supreme Court that allows decisions of the Authority for Advanced Ruling to be challenged in the appropriate High Court. As a special addition to the maiden issue we have also included an address by the Honourable Chief Election Commissioner of India at the 'Voter Empowerment' Seminar that was held at National Law University, Jodhpur. In his address he has mentioned the efforts invested by the Election Commission of India in this regard which culminated into the 'Electoral Reforms Proposals'.

In an attempt to widen our readership our book review section includes a review of two very different yet very engaging books. For most law students in India, a study of the Indian Constitution begins with the case of Kesavananda Bharati v. State of Kerala. The importance of the decision in shaping our constitution for what it is today is undeniable. The first book that is under review is "The Kesavananda Bharati Case - The Untold Story of the Struggle for Supremacy by the Supreme Court and Parliament". Written by T.R. Andhyarujina, a junior to Mr. Seevai, counsel for the Respondents, the book provides a first-hand narrative of all the politics involved in the 66 days of hearing that preceded this landmark decision. The second book reviewed is "Relocating Geographical Indicators" written by Dev Ganjee. It deliberates on the question of why Geographical Indicators was given IP protection and is a valuable addition to the existing literature on the subject.

We sincerely hope that through this maiden issue NLUJ Law Review while maintaining the scholarship of *Scholasticus,* is able to garner even greater interest and wider readership among students of law, professors, scholars and academics in the field.

—Chief Editors,

NLUJ Law Review

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NOTES

The Billion Dollar Saga: A Study of the Vodafone Judgment and its Policy Implications

Abhishek K. Singh and Kushank Sindhu

Abstract

The Vodafone judgment has been massive in its implications. A natural question arises- what major policy changes will ensue? The other question that arises is whether India should tax sale of capital assets situated in another country by non-residents, when the underlying asset is in India. There has been no discourse or literature available on either of these critical questions. This paper seeks to answer both these questions.

I. Introduction

ij The protagonists of this saga are Vodafone International Holdings B.V. ("VIH"), resident of Netherlands for tax purposes, a company controlled by Vodafone Group Pic. U.K., and the Indian Income Tax Department ("Revenue"). Hutchison, a non-resident for tax purposes, sold shares of its Cayman Islands entity to Vodafone, another non-resident for tax purposes. At the end of the transaction, Vodafone owned 51% in

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Hutchison Essar Limited ("HEL"), a resident of India for tax purposes. Revenue sought to tax this transaction arguing that the source of the income lies in India because the underlying asset is in India. Vodafone was handed tax bill of a monumental US$ 1.2billion. This was also widely interpreted as a "test case"[1] for Revenue because if the Court had rendered its decision in Revenue's favour, it would have brought similar high value transactions into its net.[2] Thus, the case generated enormous publicity.

In this paper, we have covered the possible policy implications of the judgment and have also discussed whether, in India, the sale of assets by non-residents can be taxed when the underlying asset is in India.

While the multi-dimensional case encourages several lines of research, paucity of time and space do not allow the same. Hence, *perforce,* the present paper does not take into consideration the arguments regarding Section 195 of the Act relating to withholding tax.[3]

The paper begins with an overview of Indian taxation. The subsequent section discusses the facts, arguments and judgment in detail while the third section comments

1 Jaideep Mishra, Vodafone Ruling as a test case, The Economics Times (blog), 20 February, 2012, http://blogs.economictimes.indiatimes.com/figuringitout/entry/vodafone-ruling-as-a-test-case; Both buyers and sellers in cross border M&A transactions completed even before the Vodafone transaction were all on tenterhooks awaiting 'the mid-night call'! The revenue apparently had drawn up a list of all transactions and possibly was awaiting this judgement before launching the offensive. See Impact of Vodafone ruling on Ongoing M&A deals & litigation and effect of the decision on recently concluded M&A transactions, Vivek Mehra, (visited September 1, 2012) http://www.taxsutra.com/experts/column?sid=17.

2 On the hit list are deals of Cairn UK Holding Ltd, Unilever HPC Finance Service Inc USA, Accenture Services Pvt Ltd and Euro Pacific Security Ltd. A Step Back: Vodafone, similar cases since 1962 may be opened, March 16, 2012, The Indian Express, online at http://www.indianexpress.com/news/a-step-back-vodafone-similar-cases-since-1962-may-be-reopened/924694/(visited September 1, 2012).

3 For more on this issue and even on Section 195 see, Anisha Keyal and Pritika Rai Advani, The Vodafone Judgment-Wider Concerns of Withholding Tax Under the Income Tax Act, (2010), 3(4) NUJS L. Rev. 511; Shreya Rao and Bijal Ajinkya, Groping in the Dark: The Extending Arms of the Indian International Withholding Tax, (2010), 22 (1) National Law School of Law India Review 97.

on the policy issues. The fourth section outlines the ideal position of law, and the final section summarises the arguments that we have raised in this paper.

II. Overview Of Indian Income Tax Law

A. Importance of Factor of Residence towards Determining Taxable Income

While determining the income that needs to be charged, the locality of accrual or receipt is of prime importance. Taxability of income arises out of Section 4 of the Income-Tax Act, 1961[4] ("the Act") which lays down the foundation of charging. It specifies that, for any assessment year on which income tax is to be charged, such income tax shall be charged for that year in respect of the total income of the previous year of every person.

A charge under Section 5 of the Act is governed by the fundamental principles of the source and residence rules. Non-residents are governed by the source based rule under Section 5(2). 'Source' has always been interpreted in terms of the place where the transaction took place and not where the derivation or acquiring of the item of value took place.

The Residential Status of the Assessees is also discussed under Sections 5 and 6 of the Act, according to which income subject to charge varies. In the case of a person residing in India, all income derived from whatever source: actually or deemed to be, received or accrued, in India or accrued outside India, is within the scope of taxation. A resident's world income is charged to tax, subject to a double taxation relief in respect of foreign incomes taxed abroad.[5] In the case of a non-resident, tax liability extends only to income which (a) is received or is deemed to be received in India by

4 Amended by the Finance Act, 2012 .http://law.incometaxindia.gov.in/DIT/Income-tax-acts.aspx.

5 The 82 Double Taxation Avoidance Agreements India has entered into can be accessed at "International Taxation (DTAA Comprehensive agreements - With respect to taxes on income)", Income tax Department, Department of Revenue, Government of India, (visited Aug 30,2012) http://law.incometaxindia.gov.in/DIT/intDtaa.aspx.

or on behalf of the non-resident or (b) accrues or arises, or is deemed to accrue or arise, to the non-resident in India. If he is a resident but not ordinarily resident, his .liability in respect of such income arises only if it is from a business controlled[6] or profession set up in India.

Under Section 9, all income accruing or arising, whether directly or indirectly, through or from any business connection, any property or any asset or source of income in India, or through the transfer of a capital asset situate in India, is deemed to accrue or arise in India. The section establishes a fiction that ropes in receipts which are not natural income, persons who are not direct assesses and periods which are not relevant periods.

The extra-territorial operation of the Section was judicially considered and has been declared to be not *ultra vires.*[7] The Section is a charging and not just a machinery section.[8] In order to give effect to the extra-territorial legislation, the court must be satisfied that there is a territorial nexus between the person who is to be taxed and the country which seeks to tax.[9]

B. Capital Asset

Capital asset is property of any kind, with exceptions, held by an assessee, whether or not connected with his business or profession.[10]

6 A business connection contemplated under Section 9 involves a relation between a business carried on by a non-resident and some activity in the taxable territories which is attributable directly or indirectly to the earnings, profits and gains of such business. There must be a trading activity both outside and within the taxable territory. It predicates an element of continuity, and not a stray or isolated transaction, between the business of non-residents and the activity in India.

7 *Caltex (India) Pvt. Ltd* v. CIT, *Bombay City,* [1952] 21ITR 278 (Bom) para 4. The Court considered the decisions across ages, in *Governor General in Council* v. *Raleigh Investment Co. Ltd.,* (1944) 12 ITR 265, *Wallace Bros. & Co. Ltd.* v. *Commissioner of Income Tax, Bombay City,* (1948) 161.T.R 2401 and *A. H. Wadia* v. *Commissioner of Income Tax,* (1949) 51 BOMLR 287.

8 *Anglo-French Textile Co Ltd* v. *CIT,* [2953] 23 ITR 101 (SC).

9 *Commissioner of Income-tax, Gujarat* v. *A. Raman & Co.,* AIR 1968 SC 10.

10 For more See Section 2(14) of the Act.

The words "property of any kind", has been judicially considered to be very wide and embracive and includes movable or immovable, tangible or intangible property, incorporeal rights, etc. The Act does not define "property".[11]

The existence, situation and transfer of capital asset in India are the prerequisites for charging of capital gains. The inclusion of capital asset within Section 9(l)(i) ensures its taxability under Section 5(2)(b) of the Act in the case of a non-resident. Hence, the singular objective of enacting Section 9(l)(i) seems to be to capture through a fiction such income arising to a non-resident outside India on transfer of capital asset situated in India, which may otherwise go untaxed, by capturing it within the mischief in the Act i.e. Section 5(2)(b) of the Act.

III. The Vodafone Judgment

A. Facts of the Case

In 1992, the Hutchison Group, Hong Kong, entered the Indian telecommunication industry when the group invested in Hutchison Max Telecom Limited ("HMTL"). HMTL was later renamed as HEL, (resident of India for tax purposes)[12] in August, 2005. By the year 2006, HEL had acquired license in 23 telecommunication circles in India. Hutchison Group of companies had held shares in HEL through a web of subsidiaries.[13]

11 Even the Transfer of Property Act, 1882 only mentions incidents in respect of property transfers including sale, mortgage, lease and so on. The General Clauses Act, 1897 offers more exactitude while defining immovable property and movable property but again, not 'property' as such.

12 Pursuant to the successful competition of the transaction, HEL was renamed Vodafone Essar Limited ("VEL"). HEL is referred as VEL for any event that has happened after 8 May 2007, the day after the completion of the transaction.

13 While the entire structure is not relevant here, the same has diagrammatically been represented in Annexure 1 to this paper. Annexure 1 has been taken from the judgment of the Hon'ble Supreme Court in *Vodafone International Holding B.V.* v. *Union of India*, Civil Appeal No. 733 of 2012, pg. 28, ("Vodafone S.C.). A further simplified structure for the purpose of understanding has been drawn by Nishith Desai Associates (NDA), a leading tax law firm in India and has

On 12 January, 1998, CGP Investment (Holdings) Ltd. ("CGP"), resident of Cayman Islands for tax purposes, was incorporated. As on 17 September, 2004, CGP's sole shareholder was HTI (BVI) Holdings limited ("HTML BVI"), which was a wholly owned subsidiary of Hutchison Telecommunications International Limited (CI) ("HTIL"), incorporated in Hong Kong. CGP held around 42.34% directly and 9.62% interest indirectly in HEL. In 2005, HMTL (later HEL) undertook a process of consolidation with regulatory approval, after which shares of several operating companies were transferred by diverse holding companies to HMTL, in consideration for which HMTL issued its own shares to these holding companies. Meanwhile, on 28 October, 2005, VIH acquired 5.61% shareholding in Bharti Televentures Ltd. and on the same day, Vodafone Mauritius Limited, subsidiary of VIH, acquired 4.39% shareholding in Bharti Enterprises Pvt. Ltd. which indirectly held shares in Bharti Televentures Ltd. Bharti Enterprise operates as Bharti Airtel in the Indian telecom sector.

After several rounds of negotiation, Vodafone Group Pic. on 10 February, 2007, made a final binding offer to HTIL of US$11.76 billion, based on enterprise value of US$18.80 billion of HEL. Following this, a Sale Purchase Agreement was entered into between VIH and HTIL. HTIL agreed to transfer the entire share capital of CGP held by it to VIH. Pursuant to the transaction, VIH acquired a total of 51.96% direct and indirect control in HEL. Since Vodafone Group Pic, through its subsidiary, held 10% interest in Bharti Televentures Ltd., a company which was in direct competition with HEL, VIH sought approval of the Foreign Institutional Promotional Board (FIPB). Meanwhile, on 22 February, 2007, HTIL declared a special dividend of Hong Kong Dollar 6.75 per share from the proceeds of its share interest in HEL. On 6 March, 2007, Essar Teleholdings Ltd. ("Essar"), which held around 33% interest in HEL, filed its objection with the Foreign Investment Promotion Board ("FIPB") regarding the above deal. It argued that pursuant to the transaction, Vodafone would hold interest in both HEL and BhartiAirtel, thereby creating conflict of interest and hence it would be

been marked as Annexure 2. *See* The Vodafone Holding Structure, Nishith Desai Associates, (visited Aug 1, 2012) http://www.nishithdesai.com/New_Hotline/Tax vodafone%20 structure.pdf.

unprofitable for HEL. However, following.a settlement between HTIL and Essar, it withdrew its complaint from FIPB on 15 March, 2007. On 19 March, 2007, in reply to a clarification sought by FIPB, VIH stated that its price of US$ 11.08 billion included 52% equity interest in HEL price, control premium, use and rights to the Hutch brand in India, a non-compete agreement with the Hutch group, various loan obligations and an entitlement to acquire a further 15% indirect interest in HEL, subject to Indian foreign investment rules, which together equated to 67% of value of HEL. In another letter written on 27 March, 2007, to FIPB, HEL clarified that it did not attach individual price to any of these items while determining the bid price.

On 6 August, 2007, Revenue issued a notice to VEL under Section 163 of the Act asking it to explain why it should not be treated as a representative assessee of VIH. The VIH challenged this notice under the court's writ jurisdiction on the grounds that Revenue has no jurisdiction to tax VTH. On 19 September, 2007, Revenue issued another notice to VIH under Section 201(1) and Section 201(1A) of the Act to show cause as to why it should not be treated as an assessee-in-default for failure to withhold tax. A Division Bench of the court dismissed the petition, holding that in the presence of alternative remedy before VIH, its writ jurisdiction cannot be invoked.[14] This was challenged by way of Special Leave Petition in the Supreme Court. On 23 January, 2009, the Supreme Court directed Revenue to decide whether it had jurisdiction to tax or not. It ordered further that in case such a decision was against VIH, it had the freedom to approach the Bombay High Court. On 31 May, 2010, the Revenue passed a 763 order, ruling that it had the jurisdiction to tax the current transaction. The same was challenged by VIH.

B. Arguments of the Parties

i. *Revenue's Perspective*

The primary case of the Revenue was that the subject matter of the transaction was the acquisition of HEL by VIH and that the transfer of share of CGP was only a means

14 The decision was given by the Bombay High Court in *Vodafone International Holdings B.V.* v. *UOI and Others*, [2009] 311ITR 46 (Bom).

to its end. It argued that the present transaction was just of transfer of one share in CGP, rather, on a perusal of the various Framework agreements and the Share Purchase Agreement ("SPA") entered into between the parties, was evident that the transfer resulted in the extinguishment of the rights of HTIL in HEL which constituted a capital asset situated in India and hence, was taxable by the Revenue. Revenue listed a series of rights[15] which stood transferred and believed that those rights could not have been transferred by mere share transfer of CGP, and that to transfer them it had entered into independent contracts. The total consideration paid by VIH was for these rights as well. Revenue built its argument on the fact that after the conclusion of the deal, HTIL announced a "transaction special dividend" of H.K. $ 6.75 to its shareholders in Hong Kong which was paid out of the "profits from discontinued operations". Several judgments of the Supreme Court and various High Courts were relied upon to establish that the set of rights which were transferred, independently from the transfer of share of CGP were property rights and constituted capital asset situated in India. They argued that but for the transfer of these rights Vodafone would not have been in the position to hold "controlling interest" in HEL. Further in the instant case, HTIL did not itself respect the separate legal position of its subsidiaries and disregarded them for the sake of the impugned transaction.

To drive home its point, Revenue argued that Section 9(1) of the Act was of wide amplitude and that till the time the income had territorial or economic nexus with India such income of non-resident was taxable. It was also argued that Section 9 of the Act was a "look through"[16] provision; so when there was a transfer of shares of a foreign company which holds shares in Indian company; the same could be made

15 (i) direct and indirect interest of 51.96% in the equity of HEL, (ii) Indirect interest in the equity of HEL of 15.03% through Call Options in the companies held by Analjit Singh, AsimGhosh and IDFC, (iii) Right to do business through telecom licence (iv) Acquisition and devolution of Hutch brand (v) Management rights over HEL (vi) Debt/loans through intermediaries for infusion as equity or debt in HEL.

16 Section 9(1) of the Act reads, "The following incomes shall be deemed to accrue or arise in India :- (i) All income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India."

taxable. Lastly they contended that CGP was inserted in the "last minute" so as to avoid capital gains tax and that its original target was Array, a Mauritian entity.

ii. Submissions of VIH

VIH refuted these claims and argued that there had been only transfer of CGP share and any rights that had been passed to it with respect to CGP and its downside subsidiaries was incidental to the transfer of share in CGP. Since CGP was registered in Cayman Islands and that was the place where the *situs* of the share lay, the transferred capital asset was situated outside India and the event was non-taxable. It argued that it was a fundamental principle of corporate law that there existed differences between shareholders of a company and the company itself and the latter had a right in the asset of the company which the former did not have. In the instant case, the assets were still held by the Company and there had been only change in the shareholders of the company. It was also argued that Section 9 did not have a "look through" provision and that such a provision could only be read in by means of legislative intervention and that the Courts were not allowed to judicially construct Section 9 as a "look through provision".

In the present case, the shares of the Indian company were being held by a Mauritius entity and even if there was any transfer without interposition of subsidiaries the event would not have been taxable in light of Section 13 (4) of the Indo-Mauritius DTAA[17], CBDT Circular No. 682[18] and the decision of the Supreme Court in the *Union*

17 Section 13(4) of the DTAA reads, "Gains derived by a resident of a Contracting State from the alienation of any property other than those mentioned in para. (1), (2) and (3) of this article shall be taxable only in that State."

18 The Indo-Mauritius DTAA, Circular and the *Union of India (Uol) and Anr.* v. *Azadi Bachao Andolan and Anr.,* (2003) 184 CTR SC 450 case have been dealt in detail in later parts. CBDT issued a circular in which the government clarified that capital gains of any resident of Mauritius by alienation of shares of an Indian company shall be taxable only in Mauritius, according to Mauritius taxation laws. *See* Circular No. 682, last modified March 30, 2000, http:// law.incometaxindia.gov.in/DIT/File_opener.aspx?page=CIR&schT=&csId=8e5b6291-2674-4a89-b0de-6e5640389a24&cm=682&yr=ALL&sch=&mie=Taxmarm%20-%20E»irect%20Tax%20 Laws, (visited September 5, 2012)

of India (Uol) and Anr. v. *Azadi Bachao Andolan and Anr}*[9]

C. Judgment

The Supreme Court overruled the decision of the Bombay High Court.[20] The Court examined the legislative intent of Section 9 and held that for an income to be made taxable in India the capital asset has to be situated in India. The Court reasoned that Section 9 created a legal fiction which within a very limited scope brought under its ambit certain income which would have not been otherwise taxable,[21] and that it was not possible to interpret Section 9 such that it would have the effect of changing the intent of the Legislature. The Court held that the legislature did not use the word "indirect transfer" in Section 9 and to hold otherwise would render words "capital asset situated in India" nugatory.[22] The Court relied on the proposed Direct Tax Code 2010,[23] in which provision has been made to cover indirect transfer of capital asset

19 (2003) 184 CTR SC 450, *(hereinafter* "Azadi Bachao case").

20 *Supra* at 15. The Bombay High Court analysed the various transactional documents and came to the conclusion that for HTIL the transaction meant the discontinuation of its telecommunication business in India and the price paid by VIH was for acquiring controlling interest in HEL. The Court concluded that CGP was put in picture just as a mean to an end and that only transfer of shares of CGP could not have resulted in giving effect to the true intent of the parties which was to acquire controlling interest in HEL. Hence, besides transfer of share of CGP, there were several other rights and entitlement which were transferred to VIH and that these rights were not incidental to the transfer of CGP shares and that they were independent from the share transfer. Since these rights and entitlements are property rights situated in India and were not contractual rights hence the transfer of these rights gave rise to tax implications.

21 This section charges those income by a non-resident in which the receipt of income is outside India but the transferred assets are in India. This was done to counter any possible argument of the nonresident on the grounds that income accrued outside India because the contract was executed outside India.

22 *Supra* at 12 para. 71.

23 Section 5(4)(g), Bill No. 110 of 2010 online at http://164.100.24.219/BillsTexts/LSBillTexts/asintroduced/DTC%20(110%20of%202010)%20To%20be.pdf

situated in India which indicated that such a provision did not exist in the existing Section 9 and hence it rejected Revenues' argument.

With respect to the primary argument advanced by Revenue regarding transfer of rights and entitlements separate from the transfer of CGP shares, the Court held that it would adopt the Ramsay Doctrine of "look at" approach[24] to look at the entire transaction holistically and termed the Revenue approach as a "dissecting approach", which it refused to adopt. The Court also made a distinction between a pre-ordained transaction, the sole purpose of which was to avoid tax and a transaction which evidences an investment to participate and to distinguish the two, the Court laid down several factors.[25] With the adoption of the said approach it found that various rights and entitlements passed to VIH on account of transfer of CGP share and not *dehors* of such transfer. The Court analysed the SPA and found that the need for SPA

24 In *W.T. Ramsay Limited* v. *Inland Revenue Commissioner, 1981) 54 T.C. 101 (H.L.) (U.K.),* the taxpayer had entered into a series of self-cancelling transactions just to avoid tax without any commercial profit to him. The House of Lords ruled against the tax payer and Lord Wilberforce opined, *"If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded; to do so in not to prefer form to substance, or substance to form. It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions intended to operate as such, it is the series or combination which may be regarded."* The House of Lords thus disallowed the loss as fiscal nullity since the taxpayer had made no real financial loss and thereby established the "Ramsay doctrine" or "doctrine of fiscal nullity". Several years later in *Mac Niven* v. *Westmoreland Investments Private Limited,* (2003) 1 AC 311, the Court held that Ramsay principle is not a self-standing, anti-avoidance doctrine but rather a principle of statutory interpretation.

25 The factors are duration of time during which the holding structure existed, the period of business operations in India, generation of taxable revenue in India during the period of business operations in India, the timing of the exit, the continuity of business on such exit, etc., *supra* at 12 para. 73.

arose for reasons other than what Revenue had argued* and even without SPA the transition could have taken place because of acquisition of CGP share. The Court also found that the impugned transaction was an investment to participate in India for which it took into account the fact the Hutchison structure was in place since 1994 and during the period of its operation it duly paid all its tax obligations.

The Court also found that there were business reasons for preferring CGP over Array.[27] Also, since Array was incorporated in Mauritius even if there was transfer of shares of Array the event would not have been taxable because of Indo-Mauritius DTAA. Hence CGP was not interposed in the transaction to avoid tax.

IV. Policy Implications

A. Retrospective Amendment in the Tax Statute

"I must be cruel to be kind
Thus bad begins and only worse remains behind."

—Hamlet

Shakespeare, in the above lines, tries to justify the tough decisions that the protagonist takes to ensure better governance: the operative part being better and there being no possibility of good governance. These lines aptly describe the position of the government of India today. Successive governments, over the years, have been able to innovatively deal with losses in tax battles in the Supreme Court. The government makes a retrospective amendment to the tax statute by adding an 'Explanation' under the pretext that they are 'clarificatory' in nature. The number of

26 The SPA was entered into to read just the outstanding loan between the companies, to provide for interim arrangements, to provide for seamless transfer and to provide for fundamental terms of price, indemnities, warranties etc. *supra* at 12 para. 75.

27 The transfer of Array would not have given various rights and entitlements of CGPL in Centrino and NDC Framework Arrangements and the 15% ownership in HEL which it had through exercise of call and put options.

such amendments has been witnessing a gradual rise.[28] Wrong or unethical, this is not *ultra vires* parliamentary power because in the eyes of law, the explanation simply explains the law as it stood in the Statute and that nothing new has been added to the Statute.[29] This creative exercise of the Government invited the wrath of the Supreme Court in *Ujagar Prints* v. *Union ofIndia,*.^where it held that any such curative exercise carried by the government whose effect is to render void a decision of the Court cannot be called an 'impressible' legislative overruling of the judicial decision.[31]Notwithstanding the periodic reprimand, the Government continues to carry out such amendments under the garb of *explanation* to the Statute.

The Government's interest in the judgement delivered in the Vodafone case [32] arises not only out of Toss' to the exchequer of $1.2 billion but also because there are number of similar pending cases across the country.[33] The precedential value of the judgment[34] could lead to substantial loss of face and revenue to the Government.[35] Interestingly, while writing this paper the researchers had planned to dedicate a portion of this section to studying the nature of amendment that could certainly be brought by the Government. The Government did not disappoint and in the Finance Bill, 2012, proposed a retrospective amendment to various sections of the Act. These

28 There are 16 direct tax amendments in the Finance Act, 2010 with retrospective effect, some of them coming into effect from as far back as 1976. In last six years the Government has made more than 150 retrospective amendments to the Act.

29 *Laxmi Industries Ltd.* v. *ITO,* 231ITR 514; *CIT* v. *Sri Jagannath,* 191ITR 676; *ITO* v. *Manoharlal,* 236 ITR 357.

30 (1989) 3 SCC 488. The Court acted under the authority it later identified in *National Agricultural Co-operative Marketing Federation of India* v. *Union of India,* (2003) 5 SCC 23: 260 ITR 548.

31 Prateek Andharia, "The Validity of Retrospective Amendments to The Income Tax Act: Section 9 of The Act And The Ishikawajima Harima Case", (2011) 269 NUJS L. Rev. 4.

32 *Supra* at 12.

33 *Supra* at 2.

34 Article 141 of the Constitution of India.

35 The answer to what is more important for the Government is best left to the musings of the Reader.

amendments are made in Sections 2(14)[36], 2(47)[37], 9('l)[38] and 195[39] of the Act, retrospective from April 1,1962. All amendments desired are interpretations of various Sections of the Act which were put forward by the Government in the Vodafone case[40] but were rejected by the Court. These amendments, carrying forward the practice, are packaged as 'clarificatory' in nature but the government has been candid in its motive of introducing them to nullify the Vodafone decision[41] and inhibiting its otherwise high precedential value.[42]

36 An explanation added to Section 2(14) defining 'property' would read, "'property' includes and shall be deemed to have always included any rights in or in relation to an Indian company, including rights of management or control or any other rights whatsoever."

37 An explanation added to Section 2(47) would read, "'transfer' includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India."

38 An Explanation added to Section9(l) would read, "Explanation 4.—For the removal of doubts, it is hereby clarified that the expression 'through' shall mean and include and shall be deemed to have always meant and included 'by means of, 'in consequence of or 'by reason of Explanation 5.—For the removal of doubts, it is hereby clarified that an asset or a capital asset being any share or interest in a company or entity registered or incorporated outside India shall be deemed to be and shall always be deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India."

39 Since Section 195 of the Act is not being specifically covered in this paper, the amendment made to the Section is not being quoted but surely, the amendment is meant to tackle the judgment rendered by the Court in the Vodafone Case.

40 *Supra* at 12.

41 *Ibid.*

42 Parliament right to amend laws Supreme: Pranab says on Vodafone case, March 16, 2012, DNA India, http:/ /www.dnaindia.com/india/report_parliament-s-right-to-amend-laws-supreme-pranab-says-on-vodafone-case_1689750.

Sectionll3 of the Finance Bill, 2012[43] is specifically targeted at the Vodafone judgment. According to this section, despite any judgment rendered by any Court of Law, any notice sent by Revenue in respect of income arising from the transfer of a capital asset situated in India in consequence of the transfer of a share of a company, registered or incorporated outside India, would be deemed to be valid and cannot be called into question. This clearly upsets the Court's judgment. Since the notice of Revenue still stands, it can ask Vodafone to pay withholding tax.

Adam Smith while proposing canons of good taxation specifically said that there should be no uncertainty as to tax.[44] Sadly, the government's decision to introduce

43 "Notwithstanding anything contained in any judgment, decree or order of any Court or Tribunal or any authority, all notices sent or purporting to have been sent, or taxes levied, demanded, assessed, imposed, collected or recovered or purporting to have been levied, demanded, assessed, imposed, collected or recovered under the provisions of Income-tax Act, 1961, in respect of income accruing or arising through or from the transfer of a capital asset situate in India in consequence of the transfer of a share or shares of a company registered or incorporated outside India or in consequence of an agreement, or otherwise, outside India, shall be deemed to have been validly made, and the notice, levy, demand, assessment, imposition, collection or recovery of tax shall be valid and shall be deemed always to have been valid and shall not be called in question on the ground that the tax was not chargeable or any ground including that it is a tax on capital gains arising out of transactions which have taken place outside India, and accordingly, any tax levied, demanded, assessed, imposed or deposited before the commencement of this Act and chargeable for a period prior to such commencement but not collected or recovered before such commencement, may be collected or recovered and

appropriated in accordance with the provisions of the Income-tax Act, 1961 as amended by this Act, and the rules made there under and there shall be no liability or obligation to make any refund whatsoever."

♦4 Found in his *magnum opus* "The Wealth of Nations", there are four "Original or Good Cannons of Taxation": that of Equity, Certainty, Convenience and Economy. According to Cannon of Certainty, the tax which an individual has to pay should be certain, not arbitrary. Adam Smith, "The Wealth of Nations", Edwin Cannan Edition,(1976, University of Chicago Press). The tax payer should know in advance how much tax he has to pay, at what time, and in what form and every tax should satisfy this canon. The government should also be certain about the amount that will be collected. Gaurav Akrani, "What is Tax? Definition Adam Smith's canons of construction," February 12,2010, Kalyan City Life (blog), http://kalyan-city.blogspot.com/ 2010/12/what-is-tax-definition-adam-smith.html.

the retrospective amendment has generated precisely this sort of uncertainty. The uproaramong multinational companies investing in India is understandable.[45] Notwithstanding its sovereign power to tax, the government must balance two important and not always conflicting, propositions-generating revenue by taxing and creating an atmosphere where investors can freely plan their investments in India. India is poised to emerge as an economic superpower by the end of 2050 and the role of multinational companies cannot be undermined in its growth.[46] The crystallisation of the Bill into the Act not just raises questions about the Government's credibility but also paints India as a grossly unjust and uncertain nation in the major aspect of ndertaking taxation. Major trade groups have petitioned against this move highlighting reconsideration of costs and benefits of investing in India and damage to its overall investment climate.[47] The government can remedy crystallisation of Sectionll3 by adding a clarification that cases which are pending in Court would not be affected by retrospective amendment. International practice also goes against retrospective amendments. After the British Government lost its case in *Padmore* v. *IRC*[is], it retrospectively amended Section 58 of the Finance Act, 2008, but did not affect cases which had already been decided. China's Circular 689[49] targets offshore transactions

45 Vodafone has already termed this amendment as 'grossly unjust'. PTI, "IT Act amendment with retrospective effect is unjust, says Vodafone", March 30, 2012, The Hindu, http:// www.thehindu.com/business/companies/article3262655.ece.

46 Economic liberalization, including industrial deregulation, privatization of state-owned enterprises, and reduced controls on foreign trade and investment, began in the early 1990s and has served to accelerate the country's growth. "The World Fact book," https:// www.cia.gov/library/publications/the-world-factbook/docs/history.html. (visited July 31, 2012).

47 The International Trade group representing approximately 250, 000 business entities was one of the prominent organizations. Reuters, Global business group warn India over tax plan, April 2, 2012, First Post World, http://www.firstpost.com/world/global-business-groups-warn-india-over-tax-plan-263844.html.

48 [1989] STC 493.

49 Alan Tsoi et al., "PRC Tax International and M&A Tax Services/'Deloitte Tax Analysis P95/ 2009 (19 December 2009), http://www.deloitte.com/assets/DcomChina/Local%20Assets/

involving non-residents where the underlying assets are in China and retrospective amendments have been made only for 2 years (unlike India's 50 years), and are not aimed at overriding judicial precedent.

B. Revisiting Indo-Mauritius DTAA and Treaty Shopping

The issue of treaty shopping and Indo-Mauritius DTAA came up when the Government submitted that the Mauritius route was specifically avoided by Vodafone so as to avoid tax liability.

India entered into a Double Taxation Avoidance Agreement with Mauritius ("IM-DTAA) in the year 1983. In 1994, the Central Board of Direct Tax (CBDT) clarified that if a Mauritian resident alienated shares of an Indian company, the same would be taxable only in Mauritius under its laws. Since there were heavy tax benefits in Mauritius, Foreign Institutional Investors ("FIIs") started investing in India through the Mauritian route. The Indian income tax authority sought to check this and issued notices to several FIIs on the grounds that majority of the companies investing in India were shell companies which were being controlled and run in a country other than the two treaty nations and that they were not 'resident' of Mauritius. These companies were able to obtain Tax Residence Certificate (TRC) in Mauritius because they were registered under the Mauritius Offshore Business Activities Act, 1992 (MOBA). Companies registered under MOBA are not allowed to acquire property, invest or conduct business in Mauritius. Pursuant to FIIs' distress call, the CBDT issued Circular No. 789[50] clarifying that TRC issued by the Mauritian government would

Documents/Services/Tax/TaxNewsletterEN2009/cn_tax_tap952009eng_281209.pdf(visited August 15,2012.). Also see ALAN TSOI (et al.), PRC Tax International and M&A Tax Services, Deloitte Tax Analysis 138/2011 (11 April 2011), Deolitte Tax Analysis, http:// www.deloitte.com/assets/Dcom China/Local%20Assets/Documents/Services/Tax/ TaxanalysisEN2011/cn_tax_tapl382011eng_110411.pdf. (visited August 15, 2012). 50 Circular 789, dated April 13, 2000 reads, "The test of residence mentioned above would also apply in respect of income from capital gains on sale of shares. Accordingly, FIIs, etc., which are resident in Mauritius would not be taxable in India on income from capital gains arising in India on sale of shares as per para. 4 of article 13.", online at http: / /law.incometaxindia.gov.in/

constitute sufficient evidence of residence. Benefits under the IM-DTAA could be availed by the FII investing in India through the Mauritius route. This circular was upheld in the landmark Azadi Bachao case.[51]

As far as treaty shopping was concerned, the Court found that there was nothing illegal in treaty shopping. In the absence of Limitation of Benefit Clause ("LOB"), a third party could take advantage of the treaty. Treaty shopping, for developing countries, attracts scarce foreign capital or technology and it is a tax incentive like tax holidays given by the government from time to time to attract investment.[52]

In the Vodafone case,[53] Justice Radhakrishna reiterated the point emphasized in the Azadi Bachao Case[54] that the LOB cannot be specifically read into a tax treaty. The Court held that the tax authorities were well within their rights to discard TRC in case they found that IM-DTAA was being used for illegal activities. But Revenue had to adopt the Took at' approach and consider the transaction "as a whole". The Court emphasized that in the last decade around 42% of the Foreign Direct Investment (FDI) and 15% of FII came from the Mauritian route.[55] This reasoning resonates with that in the Azadi Bachao case^that the absence of LOB clause in the treaty was in fact, a blessing in disguise for India.

A possible change that could be witnessed post the judgement in the Vodafone case[57] is that the Government of India might actively pursue insertion of LOB in the

DIT/File_opener.aspx?page=CIR&schT = &csId=952f7443-2ab3-4ba5-b6b8-76f40acfbac0&cm=789&yr=ALL&sch=&title=Taxmann%20-%20Direct%20Tax%20Laws, (visited December 15,2012).

51 *Supra* at 20.

52 Roy Rohatgi, Basic International Taxation, (2002 Kluwer Law International).

53 *Supra* at 12.

54 *Supra* at 20.

55 Share of Top Countries- FDI Equity Inflows, Department of Industrial Policy and Promotion, Government of India Ministry of Commerce and Industry, http://dipp.nic.in/English/ PubUcations/FDI_Statistics/TOP-COUNTRIES-INFLOWS.pdf. (visited August 28,2012).

56 *Supra* at 20.

57 *Supra* at 12.

DTAA or could withdraw its Circular 789 which accepts TRC issued by the Mauritius Government.[58]

The Finance Ministry in 2003 recommended incorporation of provisions to deal with treaty shopping which may be based on, "UN/OECD model or other global practices."[59] A Joint Parliamentary Committee (JPC) on the Stock Market Scam and Matters had recommended that, "Companies investing in India through Mauritius, should be required to file details of ownership with RBI and declare that all the Directors and effective management is in Mauritius."[60] There has not been any official report on the subject but newspaper reports indicate that the Government might be willing to insert LOB in the IM-DTAA or withdraw its earlier circular.[61] The Government should re-consider its decision because of two reasons. First, as the Court said, the absence of LOB has led to an increase in FDI and FII in India. In 2010, FDI from Mauritius crossed $50 billion and accounted for 42% of FDI inflow.[62] These investments must be viewed holistically. If on one hand the Government has lost Capital Gains Tax, on the other, investments have led to increase in revenue from corporate tax, dividend tax, other indirect taxes and led to the creation of millions of jobs in the country. FDI and FII have contributed significantly to India's success story. Hence, all investment should not be looked at with suspicious eyes.. At the same

58 Had there been an LOB clause, the government's argument that Cayman Islands entity was chosen so as to evade tax might have been accepted by the Court.

59 Para 3.3.1, Applicability of anti-abuse concept in relation to DTTA: Report on the Working Group on Non Resident Taxation, Ministry of Finance and Company Affairs, http:// finmin.nic.in/reports/NonResTax.pdf. (visited August 15,2012) (Constituted by the Ministry in 2002, it submitted its report in January, 2003).

60 Sectionl2.205, Joint Committee on Stock Market Scam and Matters Relating Thereto, Volume 1 Report, 13th Lok Sabha, http://www.watchoutinvestors.com/JPC_REPORT.PDF (visited August 1, 2012).

61 Hema Ramakrishnan, Post Vodafone Verdict, govt, to clamp down on Mauritius deals, The Economic Times, January 23,2012, http://articles.economictimes.indiatimes.com/2012-01-23/ news/30655716_l_tax-residency-tax-treaty-indo-mauritius. (visited September 1, 2012).

62 *Supra* at 56.

time, illegal activities like round tripping which are undertaken under the pretext of the treaty need to be curtailed and any step taken in that direction is more than welcome.

Second, Mauritius is a member of the South African Development Committee and provides a gateway for investment in Africa. Mauritius could prove to be an excellent base for Indian overseas investment in African continent.[63] Mauritius has been categorical that it would not accept change in treaty text but is willing to work with the Indian government to overcome any serious lacunae in it.[64] The two countries have close economic, cultural and diplomatic relations and Mauritius has been supporting India's bid as a permanent member in the United Nations Security Council. It would not be wise to lose a close political ally. Hence, the benefit of the absence of LOB and accepting TRC outweighs the insertion of the former and refusing the latter.

V. Should India Tax Offshore Transactions Involving Two Non-Residents Where The Underlying Assets Are In India?

International Tax Policy and specifically, the economically efficient concept of Capital Import Neutrality sufficiently answer the question. According to Capital Import Neutrality ("ON"), investment made in a particular country should not be differentiated on the basis of the residence of the investor. Hence, a resident and a non-resident investor should be taxed equally in a given source country.[65]

63 Nishith Desai and Dhruv Sanghvai, The travails of the India Mauritius Tax Treaty and the Road Ahead http://www.nishithdesai.com/ResearchPapers/The%20Travails%20of%20the%20Indian%20Mauritius%20Tax%20Treaty%20%20the%20Road%20Ahead.pdf. (visited September 1,2012).

64 Rama Krishna Sithanen, former Vice-Prime Minister of Mauritius, Review the Indo-Mauritius treaty, but business must be allowed to continue, Business Standard http://www.business-standard.com/india/news/reviewindo-mauritius-treatybusiness-must-be-allowed-to-continue-rama-krishna-sithanen/469454/(visited August 1, 2012).

65 Neil Stephens, 'A Progressive Analysis of the Efficiencies of Capital Import Neutrality', (1998-1999) 30 Law & Policy Int'l Bus. 159; Michael J. Graetz, 'Foundations of International Income Taxation', (2003 Foundation Press).

Keeping the factual matrix and ownership structure in this case constant, if an Indian investor does not incur any tax liability, CIN is satisfied and economic efficiency ensured. However, if an Indian investor does incur any tax liability then, since resident and non-resident investors are being treated differently, not taxing a non-resident would lead to economic inefficiency. (Please Refer to Annexure 3 for an illustration in terms of company X, resident of India for tax purposes to illustrate this argument).

The claim in the Vodafone case[66] was that Hutchison, by selling its share in the Cayman Islands entity, had capital gains and that it was Vodafone's responsibility to withhold tax and pay capital gains tax to the Indian authority. However there is nothing in Section 5 of the Act or the decision of the Court which could give rise to any taxing liability under the residence rules of taxation just because income is accruing to a non-resident. Thus, even if there is an Indian entity, no taxability arises and an Indian entity ar.d foreign entity are treated at par. Thus, when seen from the CIN point of view, the judgment does not promote inefficiency because just as a non-resident is exempted from paying tax, so is a resident company. In case the government does legislate to tax offshore transactions involving non-residents, CIN would not be compromised because in such a case resident entities would also be made to pay tax.

The above discussion assumes that Revenue and Court would approve an acquisition by an Indian entity of a Cayman Island entity to acquire business in India. In all probability, this is not going to be the case because the involvement of the Indian entity in the transaction would make such an acquisition one of tax evasion not tax avoidance.[67] Hence, the balance would tilt in favor of the non-resident investors because

66 *Supra* at 12.

67 The avoidance-evasion conundrum in India is usually centred around the two very famous decisions of the Supreme Court rendered in *McDowell and Co. Ltd.* v. *Commercial Tax Officer,* AIR 1986 SC 649, (hereinafter "the McDowell case") and the *Azadi Bachao case.* In the McDowell case, as per the majority opinion rendered by Justice Ranganath Misra, *"Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods."* However significant confusion was caused by the separate but concurring opinion rendered by Justice O. Chinnapa Reddy. Reddy, J., who opined that, *"No*

Hutchison would prefer selling its Cayman Islands entity so that no taxability arose and economic efficiency would not be compromised.

While the classical view judges an efficient international tax on the benchmark of CIN, National Neutrality and Capital Export Neutrality, it has been recently argued[68] that Capital Ownership Neutrality (CON) and National Ownership Neutrality are better standards. The basic premise of CON is that multinationals tend to be more productive than national firms hence a tax system should not prevent multinationals from acquiring a national firm. When a tax system does not prevent ownership distortions, CON is satisfied. In the instant case, hypothetically, if instead of Hutchison there had been an Indian firm, experiencing Capital gains, then irrespective of the fact whether the acquisition was made by a resident or non-resident, income would have been taxable under the residence rule as discussed in the second section.

The Court did hold that the transaction structure used in the Vodafone case[69]

> *one can now get away with a tax avoidance project with the mere statement that there is nothing illegal about it".* And thereby indicated that in India, the judicial attitude of tax avoidance would be no less than tax evasion. Even though this was Justice Reddy's separate opinion, what caused significant confusion was the fact that Justice Ranganath Misra, after voicing his opinion on the issue of tax avoidance, in the very next para, wrote, *"On this aspect one of us, Chinnappa Reddy,]., has proposed a separate and detailed opinion with which we agree."* This led to obvious confusing conclusion that the majority which had earlier underscored that tax avoidance was legitimate, concurred with Justice Reddy's conclusion that the principle legitimizing the avoidance was dead! Later, a three judge bench in Azadi Bachao case, clarified and observed that, *"We are afraid that we are unable to read or comprehend the majority judgment in McDowell ....as having endorsed this extreme view of Chinnappa Reddy,], which, in our considered opinion, actually militates against the observations of the majority of the Judges .....It remains true in general that the taxpayer, where he is in a position to carry through a transaction in two alternative ways, one of which will result in liability to tax and the other of which will not, is at liberty to choose the latter and to do so effectively in the absence of any specific tax avoidance provision.* However since McDowell case was a five judges bench decision while Azadi Bachao case was three judges bench decision significant confusion over the fine line between avoidance and evasion still prevails.

68 *See* Mihir A. Desai & James R. Hines Jr., Evaluating International Tax Reform, (September, 2003) 56 No. 3 National Tax Journal 487.

69 *Supra* at 12.

was genuine which was put in place for business considerations and not for avoiding tax. This does not hold true for all cases and there may be multinationals who may put a structure in place just to avoid tax. However, the stand of the present Government to tax all offshore transactions without regard to the business considerations seems incorrect and unwarranted. China has been taxing offshore transactions involving non-residents since 2009.[70] Under Chinese law, all offshore transactions do not incur intervention from the tax authorities and only those transactions which do not have "commercial justification" are taxable.[71] It is thus recommended that there is no need for a broad legislation which covers all offshore transactions where underlying assets are in India. Equity demands that only those transactions in which the structure has been created for avoiding tax purposes shall be taxed. But the difficulty arises in determining whether the transaction is for a genuine business consideration or simply structured to avoid tax. In this regard, it is submitted that sufficient guidance can be found in the Chinese legislation and the "business purpose rule" as enunciated in Vodafone Case[72] seems plausible in answering all queries.

The concern that adoption of the "business purpose rule" would require a case-to-case determination, increasing the amount of litigation is misplaced. In issues like the one discussed in this paper, Revenue largely functions in the absence of any

TT> The circular is titled "Circular on Strengthening the Administration of Enterprise Income Tax on Income Derived from the Transfer of Equity of NonTax-resident Enterprises." For more see, Rocky T. Lee, Circular 698: China's anti-tax avoidance measures for offshore SPVs http://www.lexology.com/library/detail.aspx?g=80bb2c3b-c408-4d9a-8880-86f49c8d6fdd (visited September 2,2012); Alan Tsoi, et al., China Releases clarification rules on Circular 698, http://www.deloitte.com/assets/Dcom-China/Local%20Assets/Documents/Services/Tax/TaxanalysisEN2011/cn_tax_tapl382011eng_110411.pdf. (visited September 3, 2012).

n Practitioners in China believe that characteristics satisfying commercial justification include physical offices where meetings can be held; employees, including management and back-office staff and management executives and directors who reside in or travel to the jurisdiction in which it is incorporated. *See* Kirkland and Ellis, Circular 698: Taxing Offshore Sales of Chinese Companies http://www.kirkland.com/siteFiles/Publications/PEN_021511.pdf. (visited September 1, 2012).

72 Supra at 12 para. 68.

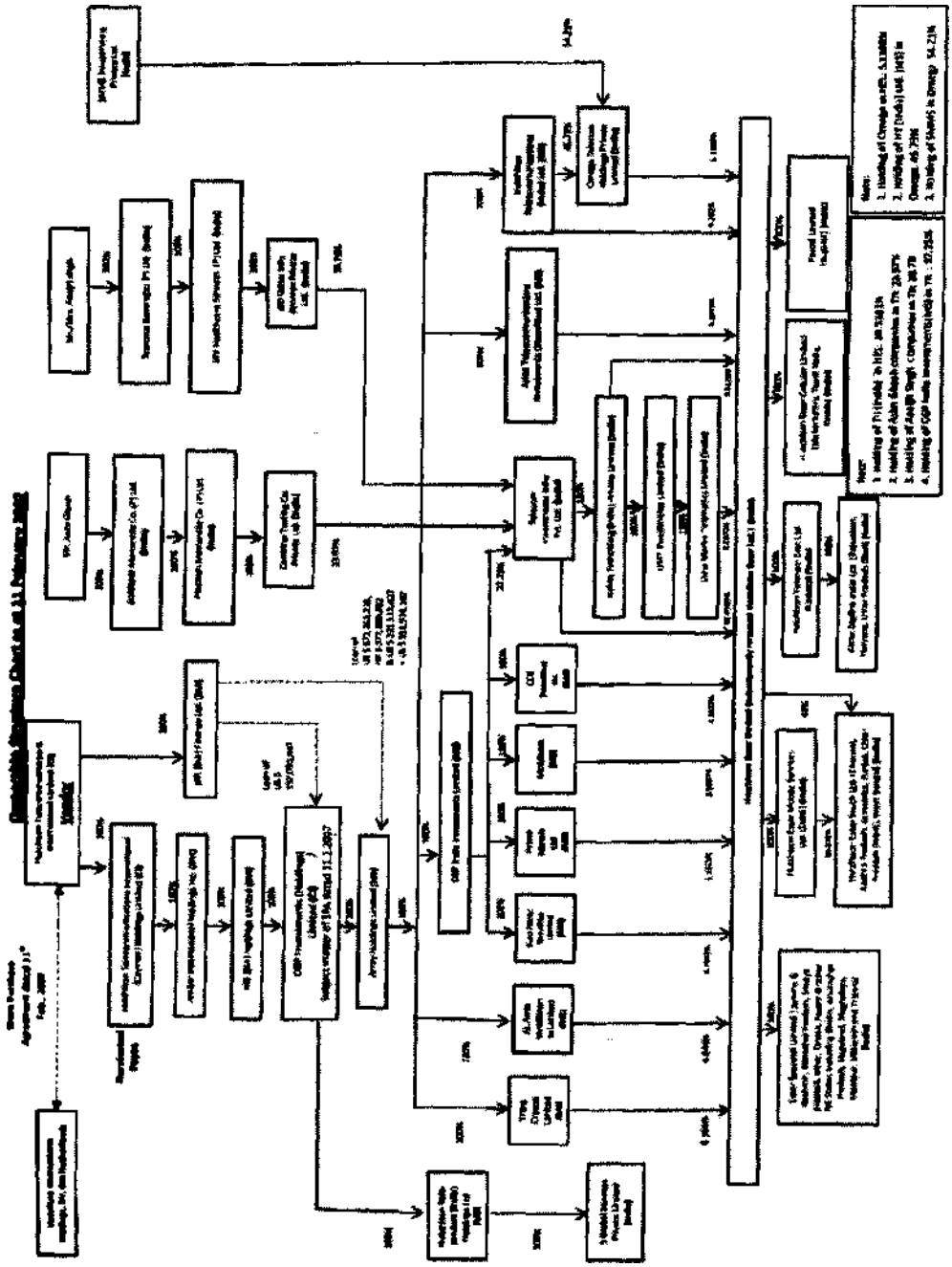
*

guidelines and the adoption of the "business purpose rule" might actually decrease the incidence of litigation. In any case, the existing Court structure is capable of handling increased litigation, if any.

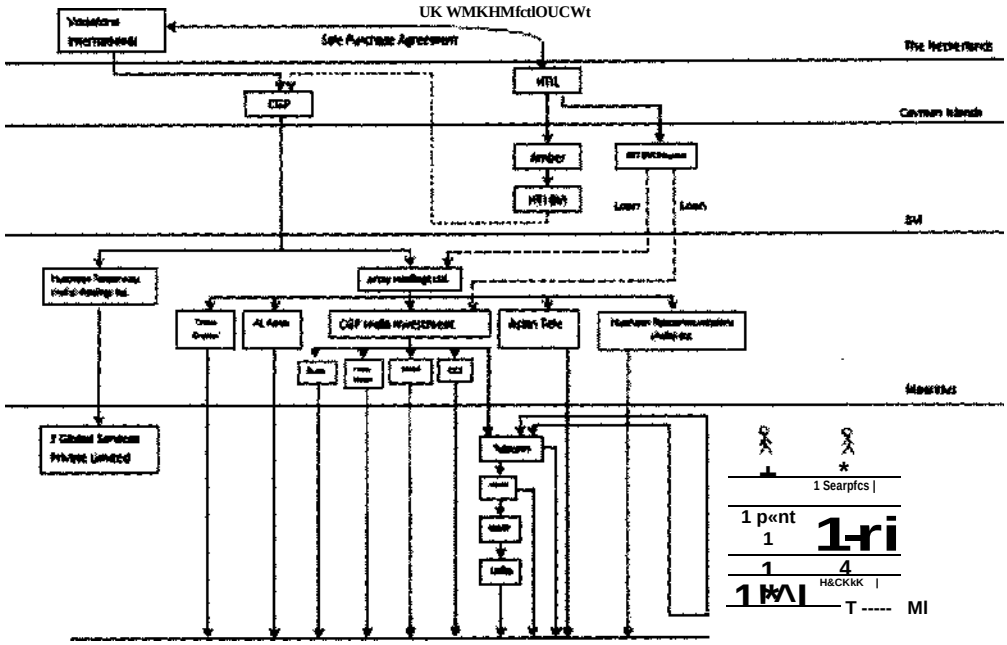
VI. Conclusion

The paper analyzed and commented on two policy questions; the first was on the retrospective amendment to the tax statute and the second was that the Government might revisit the Indo-Mauritius DTAA and incorporate a Limitation of Benefit clause in it. It was argued by the authors that Section 113 of the Finance Bill, making the retrospective amendment, must be deleted and that existing cases pending in the Court at different levels should not be brought within the ambit of the retrospective amendment. It was further argued that the Government needed to holistically look at the FDI and FII from Mauritius and several cogent reasons were given for not incorporating the LOB in the IM-DTAA. The paper also tried to determine what should be an ideal position of law and based on Chinese experience and CIN, it was suggested that while it was correct to tax offshore transactions when involving non-residents, it should be done only in limited circumstances, i.e., where the intermediary structure had been put in place to avoid tax.

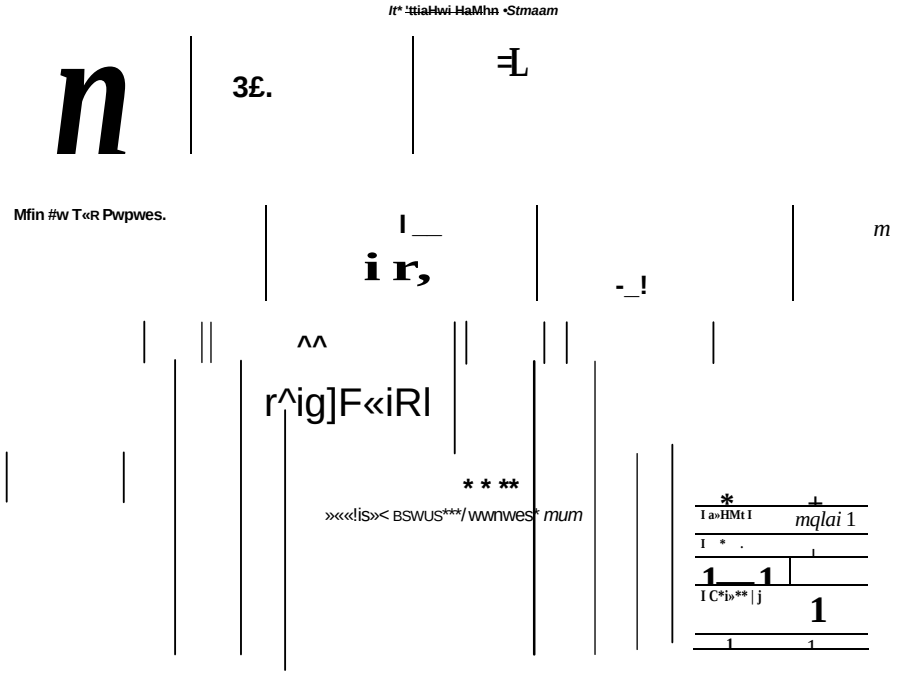
Annexure 1: Ownership Structure and Transaction Summary as appeared in the Judgment:



Annexure 2: Simplified Ownership Structure Source: NDA WEBSITE



nexure 3: Acquisition by Company X, resident of India for Tax Purposes rather than by Vodafone. Acquisition is made of Cayman Island entity.



Bolar Exemption Law in India

An Analysis in Light of Current Trends in Pharmaceutical Market

Adarsh Tripathi

ABSTRACT

This *paper deals with the Bolar exemption, a significant balancing provision under the Ind Patents Act, 1970, that protects public interest without unfairly encroaching upon patenti rights. The Bolar exemption allows the use of patented invention for carrying out research c taking regulatory approval without a license from the patentee, thereby contributing to public interest by early introduction of generics. The article aims to understand and anal the Indian law providing for Bolar exemption and its implication on the pharmaceutical mar while also covering origin of Bolar Exemption in international patent regime. The paper touches upon highly volatile questions like extent of commercial use and data exclusivity pei In light of the current state of affairs the paper strongly recommends an amendment in patent law allowing for the Bolar exception.*

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I. Introduction

Jefore the ratification of the TRIPS Agreement,[1] the Indian pharmaceutical **market** prospered due to non-existence of product patents. The highly competitive pharmaceutical industry succeeded in manufacturing generic versions of successful nedicines at very cheap prices.[2] Generic medicines are priced around 5% of the cost ?f similar medicines sold by the US and EU pharmaceutical companies.[3] A generic medicine is bioequivalent of a brand name medicine in characteristics such as dosage, jfficacy, safety etc., but it is much cheaper than the branded drug. Such drugs are essential to meet the needs of the majority of the masses who cannot afford the patented drugs. Thus, for creation of such generic drug, research over the patented drug is required, which is prohibited due to the exclusive rights of patentee. Hence the need for an exception in such circumstances arises. This need is catered by the Bolar exemption which was introduced in India with this purpose of providing access to affordable medicines right after the patent term was over.

Intellectual property laws would not do complete justice to promoting innovation if a researcher's access to essential past inventions is not preserved. Bolar exemption permits research over the patented product and getting marketing approval for selling your own product just after the expiry of the patent period, without attracting any violation of the patentee's rights. The intention behind this provision is to make sure **that** the generic versions of patented products are available with essential regulatory permissions for market launch, as soon as the innovator's product goes off patent,

1 Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex IC,, 108 Stat. 4809,1869 U.N.T.S. 299, Apr. 15,1994 (hereinafter TRIPS Agreement).

2 Jean O. Lanjouw, The Introduction of Pharmaceutical Product Patents in India: Heartless Exploitation of the Poor and Suffering? (1998) National Bureau Of Economic Research.

3 Indian Parliament Approves Controversial Patents Bill, March 23, 2005, International Center for Trade and Sustainable Development, online at http://www.ictsd.org/weeklv/05-03-23/ storvl.htm (visited March 23,2012).

instead of applying for regulatory permissions subsequent to expiry of the patent period.[4]

II. Origin of the Bolar Exemption

Bolar exemption was given statutory recognition for first time by the Hatch-Waxman Act (Drug Price Competition and Patent Term Restoration Act, 1984) .[5] However, it was in the most exceptional circumstances that the US Congress introduced this revolutionary reform.

III. History of Bolar Exemption: Emergence from USA Law

Prior to the 1984 Act, the law exempted the use of a patented product for motive of research or trials and not for revenue, from infringing the patent. It was called the "experimental use" doctrine. It was based upon the just phenomenon that a court will not remedy a *de minimus* utilization of a patent. Hence, at that time, an act to be considered as an infringement of a patent should have been of such a nature that through it the infringer would derive some commercial gain.

IV. Law Prior to Bolar Case

It was a general practice during that time for the generic companies to construct and use the patented invention for the FDA (Food and Drug Administration) sanction to promote the generic versions of those patented drugs before the expiry of the patent period. This use, in a literal sense, would qualify to be infringement of the patent as the use of the patent by the generic companies was with the sole objective of commercial gain.[6] But it seems that such a practice had the tacit approval of owners of the patented

4 Elizabeth Verkey, Law of Patents, (2012, Easter Book Company) p. 573 (hereinafter Verkey).

5 Integrating Intellectual Property Rights and Development Policy 50, September 2002, Secretary of State for International Development, Commission of Intellectual Property Rights, Working Group Report.

6 *See* United States of America, Unites States Code 35,1952, Section 271(a) *(hereinafter* USC); S *also* Steven J. Grossman, Experimental Use or Fair Use as a Defence to Patent Infringemen 1990, 30 IDEA: The Journal Of Law and Technology 243.

inventions which could be deduced from the fact that there were almost zero reported cases in which the patent holder had tried to stop such actions.[7] To the contrary, in *Hoffman-La Roche Inc.* v. *Zenith Laboratories?* decided in 1975, the plaintiff accepted that it did "not aim to hinder with Zenith's legal activities in applying for FDA approval."[9] This shows the ignorance of the manufacturers of the patented drugs of the fact that their patent gave them a right to prevent the generic companies from developing a generic copy during the lifetime of the patent.

It was the decision in *Pfizer Inc.* v. *International Rectifier Inc.*[10] that laid down for the first time that the development of a generic drug for the approval of the FDA during the life of a patent amounted to patent infringement which is not saved by the "experimental use" doctrine.[11] However the authority of this judgment on the drug development exemption is questionable as it was restricted to deciding the violation of a pre-existing court order.[12]

V. The Bolar Case and the Hatch-Waxman Act

In October, 1983 a decision by a US district court paved the way for what we today know as the Bolar exemption. In *Roche Products Inc.* v. *Bolar Pharmaceutical Co.*[13] the judiciary legalized the practice of using or manufacturing the patented drug for the purpose of securing regulatory approval, holding it to be a *de minimus* activity. In this case Roche had a patent on *Flurazepam HCl* which was an active ingredient of the prescription sleeping pill, DALMANE, manufactured by Roche. Bolar was a generic

" Alfred B. Engelberg, Special Patent Provisions for Pharmaceuticals: Have They Outlived Their Usefulness? - A Political, Legislative and Legal History of U.S. Law and Observations for the Future,1998-1999,39 IDEA: The Journal Of Law and Technology 389.

» No. 75-2221 (D.N.J, filed Dec. 23,1975).

9 *Ibid.*

10 217 U.S.P.Q. (BNA) 157 (CD. Cal. 1982).

11 *Ibid.*, p. 158.

12 *Supra* at 6, p. 391.

13 572 F. Supp 255(E.D.N.Y. 1983).

drug company that sought to perform the required FDA experiments to get its approval during the life of the patent.[14]

Meanwhile, in the 98th Congress (1983) a new legislation was introduced by Republican Waxman who was the Chairman of the House Subcommittee on Health of the Committee on Energy and Commerce (Subcommittee), on the Need to reform the FDA's generic drug approval mechanism for quicker approval in order to encourage competition and consequently lower prices*[15] This coincided with the District Court decision of *Roche* v. *Bolar*[16]. Thereafter, the initial draft of the Waxman legislation was released in April, 1984 which incorporated the decision of the District Court.[17]

Around the same time, the Court of Appeals for the Federal Circuit gave its judgment in *Roche Products* v. *Bolar Pharmaceutical Co.*[18] The Court of Appeals reversed the decision of the District Court.[19] The Court decided that:

> *"(1) competitor's use of patented ingredient to perform tests necessary for it to obtain approval of the FDA for its version of the sleeping pill once the patent expired was a prohibited use;*
>
> (2) that use did not fall within the experimental use exception to the patent laws;
>
> *(3) public policy did not require that exception be created for those using a patented ingredient to create a generic drug."*[20]

14 *Supra* at 6, 391.

15 *Ibid.*

16 *Supra* at 12.

17 "Section 271 of title 35, United States Code, is amended by adding at the end the following: (e) It shall not be an act of infringement to make, use or sell a patented invention solely for experimental use in connection with the development and submission of information under a Federal law which regulates the manufacture, use, or sale of drugs." *See* Section 202 of the First Draft of Waxman Legislation (1984).

18 733 F.2d 858.

19 *Ibid.*

20 *Ibid.*

However in June 1984, Senator Hatch proposed a similar enactment called "The Drug Price Competition and the Patent Term Restoration Act of 1984". After some initial opposition, the Act was passed in September, 1984 by the House of Representatives and Senate and received assent of President Ronald Regan.[21] It is this Act that marked the legitimized beginning of a research exemption known as *Bolar exemption* that later found recognition in most of the national patent laws.

VI. International Existence of Bolar Exemption

The credit for the acceptance of Bolar Exemption on the international forum should be given to U.S.A. This is evident from the fact that on March 9,1993, while the TRIPS Agreement was still under deliberation, Senator David Pryor asked the U.S. trade representative to take measures to ensure that the Agreement not only protected the Bolar exemption but also encouraged its application by U.S. trading partners so as to increase the accessibility of active components necessary for generic drug advancement.[22]

Even the European Union in 2004, established a fresh European pharmaceutical regulatory directive[23] with the goal of promoting the agenda of generic drugs to the European market. In this directive Bolar exemption was made applicable to generic drugs along with non-generics, but limited to those that were like the reference drug and which did not satisfy the generic meaning for mentioned reasons. Subsequently, the U.K. also gave statutory force to the Bolar exemption by adding Sub-section (5)(i)[24]

21 *Supra* at 6.

22 *Ibid.*

23 Directive 2001/83/EC [2001] OJ EC L311/67 on the Community Code for Medicinal Products for Human Use.

24 "(5) An act which, apart from this subsection, would constitute an infringement of a patent for an invention shall not do so if - (i) it consists of - an act done in conducting a study, test or trial which is necessary for and is conducted with a view to the application of paragraphs 1 to 5 of article 13 of Directive 2001/82/EC or paragraphs 1 to 4 of article 10 of Directive 2001/83/EC, or any other act which is required for the purpose of the application of those paragraphs." *See* United Kingdom, Patent Act, 1977, sec. 60(5)(i).

to S.60 of Patents Act, 1977 by the Medicines (Marketing Authorizations Etc.) Amendment Regulations 2005 which came into force on 30th October, 2005. India incorporated the Bolar exemption under S.107A(a) of the Patents Act, 1970, by an amendment in 2002.

VII. Indian Patent Law

The Indian Patent Act, 1970 *(hereinafter* Patent Act) provides exclusive right to the patent holder for protecting his commercial interest. However, these rights are subject to a few exemptions laid down in the Patent Act itself. Bolar exemption is one such statutory exemption laid down under S. 107A.

VIII. Introduction of the Bolar Exemption in India

In May 2002, during the time when proposals were made to amend India's Patent Act to bring it in compliance with the TRIPS Agreement, Section 107A was introduced as an effort by the Government to continue the supply of life saving drugs at a reasonable price. Hiis section provided for a research exemption to the known laws of patent infringement. The amendment was passed under the BJP Government owing to huge pressure from many interest groups.[25]

It was in the backdrop of the threat of the newly introduced product patent regime in the pharmaceutical industry to the strong generic industry that this amendment took shape. It aimed to stabilize the competing stakes of diverse stakeholders that included domestic generic drug manufacturers, the domestic research & development sector, overseas transnational pharmaceutical corporations, public welfare groups and intellectual property advocates.[26]

In order to effectively tackle the situation, a Joint Parliamentary Committee was set up to suggest amendments to India's patent law which delivered its report to the

25 TRIPS Agreement.

26 F.M. Abbott, Beginning of a New Policy Chapter: A Hopeful Way Forward in Addressing Public Health Needs, 2005, Financial Express.

Parliament on 19 December 2001.[27] The report recommended the insertion of S.107A in the existing Act, so as to provide for a research exemption which was in accordance with the leverages given under TRIPS Agreement.[28] This amendment thus made an effort to help generic producers, who were searching all viable ways to help moderate the harmful outcomes of the shift in the patent regime.[29] Thus the Government introduced the 2002 Amendment Act inserting S.107A in the existing Patent Act through S.44 of the Amendment Act which read as follows:

> *44. Insertion of new section 107A- After section 107 of the principal Act, the following section shall be inserted, namely:-107A. Certain acts not to be considered as infringement- For the purposes of this Act,-(a) any act of making, constructing, using or selling a patented invention solely for uses reasonably relating to the development and submission of information required under any law for the time being in force, in India, or in a country other than India that regulates the manufacture, construction, use or sale of any product.*[30]

IX. Present Status and Scope of the Bolar Exemption in India

The Indian law contained in S. 107A is most widely used exception granted against patentee's rights under Article 30 of the TRIPS Agreement, thereby rendering the Indian law in full compliance of TRIPS Agreement.[31] It is quite similar to the Canadian

27 The Patents (Second Amendment) Bill 1999,2001, COMM.91 /2001, Parliament of India- Rajya Sabha, Report of the Joint Parliamentary Committee.

28 *Ibid.*, Clause 51.

29 Shamnad Basheer, India's Tryst with TRIPS: The Patents (Amendment) Act, 2005,1 The Indian Jour, of Law and Tech. 30 (2005).

30 The Patents (Amendment) Act, 2002, Sec. 44.

31 Sudip Chaudhari, TRIPS Agreement and Amendment of Patents Act in India, 2002, 37(32) Economic and Political Weekly 3357.

law providing for Bolar exemption which was upheld by the WTO Dispute Settlement Body as being compliant with the TRIPS Agreement.[32]

The Doha Declaration unambiguously mentions at the outset "that TRIPS Agreement does not and should not prevent Members from taking measures to protect public health".[33] Also, Article 7 and 8 of the TRIPS Agreement allow countries to take measures safeguarding public health while balancing the interests of intellectual property holders.[34] Article 8 lays down that the Member Nations can take "measures necessary to protect public health and nutrition and to promote the public interest in sectors of vital importance to their socio-economic and technological development".[35] India being a developing country and highest manufacturer of generic drugs around the world, its use of Bolar exemption can largely be justified with the help of Doha Declaration in order to provide affordable medicines to its people. There is, however, a counter-argument to this. Section 8 allows for an exception only for non-commercial purposes.

This argument is supported by the US decision wherein Court disallowed the defence where the sole motive was to earn profit rather than to satisfy curiosity or intellect demand.[36] S.107A of the Indian Patent Act has not undergone judicial scrutiny yet, but it is only a matter of time. Already the controversy around this issue can be

32 "To the extent that some development activity might be permitted, consistently with Article 30 of the TRIPS Agreement, under other exceptions such as the traditional exception for experimental use of the patented product, the delay in entering the market would be correspondingly less." *See* para. 7.3 of Canada-Patent Protection of Pharmaceutical Products, WT/DS114/R (17 March 2000).

33 Doha WTO Ministerial Declaration, WT/Min(01)/DEC/1 (20 November 2001).

34 Centre for WTO Studies, Effect of Product Patent on Indian Pharmaceutical Industry: Rapid Strides in Pharma R&D, But TRIPS Flexibilities remain Important, Sep.-Oct., 2008,1(2) India, WTO and Trade Issues 3-5.

35 *See* TRIPS Agreement, *supra* 24, Art.8.

36 *Madey* v. *Duke University*, 307 F.3d 1351.

seen due to the judgment of Delhi High Court in Bayer-Cipla case[37] in which the Court has ordered Cipla to obtain the High Court's authorization before market release of the generic version of Bayer's patented product.[38] Very soon we can thus expect a judicial decision on this issue.

X. Bolar Exemption Crisis in India

It is often considered that Patent-period extensions and the Bolar exemption are self-nullifying provisions that taken together, have no actual consequence on the duration of the exclusive marketing term of most newly introduced medicines.[39] Hence the issue arising is regarding importance and relevance of Bolar exemption so as to justify the presence of such an exception over the patent rights. The moot issue that arises is to balance the individual interest (patentee's rights) and societal interest (need for better and cheaper access of products to the society).

India being a developing country with low per capita income is highly market sensitive, meaning that the people are highly dependent upon market conditions for their survival. Thus public policy exception to patents which grants a market monopoly right is of critical importance.

A. Bolar Exemption is necessary for promoting Competition in the Market.

The purpose of the Bolar exemption is not to subsidize new research at the expense of

37 *F. Hoffmann- La Roche Ltd. & Am.* v. *Cipla Ltd.,* WP (C) No. 7833/2008 *(hereinafter* Cipla case); *See also* Priyanka Golikeri, Cipla takes a Risk, rolls out Bayer's Cancer Drug, April 9 2010, available at http: / /www.dnaindia.com/money/report_cipla-takes-a-risk-rolls-out-bayer-s-cancer-drug_1369109 (visited June 22, 2012).

38 Tapan Ray, Will the 'Bayer-Cipla case' now put the 'Bolar Provision' under judicial scrutiny?, October 22,2009 available at http://www.tapanray.in/profiles/blogs/will-the-bayercipla-case-now (visited March 18, 2012).

39 Alfred B. Engelberg, Special Patent Provisions for Pharmaceuticals: Have They Outlived Their sefulness?, (1999) 39 J.L. & Tech. 389-390.

the patentee, but rather to allow research when market forces prevent it.[40] The process of making a drug available in the market could take a long time, due to the delays caused in getting approval from appropriate authorities. Thus, if research for developing generic products is allowed to start after the expiry *of* its bioequivalent patented product than market launch of generic product will only take place after several years of expiry of the patent term of the patentee. Hence, in such a case *de facto* extension of patentee's monopoly takes place for a period long after expiration of patent term.[41] Such an extension goes beyond the protection entailed in the TRIPS Agreement, and harms the final consumer by extending the monopoly. Competition in the market having already suffered substantial loss during the patent term, an extension of monopoly-term and curtailment of competition results in further considerable harms. The public interest heavily outweighs the individual interest of the patentee, validating such an exception as a limited restriction on the intellectual property right.

B. Bolar Exemption is Essential for Pharmaceutical Industry in Providing Cheap Access to Lifesaving Drugs.

One of the most detrimental aspects of amendments brought under the Indian Patents Act was introduction of product patent for pharmaceutical products, which resulted in sudden increase in price of life saving drugs. The well flourishing generic industry in India declined, which directly affected the Indian masses who could not afford patented drugs. If this right of patent holder is extended in a *de facto* manner beyond the patent protection period it causes unnecessary suffering to such masses. Such a situation even leads to violation of right to health which is an accepted human right under various international conventions.[42] Bolar exemption gains extreme relevance

40 G N Pate, Analysis of the Experimental Use Exception, (2002), 3(2) North Carolina Journal of Law and Technology 253.

41 Irina Haracoglou, Competition Law and Patents: A follow-on innovation in the biopharmaceutical industry, (2008 Edward Edgar Pub) p. 48.

42 International Covenant on Civil and Political Rights, Dec. 161966,999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16 1966, 993 U.N.T.S. 3.

in this situation as it aids the progress of generic industry, which results in availability of cheaper life saving medicines for the consumers. Even the World Health Organisation has recognized that the reasonable research exemption helps to address public health issues in developing countries.[43]

This scenario has also promoted competition amongst Indian generic manufacturers, securing the uninterrupted availability of drugs at lesser prices for domestic, and also international, consumers.[44] The Bolar provision also facilitated enhanced affordable access to anti retroviral for AIDS.[45]

C. Bolar Exemption promotes and enables further Research and Development.

It has been opined by most of the patent law theorists that research leads to further innovation, and yet patent law obstructs research in many ways, and thus exceptions such as Bolar exemption are required to strike a balance.[46] Difficulties in gaining access to important research tools, due to for instance high license fees and patent thickets, may delay or thwart scientific and technological development. Research in order to improve, invent around or develop knowledge of an invention has to be permitted, while experimenting with inventions, i.e. as research tools, is not exempted.[47] Since the main objective of patent law is promotion of science and innovation, experimental

43 Evans Misati & Kiyoshi Adachi, The Research and Experimentation Exception in Patent Law: Jurisdictional Variations and the WTPO Development Agenda, (2010), 7ICTSD Project on IPR and Sustainable Development 2.

44 Prabhu Ram, India's New "TRIPS Compliant" Patent Regime: Between Drug Patents and Right to Health, (2006), 5 Chicago-Kent Journal of Intellectual Property 204.

45 Ranjit Roy Chaudhury and Nirmal Kumar Gurbani, TRIPS safeguards in: Enhancing access to quality medicines for the underserved, (2004, Anamaya Publishers) p. 88-89.

46 Graham Dutfield, Intellectual Property Rights and the Life Science Industries: A 20th Century History, (2003, Ashgate Pub Ltd) p. 121.

47 Madeleine Claesson, Protecting Inventions and Promoting Innovation - A Difficult Act of Balance. A Study of the Experimental Use Exception and the Research Tool Issue, (2008) Lund University Thesis Database 1.

use exception is imperative for the research community.[48] For variety of drugs it is essential to provide such an exception, so that research can start at an earlier stage and result in better inventions and outcomes in future.

XI. Problems Associated with Bolar Exemption in India

In India there are several problems surrounding the Bolar exemption. Apart from enforcement difficulties that may arise in the future, there is an inherent problem relating to data exclusivity. Data exclusivity is the protection period granted to the keep in confidence the research data of an approved drug. In the protection period a follow-on competitor cannot enter the market with an abbreviated filing that relies in whole or in part on the innovator's data on safety and efficacy.[49] In other words data exclusivity protection permits the inventor exclusive rights over their test data and prevents regulatory authorities from relying on the test data to register generic alternatives. Therefore, data exclusivity, in effect, extends the term of the monopoly rights that a patentee enjoys. Yet data exclusivity rests on ambivalent values surrounding controversies. Some the most innovative, justly revolutionary products involving novel chemical entities usually take an extremely long time to enter into the market due to extensive pre-marketing product development, clinical trials and delays in regulatory permits.[50] In such cases, the patentee is not able to utilize the whole of its patent term to exercise its monopoly rights and reap out the cost of developing that product and the subsequent benefits emerging from it. Thus extension of patent term becomes vital for the patentee and thus, the patentee is left with the following options:

48 Aditya Nagarsheth, Experimental Use Exception: An International and Comparative Overview with a Possible Answer to the Forthcoming Indian Patent Legislation, (2004) 9 Journal of Intellectual Property Rights 549-556, 551.

49 Henry Grabowski, Data Exclusivity for New Biological Entities, online at http://public.econ.duke.edu/Papers/PDF/DataExclusiviryWorkingPaper.pdf (visited March, 20, 2012).

50 Rebecca S. Eisenberg, The Role of the FDA in Innovation Policy, (2007). 13 Mich Telecomm & Tech Law Review 345.

1. Patent term extensions framed to neutralize for product-development and regulatory delays serve companies to regain some of their rights to exclude, but such extension provisions are subject to strict upper limits, meaning that patent terms are often too less to protect market exclusivity for the entire period of the drug's therapeutic benefit;[51]
2. Evergreening strategies, i.e. ways to increase the period of patent protections through incremental modifications to the product,[52] could be resorted to by the patentee to get an indirect extension of patent but many a times such a modification may not even fulfill the criteria of novelty or inventive step or utility.

Looking at these alternatives, data exclusivity seems to be the best possible way to ensure market exclusivity of such products.[53] However, in India, the Patent Act does not provide for a period of data exclusivity. S. 107A of the Act, which contains the provision for the Bolar exemption is also silent about data exclusivity. This statutory gap may result in discouraging the Indian pharmaceutical industry to invest in reverse engineering and development of affordable drugs. Absence of data exclusivity legislation in India results in clash between research-based pharmaceutical companies and local generic companies.[54] This has recently been observed in the Bayer-Cipla case before the Delhi High Court, where Bayer strongly advocated for data exclusivity protection in India.[55]

51 Brook K. Baker, Ending Drug Registration Apartheid: Taming Data Exclusivity and Patent/ Registration Linkage, (2008) 34 Am. J.L. & Med. 303.

52 *Supra* at 49,345.

53 *Supra* at 50,304.

54 Verkey, *supra* at 3,574.

55 Anshul Mittal, Patent Linkage in India: Current Scenario and Need for Deliberation, (2010) 15 Jour, of Intellectual Prop. Rights 187-196,192.

Since protection of data exclusivity can also be implicitly traced to the TRIPS Agreement[56], the Indian law excluding data exclusivity protection while providing for Bolar exemption often faces criticism from the intellectual property right owners and developed countries. Before the adoption of TRIPS Agreement, most countries permitted reliance on originator test data to permit generic products. After the submission of test data by the inventor company, the regulatory authorities could rely on the data to permit later applications on identical products, or to rely on proof of prior approval of a similar product in another country. Generic producers were only to show that their product is chemically identical to the brand-name, original product, and in some countries, that it is bioequivalent.[57] This allowed easy and quick introduction of generics into the market without registration data-related expenses, so data exclusivity gained importance to preserve this right of patentee. In the United States and countries in the EU data exclusivity protection for drugs and agrochemicals was adopted even prior to the TRIPS Agreement (for example, in 1984 in the United States and in 1987 in the EU, for drugs).[58] As a result, Indian silence on the protection for data exclusivity is subject to much criticism.

There are a few other related issues that need to be clarified. For instance, the phrase in S.107A(a) *'uses reasonably related to the development'* is an open-ended one and has not been explained anywhere by any legislation. Therefore several questions arise in this regard as to what amounts to *reasonable use?* What quantity of medicine

56 "Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public or unless steps are taken to ensure that the data are protected against unfair commercial use." *See* TRIPS Agreement, *supra* at 24, Art. 39(3).

57 Protection of Data Submitted for the Registration of Pharmaceuticals, WTO and the TRIPS Agreement: Medicines, online at http://www.who.int/medicines/areas/policy/wto_trips/en/index.html (visited Dec 30, 2012).

58 *See* Charles Clift, Data Protection and Data Exclusivity in Pharmaceuticals and Agrochemicals, (2009).p 127.

may be necessary for *'uses reasonably related to development'* and submission of information? Whether production or import of unlimited quantity of medicines and successive stock piling be permitted under the phrase of *'uses reasonably related to development'* in the Indian patent regime?[59] Stockpiling of patented drugs in expectation of patent cessation have not been regarded as legal practices by a 2000 WTO ruling involving the Canadian Bolar provision. Canadian laws in question allowed a "stockpiling exception" six months prior to the expiration of the patent. This was held by the WTO to be in contravention to the TRIPS Agreement.[60]

Another pertinent question that arises is whether a regulatory permit can be given for a medicine which still has 10-15 years of patent period left? Also sometimes generic manufacturer after getting market approval directly launch their product without waiting for expiration of the patent term, thereby violating patent holder's right.[61] The Indian law is silent on all of these issues and these shortcomings if not remedied soon may cause trouble to India in the WTO.

XII. Conclusion

From the above analysis it is fair to conclude that Bolar exemption is highly relevant in Indian scenario. However, the lack of judicial interpretation in this regard poses several questions and brings the law under criticisms from several quarters.

Some problems that need to be fixed in the existing law are the recognition of data exclusivity period and; prohibition of over stockpiling of drugs. The problem of data exclusivity is a major threat to the patent regime in India, because its absence leaves branded pharmaceutical industry unprotected, which in turn may result in lesser research by these companies on diseases specific to the developing world like AIDS and malaria. The Union of India constituted a Committee for the Protection of

59 India: Patent Linkage with Regulatory Approval, Patents and more online at http:// patentsnmore. wordpress.com/2010/01/18/india-patent-linkage-with-regulatory-approval/ (visited March 3, 2012).

60 *Supra* at 31, para. 3.4.

61 *See Cipla* case, *supra* at 36.

Undisclosed Information under the chairpersonship of Mrs. Satwant Reddy, Secretary, Ministry of Chemicals and Fertilizers. A proposal for a five year term of data exclusivity for India was recommended, in the Report submitted by the Committee on August 6, 2006, but it is yet to be executed, leaving the problem of data exclusivity still open.[62] A similar five year term protection is also given in New Zealand which serves interests of brand name producers without overlooking the need of generic industry, hence balancing both the interests.[63] Even European Union has asked Indian Government to make a provision for mandatory ten year data exclusivity period, while negotiating the terms of Free Trade Agreement with India.[64] These amendments are essential to bring Indian law in compliance with the provisions of the TRIPS Agreement. For meeting the international requirements, a need persists to adequately amend the law so as to balance the patent rights along with public interest.

62 Report on Steps to be taken by Government of India in the context of Data Protection Provisions of Article 39.3 of TRIPS Agreement (2007) Government of India, Department of Chemicals & Petrochemicals Ministry of Chemicals & Fertilizers.

63 Jennifer De Vere, New Zealand IP: Taking advantage-generic pharmas in New Zealand, (2008), online at http://www.asialaw.com/Article/1970779/Search/Results/New-Zealand-IP-Taking-advantage-generic-pharmas-in-New.html?Keywords=Bolar+provision (visited July 2, 2012).

64 Amiti Sen, European Union wants India to allow Extended Patent life for Drugs, (3rd October, 2012), The Economics Times.

Bhatia to Bharat Aluminium

Does it Transform India to a Preferred Destination for International Commercial Arbitration?

Manu Thadikkaran'

ABSTRACT

The rules of arbitration ensure party autonomy, especially in international commercial transactions. However, the efficiency of the technique would be hampered if concurrent authority is conferred on the judiciary over arbitral proceedings. The scenario in India is notable in this aspect. The attitude of scepticism reflected in India, a developing country, towards an alternate dispute settlement mechanism such as arbitration may be attributed to its inexperience as well as its history. In India, the exercise of concurrent authority by the judiciary is evident from the judgments of Bhatia International and Venture Global. The law laid down by the Supreme Court in these judgments interprets the Arbitration and Conciliation Act, 1996 in a manner that is contrary to the spirit of the UNCITRAL Model Law, and has received wide criticism from the global business community.

Subsequently, however, as a means of damage control, the Indian judiciary interpreted arbitration agreements giving importance to the seat of arbitration to prevent judicial intervention. The 'seat theory', which is internationally accepted in the arena of arbitration, giving the judiciary of the place of the seat of arbitration the authority to intervene and set

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aside arbitral awards, was accepted and adopted by the Indian legal system indirectly. However, the question remains as to the effectiveness of this attempt by the Indian judiciary in containing the effects of this position of law on the Indian economy. However, the reasoning of the Bhatia judgment was justified in its circumstances. Matters regarding interim measures and collection of evidence can be enforced effectively by the judiciary of the place of the subject matter of arbitration. With regard to these limited aspects, all judiciaries must be granted the authority over arbitral proceedings to ensure efficient enforcement of awards. Hence, necessary legislative amendments, along with support from the judiciary, are essential for India to adopt a pro-arbitration regime.

I. Introduction

Arbitration is a preferred method of dispute resolution in commercial matters as it affords a greater flexibility of party autonomy and efficient resolution of disputes. It is a means of alternate dispute settlement mechanism, which provides an amicable solution among the parties, given by a third person, mutually agreed by them. Commercial arbitration, therefore, is a highly useful tool in today's world of increasing trade and commerce. When entering into contracts, the parties can incorporate an arbitration clause in the event of any further dispute between them, so as to save both parties from vexatious litigation proceedings in Courts.

Ever since the advent of globalization, there has been a considerable increase in cross-border transactions between various countries. International trade has flourished between various nations, and sellers and buyers are no longer limited to their local markets for the exchange of goods. However, with such increase in private international trade, the volume of trade disputes also increases and it becomes increasingly complicated due to the confusion regarding the applicable law in the determination of such disputes. More often, both the parties to an international contract would prefer the dispute being settled according to their own laws. At this juncture, international commercial arbitration has been viewed as an efficient method of dispute settlement as it allows the parties to choose the law by which the transaction and the disputes therein are to be governed. Moreover, it allows them to appoint an expert in

the field of commerce as the arbitrator to settle the dispute, and protects them from the unfamiliarity of the Courts in dealing with the subject. Pursuant to this, the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ("UNCITRAL Model Law")[1] came into existence with the aim of unifying the laws of arbitration around the globe and transforming it into a truly efficient tool of dispute settlement.

Prior to 1996, arbitration in India and the enforcement of international awards were governed by the Arbitration Act of 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961.[2] However, to ensure compatibility with the UNCITRAL Model Law, the Arbitration and Conciliation Act, 1996 (the "1966 Act") was enacted in India to govern national and international arbitration between various parties. The Act is broadly divided into two parts. Part I deals with provisions applicable to awards made within India, and includes provisions for interim relief and challenge to arbitral awards, while Part II deals with those applicable to awards made outside India. However, under the Act, only an award granted by a country who is a signatory to New York Convention or Geneva Convention (Convention Countries) is treated as an award enforceable under Part II of the 1966 Act ("Part II").

II. Judicial Trend prior to 2002

Section 5, which falls in Part I of the 1966 Act ("Part I"), limits the intervention of the judiciary in arbitral matters to the extent expressly provided for in the 1966 Act. Prior to 2002, however, there was confusion due to the conflicting views given by various High Courts as to the applicability of Part I to international commercial arbitrations that was held outside India. In the case of *Dominant Offset Pvt. Ltd.* v. *Adamouske Strojirny,*[3] the Delhi High Court held that Section 2(2) of the Act was an inclusive definition and hence, Part I applies to international arbitrations held outside India. The Calcutta High Court, on the other hand, held in the case of *East Coast Shipping* v.

1 United Nations Commission on International Trade Law Model Law on International Commercial Arbitration with amendments as adopted in 2006.

2 Both Acts are now repealed.

3 *Dominant Offset Pvt. Ltd.* v. *Adamouske Strojirny,* (1997) 68 DLT 157.

MJ Scraps,[4] that Part I would apply only when the place of arbitration is in India. This view was later endorsed by a Division Bench of the Delhi High Court in the case of *Marriot International* v. *Ansa! Hotels.*[5]

III. Interventionist attitude of Indian Judiciary: The Bhatia and Venture Global Judgments

When the question of applicability of the provisions of Part I to Part II came up for consideration in the case of *Bhatia International* v. *Bulk Trading S.A.,*[6] a three-judge bench of the Apex Court held that Part I applies to international commercial arbitration outside India as well, unless the applicability of the same is excluded, expressly or impliedly, by the parties. The reasoning of the Court was that Section 2(2) of the Act which states that 'Part I shall apply where the place of arbitration is in India' is an inclusive definition and this is supported by the fact that the similar provision in UNCITRAL Model Law uses the term 'only' to restrict the applicability of such Sections. Moreover, the Court also observed that taking the opposite view would lead to the conclusion that the Legislature left a lacuna in law inasmuch as there are no provisions in the Act governing the enforcement of an award granted in a non-convention country, since Part II applies only to those awards granted by a Convention Country. From the Court's perspective, this would lead a party to such an award remediless, especially if such award is contrary to the public policy of India and the judgment-debtor is forced to comply with the same under the threat of contempt in the foreign country.

The *Bhatia* judgment was followed by the Supreme Court Decision in *Venture Global Services* v. *Satyam Computer Services/* wherein it was made clear that Indian Courts had the jurisdiction to pass interim reliefs as well as set aside awards made by arbitration tribunals of seat outside India. In this case, the dispute was between an Indian Company and a U.S. Company regarding a joint venture. After receiving a

4 *East Coast Shipping* v. *MJ Scraps,* (1997) 1 Cal. HN 444.

5 *Marriot International* v. *Ansal Hotels,* AIR [2000] Del 377 (DB).

6 *Bhatia International* v. *Bulk Trading S.A.,* AIR [2002] SC 1432.

7 *Venture Global Services* v. *Satyam Computer Services,* AIR [2002] SC 1432.

favourable award from the LCIA, the Indian Company sought the enforcement of the same in Michigan. But, the U.S. Company approached the Indian Courts to set aside this award, which was entertained by the Supreme Court of India. The decision permitted the applicability of Part I, including the power of a Court to set aside an arbitral award under Section 34, to Part II governing foreign arbitrations.

IV. Bhatia and Venture Global: Well-intended yet flawed

These judgments were met with immense criticisms from the international commercial community as they have serious repercussions on private international trade. It was regarded as a reflection of the consistent inclination of the Indian judiciary to exercise authority contrary to the expectations of the global business community. With the increasing number of cross-border transactions, the need for a speedy alternate dispute settlement mechanism such as arbitration is essential. However, the effectiveness and validity of such arbitral proceedings have been greatly questioned by these decisions of the Supreme Court. Foreign investment has always shown an inclination towards legal systems with strong governance and adequate protection of rights of parties. In today's world, the trend of international commerce is to shift from West and move to East. Countries such as India and China are regarded as having the potential for massive investments due to the low cost of production, easy availability of raw materials and diverse market available for various products. However, the inevitability of disputes with such investments makes it necessary to place great reliance on arbitration, so as to save time and cost of the parties. Moreover, once a matter is attended by the Courts, the decision would be delayed by the excessively vexatious proceedings, which is a great detriment and disincentive to foreign investors. Also, the risk of a commercial matter being judged by a person not well-versed with the technicalities of the same is an added disadvantage. Recently, the international community has also been hit by the Eurozone crisis,[8] which has seen substantial

8 Report on Eurozone Crisis: The Corporate Perspective (January, 2012) published by Herbert Smith LLP, online at http://www.herbertsmith.com/NR/rdonlyres/2EE94371-9658-41C6-9CFD-C61187738A70/0 InvestmentFundsUpdateEurozoneCrisisIssuesforCorporates 09February2012.html

withdrawal of investments from around the world, including India. In such a scenario, the lack of effectiveness of arbitral proceedings would act as a huge disincentive for foreign investors in India, which would be truly detrimental to our country in its present state of economy.

One of the main reasons for the Supreme Court to allow jurisdiction to Indian Courts over matters subject to international commercial arbitration was the omission of the word 'only' in Section 2(2) of the Indian Act as opposed to Article 1(2) of the UNCITRAL Model Law. However, this should be irrelevant as UNCITRAL Model Law itself did not contain the word 'only' in Article 1(2) previously. The *travaux preparatoires* of UNCITRAL Model Law, especially a statement made by the Italian Delegate and the Chairman's response, clearly indicates that the sole reason for including the word 'only' was to avoid the exception clause ("except Articles 8,9,35 and 36") being construed as not to apply unless the seat of arbitration was abroad. Under the Indian Act, the Legislature did not find the need to add the word 'only' as the exception clause itself was omitted while importing the provision from the UNCITRAL Model Law.

Further, the reasoning of the Court that a party with an award granted at a non-convention country would be rendered remediless is also not a correct point of law. Even if an award is granted at a non-convention country, it would still be a 'foreign judgment' within the meaning of the Civil Procedure Code (CPC),[9] and a suit can be filed with the Indian Courts for the validity of the same or for the breach of any Indian law.[10] Such awards, though not binding on Courts, have evidentiary value. Thus, the reasoning of the Court that parties may be remediless does not stand, as there does exist a remedy for such parties, though the same might prove to be more difficult. An arbitral award, passed outside India, can be set aside by the Indian Courts while enforcement if such award contravenes the public policy of India. Hence, in the event of the arbitrators misconstruing Indian Public Policy, the party would not be

9 *Badat & Co.* v. *East India Trading Co.,* AIR [1964] SC 538. Held that Indian Courts have the jurisdiction to enforce awards made in a foreign country that is final.

10 Civil Procedure Code, 1908, Section 13.

rendered remediless. The intervention of judiciary, in such limited circumstances, is warranted under the scheme of the Arbitration and Conciliation Act.

Another point to note is that the decision of *Venture Global* was based on the peculiar facts of that case. The reason as to why the Indian company sought the enforcement of the award in Michigan, despite the Joint Venture having been registered in India, was to circumvent the illegality of the same in India in view of the violation of foreign exchange regulations in India. This may have been one of the considerations before the Supreme Court in arriving at the said decision. Moreover, the bench in *Venture Global* was a two-Judge bench and was bound by the ratio laid down by the *Bhatia* judgment. Also, the *Venture Global* judgment cannot be termed as 'nationalistic' as it protected a foreign party, and not the Indian party. However, the decision has the danger of being used as a precedent for all cases of international commercial arbitrations held outside India, with the Indian Courts interfering with the validity of such awards.

Thus, it can be seen that the Indian Courts have resorted to interpretations which indicate an inherent lack of faith in arbitration as a means of dispute settlement. This is due to the lack of experience India has in this field, especially since it is a developing country. In most matters of arbitration, Indian parties prefer Judges as arbitrators and always view arbitration as an extension of the judicial system. This is more so evident from the fact that a majority of matters decided through arbitration are appealed to Courts for review on trivial grounds. This trend has emerged due to the inclination of the Indian judiciary to entertain such matters, despite a clear parties' agreement that the dispute is to be settled only through arbitration. Thus, the attitude of the judiciary is in contravention with the will of the parties and the essential factor of party autonomy, the cornerstone of arbitration.

The 1966 Act was enacted with a view of having compatibility with the UNCITRAL Model Law. The Preamble of the UNCITRAL Model Law states the importance of recognizing the value of arbitration as a method of settling disputes arising in the context of international commercial relations. However, the decisions of the Supreme Court runs contrary to these objectives of UNCITRAL Model Law, which is the basis for the 1966 Act, as the validity and effectiveness of arbitration as a

method of dispute settlement and the finality of its awards are greatly undermined.

V. Judicial trend post-Bhatia and Venture Global: Damage undone

The judicial trend post-B/zafia judgment, however, has been interesting. The Courts realized the importance of non-interference with arbitral awards and thus, used the word 'implied' in the *Bhatia* judgment to not interfere with arbitral awards. The *Bhatia* decision had clearly stated that provisions of Part I shall apply to international commercial arbitrations outside India, unless the same is excluded expressly or *impliedly* by the parties. The Courts, in subsequent decisions, interpreted and enlarged the term 'impliedly' to justify non-interference with such awards made outside India. The Courts also deviated from the earlier view that proper law of the contract was the proper law of arbitration, as can be seen in the case of *Sara International Ltd.* v. *Arab Shipping Co.*,[11] and stressed on the importance of 'seat' of arbitration in international commercial arbitration. In the case of *Tamil Nadu Electricity Board* v. *Videocon Power Ltd.*[12] the Court held that since the arbitration was conducted according to UNCITRAL Model Law with the seat of arbitration in Singapore and the specification that law of arbitration would be English law, the Indian Courts have no jurisdiction over the same. In the case of *Dozco India* v. *Doosan infracore*[13] the Court held that since the parties had agreed to be governed by the laws of Korea and that the seat of arbitration was in Seoul, the jurisdiction of the Indian Courts were ousted despite the Petitioner company being incorporated in India. The Court, in this case, also negated the contention of the Indian company that the seat of arbitration was not limited to Seoul, stating that a mere reference to such a provision in brackets does not run contrary to the view that Part I has been impliedly excluded by the Parties.

In the decision of *Videocon Industries* v. *Union of India*,[14]* the Supreme Court stressed further on the importance of the seat of arbitration to determine the law governing

11 *Sara International Ltd.* v. *Arab Shipping Co.*, (2009) 160 DLT 439.

12 *Tamil Nadu Electricity Board* v. *Videocon Power Ltd.*, (2009) 4 MLJ 633.

13 *Dozco India* v. *Doosan infracore*, (2011) 6 SCC 179.

14 *Videocon Industries* v. *Union of India*, (2011) 6 SCC 161.

arbitration between the parties. The Court held that since the seat of arbitration was at Kuala Lampur and the arbitration was governed by English law, Part I would not apply despite the proper law of the contract being Indian law. Though the Petitioners contented that the arbitration was held in Amsterdam and London despite the stated seat being in Kuala Lampur, the Court held that a mere change in venue of the arbitration, which in this case was due to the outbreak of SARS in Malaysia, would not change the intention of the parties to have Kuala Lampur as the seat of arbitration and hence, the Courts of Kuala Lampur has the necessary jurisdiction.

VI. Primary Jurisdiction of the 'Seat' of Arbitration

The judicial trend after the *Bhatia* judgment have seen the Courts interpreting that if the 'seat' of arbitration is outside India, it leads to the conclusion that the parties impliedly agreed for the non-applicability of Part I, irrespective of whether the parties or the proper law governing the contract relates to India,[15] which is in consonance with the UNCITRAL Model Law as well as the true intent behind Section 5[16] of the 1996 Act.

The doctrine that the country of the seat of arbitration alone has jurisdiction to set aside an award, has been well accepted internationally. Only the court situated at the place of the seat of the arbitration, which is said to have primary jurisdiction over the arbitration, would have jurisdiction to set aside an award. In contrast, any other court, which only has secondary jurisdiction, could merely refuse enforcement of the award.[17] The distinction between the aforementioned concepts of "set aside" and a "refusal to enforce" is important due to the fact that when an award is set aside, it is unenforceable in the country in which it was made and it will usually be unenforceable

15 *See Yograj Infrastructure* v. *Ssang Yong Engineering and Construction Ltd.*, (2011) 9 SCALE 567.

16 'Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.'

17 V.S. Deshpande, Jurisdiction Over 'Foreign' and 'Domestic' Awards in the New York Convention, (1991) 7 Arbitration International 123.

elsewhere. However, when there is a refusal to enforce/recognize an award, the winning party is only denied seizure of assets in the place where enforcement is sought, though the award may still be enforced in another state in which the losing party has assets. The New York Convention provides that enforcement may be refused if the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.[18] Courts in the United Kingdom, the United States and other countries have generally construed this to mean the court of the seat of the arbitration.[19] Specifically, in the case of *Karaha Bodas Co.* v *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara et al.*[20], the US Court of Appeals was faced with the question of enforcement of an award rendered in Geneva and set aside by the Courts in Indonesia, between Indonesian parties. In this case, emphasis was laid by the Court on the importance of the seat theory of international commercial arbitration conferring primary jurisdiction to the Courts of the place of where arbitral proceedings are held and recognized the primary and secondary jurisdiction for setting aside and refusing to enforce international awards under the NYC.

However, there is one danger in this regard which needs to be considered. The parties to an international commercial arbitration nowadays are free to choose any place as the seat of arbitration, irrespective of whether such place has a close nexus with the place related to the contract. In such situations where the seat of arbitration is in a place which is not related to the contract, the arbitrators may tend to not take into consideration the law of such place and the illegalities therein, in awarding the verdict.

18 Article V(l)(e), New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1959, 330 UNTS 38.

19 C. v. *D.*, [2007] EWHC (QBD) 1541 (United Kingdom); *Yusuf Ahmed Alghanim & Sons* v. *Toys "R" US Inc.*, 126 F.3d 15 (2d Cir. 1997); *Karaha Bodas Co., L.L.C.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274 (5th Cir. 2004) (USA); *KBC* v. *Pertamina*, [2003] HKEC 511 (Hong Kong).

20 364 F.3d 274 (5th Cir. 2004).

VII. Compliance with UNCITRAL Model Law: Is Bhatia judgment justified?

Though the above decisions and the present judicial trend indicate a non-interference attitude of Indian judiciary in arbitral proceedings, the decision of *Bhatia* cannot be regarded as without merits. The Petitioners, in *Bhatia* case, had approached the Court for an interim relief during the course of arbitral proceedings. It was necessary to ensure that the property, which was the subject-matter of arbitration, was not manipulated in any way by the other party in the event of an adverse arbitral award in its favour. Such interim reliefs are to be granted by the Court of a country where the subject-matter property is situated to ensure justice and fairness to the parties.

Even Article 9 of the UNCITRAL Model Law states that it is not incompatible for a party to request a Court for grant of interim measure of protection, before or during the arbitral proceedings. The use of the word 'a Court' in this Article clearly indicates that this power is not limited to the Courts in the territory of the seat of arbitration, but to any Courts. Moreover, as per Article 1(2) of the UNCITRAL Model Law, Article 9 applies irrespective of whether the place of arbitration is within the territory of the State. The Judges in the *Bhatia* case may have had this in mind while pronouncing the judgment ensuring such fairness to the Petitioner through interim protection measures. If such interim protection is not granted, the party in whose favour the award is granted would have to further pursue the legal system for complete fairness. This would result in unnecessary delay and costs, which would again defeat the very purpose of arbitration. Similarly, it should also be noted that it is always easier for the Court of a country to collect evidence from its own territory if the property, which is the subject-matter of arbitration, is situated there. In such cases, an application for collection of such evidence by such Courts must not be dismissed on the ground of lack of jurisdiction. Though it is true that orders of this nature and interim reliefs are capable of being delivered by the arbitral tribunal, the execution of the same in the domestic country would further delay the proceedings. This is more so to be noted in light of the fact that Part II does not contain any provision for interim reliefs or collection of evidence *per se.* Thus, there are certain obstacles in the 1996 Act,

which needs to be overcome to ensure and achieve the true objective of the Act as well as the UNCITRAL Model Law.

VIII. Bharat Aluminium judgment: Damage Undone?

Given the confusion and widespread criticisms against the reasoning of the *Bhatia* judgement, the matter was referred for reconsideration by the Supreme Court to a five-Judge Constitutional Bench in the case of *Bharat Aluminium Co.* v *Kaiser Aluminium Technical Services Inc.*[21] This five-Judge Bench overruled the *Bhatia* and *Venture Global* judgments and held that Part I of the Arbitration and Conciliation Act, 1996 would apply only to international commercial arbitration held within India. In arriving at this conclusion, the Court relied on the territoriality principle and stated that the mere omission of the word 'only' in Section 2(2) of the 1996 Act as opposed to Article 1(2) of the UNCITRAL Model Law does not indicate that Part I applies to foreign arbitrations where the parties have not excluded the applicability of Part I. Moreover, the Court noted that the word 'only' present in Article 1(2) of the UNCITRAL Model Law is also missing from the Article 176(1)(I), Chapter 12 of the Swiss Private International Law Act, 1987 as well as from Section 2(1) of the 1996 Act (UK). Therefore, Section 2(2) of the Act is to be regarded an express parliamentary declaration that Part I of the 1996 Act of India applies to arbitration having their seat in India and does not apply to arbitrations seated in foreign territories. Further, the Court also stated that the purpose of the 1996 Arbitration Act was to ensure conformity with UNCITRAL Model Law, which clearly recognizes the territoriality principle. Hence, the Indian judiciary upheld the seat theory of international commercial arbitration wherein the *seat* of arbitration is regarded as the centre of gravity of the arbitration. This pro-arbitration stance is a great leap forward by the Indian judiciary in recognizing the importance of arbitration as a means of dispute settlement and making India a more viable destination for international commercial arbitration and thereby, international investments.

21 Civil Appeal No. 7019 of 2005 (Supreme Court of India), decided on 06.09.2012, MANU/SC/0722/2012

However, the *Bharat Aluminium* judgment does not solve the current problems faced by India regarding international arbitration. Specifically, the judgment holds that it would be applicable prospectively to the disputes arising from those arbitration agreements entered into on or after the date of the judgment. Effectively, this means that all the matters pending before all the Indian Courts regarding the applicability of Part I in international arbitrations would still be governed by the previous position of law in the *Bhatia* judgment. Moreover, the new position would not be applicable even to a future dispute, if the parties had entered into the arbitration agreement prior to the date of the judgment. Thus, a majority of the cases in the forseeable future would still be governed by an uncertain position of law giving excessive powers to the judiciary in international arbitration.

It is interesting to note that the Supreme Court opted for this prospective application despite its finding in paragraphs 62-69 of the judgment that the position of law in India under Section 2(2) has always intended the exclusion of jurisdiction to Indian Courts when the seat of arbitration is outside India. The Court had recognized that the 1996 Act had been modeled according to the UNCITRAL Model Law, which had clearly recognized the territorial principle. Therefore, the legislature had intended to import this territoriality principle into the 1996 Act despite the absence of the word only in Section 2(2). Hence, the Court, while recognizing that *Bhatia* was a wrong interpretation of law, has left further uncertainty through the prospective application of the judgment.

For instance, the difficulty caused by the *Bharat Aluminium* judgment is clearly visible in the matter of *Aargus Global* v *NNR Global*.[22] In this case, the Petitioner had argued that Part I applies despite the seat being in Malaysia since the substantive law governing the contract was Indian law. The Court had reserved its judgment on August 31,2012 in light of the decision of the Supreme Court to reconsider the *Bhatia* judgment. However, pursuant to the prospective application of *Bharat Aluminium*, the Court had to entertain the claim of the Petitioner under Section 34 of the Act. Thus, the Court delved into the merits of the claim under Section 34 of an arbitration held outside

22 OMP Nos. 61 and 201 of 2012 (High Court of Delhi), decided on 04.10.2012.

India since the declaratory part of the *Bharat Aluminium* judgment had a prospective application, thereby resulting in increased judicial intervention in international arbitration.

IX. Conclusion

The decisions of *Bhatia* and *Venture Global* are viewed as serious inroads by Indian Courts to the arbitral autonomy and the finality and effectiveness of arbitral awards. This had met with wide criticisms from the international commercial community and would have led to serious undermining of India's credibility in the international commercial market and the preference of India as a seat of arbitration in commercial matters. The objective of international commercial arbitration is to serve the intention of the parties for a neutral forum for adjudication of disputes. If the judiciary is allowed concurrent jurisdiction in this regard, it would seriously undermine the effectiveness and sanctity of party autonomy, which is the pillar of arbitration. It is precisely this neutral factor which renders cities such as London, Singapore and Malaysia as a preferred destination for international commercial arbitration. Though the post-judicial trend has acted as a sort of damage control, the danger of non-recognition of arbitral awards still subsists with these judgments in force and hence, urgent steps by means of amendments, as proposed by the Ministry of Law and Justice, is necessary. India, being a developing country, lacks adequate experience and faith in the system of alternate dispute resolution. To revive the choice of India as a preferred destination for international commercial arbitration, necessary legislative changes must be brought into force whereby the Indian Courts are allowed jurisdiction over arbitral proceedings only with the inclusion of a specific and unambiguous provision to this effect. An active role of the legislature and judiciary is essential for the establishment of a pro-arbitration regime in India and to ensure the underlying principle of minimizing the supervisory role of Courts in arbitral process of the Arbitration and Conciliation Act. In this regard, the judgment of the five-Judge bench by the Supreme Court which reconsidered the *Bhatia* judgment is to be viewed as a pro-arbitration stand taken by the Indian Judiciary. The Court felt the need to revisit the current position of law on

the applicability of Part I to international commercial arbitration held outside India. However, to ensure complete effectiveness of arbitration, Indian Courts should refrain from even entertaining matters under Part I, if the seat is outside India. Thus, the current gap left by the *Bharat Aluminium* judgment can be tackled by the proper application of the legislative intent in enacting the 1996 Act. With such support of the Indian Judiciary, the true intent and effectiveness of arbitration can be achieved, in line with the objectives of the UNCITRAL Model Law, which would further the economic interests of India and strengthen the credibility of the Indian legal system in the global scenario.

Navigating the Nebulous Contours of Tests of Bias

An Endeavour to an Elegant Standardization

*Soham Dutta & Satish Padhi**

ABSTRACT

Bias is an inalienable evil residing in every human being by the very virtue of human existence, which is a chronicle of moulding of opinions, predispositions and judgements born out of (in)experiences. The Rule against bias endeavours to mitigate bias and uphold the principles of fair play. The tests of bias is undoubtedly evolving, but without much clarity, it is entangling itself into a murky muddle of terminologies ranging from "reasonable suspicion", "real likelihood", "reasonable likelihood", "real danger in terms of real likelihood", and "real danger". The fusion and confusion in terminologies is evident in the judicial trend in England and India, and this has percolated within the academia. This paper highlights the visible predicament, and provides possible solutions to the same. En route, the paper embarks upon analysis of the most recent controversial judgement of Supreme Court in relation to bias in Lalit Kumar Modi v. Board of Control for Cricket in India and Ors., which merits an academic comment. The authors, after having indulged in an autopsy, conclude by chalking out a harmonious roadmap, which advocates for a "stringent reasonable suspicion test" to be applied uniformly, keeping in mind all the relevant factors in the Indian scenario.

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I.Introduction

he rule against bias is one of the important arms of natural justice derived from the atin maxim *nemo judex in sua causa,* which literally means that a man should not be a Ldge in his own cause, or in which he has a conflicting interest.[1] The compliance of jle against bias, which has expanded the contours of natural justice, has become one f the fundamental requirements of law, and is an integral part of the administrative jurisprudence. *A.K. Kraipak* v. *Union of India*[2] has expanded the horizons of natural jstice beyond quasi-judicial authorities and has applied the doctrine of bias even to idministrative proceedings.[3]

In both England and India, there exists confusion as to what properly constitutes ?ias. In India, it is more significant as bias has been linked to Article 14 of the Zonstitution.[4]

This article examines the manner in which the Courts have misconstrued the various tests applicable for proving bias namely "reasonable suspicion", "real likelihood", "real danger", and their variants, by etching out the development of law of bias in India as well as in its British counterpart. While one may find that the law in England has attained certain consoling standards, the situation in India is still grim. The case of *Lalit Kumar Modi* v. *Board of Control for Cricket in India & Ors.*,[5] exemplifies the implications arising out of a continuously vacillating judiciary. In this context, this exercise assumes contemporary relevance. It aims to bring uniformity by resolving the turbidity caused by nebulous terminologies and their application; in the alternative it hopes to serve as a guide for the courts in the resolution of bias related conflicts in the near future.

1 *Egerton* v. *Lord Derby,* (1613) 12 Co. Rep 11 (Coke L.J.). See also C.K Takwani, Lectures on Administrative Law (2008 Eastern Book Company), p. 177 *[hereinafter* Takwani].

2 (1969) 2 SCC 262. *[hereinafter* Kraipak]

3 *See also Maneka Gandhi* v. *Union of India,* (1978) 1 SCC 248.

4 *A.R. Antulay* v. *R.S. Nayak and Anr.,* AIR 1988 SC 1531.

5 (2011) 10 SCC 106. *[hereinafter* Lalit Kumar Modi]

This paper is broadly divided into four parts. The first part sets out a theoretical base by elaborating upon the doctrine of bias. Subsequently, the paper highlights the practical difficulties or confusion faced by the judiciary and secondary authors in the application of the tests of bias, which have arisen out of terminological differences of the tests and their subsequent misconstruction. The judicial approaches of both England and India are chronologically analyzed. Thereafter, we examine the *Lalit Kumar Modi* decision, which we feel is significant enough to merit a section all to itself. The paper concludes by furnishing certain concrete suggestions to redress the current crisis in this domain of public law in India.

II. Outlining the Contours of Doctrine of Bias

Bias may be of different kinds and forms, such as pecuniary bias, personal bias, or bias as to the subject matter.[6] Pecuniary bias arises when a member of the tribunal has a pecuniary (financial) interest in the subject matter of the decision. The existence of a close relation between a member of the tribunal and one of the parties leads to a personal bias. An abnormal desire to uphold some particular departmental policy, which would prevent an impartial adjudication of the dispute, results in official/ institutional bias.[7]

Dimes v. *Grand Junction Canal** is a classic case on the benchmark applicable in case of pecuniary bias. It established the rule that a direct pecuniary interest, however small, disqualifies the decision-maker from being a judge. In other types of bias, the standard for determining bias is comparatively lower, and the principle of automatic disqualification is not applied.

Where there is no scope for automatic disqualification, the focus shifts to determining whether the judge's interest in the subject matter is sufficient to justify disqualification. No litmus test has evolved till date to determine the threshold for disqualification. Hence, much discrepancy still exists in this area.

6 *Amar Nath Chowdhury* v. *Braithmaite Co. Ltd,* (2002) 2 SCC 290, p. 292.

7 *Venkatachalam Iyer* v. *State of Madras,* AIR 1957 Mad 623, p. 626.

8 (1852) 3 HLC 759.

The genesis of the doctrine of bias in India can be traced to British Administrative Law; thus in India, in case of any direct, howsoever small pecuniary bias, the principle of automatic disqualification is ritually followed.[9]

With regard to the other forms of bias, the automatic disqualification theory is not applicable. The law relating to personal and/or institutional bias is very tricky and complex. There is much dissonance regarding a uniform applicable standard in such cases. This discord is evident from the manner in which the courts have treated cases of personal/institutional bias thus far.[10]

III. Unveiling the Disarray in Implementation of the Doctrine of Bias

A. Distinguishing Between Various Terminologies.

Wade concedes that much confusion has been caused in the past by the concurrent use of differently formulated tests for disqualifying bias.[11] The question of the proper test for determining bias has a tangled history, although the modern test is now relatively clear.[12]

Various schools of thought have been prevalent among the judges. While some have suggested that there is no *reasonable suspicion of bias* test, others have held that the difference is of "doubtful pedigree" and "in a majority of cases, either test leads to the same result".[13] There has been little attempt to delineate the essentials that differentiate the above test from the *real likelihood of bias* test, since "no good purpose would be served by attempting a differentiation".[14] Nonetheless, it is perplexing to

9 *Gullapalli Nageshwara Rao* v. *State ofAndhra Pradesh,* AIR 1959 SC 1376; *Jeejeebhoy* v. Assistant *Collector,* AIR 1965 SC 1096; / *Mohapatra & Co.* v. *State ofOrissa,* AIR 1984 SC 1572; *Rattan Lai Sharma* v. *Managing Committee,* AIR 1993 SC 2155.

10 M.P. Jain & S.N. Jain, Principles of Administrative Law (2007 Wadhwa Nagpur), p. 523 *[hereinafter* M.P. Jain].

11 Wade & Forsyth, Administrative Law (2009 Oxford University Press), p. 382 *[hereinafter* Wade].

12 *Ibid.*

13 *Hannam* v. *Bradford Corporation,* [1973] 1 W.L.R. 937, p. 942 *[hereinafter* Hannam].

U R v. *Altrincham* Justices, [1975] 1 Q.B. 549, p. 554 (Lord Widgery C.J.).

have two tests existing *parri passu* without an articulated differentiation.

As the name indicates, "reasonable suspicion of bias" test operates on the pivot of reasonableness. This test does not concern itself with the factual existence of a bias, but it deals with the existence of "any reasonable and any real or substantial-grounds for suspecting bias".[15] The "real likelihood of bias" test is comparatively mystical as it can refer either to the possibility or the probability of bias. Furthermore, after looking into the facts and circumstances of the case, there are two perspective variants of determining bias; one from the perspective of a reasonable man, and the other is the courts' own viewpoint.

The difference between the two tests is a reflection of the nearness to either of the two ends of the spectrum.[16] Thus, the real likelihood test denotes the predominant probability of the risk of bias as discerned by a reasonable person; whereas the reasonable suspicion test denotes a significant possibility of risk as perceived by a reasonable man, connoting a less commanding danger of bias than the real likelihood test.[17] Since the rule against bias is concerned with outward appearances, the temptation to vent improper favour may emit a virtually overriding force, thereby gratifying the "real likelihood" test. Where the temptation is not that strong, but cannot be discounted altogether, the "reasonable suspicion" test can prevail.[18] Therefore, the two tests are nothing but a subtle interplay between certain thinly differentiated words.

As aptly stated by Lord Denning M.R., a real likelihood of bias exists when "a reasonable man would think it likely or probable" that an adjudicator favoured one side unfairly. Real likelihood does not consider "the mind of the adjudicator", howsoever impartial he might be, but perceives bias through the lens of a "right-minded persons".[19] Professor De Smith also concurs by holding that *real likelihood of*

15 *Allinson* v. *General Medical Council*, [1894] 1 Q.B. 759, p. 762 (Lopes L.J.).

16 De Smith, De Smith's Judicial Review in Woolf, Jowell and Le Sueur (eds.) (Sweet & Maxwell Ltd 2007), p. 506 *[hereinafter* De Smith].

17 Francis Alexis, Reasonableness in the Establishing of Bias, (1979) Public Law 152.

18 *Ibid.*

19 *Metropolitan Properties* v. *Lannon*, [1969] 1 Q.B. 577, p. 579.

bias test is based on the "reasonable apprehensions of a reasonable man."[20] However, the confusion occurs because the Commonwealth courts often identify reasonableness with the *real likelihood* test,[21] following which reasonable suspicion has been equated with real likelihood at times.

The impasse has also been acknowledged by the Hon'ble judges of the Indian Supreme Court in *S. Parthasarathi v. State ofA.P.*[22] who have held that, "the test of real likelihood and reasonable suspicion are really inconsistent with each other."[23] The infirmity lies in the inability of courts to nail down and stick to one particular test. De Smith has correctly observed in this regard that:

The various tests of bias thus range along a spectrum. At the one end, a Court will require that, before a decision is invalidated, bias must be shown to have been present. At the other end of the spectrum, the Court will strike at the decision where a reasonable person would have a reasonable suspicion from the circumstances of the case that bias might have infected the decision. In between these two extremes is the 'probability of bias' (this being closer to the 'actual bias' test), and the 'possibility of bias' (this being closer to the 'reasonable suspicion' test).[24]*

Prof. IP Massey, in his hallowed treatise, opines that to challenge an administrative action successfully in India, one has to demonstrate either "reasonable suspicion of bias" or "real likelihood of bias".[25] He then goes on to articulate that both the tests have much in common, and in majority of cases it will lead to similar results.[26] He proceeds on the pretext that both the tests are same, and that the Courts have been

20 De Smith, *Supra* at 16, p. 505.

21 *Supra* at 17, p. 148.

22 (1974) 3 SCC 459. *[hereinafter* S. Parthasarathi]

23 *Ibid*, p. 465.

24 De Smith, *Supra* at 16, p. 506. See also M.P. Jain, *Supra* at 10, p. 529.

25 IP Massey, Administrative Law, (2008 Eastern Book Company), p. 204 *[hereinafter* Massey].

26 *Ibid.*

giving different terminologies even though there is no *substantial difference.*[27] However, while pronouncing that there is a need to prove "reasonable suspicion of bias," he does not cite a single Indian case, and rather relies on the English case of *Metropolitan Properties Ltd* v. *Lannon.*[29] Furthermore, throughout his analysis of the various judicial pronouncements rendered on bias by the Courts in India, he keeps on reiterating the fact that the "real likelihood of bias" has been followed by the Courts in India. This leads to the inevitable conclusion that there was no need of stating that "reasonable suspicion of bias" is required to be proved in India, unless it is the same as the "real likelihood of bias". This viewpoint probably stems from Prof. H. W.R Wade's assertion that both tests will lead to the same result if 'likelihood' was given the meaning of *possibility* rather than *probability.*[29] The fallacy of this argument lies in the fact that it will lead to the disappearance of reasonable suspicion being based on possibilities, and cutting off various advantages from its application. The reasonable suspicion test, based on possibilities, imposes more stringent standards on administrators than the real likelihood test. Therefore, it ensures efficiency in administration and leads to superior justice administration. Prof. Massey's viewpoint is not actually the position of law, and has also completely overlooked the Apex Court's decision in *S. Parthasarthi,* wherein the Court, speaking through K.K Mathew J., has observed that "the tests of 'real likelihood' and 'reasonable suspicion' are inconsistent with each other."[30]

On the other hand, Justice C.K. Takwani, an eminent jurist contends that the test of bias in India is that of "real likelihood of bias".[31] He pronounces that the test that

27 *Ibid,* p. 204. ("The reasonable suspicion test looks mainly to outward appearance, and real likelihood test focuses on the court's own evaluation of possibilities; but in practice the tests have much in common with one another and in the vast majority of cases they will lead to the same result").

28 *Supra* at 19. *[hereinafter* Lannon]

29 See Wade, *Supra* at 11, p. 382.

30 *Ibid.,* para. 16.

31 Takwani, *Supra* at 1, p. 185 ("On issues relating to other than pecuniary interest, the test is whether there is a real likelihood of bias in the Judge").

should be followed is 'reasonable likelihood of bias'.[32] This demonstrates that, there is a distinction between 'real likelihood' and 'reasonable suspicion' tests. But further on, a contradiction is apparent, as he states that, "there must be reasonable evidence to satisfy that there was a real likelihood of bias."[33]

Professor M.P. Jain opines that the test is "real likelihood or real possibility of bias".[34] He conveys that there are two separate tests for determining bias.

To add to the confusion, the Courts have introduced a new concept called the "real danger" test.

IV. The Saga of Judiciary's Struggle in Shaping the Tests of Bias

In the backdrop of the above conceptual and etymological confusion, it would be apt to embark upon the stance of the judiciary in this respect.

A. The Doctrine of Bias: Developments in England

The inception of the 'reasonable suspicion' test in England can be found in the King's Bench pronouncement of *R* v. *Sussex*[35] wherein Lord Hewart C.J. posited that "nothing should be done which creates *even a suspicion* of improper interference with justice." He reinforced this test with the rationale that "it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[36] Prof. J.F. Garner also observed in this regard that "the appearance of bias is regarded as seriously as actual bias"[37]

The tables turned in *R* v. *Camborne Justices*,[36] where the Court emphasized on the

32 *Ibid*, p. 186.

33 *Ibid*, p. 187.

34 M.P. Jain & S.N. Jain, Principles of Administrative Law (2010, Lexis Nexis Butterworths Wadhwa, Nagpur), p. 325.

35 [1924] 1 K.B. 256.

36 *Ibid*, p. 259.

37 J.F. Garner, Administrative Law (1974, Butterworth & Co), p. 123.

38 [1955] 1 Q.B. 41.

need to prove rea\Aike\ihood of bias.However, in Metropolitan Properties Ltd. v. Lannon,[39] Lord Denning M.R. laid down that the test of bias is whether there is "real likelihood" of bias or not in the facts of the case, which has to be ascertained with reference to "right minded persons". The Court accentuated that irrespective of how impartial the judge might be, if in the minds of right-minded persons, based on the given facts and circumstances, an impression is created that there could be a real likelihood of bias, the decision is liable to be quashed. However, mere surmise or conjecture would not suffice. Thus, this test focused on "outward appearance" of bias.

Lord Denning emphatically reiterated the eternally sacrosanct principle of natural justice, "fundamental importance that justice should not only be done, but should be manifestly seen to be done."[40] Interestingly, this canon is envisaged under the "reasonable suspicion" test and not in the "real likelihood" test. Thus, even though *Lannon* was couched in terms of "real likelihood" test, it moved close to "reasonable suspicion" test through the eyes of a reasonable man. According to Wade, *Lannon* which was a rehabilitation of "reasonable suspicion test in terms of real likelihood" test, "left a legacy of some confusion" in "somewhat confusing welter of authority".[41] *Lannon* has been interpreted in a similar manner by Prof. Massey.[42]

Lannon's (apparently conveyed) "real likelihood" test was followed in a few other cases[43] till the landmark judgement of *R.* v. *Gough*** where the House of the Lords affirmed the 'real likelihood' test in a criminal case, but it was emphasized more in terms of possibility rather than probability.[45] However, Lord Goff added that:

The Court should look at the matter through the eyes of a reasonable man... by ascertaining the relevant circumstances from the available evidence, knowledge of which would not

39 *Supra* at 19.

40 *Ibid.*

41 Wade, *Supra* at 11, p. 383. *See also* Hannam, *Supra* at 22.

42 Massey, *Supra* at 25.

43 See Hannam, *Supra* at 13.

44 [1993] AC 646. *[hereinafter* Gough]

45 This view is also supported by Prof. H.W.R. Wade. See Wade, *Supra* at 11, p. 383.

necessarily be available to an observer in Court at the relevant time.[46]

This change of perspective, from the viewpoint of a reasonable observer to that of the courts' possession and availability of evidence, was (mis)construed in later cases as shift from apparent bias to establishing of actual bias,[47] or leastways real danger of bias.[48] Thus *Gough* marked the shift to stricter tests of bias by explicitly rejecting the reasonable suspicion test.

The "real danger" test saw its concretization in the *Locabail*[4,9] which actually germinated from the misconstruction of Lord Goff's judgement in *Gough.* The Court of Appeals after pondering upon several authorities in several common law countries upheld the 'real danger' test to be the appropriate test. Although it conceded that it would be a rather dangerous and futile to attempt to define or list the factors which may or may not give rise to a *real danger of bias,* it stated that everything is dependent upon the facts and circumstances, which may include the nature of the issue to be decided.

MP. Jain concludes by stating that in UK, both the reasonable suspicion test and real likelihood test have been replaced and the current test of bias is now the "real danger" test, which is more narrow and restrictive than its predecessor.[50] But Wade differs by holding that the current test of bias has again reverted to the reasonable suspicion test from the real danger test.[51] The reason for this transition is attributed to

46 *Supra* at 44, p. 670.

47 *R* v. *Inner West London Coroner ex parte Dallaglio,* [1994] All ER139.

48 See *Locabail (UK) Ltd.* v. *Bayfield Properties Ltd.,* [2000] QB 451; *Re Medicaments & Related Class of Goods,* [2001] 1 WLR 700 (CA). This construction stems from Lord Goff's following statement, "having ascertained the relevant circumstances, the court should ask itself whether having regard to those circumstances, was there a *real danger* of bias, in which case the decision should not stand".

49 *Locabail (U.K.) Ltd.* v. *Bayfield Properties Ltd.,* 2000 Q.B. 451. *[hereinafter* Locabail]

50 M.P. Jain, *Supra* at 10, p. 535.

51 Wade, *Supra* at 11, p. 384.

Article 6(1)[52] of the European Convention of Human Rights (ECHR), which entitles those affected to the determination of their "civil rights and obligations" or of any criminal charge against them "by an independent and impartial tribunal established by law". Thus, it insists that the appearance of bias, if sufficient to taint a decision, is in breach of Article 6(1). The "real danger" test was not aligned with the Convention, and thus to mitigate the discrepancy between common law and the Convention, the test has been reverted to reasonable suspicion test. The House of Lords[53] and Court of Appeal[54] have affirmed this by stating that the test in *Gough* was at odds with the test under Article 6(1) and it should be modified. Thus, after much flip-flop, in England the test of bias has again rolled back to its old common law standards of "reasonable suspicion" which is in consonance with the Article 6 of ECHR.[55]

B. The Indian Experience so Far

While the tempest seems to have finally calmed in England, in India, given the current situation, it still seems to be a distant dream. The grave inconsistency is manifest from the courts' approach on bias, which is highlighted and addressed below.

The first noteworthy case in this regard is *Manak Lai* v. *Chand*[56]. The Court, speaking through Gajendragadkar J., ruled that proof of actual bias was unnecessary,

52 Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6(1), C.E.T.S. 5, 1953 ("In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice").

53 *Lawal* v. *Northern Spirit Ltd*, [2003] UKHL 35.

54 *Medicaments and Related Classes of Goods*, [2001] 1 WLR 700 (CA).

55 De Smith, *Supra* at 16, p. 536. See Wade, *Supra* at 11, p. 384.

56 AIR 1957 SC 425.

and reasonable ground for assuming *possibility of bias* was sufficient. This case not only implemented the reasonable suspicion test, but applied it in the widest import by assessing the impression of bias created on litigating public (the person affected and not that of the reasonable man adopted in *Lannon).*

The hailed landmark judgement on the jurisprudence of the doctrine of bias is the decision of the Constitutional bench in *Kraipak* where the court, speaking through Hegde J., *inter alia* observed that:

"The real question is not whether he was biased. It is difficult to prove the state of mind of a person. Therefore, what we have to see is whether there is reasonable ground for believing that he was likely to have been biased. A mere suspicion of bias is not sufficient. There must be a reasonable likelihood of bias. In deciding the question of bias we have to take into consideration human probabilities and ordinary course of human conduct.[57]"

Thus, this case emphasized "likelihood" in terms of *probability,* leading to a shift from the "reasonable suspicion" test to the narrower "real likelihood" test. However, the Court retained the perspective of the affected person as a test of bias and not that of reasonable man.[58]

Meanwhile, a two judge bench in *S. Parthasarathi* independently reaffirmed the "real likelihood of bias" test, while acknowledging that "The tests of real likelihood and reasonable suspicion are inconsistent with each other."[59] The Court defined real likelihood of bias as a "substantial possibility" of bias. The perspective was also shifted from *affected person* to that of *reasonable apprehension of a reasonable man* as laid down in *Lannon.* However, the test became more restrictive than *Lannon* as the qualifying words used were "reasonable man *fully cognizant of facts".* In *Lannon,* it was a matter of impression, not knowledge.

57 *Supra* at 2, para. 15.

58 See M.P. Jain, *Supra* at 10, p. 536.

59 *Ibid,* para. 16.

The real likelihood test laid down in *Kraipak* and *Parthasarathi* had been followed in differing degrees in various High Court decisions.[60]

However, even before things could concretize, a three judge bench in *G. Sarana* v. *Lucknow University*[61] rattled the settled position. At one point, Jaswant Singh J., opined that "what has to be seen is whether there is a reasonable ground for believing that he was likely to have been biased."[62] Immediately, after that the Court changed its stance and stated that "...there is a substantial possibility of bias..."[63]Thus, the Court was in a continuous flux between the two tests i.e. "reasonable suspicion" and "real likelihood" test. M.P. Jain observes that even though the latter test seems to be more restrictive than the former, it seems that the Court is not clear what specific test it [the Court] had in mind, or whether it thought that all these various expressions were synonymous.[64]

Subsequently, a four judge bench in *Ashok Kumar Yadav* v. *State of Haryana*[65] brought back things on track by upholding the *Kraipak* ruling by emphasizing on reasonable apprehension of *real likelihood of bias.*[66] Again, a two judge bench in *Ranjit Thakur* v. *Union of India*[67] upheld the *Kraipak* and *Lannon* ruling by upholding the test of "real likelihood of bias". However, the Court shifted its perspective to the impression created in the mind of the party before him, which is wider than the reasonable person approach in *Lannon* or *Ashok Kumar Yadav* case.

60 See *Chamba Singh* v. *State of UP,* AIR 1973 All 552; *D.K. Khanna* v. *Union oflndia,* AIR 1973 HP 30; *D.L. Ramesh* v. *Karnataka,* AIR 1978 Kant 3; *K. Chelliah* v. *Chairman Industrial Finance Corporation,* AIR 1973 Mad 122; *Bhupendra Kumar Singhal* v. *P.R. Mehta,* AIR 1990 Guj 49; *Dim/a Chandra* v. *Vice-Chancellor, Roorkee University,* AIR 1992 All 298, *Kumkum Prakashan* v. *State,* AIR 1990 Guj 12.

61 AIR 1976 SC 2428.

62 *Ibid,* para. 11.

63 *Ibid,* para. 14.

64 M.P. Jain, *Supra* at 10, p. 537.

65 AIR 1987 SC 454. *[hereinafter* **Ashok Kumar Yadav]**

66 *Supra* at 65, para. 16.

67 AIR 1987 SC 2386.

Amidst all the continuing flux in determination of the proper test, the sudden change of perspective in UK from the "real likelihood" test to the "real danger" test[68] seems to have had an influence on the Indian Judiciary. The case of *Kumaon Mandal Vikas Nigam Ltd.* v. *Girja Shankar Pant*[69] is noteworthy in this respect; the Court stormed the somewhat settled real likelihood test and ventured into "real danger" test. It upheld the requirement of availability of positive and cogent evidence, following which from the surrounding facts and circumstances conclusion of "real danger" of bias had to be arrived at. The Court expressed its concurrence with the much controversial *Locabail* to support their argument.[70]

This was reinforced in *State of Punjab* v. *V.K. Khanna*[71] where the two judge bench upheld *Kumaon Mandal* and *Locabail,* and even went a step ahead of the "real danger" test to ultimately land into the "actual bias" test by holding that there was not only a requirement of demonstrating cogent evidence for proving bias, but also an incident of miscarriage of justice for quashing the decision.[72]

V.K. Khanna was reaffirmed in *Abraham Kuruvila* v. *S.C.T. Institute of Medical Sciences and Technology.*[73] It was held that "not only does the *existence of a factual bias* have to be proved, but it must also be shown that the same has *resulted in a miscarriage of justice."*[74]

It is pertinent to note that the judiciary has gravely perplexed itself by its ambulatory stance over the subject. M.P. Jain's observation, in this regard, is appreciable. He has aptly stated that:

68 *Supra* at 48.

69 2001 (1) SCC 182. *[hereinafter* Kumaon Mandal]

70 *Ibid,* para. 35.

71 2001 (2) SCC 330. *[hereinafter* V.K. Khanna]

72 *Ibid,* para. 5. ("mere general statements were not sufficient but that there must be cogent evidence available to come to the conclusion that there existed a bias which resulted in a miscarriage of justice").

73 (2005) 9 SCC 49.

74 *Ibid,* para. 6.

On the question of bias, it is in a state of confusion because the Courts do not apply only one test uniformly, but have propounded several tests for the purpose. It may lead to great advantage if the Supreme Court is able to evolve one uniform test for the purpose, as this would avoid unnecessary and avoidable confusion in this area.[75]

Indeed, a uniform stance is greatly desired, the lack of which has recently led to another incongruous misadventure, which has been discussed while examining the *Lalit Kumar Modi* case.

V. The Decision in Lalit Kumar Modi v. Board of Control for Cricket in India and Ors.

It is vital to examine the latest addition to the existing disarray in *Lalit Kumar Modi* v. *BCCI & Ors.*[76] This case has again reinforced the real danger test, and deserves a closer scrutiny.

The first Respondent, BCCI, had been organizing the Indian Premier League (IPL) annually since 2008, and the Petitioner, Mr. Lalit Modi was appointed as the Chairman of IPL. In April 2010, BCCI received complaints accusing Mr. Lalit Modi of breaching confidentiality, accepting multi-million dollar kickbacks while assigning broadcasting rights for IPL matches, attempting to rig the auctioning of two new IPL teams, having proxy stakes in IPL teams, helping family members in benefitting from IPL contracts, and acting against mandate of the governing council by entering into transactions with rank strangers and attempting to create a parallel cricket body at the international level. Show cause notices were served upon the Petitioner, who responded by denying all the allegations. Instead, he mentioned that Mr. Shashank Manohar, President of BCCI should recuse himself from the decision-making process by resigning from the disciplinary committee in the interest of fairness. Accordingly, Shri Manohar recused himself from the disciplinary committee. Shri Jyotiraditya Scindia, Shri Chirayu Amin, and Shri Aran Jaitley were the new members of the disciplinary committee.

75 M.P. Jain, *Supra* at 10, p. 576.

76 *Supra* at 5

Mr. Modi challenged the validity of constitution of the disciplinary committee \ grounds of institutional bias. According to him, the members were present in the Leering of the Governing Council of IPL, wherein it was decided to charge him (the etitioner) with fraud, and where President of BCCI was authorized to take appropriate vil and criminal action against the Petitioner. Since the members had already been \ade party to the decision to initiate disciplinary action against Petitioner, fairplay ■ras not expectable and hence, there was reasonable apprehension of bias. So he prayed Dr mutually acceptable and independent persons to form the adjudicatory panel. Moreover, the Petitioner alleged that Shri Amin succeeded him as the chairman of PL, and thus there was real likelihood of bias against him, since he would have a personal interest in the outcome of the decision.

The two judge bench, speaking through H.L. Gokhale J., held that Mr. Lalit Modi, Deing a member of the society and having accepted the rules, consented to the disciplinary authority of three member committee which would be constituted under the rules.[77] The committee had already conceded to his request of replacing Manohar, even though he "could not claim a right to dictate the members of the committee." The new committee formed by substitution of Mr. Manohar had to adjudicate since bodies such as BCCI are expected to take up complaints against their members in General Body Meeting and they are expected to sort it out using their internal disciplinary mechanism, and such participation cannot result in an institutional bias since only a *prima facie* opinion is formed in general meetings.[78]

With regard to bias, the judges upheld the "real danger" test by relying on *M.P. Special Police Establishment* v. *State ofMadhya Pradesh and* Ors.[79] The Court emphatically stated:

The Petitioner may have an apprehension, but it is not possible to say from the material on record that he was facing a real danger of bias. We cannot presume that the three member

77 *Ibid*, para. 30.

78 *Ibid.*

79 (2004) 8 SCC 788. *[hereinafter* M.P. Special Police]

committee will not afford the petitioner a fair hearing, or that it will not render unbiased findings.[60]

It is evident that the Court approved the "real danger" test as the benchmark, leaving out the *reasonable suspicion* test and the *real likelihood* test. The Court felt that the Constitutional bench in *M.P. Special Police* had clarified the legal position by holding that the test of *real danger* of bias is the valid test, and not the one of *reasonable apprehension,* and that they being a two judge bench were inevitably bound by the decision. But that was actually not the case.

VI. Scrutinizing the Court's approach : An Ultimate Analysis

In *M.P. Special Police,* there was complaint of corruption against the two ministers of M.P Government to the Lokayukta. The Lokayukta made a detailed enquiry and directed registration and investigation of the case since there was a prima facie evidence of corruption. However, the Council of Ministers refused to grant sanction for prosecution on grounds of no evidence, but the Governor opined otherwise and granted sanction for prosecution. The Apex Court held that under Article 163 of the Constitution, undoubtedly, in a matter of grant of sanction to prosecute, the Governor is normally required to act under the aid and advice of the Council of Ministers, and not at his discretion. However, exceptional circumstances may arise if there is a question of prosecution of the Chief Minister or other ministers, since there can be a great presumption of bias.[81] The Court emphasized that a high authority like Council of Ministers is not only expected to act fairly, honestly, and in a *bonafide* manner in accordance with the four-corners of the statute (the Constitution), but also ensure that the purpose and object of the statute is effectuated.[82] The Court held that conclusion of bias becomes inescapable when the facts and circumstances indicate bias. Here, apparent bias was excluded from the scope by statute, and actual bias was required to be proved in such case which eventually could not be demonstrated due to lack of

80 *Supra* at 5, para. 32.

81 *Supra* at *79,* para. 19.

82 *Ibid,* para. 29.

evidence.[83] The Court then went on to state that, in collective decisions, apparent bias cannot be imputed since bias can be imputed on individuals only. However, on those rare occasions where on facts the bias becomes evident and/or the decision of Council of Ministers is shown to be arbitrary, irrational and based on non-consideration of relevant factors, then the veracity of the decision can be questioned.[84]

Thus, the highly strict test of 'real danger of bias', was applied in the backdrop of statutory and Constitutional mandate which required the Council of Ministers to be the sanctioning authority, irrespective of their composition. To be more precise, it was a constitutional mandate which is of highest stature. Apparent bias could only be applicable only if the Constitution was amended, otherwise the Court had no option other than resorting to the "real danger" test keeping in mind the peculiar facts and circumstances before it.

Therefore, it is submitted that the Constitutional bench in *M.P. Special Police* never intended to lay down the "real danger" test as the general law of the land. Moreover, the facts of *M.P. Special Police* have no minimum semblance so as to be applied to the *Lalit Kumar Modi* judgement; thus the Court erred in construing it as a binding precedent.

The other judgement referred to in *Lalit Kumar Modi* is *Kutnaon Mandal.* The noteworthy feature of *Kumaon Mandal* is that it entirely relied on English authorities (primarily *Locabail)* to come up with the "real danger" test. The two-judge bench ignored and overlooked all the Indian authorities on the test of bias, including the constitutional bench decision in *Kraipak,* to arrive at the anomalous conclusion. Presently, even the English test of bias has again reverted to "reasonable suspicion" test. The approach of the court to rely on English decisions is wrongly founded in law and thus, worthy of criticism. Furthermore, *Locabail,* which is the foundation of *Kumaon Mandal,* is itself based on misinterpretation of Lord Goff's observations in Gough as laying down "real danger" test, which is not the case since Gough has at most laid down "real likelihood" test and no further.[85]

83 *Ibid,* para. 23.

84 *Ibid,* para. 33.

85 *Supra* at 43.

The *Lalit Kumar Modi* judgment, has also failed to appreciate the decision of the constitutional bench in *Kraipak.* It has instead referred to some decisions of the English courts which are no longer followed in England itself, the wrongly founded *Kumaon Mandal* case, and the grossly misinterpreted MP. *Special Police* case which, with regard to the facts and circumstances, has absolutely no nexus with this judgement.

VII. Conclusion

The "real danger of bias" test, being nearer to the "actual bias" test, inherits most of the demerits of " actual bias" test. The "real danger" test imposes too heav^ abutdeu orv Ave app\\cai\t, wYvich is not desirable. Bias, a clandestine human attribute, should be seen to be nipped in the bud since even if a person believes that he was acting impartially, he may be subconsciously affected by it, thereby vitiating the proceeding. Thus the strict and narrow "real danger" test is greatly disapproved, leaving behind a dilemma of choosing between the "reasonable suspicion" and "real likelihood" test.

The "reasonable suspicion" test places a *lighter burden* on an applicant than "real likelihood test", without itself preferring any biased approach by resorting to *standards of reasonableness through eyes of reasonable man.* Reasonable suspicion, being a more lenient and broader test, imposes a *more stringent standard* on administrators than the "real likelihood" test. However, the strict adherence to the "reasonable man" approach acts as a safety valve, preventing undue hampering of administration. Moreover, the "real likelihood" test, as visualized by the Courts, is more difficult to establish than "reasonable suspicion" test, and so the finding of bias based on "real likelihood" test may be interpreted by laymen as tantamount to finding of actual bias. The public interest would be better served by resorting to the "reasonable suspicion" test, which would cause no permanent imputation on the tribunal impugned, since any accusation of bias on a tribunal is a serious matter for a tribunal.[86]

This view finds concurrence not only in the EU but also in England. While in the EU, Article 6(1) ECHR has entirely shifted the test of bias to the "reasonable suspicion"

86 See also *Supra* at 17, p. 154.

test, England has almost successfully reinstated the "reasonable suspicion" test after having accidentally ventured into "real danger" test in a few instances. However, the situation in India is far from being settled, nothing short of a quagmire. The cardinal rule that "Justice should not only be done, but manifestly and undoubtedly be seen to be done" is a necessary corollary of the maxim *Nemo Judex in Sua Causa.* The "reasonable suspicion" test exhibits greatest deference to the abovementioned cardinal principle and thus, also to fair play in action. The entire concept of natural justice is derived from the modern concept of rule of law propounded by A.V. Dicey, which has also been incorporated in Article 14 of our Constitution. Thus, the "reasonable suspicion" test also has a Constitutional significance since it upholds the sacrosanct fundamental right to equality and rule against arbitrariness. However, to overcome the shortcomings of excessive leniency of "reasonable suspicion" test, which might cause administrative inconvenience, the authors advocate a *stringent* "reasonable suspicion" test which would better facilitate in furthering the principles of natural justice.

A uniformity or stability in judiciary, which is highly conspicuous by its absence, is greatly coveted. The Supreme Court can unilaterally bring uniformity to the test of bias, which seems to be time and again derailed. A seven judge bench can clarify and settle the dust once and for all. The million dollar question is: Will the Supreme Court doit?

NOTES

Globalisation and the Legal Profession

*Justice (Retd.) N N Mathur**

Globalisation means different things to different people. It also evokes different responses from different stakeholders. However, what cannot be ignored and contested is that globalisation is a reality. Enormous technological advancements made by the human race has shrunk boundaries and brought people closer. Globalisation offers both opportunities and challenges. We need to maximise the opportunities and effectively respond to the challenges. Globalisation is impacting all walks of life and all professions including the legal profession.

To start with, globalisation refers to the increased international economic processes driven by market forces of international demand and supply. This can also be termed as economic globalisation. The development of global institutions like the World Trade Organisation and proliferation of many free trade agreements and bilateral investment treaties between different countries have given a fillip to the process of economic globalisation.

This increased transnational economic activity requires extension of international law to the entire business world. This increasing business related opportunities compelled adjustments in the legal order to meet changing demands. These novel developments included enactment of new laws, drafting of international contracts and evolving globally competitive regulatory frameworks in extremely diverse jurisdictions. The legal hurdles of international trade were abolished with the adoption

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of an international legal order that aimed to smoothen the flow of goods and services across borders. Consequently, globalisation has brought about the growth of institutions intended to ensure observance and keep an eye on international trade as guided by the developed set of legal principles (Hague Academy of International Law, 2001). One can argue that globalisation has had an impact on the international legal system due to the requirement to regulate several business practices.

Globalisation has influenced the way of doing business and to a great extent impacted legal profession world over. The process of globalisation has augmented the way of doing trade between numerous nations which have dissimilar legal systems, hence requires individual states to develop programs that make sure their systems are compatible to enable a viable business environment. This increase of international economic and commercial activities has impacted the sovereign ability of individual countries to adopt laws and hence has resulted in changes in the legal profession so as to regulate these activities.

Globalisation has brought about changes in quite a few areas in law and legal systems -

1. Conventional transnational areas such as public international law especially in the area of international economic law, international trade and financial law and law related to environment protection especially climate change;
2. Recently emerging transnational areas such as information technology law, law related to government and public procurement; linkages between law and poverty and law and development; newly and vastly changing landscape of intellectual property protection; and new forms of international commercial arbitration like investment treaty arbitration.

The legal profession has conventionally functioned chiefly within national boundaries. However, as the process of globalisation intensifies, a mounting number of global transactions are affected by multiple legal orders. The process of globalisation is also witnessing a shift in the economic power from the global north to global south including countries like Brazil, China, India, Russia and South Africa (BRICS). These factors are now playing a very important role in the global economic affairs.

An important area of legal profession that has been impacted by globalisation is legal education. Dynamic globalisation also requires changes in legal education and curriculum in order to meet the changing demands. Thus, it is pertinent to adapt the existing curriculum in all Indian law schools to the changed times. We need more global courses where students study law form different perspectives and different viewpoints as against a one-jurisdiction approach. We need to develop our courses in such a manner that students are trained to think in a comparative manner where they compare and understand different legal systems and legal models. It is also necessary for the law schools to develop in students an ability to think critically so that the existing processes of globalisation can be challenged and scrutinised. Our law schools should aim to develop students who can work in global, multicultural and multilingual atmosphere. The National Knowledge Commission of India (NKC) has also stressed upon the fact that Indian legal education should meet the needs of trade, commerce and industry given the overall context of internationalisation of the legal profession.

To conclude, globalisation presents both opportunities and challenges to the legal profession. It is pertinent that all the stakeholders in the legal profession - judges, lawyers, practitioners, legal academicians, law schools and law students work collectively to derive maximum gain from the opportunities presented and effectively deal with the challenges posed.

Can BIT Claims Be Made Against India For The Actions Of The Indian Judiciary?

*Dr. Prabhash Ranjan**

I. Introduction

Bilateral Investment Treaties (BITs) are treaties signed at the bilateral, regional or multilateral level by two or more countries to protect investments made by investors of both the countries.[1] BITs protect investments by imposing conditions on the regulatory behaviour of the host state and thus, prevent undue interference with the rights of the foreign investor. These conditions include restricting the host state from expropriating investments, barring for public interest with adequate compensation; imposing restrictions on host states to discriminate against foreign investment; allowing for repatriation of profits subject to conditions agreed to between the two countries; and most importantly, allowing individual investors to bring cases against host states if the latter's sovereign regulatory measures are not consistent with the

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1 J Salacuse BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries (1990) 24 *International Lawyer*, 503.

BIT[2] to be monetarily compensated.[3] This is known as the investor-state dispute settlement system, which, in this note is called as investment treaty arbitration (ITA).

There has been a steady increase in the number of BITs - from 500 in 1990 to 3164* by the end of 2011.[5] India has entered into BITs with 86 countries out of which 73 have already come into force.[6]

Further, in the last few years, India has entered into a Comprehensive Economic Cooperation Agreement (CECA) containing a chapter on investment with Singapore, Korea, Malaysia and Japan. India has recently finalised a Free Trade Agreement (FTA) containing a chapter on investment with ASEAN.[7] India is also negotiating CECAs with Indonesia, Australia, Mauritius and New Zealand.[8] It is also negotiating a BIT

2 For a general discussion on BITs see M Sornarajah The International Law on Foreign Investment (2004 Cambridge University Press), p.204-314; R Dolzer and C Schreuer, Principles of International Investment Law (2008 Oxford University Press); A Newcombe and L Paradell, Law and Practice of Investment Treaties (2009 Kluwer: Hague), p.1-73; J Salacuse, The Law of Investment Treaties (2010 Oxford University Press); Vandevelde, Bilateral Investment Treaties: History, Policy and Interpretation (2010 Oxford University Press).

3 It has been argued that investor-state dispute resolution became necessary because of the disadvantages that the investor faced in domestic courts of the host country and due to the weaknesses of the diplomatic system of protection. *See* W M Choi The Present and Future of The Investor-State Dispute Settlement Paradigm (2007), 10 Journal of International Economic Law, p. 734-736.

4 The figure of 3164 BITs includes 2833 standalone bilateral treaties and 331 other BITs - mainly investment chapters in Free Trade Agreements. This figure does not include Double Taxation Avoidance Agreements (DTAA).

5 World Investment Report: Toward a New Generation of Investment Policies (5th July 2012), United Nations Conference on Trade and Development (UNCTAD).

6 *Ibid* This figure of 73 BITs includes 69 standalone BITs and 4 CECAs containing a chapter on investment.

7 Sujay Mehdudia, India, ASEAN Finalise FTA In Services, Investment, (20 December 2012) The Hindu, online at: http://www.thehmdu.com/business/Economy/india-asean-finalise-fta-in-services-investments/article4222052.ece (visited December 22 , 2012).

8 Trade Agreements, Department of Commerce, Government of India, online at: http:// commerce.nic.in/trade/international_ta.asp?id=2&trade=i (visited December 15, 2012).

with Canada.[9] However, recent developments suggest that this BIT has run into rough weather.[10] India is also negotiating a BIT with the US,[11] and a FTA with a chapter on investment with the European Union.[12]

CECAs are comprehensive economic agreements (can also be called free trade agreements) covering trade liberalisation (goods and services), investment protection and liberalisation, competition policy, trade facilitation, rules of origin and intellectual property rights. The investment chapters in these CECAs, along with provisions on investment protection and also contain market access provisions (such as national treatment to establishment or pre entry establishment) which do not exist in any of the existing standalone Indian BITs. Thus, India's BIT programme stands on two legs- standalone bilateral investment treaties and investment chapters in bilateral CECAs- in this paper collectively called BITs.

Despite this massive BIT programme, Indian BITs didn't attract much attention till foreign investors slapped India with ITA notices in 2012 (See Table I). In many instances, the notice has been issued due to the actions of the Indian judiciary. The most important case here that has sparked a controversy in India relates to the grant

9 Initial Environment Assessment (EA) of the Canada-India Foreign Investment Promotion and Protection Agreement (FIPPA), Foreign Affairs and International Trade, Canada, (22 November 2012), online at: http://www.international.gc.ca/trade-agreements-accords-cornmerciaiix/agr-acc/ea-canindia-caninde.aspx?lang=eng&view=d (visited December 15, 2012).

10 P Ranjan and K Bharadwaj, Stephen Harper Left India with no FIPA. Here's why, (17 December 2012) Troy Media, online at: http://www.troymedia.com/2012/12/17/stephen-harper-left-india-with-no-fipa-heres-why (visited January 3, 2013).

11 The United States and India: A Vital Partnership in a Changing World, Department of State, United States, (26 October 2012), online at: http://www:state.gov/s/d/2012/199801.htm. (visited December 20, 2012),

12 Luxembourg for Early Conclusion of India-EU FTA, (16 October 2012), The Economic Times, online at: http: / /articles.economictimes.indiatimes.com/2012-10-16/news/34498965_l_india-gaston-stronck-luxembourg-ambassador-luxembourg-stock-exchange. (visited December 25, 2012) *See also* the Economic Survey of 2011-12 that gives information about the ongoing negotiations on these CECAs in Economic Survey (2011-12), p.176-177.

of Unified Access Service License (UAS) with 2G spectrum to telecom companies of both Indian and foreign origin by the Indian government. These telecom licenses were granted following the first-come-first-serve policy. However, a writ petition was filed in the Supreme Court of India arguing that the grant of these licenses was arbitrary and unconstitutional. The Supreme Court of India held that the licenses granted by the Indian government were 'arbitrary and unconstitutional' and hence all the licenses were illegal and thus quashed.[13] The cancellation of these telecom licenses will adversely affect the investment of many foreign companies who claim that they bought these licenses from the Indian companies and hence should not be penalised for the wrongdoing of someone else. Sistema, a Russian firm, whose licenses have been cancelled by the Supreme Court of India, has served a notice to India to commence ITA proceedings under the India-Russia BIT.[14] Similarly, Telenor, another company whose telecom licenses have been cancelled issued an ITA notice to India invoking the India-Singapore BIT.[15]

13 *Centre for Public Interest Litigation and Others v Union of India and others,* Writ Petition Civil No. 423 of 2010, in the Supreme Court of India.

14 Sistema Sends a Notice to Republic of India to Settle Dispute Relating to the Revocation of SSTL's Licenses, (28 February 2012), online at: http://www.sistema.com/press/press-releases/2012/02/sistema-sends-a-notice-to-the-republic-of-india-to-settle-dispute-relating-to-the-revocation-of-sstl's-licenses.aspx (visited on 2 January 2013). *See also* Fix Dispute in Six Months or Face Arbitration, Sistema tells India, (29 February 2012), The Financial Express, online at: http://www.financialexpress.com/news/fix-dispute-in-6-months-or-face-arbitration-sistema-tells-india/918076/0 (visited December 28 , 2012).

15 Arun S. & Thomas K. Thomas, 2G Mess: Telenor May Invoke India-Singapore Bilateral Pact,, (22nd March 2012), The Hindu Business Line, online at: http://www.thehindubusinessline.com/industry-and-economy/info-tech/article3155481.ece (visited December 27, 2012).

Table I - Investment Treaty Arbitration Notices Issued to India in 2012

Foreign Investor	BIT	Reason for the Notice
Sistema Joint Stock Financial Corporation	India-Russia	Cancellation of 2G Telecom Licenses by the Supreme Court of India
Telenor Asia	India-Singapore	Cancellation of Telecom Licenses by the Supreme Court of India
Capital Global and Kaif Investment	India-Mauritius	Cancellation of Telecom Licenses by the Supreme Court of India
Axiata Group	India-Mauritius	Cancellation of Telecom Licenses by the Supreme Court of India
Vodafone	India-Netherlands	Imposition of Retrospective Taxation
Children's Investment Fund	India-Cyprus	Alleged mismanagement of state owned Coal India Ltd by the Indian Government, which owns 90% stake. Children's Investment Fund has a minority stake in Coal India Ltd.
Bycell	India-Mauritius and India-Cyprus	Withdrawal of certain security clearances given by the Foreign Investment Promotion Board (FIPB) granted earlier to the investor.

Source-Author's compilation from multiple sources including media reports andpress releases of foreign companies

Thus, foreign investors allege that the actions of the Indian judiciary violate BITs. This has triggered a debate in India regarding whether actions of judiciary can be challenged as violation of India's BIT obligations. The Attorney General (AG) of India, G E Vahanvati, is of the view that foreign telecom companies like Sistema and Telenor cannot claim damages from Indian government under different BITs for losses emanating out of orders passed by the Supreme Court of India because court orders do not constitute a cause of action against the government.[16] The AG is also of the view that the claim of damages by foreign investors is based on a complete

16 Thomas K. Thomas, Foreign Players cannot invoke Bilateral Treaties: Attorney General, (13 August 2012), The Hindu Business Line, online at: http://www.thehindubusinessline.com/ industry-and-economy/info-tech/article3764819.ece?homepage=true&ref=wl_home (visited January 2, 2013).

misunderstanding of the Constitutional provisions prevailing in India, which recognise a separation of powers between the executive, judiciary and the legislature.[17] One can draw two points from the opinion of the AG. First, only executive actions and not judicial actions can violate the BIT. Second, one can have recourse to the domestic legal order to find out whether an international legal claim can be made or not. However, not everyone in the Indian government agrees with the AG on this point. For example, the Ministry of External Affairs is of the view that for the purposes of international law, the Indian state is one entity and that actions of any organ of the state is attributable to India.[18] The Ministry of Commerce is also of the same view.[19] Nevertheless, the AG is believed to have reiterated his earlier view that foreign telecom companies cannot challenge actions of the Indian judiciary as violation of the BIT.[20] This particular aspect has two dimensions. First, whether, in principle, a BIT claim can be brought against India for the actions of the Indian judiciary. Second, if yes, then whether the cancellation of the telecom licenses by the Indian Supreme Court violates India's BITs. This note is not concerned with the second dimension. In other words, it does not discuss whether India has or has not violated its BIT obligations. Instead, it focuses on the first dimension and discusses whether, in principle, BIT claims can be made against India for the actions of the Indian judiciary. In this regard, in Section II, the note focuses on the two ITA cases involving India where the actions of the Indian judiciary were challenged as a BIT violation. Section III of the note focuses

17 *Ibid.*, *See also* Anandita Singh Mankotia, Notice by Sistema not relevant as SC cancelled licenses, not Govt, says AG, (23 May 2012), The Financial Express, online at: http://www.financialexpress.com/news/notice-by-sistema-not-relevant-as-sc-cancelled-licences-not-govt-says-ag/952533 (visited December 28, 2012).

18 Foreign Telcos Can't Claim Damages from Government in 2G Case, (5 December 2012). NDTV Profit, online at: http://profit.ndtv.com/news/corporates/article-foreign-telcos-cant-claim-damages-from-government-in-2g-case-ag-314309 (visited December 28, 2012).

19 *Ibid.*

20 *Ibid.* See also Joji Thomas Philip, AG reiterates that 2G Investors Can't Seek Damages under BIPA,(5 December 2012), The Economic Times, online at: http:/economictimes.indiatimes.com/ ne ws / news-by-industry /telecom / ag-reiterates-that-2g-investors-cant-seek-damages-under-bipa/articleshow/17496788.cms (visited December 28, 2012).

on international law principles on attribution and international law cases including BIT disputes where judicial action has resulted in state liability. Section IV gives the conclusion.

II. ITA Disputes Involving Indian Judiciary

It is important to bear in mind that this is not the first time that actions of the Indian judiciary have been challenged as violation of Indian BITs by foreign investors. Such challenges have been made in the past. The note discusses two ITA cases involving India where an important reason behind BIT claims against India was the action of the Indian judiciary. In fact, these are the only two ITA cases involving India.

In 2011, India lost a BIT dispute to an Australian company - *White Industries . Republic of India.*[21] This particular case involved challenging judicial delays in enforcing an international commercial arbitration award as violation of the India-Australia BIT (See Table II). White Industries obtained an arbitral award in its favour in a contractual dispute with Coal India, an Indian public sector company, and sought enforcement of the award before the Delhi High Court in India. Simultaneously, Coal India approached the Calcutta High Court to have the award set aside, and the request was granted. White Industries appealed to the Supreme Court in 2004 and the final decision is still pending. In 2010, White Industries took the matter to ITA on the grounds that the inordinate delay in Indian courts to enforce the arbitration award violates the India-Australia IIA.[22] The tribunal held that this delay by Indian courts violated India's obligation to provide White industries with an 'effective means' of asserting claims and enforcing rights, despite the fact that the India-Australia BIT does not mention or

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

22 *See* Prabhash Ranjan, The White Industries Arbitration: Implications for India's Investment Treaty Programme (2012), Investment Treaty News, USD, online at http: / /www.iisd.org/itn/ 2012/04/13/the-white-industries-arbitration-implications-for-indias-investment-treaty-program/.
See also M Sanan, The White Industries Award: Shades of Grey (2012) 13 Journal of World Investment and Trade.

include such a duty for host states. The tribunal got around that by holding that White Industries could borrow the 'effective means' provision present in the India-Kuwait IIA(Article 4(5) of the India-Kuwait BIT provides that *'each contracting party shall...provide effective means of asserting claims and enforcing rights with respect to investments...'.)* by relying on the MFN provision of the India-Australia IIA.(Article 4(2) of the India-Australia BIT provides the MFN provision according to which, *'a contracting party shall at all times treat investments in its territory on a basis no less favourable than that accorded to investments or investors of any third country'.)*

Table II - BIT Disputes Involving India

Foreign Investor	BIT	Reason for the Dispute	Year of ITA Award
White Industries	India-Australia	Judicial delays in enforcing Arbitral award	2011
GE and Bechtel	India-Mauritius	Issuance of anti-arbitration injunctions by courts	ITA award not issued - compromise reached

Source - Author's compilation from multiple sources

Before the White Industries case, the only instance where India was involved in at the ITA was the Dabhol power project case. This case relates to an FDI project related to building an electrical power plant in India in the early 1990s soon after the adoption of the liberalisation programme by India in 1991. Enron Corporation along with General Electric (GE) Corporation and Bechtel Enterprises formed a company called Dabhol Power Company (DPC) in Maharashtra (a western Indian state) to generate electrical power. This formed the biggest FDI investment at that time in India. DPC entered into an agreement with the Maharashtra State Electricity Board (MSEB) a public sector enterprise as the sole purchaser of the power generated by DPC. Subsequently, due to political opposition to the project on grounds of alleged irregularities and the high cost of power charged by DPC, MSEB cancelled the contract to purchase power leaving DPC without a consumer to sell electrical power and thus having a huge adverse impact on DPC's business.[23] Further, the central government

23 For detailed facts of the case, *see* Kundra P, Looking Beyond the Dabhol Debacle: Examining its Causes and Understanding its Lessons, (2008) 41 Vanderbilt Journal of Transnational Law 908.

of India, which acted as a counter guarantor, after making some payments, also declined to pay DPC for different reasons.[24] DPC was restrained from starting an international arbitration by anti-arbitration injunctions issued by Indian courts.[25] The Mauritius based subsidiaries of GE and Bechtel, relying on the India-Mauritius BIT, challenged India's measures including the judicial action of issuing anti-arbitration injunctions by courts as violation of the India Mauritius BIT. However, before an ITA award could be issued a mutual settlement was reached[26] whereby a mammoth compensation[27] was awarded to foreign investors by India.

Thus, in both these cases, it was the action of the Indian judiciary that was challenged as a violation of Indian BITs.

III. International Law on Attribution

The general rule in international law is that attributable conduct of a State extends to the organs of the government or of those who have acted under the direction, instigation or control of those organs ("agents" of the state).[28] Article 4(1) of the International Law Commission (ILC) Draft Articles on state responsibility[29] states that

24 *Ibid.*

25 *Ibid.*

26 GE settles Dabhol Issue, (3 July 2005), The Indian Express, online at: http:// www.indianexpress.com/oldStory/73760/ (visited on 28 December 2012).

27 According to some - US $ 1 billion)(J Ghosh, 'Treacherous Treaties' *'Frontline'* (3 December 2010), online at: http://www.frontlineonnet.com/fl2724/stories/20101203272409200.htmon line (visited December 15, 2012).

28 I Brownlie, System of the Law of Nations: State Responsibility, Part I (1983 Oxford, Clarendon Press), p. 132-166 *in* Draft Articles on Responsibility of States for Internationally Wrongful Acts, p. 38.

29 Under the UN Charter Art 13, General Assembly has the function of codifying and progressively developing customary international law. This function has been delegated to ILC. For more on this see International Law Commission, online at http://untreaty.un.org/ilc/ilcintro.htm (visited January 1,2013). Also see J Crawford, The ILC Articles' on Responsibility of States for Internationally Wrongful Acts: A Retrospect (2002) 96 American Journal of International Law, p874.

'the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State', thereby bringing judicial organs within the purview of those organs the conduct of which can result in the violation of a state's international obligations. This codifies a broadly recognised principle of customary law.[30] The commentary on the ILC Articles of State Responsibility clearly state that the reference to state in Article 4 is not limited to the organs of the central government.[31] It also states that reference to state in Article 4 *'extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level. No distinction is made for this purpose between legislative, executive or judicial organs.'*[32] This clearly shows that the actions of judiciary are very much part of the actions of state and hence judiciary can also be the author of an internationally wrongful act.[33] The International Court of Justice (ICJ) has also confirmed this in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*.[3]* The court said, *'according to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule ... is of a customary character'*.[35] In other words, judicial decisions emanate from a state organ in the same manner as a legislation passed by the legislature or a decision taken by the executive.[36]

30 M Shaw, International Law (2008 Cambridge University Press: Cambridge: Sixth Edition), p.786-787.

31 Commentary on ILC Articles, p.40.

32 *Ibid.*

33 *Ibid.*

34 *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, *Advisory Opinion*, I.C.J. Reports 1999.

35 *Ibid*, p 87, para. 62. *See also Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.}., Series A, No. 7,* at p. 19; *Salvador Commercial Company* case, UNRIAA, vol. XV (Sales No. 66.V.3), p. 455, at p. 477 (1902).

36 Eduardo Jimenez de Arechaga, International Law in the Past Third of a Century, (1978 Recueil des cours General Course in Public International law: The Hague), p.159-1.

Also, Professor Brownlie states that actions of courts relate substantially to the rubric of 'denial of justice'[37] but may also affect the responsibility of the state in other ways.[38] One such way of affecting the responsibility of state is if courts commit errors in the task of application and interpretation of treaties.[39]

Article 4(2) clarifies that *'an organ includes any person or entity which has that status in accordance with the internal law of the State.'* The commentary on the ILC Articles of State Responsibility, while discussing the significance of internal law of the country in determining attribution, provides that *'it is not sufficient to refer to internal law for the status of state organs.*® In other words, a country cannot deny responsibility for the action of a body, which in reality performs state function, simply by relying on its internal law classification under which such organ may not have the status of a state organ.[41]

Further, Article 3 of the ILC Articles state that whether an act of the state is internationally wrongful is governed by international law and not by domestic law. In other words, a country cannot escape liability under international law by arguing that its actions are in accordance with its municipal or internal laws.[42] In this regard, it also important to take note of Article 27 of the Vienna Convention on Law of Treaties, which states that *'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.* Thus, in the Indian context, even if an act is lawful under Indian law and has been performed as per the provisions of the Constitution, it does not affect the characterisation of the same act as internationally wrongful under Indian BITs.

37 This is discussed in the BIT jurisprudence ahead in the note.

38 I Brownlie, Principles of Public International Law (2008 Oxford University Press Oxford: Seventh Edition), p 451. On 'denial of justice' in international law see J Paulsson, Denial of Justice in International Law (2005 Cambridge University Press: Cambridge).

39 *See* McNair, Law of Treaties (1961 Clarendon Press: Oxford).

40 ILC Articles on State Responsibility, p.42.

41 *Ibid.*

42 ILC Articles on State Responsibility, p.36.

A. BIT jurisprudence on liability for judicial actions

BIT cases also provide enough support to the argument that judicial decisions can be challenged as violation of the BIT.[43] In *Saipem* v *Bangladesh,* the tribunal while deciding on jurisdiction said that courts are part of the state and it cannot be seriously challenged that actions of the courts are not attributable to Bangladesh.[44] In fact, this particular aspect was not even challenged by Bangladesh.[45] In *Azinian* v. *Mexico,* it was held that decision of a municipal court, which is clearly incompatible with a rule of international law, will trigger responsibility of the state under international law.[46] Similarly, in *Middle East* v. *Egypt,* the issue before the tribunal was whether a seizure and auction ordered by national courts of Egypt constituted indirect expropriation,[47] demonstrating that actions of national courts can give rise to responsibility under international law. In addition to the above cases, it has been argued that state liability under BITs can also arise for actions of courts that violate the fair and equitable treatment (FET) provision.[48] The violation of FET will arise in the event of not following procedural propriety and due process.[49] Thus, the FET standard includes the notion of denial of

43 S Sattar, National Courts and International Arbitration: A Double Edged Sword?, (2010) Journal of International Arbitration 51.

44 *Saipem Spa v.The People's Republic of Bangladesh,* ICSID Case No ARB/05/07 (Decision on Jurisdiction), para. 143.

45 *Ibid.*

46 *Azinian* v. *Mexico,* Award of November 1,1999, 5 ICSID Rep. 269, paras. 97-105 (2002).

47 *Middle East Shipping Cement Ltd* v. *Egypt, 7* ICSID Rep 178, para. 139. *See also Rumeli* v. *Kazakhstan,* Award, 29 July 2008, para. 704; *Waste Management, Inc.* v. *United Mexican States,* ICSID Case No. ARB(AF)/00/3, Award, 16 (Apr. 30,2004). J Coe and N Rubins' Regulatory Expropriation and the Teemed Case: Context and Contributions' (2005) in T Weiler *(ed) International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary* \ *International Law* (Cameron May: London), p 607-608.

48 Sattar, supra at 45.

49 *See also Jan de Nul* v. *Egypt,* Award, 6 November 2008, para. 187.

justice,[50] which, in international law, is part of the deficiencies of host state organs particularly those involved in administering justice *i.e.* courts.[51] BIT tribunals have been concerned with the issue of denial of justice in administration of justice by national courts. For instance, in *Mondev v* LISA,[52] the tribunal held that *'the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to 'unfair and inequitable treatment'.*[53]

Similarly, in *Loewen* v. *United States,* the tribunal held the host state responsible for the action of its court involving denial of justice.[54]

In addition to cases relating to denial of justice, BIT jurisprudence also demonstrates that host states have been held responsible for the actions of its courts unduly interfering with the international arbitration process. For instance, in *Saipem* v *Bangladesh*[55] - an Italian investor dragged Bangladesh to international arbitration under the Italy-Bangladesh BIT because of the refusal by the High Court of Bangladesh to enforce an international arbitral award in favour of the Italian investor. The court held that the international arbitral award was a nullity under Bangladeshi law and hence unenforceable. However, the tribunal held that actions of the Bangladeshi courts violate the BIT.[56] Similarly, in other BIT cases like *ATA* v. *Jordan,*[57] *GEA* v. *Ukraine,*[58]

50 J Salacuse, The Law of Investment Treaties, (2010 Oxford University Press), p.241-243. *See also* Paulsson (2005), p 109.

51 I Brownlie, Principles of Public International Law (2003 Oxford University Press: Oxford), p. 506. *See also Elettronica Simla SpA (ELSI) United States* v. *Italy* (1989) ICJ 15 at 76.

52 *Mondev International Ltd* v. *United States of America* ICSID Case No. ARB (AF)/99/2, Award, 11 October 2002.

53 *Ibid,* para. 133.

54 *Loewen* v. *United States,* Award, 26 June 2003, 7 ICSID Rep 442 (2005) para. 132.

55 *Saipem Spa* v. *The People's Republic of Bangladesh,* ICSID Case No ARB/05/07.

56 *Ibid,* paras. 158-160.

57 *ATA Construction, Industrial and Trading Company* v. *The Hashemite Kingdom of Jordan,* ICSID Case No ARB/08/2.

58 *GEA Group Aktiengesellschaft* v. *Ukraine,* ICSID Case No. ARB/08/16.

and *Frontier Petroleum* v. *Czech Republic*,[9]* the actions pertaining to interference with the arbitral process by the courts of Jordan, Ukraine and the Czech Republic, respectively, were adjudicated by arbitration tribunals under different BITs.[60]

IV. Conclusion

Both international law principles relating to attribution and the BIT jurisprudence amply demonstrates that state can be held liable internationally for the actions of its judiciary. In India's case, the two ITA cases clearly show how BIT claims have been brought against India for the actions of the judiciary and, in fact, in one case, the claim was successful *(White Industries* v. *India).* Thus, in this light, one can safely conclude that the foreign telecom companies, in principle, can surely bring a BIT dispute against India for the cancellation of the telecom licenses even if these licenses have not been cancelled by the executive but by the judiciary. Whether the foreign companies will succeed in such BIT claims is a different matter altogether.

59 *Frontier Petroleum Services Ltd* v. *Czech Republic*, Final award, PCA, UNCITRAL Arbitration Rules, IIC 465 (2010).

60 *See also* C Claypoole, Recent Developments in the Jurisprudence of Investment Arbitration Tribunals, (2012) 5 Global Arbitration Review's European and Middle Eastern Arbitration Review, Article 4.

Appeals from the Authority of Advance Rulings

The Implications of Columbia Sportswear v. DTT, Bangalore

Niyati Satnir Gandhi'

I. Introduction

The Authority for Advance Rulings [hereinafter referred to as "the Authority" or the "AAR"] in India was set up under Chapter XIX-B of the Income Tax Act, 1961 by the Finance Act of 1993 keeping in mind that owing to the complexity of modern tax laws, international taxpayers need certainty with respect to the tax implications of transactions they propose to undertake before making investments in a foreign country. An Authority for Advance Rulings (Income Tax) under Section 245N of the Income Tact Act, 1961 has been set up to provide advance rulings to applicants seeking determination of the tax liability of a non-resident or a resident applicant with such non-resident in relation to a transaction which has been undertaken or is proposed to be undertaken by such applicants. The rulings of the AAR are only binding on the parties applying for the same.[1]

In this paper, I have analyzed a recent decision of the Supreme Court holding

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Union of India v. *Azadi Bachao Andolan,* 263 ITR 706.

that rulings of the AAR can be challenged by way of a Writ Petition in the appropriate High Court. I conclude that the economic consequences of long drawn litigation discourage parties from approaching the AAR and the Authority will soon be redundant or not more than just another stage in litigation, unless the legislature urgently resolves the matter.

II. The Judgment in Columbia Sportswear

Recently, in a significant judgment,[2] the Supreme Court held that in order to contest rulings of the AAR, writ petitions may be filed before a High Court under Article 226 of the Constitution of India apart from the filing of a Special Leave Petition before the Supreme Court under Article 136 of the Constitution of India. However, recognizing that the existence of jurisdiction does not mandate its exercise,[3] it added that if the Supreme Court finds that the High Courts are adequately equipped with dealing with a matter, it may decline to exercise its extraordinary jurisdiction under Article 136 of the Constitution. The judgment did a two-step analysis to arrive at the conclusion. The first was to determine whether the AAR is a tribunal for the purposes of Article 227 which gives the High Court superintendence over all courts and tribunals throughout the territory over which it exercises jurisdiction. The second was to determine whether a writ can be issued in a situation where the statute made the ruling binding on all parties involved.

III. Is the AAR a Tribunal?

The test to determine what a "tribunal" for the purposes of Articles 136 and 227 can be is found in various pronouncements of the Supreme Court. In *Jaswant Sugar Mills* v. *Lakshmichand** the Court held that a tribunal, adjudication whereof is subject to appeal, besides being under a duty to act judicially, is a body invested with the judicial

2 *Columbia Sportswear* v. *DTT, Bangalore* SLP (C) No. 31543 of 2011. [Hereinafter *Columbia Sportswear]*

3 *Durga Shankar Mehta* v. *Thakur Raghuraj Singh & Ors.,* AIR 1954 SC 520.

4 AIR 1963 SC 677.

power of the state. An order would be outside the ambit of Articles 136 and 226 if it is passed in the discharge of purely administrative or executive duties.[5] Tribunals are adjudicating bodies like a Court and can deal with and finally determine disputes between the parties which are entrusted to their jurisdiction.[6] A tribunal, whose order is within the purview of Article 136(1), is one to which the State has transferred its inherent judicial power by virtue of which it exercises the state's inherent judicial function.[7]

Is the AAR then a tribunal? The court in *Columbia Sportswear*, relying on the definition of advance ruling under section 245N said that the State, under the provisions of the Income Tax Act calls upon the Authority to make a determination not only in relation to a transaction but also the tax liability arising out of a transaction and the quantum of income. Such determination may be on any question of law or fact specified in the application and is binding on the parties under Section 245S. (Income Tax Act, 1961) Therefore, it certainly derives its powers from the State and can finally determine disputes between parties within its jurisdiction.

The next issue is whether such determination is a "judicial" determination. In *The Province of Bombay* v. *Kusaldas A Advani,*[8] the Supreme Court laid down the test for determining whether a decision is judicial in nature and held that it was necessary to find out whether there was a duty to act judicially in the first place. The Court further referred to the ruling in *The King* v. *London County Council,*[9] where the King's Bench had ruled that a decision would be judicial in nature if rights of parties are determined by an authority on grounds of evidence produced by both parties. Such an authority need not be a court but may also be a tribunal and its decision would be amenable to a writ of certiorari.

The court in *Columbia Sportswear,* citing H.M Seervai, stated that "an authority

5 *Bharat Bank Ltd* v. *Employees ofBharat Bank Ltd.,* AIR 1950 SC 188.

6 *Associated Cement Companies Ltd.* v. *P.N. Sharma,* AIR 1965 SC 1595.

7 *Union of India* v. *R. Gandhi,* (2010) 11 SCC 1.

8 [1950] 1 SCR 621.

9 [1931] 2 KB 215.

acts in judicial capacity when, after investigation and deliberation, it performs an act or makes a decision that is binding and collusive and imposes obligation upon or affects the rights of individuals." It found that since Section 245S expressly makes the ruling of the AAR binding on the applicant, Commissioner of Income Tax and other subordinate authorities, it was *a body acting in judicial capacity.*

IV. Can the Judicial Decision-Making Power of the AAR exclude the power of Judicial Review of the High Courts and the Supreme Court?

Section 245S(1) not only has an impact on the determination of whether the AAR is a judicial tribunal but also whether the "binding" decision of the Authority is subject to judicial review. The settled position of law as per *Kihoto Hollohan* v. *Zachillhu & Ors.*[w] and *Jyotendrasinhji* v. *S.L.TripathP* is that the Constitution grants the High Courts and the Supreme Court the power of Judicial Review under Articles 136, 226 and 227. These powers, which are arguably a part of the basic structure of the Constitution, cannot be excluded by provisions made in a statute by the Legislature making the decision of a tribunal final or conclusive. Therefore, despite the ruling being binding, the writ jurisdiction of the High Courts and the extraordinary jurisdiction of the Supreme Court cannot be barred. Although jurisdiction vis-a-vis judicial review has been recognized, what has not been expressly discussed is the scope of this jurisdiction. This will be of great significance once there is an influx of cases before the High Courts. The author argues that the High Court will not act as a court of first appeal reviewing findings of both law and fact. In case of an appeal before the High Court, it will function as a court of review whereby the court will not interfere in findings of fact even if they are erroneous.[12] The court cannot issue a writ of certiorari in a case of a mere wrong decision as that would be a "cloak of an appeal in disguise". It would issue such a writ only if there is a patent error on the face of the record.[13] Just as the court made a

10 1992 Supp (2) SCC 651.

11 1993 Supp (3) SCC 389.

12 *Hari Vishnu Kamath* v. *Syed Ahmad Ishaque & Ors.,* AIR 1955 SC 233.

13 *T.C. Basappa* v. *T.G. Nagapa & Am.,* AIR 1954 SC 440.

clarification regarding the jurisdiction of the Supreme Court under Article 136 as being extraordinary, it would have been helpful to have similarly clarified the jurisdiction of the High Courts to ensure reduced petitions.

V. Conclusions and Recommendations

In the 2011 *Sanofi* case,[14] the Authority itself observed that it would be counter-productive to the very purpose of setting up an Authority for Advance Rulings if parties will be given a chance to challenge such rulings before the High Courts at any stage. It pointed out that since advance rulings needed to be given out expeditiously, it would be more appropriate "if the Supreme Court were to entertain an application for Special Leave to Appeal directly from a ruling of this Authority, preliminary or final, and render a decision thereon rather than leaving the parties to approach the High Courts for such a challenge".

However, the judgment could not have been decided in any other way owing to the constitutional right to appeal found both in Articles 136 and 226. Unlike in other countries where it operates as an administrative authority, the AAR in India is, as stated above, an independent high level adjudicatory body headed by a retired judge of the Supreme Court and the rulings are not just administrative decisions given by Revenue officials but are binding on the parties. The legislature needs to take into consideration that the Authority has been set up with the objective of reduction of unnecessary litigation and therefore to promote better taxpayer relations in respect of transactions involving non-residents especially considering the consequences of legal uncertainty in tax disputes (for example, the disputed tax amount in the Vodaf one case was Rs 11,000 crore and the need to pay the same would amount to upsetting the financial calculus that justified Vodaf one's acquisition of Hutch.) This is not conducive to future flow of direct investment to India because when a party is deciding whether or not to seek an advance ruling it will measure the costs of the same such as "red-flagging" an ambiguous legal issue guaranteeing analysis by the administration, the

14 *Groupe Industrial Marcel Dassault* v. *Merieux Alliance,* **AAR** No. **846** & 847, November **28, 2011.**

cost of applying for the ruling and the following proceedings, the waiting period, etc. against the benefits of the same such as avoidance of possible long-drawn litigation, changing the structure of acquisition, etc. The costs imposed by time especially, are relevant with respect to foreign direct investment in an emerging market like India as a well-timed entry could determine the profitability of a particular commercial enterprise.[15]

Consequently, the legislature saw the need to provide certainty to such foreign investors in a timely manner. Although the statute, by way of Section 245R(6), provides that the decisions of the Authority must be provided within six months of the receipt of the application, the average disposal time of cases before the AAR ranges from 12 to 18 months.[16]

Adding several possible stages of appeal only adds to the time taken for disposal. This may result in taxpayers disregarding the forum as a workable alternative for predetermination of tax liability for proposed transactions given that time frames are crucial factors in deal closures.

In addition to the same, in a recent amendment by way of the Finance Act, 2012, adding Section 245N to the Income Tax Act, 1961, the Authority's subject matter jurisdiction has been expanded to include adjudicating on questions of whether an arrangement qualifies as an "impermissible avoidance arrangement" in context of the GAAR. Furthermore, there are close to two hundred applications still pending for disposal before the AAR and in light of the growing complexity of international tax law the numbers are bound to rise.[17]

To ensure that prospective applicants continue to approach the AAR to determine their tax liability on proposed transactions, it is imperative that the AAR is reformed

15 Y. Givati, "Resolving Legal Uncertainty: The Unfulfilled Promise of Advance Tax Rulings", (2009), 29 Virginia Tax Review 137,140.

16 M. Butani, Advance Rulings: Time for a Reality Check, Business Standard, September 17,2012, online at http://www.business-standard.com/india/news/advance-rulings-time-forreality-check/486603/ (visited Sep 17, 2012).

17 *Ibid.*

to suit the objectives envisaged when it was set up. In addition to the same, to shorten the time period of disposal, one level of appeal must be done away with. However, this would require a Constitutional amendment by way of inserting an exception like that for Armed Forces tribunals under Article 136(2) so that the object with which this authority was conceived can be fulfilled. The latter is an unlikely move as time for disposal is a systemic problem across the Indian judiciary and including the AAR as an exception to the writ jurisdiction of the High Courts would set a dangerous precedent. The few exceptions to judicial review in the Constitution (such as Articles 31(4), 31(6), 136(2), 227(4), 262(2), 2430,243ZG, 329(a)) -are indicative of the fact that in certain situations, judicial review may not be regarded as an indispensable measure to determine the legality or propriety of actions.[18] However, these exceptions have a very high threshold, usually that of threatening the sovereignty and integrity of our nation. For example, the Armed Forces exception is in place to maintain the discipline among the Armed Forces and decisions with respect to inter-state river water disputes have been expressly placed in the hands of the Parliament to allow for elastic action that may be necessary to be taken for meeting with the problems posed. However, if elasticity is interpreted to be the criterion for deterrnining the existence of an exception, the AAR should be allowed the privilege due to the pressing need for the same as a mode of encouraging investment.

Until this issue is resolved by the Legislature as it deems appropriate, the judgment of the Supreme Court in *Columbia Sportswear* will serve to clarify conflicting decisions such as that of *DIT* v. *Morgan Stanley*[19] where the court allowed a special leave petition against a ruling from this Authority and *Fosters India*[20] where the court had laid down that it was necessary to approach the High Court under its writ jurisdiction before filing a special leave petition before the apex court. The practical implications of the same will certainly affect those litigants adversely whose SLPs

18 *CEO* v. *Sunny Joseph,* WA No. 1495 of 2005, September 9, 2005, Kerala High Court.

19 (2007) 109 BOMLR 1348.

20 *Foster's Australia Limited* v. *CIT,* (2008) 7 DTR 206 (AAR).

ave been admitted several years ago as they will have to approach the High Court ^ain which will result in considerable expenses and delays. For now, the procedure mailable to an assessee would be first the AAR, then a Division Bench of the High ourt, followed by an SLP, then the assessment order and further the ordinary process f appeals.

BOOK REVIEWS

Indian Constitutional Law

The Kesavananda Bharati Case: The Untold Story Of The Struggle For Supremacy By The Supreme Court And Parliament by T.R. Andhyarujina
Universal Law Publishing Company, 2012. 152 pp. Hardback INR 295

The carefully crafted doctrine of separation of powers has over the centuries resulted in a constant friction between the Parliament and the Judiciary. Following India's independence in 1947, the Parliament enacted several laws with the aim of promoting socialistic reforms. To protect itself from clashes with the Judiciary, the Parliament by way of its very first amendment in 1951 added the Ninth Schedule to the Constitution to provide to laws placed under this schedule, immunity from judicial review. Matters came to head in 1967, where an eleven judge bench of the Supreme Court ruled that the power of making amendments and legislating were not different. Article 368 merely provided for the procedure for amendment and any amendment of the Constitution should be deemed as law understood under Article 13(2). Thus by way of a 6:5 majority, in the judgement in *Golaknath v. State of Punjab* (AIR 1967 SC 1643), the Indian Judiciary nullified the position established by the Parliament through its amendments. This was followed by a number of amendments by the Parliament in 1971 and 1972 in its attempt to regain lost ground. With the power to amend any part of the Constitution including Fundamental Rights, it restored its position prior to *Golaknath* (The Constitution (Twenty-fourth amendment) Act 1971); limitations on the right to property were imposed; Article 14 and Article 19 were made subordinate to Article 39 (b) and (c) in the Directive Principles of State Policy (The Constitution (Twenty-fifth amendment) Act 1971) and the entire section of legislation dealing with land

reforms was placed under immunity in the Ninth Schedule (The Constitution (Twenty-ninth amendment) Act 1972).

In 1970, a pontiff of a religious mutt in Kerala, challenged the acquisition of land by the Government under the Kerala Land Reforms Act, 1963. Following this, he challenged the 29th Amendment (1972) which added two Kerala Land Reforms Amendment Acts of 1969 and 1971 to the Ninth Schedule. The other amendments were subsequently challenged and were heard together. Represented by the eminent advocate Nani Palkhivala, this pontiff, Keshavananda Bharati became the lead petitioner in the case while constitutional scholar, H.M. Seervai, along with Attorney-General Niren De, argued on behalf of the respondents. A constitutional bench of 13 judges heard the matter for 66 days delivering one of the lengthiest judgements in the history of the Indian judiciary.

The relevance of the judgment cannot be undermined and April 24* 1973 is possibly the day which marked the culmination of a struggle for supremacy over the power to amend the Constitution between the Parliament and the Government of the day on one hand and the Supreme Court on the other. Since then, a vast body of literature has emerged in an attempt to understand this judgement. However, Mr. T.R. Andhyarujina's *The Kesavananda Bharati Case: The Untold Story Of The Struggle For Supremacy By The Supreme Court And Parliament* is not one such book. As the title of his work suggests, the book seeks to bring forth a 'behind the scenes' view of the judgement and who better to narrate what transpired in the corridors of the Apex Court than one who was an eyewitness to the case. As a junior to H.M. Seervai, council for the respondents, the author was very much aware of the political and judicial undercurrents during those 66 days. In his book he chronicles the various controversies that surrounded the judgement and the events that transpired following it, which may change the very face of what is believed to be one of the most important decisions by the Indian judiciary.

The author carefully recreates the political undertones that formed the background to the *Keshavanada Bharathi* judgment. Indira Gandhi was at the height of her reign with enough seats in the House to take any decision. In preparation of the

upcoming conflict, she tried to constitute a 13 judge bench that would rule in her favour and to a certain extent she succeeded, putting to practice President Roosevelt's threat of court packing. Justices A.N. Ray, K.K. Mathew, D.G. Palekar, M.H. Beg, and S.N. Dwivedi were in support of the Government while Chief Justice Sikri and Justices J.M. Shelat, K.S. Hegde and A.N. Grover were determined to limit the amending power of the Parliament. Justices H.R. Khanna, A.K. Mukherjea, P. Jaganmohan Reddy and Y.V. Chandrachud were yet to take sides. The author also gives an insight into the chaos that prevailed within the judiciary itself, of the 13 judges often arguing the matter amongst themselves, of Justice Beg's miraculous recovery when his illness threatened to result in the matter being heard afresh and of Nani Palkhivala's compromise of submitting a written draft of his arguments in reply to the respondents.

When the decision was finally delivered, Justices A.K. Mukherjea, P. Jaganmohan Reddy joined the ranks of Chief Justice Sikri while Y.V. Chandrachud decided in favour of the respondents. Justice Khanna chose to take neither side, and it was apparently his decision that formed the majority decision. In his book, Mr. T.R. Andhyarujina sets out to challenge this majority decision as being a clever strategy by Chief Justice Sikri to ensure that his view formed the majority. Following the delivery of the judgment, Chief Justice Sikri circulated a note entitled "View of the Majority" which he got 9 of the 13 judges to sign. The most important aspect in the note was that it said that Article 368 of the Constitution did not give the Parliament the power to amend the basic structure of the constitution. However, this statement reflected the judgement of only six of the judges sitting on the bench. Justice Khanna, who took neither sides, stressed on the word amendment stating that though an amendment can result in changes to the Constitution, it cannot leave the existing Constitution unrecognizable.

Unlike Chief Justice Sikri and the 5 other judges who had their own definitions of what constituted the 'basic structure', Justice Khanna in his judgement did not use this phrase at all. However, may be since the note reflected the essence of his judgement, Justice Khanna willingly signed it. And thus a note, whose legality yet remains undetermined, came to be the law of the land.

Following the delivery of the judgment and the retirement of Chief Justice Sikri, Justice A.N. Ray superseded three judges to be appointed his successor. The superseded judges, Justices Shelat, Hegde and Grover, all of whom had supported Chief Justice Sikri in the *Keshavananda Bharati* case, resigned in protest. Soon afterward in 1975, the Allahabad High Court invalidated Indira Gandhi's elections under the Representation of People Act, 1951. In response, she imposed an emergency. Pending an appeal in the Supreme Court she amended the electoral law to retrospectively nullify her disqualification and on August 10,1975, passed the 39th Amendment Act which removed the authority of the Supreme Court to adjudicate petitions regarding elections of the President, Vice President, Prime Minister and Speaker of the Lok Sabha. Instead, a body constituted by the Parliament would be vested with the power to resolve such election disputes (Article 329A). On October 7,1975, in the case of *Smt. Indira Nehru Gandhi* v. *Shri Raj Narain* (AIR 1975 SC 2299) the Court upheld the amendments to the election laws but struck down the constitutional amendments limiting the power of judicial review as unconstitutional as going against the basic structure.

Justice Khanna himself upheld 'democracy' which included conducting free and fair elections as part of the 'basic structure' of the Constitution. But the author maintains that in the *Keshavananda Bharati* judgement, Justice Khanna did not share the opinion of Chief Justice Sikri and the other four judges with regard to the basic structure doctrine and that he was not against an amendment to the Constitution as long as it did not render the Constitution unrecognizable.

Indira Gandhi did not take the decision lightly, and within three days of the judgement, Justice A.N. Ray convened a 13 judge bench to review the *Keshavananda Bharati* judgement. Once again Indira Gandhi made efforts to form the bench. However Chief Justice A.N. Ray dissolved the bench after two days of hearings. Nani Palkhivala who had eloquently argued against the review of the *Keshavananda Bharati* decision, was said to have petitioned the Prime Minister to abstain from doing so, fearing the repercussions of future misuse of the Prime Minister's bonafide intentions.

The book, which brings to light the myriad questionable situations that

surrounded the *Keshavanada Bharati* decision, could have been accomplished only by a person of the author's stature, as he minces no words to make statements which are perhaps against the ruling party of the day. He achieves no mean feat as he tries to illustrate the ripple effect of all the political and judicial controversies no matter how small. For instance, he observes that Justice Chandrachud whose alliance had been seemingly in favour of the petitioners ultimately decided in favour of the respondents and he questions the degree of influence that the executive may have over the judiciary. The author notes that perhaps the decision was in fact an *equal triumph* and that as observed by Justice Mathews in the *Raj Narain* case, the basic structure as enunciated in the *Keshavananda Bharati* decision remains a *twinkling star up above the Constitution. The Kesavananda Bharati Case: The Untold Story Of The Struggle Tor Supremacy By The Supreme Court And Parliament* thus seeks to reveal the thorns beneath the rose; the case which was described by the eminent scholar, Upendra Baxi as '...not just a reported case on some Articles of the Indian Constitution...[but that was], in some sense, the Indian Constitution of the future'.

Reviewed by **S.N. Chidambara Sastry***

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Intellectual Property Law

Relocating Geographical Indications by Dev Ganjee

Cambridge University Press, Cambridge, England, 2012. 362 pp. Hardback: £70.

Tracing the very origin of 'Geographical Indication' *(hereinafter* GI) in the Intellectual Property *(hereinafter* IP) regime and questioning the basis for its existence, the book forms an interesting and unique read. It is not only a crucial addition to the existing literature, but its introduction in the Indian markets can have significant impact considering the recent GI controversies. (Pattamadai mats and the Nagarcoil lamps attempted to be registered as GIs by Tamil Nadu and the Tirupati Laddu registered as a GI.)

Not many scholars have reflected in such detail about why GIs have been given an important status in the IP regime. The book is an excellent source for beginners to develop an insight into the subject; and for the people more acquainted with IP laws, it is a good read as the author traces the history of GI and presents his analysis.

While glancing through the list of editors, one can see that it not only features established scholars such as William R. Cornish, Lionel Bentley, Paul Goldstein and Francois Dessemontet but also Rt. Hon. Sir Robin Jacob (English Court of Appeal) who has written extensively on IP issues and exhibits a perfect blend of a judicial-academic personality.

The book is divided into two parts consisting of three chapters each of which follow an independent introduction. Part 1 throws light on the concepts of Indication of Source and Appellation of Origin while Part 2 deals exclusively with the Agreement on Trade-Related Aspects of Intellectual Property Rights *(hereinafter* TRIPS Agreement).

The introduction to the book gives a good start to the work and has much to offer to the beginners for it is a perfect example of penning down the research methodology with a clear outline of the legal problem sought to be addressed followed by a brief insight into the controversies involved. A mention of the research questions brings clarity regarding the organization of the text. Evident from the title, the first impression of the book suggests that the author would retrace the concept of GI and that is indeed the evaluation undertaken by the author. In the words of the author the intent of the manuscript is to examine:

a. Under what circumstances are signs which indicate the geographical origin of products incorporated within international IP law?
b. What can this tell us about the present international regime?

The above is precisely what the author has addressed throughout the book and each chapter unfolds as a step in logical coherence of the one preceding it.

The author's attempt to write the book is motivated by the idea that the law in the area of GI is not coherently developed which can be attributed to the fact that the nature, scope and institutional form of protection in case of GI vary considerably across jurisdictions. The author has made every effort to bring clarity to the subject by succinctly penning down development of the law as well as its controversies. This seems to be the central thesis of the book. It revolves around the two main questions mentioned above which are addressed in the form of eight research questions. The author places reliance on the Paris Convention, the Madrid Agreement and the Lisbon Agreements for arguing his thesis and the text involves an exhaustive analysis of these agreements in the context of GIs. The thesis is proven effectively when the author points out that the provisions of the TRIPS Agreement draw relevance from the previously existing concepts.

The first part of the book gains relevance when the author begins discussion of the provisions of the TRIPS Agreement in the second part. The main point made in this regard is that the TRIPS Agreement though significant is not a very conceptually stable agreement. The author believes that the history of GI has been poorly understood and even though the economic and political significance of GI have grown, the

conceptual and institutional ambiguities exist. There are divergences in the conception of GIs as distinct objects of property rights, the nature of the interests they serve and the manner in which they have been complicated. The ambiguity is identified and proved with respect to the definition of GI, the existence of two levels of protection in TRIPS Agreement (i.e. the levels of protection set by Articles 22 and 23), genericide and conflict between GI and Trademarks. The author has tried to find answers to why such ambiguities exist and an exhaustive discussion about Article 22 of TRIPS Agreement indicates how the definition of GI is born out of strategic concessions and political reasons to forgo a prescribed universal form of protection. Amidst these ambiguities, the author's attempt to relocate the basis of GIs comes into picture where the reader's attention is drawn to the ongoing debates in the TRIPS council and the focus boils down to the alternative interpretations of GI protection. The main points include the kind of protection which can be offered if an international registration regime is bought in place or if the special protection (as in Article 23 TRIPS Agreement) is extended to all products.

As a matter of practice, the author has adopted the methodology of dividing a particular legal issue into smaller issues and subsequently addressing them at length. For most topics the author has chosen to give a brief statement of explanation to provide conceptual clarity to a beginner. This is very much in line with the objective of the author which is to relocate the very basis of GI as an alternative compressed method of presenting arguments could have defeated the purpose of the whole thesis. While dealing with a specific problem, the author clearly presents the material from which he proposes to draw his claims. For instance, while dealing with the concept of Indication of Source in chapter 2, the author first conducts an analysis of the existing provisions of the Paris Convention and points out alternative possibilities in the form of two other sets of provisions which were not carried forward. The author chooses to discuss them at this point of time because they feature in contemporary debates.

It is worth mentioning that the main points presented by the author in each chapter are embedded in the interpretations based on various legal texts and the negotiating history. The claims made by the author are well founded. This is seen in

the discussions with regard to the TRIPS Agreement. While trying to discuss the import and implication of the TRIPS Agreement GI provisions, the author says that, "the definition of GI in Article 22.1 has been influenced by prior negotiations under the auspices of WIPO as well as the EU's Regulation 2081/92, where the terroir and reputation logics were fused together." The author explains the terroir concept in detail and then proceeds to a discussion on its various aspects. Thus, when questions are raised, the reader does not feel a sense of void.

With respect to the conclusions drawn in the text, the methodology adopted by the author requires a special mention. The author has ensured that each chapter is accompanied by a brief conclusion where the arguments are summarized. This proves to be of great help as it refreshes the discussion in the said chapter and further equips the reader to understand the discussions which would follow. Apart from the brief conclusions at the end of every chapter, the final concluding chapter flows from the discussions in each chapter and not only provides answers to the queries raised but also justifies the very existence of the work.

The topic draws its contemporary relevance from its exhaustive discussion on the TRIPS Agreement. The author begins the discussion by first enquiring whether Indication of Source was an appropriate fit in the category of IP and why. The second stage of enquiry deals with researching the process by which the connection between product, place and people was initially configured and then reconfigured over the 20th century in France. The book also deals with the Appellation of Origin in France where the subject matter was wine, the Lisbon Agreement where the circle of Appellation of Origin products were expanded and his reasons for believing that the relevance of the TRIPS Agreement is overstated.

The book has been written in a manner that appeals to a beginner and scholar alike. The threshold of the assumption of expected basic understanding is very low and even a basic idea about the concept of GIs would be sufficient to appreciate the arguments. The author has supplied explanations throughout the text to assist the reader. Judging from the perspective of a scholar reading the text, he would find the work distinct and appealing as this analysis is one-of-its-kind. It is one of the first

attempts to retrace the very basis of GIs and find answers to its very existence. It theorizes why and how GIs are given protection. It is safe to conclude that the text is a valuable addition to the existing pool of knowledge and would certainly provide assistance in the better understanding of GIs as a concept in the IP paradigm.

Reviewed by **Mahima Rathi***

SPEECH BY THE CHIEF ELECTION COMMISSIONER OF INDIA

Electoral Reforms and Voter Empowerment

Keynote Address by Shri. VS Sampath

Periodic free and fair elections form the cornerstone of a democracy. The voter is the most important stakeholder in an election. Voting in an election is an expression of the will of the voter in choosing how the country will be run for the next five years. Empowerment of the voter has therefore been the focus of the Election Commission of India over the years. The Commission has started several innovative practices for this purpose. Certain things require a change in the law or rules and form an important part of the 'Electoral Reforms' proposals of the Commission. However the Commission has brought about several reforms for voter empowerment on its own by issuing executive instructions. I will mention some of the important innovations introduced by the Commission in recent times: -

1. Hassle-free enrolment - In order for any person to be able to vote in an election, the name of the person must be enrolled in the electoral roll of the concerned polling station. In the last few years, the Commission has taken many new steps to make enrollment hassle free. Some of the steps taken by the Commission are:
    a. Appointment of Booth Level Officers (BLOs) at every polling booth: These BLOs remain in contact with voters and help them in filling application forms and getting their names enrolled.
    b. Appointment of Booth Level Volunteers (BLVs): Volunteers of civil society organizations, members of resident welfare associations etc. are encouraged

to become Booth Level Volunteers to help voters in their areas to get enrolled in the electoral rolls.

c. Appointment of Booth Level Agents (BLAs) by political parties: Political parties have been requested to appoint BLAs, who are representatives of political parties at the booth level. They make the process of enrollment transparent. Recently, the Commission has allowed BLAs to collect application forms of voters and deposit them with the BLO.

d. Use of Information Technology for -

i. Searching names of electors using the internet and also by sending an sms query, ii. On-line applications for inclusion, modification, deletion or transposition of entries in the electoral rolls. Hi. Complete transparency in the filing of claims and objections by uploading the list of all claims and objections on the website of the Chief Electoral Officer (CEO), iv. Complete transparency by uploading the entire electoral roll of the State on the website of the CEO.

e. Use of Common Service Centers under the Ministry of Information Technology to provide voters with services related to electoral rolls.

f. Use of drop boxes to collect application forms from voters.

g. Principals of schools and colleges have been asked to accept application forms for inclusion of names in the electoral roll along with admission forms from students.

h. Instructions have been given to simplify the enrollment in cases where documentary proofs of age and address are not available. In the case of homeless persons, the BLO verifies the fact of ordinary residence by visiting the place at night. No age proof is necessary where it is evident that the voter is above the age of 18 years. In cases of doubt, a certificate from the local people's representatives or the statement of parents becomes adequate.

i. A call center with a toll free number -1950 has been set up in every state.

j. A public grievances website has been developed for voters to lodge their grievances and track their 'resolution status' online.

2. Facilitation of voting at polling stations - The Commission takes all possible steps to ensure the fullest possible participation of voters in elections. Some important steps taken by the Commission in recent years are:
   a. Systematic Voter Education and Electoral Participation (SVEEP), has been launched to increase turnout in elections, and it has been successful.
   b. Photo voter slips are distributed to the voters a few days before the election to inform them about the date, time and place of voting. These slips are an invitation to voters, to come and cast their vote, and also serve as a document, for verification of identity at polling stations.
   c. Voter slips are also issued on mobile phones, if voters send an sms with their EPIC (Elector's Photo Identity Card) number.
   d. Details of polling stations can be found on the website of the CEO.
   e. Alphabetical lists of voters are kept outside polling stations to help voters find their serial number and name in the electoral roll.
   f. Facilities for drinking water and toilets are organized at polling stations.
   g. Ramps are provided for the differently-abled voters at polling stations,
   h. Ballot paper in Braille is provided for the visually handicapped.
3. Prevention of intimidation - Vulnerability mapping was started by the Commission a few years ago to ensure that no intimidation of voters takes place so that every person is able to cast his/her vote in a free and fair manner. Officers of the Commission visit polling areas and interact with the voters, especially those of the deprived and vulnerable categories to determine who the possible intimidators are and who are likely to be intimidated. Action under preventive sections of the Code of Criminal Procedure, 1973, is taken by taking bonds for keeping peace and good behaviour from possible intimidators. Similarly, non-bailable warrants are executed. Arms and ammunitions of people likely to cause trouble are confiscated. Proactive action is taken to protect and instill confidence in the vulnerable communities. This includes measures like frequent meetings

and phone calls, deployment of police forces, flag marches by the force and even escorting the vulnerable voters to polling stations if found necessary. 4. Control over Money Power - The Election Commission of India is conscious of the fact that money power is used to influence voting behaviour all over the world. Instances of distribution of cash, liquor, clothes and other things as bribe for voting is not uncommon. Recently, paid news has further increased the role of money power in elections. The Commission has taken several steps to curb the role of money power. These include -

a. Creation of an expenditure monitoring division in ECI headquarters.
b. Machinery for monitoring election expenditure including expenditure observers, surveillance teams, videography etc.
c. Maintenance of shadow expenditure registers.
d. Seizure of cash if carried above a certain quantity.
e. Seizure of liquor, drugs etc.
f. Instructions to open a separate bank account for election expenditure.
g. Abstract of expenditure statement of all candidates put on the website of CEO.

While the Commission has, on its own, taken many steps to empower the voter, several things require changes in the laws or the rules. These are included in proposals for electoral reforms sent by the Commission to the government from time to time. The main proposals which will empower the voter are:

1. By its letter dated 5* July 2004, the Commission had proposed that exit polls and opinion polls should be completely banned. The amendment in Representation of Peoples Act, 1951 has banned only exit polls and not opinion polls. There is a possibility that the voter may be subject to undue influence by rigged opinion polls.
2. By its letter dated 5* July 2004, the Commission had proposed that surrogate advertisement in media should be prohibited. The matter is still pending with the Law Ministry.
3. By its letter dated 5* July 2004, the Commission had proposed the

introduction of "None of the above" option on ballot paper/EVM to enable the voter to reject all candidates if he so chooses. The matter is still pending with the Law Ministry.

4. By its letter dated 5th July 2004, the Commission had proposed a ban on government sponsored advertisements before elections as they can have undue influence on voters. Similarly, by the same letter, the Commission had" proposed a ban on political advertisements on television and cable network and to provide a suitable advertisement code and monitoring mechanism to prevent undue influence on voters. The matter is pending in the Law Ministry.

5. By its letter dated 3rd February 2011, the Commission has proposed that "paid news" be added in the category of corrupt practices or electoral offences as paid news can have undue influence on voters.

I would like to end by saying that the Commission will continue in its endeavour to empower the voter in the interest of safeguarding democracy.