VOLUME 6 WINTER 2020 ISSUE 2

NLUJ LAW REVIEW

ISSN:2326-5320

6(2) NLUJ LAW REVIEW (2020)

ARTICLES

-A NATIONAL LAW UNIVERSITY JODHPUR PUBLICATION-

VOLUME 6 **WINTER 2020** **ISSUE 2**

NLUJ Law Review

VOLUME 6 WINTER 2020 ISSUE 2

NLUJ Law Review

TABLE OF CONTENTS

ARTICLES

Mitali Gupta and Shreya Jha, *The Inclusion of Data Privacy in Antitrust analysis*, 6(2) NLUJ Law Review 1 (2020)

THE INCLUSION OF DATA PRIVACY IN ANTITRUST ANALYSIS

MITALI GUPTA[+] & SHREYA JHA[*]

ABSTRACT

Consumer data is more precious and vulnerable in today's digital economy than ever before. Today, business firms are collecting and storing personal data at a rapid pace with minimal legal safeguards in place. This has implications on both, data privacy policies and antitrust laws. For instance, when data-rich firms such as Microsoft-LinkedIn or Google-DoubleClick, amalgamate, data becomes a primary source of competitive advantage. These scenarios create both data privacy and antitrust concerns. Conflict arises when it is to be determined whether, during mergers, abuse of dominant position coupled with violations of data privacy should be dealt with by competition law or by unique data protection laws. This article seeks to resolve this conflict by first, clearly delineating the goal of an antitrust law and bringing privacy within the scope of antitrust analysis; second, distinguishing those privacy issues which should be addressed by competition law from privacy issues which form a subject matter of data protection law; and third, asserting the need for harmonising the two different-natured legislations of data protection and

[+] The author is a fifth-year student of Amity Law School, Delhi (Guru Gobind Singh, Indraprastha University) and may be contacted at **mitaliminigupta[attherate]gmail[dot]com**.

[*] The author is a fourth-year student of Amity Law School, Delhi (Guru Gobind Singh, Indraprastha University) and may be contacted at **shreya[dot]jha78[attherate]gmail[dot]com.**

antitrust, with the ultimate objective of strengthening user data privacy. In order to achieve the above-mentioned objectives, this article first, describes the digitalisation of economy and privacy issues that stem from it; second, analyses the anti-competitive implications of consumer data; third, explores and analyses the role and need for antitrust analysis in privacy protection; fourth, focuses on the privacy-antitrust conundrum in the Indian competition landscape; and fifth, analyses how privacy can be seen as a competitive advantage with respect to growing awareness among consumers about the vulnerability of their data. Conclusively, this article establishes the protection of data privacy as a role of antitrust law in this digital economy.

TABLE OF CONTENTS

I. INTRODUCTION

The market landscape has drastically changed in the last few decades. The digitalisation of the global economy has set in motion a new wave of capitalism. Markets now operate in a 'digital economy' where the erstwhile relationship between consumers and businesses is transforming significantly.

'Digital economy' is a term used to identify markets where the trade of goods and services are facilitated by digital technologies.[1] One of the characteristic features of this economy is that business models are centred on a flow of 'information' between consumers and business firms.[2] This flow of information largely comprises of the personal data of consumers. In many ways, consumer data has become the 'currency' of this digital economy.

With access to large sets of consumer data and rapidly evolving technology, business firms have started to mine and process this data. Through the analysis that is derived from the processing of personal data, they are able to target goods and services more effectively. They no longer have to depend on the organic chain of demand and supply – they are now capable of creating demand by tapping into the behaviours and buying patterns of consumers.

---

[1] Organisation for Economic Co-operation and Development [OECD], *The Digital Economy*, DAF/COMP (2012)22 (Feb. 7, 2013), https://www.oecd.org/daf/competition/The-Digital-Economy-2012.pdf.

[2] Organisation for Economic Co-operation and Development [OECD], *Quality Considerations in Digital Zero-Price Markets-Background Note by Secretariat*, DAF/COMP(2018)14 (Oct. 9, 2018), https://one.oecd.org/document/DAF/COMP (2018)14/en/pdf.

In the hierarchy of things, antitrust laws occupy a significant place in this new age digital economy. When businesses mine and process personal data, two major concerns crop up: *(a)* the privacy and rights of consumers are threatened, and *(b)* a massive divide is created between businesses that can mine consumer data and those that cannot. Since the main goals of antitrust law are freedom of competition, economic efficiency, and protection of consumers and competitors, the regulation of consumer data in this digital economy becomes a concern that falls within the purview of antitrust regulations.

Traditional antitrust analysis, however, concerns itself with 'pricing models' only. 'Pricing models' are various methods that firms use to price their goods and services. Since consumer data is a 'non-pricing model', the traditional antitrust analysis does not take it into account. However, times are changing, and today's digital economy sustains heavily on the personal data of its users. Undoubtedly, there is a strengthened need for the adoption of an approach that goes beyond 'pricing models' to determine the nature and outcome of anti-competitive practices.

When transactions happen in the digital economy, firms tend to collect the personal data of consumers in exchange of services. Usually, this collection happens without the consent or knowledge of users. Data is further compromised when data-rich firms merge or amalgamate, when dominant firms abuse their market power, and when firms resort to unethical practices.

There has been much debate around the inclusion of 'data privacy' as a 'non-price' parameter of assessing competition within the antitrust analysis. The bone of contention is whether privacy breaches emanating from digital transactions warrant examination by antitrust laws or specialised data protection laws.

This article seeks to resolve this debate by analysing the harms of having data privacy 'blind-spots' in antitrust laws. The primary objective of this article is not based upon understanding of how privacy breaches should be tackled, but to analyse the need for the involvement of antitrust regulations in tackling privacy breaches in the digital economy.

II. DATA AND THE DIGITAL ECONOMY

The collection of consumer data in exchange of services is not a novel concept. The practice of collecting personal data by digital forums is not unethical in itself. It does not compromise consumer welfare and is not an anti-competitive practice *per se*.

However, until a few years ago, when firms gathered personal data, they only used it to formulate business strategies or cultivate healthy public relations. There was a difference in the quantity and quality of sensitive personal data collected. Consumers also had more control over the data that they shared.

Today, business firms have unregulated access to large volumes of personal information. They resort to three practices to collect and analyse consumer data—*first*, by directly asking consumers for their data; *second*, by tracking them indirectly; and *third*, by appending other sources of customer data to their own.[3] Information collected from consumers includes everything from their age, sex, and personality traits, to their sexual orientation, political preferences, and religious beliefs.

Moreover, with the advent of 'Big Data Analytics' and 'data mining', large volumes of unstructured data can be simplified and used to identify and predict patterns and preferences. Personal data now has the potential of being used in machine learning projects and other advanced analytics applications.[4]

'Big Data Analytics' is a process through which computers teach themselves to crunch large datasets. When businesses examine pre-existing databases to generate information which is used to determine the consumer's 'pain-point', it is known as 'data mining'.[5] Big Data Analytics, aided by data mining and deep learning, allows high degrees of permutations and combinations within a data set to obtain desirable results.[6] Through this, businesses can evaluate behavioural patterns of their customers more effectively.

---

[3] Adam C. Uzialko, *How Businesses Are Collecting Data (And What They're Doing With It)*, BUSINESSDAILY.COM, https://www.businessnewsdaily.com/10625-businessescollecting-data.html (Aug. 3, 2018).
[4] *Big data,* SEARCHDATAMANAGEMENT, https://searchdatamanagement.techtarget.com/definition/big-data (last visited Feb. 24, 2020).
[5] Organisation for Economic Co-operation and Development [OECD], *Big Data: Bringing Competition Policy to the Digital Era The Digital Economy*, DAF/COMP/M(2016)14 (Oct. 26, 2016), http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M%282016%292/ANN4/FINAL&docLanguage=En [*hereinafter* "**OECD**"]
[6] Emerging Tech from the arXive, *The Big Data Conundrum: How to Define It?*, MIT TECH. REV. (Oct. 3, 2013), https://www.technologyreview.com/s/519851/the-big-dataconundrum-how-to-define-it/.

By simplifying and analysing the data that they collect, firms can design products and services that are tailored to consumer needs.

An example of effective data mining is Walmart Inc.'s identification of the positive association between the occurrence of a hurricane and the consumption of strawberry Pop-Tarts. Walmart recognised that the sale of strawberry Pop-Tarts increased about seven times ahead of a hurricane. Accordingly, it started stocking Pop-Tarts before a hurricane and placed it before the check-out. Soon enough, all Pop-Tarts were sold out.[7]

It is thus evident that new technologies have ushered in a brighter and more efficient market dynamic for big, data-rich business firms. However, it is also evident that consumers pay for this efficiency with their personal, and often sensitive, data.

III. THE ANTI-COMPETITIVE ASPECT OF CONSUMER DATA

While it is widely acknowledged that mining and analysis of consumer data give rise to data privacy concerns, it is also steadily becoming evident that they pose anti-competitive concerns as well. Firms with access to large volumes of consumer data and modern data technologies possess a competitive edge over businesses that do not have access to either of these. This perpetuates an unfair competitive advantage. Violation of data privacy thus needs to be analysed as an antitrust concern. To do this, it is imperative to discuss the implications of privacy breaches on both, consumers and non-dominant market players.

[7] OECD, *supra* note 5.

A. THE IMPACT ON CONSUMERS

The impact of data privacy violations on consumers can be examined via various angles. When assessed through the lens of antitrust analysis, we find it is often argued that violation of data privacy negatively affects 'quality' of services. This argument is founded on the idea that 'privacy protection' must be seen as an aspect of 'quality' of a good or service.[8]

This quality-based approach towards violations of privacy was first articulated by Peter P. Swire, internationally renowned privacy law expert, in his testimony to the Federal Trade Commission[9] during the Google-DoubleClick merger.[10] He argued that 'privacy' must be seen as a component of 'quality' of service, and thus be a part of consumer welfare and antitrust analysis. He also elaborated how violation of privacy is detrimental to the chief goal of antitrust law – consumer welfare.[11]

His approach can be better explained against the backdrop of the Google-DoubleClick merger. Google LLC, he argued, had 'deep' and detailed information about consumer search terms. DoubleClick, on the other hand, had 'broad' information that enabled it to pinpoint surfing

---

[8] KLAUS MATHIS & AVISHALOM TOR, NEW DEVELOPMENTS IN COMPETITION LAW AND ECONOMICS 289 (1st ed. 2019).
[9] Case COMP/M.4731, Google v. DoubleClick, EUR. COMM'N (Mar. 11, 2008).
[10] OLES ANDRIYCHUK, COMPETITION LAW FOR THE DIGITAL ECONOMY 133 (Björn Lundqvist and Michal S. Gal eds., 2019) [*hereinafter* "**ANDRIYCHUK**"].
[11] Peter P. Swire, *Submitted Testimony to the Federal Trade Commission Behavioural Advertising Town Hall* (Oct. 18, 2007), http:/www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/testimony_peterswire/Testimony_peterswire_en.pdf.

patterns of individuals. After Google's acquisition of DoubleClick, the former acquired both, a deep as well as a broad collection of information.

Before a merger such as this, Swire argued, consumers were tracked by only one database, whereas afterwards, they are subjected to a significantly higher level of tracking.[12] Hence, for consumers with 'high privacy preferences', this amassing of 'deep' and 'broad' information leads to a significant reduction in the quality of the product.[13]

Moreover, when data-rich firms merge, they acquire the power to extract more information from users. This happens not only because the newly amalgamated firm possesses more data, but also because this combined data serves as a tool to profile individuals and invade their privacy.[14] Thus, consumers are likely to experience degradation in the quality of goods and services, especially in post-merger scenarios, as a result of newly acquired market power.[15]

Another example of how data privacy violations can lead to a reduction of consumer welfare can be drawn from Amazon.com, Inc., the leading e-commerce platform. In 2000, Amazon utilised information that it already had to predict the highest prices that American customers would be willing or likely to pay for DVDs. This was termed as 'Price Test'. Although

---

[12] Peter Swire, *Protecting Consumers*: *Privacy Matters in Antitrust Analysis*, CTR. FOR AM. PROGRESS (Oct. 19, 2007, 9:00 AM), https://www.americanprogress.org/issues/economy/news/2007/10/19/3564/protecting-consumers-privacy-matters-in-antitrust-analysis/.

[13] Case COMP/M.4731, Google v. DoubleClick, EUR. COMM'N (Mar. 11, 2008).

[14] OECD, *supra* note 5.; MAURICE E. STUCKE & ALLEN P. GRUNES, BIG DATA AND COMPETITION POLICY (2016).

[15] ANDRIYCHUK, *supra* note 10.

it was eventually discarded due to anger among the customers, it presented one of the earliest instances of how digital platforms may facilitate first-degree price discrimination schemes using aggregated data.[16] Such practices reduce the welfare of consumers in a competitive market.[17]

Consumer welfare is not just compromised when firms actively misuse data but is also compromised when firms collect data without any safety regulations in place. Walmart, for instance, interacts with its consumers through both, 'brick-and-mortar' stores as well as its website and app. It is thus able to collect about two and a half petabytes of unstructured data from its 1 million customers, through which it can extrapolate a consumer's age, gender, parenthood, driver's license number, etc.[18]

Similarly, Uber Technologies, Inc. knows the travel pattern of its customer, through which it may be determined where the customer lives, eats, exercises, etc. Smart speakers, like Amazon Echo or Google Home, which are activated with certain 'wake words', keep their listening device active at all times. This has raised various data security issues, such as the possibility that these devices are constantly listening to and storing private conversations.[19] Further, companies like Facebook, Inc. and Google LLC,

---

16 Todd. R. Weiss, *Amazon apologizes for price-testing program that angered customers*, COMPUTERWORLD (Sept. 28, 2000, 1:30 PM), https://www.computerworld.com/article/2588337/amazon-apologizes-for-price-testing-program-that-angered-customers.html.

17 Peter Swire & Lagos Yianni, *Why the Right to Data Portability Likely Reduces Consumer Welfare: Antitrust and Privacy Critique*, 72 MD. L. REV. 335 (2012).

18 Ariel Dobkin, *Information Fiduciaries in Practice: Data Privacy and User Expectations*, 33 BERKELEY TECH. L. J. (2018).

19 Ben Dickson, *Beware the privacy and security risks of smart speakers*, TECHTALKS (June 5, 2018), https://bdtechtalks.com/2018/06/05/google-home-amazon-echo-privacy-security-risks/ [*hereinafter* "**Dickson**"].

collect data from their users and monetise it to target specific consumer groups by selling their advertising spaces.[20]

In what came to be known as the 'Cambridge Analytica Scandal', it was revealed that the company Cambridge Analytica had allegedly mined data of 87 million Facebook users to target campaigns during 2016's US Presidential Election.[21] In his book *People v. Tech*, Jamie Bartlett compared this to the "chipping away of the pillars of democracy and upending of fundamentals of capitalism."[22] Facebook was accused of privacy violations, sharing customer data with Cambridge Analytica, and illegal manipulation of public opinion during the US Presidential Election as well as India's 16th Lok Sabha Elections.[23]

These instances point to the conclusion that user data privacy is vulnerable to breaches in the digital economy and digital democracy. While a lot of this data is collected sans the consent or knowledge of consumers, often consumers are forced to share their data because they have no choice.

---

20 Marc Israel, *The CMA launches a new market study in a bid to keep pace with a fast-moving digital economy*, WHITE & CASE (July 9, 2019), https://www.whitecase.com/publications/alert/cma-launches-new-market-study-bid-keep-pace-fast-moving-digital-economy.

21 Charmy Harikrishnan, *Micro targeting of voters can swing entire elections: Bartlett, who discovered Congress poster in Cambridge Analytica office*, ECONOMIC TIMES, https://economictimes.indiatimes.com/news/politics-and-nation/micro-targeting-of-voters-can-swing-entireelections-bartlett-who-tweeted-congress-ca-poster-pic/articleshow/63659215.cms (last updated Apr. 9, 2018, 3:58 PM).

22 ANDRIYCHUK, *supra* note 10.

23 Neeraj Chauhan, *CBI begins examining Cambridge Analytica data breach scandal*, TIMES OF INDIA (Aug. 3, 2018, 7:50 PM), https://timesofindia.indiatimes.com/india/cbi-begins-examining-cambridge-analytica-data-breach-scandal/articleshow/ 65261565.cms.

In existing data protection frameworks in India and around the world, firms can invade user privacy as long as they disclose it in their terms and conditions. These terms and conditions are generally bulky, incomprehensible, or ambiguous.[24] Consumers are thus left with no choice, making the so-called concept of 'consent' under data protection laws illusory.[25] The only options available to consumers are either to hand over their data or to avoid digital services altogether.

Besides this, multi-service firms in the online market often collect data for a certain purpose but use it for purposes other than those that consumers consented to. For instance, firms often transfer or sell the data of their users to third-parties that have no direct relationship with these consumers. In a research conducted by Privacy International, it was found that over 60% of Android apps, such as Spotify, Duolingo, Trip Advisor, Period Tracker Clue, etc., shared data with Facebook, regardless of whether or not the user had a Facebook account.[26] Similarly, Bounty, a well-known

---

[24] Hal Singer, *Germany's Antitrust Agency Cracks Down On Facebook: But Is Antitrust The Right Tool For The Job?,* FORBES (Mar. 18, 2019, 6:05 AM), https://www.forbes.com/sites/washingtonbytes/2019/03/18/germanyscompetitionagency-cracksdown-on-facebook-but-is-antitrust-therighttoolforthejob/#7388fe02260e.

[25] Eur. Data Prot. Supervisor, *Privacy and competitiveness in the Age of Big Data: The interplay between data protection, competition law and consumer protection in the Digital Economy,* EUR. COMM'N (Mar., 2014), https://edps.europa.eu/sites/edp/files/publication/14-0326_competitition_law_big_data_en.pdf.

[26] Lorraine, *Investigating apps that share personal data to Facebook without user content,* RESPONSIBLE DATA (July 16, 2019), https://responsibledata.io/2019/07/16/investigating-apps-that-share-personal-data-to-facebook-without-user-consent.

provider of pregnancy and parenting packages, sold data of 34.4 million users to a third-party firm, Equifax, without informing its customers.[27]

The fundamental goal of antitrust law is to protect consumers from exploitative anti-competitive behaviour and unfair transfer of their wealth to firms with market power.[28] The Indian competition law, in particular, ensures healthy competition in the market by setting 'rules of the game' that protect the competition process itself, rather than competitors in the market. This, in turn, leads to economic efficiency, economic growth, and development of consumer welfare.[29] Thus protecting the interests of consumers by safeguarding their data privacy is essential objective of antitrust laws.

B. THE IMPACT ON NON-DOMINANT MARKET PLAYERS

Along with consumers, non-dominant market players also face multifaceted concerns arising out of data collection and mining. For such firms, it's essentially a non-starter to begin collecting their data.[30] Moreover, when dominant firms analyse and mine consumer data, it tends to take the shape of 'unique' and 'non-replicable' data.[31] Since this unique data is only available to some firms, it becomes an antitrust concern. Besides, antitrust

---

27 Ben Wolford, *Data sharing and GDPR Compliance: Bounty UK shows what not to do*, GDPR, https://gdpr.eu/data-sharing-bounty-fine/ (last visited Feb. 29, 2020).

28 Jack Kirkwood, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191 (2008).

29 Excel Crop Care Limited v. Competition Commission of India, AIR 2017 SC 2734 (India).

30 Becky Chao, *Where Does Antitrust Law Fit in When Consumer Privacy Is at Stake?,* PAC. STANDARD (Feb. 28, 2019), https://psmag.com/social-justice/can-antitrust-laws-help-keep-your-data-private.

31 Jay Modrall, *Antitrust Risks and Big Data*, SSRN PAPERS (June 1, 2017), https://papers.ssrn.com /sol3/papers.cfm?abstract_id=3059598.

authorities are concerned that the need for a large volume or variety of data may result in 'entry barriers' for new entrants and small companies that are unable to collect or buy access to the kind of data that is available to established companies.

Thus, the impact of data collection on non-dominant market players emerge in three scenarios – *first*, during mergers and acquisition; *second*, exclusion of competitors by depriving access to data; and *third*, by exercising market power.

i. Mergers and Acquisitions

Mergers and acquisitions strengthen the dominance of existing market players. When data-rich companies merge, they become 'data richer', and acquire new data sets. This becomes a primary source of a competitive advantage which impacts smaller, non-dominant businesses that do not have equal access to data.

During the Microsoft-LinkedIn merger and the Google-DoubleClick merger, the European Commission (*hereinafter* referred to as "**EC**") and the Federal Trade Commission (*hereinafter* referred to as "**FTC**"), respectively, made a common observation that consumer privacy forms a non-price attribute of competition and it may be adversely affected during a merger.[32]

[32] Dickson*, supra* note 19.

While assessing the Microsoft-LinkedIn merger,[33] the EC noted how the integration of LinkedIn with Outlook.com would lead to a significant expansion of its user database, which could, in turn, negatively affect competition in the market. The EC observed that, as a result of the merger, there would be a two-fold reduction in the choices available to consumers. Firstly, new service providers would struggle to enter the market; and secondly, professional social networks, such as Xing, Viadeo, and GoldenLine, that not only act as competitors but also have better privacy policies, will become marginalised and foreclosed.[34]

An identical consideration arose in the case of UK-Everywhere Everything,[35] where the question that was to be examined was whether the proposed joint venture would lead to the creation of a unique database, which would become an essential input for targeted mobile advertising that no competitor would be able to replicate. Likewise, during the Microsoft-Yahoo! Merger,[36] and the Tomtom-Tele Atlas merger,[37] certain considerations regarding efficiency arose, such as whether the merger would allow the company to perform better because of their newly acquired databases.

---

[33] Press Release, Mergers: Commission approves acquisition of LinkedIn by Microsoft, subject to conditions (Dec. 6, 2016) (on file with European Commission), https://ec.europa.eu/commission/presscorner/detail/en/IP_16_4284.
[34] Case M.8124, Microsoft v. LinkedIn, EUR. COMM'N (Dec. 06, 2016).
[35] Case COMP/M. 6314- Telefónica UK v. Vodafone UK/ Everything Everywhere / JV, EUR. COMM'N (Sept. 4, 2012).
[36] Case COMP/M.5727, Microsoft v. Yahoo! Search Business, EUR. COMM'N (Feb. 2, 2010).
[37] Case COMP/M.4854, TomTom v. Tele Atlas, EUR. COMM'N (Oct. 21, 2008).

The Facebook-WhatsApp merger is also worthy of examination.[38] Before the companies merged, their data was separate and compartmentalised. However, after the merger took place, WhatsApp changed its privacy policy, which allowed it to share the data of its users with Facebook.[39] Interestingly, in the mid-2000s, Facebook, a new social media, differentiated from the then market leader MySpace by publicly pledging to privacy. However, with the demise of other social media platforms and the acquisition of Instagram and WhatsApp, Facebook's competition began to disappear. Thereafter, Facebook revoked its erstwhile privacy policy – which allowed its users to vote in case of any change to the privacy policy – and formulated a new one through which Facebook can track user activity across 8 million-plus websites without any option to opt-out. Even if users choose to leave, they would continue to be subjected to surveillance. All these measures strengthened the dominance of Facebook in the market.[40]

Subsequently, a complaint alleging that Facebook had been carrying 'unfair and deceptive' practices by changing its privacy policies and thereby compromising user data privacy was filed.[41] The EC levied a fine of 110

---

[38] Dickson*, supra* note 19.

[39] Anthony Cuthbertson, *Facebook to merge Instagram, WhatsApp and Messenger,* THE INDEPENDENT (Jan. 25, 2019, 3:39 PM), https://www.independent.co.uk/life-style/gadgets-and-tech/news/facebook-instagram-whatsapp-messenger-merge-explained-a8746551.html

[40] Dina Srinivasan, *Why Privacy is An Antitrust Issue*, NEW YORK TIMES, (May 28, 2019), https://www.nytimes.com/2019/05/28/opinion/privacy-antitrust-facebook.html [*hereinafter* "**Srinivasan**"].

[41] Gaspard Sebag, Aoife White & Stephanie Bodoni, *Facebook fined $122 million over WhatsApp deal for misleading EU,* LIVEMINT (May 18, 2017, 2:54 PM), https://www.live

million Euros on Facebook for providing 'misleading information' about the WhatsApp takeover.[42] It was noted that post-merger, Facebook had changed its privacy policy and this allowed it to draw user data from other platforms like Instagram and WhatsApp and was thereby responsible for misleading the Commission by disclosing inadequate information.

Another interesting aspect of this merger, as noted by the Catalan Competition Authority, was that even though post-merger there was a decrease in the number of users, this would not render WhatsApp as unprofitable. In the absence of price, there is no benchmark which helps in assessing how many users should leave WhatsApp to render it unprofitable or pressurise it into changing its policies. Moreover, advertisements generate enough revenue to cover all such potential losses. Thus, in a digital economy, such data-rich firms are capable of rendering services free of cost.

During such mergers, antitrust authorities engage in a 'harm versus benefit' analysis to decide whether or not the merger should be permitted. Authorities assess the advantages that the new entity would reap because of the new combination of different data sets that it would come to possess. This analysis is done in light of the foreclosure of competition in the market.

mint.com/Companies/ejCEXcPyBP9jS72aIyCreL/Facebook-fined-122-millionoverWhatsAppdeal-for-misleadin.html.

[42] Press Release, Mergers: Commission fines Facebook 110 million Euros for providing misleading information about WhatsApp takeover (May 18, 2017) (on file with European Commission), http://europa.eu/rapid/press-release_IP-17-1369_en.htm.

During the assessment of the Facebook-WhatsApp merger,[43] the EC recognised consumer privacy as potential harm but failed to incorporate it as an essential parameter. It merely observed that any privacy concerns flowing from this merger cannot fall within the purview of EU antitrust laws. This approach, however, warrants re-examination.

When two data-rich companies hold a strong position in the market, their combination might lead to foreclosure of competition. Furthermore, the main 'point of contact' between firms and the government where a combined approach can be fostered is during merger assessments.[44] The question of privacy becomes relevant in such cases because mergers might lead to a gain in market power and this might lead to degradation in privacy. Moreover, as discussed above in the analysis of how privacy violations impact consumers, reduced data protection is closely associated with reduced quality of services.[45]

Thus, even if the inherent nature of antitrust laws and data protection laws are different from each other, privacy protection should not be excluded from the ambit of antitrust analysis. Segregating data privacy from competition law based on their separate nature should not be a viable option.

---

43 Case COMP/M.7217, Facebook v. WhatsApp, EUR. COMM'N (Oct. 10, 2014).
44 Srinivasan, *supra* note 40.
45 *Id.*

ii. Exclusion of Competitors by Depriving Access to Data

When firms become 'data-rich', it is often accompanied by the exclusion of non-dominant market players from the market on account of their inability to access the rich volume of data that dominant firms possess.

According to the EC, when dominant firms refuse to grant access to such data to competitors, it does not *per se* become an anti-competitive practice. However, when the data in question is essential for competitors, refusal by the dominant firm may be viewed as an anti-competitive practice. In such cases, the competitor needs to demonstrate that the data in question is unique and that there are no other means of achieving access to the data that it desires.[46]

Refusal to grant access to data could also attract antitrust action if it is discriminatory.[47] An example may be drawn from the Cegedim case decided by the French Supreme Court.[48] The facts of this case revolve around the firm Cegedim SA which had acquired a dominant position in the market by supplying healthcare software solutions and computer services to pharmacies. On a complaint filed by 'Euris', a company specializing in customer relationship management software (*hereinafter* referred to as "**CRM**"), it was found that while Cegedim sold its CRM medical database to pharmacies that used its own or competing

---

[46] AUTORITE DE LA CONCURRENCE AND BUNDESKARTELLAMT, *Competition Law and Data*, (May 10, 2016), https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?blob=publicationFile&v=2.

[47] *Id.*

[48] AUTORITÉ DE LA CONCURRENCE, *8 July 2014: Health/Medical information databases*, (July 10, 2014), https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/8-july-2014-health-medical-information-databases.

management software, it denied selling it to pharmaceutical labs intending to use Euris' CRM.[49] Due to this, Euris lost about 70% of its CRM software customers between 2008 and 2012. The French Competition Authority's ("**FCA**") decided to impose a 5.7 million Euro fine on Cegedim on the grounds of it being 'unjustified discriminatory behaviour',[50] and the same was upheld by the French Supreme Court.

Often, dominant firms may have access to such data analytics that they can efficiently analyse the patterns and preferences of their users and subsequently target them with tailored advertising. This ends up providing them with a competitive advantage because competing suppliers cannot match the access to, and analysis of, data that dominant firms are capable of having.[51]

During its decision in the case concerning practices by the France Télécom, SFR, Cegetel, and Bouygues Télécom, the FCA issued an opinion on the issue of cross usage of client databases, i.e., cross-selling and its anti-competitive implications.[52] Bouygues Telecom and SFR, two major players in the French telecom market, launched 'quad-play services.' Given its success, France Telecom-Orange, the principal player in the market, also announced its decision to launch a 'quad-play service.' Accordingly, the

---

[49] Florence Ninane & Patricia Carmona Botana (Allen & Overy LLP), *French Supreme Court confirms discriminatory abuse in market of medical information databases for pharmaceutical companies*, LEXOLOGY (Aug. 21, 2017), https://www.lexology.com/library/detail.aspx?g=84b23a3c-41f1-4f5d-b55f-e8ee48089bb7.
[50] Organisation for Economic Co-operation and Development [OECD], *Considering Non-Price Effects in Merger Control - Background Note by the Secretariat*, DAF/COMP(2018)2 (June 6, 2018), https://one.oecd.org/document/DA F/COMP(2018)2/en/pdf.
[51] *Id.*
[52] Decision No. 04-D-48, French Competition Authority (2004).

FCA opined that cross usage of client database is possible by Orange and this may have foreclosing effects.[53]

iii. Market Power

The control of data with a few dominant firms can also become a source of market power. Two factors determine whether this market power is anticompetitive—(i) the scarcity of data and (ii) the relevance of data to competitive performance.[54] Based on these parameters, whether or not entry barriers exist in the market is decided on a case to case basis.

When the Bazaarvoice-PowerReviews merger[55] was proposed,[56] the Court found that BazaarVoice and PowerReviews were the only significant competitors in the market of rating and review platforms. Thus, this merger was viewed as anti-competitive since it would vest such market power with the newly merged entity that entry barriers would be created for other firms.[57]

---

53 Diarmuid Ryan & Tom S. Pick (Squire Patton Boggs), *French Competition Authority opinion on database cross-selling*, LEXOLOGY (June 30, 2010), https://www.lexology.com/library/detail.aspx?g=ef5609e3-5729-4620-8f6fbd1b748a1a30.

54 Case COMP/M.5727, Microsoft v. Yahoo! Search Business, EUR. COMM'N (Feb. 2, 2010).

55 *Justice Department Files Antitrust Law Suit Against BazaarVoice Inc. Regarding the Company's Acquisition of Power Reviews Inc.*, U.S. DEP'T OF JUSTICE (Jan. 10, 2013), https://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-against-bazaarvoice-inc-regarding-company-s.

56 United States v. Bazaarvoice, Inc., 13-cv-00133-WHO, N.D. Cal. Civ. R. 1-1, (2014).

57 Laura Wilkinson & D. Jane Cooper, *DOJ's Successful Challenge Of Bazaarvoice's Acquisition: A Reminder That Consummated Deals Are Not Immune From Section 7 Scrutiny*, CORP. COUNS. BUS. J. (Feb. 20, 2014), https://ccbjournal.com/articles/dojs-successful-challenge-bazaarvoices-acquisition-reminder-consummated-deals-are-no.

IV. TRACING THE LIMITATIONS OF ANTITRUST IN REGULATING DATA PROTECTION

It can be reasonably deduced from the examples discussed hereinabove that the lack of policies addressing data privacy issues within the folds of antitrust law is a growing matter of concern. Without such policies in place, the question of accountability looms large. Who is accountable for the protection of the vast amount of personal data that is stored with firms? How vulnerable are consumers to threats of data breaches, discrimination, information manipulation, etc.?

Privacy, being a non-price effect of competition, is often ambiguous and fact-dependent. It is difficult to quantify the amount of privacy violation that has occurred and the amount of reduction in the quality of services as a result. Further, there is a lack of consensus in defining 'privacy harms' since an antitrust injury might not always transpire out of a merger founded on data monopolisation.[58]

On the other hand, other non-price competition effects, like innovation, may arise due to the availability of new data. This may lead to new and better business models. Thus, innovation in the digital economy may be tarred with the "reduced privacy" epithet if an innovation utilises consumer data. There may be situations where these two non-price effects arise simultaneously during the assessment of agglomeration.[59]

---

[58] Geoffrey A. Manne & R. Ben Sperry, *The Law and Economics of Data and Privacy in the Antitrust Analysis*, SSRN PAPERS (2014), https://papers.ssrn.com/sol3/papers.cfm?abstractid=2418779.
[59] *Id.*

According to a report by the Organisation for Economic Co-operation and Development (*hereinafter* referred to as "**OECD**"), when privacy is considered from the perspective of consumer welfare, it involves an analysis of various behavioural issues.[60] For instance, consumers may either display a lack of ability to monitor whether firms are living up to their data protection commitments, or display "excessive pessimism" concerning the degree of privacy protection which they may extract from firms.[61] It is also a concern that, because of the reasons aforementioned, the inclusion of privacy during merger assessments might lead to 'subjectivity' in the process as there may be different dimensions of consumer preference concerning privacy.[62] Furthermore, blocking a merger on the grounds of privacy protection might not necessarily be effective because data sets can be combined regardless through third-party data brokers.[63] Thus, the inclusion of data privacy within antitrust analysis comes with its challenges and dilemmas.

These dilemmas have been subject to varied considerations by competition authorities in different jurisdictions.

In the European Union (*hereinafter* referred to as "**EU**"), for instance, the antitrust analysis goes beyond pricing-models and takes into account five parameters of competition – price, output, quality, choice, and innovation. The stance of the EU is that the data of customers may often

---

[60] Case COMP/M.5727, Microsoft v. Yahoo! Search Business, EUR. COMM'N (Feb. 2, 2010).
[61] *Id.*
[62] *Id.*
[63] *Id.*

be used by businesses for their ends, and this may result in reduced quality of services offered to consumers. When such reduction is a result of a merger or is rooted in an abuse of dominant position, it falls within the purview of antitrust regulations. The EU relied on non-price parameters in various merger cases such as Microsoft-Skype, Facebook-WhatsApp, and Microsoft-LinkedIn.[64] The EU has also enacted the General Data Protection Regulation (*hereinafter* referred to as "**GDPR**") to secure consumer welfare.

The United States, on the other hand, distinguishes between consumer welfare regulations and antitrust laws. Antitrust regulations are applied judiciously. Unless firms enter into agreements or conduct themselves in any other manner that may restrain or harm competition via price or non-price dimensions, their practices are not considered as antitrust violations. Concerns arising out of privacy violations, deceptive advertisements, and reduction in quality of services are considered to be matters within the purview of consumer protection regulations.[65]

The recent decision by Germany's national competition regulator, Bundeskartellamt, in the Facebook case is an example of how user data privacy can be brought within the ambit of antitrust analysis to ensure consumer welfare. In this case, it was found that user data was flowing from websites to Facebook, even when no Facebook symbol was visible on such

---

[64] Organisation for Economic Co-operation and Development [OECD], *Quality Considerations in Zero Price Economy-Summaries of Contribution*, DAF/COMP/WD(2018)147 (Nov. 28, 2018), https://one.oecd.org/document/DAF/ COMP/WD(2018)147/en/pdf.
[65] *Id.*

a website. Moreover, website operators were found to be using 'Facebook Analytics' to carry out user analytics. The Bundeskartellamt recognised that Facebook was abusing its dominant position. Its behaviour was deemed as exploitative because of how its users lost control of how their data was being used.[66] The Regulator held that Facebook-owned services, like Instagram and WhatsApp, can continue to collect data, subject to the fact that users consent to it. User consent was also made compulsory while collecting data from third party websites and assigning them to a Facebook account.[67]

V. THE INDIAN SCENARIO: THE PRIVACY-ANTITRUST CONUNDRUM

The 'digital economy' phenomenon has arrived in India as well. India has recently witnessed a sharp spike in the number of national and multi-national tech and e-commerce giants in the country. These firms have introduced business models that employ Big Data Analytics and data mining to optimise the experience of users. While this has enhanced convenience and contributed to the ease of doing business, it has also intensified privacy and anti-competitive concerns.

These concerns were recently highlighted in the Indian context when the multinational retail corporation, Walmart, acquired a 77% stake in the Indian e-commerce company, Flipkart Pvt. Ltd. The Confederation of All India Traders raised concerns regarding the data security and privacy

[66] *Id.*
[67] *Bundeskartellamt prohibits Facebook from combining user data from different sources*, BUNDESKARTELLAMT (Feb. 7, 2019), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html.

of Indian online shoppers since they would now be subject to a cross-border flow after Flipkart relinquishes its data to Walmart post-merger.[68] Although this issue was not raised before the Competition Commission of India (*hereinafter* referred to as "**CCI**"),[69] it did initiate the conversation of whether privacy concerns need to be assessed as antitrust issues in India.

The need for 'data privacy' and the 'right to privacy' are gradually gaining recognition by both, the Indian parliament and the Indian judiciary. In 2018, the Supreme Court of India declared 'privacy' as a Fundamental Right.[70] In December 2019, the Minister of Electronics and Information Technology introduced the Personal Data Protection Bill in the Lok Sabha. The Bill seeks to protect individual personal data by setting up consent as a central requirement for data sharing. It further empowers individuals to obtain, erase, update, or prevent the disclosure of their data. The Bill also proposes to establish a Data Protection Authority which will be entrusted with the tasks of protecting individual interest by preventing misuse of personal data. Further, it provides punishment for the processing or transferring of personal data in violation of the Bill and also punishes the re-identification of personal data without the consent of users.

---

[68] Sameer Ranjan, *With Walmart-Flipkart deal e-commerce sector to witness increase in cross-border data transfer*, YOURSTORY (May 14, 2018), https://yourstory.com/2018/05/walmart-flipkart-deal-indian-ecommerce-sector-witness-increase-cross-border-data-transfer.

[69] *Notice under S. 6(2) of the Competition Act filed by Wal-Mart International Holdings Inc. Combination Registration Number C-2018/05/571*, COMPETITION COMMISSION OF INDIA (Aug. 8, 2018), https://www.cci.gov.in/sites/default/files/Notice_order_document/Walmart%20PDF.pdf.

[70] Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1 (India).

The Competition Commission of India can be instrumental in inculcating this right to data privacy within the folds of antitrust laws. The CCI has, in the past, recognized the concept of 'special responsibility', which is the responsibility of dominant firms to not impair competition in the market.

In the case of *Matrimony.com Ltd. and Ors. v. Google LLC*,[71] the CCI observed how dominant firms have a special responsibility, especially in online marketplaces, to ensure fairness. Although fairness was explained in the context of not restricting competition in the market, it can be given a wider interpretation to include protection of user data privacy and strengthen its internal mechanism to safeguard against breach of personal data.

However, the CCI has shown hesitation on aspects related to the merger of data privacy laws and competition laws. In *Shri Vinod Kumar Gupta v. WhatsApp Inc.*,[72] the CCI observed how any breach of privacy policies under the Information Technology Act, 2000 does not fall under the purview of Competition Act, 2002, thus indicating its reluctance towards merging the two areas. Recently, in July 2019, the CCI announced that it would conduct a market survey to look into digital anti-competitive practices. However, it has made no indication as to whether or not it would

---

[71] Matrimony.com Ltd. v. Google LLC, 2018 Comp LR 101 (India).
[72] Shri. Vinod Kumar Gupta v. WhatsApp Inc., 2017 Comp LR 495 (India).

include consumer data privacy as one of the parameters to determine competition.[73]

Needless to say, as market dynamics evolve, so must antitrust analysis. There is a need to overhaul the Competition Act, 2002 and re-define what anti-competitive practices should include. The Competition Act is a part of the second-generation economic reform that aimed to provide a comprehensive set of guidelines for the prohibition of horizontal and vertical anti-competitive agreements, the abuse of dominant position, and the regulation of combinations which cause or are likely to cause an appreciable adverse effect on competition.[74]

At present, the Competition Act does not allow for the convergence of competition and privacy. Hence, an amendment in the legislation is strongly suggested for meeting the goal of consumer welfare. There is a need to introduce statutory guidelines that explicitly introduce data privacy and unfair concentration of consumer data as parameters of analysing whether or not a merger would be anti-competitive. Such an amendment, coupled with penal measures to enforce it, would help in safeguarding consumer data and protecting it from misuse.

Moreover, modifications are required in the approach taken by the CCI. When the CCI is to evaluate if an agreement would have an

---

[73] Mihir Dalal, *Internet monopolies: India's trust deficit*, LIVEMINT (July 10, 2019, 11:41 PM), https://www.livemint.com/technology/tech-news/internet-monopolies-india-s-trust-deficit-1562781421036.html.

[74] B.S. Chauhan, *Indian Competition Law: Global Context*, 54(3) J. OF INDIAN L. INST. 315 (July, 2012).

appreciable effect on competition, it should factor in the role that access to personal data plays in creating entry barriers, driving out existing competitors, foreclosing competition, and providing a competitive advantage by empowering data-rich firms to provide improved services to consumers. It should also be careful in approving of combinations concerning data-rich firms since combinations like these have the potential of becoming anti-competitive as discussed.

Even though the harmonisation of these different-natured concerns – of data privacy and competition – has not been the priority of either the CCI or the Supreme Court of India, it is inevitable that they converge sooner or later since 'consumer welfare' continues to be the ultimate objective of both these areas.[75] Without addressing data privacy concerns within the purview of competition law, the goal of consumer welfare cannot be met.

VI. THE ROADMAP OF INCLUDING PRIVACY AS AN ANTITRUST CONCERN

It is undisputed that a healthy, welfare-oriented market requires the existence of free and fair competition. Antitrust policies thus need to ensure that a level-playing field is created for all market players. In furtherance of this goal, we suggest certain approaches that antitrust authorities, as well as business firms, can adopt in order to ensure that consumer welfare and market competition do not suffer.

[75] *Consumer Protection and Competition Policy*, The Eleventh Five Year Plan, (Dec. 24, 2019), http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11_v1/11v1_ch11. pdf.

A. USING PRIVACY AS A COMPETITIVE ADVANTAGE

In his support for the federal privacy legislation, Tim Cook, the CEO of the tech giant Apple Inc., stated that "innovation, breakthrough ideas, and great features can go hand in hand with privacy—and they must."[76] This, we believe, is the kind of approach required to find solutions for the concerns that have been discussed so far.

As has been analysed in the preceding sections, the importance of data privacy and ethics has gained global momentum in recent years. There is increased awareness among consumers regarding the impact of privacy violations and the rights that they have to that effect.[77] Across the globe, consumers are now seeking greater accountability. Thus, it is now time for firms to discard the 'race to the bottom' where they acquire data at the cost of consumer privacy in order to gain market power.

Instead of tech firms fostering a trend of 'race to the bottom' of privacy standards by establishing dominance and lack of choice in terms of data privacy for consumers, a 'race to the top' of privacy standards should be followed. There is a need for dominant firms to attach a sense of 'special responsibility' towards privacy and to view 'privacy' as a competitive advantage.

---

[76] Tim Cook, *You Deserve Privacy Online. Here's How You Could Actually Get It*, TIME (2019), https://time.com/collection/davos-2019/5502591/tim-cook-data-privacy/.
[77] Kelly D. Martin, Abhishek Borah & Robert W. Palmatier, *Research: A Strong Privacy Policy Can Save Your Company Millions*, HARV. BUS. REV. (Feb. 15, 2018), https://hbr.org/2018/02/research-a-strong-privacy-policy-can-save-your-company-millions.

B. DEMARCATING THE ROLES OF CONSUMER PROTECTION LAWS AND ANTITRUST LAWS

As has been done by countries such as the United States of America, a distinction between privacy-related issues which can be handled by competition law, from privacy-issues which can be addressed by specific data protection law, must be drawn.

Privacy is subjective, contextual, and has commercial value, i.e. consumer data is an important commercial good for digital platforms.[78] Thus, antitrust enforcement may try and ensure that it does not interfere in cases where there is no loss of efficiency arising out of the acquisition of consumer data.[79] In such situations, consumer or data protection laws can offer suitable remedies. Besides this, antitrust laws can focus on broader macroeconomic harms and consumer protection and data privacy laws can restrict themselves to specific contractual bargains.[80]

C. 'COMPARE AND FORGET'

Another approach that may be adopted to address the inclusion of data privacy in competition law could be that of "compare and forget", as was suggested by the Dutch Data Protection Authority. This was suggested in the context of service providers like WhatsApp being allowed short term

---

[78] Maureen K. Ohlhausen & Alexander P. Okuliar, Competition, *Consumer Protection and The Right Approach to Privacy*, 80 ANTITRUST L. J. 1 (2015).
[79] *Id.*
[80] *Id.*

access to the full address book of a user to help the user identify which of their contacts were already WhatsApp users.[81]

D. OTHER APPROACHES

Authorities may also consider other approaches, such as formulating and implementing strict rules to ensure minimal data retention. They may also enact policies that empower individuals to withdraw their data from databases without threats of surveillance and the like. Furthermore, with regards to issues about subjectivity of privacy concerns of consumers, surveys may be conducted to gauge the importance of privacy protection to the consumers.[82]

VII. CONCLUSION

User data, which is highly treasured by firms, have antitrust implications when the data is used in a manner that violates user privacy or creates entry barriers for non-dominant firms in the market. In light of this concern, this article has demonstrated how the introduction of user data privacy within the ambit of antitrust analysis will strengthen consumer welfare without encroaching upon the aims and objectives of specialised data protection laws.

We have also analysed in this article how certain limitations exist in the pre-existing laws relating to antitrust, consumer protection, and data

---

[81] Case COMP/M.5727, Microsoft v. Yahoo! Search Business, EUR. COMM'N (Feb. 2, 2010).
[82] *Id.*

privacy. Furthermore, it may be difficult for all these fields to converge since 'privacy' is often ambiguous and fact-dependent, thus being subjective. Nevertheless, this obstacle should not stop authorities from pushing for the inclusion of data privacy as a non-price parameter of assessing competition in the market.

This article has also discussed at length how, in the status quo, there is a growing awareness among consumers regarding the vulnerable position of their data and rights. To address this, we have suggested that authorities and firms can make efforts to turn consumer data into a competitive advantage instead of a disadvantage by focusing on privacy-friendly policies.

In conclusion, we believe that until and unless an inclusive and holistic analysis of antitrust and consumer data is done, the free market shall continue to suffer and both, consumers and competitors, will not benefit from the true object of antitrust laws. After all, as was said by Charles James, the eminent antitrust attorney, "the standard formulation on remedy is that it ought to cure past violations and prevent their recurrence since that is what antitrust is all about."

Shama Mahajan, *Patent Pooling and Anti-Competitive Agreements: A Nascent dichotomy of IPR and Competition Regime,* 6(2) NLUJ Law Review 35 (2020)

PATENT POOLING AND ANTI-COMPETITIVE AGREEMENTS: A NASCENT DICHOTOMY OF IPR AND COMPETITION REGIME

SHAMA MAHAJAN[+]

ABSTRACT

*Intellectual Property Rights (hereinafter referred to as **"IPR"**) are known to encourage and create a system of monopoly in the market while competition laws aim to discourage the same. The question is, do competition laws discourage monopoly per se or do they aim at regulating monopoly when it ventures beyond the permissible field, demarcated for its operation? It is important to understand that IPR and Competition law aim to achieve wealth-maximization in an economy. Therefore, it would be erroneous to say that there is a constant tussle between the two. The interface of IPR and Competition law is indeed at a nascent stage as far as India is concerned. In this paper, the primary focus is on analysing when patent pooling agreements qualify to be termed as anti-competitive agreements and further how the threshold of this qualification is determined. It provides a comparative study of the position prevalent in the United States of America and the European Union as far as patent pooling agreements and their anti-competitive effects are concerned. It also analyses the validity of conflation of §§3 and 4 of the Competition Act, 2002 for determining the anti-competitive effect of patent pooling agreements and*

[+] The author is a fourth-year student at Symbiosis Law School, Pune and may be contacted at **shamam2412[attherate]gmail[dot]com.**

the efficaciousness of 'The Essential Facilities Doctrine' as a test for qualification of a patent pooling agreement as anti-competitive under §3 of the Competition Act, 2002.

TABLE OF CONTENTS

I. INTRODUCTION

Before delving into the question of patent pooling agreements it is imperative to have clarity on the objectives of the two legal regimes, i.e., Competition Law and IP Law, which are always considered to be at loggerheads. The aim of Competition Law is to create and enforce regulatory policies in the economy which allow it to prosper, by ensuring fair competition in the market. It does not aim to hinder growth of the society or prevent any market player from gaining profits, rather it provides an equal opportunity to all, to earn profits by discouraging concentration of power and profit in the hands of a few.

IP Laws on the other hand aims to provide incentive for the innovators recognizing their efforts and money spent in innovation by providing for restrictive monopolies. The argument that IP Laws encourage monopoly therefore contravening the objectives of Competition Law, fails in its inception as, the premise that 'Competition Law prohibits monopoly' is a misnomer. The co-existence[83] of these seemingly contradictory branches of law was recognised by the US Supreme Court in 1948 where it ruled that, monopoly created by a patent, when operates beyond such limits, the provisions of Sherman Act, 1890 are attracted.[84] Therefore, it is settled that Competition law governs and discourages monopoly when it tends to become anti-competitive. Every monopoly cannot be treated as anti-competitive.

---

[83] Atari Games Corp v. Nintendo of America Inc. 897 F.2d 1572, 1576 (Fed Cir 1990).
[84] United States v. Line Material Co., 333 U.S. 287, 308, 76 U.S.P.Q. (BNA) 399, 408 (1948).

Now that some basic misnomers stand cleared, it is important to have conceptual clarity on patent pooling. 'A patent pool is an arrangement by which two or more patent holders put their patents together and in return receive a license to use them.'[85] The United States Patent Office (USPTO) defines a patent pool as "an agreement between two or more patent owners to license one or more of their patents to another third party or parties." Patent pools have been given the credit for navigating the way through patent thicket and were used to clear patent blockings, cease patent hostilities and create market division among horizontal competitors.[86] As much as it encourages competition and innovation, patent pooling can also instigate anti-competitive behavior as, any cooperation among competitors, also involves an inherent risk of collusive behavior and may be regarded as a cartel. There may be competition-related concerns regarding the licensing practices and restrictions they entail.[87] The so-called 'patent thickets' i.e., [overlapping patent rights controlled by rights holders that require innovators to reach licensing deals for multiple patents from multiple sources],[88] can lead to increased transaction costs thereby to chilling effects on the development of new products.[89] It is due to this, that patent pooling agreements, attract the provision of §3 of the Competition Act, 2002.

---

85 VAUGHAN, FLOYD L. THE UNITED STATES PATENT SYSTEM: LEGAL AND ECONOMIC CONFLICTS IN AMERICAN PATENT HISTORY, 39, 40 (Oklahoma 1st ed. 1956).

86 Ashutosh Sinha, *Patent Pools*, IRUNWAY (Feb 2, 2020) https://www.i-runway.com/images/pdf/Patents%20Pools.pdf.

87 Secretariat WIPO, *Patent Pools and Antitrust-A Comparative Analysis*, WIPO, (Feb 2, 2020), https://www.wipo.int/export/sites/www/ip-competition/en/studies/patent_pools_report.pdf [*hereinafter* "**Secretariat WIPO**"].

88 IAN HARGREAVES, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH, 18 (2011).

89 Secretariat WIPO, *supra* note 87.

§3 of the Competition Act, 2002 prohibits any agreement which causes or is likely to cause appreciable adverse effects on competition in the Indian market. §4 on the other hand prohibits unilateral conduct of a dominant undertaking that amounts to abuse of its dominance. However, there is hardly any guidance available on the manner in which the provisions are to be interpreted and administered. The Competition Commission of India (*hereinafter* referred to as "**CCI**") in its decision-making has relied on static analysis focusing on price and output which is popular among economists and competition analysts.[90] These legal standards are informed by economics and as economics evolves the law ought to evolve with it.[91] The next section highlights the inconsistent approach of the CCI as far as §§3 and 4 of the Competition Act, 2002 are concerned and the need for maintaining the distinction between the two from IPR perspective.

II. §§3 & 4 OF COMPETITION ACT: RISING ABOVE THE ERRONEOUS CONCEPTUAL APPROACH

§4 prohibits abuse of dominant position in the market and hence, entails an analysis of the relevant market to determine, whether a firm is a dominant player in the market, so as to prevent it from engaging in exclusionary and exploitative practices, which would otherwise be permissible to a non-dominant player.[92] While §3 provides a non-exhaustive

---

[90] Yogesh Pai & Nitesh Daryanani, *Patents and Competition Law in India: CCI's Reductionist Approach in Evaluating Competitive Harm*, J. OF ANTITRUST ENFORCEMENT, 299, 303 (2017) [*hereinafter* "**Yogesh Pai**"].
[91] Robert D Atkinson and David B Audretsch, *Economic Doctrines and Approaches to Antitrust*, RESEARCH PAPER SERIES NO 2011-01-02, INDIANA UNIVERSITY-BLOOMINGTON: SCHOOL OF PUBLIC & ENVTL. AFFAIRS (2011).
[92] Nederlandsche Banden-Industrie Michelin (Michelin) v. Commission, ECR 3461 (1983).

list of agreements, which can qualify as anti-competitive due to their appreciable adverse effect on competition which also requires that, its application is done on the basis of factors that include exclusionary effects such as creation of entry barriers, market foreclosure, etc. enumerated §19(3) of the Act.

The problem arises with the approach of the CCI while dealing with these primarily different sections and their conjunction. A combined reading of §3(1) of the Competition Act, 2002, modelled on Article 101(1) of the Treaty on Functioning of European Union (*hereinafter* referred to as "**TFEU**"), with §2(b) of the act which defines an 'agreement', paves a logical path for concluding that, §3 can be applied only when it can be proven that two or more parties have acted in collusion or concert, and cause or are likely to cause an appreciable adverse effect on competition in India. In the light of this understanding let us now critically analyze the CCI's approach towards certain land mark cases and compare the same with EU and USA's stance on such similar issues.

A. CCI'S APPROACH IN INDIA

In *Department of Agriculture, Cooperation & Farmer's Welfare v. M/s Mahyco Monsanto Biotech India Ltd.*,[93] the CCI held that the agreements entered into by Mahyco Monsanto Biotech India Ltd. with its sub-licensees, with regards to its Bt Cotton Technology, was considered to have appreciable adverse effect on competition of 'Bt Cotton technology market' and the conditions imposed through the agreement on termination were

[93] Department of Agriculture, Cooperation & Farmer's Welfare v. M/s Mahyco Monsanto Biotech India Ltd., Order dated 10 February 2016 in Reference Case No 2 of 2015.

also harsh and thus beyond the realm of protection guaranteed under IP Laws as envisaged under §3(5) of the Act.

The factual circumstance however indicates that application of §3 in this circumstance was erroneous. In this case the Monsanto group through its sub-license agreements whereby Bt Cotton technology patents are sub-licensed to the seed manufacturing companies in India was charging unfair trait value; limiting scientific development elating to Bt Cotton Technology and Bt cotton seeds and also imposed unreasonable termination conditions. All of its activities amounted to unilateral abuse of its dominant position in the market whereby it forced the seed manufacturers to bow down to its will.[94] There lacks any agreement or consensus governed by free will between the seed manufacturers and Monsanto for it to qualify as an agreement as per §2(b) of the Competition Act, 2002 for application of §3.

B. EC JURISPRUDENCE

The European jurisprudence emphasizes on the distinction, as far as anti-competitive agreements and abuse of dominant position is concerned. In *Bayer AG/Adalat*,[95] when the EC held that reduction of supplies by Bayer to its wholesalers in France and Spain, with the objective of maintaining its price strategy and parallel exports prevention to the UK, was an anti-competitive agreement between Bayer and the wholesalers, amounting to violation of Article 85(1) of the EC Treaty which is now Article 101(1) of TFEU, the General Court reversed this decision. The

---

94 Yogesh Pai, *supra* note 90.
95 Bayer AG/Adalat, OJ L201/1 (1996).

Court has laid down the fundamental basis of distinction between the two by holding that, there cannot exist an agreement where one person tacitly acquiesces in measures adopted by others.[96] This rationale was upheld by ECJ in the appeal establishing the foundation that a unilateral policy of one combined with an act governed 'out of no choice' of another, having an effect of hindering competition does not *ipso facto* mean that there exists an agreement in contravention of the Article 101(1) of TFEU.

C. STANCE OF USA

USA's Antitrust laws also cater to the prominent distinction between an anti-competitive agreement and abuse of dominant position as, for the former to be established, the plaintiff has to satisfy a two-fold test; first that the parties to the agreement share common intent to harm or restrict competition and; second that they must also receive some benefit out of it.[97] The US Supreme Court has expressly laid down that unwilling compliance with unilaterally imposed policy does not constitute concerted action.[98] Unreasonable concerted action will be held in violation of §1 of the Sherman Act, 1890 while §2 of the Sherman Act, 1890 proscribes unilateral conduct that creates, maintains, or threatens an actual monopoly through anti-competitive means.

96 Bayer v. Commission [2000] ECR II-3383.
97 Christopher Leslie, *Unilaterally Imposed Tying Arrangements and Concerted Action*, 5 OHIO STATE L. J. 60, 1806 (1999) [*hereinafter* "**Leslie**"].
98 Monsanto v. Spray-Rite Service, (1984) 465 U.S. 752.

D. WHAT DIFFERENCE DOES A SECTION MAKE?

The question is, what difference a section makes when ultimately the act is anti-competitive. This question stems from a lot of practical aspects of functioning of the competition laws in the above discussed jurisdictions. In USA for example, the need to maintain the distinction is important because, if the distinction between concerted action and unilateral conduct is not maintained, then §1 of the Sherman Act, 1890 would subject all parties to the agreement to antitrust liability and damages irrespective of whether they have an intent to restrain trade.[99] Indeed in India, no such consequence can arise as the CCI under §3 of the Competition Act, 2002 has discretion to hold even one party guilty of violating §3 of the Competition Act, 2002 even if it goes against the very notion of the concept of agreement. A unilaterally motivated act, which imposes obligation on another lacks the 'consent' aspect of an agreement and is in the nature of a command. Tying arrangements, are the best example of when the same conduct would be classified as an abuse of dominant position and also qualify as concerted conduct.

However, the pertinent reason for this discussion in the context of this paper and its topic is that, such blurring of lines results in conflation of applicable standards for evaluating competitive harm. Furthermore, there is significant dilution of the permissible limits for certain conducts. This becomes very relevant when the question involves an interface of IPR and Competition Law. This becomes clearer upon analysis of the CCI's

[99] Leslie, *supra* note 97 at 1804.

approach in the *Automobile Spare Part's Case*.[100] In this case the CCI examined the agreements entered between the automobile manufacturers and Original Equipment Suppliers (*hereinafter* referred to as "**OESs**") which restricted them from supplying spare parts directly in the Indian aftermarket, where such parts are manufactured by OESs or using the IP of OEMs in some form. CCI had reached the conclusion that §4(2)(c) of the Competition Act, 2002 was violated as automobile manufacturers had resorted to means other than legitimate competition to deny market access to independent workshops consequently strengthening their dominant position as only source of supply in aftermarket. The CCI did not stop here, it went ahead to evaluate these agreements on the yardstick of §3 of the Competition Act, 2002 to conclude that, the imposed restrictions on OESs are in violation of §§3(4)(b), 3(4)(c) and §3(4)(d) read with §3(1) of the Competition Act, 2002 due to its appreciable adverse effects on competition in automobile sector.

Restricting the scope of this paper only to the application of §3 merits a discussion. One of the justifications posed by automobile manufacturers included the exemption under §3(5) of the Competition Act, 2002 for measures protecting IP which went unheard by the CCI. The ground for this refusal stems from the parallel drawn between §§3 and 4 of the Competition Act, 2002 and that is, there is no equivalent of §3(5) under §4 of the Competition Act, 2002. Thus, if an enterprise is found to be in abuse of its dominant position under §4 of the Competition Act, 2002 then it is no defence that such conduct is within the permissible limits of the IP

---

[100] Samsher Kataria v. Honda Siel Cars India Ltd., Case No. 03/2011 (India).

rights, in this case of OEMs.[101] However, the IP argument merited discussion and analysis under §3 of the Competition Act, 2002 for violation, for which the OESs were held liable. This clearly highlights the confusion that arises due to the lack of importance given to the element of consent given/obtained under free will, with respect to the conduct of the parties concerned.

This decision leads to the establishment of a principle which attacks the very notion of exercise of patent rights. The absurdity arising out of this conclusion is that, every vertical restraint that is employed to complement the exercise of patent rights, will be deemed to be in violation of §4 of the Competition Act, 2002 even if it is within reasonable limits of §3(5) of the Competition Act, 2002.[102] This means that non-dominant players can enter into agreements that cause foreclosure of markets, while enhancing certain distribution efficiencies, and the CCI, balancing the factors under §19(3) of the Competition Act, 2002 may conclude that it does not have appreciable adverse effect on competition in the market. However, this leeway is not available to dominant players,[103] which in a way deprives them of the independence to carry out their trade operations.[104] The expected behaviour from organisations must not be in contravention of the prohibitions laid down under the competition regimes and not in engagement of conduct which causes inconvenience to other competitors. Anti-competitive

[101] *Id.*
[102] Yogesh Pai, *supra* note 90.
[103] Samsher Kataria v. Honda Siel Cars India Ltd., Case No. 03/2011 (India).
[104] Cases C-2/01 P, C-3/01 P Bundesverband der Arzneimittel-Importeure eV v. Bayer AG [2004] ECR I-23.

behaviour/conduct and inconvenience due to legitimate strategies to enhance competitive positions can't be regarded as synonymous to each other.

In India it is important to note that, under §3 of the Competition Act, 2002 what is taken into consideration is the effect of the agreement and not its object. This is a conscious departure from the *per se rule* of EU. US Supreme Court's observation in this regard shed some light on the need of the CCI to restrain itself in application of the competition laws especially when IPR issues are involved. US Supreme Court held that, §1 of the Sherman Act, 1890 doesn't apply to 'every contract' but only those which unreasonably retrain trade as, all contracts necessarily restrain trade at some level,[105] and applying §1 of the Sherman Act, 1890 prohibition on every contract restraining trade would have the effect of outlawing the body of private contract law.[106]

Thus, it is important to maintain distinction between §3 and §4 of the Competition Act, 2002 and as far as analysis of agreements under §3 of the Competition Act, 2002 is concerned, question of dominance is irrelevant. This becomes more necessary from patent pooling agreements point of view as, if such agreements are tested on the anvil of §4 of the Competition Act, 2002 then it is more likely to fail, as patents inherently create a kind of domination, and patent pooling in absence of any guiding clause for IP under §4 of the Competition Act, 2002, is more than likely to be considered as an abuse of dominant position. Therefore, when patent

---

[105] Standard Oil Co. v. United States, 221 U.S. 1 (1911).
[106] National Society of Professional Engineers v. United States, 435 U.S. 679 (1978).

pooling agreements are tested for their anti-competitive effect it must be restricted to §3 of the Competition Act, 2002. The test of reasonability must be applied to determine whether a patent pooling agreement qualifies for exemption under §3(5) of the Competition Act, 2002.

III. PATENT POOLING: KINDS AND ADVERSE IMPLICATIONS

Historically, patent pools have been concentrated in Europe and the United States although recently Asian companies increased their participation in patent pools given their growing role in technological innovation.[107] The major reason for formation of patent pools is the issuance of competing or overlapping patents. This relation between patents can be described as substituting and complementary.

A. SUBSTITUTE PATENTS

Two patents are called substitutes if they cover alternative technologies and are non-blocking. A patent concerning a particular subject-matter is non-blocking when it does not prevent the use of another patent in the same field because it relies on a different subject-matter not covered by the first patent.[108] The subject-matter covered by such patents can be used parallelly without infringing each other.

B. COMPLEMENTARY PATENTS

Two mutually blocking patents are complementary from a legal perspective. Such patents are generally described as those infringing upon

---

[107] World Intellectual Property Report 2011, *The Changing Face of Innovation, Chapter 3: Balancing Collaboration and Competition*, 121, WIPO, (Feb. 6, 2020), https://www.wipo.int/edocs/pubdocs/en/intproperty/944/wipo_pub_94 4_2011.pdf.

[108] Secretariat WIPO, *supra* note 87.

each other. Mutually blocking patent rights are the result of cumulative innovation, where no technological component can be marketed individually without the technological complements protected by patent rights of different companies.[109] Thereby necessitating patent licensing for producing desired output without infringing patent claims. Patents can be one-way blocking, meaning that one patent infringes another patent while the latter doesn't necessarily infringe the first patent.[110]

It is on the basis of their nature that, US and EU antitrust regulations permit and consider pooling of complementary patents as generally pro-competitive. *Summit v. VIX*[111] stands as a testimony to the anti-competitive nature of a patent pool where it was held that, pooling of patents concerning laser eye surgery technology was restricting competition which would otherwise exist and this was because of the patents being substitutes in nature.

In addition to substituting and complementary patents, in the context of standardization, patents can be classified as essential and non-essential. Essential patents are those required in order to comply with a technical standard. As a consequence, essential patents are by nature also complementary because they are standard-essential.[112] Patents are non-

---

[109] Justus Baron & Henry Delcamp, *Patent Quality and Value in Discrete and Cumulative Innovation*, WORKING PAPER 2010-07, CERNA WORKING PAPER SERIES, 3, (Feb. 5, 2020), https://hal-mines-paristech.archives-ouvertes.fr/docs/00/53/66/50/PDF/Quality_indicators_16-11-10_VF.pdf
[110] Charles River Associates Ltd., *Report on Multiparty Licensing*, 6, EC EUROPA, (Feb. 5, 2020), http://ec.europa.eu/competition/antitrust/legislation/multiparty_licensing.pdf
[111] William J. Baer, *Report from Bureau of Competition*, FED. TRADE COMM'N (Feb. 6, 2020), https://www.ftc.gov/public-statements/1998/04/report-bureau-competition# N_3_.
[112] Secretariat WIPO, *supra* note 87.

essential if there are substitutes to the covered technology.[113] Therefore, patent pools comprising of non-essential patents are more likely to be anti-competitive as compared to essential patents.

C. ADVERSE IMPLICATIONS OF PATENT POOLING

The need to differentiate the kinds of patent arises mainly because of the need of assessing their impact on competition. Substitute patents compete with each other, and therefore shouldn't be bundled in a pool, as competition between such substitute technologies would be eliminated. This concern however, doesn't apply to complementary patents because actual or potential competition remains unaffected. Hence, the pooling of complementary patents is generally considered pro-competitive.

Patent pooling agreements may *prima facie* seem pro-competitive but they also discourage outside firms to invest in R&D if they increase the threat of litigation, pools may slow innovation if they redirect R&D by outside firms towards technologies that are not covered by pool patents, especially if those technologies are inferior substitutes to innovation.[114] In addition, patent pools giving rise to cooperation among competitors is likely to encourage potential collusion for creating a forum for sharing competition sensitive information, price fixing etc.[115] All these considerations play a crucial role when an effect of a patent pooling

---

113 *Id.*

114 Thomas D. Jeitschko & Nanyun Zhang, *Adverse Effects of Patent Pooling on Product Development and Commercialization*, 30 et seq, JUSTICE (Feb. 7, 2020) www.justice.gov/atr/public/eag/283557.pdf.

115 NUNO PIRES DE CARVALHO, THE TRIPS REGIME OF ANTITRUST AND UNDISCLOSED INFORMATION (Kluwer Law International, 161 et seq. 2008).

agreement has to be evaluated for example as per Indian standards whether it is creating an appreciable adverse effect on competition. Patent pooling is capable of being used as instrument to control price or output of downstream product affecting normal functioning of the market. Since such agreements qualify as horizontal agreements, there exists the danger of unlawful allocation of market.

Licensing practices which do not allow members of the patent pools to liberally license the patents covered by the pool and charge such prices which are above the competitive rate are likely to raise anti-competitive concerns. In a report of the Department of Justice (*hereinafter* referred to as "**DOJ**") and the Federal Trade Commission (*hereinafter* referred to as "**FTC**") warned that pools which do not license technologies freely "may pose a barrier to entry if existing relationships make it harder for 'new firms to come in and overcome the patent thicket."[116] So long as licensing conditions are not restrictive the question of anti-competitive behaviour would not arise.

It is due to such adverse impact that it is necessary to evaluate the patent pooling agreements on the threshold of competition law so as to prevent abuse IP Rights.

---

[116] DOJ & FTC, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, 62, JUSTICE (Feb. 6, 2020), www.justice.gov/atr/public/hearings/ip/222655.pdf.

D. PATENT POOLS: AN EVOLUTION ON GLOBAL FORA

Serafino's survey of about 35 patent pools organized or proposed from 1856 to the present across a number of industries indicate that 'each of the patent pools was organized in response to a particular set of policy objectives and circumstances' and there is 'no single reason for creating a patent pool and no single way to manage a pool.'[117]

Some of the well-known patent pools include the Sewing Machine Combination of 1856, a voluntary arrangement bringing together nine complementary patents held by different patent holders, to build a functional sewing machine. Its formation was necessitated owing to the ongoing litigation between the parties due to which the sales figures took a major hit.[118] Another one was the Manufacturers' Aircraft Association (MAA), a government enforced pool formed in 1917, encompassing most of the aircraft manufacturers in the United States. Need for its creation was rendered by the two major patent holders, the Wright Company and the Curtiss Company as, they had effectively blocked the building of any new airplanes which the Govt. had to deploy given the World War I situations.[119]

In recent times the patent pools have evolved in the field of consumer electronics. They are mainly set up as a response to the standard

---

[117] SERAFINO D, *Survey of Patent Pools Demonstrates Variety of Purposes and Management Structures*, KNOWLEDGE ECOLOGY INTERNATIONAL RESEARCH Note 6 (2007).
[118] Indrani Barpujari, *Facilitating Access or Monopoly: Patent Pools at the Interface of Patent and Competition Regimes*, 15 J. OF INTELL. PROP. RTS. 345, 348 (2010) [*hereinafter* "**Barpujari**"].
[119] *Id.*

setting regime to keep pace with the need of promoting new standard.[120] Like the MPEG-2 Patent Pool which combined 27 patents held by 9 patent holders necessary to meet MPEG-2 standard; it being a video data storage compression standard used in connection with Digital Versatile Disc (DVD) technology. The 1995 DVD Patent Pool of Philips and Sony, with the former to be the licensor. Six months later, another DVD pool was formed by Hitachi, Matsushita, Mitsubishi, Time Warner, Toshiba and JVC, and both the pools were cleared by the Anti-Trust Division of the US Department of Justice. The Golden Rice pool, on the other hand, is based on an altruistic principle for making available the product for developing countries.[121]

Patent pools have been prevalent since late 19th Century in USA and have been broken down due to its cartel-like attributes by means of judicial intervention as was the case of patent pooling arrangement set up by the Radio Corporation of America, along with General Electric, Westinghouse and American Telephone and Telegraph, which was ultimately broken up through a consent decree of the court in *United States v. Radio Corporation of America et al.*[122] Similarly, the members of the pool of 600 patents relating to Glass-blowing technology were forced by the court to license the patents to all new comers at reasonable royalty rate.[123]

---

120 SHAPIRO C., *Navigating the Patent Thicket: Cross Licenses, Patent Pools and Standard Setting*, in INNOVATION POLICY AND THE ECONOMY, 119-150 (A B Jaffe, J Lerner, S Stern ed., 2001) [*hereinafter* "**Shapiro**"].
121 Barpujari, *supra* note 118.
122 United States v. Radio Corporation of America, 341 U.S. 412 (1951).
123 Hartford Empire v. United States, 323 U.S. 386 (1945).

What is more important is that, even though it was observed that patent pools can be anti-competitive, the courts still acknowledged the need for such pools for functioning of the IP regime. Through various legal precedents like, *E. Bement & Sons v. National Harrow Co.*,[124] *Standard Sanitary Manufacturing Co. v. United States*,[125] and *Standard Oil Co. v. United States*,[126] the courts have traced the need of maintaining an equilibrium between the antitrust and the IP regime. It has recognized the monopolistic nature of patents however, highlighted that the *per se* rule applicable to cartels under the antitrust law will not be applicable to patent pools unless they degenerate into cartels. The *rule of reason* was developed, where contracts and licensing agreements were subject to antitrust scrutiny only when they were unreasonably in restraint of trade. The next section highlights the legal development in different jurisdictions based on their experience in relation to IP and Competition interface especially patent pooling agreements.

E. JURISDICTIONAL PERSPECTIVE OF PATENT POOLING AGREEMENTS

i. USA

There exist some formal recognition of the interface of IP and Competition law in US evident from its Antitrust Guidelines for the Licensing of IP,[127] updated in January 2017, keeping pace with statutory

[124] E Bement & Sons v. National Harrow Co., 226 US 20 (1912).
[125] Standard Sanitary Manufacturing Co. v. United States, 226 US 20 (1912).
[126] Standard Oil Co. v. United States, 221 US 1 (1911).
[127] Antitrust Guidelines for the Licensing of Intellectual Property, Issued by the US DOJ and the FTC (1995), https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/0558.pdf [*hereinafter* "**Antitrust Guidelines**"].

case laws and the 2010 Horizontal Merger Guidelines.[128] These principles recognize that excessive antitrust intervention, curtailing the exercise of right of exclusivity may undermine the incentive to innovate which forms the basis of the patent system.[129]

The IP Guidelines expressly recognize the pro-competitive benefits of patent pooling agreements and cross-licensing arrangements.[130] At the same time the guidelines also offer a word of caution in evaluation of the pooling agreements. It enumerates 4 circumstances in which antitrust scrutiny is warranted and they are:

1. Collective price or output restraints in pooling arrangements that do not contribute to an efficient integration of economic activity;
2. Settlement agreements that combine intellectual property assets of horizontal competitors and that have the effect of diminishing competition;
3. Exclusion of competitors from patent pool when the excluded firms cannot effectively compete in the relevant market and when the pool participants collectively possess market power and
4. Pooling arrangements that deter research and development.[131]

---

[128] Antitrust Guidelines for the Licensing of Intellectual Property, Issued by the US DOJ and the FTC, (2017), https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf.
[129] Thomas Cheng, *Putting Innovation Incentives back in the Patent-Antitrust Interface*, 11 NW J TECH IP 385, 386–93 (2013).
[130] Steven C. Carlson, *Patent Pools and the Antitrust Dilemma*, 16 YALE J. ON REG. (1999).
[131] Antitrust Guidelines, *supra* note 127 at Guideline 5.5.

In *Northwest Wholesale Stationers v. Pacific Stationery & Printing*,[132] the court held that the exclusion of a competitor from a purchasing cooperative was not *per se* unlawful in absence of existence of market power. Thus, there exists some legal jurisprudence guiding patent pooling and their anti-competitive effects.

ii. EU

As far as EU is concerned, patent pooling agreements are not expressly covered under the Technology Transfer Regulation.[133] As per this Regulation certain agreements are exempted from application of Article 101(1) of TFEU so long as market shares of the given entities do not exceed 20% and satisfaction of other relevant criteria. Thus, irrespective of the market shares of the involved undertakings, patent pools do not enjoy a safe harbour treatment.[134] The Technology Transfer Guidelines address analysis of Patent Pools and also acknowledge that they may have both pro and anti-competitive effects.[135]

The Guidelines recognize two kinds of patents i.e. essential and non-essential patents whereby essential patents are those where there are no substitutes for such patented subject-matter inside or outside the pool

---

132 Cf. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985).

133 Commission regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, EUROPA, (Feb. 5, 2020, 11:00 PM), http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0772: EN:HTML.

134 Secretariat WIPO, *supra* note 87.

135 Commission Notice, Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, (2004/C 101/02) [*hereinafter* "**Technology Transfer Guidelines**"].

and such essential patents are by necessity complements.[136] There exists a presumption in favour of patent pools of essential patents that they generally do not infringe Article 101(1) of TFEU.[137] On the contrary a pool which is substantially composed of non-essential patents which are substitute patents, amount to price fixing,[138] and hence regarded as anti-competitive and in violation of Article 101(1) and not capable of fulfilling the conditions of Article 101(3) of TFEU. Under the Technology Transfer Guidelines, patent pools covering non-essential patents that have a significant position on the market are likely to fall under the prohibition of Article 101 TFEU.[139]

On 21 March 2014, the European Commission adopted the new rules for the assessment of technology transfer agreements between two undertakings.[140] The revised guidelines cater to the advancements in technology and aim to improve the IPR-Competition functioning dynamics. The guidelines aim to encourage innovation and sharing of IP by regulation of the means through which such sharing is achieved i.e. the licensing and patent pooling agreements.

With specific focus directed towards patent pooling, the revised guidelines are said to have provided a 'soft safe harbour' for patent pools

---

136 Recital 216 of the Technology Transfer Guidelines.
137 *Id* at Recital 220.
138 *Id* at Recital 219.
139 *Id* at Recital 221.
140 Commission Regulation (EU) No. 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements (OJ L93/17 of 28.3.2014).

referred as 'technology pools' for the first time.[141] These guidelines expand on application of article 101 of TFEU and also acknowledge its pro-competitive effects along with the fact that it can allow for one-stop licensing of the technologies covered by the pool [which] is particularly important in sectors where IP rights are prevalent and licenses need to be obtained from a significant number of licensors in order to operate on the market.[142]

The patent pool is legitimate and will be declared beyond the scope of article 101 of TFEU if, all the factors at 261 of the Guidelines are satisfied irrespective of the market shares or position of the parties to the pool in question. This 'safe harbour' applies also to licensing out from the pool to third parties which are not members of the pool.[143] The yardsticks which determine whether or not the pool would avail the safe harbour are:

1. Barriers to pool creation process to all technology right owners;
2. Sufficiency of safeguards to ensure pooling of only essential technologies;
3. Sufficiency of safeguards in respect of exchange of sensitive information which is essential for efficient functioning of the pool;

141 Maria Gaia Pazzi, *Revised Technology Transfer Block Exemption Rules*, ANTITRUST & PUB. POLICIES, (Feb. 7, 2020) http://a-p-p-review.com/article/view/10205/9496.

142 Communication from the Commission - Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements OJ C 89, 28.03.2014, pp. 3-50 , 94-143, 242-273, and Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements OJ L 93, 28.03.2014, pp. 17-23.

143 *Id.*

4. Licensing of pooled technologies is on non-exclusive basis;
5. Licensing of pooled technologies to all potential licensees on terms of FRAND (fair, reasonable and non-discriminatory terms);
6. Availability of freedom to challenge the validity and essentiality of the pooled technologies to the parties contributing to the concerned technologies and the licensees and
7. Their freedom to develop competing technologies and products.[144]

The revised guidelines aim to balance competition and innovation by exempting blanket approval to certain clauses in a Technology Transfer Agreement from competition rules. It introduces a case-to-case basis analysis for such clauses to determine its competitive validity. These clauses include; allowing licensor to terminate a non-exclusive agreement if the licensee challenges the validity of the intellectual property rights and also clauses forcing the licensee to license any improvements it makes to the licensed technology to the licensor on an exclusive basis.[145] They also adopt a cautionary approach in terms of patent pools involving dominant players by providing for "non-discriminatory and non-excessive" licensing terms as well as "non-exclusive licenses" to prevent anti-competitive effects on downstream markets.[146]

---

[144] Guideline at 261, Communication from the Commission — Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to Technology Transfer Agreements OJ C 89, 28.03.2014, pp. 3-50, 94-143, 242-273 [*hereinafter* "**Commission Communication**"].

[145] Antitrust: Commission adopts revised competition regime for technology transfer agreements, EC EUROPA, (Feb. 6, 2020), https://ec.europa.eu/commission/presscorner/detail/en/IP_14_299.

[146] Commission Communication, *supra* note 144 at Guideline 269.

iii. Japan

The recently amended "Guidelines Concerning Use of Intellectual Property" in Japan act as the guiding principles as far as competitive analysis of the Patent Pool is concerned.[147] It recognizes the advantages of patent pool and provides that it is not *per se* in restraint of trade. It also highlights four circumstances, in existence of which a patent pool will be considered as anti-competitive and they are:

1. The creation of a patent pool relating to substitute (i.e., competing) technologies and jointly setting forth licensing conditions relating to these substitute technologies;[148]
2. Collusion among the entities that form the patent pool aimed at preventing any improvement to the technology licensed to the pool;[149]
3. The creation of a patent pool by competing entities to jointly determine the price, quantity or customers of their products using the licensed technology;[150] and
4. The creation of a patent pool by competing entities and refusing to license the covered technology to new entrants or certain existing entrepreneurs without reasonable grounds.[151]

Due to the above guidelines any agreement of patent pooling in contravention of the above guidelines can be classified as anti-competitive.

---

[147] The IP Guidelines, www.jftc.go.jp/en/legislationguidelines/ama/pdf/070928_IP _Guideline.pdf.
[148] *Id* at Part 3, §2 (i)(b).
[149] *Id.*
[150] *Id* at Part 3, §2 (i)(c).
[151] *Id.* at Part 3, §2 (i)(d).

This clearly indicates that patent pooling agreements are required to be governed and regulated in an efficient manner such that enforcement of one law does not adversely affect the functional regime of another. The next section provides an Indian perspective towards patent pooling agreements and analyses the efficacy of 'Essential Facilities Doctrine' as an instrument for testing whether patent pooling agreements fall within the scope of exception under §3(5) of the Competition Act, 2002 or will be considered to have appreciable adverse effect on competition in the market.

IV. PATENT POOLING AGREEMENTS AND ESSENTIAL FACILITIES DOCTRINE: AN INDIAN PERSPECTIVE

As far as India is concerned patent pools and pooling agreements are relatively a new concept yet to be formally recognised in any statute or legal regulations thus, there is a dearth of case law and legal jurisprudence on this subject-matter. It due to this that, we have to rely on derived jurisprudence from other jurisdictions and case law of nations like USA and EU which has a history of patent pooling tracing as far back as 150 years.

A. WHAT DOES PATENT POOLING MEAN 'IN' AND 'TO' INDIA?

Patent pools prove to be of advantage to the developing nations to get the benefits of all materials, substances, tools or any other thing which holds patent. As the name may suggest patent pooling involves pooling of technology, resources, expertise, facilities and services. It has helped in making the availability of medicines in developing countries like India relatively easier. They are also perceived as a solution to the problem of in access to affordable health care. The Medicines Patent Pool, for instance, proposed by Medicines sans frontiers (MSF) seeks to bring together patents held by different entities relating to the manufacture, sale and distribution of HIV-AIDS anti-retroviral medicines (and potentially other medicines that meet significant public health concerns) in the developing world.[152]

It is important to note that even though a pool may be international in its scope yet, it is governed by the national laws of competition and IP of the country in which manufacture/sale of product arising out of pool is likely to occur. As far as India is concerned, this concept is very nascent hence, not prevalent among the Indian Companies as yet. However, if we complain that there exist no law governing patent pooling then we must also acknowledge that there is no legal barrier hindering or denying the formation of such pools either.

However, the Patent (Amendment) Act, 2005 contains certain provision which must be granted due consideration while forming a patent pooling agreement. Like the sections governing licensing and assignment of patents are of utmost relevance as, the basis of a pooling agreement is cross-licensing.[153] Certain provisions of Patent Act, may also be interpreted to provide for formation of patent pooling agreements and has inbuilt regulation mechanism for their anti-competitive aspects.[154] §102 of the Indian Patent Act, 1970 provide for setting up of patent pooling agreements which are administered, managed and regulated by Government. However, what is unfortunate is the approach taken by the CCI towards patent pooling agreements by labelling them as 'restrictive trade practice' as it has

---

152 Shapiro*, supra* note 120.
153 §68 and 69, Indian Patents (Amendment) Act, 2005.
154 §140, Indian Patents Act, 1970.

provided a set of practices which are anti-competitive in nature.[155] This response can be said to have been prompted due to the anti-competitive nature of such pooling agreements which is capable of being regulated under the competition law. Thus, the next relevant question is whether Indian Competition regime is equipped to regulate such agreements.

B. HOW REASONABLE IS 'REASONABLE'?

§3(3) of the Competition Act, 2002 deals with horizontal agreements while §3(4) deal with vertical agreements. It is a matter of common knowledge that IPR confers upon its owner the right of exclusivity and freedom to use his product as per his own will up to a certain degree. §3(5) of the Competition Act, 2002 allows IPR owners to enter into any agreements so long as he imposes reasonable restrictions under such agreements which are necessary to protect his rights, and such agreements shall be permissible though they are otherwise restricted under §§3(3) and 3(4) of the Competition Act, 2002 Act. Therefore, the test provided for an agreement related to IP to qualify for the exemption provided under §3(5) of the Competition Act, 2002 is that of 'reasonability of restrictions.' Hence if under the garb of such agreement an IPR owner tries to impose unreasonable restrictions, he might have to forego his right of exclusivity.

There surrounds an air of uncertainty when it comes to deciding what can qualify as reasonable and what is unreasonable. For the purpose of application of §3(3) or §3(4) of the Competition Act, 2002 and to evaluate the appreciable adverse effect on competition of a patent pooling

[155] Manas Bulchandani and Akshay Khanna, *Patent Pooling in The Indian Scenario*, 4 INDIAN J. OF L. 15, 20 (2018).

agreement the first step is to prove that it falls beyond the scope of protection grated under §3(5) of the Act. It would be erroneous to use the appreciable adverse effect on competition as the yardstick for deciding the validity and competency of a patent pooling agreement keeping in mind the US Courts observation discussed in previous section that every contract/agreement is likely to have some adverse and restraining effect on the market. Furthermore, §3(5) of the Competition Act, 2002 provides that so long as conditions of the agreement are 'reasonable' it enjoys the exemption.

What exactly will qualify as reasonable is nowhere defined in the act. Through an advocacy booklet however, CCI has offered some clarity through certain instances which qualify as unreasonable restrictions and they include: licensing arrangements likely to affect adversely the prices, quantities, quality or varieties of goods and services, agreement which divides the markets among firms that would have competed using different technologies, arrangements that effectively merges the R&D activities of two or only a few entities that could plausibly engage in R&D in the relevant field, exclusive licensing arrangements, including cross-licensing by parties collectively possessing market power, grant backs, exclusive licensing and acquisition of IPRs.[156] All of the above will be considered to fall within the contours of competition law as long as they are not in reasonable juxtaposition with the bundle of rights that go with IPRs. However, this

---

[156] Advocacy Booklet on Intellectual Property Rights under the Competition Act, 2002, Competition Commission of India; Aditya A Kutty and Sindhura Chakravarty, *The Competition-IP Dichotomy: Emerging Challenges in Technology Transfer Licenses*, 16 J. OF INTELL. PROP. RTS., 258, 264 (2011).

does not really help in case of patent pooling agreements as it in itself requires a threshold defining reasonability.

In USA for that matter, the antitrust authorities adopt a 'rule of reason approach' while considering any such restrictive licensing arrangements.[157] The framework for evaluating licensing restraints is spelt out in part 3.4 of the Guidelines.[158] §3(5) of the Competition Act, 2002 also adopts this approach. However, USA also has specific guidelines governing patent pooling agreements unlike India. The question is how to apply this test of reasonability to patent pooling agreements which are not inherently anti-competitive though may have restrictive effects.

C. ESSENTIAL FACILITIES DOCTRINE

It is in my opinion a better practice to adopt 'essential facilities doctrine' to test the reasonability of the patent pooling agreements in Indian context. The term "essential facilities" is not officially used in cases or judicial documents in the U.S or E.U.[159] The doctrine traces back its origin to the landmark *Terminal Railroad Association* case in which an agreement between the rail road companies of St. Louis relating to restricting the operation of bridges and terminals to get across river Mississippi to members of association was held to be in violation of the Sherman Act,

---

157 Antitrust Guidelines for the Licensing of Intellectual Property, Issued by the US DOJ & the FTC (1995).

158 *Id.*

159 Sebastian J. Evrard, *Essential Facilities in the European Union: Bronner and Beyond*, 10 COLUM. J. FOR EUR. L., 491 (2004).

1890.[160] The essential facilities doctrine is used in US as an exception to application of IP laws as well.[161]

The underlying principle of this doctrine may be ascertained as, to prevent one player from taking advantage of his position by colluding with others so as to deprive those who lack such advantage from having a fair chance of participation in the market. The term 'essential' can be understood to connote a level of distinctiveness and 'facilities' to mean any asset which holds some monopoly power and proprietorship due to its uniqueness.[162] *Prima facie* this may seem to be a test for dominant position however, it may be applied to the agreements between the patent pooling parties to ascertain whether assets having monopoly power are being used in anti-competitive manner by their respective holders through collusion. This will be determined by the nature of assets involved in the agreement. If the patented assets are of such nature that their independent existence devoid of the pool is essential for advancement of fair market and survival of competitors then such agreements shall be considered unreasonable and hence beyond the scope of exemption of §3(5) of the Competition Act, 2002.

---

160 United States v. Terminal Railroad Assn. of St. Louis, 236 U.S. 194, 35 S. Ct. 408, 59 L. Ed. 535 (1915); Terminal RR Assn. v. US, 266 U.S. 17, 45 S. Ct. 5, 69 L. Ed. 150 (1924).

161 Sergio Baches Opi, *The Application of the Essential Facilities Doctrine to Intellectual Property Licensing in the European Union and the United States: Are Intellectual Property Rights Still Sacrosanct?* 11 (2) FORDHAM INTELL. PROP. MEDIA AND ENTM'T L. J., 410 (2001).

162 Meenakshi K.K.; Hardik Jain, *IPR-Antitrust Crossroads: Is Essential Facility Doctrine a Solution*, 11 NUALS L. J. 123, 146 (2017).

The doctrine can be applied such that for the patent pooling agreement to be anti-competitive following factors will have to be proved:

1. Inability of the players beyond the pool to duplicate the assets
2. Denial of the use of facilities to competitor
3. Prevention of new product from entry in market
4. The patents covered by the agreement are substitute patents
5. Availability of substitutes to covered technology in the patent pooling agreement.

This provides a yardstick for defining reasonability so that there exists uniformity of approach.

The reasoning applied by USA in dealing with exclusive dealing arrangements reflects the application of essential facilities doctrine. In this context, exclusive dealing arrangements may give rise to the possibility of anticompetitive exclusion only if the monopolist is able to exclude rival suppliers from a large enough fraction of the market to deprive them of the opportunity to achieve minimum efficient scale.[163]

This approach is more suitable as it caters to the need and nature of restrictive covenants that form part of the patent pooling agreements. Restrictive covenants cannot be *ipso facto* considered to be 'stringent and unfair' or 'harsh' specially when they can have pro-competitive and IPR governed reasoning. If not all but most of the times the vertical non-price restraints justify enhancement of distribution efficiency and stimulation of

---

[163] Joshua D Wright, *Overshot the Mark? A Simple Explanation of the Chicago School's Influence on Antitrust*, 1(5) COMP. POL'Y INT'L (2009).

inter-brand competition by resolution of the free rider problem, i.e. particular dealers enjoying cost advantages by benefiting from the demand-stimulating activities of other dealers.[164]

If we compare 4 circumstances in which antitrust scrutiny is warranted for agreements under US's Antitrust Guidelines for the Licensing of IP it is evident that, they collectively incorporate the doctrine of essential facilities. The four circumstances discourage patent pooling agreements when, such collusion can deprive other players a chance at competition. Therefore, when the patent pooling agreements are such that they incorporate patents whose independent existence devoid of pooling are essential for existence of other players in market and their pooling shall inadvertently deprive such other players of the market of functioning, will be held to be beyond the scope of §3(5) of the Competition Act, 2002 and subject to §§3(3) and 3(4) of the Competition Act, 2002.

The previously highlighted CCI's approach in dealing with cases involving IP and Competition interface highlights its tendency of side-lining the rule of reason approach which will have adverse impact on IPR regime specially when the CCI will be faced with the challenges of patent pooling agreements and competition law. Applying the 'essential facilities doctrine' it may be argued that the conditions imposed in Monsanto's patent licensing agreements were designed to meet the conditions of competition in the market for licensing of Bt cotton technology, which is a

---

[164] JOHN R ALLISON, *An Analysis of the Vertical Price-Nonprice Dichotomy*, 21 AKRON L. REV., art 1 (1987), (Feb. 7, 2020).

market that thrives on dynamic efficiency driven by competition through innovation.

Furthermore, in case the parties to the pooling agreement are dominant players in the market, EU's cautionary approach whereby "non-discriminatory and non-excessive" licensing terms as well as "non-exclusive licenses" in terms of patent pooling be given due regard while testing the agreement on 'essential facilities' threshold. However, the mere fact of an entity is dominant player would *ipso facto* render the pooling agreement anti-competitive. Since, the essential facilities doctrine is applied as a test for dominant position as well, its application to test validity of patent pooling agreements would in other way allow IP to also act a factor in deciding abuse of dominant position. It would be erroneous to regard IP only as an exception to §3 of the Competition Act and be disregarded in evaluation of §4 when the contemporary times demand contrary.

V. CONCLUSION

From the above analysis it may be concluded that, interface of IP and Competition Law is inevitable with the advent of technological advancements in the market. Indian jurisprudence as far as this interface is concerned is at a very nascent stage. Furthermore, India also lacks in a clarity of approach as far as such interface is concerned. The CCI will have to adopt an approach which allows the two legal regimes to function complementarily as has been recognised in USA and EU.

As far as the conflation of standards of §§3 and 4 of the Competition Act, 2002 are concerned it is very important that CCI maintains a clear distinction of evaluative norms for these two sections. This is more essential from Patent Pooling Agreements perspective as it allows such agreements an opportunity to be tested for its reasonability. Patent Pooling Agreements are not *per se* anti-competitive and the 'essential facilities doctrine' can pave the way for determining its reasonability for the purpose of exemption under §3(5) of the Competition Act, 2002. The US Guidelines also reflect the incorporation of this principle in an indirect manner as far as reasonability of patent pooling agreements is concerned.

This regime would allow Patent Holders to function freely and within the scope of competition law without unwarranted intervention by CCI which plays a crucial role in discouraging patent pooling which in turn has adverse effect on competition as well as innovation. It is important to ensure that confluence of both IP and Competition regime is in furtherance of the economy which is the all-encompassing objective shared by both regimes in question.

Meenal Garg, *Introducing third-party funding in Indian Arbitration: A tussle between conflicting policies,* NLUJ Law Review 6(2) 71 (2020)

INTRODUCING THIRD-PARTY FUNDING IN INDIAN ARBITRATION: A TUSSLE BETWEEN CONFLICTING PUBLIC POLICIES

MEENAL GARG[+]

ABSTRACT

Third-party funding in litigation as well as arbitration is a development that has taken the world by storm. Despite such development, India continues to take a silent stance regarding the same. As opposed to this silent stance, this paper aims to shed light on the possibility of introducing third party funding in the Indian arbitration regime. By adopting a comprehensive approach, this paper begins by laying down a working definition of third-party funding. Next, this paper makes reference to the practices prevalent in various jurisdictions with respect to third party funding. While tracing such developments, the author also critiques some of the problems associated with third party funding and what approach has been adopted globally to effectively solve such problems. By employing the international developments as a foundational basis, the author then turns to Indian law by analyzing various rulings and statutory provisions that impliedly permit third party funding in the Indian arbitral regime. Finally, the author concludes by suggesting the changes that need to be introduced to effectively deal and promote third part funding.

[+] The author is an associate at AKB Lex, Chandigarh and may be contacted at **meenal.garg95[attherate]gmail[dot]com**.

TABLE OF CONTENTS

I. INTRODUCTION

Third party funding is a rapidly evolving phenomenon in litigation as well as arbitration. If properly employed, third-party funding could benefit the parties by levelling the playing field and at the same time benefit the society as a whole by promoting the goal of access to justice. Third party funding comes in all shapes and sizes. Due to a general lack of consensus amongst the scholars, "it is almost impossible to find a one-size-fits-all definition of third-party funding."[165] However, there are certain characteristics of third-party funding that distinguishes it from other arrangements like insurance, contingency fee agreements etc. Though it would be outside the purview of this paper to have an elaborate discussion on the subject, it would be prudent to lay down a working definition of 'third-party funding' based on popular notions and concepts.

Sahani defines third party funders as, "Third – party Funders are entities that invest in litigation and arbitration for profit."[166] Similarly, other commentators have opined that third-party funding is "funding of proceedings by an unconnected entity to a dispute to a party, typically the claimant, in return for financial gain, such as a share of the damages awarded or a share of the settlement sum."[167] While analysing such definitions, scholars have also argued that third party funding does not

[165] Maxi Scherer et al., *Third Party Funding in International Arbitration in Europe: Part I- Funders' Perspectives*, INT'L BUS. L. J. 207, 209 (2012).
[166] Victoria Shannon Sahani, *Reshaping Third-Party Funding*, 91 TUL. L. REV. 405, 407 (2017) [*hereinafter* "**Sahani**"].
[167] K.C. Lye & Katie Chung, *Singapore- Update on Recent Changes*, 19(5) INT'L ARB. L. REV. 140 (2016).

involve sale of claim as the whole of the original claim vests with the claimant.[168]

From a conjoint reading of the definitions reproduced above, it can be stated that third party funding is an investment by a party who has no interest in the subject matter of dispute but makes such investment and exercises a varying degree of control over the proceedings with a view to profit from the claims of the funded party. Furthermore, it can be easily seen that in theory, the funder may finance the claim of either the claimant or the respondent.[169] However, since funding of claims provides a higher chance to gain higher returns, funding the claimants instead of respondents attracts greater attention of the funders. This is because; funding the claim of respondents would only defeat the claims of the claimant without providing any actual returns to the funder unless of course, the defendant puts forth counter claims before the arbitral proceedings. It is noteworthy to mention here that the words 'investment' and 'profit' are the key elements which distinguish funding from other concepts. This can be elucidated with the help of an example. In an ICSID arbitration, the claim was financed by a foundation not with a view to earn profits but because the financing foundation was generally against the sale of tobacco products which was the subject matter of the said arbitration.[170] In such cases, the

---

168 Maxi Scherer et al., *Third Party Funding in International Arbitration in Europe: Part II- The Legal Debate*, INT'L BUS. L. J. 649, 655 (2012) [*hereinafter* "**Scherer**"].
169 William Park & Catherine A. Rogers, *Third-Party Funding in International Arbitration: The ICCA Queen-Mary Task Force*, No. 42-2014 Penn State Law Legal Studies Research Paper Series (2014).
170 Philip Morris Products S.A. v. Oriental Republic of Uruguay*,* ICSID Case No. ARB/10/7 (2016).

financing can at best be described as donation rather than funding,[171] simply because there is a lack of profit-earning motive.

II. DEVELOPMENTS IN COMPARATIVE LAW

A. THE OBSOLETE MAINTENANCE & CHAMPERTY DOCTRINE

The concepts of maintenance and champerty are the primary reasons that have constrained the development of third-party funding in common law countries. In simple words, maintenance means the unnecessary intermeddling of third parties to a dispute in which they have no interest. On the other hand, champerty which is considered as an aggravated form of maintenance refers to the share of the intermeddler from the proceeds of the litigation.[172] Some researchers have opined that third-party funding is indeed a form of maintenance or champerty.[173] In this respect, it is noticeable that whilst on one hand, it is debatable as to whether third-party funding strictly falls within the notions of maintenance and champerty or not, in the opinion of this author, the concept of third party funding is so complexly associated with the aforementioned common law principles that the former cannot be properly understood without making recourse to the latter. Therefore, the following discussion would be based on the premise that third-party funding is indeed a loose form of maintenance or champerty.

---

171 Eric De Brabandere & Julia Lepeltak, *Third Party Funding in International Investment Arbitration* 6 (Grotius Centre for International Legal Studies, Working Paper No. 1, 2012).
172 Jern-Fei Ng, *The Role of the Doctrines of Champerty and Maintenance in Arbitration*, 76 ARB. 2 (2010).
173 Hong-Lin Yu, *Can Third Party Funding Deliver Justice in International Commercial Arbitration?*, 20(1) INT'L ARB. L. REV. 20, 22 (2017).

The concept of maintenance and champerty has been diluted to a large extent in various jurisdictions, particularly when such issue is raised in pretext of arbitration. This has been viewed as a welcome change. Australia was one of the first few countries to abolish the crimes and torts arising from maintenance and champerty. In a popular case, the Australian Court held that champerty cannot pose as a hindrance to a legitimate claim. It was also held that even during the times, when champerty was popular, the real criteria for judging such agreement was to analyze the consequences flowing from such agreements. In other words, an agreement cannot be declared as violative of public policy merely because a claim is being funded by an unrelated or third party.[174] Similarly, English Courts have also opined that the public policy need to evolve with the passage of time and consequently the doctrines of maintenance and champerty were diluted thereby, paving way for introduction of third-party funding.[175]

Hong Kong[176] and Singapore[177] are two countries that have recently made legislations trying to regulate the new and unexplored concept of third-party funding. Therefore, it would be useful to analyze the position prevalent in these two jurisdictions. The Hong Kong Courts have held that since arbitration is a private consensual adjudication, the public policy doctrine of champerty should not be extended to arbitration and its

---

174 *Campbells Cash & Carry Pty. Ltd. v. Fostif Pty. Ltd.*, (2006) 229 CLR 386 (Austl.).
175 Arkin v. Borchard Lines Ltd., (2005) E.W.C.A. Civ. 65 (U.K.).
176 HONG KONG, THE ARBITRATION AND MEDIATION LEGISLATION (THIRD PARTY FUNDING) (AMENDMENT) ORDINANCE, (2017), https://www.gld.gov.hk/egazette/pdf/20172125/es1201721256.pdf.
177 Civil Law Act (1999) (amended 2017) (Sing.); Civil Law (Third-Party Funding) Regulations (2017) (Sing.).

application should be solely restricted to public justice administration, viz. litigation.[178]

In another landmark decision, the Hong Kong Courts have held that maintenance or champerty and access to justice are two notions of public policy which need to be balanced against each other while deciding whether to allow or prohibit third-party funding.[179] In this author's opinion, this ruling is capable of being interpreted both in favour of as well as against third party funding. Though, the Hong Kong Court interpreted this against third party funding (at least as far as arbitration is concerned), the Singapore courts have accorded more weightage to public interest than the principles of champerty. The Singapore Courts have held, "[T]he purity of justice and the interests of vulnerable litigants are as important in... [arbitration] proceedings as they are in litigation. Thus, the natural inference is that champerty is as applicable in the one as it is in the other."[180]

While analysing the above case laws, one commentator has opined:

> *[I]t is no longer appropriate to use the doctrines of champerty and maintenance as blunt instruments with which to strike down third-party funding agreements; a more qualitative and purpose-oriented analysis of the nature of the arrangement concerned need to be*

178 Cannonway Consultants Ltd. v. Kenworth Engineering Ltd., (1995) 1 H.K.C 179, 190 (H.K.).
179 Unruh v. Seeberger, (2007) 10 H.K.C.F.A.R. 31 (H.K.).
180 Otech Pakistan Pvt. Ltd. v. Clough Engineering Ltd., (2007) 1 SLR 989, ¶36 (Sing.).

> *undertaken in order to assess the risk that such arrangement would hold for the integrity of the arbitration in a given claim*.[181]

One scholar has further argued that public policy does not impose a ban on third party funding rather the latter advances public policy by providing access to justice to those who cannot afford to contest in an arbitration proceeding. Moreover, it has been opined that the inherent policy issues or limitations can be corrected through regulation.[182]

In context of civil law countries like Germany where the concepts of maintenance and champerty are unknown, it has been observed in respect of third-party funding:

> *A key difference between the common law countries and the civil law countries is that the ancient doctrine of champerty and maintenance that occasionally still plagues the industry in the common law world does not exist in the civil law countries, which is one of the reasons why a balanced market was able to grow in Europe....*[183]

The invariable implication which can be drawn from the above discussion is that public policy of providing access to justice to all should outweigh the public policy doctrine of maintenance and champerty and the real criteria to test whether such agreements are violative of public policy

---

181 Sai Ramani Garimella, *Third Party Funding in International Arbitration: Issues and Challenges in Asian Jurisdictions*, 3 AALCO J. INT'L L. 45, 59 (2014).
182 Collin R. Flake, *Third Party Funding in Domestic Arbitration: Champerty or Social Utility?*, 70(2) DISP. RESOL. J. 109, 120-23 (2015).
183 George R. Barker, *Third-Party Litigation Funding in Australia and Europe*, 8 J. L. ECON. & POL'Y 451, 522 (2012).

or not is to see whether the object of such agreements is unconscionable or unfair to any party or not. Moreover, the above discussion has shown that scholars on both sides of the Atlantic are in agreement to the aforesaid criteria.

III. TROUBLED WATERS: UNDERSTANDING THE COMPLICATIONS OF THIRD PARTY FUNDING

The involvement of strangers in arbitration claims has attracted a host of issues which may pose as a cause of concern for development of this concept in the global scenario. These issues include but are not limited to impartiality of arbitrators, security of costs, the effect of such agreements on attorney-client privilege etc.

The issue of disclosure of third-party funding agreements have been one of the core debates surrounding third-party funding. This issue also assumes importance as it is very closely connected with an arbitral tribunal's independence and impartiality. In principle, the arbitral tribunal does not have any jurisdiction to consider or give any finding with respect to the funding agreement as its jurisdiction is limited to the dispute referred to it by the parties through the arbitration agreement. Furthermore, since the funder is not a party to the arbitration agreement the arbitral tribunal or for that matter, even the opposite party may not be aware of the existence of any third-party funder. This issue has been dealt in detail in international commercial arbitration and investment arbitration. In a decision, the tribunal ordered the claimant to disclose the involvement of third-party funder due to two reasons. Firstly, to ensure the integrity of arbitral proceedings by checking for any potential 'conflict of interest'. Secondly, to ensure security of costs because it may so happen that at the time of payment, such funder may disappear as it is not a party to the arbitration.[184] Furthermore, in addition to the general principles of independence of arbitrators, scholars have opined that due to the public international law character of investment treaty arbitration, there is a need to promote transparency in general and disclosure of third-party funding agreements specifically in investment arbitrations.[185]

Some commentators have argued that while making such disclosure, the entire funding agreements need to be disclosed rather than few selective provisions.[186] In this respect, it is argued that it is too soon to comment upon the extent of disclosure of funding agreements but it would be safe to say that full agreements need not be disclosed. This is because if full disclosure is made, the strategies of the funded party as well as other confidential information may be revealed which might be misused by the other party. In addition to this it is further opined that in an ideal scenario, it would be in the interest of the parties to disclose such funding agreements at the earliest opportunity before the appointment of the arbitrator. This is because if it is later out found that there exists some kind of relationship

[184] Sehil v. Turkmenistan, ICSID Case No. ARB/12/6 Procedural Order No. 3 (12 June 2015).
[185] Eric De Brabandere, *'Mercantile Adventurers?' The Disclosure of Third-Party Funding in Investment Treaty Arbitration*, SSRN PAPERS (Oct. 8, 2016), https://papers.ssrn.com/sol3/papers.cf m?abstract_id=2846996.
[186] Miriam K. Hardwood et al., *Third-Party Funding: Security for Costs and Other Key Issues*, 2 INV. TREATY ARB. REV. 103, 120 (2017).

between the arbitrator and the funder, the parties would have to start afresh by appointing a new arbitrator.[187]

Some authors have suggested that one of the ways to ensure disclosure is that the parties themselves incorporate a clause in the arbitration agreement mandating the disclosure of third-party funding arrangements.[188] In response, the author is in agreement with such solution because of its inherent advantage that the parties can pre-decide the extent of disclosure of such agreements in advance. This would save the arbitral tribunal's time and at the same time ensure that the independence of any arbitrator is not compromised in any manner.

Once the issue of disclosure has been settled, the question of security for costs comes into picture. In other words, once the tribunal becomes aware of the existence of a third-party funder, should the arbitral tribunal by means of this fact automatically order for security for costs or not? In this respect, it has been observed that this is not a simple 'yes or no' decision but has to be decided after considering various legal as well as factual aspects and that no uniform criterion exists in international commercial arbitration to decide upon this question.[189]

Thus, to sum up this part, it can be observed that in most jurisdictions, there exists a confusing or inadequate compliance system

---

187 Jennifer A Trusz, *Full Disclosure? Conflicts of Interest Arising From Third-Party Funding in International Commercial Arbitration*, 101 GEO. L. J. 1649 (2013).

188 Alexander Brabant et al., *Third Party Funding in International Arbitration: Practical Consequences and Tactical Considerations*, 19(5) INT'L ARB. L. REV. 113, 115 (2016).

189 Sai Anukaran, *Security for Costs in International Commercial Arbitration: Mandate, Exercise of Mandate, Standards and Third Party Funding*, 84(1) ARB. 77, 86-87 (2018).

which has added to the uncertainties and risks associated with third party funding[190] but nevertheless, such a system exists in most countries as well as in international arbitrations.

IV. MAKING A CASE FOR APPLICABILITY OF THIRD-PARTY FUNDING IN INDIA

A. POLICY CONSIDERATIONS MANDATING INTRODUCTION OF THIRD-PARTY FUNDING

The development of third-party funding in India has been almost negligible and it has been only recently that this concept has attracted attention from the Indian courts. Till date, the author is yet to see any precedent by Indian Courts as far as third-party funding in arbitration is concerned. At the same time, it is also pertinent to mention here that the Hon'ble Supreme Court has recently held that third-party funding in litigation is legal in India provided that the funder is a non-lawyer which is a welcome development.[191] The recent High Level Committee Report to review the Institutionalisation of Arbitration Mechanism in India, while making a passing reference to third party funding has also made an observation that the implementation of similar mechanism in India would give a boost to arbitration in India.[192] Similarly, Order XXV of the Civil Procedure Code as amended by Maharashtra, Gujarat, Karnataka and MP

---

[190] Sahani, *supra* note 166, at 423.
[191] Bar Council of India v. A.K. Balaji, (2018) 5 S.C.C. 379 (India), ¶ 35.
[192] DEPT. OF LEGAL AFFAIRS, REPORT OF THE HIGH LEVEL COMMITTEE TO REVIEW THE INSTITUTIONALISATION OF ARBITRATION MECHANISM IN INDIA (July 30, 2017) http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf.

also recognises the right of a plaintiff to transfer right in suit property to a financier.[193]

A bare perusal of Indian laws reveal that third-party funding is not per se prohibited in India but the public policy principles of maintenance and champerty have generally acted as a hindrance for the development of this concept in India. It is imperative to mention here that the terms 'maintenance' or 'champerty' are nowhere expressly mentioned in Indian statues, however, they have been historically interpreted as part of the phrase 'opposed to public policy.'[194]

In this respect, the Indian Supreme Court has held that the strict rules of maintenance and champerty as enshrined in English law are not applicable in India and agreements of champertous nature are not per se violative of public policy as long as advocates are not involved in the transaction.[195] In some of the later decisions, Indian courts have held such agreements to be violative of public policy but the test has been that the unlawful object of the agreement must be manifest on the face of the financing agreement.[196] While analysing various case laws, jurists have opined that "while recovery of the funded amount, and perhaps interest, was permissible, but if the funding was either for a large portion of the stake, or was success-fee-linked, it was violative of public policy and hence

---

193 Order XXV, The Code of Civil Procedure, 1908 (No. 5 of 1908) (India).
194 § 23, The Indian Contract Act, 1872, (No. 9 of 1872) (India).
195 Re: Mr 'G' A Senior Advocate v. Unknown, (1955) 1 S.C.R. 490 (India), ¶11; M.P. Jain, *The Law of Contract Before its Codification*, 14 J. INDIAN L. INST. (SPECIAL ISSUE) 178, 187-98 (1972).
196 Rattan Chand Hira Chand v. Askar Nawab Jang, (1991) 1 S.C.R. 327 (India).

prohibited."[197] In response, this author argues that as seen in the international arbitration regime, the need of the hour is to balance public policy considerations against each other and bridge the gap between legitimate claims and lack of resources to support the same. It is further argued that such doctrines should be diluted considering the fact that the country from which these public policy doctrines originated has scrapped the strict application of such doctrines.

Another argument which can be put forth for introducing third party funding in arbitration is that litigation and arbitration differ in material aspects. Firstly, arbitration is based upon the concept of party autonomy where all catalysts of the proceeding are directly or indirectly decided by the parties. Thus, keeping in line with the same, parties should be free to take the services of a third-party funder wherever necessary. In support of this, it is opined that a party is a best judge of its interest and the court should ordinarily uphold such consent if it is satisfied that the benefits arising from such funding outweigh the risks associated with such funding. Moreover, it is suggested that the standards of maintenance and champerty should be relaxed in arbitration as the state has little or no stake in private disputes.

Another noteworthy point in this respect is that in litigation, there are statutory provisions for providing free legal aid to the party who cannot afford the same.[198] Thus, it is not absolutely incorrect to say that India is

---

[197] Payal Chawla & Aastha Bhardwaj, *"Saving Arbitration from Arbitration Cost". Is Third Party Funding the Answer?*, BAR & BENCH (Dec. 19, 2017), https://barandbench.com/saving-arbitration-costs-third-party-funding/.

[198] Order XXXIII, The Code of Civil Procedure, 1908 (No. 5 of 1908) (India).

perhaps justified, to some extent, in not expanding the scope of third party funding in litigation. However, it is noteworthy to mention here that in contrast to the same, there is no such provision in the Arbitration Act. In such circumstances, a party is either required to put forth its claim (or defend it) on his own or surrender it due to financial restraints. In this respect, it has been observed that unlike litigation, where the litigant has a constitutional right to access to justice; a party de facto loses this right if it is unable to support the costs of arbitration.[199] Furthermore, in certain cases, the less privileged party may be able to hire the services of a lawyer but the opposite party might be in a position to hire better lawyers, thereby enabling it to put forth its claim in a much better way. Such a situation may arise, for instance, in case of real estate contracts where the buyer is comparatively in an inferior position as compared to the builder. In such circumstances, third-party funding can play a pivotal role while financing such less privileged parties whose claim is likely to succeed thereby, levelling the playing field. This argument has found much support globally and arguing on similar lines, one scholar has opined that "... [T]hird-party funding may well introduce a mechanism similar to legal aid applicable in court systems."[200]

Apart from the above arguments it is pertinent to mention that it is an internationally acknowledged fact that sometimes arbitration may involve huge costs. Furthermore, the Supreme Court of India has justified

---

[199] Francisco Blavi, *Towards a Uniform Regulation of Third Party Funding in International Arbitration*, 18(6) INT'L ARB. L. REV. 143, 144 (2015).

[200] Khalil Mechantaf, *Third-Party Funding in International Arbitration: Active Funders as parties in Arbitration Proceedings*, 82(4) ARB. 371 (2016).

this high cost if it results in a proportionate time saving.[201] In this author's considerate opinion, this ruling implies that the Indian courts have impliedly agreed to the fact that arbitration costs cannot be reduced and something needs to be done so that these high costs do not pose as a hindrance in development of arbitration in India. In this humble author's views, perhaps third-party funding is the only way to combat this 'expensive arbitration' problem and popularize arbitration amongst the masses.

An argument which is often forwarded by critics of Third-Party Funding is that by enabling such a facility; the parties would be encouraged to bring forth frivolous and vexatious claims. In this respect, it has been argued that there are provisions in the Arbitration Act,[202] which enables the Courts to impose penalty in case the Court finds that such a proceeding was vexatious or frivolous. It has been further opined that any funder would examine the case so as to ascertain whether he will benefit from such investment or not and would not invest in any case which according to him is vexatious, frivolous or otherwise not likely to succeed.[203]

Thus, it can be easily seen that in light of the many advantages that third-party funding has to offer and the absence of any concrete argument to prohibit the same, it would be in the interest of the state if third-party funding is introduced in Indian arbitration regime. Furthermore, it is

---

201 Sanjeev Kumar Jain v Raghubir Saran Charitable Trust, (2012) 1 SCC 455 (India), ¶ 17.
202 § 31(3), The Arbitration and Conciliation Act, 1996, (No. 26 of 1996) (India).
203 Kumudini Chattopadhyay, *Third-Party Funding in Arbitration - Questioning its Scope in India*, CIARB (Aug. 15, 2017), http://www.ciarb.org/docs/default-source/ciarbdocuments/ournetwork/ymg/ymg-features/third-party-funding-in-arbitration---questioning-its-scope-in-india.pdf?sfvrsn=4.

suggested that by permitting third party funding by non-lawyers' entities in litigation, the Apex Court has already paved the way for introducing third party funding by non-lawyers in the Indian arbitration regime.

B. REGULATING THIRD-PARTY FUNDING: DEFINING THE ROLES OF LEGISLATURE AND THE JUDICIARY

Now, that it has been settled that there is nothing in Indian law to prevent or prohibit the usage of third-party funding in Indian arbitration, it is only a matter of time that third-party funding will find its way in Indian arbitration. However, at the same time, it is imperative that India prepares itself before such inevitable event takes place. In other words, by reason of its infancy and lack of concrete legislation at the international level, the speculative disadvantages of third-party funding may very well become a reality which may ultimately defeat the object for which third party funding was employed in the first place. Therefore, this part of the paper would address the concerns regarding regulation of third-party funding industry in India focusing on some controversial issues surrounding third-party funding. As far as legislation or judicial intervention is concerned, third-party funding may prove to be particularly tricky in this respect and it would be wise to demarcate the roles of the state organs so as to effectively regulate third-party funding in theory and in practice.

The first issue pertaining to third-party funding which requires regulation is the degree of control that can be exercised by the funder. The power of the funder to exercise control over how a claim shall be put forth in arbitration arises from the fact that at any point of time, he may withdraw his financial assistance. To put this in another set of words, through control over future funding of the lis, the funder ensures that no decision with respect to the funded claim is taken against the wishes or knowledge of the funder. Some scholars while according a superior role to party autonomy have opined that the parties should be free to determine the extent of such "control."[204] In this respect it is opined that keeping in mind the consensual nature of the funding agreement, the aforementioned submission may seem logical but the same cannot be implemented in India primarily due to two reasons. Firstly, despite recent rulings, India is still at a very nascent stage as far as third-party funding is concerned when compared with other jurisdictions. In such a scenario, experienced funders or repeat players may 'fool' the claimants into subsuming a higher degree of control from the funded party. Secondly, assuming the fact that the aim of legalizing arbitration funding is to popularize arbitration among the masses, i.e., to say that the parties would prefer to go for arbitration instead of litigation for even simplest of cases; the funders may have higher bargaining power to force a claimant into surrendering a higher degree of control to such funder. Furthermore, the likelihood of such a scenario is very high considering the funded party's adamant need to secure finances to support its claim. Thus, it would be prudent if the state issues certain rules or guidelines regulating the funding industry in the country. To substantiate this, attention may be drawn to the fact that though some countries have left the funding industry to self-regulation, however, with the expansion of

---

[204] Oliver Gayner & Susanna Khouri, *Singapore and Hong Kong: International Arbitration Meets Third Party Funding*, 40 FORDHAM INT'L L. J. 1033, 1044 (2017) [*hereinafter* "**Gayner & Khouri**].

this industry; even such countries are working towards introducing statutory regulations with the aim of clarifying the parties' obligations. Therefore, it would be advisable that India learns from such international experiences and issues certain guidelines to regulate the funding industry in India.[205] In addition to this and by giving due consideration to party autonomy, it is also opined that such regulations may be reduced as the industry matures.

Coming to the concept of disclosure, it has been already seen that the general notion in the international community is to disclose such third-party funding to some extent either to ensure compliance with principle of full disclosure or to ensure security of costs. As far as the position in India is concerned, in cases where there might be a possible conflict of interest between the financier and the arbitrator(s), the disclosure of third party funding agreements assumes importance.[206] In this respect, the Arbitration Act clearly casts a duty upon the arbitrator to disclose (in writing) any fact that may put a question mark on his independence or impartiality.[207] Moreover, it might be necessary to disclose such funding agreements to ensure the independence of the arbitrators. Non-disclosure may lead to setting aside of the award which might have been in favour of the funded party thus leaving the whole arbitration exercise futile.[208]

---

[205] Mary Jordan, Andrew Matheson & Emma Brown, *Why Third Party Funding is on the Rise in England & Wales*, GLOBAL ARBITRATION NEWS (Feb. 27, 2018), https://globalarbitrationnews.com/why-third-party-funding-is-on-the-rise-in-england-wales/.
[206] Scherer et al., *supra* note 168, at 652.
[207] *See,* §12, The Arbitration and Conciliation Act, 1996, (No. 26 of 1996) (India).
[208] *Id.* at §34(2)(a)(v).

A careful perusal of the provisions of the Arbitration Act and the above discussion until now reveals that assuming the fact that third-party funding becomes legal in India; it is probable that for the interim being, the courts will have a more prominent role while shaping third-party funding viz. reinterpreting existing provisions. While doing so the courts may bank upon the experiences of other jurisdictions. However, as the industry matures, "...it appears that the legislatures – rather than the courts – are seeking to lead the way in shaping the future of the third-party funding industry."[209] This is because ultimately, the responsibility would fall upon the legislature to amend the existing provisions to empower the courts as well as arbitral tribunals to effectively adjudicate upon the issue of third-party funding. For instance, §2(h) of the Arbitration and Conciliation Act, 1996 defines party as "party to an arbitration agreement." This may pose as a hindrance in development of third-party funding in Indian arbitration as technically, a funder is not a party to an arbitration agreement. Such outdated definitions and statutory fallacies in the existing arbitration regime would obviously pose as a hindrance for introduction of third-party funding in India. Having said that, this author is in agreement with commentators who opine that the funding industry is self-regulating and therefore, the intervention by the legislature should be minimal and in case any risks associated with the funding industry do materialize, the same can be addressed by the courts or the arbitral tribunals themselves.[210]

---

209 Victoria Shannon, *Recent Developments in Third-Party Funding*, 30 J. INT'L ARB. 443, 452 (2013).

210 Gayner & Khouri, *supra* note 204, at 1042.

Finally, it is suggested that India can follow the example of Singapore by creating a presumption in favour of third-party funding agreements in arbitration. After considering the 'totality of factors', if such presumption is rebutted then the agreement may be termed as violative of public policy. According to this author's considerate opinion, this will be the correct way of balancing the two conflicting public policies.

V. CONCLUSION

Steinitz has argued (in context of litigation funding); that instead of prohibiting litigation funding, it should be regulated because it has its own set of benefits for the society.[211] In this respect, it is opined that applying this principle *mutatis mutandis* to domestic and international arbitration, the need of the hour is to regulate third party funding instead of imposing a blanket prohibition on the same. Moreover, the analysis in this paper has revealed that certain provisions already exist in Indian law to introduce third party funding. The absence of any precedent expressly prohibiting third party funding supports the above finding. As one scholar has argued, the provisions need to be reinterpreted rather than revised or amended.[212] At the same time, it is necessary that amendments are made to existing legislations to ensure that the cons of third-party funding do not outweigh its pros.

Finally, it is this author's considerate view that third-party funding is here to stay and it is high time that the same is introduced in India

---

[211] Maya Steinitz, *Whose Claim is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268 (2011).

[212] Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. REV. 388 (2016).

especially in the field of arbitration. It is admitted here that it cannot be possibly assumed that such a system would be a perfect one. However, it is obvious that the patent and latent difficulties pertaining to same would come to light once such a system is implemented. This would be in line with the international developments and could be viewed as a robust step in fulfilling the dream of making India as an international arbitration hub.

Ayush Pokhriyal & Vasu Gupta, *Artificial Intelligence Generated works under Copyright Law,* NLUJ Law Review 6(2) 93 (2020)

ARTIFICIAL INTELLIGENCE GENERATED WORKS UNDER COPYRIGHT LAW

AYUSH POKHRIYAL[+] AND VASU GUPTA[*]

ABSTRACT

The world as we know it has changed tremendously in leaps and bounds with the evolution of technology, but changes in law haven't always followed in synchrony. Traditionally creative works like writing and cooking which were conceptualized only to the ingenuity of humans, have now become an apparent task of Artificial Intelligence. Since then, great advancement in programming and computational intelligence has opened many possible avenues of work for computers, one of which being creative works. This upsurge of mechanically created original work has led itself to a collision course with the Copyright Law in India, raising doubts in the minds of legal practitioners as to who shall be the owner of the said original creation. Applying the traditional rules of intellectual property law does not yield a plausible solution to this problem.

This paper shall discuss whether autonomously developed mechanical creation can be copyrightable, and if yes then what are the basic impediments in the current legal scenario which prevents machines and Artificial Intelligence to be allowed such Intellectual

[+] The author is a second-year student of Hidayatullah National Law University, Raipur and may be contacted at **pokhriyal.ayush[attherate]gmail[dot]com**.

[*] The author is a second-year student of Hidayatullah National Law University, Raipur and may be contacted at **guptavasu2899[attherate]gmail[dot]com.**

Property Rights. The paper shall discuss the different scenarios of Copyright ownership in such mechanically generated works.

TABLE OF CONTENTS

I. INTRODUCTION

Artificial Intelligence[213] (*hereinafter* referred to as "**AI**") is not a new concept, especially for the Science-fiction community. Its conceptual existence dates as far as 1927 in the movie 'Metropolis', which had the earliest depiction of humanoid robots and Artificial Intelligence, raising havoc over the city.

As the new age dawns upon AI, these devices have been able to perform wonders that were once unthinkable. They can make their own music,[214] among other things and have started making their presence felt in many more fields that were thought to be a playground of humans. AI has even started to assist novelists in their work,[215] and it seems that the requirement set by Geoffrey Jefferson[216] has been met, up to an extent.

As AI takes a more active role in our day to day lives, it becomes important to address the question regarding the status of ownership of the work created by AI. The idea that the machine is capable of intellectual labour is beyond the scope of current copyright law.[217] Thus we will analyse if AI is capable of ownership under the Copyright law, the implications thereof and its drawbacks. We shall also discuss the alternate options of

---

213 Joel Shurkin, *Expert systems: the practical face of artificial intelligence*, 86 TECH. REV. 72 (1983) [*hereinafter* "**Shurkin**"].

214 Cade Metz, *Google's AI Invents Sounds Humans Have Never Heard Before*, WIRED (May 15, 2017, 7:00 AM), https://www.wired.com/2017/05/google-uses-ai-create-1000s-new-musical-instruments/.

215David Streitfield, Computer *Stories: A.I. Is Beginning to Assist Novelists,* THE NEW YORK TIMES (Oct. 18, 2018), https://www.nytimes.com/2018/10/18/technology/ai-is-beginning-to-assist-novelist s.html.

216 Geoffrey Jefferson, *The Mind Of A Mechanical Man*, BRIT. MED. J. 1110 (1949).

217 Trevor W. Nagel, *Software Development: The Limits of Existing Legal Protection*, 9(3) HARV. INTL. REV. 46 (1987) [*hereinafter* "**Nagel**"].

either giving ownership to the developer or assigning the ownership of work created by AI to public domain.

II. ARTIFICIAL INTELLIGENCE - OVER THE YEARS

AI is a growing field of technology. "Artificial Intelligence" is a term used to describe a specialty field within computer science that is aimed at producing computers that exhibit intelligent conduct.[218] Artificial Intelligence was originally coined and defined by Prof. John McCarthy (also known as Father of A.I.) in the most simple terms as "the science and engineering of making intelligent machines, especially intelligent computer programs."[219] It is hard to define intelligence without human context. Maybe that is the reason why the idea of machines having intelligence independent of any human contribution seems implausible. However, the recent development of powerful hardware and software has in fact made it possible to develop technology that can perform complex tasks without any human intervention.

In 1949 Geoffrey Jefferson, a neurosurgeon stated "*Not until a machine can write a sonnet or compose a concerto because of thoughts and emotions felt, and no: by the chance fall of symbols, could we agree that machine equals brain-that is, not only write it but know that it had written it.'*"[220]

---

[218] Shurkin, *supra* note 213.
[219] John McMarthy, *what is artificial intelligence?* STANFORD UNIVERSITY, (Nov. 12, 2007), http://jmc.stanford.edu/articles/whatisai/whatisai.pdf.
[220] Nagel, *supra* note 217.

In 1950, Alan Turing discussed the question – Can Machines think? The better way to phrase that question could have been – Can machines think like humans, but without humans? Alan Turing proposed a game where an interrogator has to figure out which one is human and which one is the computer by asking questions. The interrogator has to decide based on the answers only. The computer has to make the interrogator believe that it is human.

This test checks how far a machine can imitate humans or in other words think like humans. This test can be used to check whether a machine qualifies as an Artificially Intelligent machine. An AI machine has to be differentiated from a normal machine because their application is different. An AI is not a tool like a machine. It is an imitation of human intelligence and as such could be treated as human equivalent when judging its contribution in a production process.

Artificial Intelligence works by combining large amounts of data with fast, iterative processing and intelligent algorithms, which allows the software to learn automatically from patterns in data.[221] It is supposed to exhibit and stimulate human like intelligence, in novel situations with a goal achieving mindset in complex environment.[222]

---

[221] *Artificial Intelligence – What it is and why it matters,* SAS, https://www.sas.com/en_in/insights/analytics/what-is-artificial-intelligence.html.

[222] J. Horst., *A Native Intelligence Metric for Artificial Systems,* THE NAT'L INST. STANDARDS & TECH., (August 1, 2002), https://tsapps.nist.gov/publication/get_pdf.cfm?pub_id=824478.

It involves combination of machine learning,[223] deep learning,[224] neural network, natural language[225] processing and computer vision.

Initially board games had been reserved exclusively for humans, but in 1997, IBM's Deep Blue, a chess-playing computer, successfully won two times, had three draws, and had just one defeat in matches against the world chess champion Garry Kasparov, using a heuristic search technique.[226] In 2003, the German Deep Fritz chess-playing computer drew a four-game match against Garry Kasparov. In 2015, AlphaGo, an AI program by Google, defeated the European Go champion by five games to nil. This was the first time a computer program had defeated a human professional Go player; an achievement in its own right.

These machines have also been able to make music and very recently the world's first album composed and produced by an Artificial Intelligence was released.[227] It is becoming evident that this growing field of technology is becoming capable of actions independent of human intervention and control. When an Artificial Intelligence creates work that

---

223 Sendhil Mullainathan & Jann Spiess, *Machine Learning: An Applied Econometric Approach,* 31(2) J. ECON. PERSP. 87 (2017).

224 Wehle, Hans-Dieter, *Machine Learning, Deep Learning, and AI: What's the Difference?.,* RESEARCHGATE, (2017), https://www.researchgate.net/publication/318900216_Machine_Learning_Deep_Learning_and_AI_What's_the_Difference.

225 Aravind J. Joshi *"Natural Language Processing",* 253 (5025) AM. ASS'N OF ADVANCEMENT OF SCI. 1242 (1991).

226 *Deep Blue*, IBM'S 100 ICONS OF PROGRESS, (September 13, 2011), https://www.ibm.com/ib m/history/ibm100/us/en/icons/deepblue/.

227 Dom Galeon, *The World's First Album Composed and Produced by an AI Has Been Unveiled*, FUTURISM (Aug. 21, 2017, 4:13 PM), https://futurism.com/the-worlds-first-album-composed-and-produced-by-an-ai-has-been-unveiled.

does not have any contribution from humans, should humans be given the copyright claim under the intellectual property rights?

III. CAN AI BE GIVEN OWNERSHIP OF INTELLECTUAL PROPERTY UNDER THE CURRENT COPYRIGHT LAW?

For a work to be given protection under copyright law there are a few requirements. Since it is not the idea but the expression of ideas that can be copyrighted, it is essential that the form of the art be in a tangible form, creative enough that it perceptibly differs from the original work[228] or is an original work.

Within the framework of the copyright law, intellectual property ownership rights depend initially on "authorship."[229] That is, the person claiming the copyright must either be the author himself, or he must have succeeded to the rights of the author."[230] The intellectual property law provides right of protection to the creators and inventors with respect to their inventions, designs and artistic works. The purpose of these laws are to provide people with incentives to develop creative works that are valuable for the society and profit from it by ensuring there is no misappropriation of their works by others.

In the case of Andrien v. Southern Ocean County Chamber of Commerce,[231] the court held that for a work of authorship to exist, there

---

228 Bleinstein v. Donaldson Lithographing Co., 188 U.S. 239 (1903).
229 Copyright Law of the United States, 17 U.S.C. §201(a) (1982).
230 *Id.*
231 Andrien v. Southern Ocean County Chamber of Commerce, 927 F.2d 132, 134-35 (3d Cir. 1991) (U.S.).

must be a legally recognized author who has created the work. The author is generally the person who conceives the copyrightable expression and fixes it, or causes it to be fixed in a tangible form.[232] The author has been limited to living human beings for all purposes in the Copyright Act. This is evident from different sections that discuss about the kin of the author, lifetime of the author, and death of the author.[233]

In most cases where the creator of these software are humans, application of law is unchallenging as it suits the Copyright law's concept of person being the original author/creator, but as Artificial Intelligence becomes more "intelligent" in their role as the assistants of humans in the creation of a wide range of products and become more independent to develop their own individual products; the law here does not provide a clear resolution. Can AI then be deemed as an inventor, author and own/sell intellectual property?[234]

In the famous Macaque selfie case,[235] a monkey had mistakenly taken a selfie, a dispute arose as to whom the copyright of the selfie should go. PETA, an animal rights organization claimed that the monkey owned rights to the picture. The photographer whose camera the monkey used claimed he owned the rights since he had made significant creative contribution. The court held that an animal cannot be the author/creator and cannot protect its claim. In these cases, the court tries to find the closest

[232] Woodrow Barfield, *Intellectual Property Rights in Virtual Environments: Considering the Rights of Owners, Programmers and Virtual Avatars*, 39 AKRON L. REV. 649 (2006).
[233] The Indian Copyright Act, No. 14 of 1957, India Code (1957), Ch. V.
[234] Pamela Samuelson, *Allocating Ownership Rights in Computer-Generated Works,* 47 PITT L. REV. 1185 (1985-1986). [*hereinafter* "**Samuelson**"]
[235] Naruto et al v. David Slater, No. 16-15469, 2018 WL 1902414 (9th Cir. Apr. 23, 2018).

human link that caused the work. Finally, the picture was put in public domain.

Under the American Copyright Act,[236] a work is fixed in a tangible medium of the expression "when its embodiment in a copy or phono record, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[237]

The requirement for "tangible form" is fairly loose since it only has to be permanent or stable to permit it to be "perceived, reproduced, or otherwise communicated." Thus, tangible form is not limited to actual physical form like on paper, canvas or film reel but can be even on a computer screen. This implies that to qualify for the requirement of tangible form an AI can make do with just displaying the end result or in any form capable of being perceived, as long as it is able to be retained for long enough time.

In *Tata Consultancy Services v. State of Andhra Pradesh,*[238] computer programs were held to be tangible. In *R.G Anand v. M/S. Delux Films,*[239] it was pointed out that the law does not recognize property rights in abstract idea, nor is an idea protected by a copyright and it becomes a copyright, and subsists only when the idea is given embodiment in a tangible form. In an

---

236 The Copyright Act, 17 U.S.C. §102 (1976).
237 *Fixed in a Tangible Medium of Expression*, CORNELL LAW SCHOOL, (July 11, 2019, 7:02 PM) https://www.law.cornell.edu/wex/fixed_in_a_tangible_medium_of_expression.
238 Tata Consultancy Services v. State of Andhra Pradesh, (2004) 137 STC 620 (India).
239 R.G Anand vs M/S. Delux Films, AIR 1978 SC 1613 (India); Bobbs-Merrill Company v. Isidor Straus & Nathan Straus, 210 US 339 (28 S.Ct. 722, 52 L.Ed. 1086).

American case of *MA1 Systems Corp. v. Peak Computer, Inc.,*[240] it was held that the loading of software into a computer's random-access memory was sufficiently permanent for it to be deemed fixed.

So far, AI seems to be eligible for creating tangible work. Conferring the authorship rights is dubious since courts till now have tried to give it to the closest human person who caused the work to be created.

The Indian Copyright Act requires a certain amount of creativity to characterize work as copyrightable. §2(y)[241] defines work as a literary, dramatic, musical or artistic work, a cinematograph film, a sound recording. §2(o)[242] expands on the list to include computer programs, tables compilations etc. §13[243] enlists what work qualifies for a copyright claim. §52[244] gives the exceptions.

This 'modicum of creativity' standard was laid down in the famous case of *Eastern Book Company v. D.B Modak*.[245] The word 'original' does not mean that the work must be the expression of original or inventive thought. As regards to derivative work, originality is a matter of degree depending on the amount of skill, judgment or labour that has been involved in making the compilation.[246] The judgement also defined primary work as literary work not based on the existing subject matter. It defined secondary or derivative work as work based on existing subject matter. As the copyright

---

240 MA1 Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993).
241 The Indian Copyright Act, No. 14 of 1957, India Code (1957).
242 *Id.*
243 *Id.*
244 *Id.*
245 Eastern Book Company v. D B Modak, (2008) 1 SCC 1 (India).
246 *Id.*

pertains to the expression of idea and not the idea itself, it does not require that the work should be in an "original form" but just that it should not be copied from another work.[247]

The copyright work which comes into being should be original in the sense that by virtue of selection, coordination or arrangement of pre-existing data contained in the work, the work is somewhat different in character as produced by the author. Although the programmer may help in creating a framework within which the computer makes selection or arrangement of data, but it is actually the computer that makes the selection,[248] and going through a combination of selections is what computers are apt for. Machines have been able to exhibit sufficient originality to qualify for copyright protection.

An AI is capable of producing original as well as derivative work. In 1993, the author used a computer program (heuristically based expert system) to copy the style of another writer Jacqueline Susann, and assist him in writing the book '*Just This Once*.'[249] In this case there was a collaboration between the computer program and the author. The book could not be said to be directly copying the original book of Jacqueline Susann, '*Valley of the Dolls*'. The computer was creative. Although it had emulated the book's style, the end product was a collaboration between the

247 London Press Limited v. University Tutorial Press Limited, [1916] 2 Ch 601 (U.K.); Macmillan and Company v. K. &J. Cooper, AIR 1924 PC 75 (India).
248 Eastern Book Company v. D B Modak, (2008) 1 SCC 1 (India).
249 SCOTT FRENCH, JUST THIS ONCE (1993).

program and the author, which was completely new, something perceptively and evidently different than the "source material."

AI has also been producing music, Google Magenta's NSynth Super, Amper Music, IBM's Watson Beat, Spotify's Creator Technology Research Lab, and Jukedeck create music using AI. Most of them use deep learning networks.[250] The music created is completely original. It is created with little to no input from the user.

It is obvious that the music created or the books written by AI are eligible for copyright protection[251] but ambiguity begins in determination of *'to whom'* the copyright should/would go. For the AI to get the claim, it is essential that AI is a legal person. It is also required that the work was done by AI independent of any human association.

What separates AI from machines which are designed to perform a limited set of actions strictly under human control is the ability of the AI to apply existing knowledge to a new set of facts or problems."[252] Facebook created an AI chat-bot that developed its own language and started communicating with other chat-bots although that was not the purpose its creator intended.[253] It can be seen that AI is developing in unexpected ways, solving problems it was not supposed to.

---

250 Dani Deahl, *How AI- Generated Music Is Changing The Way Hits Are Made,* THE VERGE (Aug. 31, 2018, 9:00 AM), https://www.theverge.com/2018/8/31/17777008/artificial-intelligence-taryn-southern-amper-music.

251 Karl F. Milde, Jr., *Can a Computer Be and "Author" or an "Inventor"*, 51 J. PAT. OFF. SOC'Y 378 (1969).

252 Bob Ryan, *AI's Identity Crisis*, BYTE, Jan. 1991, at 239, 240.

253 Andrew Griffins, *Facebook's Artificial Intelligence Robots Shut Down After They Start Talking To Each Other In Their Own Language,* INDEPENDENT (July 31, 2017, 5:10 PM)

It has been argued that all the work created by Artificial Intelligence is a derivative work of generator program.[254] But in general, computer-generated works do not incorporate recognizable blocks of expression from the underlying program or from the data base that the program draws upon in the generative process. For this reason, computer-generated output should not automatically be considered "derivative works" merely because in common parlance it could be said that the output was "derived" from or "based upon" the generator program.[255]

It's plausible that AI is creative and capable of original work. Thus, it seems that the only barrier for AI to get copyright claim is recognition by the legislation. Giving AI authorship makes sense in a world that is increasingly being reliant on AI for a range of services.

AI seems to be eligible for copyright protection under the law. It ticks almost all the boxes. It is creative and capable of creating original content in a tangible medium but it still cannot be given authorship under the current law. To be eligible for authorship, AI must first be given a legal identity independent of its developer.

IV. CAN AI BE TERMED AS A LEGAL ENTITY?

The very first challenge that we face for developing an Intellectual Property Right Regime that caters to Artificial Intelligence is whether

---

https://www.independent.co.uk/life-style/gadgets-and-tech/news/facebook-artificial-intelligence-ai-chatbot-new-language-research-openai-google-a7869706.html.

[254] Darin Glasser, *Copyrights in Computer-Generated Works: Whom, if Anyone, Do We Reward?,* 1 DUKE L. & TECH. REV. 24 (2001).

[255] *Id.*

Artificial Intelligence can be given a legal entity. Black's Law Dictionary defines "legal entity" as "a lawful or legally standing association, corporation, partnership, proprietorship, trust, or individual. It has legal capacity to (1) enter into agreements or contracts, (2) assume obligations, (3) incur and pay debts, (4) sue and be sued in its own right, and (5) to be accountable for illegal activities."[256]

Law grants rights to only those who are recognized by law either as natural or artificial persons. Till now jurisprudence around the world has not officially accepted the proposal to grant legal identity to these non-bionic persons. Though recent trends tend to show that such legal personhood can be given to machines. Recently in 2017 an Artificial Intelligent Robot named Sophia was granted the world's first robot citizenship in a country which has been time and again barraged by critics for its blatant violation of Human Rights; Saudi Arabia. Sophia was granted full citizenship.[257]

Is it fair to assume that these rights are the same as her fellow Saudi citizens – and of humans more generally around the world? Sophia is not the only one with such rights, recently artificial intelligence 'boy' Shibuya Mirai became first AI bot to be granted residency in Tokyo, Japan. Astonishingly an Artificial Intelligent robot named SAM developed by Arvid Jense and Marie Caye, is said to have its own bank account.[258] Creator

---

[256] *Legal Entity,* BLACK'S LAW DICTIONARY (10th ed. 2014).
[257] Zara Stone, *Everything You Need To Know About Sophia*, *The World's First Robot Citizen*, FORBES (Nov. 7, 2017, 12:22 PM), https://www.forbes.com/sites/zarastone/2017/11/07/everything-you-need-to-know-about-sophia-the-worlds-first-robot-citizen/.
[258] Renske Mehra, *Robot Sam is now working for Wall Street*, INNOVATION ORIGINS (Feb. 12, 2018) 6:34 PM) https://innovationorigins.com/robot-sam-now-working-wall-street/.

of Sophia, Dr. David Hanson in his paper "Entering the Age of Living Intelligence Systems and Android Society" has predicted that by 2045 robots would have developed themselves so much that they would insist for their civil rights.[259]

It is a concept of Common Law that only a person can sue or be sued and it certainly also applies to Intellectual Property Rights. To be able to apply for Intellectual Property Rights and also to sue for any infringement of such rights, the body has to be a Legal Person. For this reason, the issue of personhood for non-human entities becomes an important topic when discussing legal rights to artificial intelligence.

The jurisprudence has since the industrial revolution developed itself due to necessity to include body corporates and corporations as separate legal entities with the ability to enforce their rights. The concept is that 'persona ficta' (Latin for legal person) has a legal name and has certain rights, protections, privileges, responsibilities, and liabilities in law, similar to those of a natural person.[260] Its main idea is that Legal/Juridical personality allows one or more natural persons (universitas personarum) to act as a single entity (body corporate) for legal purposes and yet the identity

---

[259] David Hanson, '*Entering the Age of Living Intelligence Systems and Android Society*' Playstation (2018), http://Detroit:%20Become%20Human%20will%20be%20out%20on%20the%2025th%20May%202018%20exclusively%20on%20PlayStation%204.%20To%20purch%20the%20game%20and%20for%20more%20information%20please%20visit:%20https:/www.playstation.com/en-gb/.

[260] Vijay Sardana, *Jurisprudence - Nature and Concept of Legal Person,* LAW NOTES FOR STUDENTS, (June 25, 2019, 8:56 PM), http://lawnotesforstudents.blogspot.com/2017/05/jurisprudence-nature-and-concept-of.html.

of the natural person was separate from the legal entity. This concept was developed due to the necessities arising in human society.

The very words "Juristic Person" connote recognition of an entity to be in law a person which otherwise is not. In other words, it is not an individual natural person but an artificially created person which is to be recognized in law as such.[261] Application of the concept of legal personality to a non-human entity is not limited and may be applied in accordance with law as and when required. Artificial Personality may be granted to any non-human entity, "e.g., idols, group of human beings, a fund."

A religious idol may also be granted such identity even though it is clear that it won't be able to carry out tasks such as litigation or coming into contractual obligations themselves like signing a contract. The law appoints agents which act as representatives of such in-animate agencies, to represent them and the acts of such agents are imputed to the legal persona of the idol and are not the juristic acts of the agent themselves.[262] In many cases, the Supreme Court of India has granted legal and juristic identity status to religious Idols making them capable of holding property and paying taxes through their representatives.[263] Similar process can be applied to Artificial Intelligence.

When machines are more capable than mere idols and religious institutions, they can be granted legal identity for the purposes of granting

---

261 Shiromani Gurudwara Prabandhak Committee Amritsar v. Shri Som Nath Dass, (2000) 4 SCC 146 (India).
262 PATON, GEORGE WHITECROSS, <u>A TEXTBOOK OF JURISPRUDENCE</u>, 349, 350 (David P. Derham et al. eds., 3rd ed.) (1967).
263 Yogendranath Naskar v. CIT, AIR 1969 SC 1089 (India).

them civil rights. Parallel arguments of cases where animals were given rights is relevant here. In both cases there are somewhat intelligent 'individuals.' While many legislators staunchly hold that there has to be intelligence at par with humans that is required to achieve legal personhood, in contrast there are people with severe cognitive deficits and even young toddlers are given legal personhood,[264] in comparison to AI which shows a high level of awareness and reasoning. So, if people with cognitive disabilities and mental retardness can be awarded legal personhood, why couldn't AI be considered a legal person, which is equally smart or sometimes, even smarter? The arrangement of law is flexible, and has as such the possibility of creating new entities by amending the existing system of law and such an act will be new innovative way of encouraging development of Artificial Intelligence research.[265]

Thus, Artificial Intelligence is capable of being given a legal identity. It is more "intelligent" than animals, more animate than idols and rivers, and capable of being represented by individuals like a corporation. So, it seems that AI might just get the copyright on work it creates. But there are a few issues in giving Artificial Intelligence these rights.

V. HURDLES IN GIVING AI COPYRIGHT

Problems begin to pour in when one says the AI produces art that has already been created by someone else. In that case if the creator of the original art wants to sue for its copyright breach, does it sue the user of the

---

264 Elizabeth L. Decoux, *In the Valley of the Dry Bones: Reuniting the Word "Standing" with its Meaning in Animal Cases,* 19 WM. & MARY ENVTL. L. & PLO'Y REV. 681, 755 (2005).
265 Ryan Abbott, *I Think, Therefore I Invent: Creative Computers and the Future of Patent Law*, 57 B.C. L. REV. 1079 (2016).

AI who did not consciously create that iteration? Or if it does sue the user, can the user claim that the AI created it and he had no knowledge of the work being created to be an infringement of the original creator as a valid defence?

A. THE SWEAT & BROW THEORY

One might just say, that by giving AI the right to copyright ownership, no useful end is served. An AI cannot protect its own creations as it cannot sue, it has no financial motive like other creators to protect his creations and it can produce endless creations at the blink of an eye. Enforceability of the law in respect of Artificial Intelligence is uncertain.[266]

The whole purpose of copyright law is to protect the interests of the author. Copyright act is supposed to protect the moral and economic rights of the author.[267] Legal Scholars like Samuelson and Miller have noted that the rationale for copyright is to provide an incentive for authors to create copyrightable works. Accordingly Arthur Miller believes, since "these software and machines" currently need no such incentive to create work as there can be no copyright awarded to such entities.[268] It is supposed to provide incentives for the creator to create more original content which is beneficial for the society and also profit from these creations.[269]

---

266 Evan H.Farr, *Copyrightability of Computer- Created Works*, 15 RUTGERS COMP. & TECH. L.J. 63,65 (1989).
267 Naruto et al v. David Slater, No. 16-15469, 2018 WL 1902414 (9th Cir., Apr. 23, 2018).
268 Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?,* 106 HARV. L. REV. 977 (1993).
269 Stephen G. Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs,* 84 HARV. L. REV. 281, 284-93 (1970); Ralph S. Brown Jr., *Eligibility for Copyright Protection: A Search for Principled Standards,* 70 MINN. L. REV. 579, 596 (1985).

Copyright protection incentivizes the author to create more work because of the certainty that that work would not be copied by unauthorized users. AI on the other hand does not need financial or social motivation to create work. It can create work in the click of a button in the blink of an eye. So, giving rights to them serves no end. The likelihood of machines requiring this incentive and having the consciousness of protecting from infringement is very low. It does not require remuneration for its hard work. A machine simply does what it is programmed to do, without financial motivation.[270]

Unless and until there is extreme anthropomorphism, and AI reaches a point where it becomes self-aware and self-determining that it starts demanding financial incentives, there isn't any need for granting exclusive ownership rights to the machine.[271] The machine developers are to be given such copyright on computer generated works, since that could provide incentives to them to develop more such AI machines. (Milde argues, that computer manufacturers need such incentives to encourage investment in computer designs).[272]

---

270 *Copyright Law and Artificial Intelligence*, AMERICAN BAR ASSOCIATION, (Dec. 2017, 9:00 PM), https://www.americanbar.org/news/abanews/publications/youraba/2017/december-2017/copyright-laws-and-artificial-intelligence/.

271 Lorna Brazell, *Can Copyright Survive Artificial Intelligence?* SCL TECH LAW FOR EVERYONE (Aug. 2, 2018, 10:45 AM), https://www.scl.org/articles/10139-can-copyright-survive-artificial-intelligence.

272 Samuelson, *supra* note 234.

B. THE COPYRIGHT ACT IMPLIES THE AUTHOR TO BE A HUMAN ENTITY

Under the Indian Copyright Act 1957, the term 'author' though defined, is somewhat left open ended in matters concerning autonomously generated computer work. §2(d)[273] defines "author" (i) in relation to literary or dramatic work, the author of the work, (ii) in relation to a musical work, the composer (vi) in relation to any literary, dramatic, musical or artistic work which is computer- generated, the person who causes the work to be created.

It must be observed that the definition of author under the Indian Copyright Act does not mention of an animate individual (human) and does not hint of the legal personality of the author.[274] It is imperative to notice is that the enactment in sub-clause (vi) patently mentions that for any computer generated work, the person causing the work to happen shall be the author. On plain perusal of the provision it does not take into consideration any computer machine which is intelligent to act as humans, it only considers those computers which are operated by human agency or has some amount of human interaction.[275]

They have considered computers as mere tool for humans to use in their creative endeavours. This creates a void in the legislation as to whether a machine which is capable of independent creative thought process can

---

[273] The Indian Copyright Act, No. 14 of 1957, India Code (1957).
[274] Ritvik M Kulkarni, *Of Artificial Intelligence and Authorship,* SPICY IP BLOG (Dec.11, 2016, 4:00 PM), https://spicyip.com/2016/12/of-artificial-intelligence-and-authorship.html.
[275] *Who Owns Computer Generated Works,* LEARN AND DIGEST BLOG (June, 2014, 1:03 AM), http://learndigest.blogspot.com/2014/06/who-owns-computer-generated-works.html

have separate ownership rights? This issue can be rectified by understanding the intent of the legislation.

Under Chapter V of the Indian Copyright Act, in §22,[276] the act talks about the term of the copyright in published literary, dramatic, musical and artistic work- where it mentions term of any work published within the "lifetime" of the author until sixty years from the beginning of the calendar year following the year in which the author "dies."[277] It is clear that the intention of the legislators was at that time to include only mortal beings as subjects of copyright law. Whether or not the legislators at that time did not foresee the idea of making non-living immortal entities such as Artificial Intelligence itself the subject of copyright law is still not clear. But under current law, the author must be a living being or at least a corporation comprising living beings.

Even under United Kingdom Copyright Act, the law does not provide for the computer to get the rights. It says in the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken.[278]

C. LEGAL PERSONHOOD

Artificial Intelligence is not a recognized legal entity and there isn't any process of registering an AI as a legal entity. While one can argue that

---

276 The Indian Copyright Act, No. 14 of 1957, India Code (1957),

277 Samuelson, *supra* note 234.

278 Copyright, Designs and Patents Act 1988, c. 10. §178 (U.K.).

even corporations are given legal identity, however, Solum believes that corporations have humans who constitute its board of directors or the senior management which exerts control over the corporations.[279] Whether this should be followed as a precedent for giving legal personhood to AI, AI will have to exhibit a broad range of intellectual abilities before they can resemble human like cognitive and perceptual capabilities.

Presently lack of human like intellectual abilities, and just knowledge in specific field or conduct like playing chess or creating music will not be enough for taking AI into consideration for granting a status vis-a-vis legal personhood.[280] Other reasons include lack of self-awareness in the machines.

With the software developer of the AI or the user of AI the closest natural persons, it only makes sense to grant ownership to such natural persons. In other contexts, courts routinely decline to extend legal rights to entities other than natural persons, such as animals.[281]

Though these natural persons seem to be potential candidates for getting ownership, issues arise because they do not come under the definition of 'author' for copyright. Where the end computer generated work was done completely autonomously without human interaction, the software developer fails to comply with the definition of author in context to that particular autonomously generated AI work under the Copyright

[279] B. Solum, *Legal Personhood for Artificial Intelligences,* 70 N.C. L. REV. 1231 (1992).
[280] Woodrow Barfield, *Issues of Law for Software Agents within Virtual environments*, 14(6) PRESENCE: TELEOPERATORS & VIRTUAL ENV'TS, 741 (2005).
[281] Tommy v. Lavery, et al.; Kiko v. Presti, et al, 54 N.Y.S.3d 392 (N.Y. App. Div. 2017).

Law.[282] Certainly these software developers are skilled in designing such incredible coding software, yet they might have no skill at all of creating, the final computer generated work,[283] such as a painting or music.[284]

VI. POTENTIAL CANDIDATES FOR COPYRIGHT OWNERSHIP

The alternatives of giving ownership to Artificial Intelligence for Artificial Intelligence created work is either giving the ownership to the developer of the Artificial Intelligence that created the work or to put the work in public domain. The developer is the closest human agent when an Artificial Intelligence creates something. A developer of Artificial Intelligence could be credited for all creations on Artificial Intelligence. Here we are assuming that the developer does not sell or license the Artificial Intelligence to someone else but uses it to create work.

Putting the work created by Artificial Intelligence in public domain is another option. By putting the work in public domain, the work is free for anyone to access and use. It makes the work readily available, accessible and free. Since the Artificial Intelligence did not incur any cost to produce the work, making the work accessible for free would not be illogical.

A. DEVELOPERS OF ARTIFICIAL INTELLIGENCE

Artificial Intelligence is different from machines that came before it for the simple reason that Artificial Intelligence does not require any human

---

282 Ben Hattenbach; Joshua Glucoft, *Patents in An Era of Infinite Monkeys and Artificial Intelligence*, 19 STAN. TECH. L. REV. 32 (2015).

283 *Id.*

284 Stephen Thaler, *Neural Networks that Automatically Create and Discover,* IMAGINATION ENGINES INC. (1996), http://imagination-engines.com/iei_pcai.php.

input. Other machines and software that came before it required human intervention. As Artificial Intelligence works independent of human agency it becomes contentious whether Artificial Intelligence could be considered a tool of humans. There exists a thin line between what can be considered a tool and what can be considered a human equivalent machine.

It would be fair to attribute some part of the output of the computer to the programmer. To develop an excellent output generating machine requires high intellectual labour and persistence from the developer side. It is time consuming and expensive for the programmer, and it would be a fair reward to allow them copyright for the fruits of its intellectual labour even though the output is maybe something they might not have envisioned.[285] After all, the machine at least starts with following the instructions of the developer.[286] It was the programmer who gave the Artificial Intelligence the initial capability to produce the output.

Many legislators argue that developers and users of Artificial intelligence cannot be the rightful owner of the computer-generated work, because of their lack of contribution to the output. In plenty of cases the developer might now even conceive of such an output. For instance, Facebook had to shut down its program at Facebook AI Research Lab (FAIR) when they realized that an AI had developed its own unique

---

[285] JOHN HAUGELAND, ARTIFICIAL INTELLIGENCE: THE VERY IDEA (1985).
[286] *Id.*

language which the humans could not either explain or understand, and was using it to communicate to other AI.[287]

So, is there any legal doctrine where the ownership might be granted to one who not only did not conceive nor did the entity contributed in anyway in the production of such computer-generated work?

The answer is yes. The doctrine of work done under a hire agreement, is an exception to the general notion of copyright law that the author is the first owner of the output. The doctrine gives ownership rights to the employer or commissioning party who pays for the creation of such work, rather than the person who actually conceived or fixed the expression.[288]

Ownership of work in case of hire in conceptualized under §17[289] of the Indian Copyright Act 1957, which states that in absence to a contract to the contrary, in case of literary, dramatic or artistic work done by an author under the course of its employment under a contract of service, the employer, and where the author in case of photograph taken, or a painting or portrait drawn, or an engraving or a cinematograph film made, at the instance of any person, the employer and the person at whose instance the work was made shall be the first owner of the work.[290]

---

[287] Tony Bradley, *Facebook AI Creates Its Own Language In Creepy Preview Of Our Potential Future*, FORBES, (Jul. 31, 2017, 11:20 AM), https://www.forbes.com/sites/tonybradley/2017/07/31/facebook-ai-creates-its-own-language-in-creepy-preview-ofourpotentialfuture/#7f4a013292c0.

[288] Darin Glasser, *Copyrights on Computer-Generated Works: Whom, If Anyone, Do We Reward?* 24 DUKE L. & TECH. REV. (2001).

[289] The Indian Copyright Act, No. 14 of 1957, India Code (1957),

[290] The Indian Copyright Act, Ns. 14 of 1957, India Code (1957), §17(a)(c).

The rights to ownership of a lyricist or a song writer maybe defeated by the producer who engages them[291] as accordance to the §17 sub clause (b) and (c).[292] This could be an alternative in resolving the current debate of allotting ownership right to computer generated works. The developer of the Artificial Intelligence software can be assumed as an employer and the software in itself its employee.

Also, the developer puts sufficient hard work in creation of AI. When talking about the amount of work put in, programmers could not be said to have put no work in production of that 'specific output.' The programmer chooses from multiple options (different model selection, setting the objective functions and further selections determining the framework within which the algorithm trains and adjusts) to create its algorithm, which generates output. The programmers then goes through extensive data and sets, with which the algorithm learns, how to decide to classify the data for training and testing purposes provided with certain limits[293] (bias and variance, on which the speed and accuracy of the algorithm is determined).[294] Similarly, a lot of complicated decision making and prior programming goes into making an algorithm for AI before it is ready to go live and let loose to create its own independent output. The amount of decisions and work put in by the programmer and the output, which is directly, or indirectly a product of the programmer's creative

---

[291] Indian Performing Right Society Ltd. Vs. Eastern Indian Motion Pictures Association, AIR 1977 SC 1443 (India).
[292] The Indian Copyright Act, No. 14 of 1957, India Code (1957),
[293] David Lehr & Paul Ohm, *Playing with the Data: What Legal Scholars Should Learn About Machine Learning*, 51 U.C. DAVIS L. REV. 653, 683-84 (2017).
[294] *Id* at 696-97.

genius, makes it reasonable to think that the programmer should be the author of such work.[295]

However, this might lead to opening up of a Pandora's box with even more complex issues like, when the said programmer dies, the Artificial Intelligence might still go on to create more works and in such a scenario with absence of the developer, who shall be the owner of further computer-generated works? Also, if the Artificial Intelligence works as an employee, will it have rights like contractual rights? (Even if the artificial intelligence was deemed to be an employee one will have to determine whether the work was under a work of hire under the copyright act.)[296]

B. PUBLIC DOMAIN

One alternative while allocating ownership is to not give it to anyone but to put the work in public domain. It makes sense when one considers that it costs AI virtually nothing to create work. Once AI has been developed to create a particular kind of work, it can create infinite iterations of it without incurring any extra cost or consuming extra resources.

Moreover, AI does not need incentive to create work. The whole purpose of intellectual property law is to incentivize the author to create more work. AI does not require any financial motivation. It does not have any needs. Also, to confer rights to the developer does not make sense since

---

[295] Samantha Fink Hedrick, *I "Think" Therefore I Create: Claiming Copyright in the Outputs of Algorithms*, 8(2) JIPEL 324 (2019).
[296] The Indian Copyright Act, No. 14 of 1957, India Code (1957), §17.

the developer did not even envision the final product or assisted the AI in making that product.

But there are issues with putting the AI generated work in public domain. Developers do not have incentives to develop more AI, or improve its capabilities. For people and corporations tend to put a lot of money for development of AI technology, and putting them in public domain fails to encourage them to invest in AI research resulting in decline of AI as well as innovation in technology.[297] Thus immediately putting the computer generated work in the public domain is unwanted as it decreases the amount of works entering the public domain hence counter-productive.

It becomes increasingly difficult to attribute a creation to its creator. A person can simply tweak the work created by AI and claim it his own. It is hard to locate the true creator of an art. Apart from dis-incentivizing developers to make AI create more work it would also lead to IP theft, multiple claims of ownership for same work.

Another reason not to adopt this seemingly sensible proposal is that it conflicts with the temper of the times. At the moment, the legislature, the executive branch, and the courts seem to strongly favour maximizing intellectual property rewards, especially for high technology innovators. Perhaps the best reason to allocate ownership interests to someone is that someone must be motivated, if not to create the work, then to bring it into public circulation. If a flawless work has been created by the use of a computer program, and the law deems the work to be not owned by the

---

[297] Kalin Hristov, *Artificial Intelligence and the Copyright Dilemma*, 57 IDEA 431 (2017).

developer because of the lack of a human author, the user who proximately caused its creation has little incentive to go to the trouble of bringing forward what the law says is in the public domain.

The user is more likely to withhold it from the public, or to lie about who created the work, or to make some little change in it (perhaps not an improvement) just to establish a stake in it. Innovations that are kept secret do not promote the progress of science and the useful arts as much as innovations that are revealed and disseminated.[298]

Thus, it seems the cons outweigh the pros. Putting AI generated work in public domain could hamper future innovation and creativity. It would also lead to dis-incentivizing people to create AI software. Furthermore, it goes against the spirit of capitalism.

VII. CONCLUSION

A dire need exists, to find out the most effective legal manner to protect autonomously developed creations in the international market. More specifically, this controversy has focused on whether these creations should be protected by amending and modifying existing forms of copyright ownership rights or by creating a completely new form of legal legislation. Artificial Intelligence is taking a predominant place in the daily lives of many individuals.

---

[298] D. Ladd, *Donald C. Brace Memorial Lecture*, N. Y. U. L. Ctr. (Apr. 13, 1983).

It is becoming evident that Artificial Intelligence will become even a bigger part of our lives in the foreseeable future. As they take a creative role more and more of intellectual property creations will be accredited to these AI bots. As such the question as to whom should the ownership of this intellectual property be vested with becomes important. The fate of millions of dollars of income in the form of book sales, royalties, art auctions etc. depends on to whom the ownership right goes. Does it go to the developer of Artificial Intelligence application, the Artificial Intelligence itself or into public domain?

Giving it to the developer seems illogical under the current Intellectual Property Regime as giving ownership rights to an entity that did not conceive the idea or actively participate in its creation goes patently against the provisions of the Copyright Law. Although the developer created the software but it does not have control over what the software created.

To give ownership rights to Artificial Intelligence itself is a slippery slope. The rights would be vested in the body incorporated to represent the Artificial Intelligence software. The problem with this approach is that it defeats the purpose of the law. The purpose of Copyright Law is to protect the creator and incentivize them to create more work but Artificial intelligence does not require incentive to create more work. It simply would not remain a level playing field.

To vest the right in no one but rather put the intellectual property in public domain would serve the consumer the best at present stage. The purpose of law is to protect and incentivize the creator but a creator does not exist in the traditional sense of it. Since AI generated work does not require incentive it makes sense to not give it protection under the law. However, issues exist in this paradigm as well. Putting the work in public domain is not commercially viable as a machine whose work is not saleable would not earn much for the developer of the machine.

The Current field of Artificial Intelligence is at a nascent stage, and the potential for growth is limitless. But what is known for sure is that the Copyright law in its current form is incapable of dealing with work created by Artificial Intelligence. The problem that stems from works created by Artificial Intelligence are many.

Thus it seems that the current Intellectual Property Law can be retained but a new interpretation can be provided which encourages growth in this budding technology and retains its principle that for an intellectual work to exist the closest human agency has to be found or the law could be amended to include artificial as an author like a corporation, to put the ownership rights in.

It is clear that more research is needed in this field to find solutions to this problem to keep pace with the developments in Artificial Technology.

Om Prakash Gautam, *Empathetic Amenability of the obligations in good faith under Law of Treaties: A Diamond in the Hay Stack*, NLUJ Law Review 6(2) 125 (2020)

EMPATHETIC AMENABILITY OF THE OBLIGATIONS IN GOOD FAITH UNDER LAW OF TREATIES: A DIAMOND IN THE HAY STACK

OM PRAKASH GAUTAM[+]

ABSTRACT

ICJ in Jadhav's Case held, that Pakistan was in breach of the obligations under Vienna Convention on Consular Relations, and relied on good faith to assess the nature of breach. Good faith plays a predominant role in treaty relations, thereby translating into general obligations: to abstain from acts, pending ratification of a treaty, that would prejudice the rights of the other party; having ratified the treaty, to perform it in good faith and not to frustrate its object and purpose; to negotiate and settle disputes in good faith; to interpret treaties in good faith; and to exercise rights in good faith. Under Art. 18 of Vienna Convention on the Law of Treaties, 1969 (VCLT)[299], states that have signed or ratified a treaty are supposed to refrain from acts which might defeat the object and purpose of the treaty prior to its entry into force. It gives concrete meaning to the principle of good faith by protecting legitimate expectations. The legitimate expectation means that fundamental

[+] The author is an Assistant Professor at National Law University, Jodhpur and may be contacted at **opg[dot]nlu[attherate]gmail[dot]com.**

fairness requires a State to refrain from undermining an agreement on which another State is relying. Pacta sunt servanda binds the State party to the provisions of the treaty and to perform them in good faith. ICJ in Nuclear Tests Case held that, 'one of the basic principles governing the creation and performance of legal obligations... is good faith'. Art. 31(1) VCLT states that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. This rule of treaty interpretation highlights three sources: the treaty's terms, the context of those terms, and the treaty's object and purpose.

TABLE OF CONTENTS

I. INTRODUCTION

Mr. Kulbhushan Jadhav was arrested by Pakistani authorities for espionage and terrorism. Pakistan raised the issue of arrest with India and released a video in which Mr. Jadhav confessed for acts of espionage and terrorism in Pakistan. India made requests for consular access. Subsequently, Mr. Jadhav was tried and sentenced to death by Military Court. India raised the issue before ICJ for consular assistance with regard to the arrest, detention, trial and sentencing of Mr. Jadhav especially under Art. 36 of Vienna Convention on Consular Relations, 1963. The Court held[300] that, Pakistan is under obligation to inform Mr. Jadhav without further delay of his rights and to provide Indian officers access to him in accordance with Article 36 of the Vienna Convention on Consular Relations. It has committed breach of its obligations by not informing Mr. Jadhav without delay of his rights under Article 36, paragraph 1 (b) of Vienna Convention on Consular Relations; and deprived India of the right to communicate with and have access to Mr. Jadhav, to visit him in detention and to arrange for his legal representation under Article 36, paragraph 1 (a) and (c), of the Vienna Convention.

Making a reference to Art. 26 of the Vienna Convention on the Law of Treaties, Judge Robinson[301] held that, it requires a careful examination of all the relevant circumstances including the treaty in question and their conduct, to determine whether parties to a particular treaty have acted

---

[300] Jadhav (India v. Pak.), Judgement, 2019 I.C.J. General List No. 168 (July 17).
[301] Jadhav (India v. Pak.), Judgement, 2019 I.C.J. General List No. 168, at 6,7, ¶ 10 (July 17) (declaration by Robinson, J.).

consistently with their obligations under the treaty. He also relied on the decision of the court in Gabčíkovo-Nagymaros Project (Hungary/ Slovakia), that the good faith obligation requires parties to apply a treaty "in a reasonable way and in such a manner that its purpose can be realized."[302] The court[303] applied the customary rules of treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties to interpret Vienna Convention on Consular Relations.[304] In his separate opinion, Judge Cancado Trindade[305] held that: no records were provided as to Mr. Jadhav's trial by a military court and there is lack of evidence of due process of law and observance of his fundamental human right to life. The prosecution, conviction and sentencing of Mr. Jadhav in such circumstances disclose a lack of bona fides.

In his dissenting opinion, Judge Jillani observed[306] that the question of the abuse of rights is closely intertwined with the fundamental principle of good faith. The rights and obligations stipulated in an international treaty are to be exercised and performed in accordance with the object and purpose for which those rights were created. He further held that, India has

---

302 Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 79, at 7, ¶ 142 (Sept. 25).

303 Jadhav (India v. Pak.), Judgment, 2019 I.C.J. General List No. 168, at 20-21, ¶ 71 (July 17).

304 Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, 2004 I.C.J. Rep. 12, at 48, ¶ 83 (March 31); Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, 2008 I.C.J. Rep. 177, at 232, ¶ 153 (June 04).

305 Jadhav (India v. Pak.), Judgement, 2019 I.C.J. General List No. 168, at 23, ¶ 91 (July 17) (separate opinion by Trindade, J.).

306 Jadhav (India v. Pak.), Judgement, 2019 General List No. 168, at 2, ¶ 4 (July 17) (dissenting opinion Jillani, J.).

abused its right when claiming consular access to its national who had been instructed to commit serious crimes of terrorism and espionage in Pakistan.

The principle of good faith is an intrinsic part of the law of treaties, applicable to their formation, performance, interpretation and termination.[307] Cheng observed that, good faith plays an overarching role in treaty relations and "governs treaties from the time of their formation to the time of their extinction,"[308] thereby translating into general obligations such as: to abstain from acts pending ratification of a treaty that would prejudice the rights of the other party; having ratified the treaty, to perform it in good faith and not to frustrate its object and purpose; to negotiate and settle disputes in good faith; to interpret treaties in good faith; and to exercise rights in good faith.[309] The Vienna Convention on the Law of Treaties ("Convention") preamble notes that the principle of good faith has universal recognition.[310] The Convention mandates good faith in the performance of existing treaty obligations by explicitly adopting the

[307] BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 106-20 (Stevens, 1953) [*hereinafter* "**CHENG, GENERAL PRINCIPLES**"]; SCHWARZENBERGER, THE FUNDAMENTAL PRINCIPLES OF INTERNATIONAL LAW, 191, 295 (1955); A. MCNAIR, THE LAW OF TREATIES 465 (1961); C. WOLFF, JUS GENTIUM METHODO SCIENTIFICA PERTATATUM, 282-84 (J. Drake trans. 1764 ed., 1934); Tariq Hassan, *Good Faith in Treaty Formation*, 21 VA. J. INT'L L. 443, at 450 (1981) [*hereinafter* "**Hassan**"].

[308] CHENG, GENERAL PRINCIPLES, *supra* note 307, at 106; ANDREW D. MITCHELL, M. SORNARAJAH & TANIA VOON, GOOD FAITH AND INTERNATIONAL ECONOMIC LAW, 11 (OUP, 2015) [*hereinafter* "**MITCHELL, INTERNATIONAL ECONOMIC LAW**"].

[309] CHENG, GENERAL PRINCIPLES *supra* note 307; Andrew Mitchell, *Good Faith in WTO Dispute Settlement*, 7 MELB. J. INT'L L. 339, at 345 (2006).

[310] IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES (2nd ed.1984) [*hereinafter* "**SINCLAIR, VCLT**"]; Kearney & Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495 (1970); Hassan, *supra* note 307.

principle of *pacta sunt servanda*:[311] "*Every treaty in force is binding upon the parties to it and must be performed by them in good faith*."[312] The Convention further provides that "*treaty shall be interpreted in good faith*",[313] and implicitly requires good faith in treaty termination.[314] The paper analyses the context of good faith in the Convention with respect to three dimensions: Art. 18: Obligation not to defeat Object and purpose of Treaty; Art. 26: Performing Treaty obligations; and Art. 31: Treaty Interpretations.

II. OBLIGATION NOT TO DEFEAT THE OBJECT AND PURPOSE OF A TREATY

Article 18 of the Convention[315] provides: "*A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.*" Article 18 which elaborates upon "interim obligations" as it governs the State conduct in the period between a State signalling its intention to join a treaty (i.e., signature) and the moment the State either becomes bound to the treaty (i.e., ratification) or makes clear its intention not to become a

[311] Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331.
[312] *Id.* at art. 26.
[313] *Id.* at Art. 31(1).
[314] A. DAVID, THE STRATEGY OF TREATY TERMINATION: LAWFUL BREACHES AND RETALIATIONS 169 (1975); Hassan, *supra* note 307, at 451.
[315] Vienna Convention, *supra* note 311, at art. 18.

party to the treaty.[316] The time between signature and ratification allows governments to review a treaty before the State becomes bound by it.[317]

Generally, signature entails various implications, the most common being authentication of the text.[318] It can also entitle a State to ratify a treaty, whereas if it had not signed the treaty, it could only have become its party by accession. If a State does not sign a treaty, it cannot for example take part in certain post-signature activities, e.g. formation of treaty-established bodies. Signature can also enable a State to submit reservations at the time of signing or at the start of its provisional application.[319] In short, signatures do bring certain rights or benefits to the State, and it is therefore appropriate that the latter would assume certain obligations at that time.[320] When a State consents by the act of a signature alone to be bound by a treaty[321] and that treaty enters into force immediately after the signature, there is no interval between the signature and entry into force and thus all legal consequences of entry into force take effect instantly, i.e. the State is required to apply it in good faith (*pacta sunt servanda*).[322] By contrast, when a signature implies merely authentication of the text of a treaty subject to

---

316 David S. Jonas, *The Comprehensive Nuclear Test Ban Treaty: Current Legal Status in the United States and the Implications of a Nuclear Test Explosion*, 39 N.Y.U. J. INT'L L. & POL. 1007, 1042-44 (2007); Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 VAND. J. TRANSNAT'L L. 565, 594 (2010) [*hereinafter* "**Saunders**"].

317 SINCLAIR, VCLT, *supra* note 310, at 29, 39-4; Saunders, *supra* note 316.

318 Vienna Convention, *supra* note 311, at art. 10.

319 *First Report on the Law of Treaties by SR Humphrey Waldock*, [1962] 2 Y.B. Int'l L. Comm'n 47 at 7, U.N. Doc. A/CN.4/144 [*hereinafter* "**Waldock, Law of Treaties**"].

320 *First Report of SR Hersch Lauterpacht*, [1962] 2 Y. B. Int'l L. Comm'n 109-110 ¶ 3, U.N. Doc. A/CN.4/63.

321 Vienna Convention, *supra* note 311, at art. 12; Council of Europe, TREATY MAKING - EXPRESSION OF CONSENT BY STATES TO BE BOUND BY A TREATY, 9-10 (2001).

322 Vienna Convention, *supra* note 311, at art. 26.

ratification, or when it implies consent to be bound and the treaty is to enter into force only after a certain period, a certain interval between the signature and entry into force arises, and that raises the question on the legal position of the State during that period.[323]

Ratification is not obligatory under international law and falls within the discretion of States, the interim period between signature and ratification being intended precisely for consideration on the ratification.[324] That does not mean, however, that the State is allowed to prejudice in that interim period with its actions the subsequent entry into force or application of the treaty. A State could be held responsible for such acts under international law simply because the principle of good faith alone requires that the State refrains from acts having such effect, the interim obligation being an emanation of that principle.[325]

Samuel B. Crandall wrote in 1916 that pending entry into force, "neither party may, without repudiating the proposed treaty, voluntarily place itself in a position where it cannot comply with the conditions as they existed at the time the treaty was signed."[326]

---

323 Andrej Svetlicic, *Obligation of a State Not to Defeat the Object and Purpose of a Treaty between Its Signature and Entry into Force*, 70 PRAVNIK 361, 362-363 (2015).
324 *Waldock, Law of Treaties, supra* note 319, at ¶ 5; Martin A. Rogoff, *The International Legal Obligations of Signatories to an Unratified Treaty*, 32 MAINE L. REV., 267 (1980); *Id.* at 364.
325 Svetlicic, *supra* note 323, at 365.
326 SAMUEL B. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT, 343-44 (2nd ed. 1916); Jan Klabbers, *How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent*, 34 VAND. J. TRANSNATL. L. 283, 295 (2001).

The Draft Convention on the Law of Treaties, prepared in 1935 under the auspices of Harvard Law School, contained a draft Article on the interim obligation, although it noted that it was concerned with a duty of good faith rather than of international law.[327] Draft Article 9 reads: "Unless otherwise provided in the treaty itself, a State on behalf of which a treaty has been signed is under no duty to perform the obligations stipulated, prior to the coming into force of the treaty with respect to that State; under some circumstances, however, good faith may require that pending the coming into force of the treaty the State shall, for a reasonable time after signature, refrain from taking action which would render performance by any party of the obligations stipulated impossible or more difficult."[328]

J. Mervyn Jones, in 1949, formulated the interim obligation as follows: "*Signature may, in conditions not yet defined by positive law, commit a State to the obligation not to exploit the signed text for its own purposes by abusing its discretion to ratify. Where a State has led other States to believe that its ratification will follow as a matter of course it ought not to do anything between signature and ratification which would frustrate the purpose of the treaty*."[329] Finally, Lord McNair, held that "*one party to a treaty must not, pending ratification, do anything which will hamper any action that may be taken by the other party if and when the treaty enters into force ....*"[330] Hence, there seems to be a general agreement among the writers that, in

---

327 Harvard Law School, *Harvard Draft Convention on the Law of Treaties*, 29 AM. J. INT'L L. 657, 658 (1935); Klabbers, *supra* note 326.
328 Harvard Law School, *Harvard Draft Convention on the Law of Treaties*, 29 AM. J. INT'L L. 657, 658 (1935); Klabbers, *supra* note 326.
329 J. MERVYN JONES, FULL POWERS AND RATIFICATION: A STUDY IN THE DEVELOPMENT OF TREATY-MAKING PROCEDURE, 89 (1949); Klabbers, *supra* note 326.
330 A.D. MCNAIR, THE LAW OF TREATIES 200 (1986); Klabbers, *supra* note 326.

one form or another, an obligation exists, not to impair the value of an undertaking pending ratification or entry into force.[331]

Many post-Vienna Convention writers advocate a legitimate expectations test.[332] Art. 18 VCLT, protects the legitimate expectations of other participants in the treaty-making process, and is based on good faith.[333] *Paul McDade* devoted to analysing the legality of unilateral attempts to explore the deep sea-bed by signatories of the UN Convention on the Law of the Sea, 1982 observes: "*The emphasis should be on conduct, a state can expect as a result of the obligation of good faith, rather than defining which actions constitute bad faith. Examining the legitimate expectations which each state is entitled to expect regarding the treaty which has been signed and the conduct of other states in relation thereto is likely to be more fruitful than focussing on bad faith or attempting to prove subjective intent to abuse a set of rights.*"[334] Mark Villiger, concluded that '*clearly, Art. 18 gives concrete meaning to the principle of good faith by protecting legitimate expectations.*'[335] Robert Turner, advocated legitimate expectations test: "*the underlying principle behind article 18 is not that signed treaties are binding; it*

331 Klabbers, *supra* note 326, at 296.
332 SINCLAIR, VCLT *supra* note 310, at 42-44; Joni S. Charme, *The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma*, 25 GEO. WASH. J. INT'L L. & ECON. 96 (1992); Klabbers, *supra* note 326, at 315.
333 OLIVER DORR AND KIRSTEN SCHMALENBACH (EDS), VIENNA CONVENTION ON THE LAW OF TREATIES - A COMMENTARY (Springer 2012).
334 Paul V. McDade, *The Interim Obligation Between Signature and Ratification of a Treaty*, 32 NETH. INT'L L. REV. 22 (1985); Klabbers, *supra* note 326, at 315.
335 MARK EUGEN VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES, 321 (1985); Klabbers, *supra* note 326, at 315.

is instead that fundamental fairness requires a State to refrain from undermining an agreement on which another State is relying ....".[336]

Yoram Dinstein, argued that signature creates legitimate expectations to the extent that the signatory State is bound to refrain from acts defeating the object and purpose of a treaty, and in the case of the Chemical Weapons Convention this means that a signatory State (or ratifying State) is not allowed to accelerate the production and stockpiling of chemical weapons, although it would not yet be under an obligation to stop producing and stockpiling altogether.[337]

In *S.E.B. v. State Secretary for Justice*,[338] case before the Judicial Division of the Dutch Council of State (the highest administrative court in the Netherlands), the Court refused to honour an appeal on the interim obligation when a Moroccan teenager whose father lived in the Netherlands and claimed a right to be reunited on grounds of the Rights of the Child Convention.[339] At the material time, the Convention had been signed by the Netherlands but not yet ratified, and accordingly it had not yet entered into force for the Netherlands. The Court argued that: "this obligation means that in the majority of cases, a State should refrain from acts which would make the future application of the treaty in question impossible once it has

---

336 Robert F. Turner, *Legal Implications of Deferring Ratification of SALT*, 21 VA. J. INT'L L. 747, 777 (1981); Klabbers, *supra* note 326, at 315.
337 YORAM DINSTEIN, THE CONVENTION OF THE PROHIBITION AND ELIMINATION OF CHEMICAL WEAPON: A BREAKTHROUGH IN MULTILATERAL DISARMAMENT 151, 154-55 (1995); Klabbers, *supra* note 326, at 315.
338 S.E.B. v. State Secretary for Justice, 1992, 25 Neth. Y.B. Int'l L. 528 (1994); Klabbers, *supra* note 326, at 319.
339 United Nations Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448.

entered into force. Contrary to what the appellant evidently believes, it cannot be maintained that the refusal constitutes an act that makes the future application of the Child Rights Convention impossible."[340]

In *Opel Austria case*,[341] before EC's Court of First Instance, the issue was whether the EC Council had violated the interim obligation in imposing tariffs against gearboxes made by Opel Austria, as a retaliatory measure to countenance government subsidies, shortly before the Agreement establishing the European Economic Area (EEA) entered into force between Austria and the EC.[342] The prohibition contained in the EEA agreement would undoubtedly be self-executing in the legal orders of the territories covered by community law from the moment of entry into force onwards. The Court annulled the contested regulation, with reasoning that the regulation had 'infringed the applicant's legitimate expectations.'

In *Danisco Sugar case*,[343] before the European Court of Justice, a week and a half before January 1, 1995, when Sweden's membership of the European Union would take effect, Sweden's parliament adopted a new Sugar Law on December 20, 1994, which would take effect a day before

340 S.E.B. v. State Secretary for Justice, 1992, 25 Neth. Y.B. Int'l L. 528 (1994).

341 Case T-115/94, Opel Austria GmbH v. Council, 1997 E.C.R. II-39; Jan Klabbers, *Protection of Legitimate Expectations in EC Law Deriving from an International Agreement Prior to its Entry into Force: The Opel Austria Decision of the Court of First Instance,* 95 LAKIMES 732 (1997); P.J. Kuijper, *The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties 1969*, 25 Legal Issues of Eur. Integration 1 (1998); Klabbers, *supra* note 326, at 321.

342 Case T-115/94, Opel Austria GmbH v. Council, 1997 E.C.R. II-39, ¶ 39-44; Klabbers, *supra* note 28, at 321.

343 Case C-27/96, Danisco Sugar AB v. Allmnna Ombudet, 1997 E.C.R. 1-6653; Klabbers, *supra* note 28, at 328.

Sweden's accession to the Union. Under the Sugar Law, anyone holding large amounts of sugar in stock at midnight, December 31, 1994, was to be subjected to a heavy tax. The purpose was to prevent speculation with sugar, because the regular EU sugar price differed markedly from the then current Swedish market price. As a result of the new law, Danisco Sugar AB was liable to pay, according to a determination of the Swedish agricultural board, close to half a billion Swedish crowns by way of sugar tax. Danisco brought proceedings for annulment of the Sugar Law, claiming among other things that the enactment of the Sugar Law just prior to entry into force of Sweden's membership of the EU amounted to a violation of the interim obligation. The Court did not address the point about the interim obligation, holding it to be "unnecessary." Between the contracting parties themselves, the EC and Sweden, no expectations were frustrated. Hence, on this "intergovernmental" level, since no problem relating to the interim obligation occurred or could possibly occur, no expectations of the treaty partners were frustrated, none was accused of acting in bad faith, and neither of the parties considered that the enactment of the contested Sugar Law defeated the object and purpose of Sweden's accession to the Union.

In the case *Certain German Interests in Polish Upper Silesia*,[344] before the Permanent Court of International Justice (PCIJ), in which Poland challenged the right of Germany to alienate certain assets after the signature and before entry into force of the Treaty of Versailles, the court ruled in

[344] Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Judgement 1926 P.C.I.J. (ser. A) No. 7 (May, 25); Svetlicic, *supra* note 323, at 365.

favour of Germany who in its view had the right to dispose of its property and only an abuse of this right could mean a violation of the treaty. One of the arguments of the Polish Government was that Germany abused its rights by alienating certain assets before ceding sovereignty over the relevant territory. The PCIJ inter alia confirmed indirectly that a signatory is not allowed to act contrary to the principle of good faith in certain circumstances and that its obligations under an unratified treaty could be violated as a consequence of the abuse of rights. It argued in this regard that since the treaty had not prevented Germany from alienating such assets after ratification, alienation between signature and ratification was not a violation of the good faith principle. On the basis of this argumentation of the PCIJ it could be concluded that if Germany had no such right under the treaty after ratification, there would be an abuse of this right if alienation took place in the interval between signature and ratification.

In *Megalidis v Turkey*,[345] the Greek claimant claimed restitution of items taken from him by Turkish authorities allegedly in violation of Article 65 of the Treaty of Lausanne, signed on 24 July 1923. The arbitral tribunal ruled that the Turkish authorities acted in violation of international law because parties have from the treaty signature and before its entry into force an obligation to refrain from acts with which they would prejudice the treaty by narrowing the scope of its provisions.

The above decisions duly affirm the principle under Art. 18, VCLT to protect the legitimate expectations of the signatory state to an unratified

---

[345] Svetlicic, *supra* note 323, at 366.

treaty, by not allowing the other signatory states, to act contrary to the obligations in good faith. Signature to a treaty, pending ratification creates legitimate expectations, that the signatory state is bound to refrain from acts defeating the object and purpose of a treaty.

III. PERFORMING TREATY OBLIGATIONS

The rule of *pacta sunt servanda*, with its origins in Roman law,[346] is today commonly considered a norm of both treaty and customary international law.[347] Whether it can also be considered a general principle of law seems unclear.[348] *Pacta Sunt Servanda* is Latin for "agreements must be kept." This maxim is one of the most ancient foundations of law itself.[349] Grotius recognized the importance of this rule to the stability of legal relations when he stated that 'to respect scrupulously the faith given is the foundation of States and of the grand community of nations.'[350]Art. 26 of

---

346 ROBERT KOLB, LA BONNE FOIEN DROIT INTERNATIONAL PUBLIC, 87-92 (Presses Universitaires de France 2000); MITCHELL, INTERNATIONAL ECONOMIC LAW *supra* note 308, at 18.

347 MARION PANIZZON, GOOD FAITH IN THE JURISPRUDENCE OF THE WTO: THE PROTECTION OF LEGITIMATE EXPECTATIONS, GOOD FAITH INTERPRETATION AND FAIR DISPUTE SETTLEMENT, 27 (Hart Publishing 2006); Mitchell, *supra* note 308, at 346.

348 Anthony Aust, *Pacta Sunt Servanda, in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 1, (Rudiger Wolfrum ed., 2014); JEAN SALMON, THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY,(Olivier Corten & Pierre Klein eds., 2011).

349 Black's Law Dictionary (10th ed. 2014); Hans Wehberg, *Pacta Sunt Servanda*, 53 AM. J. INT'L LAW 775, 780 (1959); ANTHONY AUST, PACTA SUNT SERVANDA: MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2007); Jonathan Granoff, *Pacta Sunt Servanda: Nuclear Weapons and Global Secure Sustainable Development*, 21 SW. J. INT'L L. 311, 330 (2015).

350 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE (1625); ROBERT KOLB, GOOD FAITH IN PUBLIC INTERNATIONAL LAW 86 (2000); GOOD FAITH AND INTERNATIONAL ECONOMIC LAW 18 (Andrew D Mitchell, M Sornarajah and Tania Voon eds., 2015).

the VCLT provides:[351]"*Pacta Sunt Servanda*: Every treaty in force is binding upon the parties to it and must be performed by them in good faith." *Pacta sunt servanda* is found in all legal systems, in all periods of history, in all cultures, in the judicial orders of all sovereigns, and in all religions.[352]*C. Wilfred Jenks*[353]said "the principle of *pacta sunt servanda* is common to all major legal systems including, with certain qualifications, Soviet law."*Pacta sunt servanda* arises from Natural Law, and in light of the Greco-Roman-Christian tradition, to arise from the law of God.[354] Pursuant to a monist theory, a commitment, once given, must be carried out in good faith as a sacred obligation. Likewise, all major religions and their supporting legal systems arrive at a similar result. But, aside from moral obligations advanced by the natural law school, other theories of jurisprudence lead to the same conclusion, i.e., *pacta sunt servanda* is the most basic norm of customary international law,[355] simply because it is based on the expressed will and agreement of sovereign States.[356]

---

351 *supra* note 311, at art. 26.

352 W. Paul Gormley, *The Codification of Pacta Sunt Servanda by the International Law Commission: The Preservation of Classical Norms of Moral Force and Good Faith*, 14 ST. LOUIS U. L. J. 367, at 373 (1970) [*hereinafter* "**Gormley**"].

353 C. WILFRED JENKS, PACTA SUNT SERVANDA - THE COMMON LAW OF MANKIND 143-45 (1958); Wehberg, *Pacta Sunt Servanda*, 53 AM. J. INT'L L. 775 (1959); *Id.* at 374.

354 PHILLIPSON, THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME, 380-81 (1911); GERALD G. FITZMAURICE, SOME PROBLEMS REGARDING THE FORMAL SOURCES OF INTERNATIONAL LAW 161 (1958); Gormley, *supra* note 352, at 371.

355 B. A. WORTLEY, JURISPRUDENCE 45-64 (1967); J. L. Kunz, *The Meaning and the Range of the Norm Pacta Sunt Servanda,* 39 AM. J. INT'L L. 180 (1945); Gormley, *supra* note 352, at 371.

356 Gormley, *supra* note 352, at 371.

Bin Cheng held that *pacta sunt servanda* is merely one element in an even more fundamental notion of good faith.[357] The material duty to act in good faith during the performance of a treaty was stated by Waldock in the ILC's Report as "one of good faith and not *strictijuris*."[358] Beyond question, good faith is inherent in *pacta sunt servanda.* Good Faith would apply at all stages: negotiation, signature, ratification, and application. In addition, good faith and *pacta sunt servanda* must be applied even prior to the conclusion of a treaty.[359]

Lord McNair in his Law of Treaties stated: "No Government would decline to accept the principle *pacta sunt servanda*, and the very fact that Governments find it necessary to spend so much effort in explaining in a particular case that the pactum has ceased to exist, or that the act complained of is not a breach of it, either by reason of an implied term or for some other reason, is the best acknowledgement of that principle."[360] *Oppenheim* held,[361] "treaties are legally binding, because there exists a customary rule of International Law that treaties are binding. The binding effect of the rule rests in the last resort on the fundamental assumption,

---

[357] BIN CHENG, GENERAL PRINCIPLES, *supra* note 307, at 105-62; Gormley, *supra* note 352, at 383.
[358] ILC, Yearbook of the International Law Commission, Vol. II (1964) A/CN.4/SER. A/1964/ADD.17; Steven Reinhold, Good Faith in International Law, 2 UCLJLJ 40, 60 (2013) http://discovery.ucl.ac.uk/1470678/1/2UCLJLJ40%20-%20Good%20Faith.pdf [*hereinafter* "**Reinhold**"].
[359] Gormley, *supra* note 352, at 384.
[360] LORD MC NAIR, PACTA SUNT SERVANDA AND THE GENERAL PRESUMPTION AGAINST UNILATERAL TERMINATION, 493-505 (1961); Gormley, *supra* note 352, at 370.
[361] L.F.L. OPPENHEIM, INTERNATIONAL LAW 881 (6th ed. H. Lauterpacht ed. 1947); Gormley, *supra* note 352, at 376.

which is neither consensual nor necessarily legal, of the objectively binding force of International Law."

Professor Lissitzen[362] held that Article 38 of ICJ Statute includes the customary norm and stated, that *pacta sunt servanda* is incorporated into Article 38(1) (a) of the ICJ Statute, a provision requiring that the Court shall decide disputes in accordance with "international conventions, whether general or particular, establishing rules expressly recognized by the contesting States."[363] He argues: "*§1(a) of Article 38 means that states are bound by the norms of valid and existing treaties which they have expressly accepted. It is an expression of the principle of pacta sunt servanda and is relatively easy to apply.*"

A treaty should be performed with the intentions of the parties in mind, rather than looking to a formalistic understanding of the wording.[364] ICJ in *Gabcikovo-Nagymaros* case noted,[365] *pacta sunt servanda* under Article 26 of the VCLT combines two elements: (1) The binding nature of treaty obligations themselves; and (2) the duty to perform these obligations in good faith. Good faith generally entails honesty and fair dealing between the parties, wherein it implies that the parties must truthfully represent their motives in a manner that it abstains from taking unfair advantage of the

---

[362] OLIVER LISSITZYN, INTERNATIONAL LAW TODAY AND TOMORROW 34 (1965); Gormley, *supra* note 352, at 376.
[363] Statute of the International Court of Justice, International Court of Justice, https://www.icj-cij.org/en/statute (last visited Mar 12, 2020).
[364] JEAN SALMON, THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, 53 (Olivier Corten & Pierre Klein eds., 2011); Reinhold, *supra* note 358.
[365] Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 79, at 7 (Sept. 25); Daniel Davison-Vecchione, *Beyond the Forms of Faith: Pacta Sunt Servanda and Loyalty,* 16 German L.J. 1163, 1166 (2015) [*hereinafter* "**Vecchione**"].

unintended interpretation of the agreement.[366] In both *Nicaragua v. Honduras*[367] and *Cameroon v. Nigeria*[368] (Preliminary Objections) the ICJ confirmed that good faith "is not in itself a source of obligation where none would otherwise exist."[369]

In proceedings brought by New Zealand and Australia against France (the *Nuclear Tests cases*) for atmospheric nuclear tests conducted by France in the South Pacific, the ICJ found statements made by France that it would no longer conduct nuclear tests of this kind after the 1974 tests to be legally binding, as France's undertaking was subject to the principle of good faith.[370] In the *Nuclear Tests Case*, the ICJ held that: "*One of the basic principles governing the creation and performance of legal obligations... is good faith. Trust and confidence are inherent in international cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential. Just as the very rule of pacta sunt servanda in the law of treaties is based on good faith, so also is the binding character of an international obligation. Thus, interested states may take cognisance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.*"[371] The Court's reasoning shows that good faith can

366 Anthony D'Amato, *Good Faith, in* 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 599 (Rudolf Bernhardt ed., 1992) [*hereinafter* "**D'Amato**"].
367 Border and Transborder Armed Actions, Jurisdiction and Admissibility (Nicar. v. Hond.), Judgement, 1988 I.C.J. Rep. 69, at 105 (Dec. 20).
368 Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections 1998 I.C.J. Rep. 275 (June 11); Vecchione, *supra* note 365.
369 Border and Transborder Armed Actions, Jurisdiction and Admissibility (Nicar. v. Hond.), Judgement, 1988 I.C.J. Rep. 69, at 105, ¶ 94 (Dec. 20); Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections 1998 I.C.J. Rep. 275, ¶ 39 (June 11).
370 Nuclear Tests (Austl. v Fr.), Judgement, 1974 I.C.J. Rep 253, ¶ 46 (Dec. 20).
371 Nuclear Tests Case (Austl. v Fr.) (Merits) 1974 I.C.J. Rep 253, ¶46.

be a basis for legal obligations in the same way as the maxim *pacta sunt servanda* is for treaty obligations.[372] It must be noted that, ICJ in its judgments has inaccurately used "good faith" to refer to the creation of obligations by giving consent, rather than the duty to perform obligations fairly and honestly.[373]

IV. TREATY INTERPRETATION

The principle of good faith is a legitimate source for identifying tools, principles or even values that can be taken into account in interpreting treaties, despite the absence of any express reference to them in the VCLT. The principle of good faith is then both constitutive of principles of treaty interpretation under international law and complementary to the application of those principles, and it can be difficult to identify a stand-alone application of good faith in treaty interpretation.[374] Article 31(1) of the VCLT states,[375] that a "*treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose*." There are three sources of treaty interpretation namely: the treaty's terms, the context of those terms, and the treaty's object and purpose.[376] The Textualist School begins with the

---

372 VAUGHAN LOWE, INTERNATIONAL LAW 74 (2007); Reinhold, *supra* note 358, at 48.
373 Hugh Thirlway, *Law and Procedure of the International Court of Justice 1960-89, Part One*, 60 Brit. Y.B. Int'l L. 1, 10 (1989); Vecchione, *supra* note 365, at 1167.Hugh Thirlway.
374 Martin Dawidowicz, *The Effect of the Passage of Time on the Interpretation of Treaties: Some Reflections on Costa Rica v Nicaragua,* 24(1) LEIDEN J. INT'L L. 201, 212 (2011); RICHARD GARDINER, TREATY INTERPRETATION 148 (2008).
375 Vienna Convention, *supra* note 311, at art. 31(1).
376 IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 604-07 (6th ed. 2003); Sinclair, VCLT *supra* note 310, at 114-15; Saunders *supra* note 316, at 577-578.

presumption that the intention of the parties is reflected from the text of the treaty and therefore, the purpose of treaty interpretation is to ascertain the meaning of the text. The subjective school allows for the treaty interpretation beyond the text of the treaty to ascertain the intention of the parties. Lastly, the teleological school asserts that the treaty must be interpreted to give effect to the object and purpose of the treaty. The Vienna Convention combines all the three approaches, although textualism is dominant.[377]

A. PRINCIPLE OF EFFECTIVENESS

The principle of effectiveness is, as the ILC put it, implied in the general rule on interpretation.[378] Whilst that principle is not expressly stated in articles 31 to 33 of the VCLT, it is a specific articulation of the principle of good faith and the consideration that a treaty is to be interpreted in accordance with its object and purpose.[379] The principle of effectiveness is part of the general rule that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in the context of that treaty and in the light of its object and purpose. The application of the general rule means that if "a treaty is open to two interpretations one

---

[377] *Report of the International Law Commission on the Work of the Second Part of Its Seventh Session,* [1966] 2 Y.B. Int'l L. Comm'n 169, 220, U.N. Doc. A/6309/Rev.1; Saunders, *supra* note 316, at 578.

[378] *Report of the International Law Commission on the Work of Its Sixteenth Session, 11 July 1964, Official Records of the General Assembly—Nineteenth Session,* [1964] 2 Y.B. Int'l L. 201 (1964); MITCHELL, INTERNATIONAL ECONOMIC LAW, *supra* note 308, at 44.

[379] *Third Report on the Law of Treaties by SR Humphrey Waldock*, [1962] 2 Y.B. Int'l L. Comm'n 47 at 5, U.N. Doc. A/CN.4/144; *Draft Articles on the Law of Treaties with Commentaries*, [1966] 2 Y.B. Int'l L. Comm'n at 6 (1966); MITCHELL, INTERNATIONAL ECONOMIC LAW, *supra* note 308, at 44.

of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted."[380]

B. HARMONIOUS INTERPRETATION

Another understanding of good faith interpretation is that a treaty can be interpreted in the light of relevant treaties, general principles of law and customary international law. Article 31(3)(c) of the VCLT explains that, in interpreting treaties, account should be given to the context and 'any relevant rules of international law applicable in the relations between the parties.' The principle according to which treaties are to be applied in good faith logically also embodies the principle of good faith interpretation because, application presupposes interpretation.[381] The interpretation of treaties in good faith is essential to the effect of the principle of *pacta sunt servanda*.[382] In *Gabčíkovo-Nagymaros*,[383] the ICJ explained Article 26 of the VCLT by stating that, the purpose of the treaty and intention of the parties should prevail over the literal application of the treaty.

---

[380] *Report of the International Law Commission on the Work of Its Eighteenth Session (4 May–19 July 1966),* [1966] II Yearbook ILC 219; MITCHELL, INTERNATIONAL ECONOMIC LAW, *supra* note 308, at 44.

[381] Int'l Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law—Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.682, at 423(2006); Int'l Law Commission, Second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, Georg Nolte (Special Rapporteur), UN Doc A/CN.4/671, at 4 (2014); MITCHELL, INTERNATIONAL ECONOMIC LAW, *supra* note 308, at 53; RICHARD GARDINER, TREATY INTERPRETATION 27–29 (OUP 2008).

[382] *Report of the International Law Commission on the Work of Its Eighteenth Session (4 May–19 July 1966),* [1966] II Yearbook ILC 219; MITCHELL, INTERNATIONAL ECONOMIC LAW, *supra* note 308, at 53.

[383] Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 79, at 7, ¶ 142 (Sept. 97).

The principle of good faith can also be used in interpreting silences in treaties, wherein the principle can justify completing the treaties with content that is not expressly stated and possibly with norms of customary international law or general principles of law, including the principle of good faith itself. As *Lauterpacht* said, many examples of interpretation of silence are no more than interpretations 'by reference to common sense and the canons of good faith.'[384]

C. Subjective Function of Good Faith: Assessing Behaviour of Interpreters

In performing its subjective function, the focus of good faith is on whether or not a treaty interpreter properly applied the relevant principles of interpretation and whether its interpretative reasoning is based on valid substantive arguments.[385]

Vice-President Schwebel wrote in his dissenting opinion in the case before the International Court of Justice (ICJ) on *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* that the ICJ's interpretation did 'not comport with a good faith interpretation of the treaty's terms' and that its failure to resort to preparatory work resulted 'if not in an unreasonable

[384] HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 167 (1958); MITCHELL, INTERNATIONAL ECONOMIC LAW, *supra* note 308, at 54.
[385] Arbitration on the Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau (Guinea-Bissau v. Senega), Decision, 1985 XIX UNRIAA 149, ¶ 46 (February 14).

interpretation of the treaty itself, in an interpretation of the preparatory work which is "manifestly…unreasonable.."[386]

V. CONCLUSION

In international dispute settlement, good faith has a firm place as both a facilitating and a restraining agent: it helps, on the one hand, to infuse predictability and reasonableness into state behaviour, furthers due process, and serves as an interpretative tool for international courts and tribunals, while on the other hand it restrains legal formalism and arbitrariness. The principle of Good faith has been construed as "Swiss Army Knife,"[387] because legal rules related to honesty, fairness and reasonableness are identified with the overarching principle of Good Faith.[388] International Court of Justice in *Nuclear Test Case* held "*One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this Co-operation in many fields is becoming increasingly essential.*"[389]

Under Art. 18, an obligation exists in good faith not to impair the value of an undertaking pending ratification or entry into force. It protects the legitimate expectations of other participants in the treaty-making process. The legitimate expectation is not that signed treaties are binding,

---

386 Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain), Jurisdiction and Admissibility, 1995 I.C.J. Rep. 6, ¶ 36 (July 1) (Vice-President Schwebel).
387 MITCHELL, INTERNATIONAL ECONOMIC LAW, *supra* note 308, at 9.
388 JOHN O'CONNOR, GOOD FAITH IN INTERNATIONAL LAW 154 (1991); D'Amato, *supra* note 366.
389 Nuclear Tests (Austl. v Fr.), Judgement, 1974 I.C.J. Rep 253, at 268 ¶ 46 (Dec. 20).

rather fundamental fairness requires a state to refrain from undermining an agreement on which another state is relying. The signature creates legitimate expectations to the extent that the signatory state is bound to refrain from acts defeating the object and purpose of a treaty. "Good faith" is generally taken to entail honesty and fair-dealing between the parties concerned, such as truthfully representing their motives and abstaining from taking unfair advantage of an unintended interpretation of any agreement they come to.[390] Hence, a treaty should be performed with the intentions of the parties in mind, rather than looking to a formalistic understanding of the wording. The principle of effectiveness as part of the general rule implied under Art. 31-33 of VCLT, means that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in the context of that treaty and in the light of its object and purpose. Another understanding of good faith interpretation is that a treaty can be interpreted in the light of relevant treaties, general principles of law and customary international law.

---

[390] D'Amato, *supra* note 366.