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EDITORIAL

Academic ventures have always promised the ambrosia of the unattained, unrealised and yet to come. These ventures become even more promising when utilised to shape and explore the legal terra. This makes the work which makes our mandate ever more rewarding, aside from all the extra exposure to legal writing. We have to emphasise the importance of research and the prowess which this sort of work bestows upon us. What most people fail to realise is that the trope of "Work being its own reward" is actually fulfilled in this line of work.

That is the reason our only outlets of individual expression seem more and more elated, year after year. We try to cover more and more ground in our annual endeavour. It is thus with a measured optimism that we present the Sixth Edition of RMLNLU Law Review, hoping that this will cement and embellish our place in the legally-curious intelligentsia and learners alike. Thus, we unveil a patchwork of Economic laws, International perspectives, Tax matters, Doctrinal issues of jurisprudence and resource exploitation and much more in this edition. We hope that the articles contained quench some queries and encourage others while quenching some curiosity and provoking it in other ways.

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SPECIAL ECONOMIC ZONES IN INDIA: CRITICAL EXAMINATION OF THE NEOLIBERAL DEVELOPMENT AGENDA AND LABOUR RIGHTS TRADE-OFF

- Shantanu Dey [*]

I. INTRODUCTION - EXAMINING THE SCOPE OF THE ISSUE

The Indian state responding to a severe balance of payment crisis in 1991 initiated a landmark process of reorientation of the policy framework permanently transforming the economic landscape. With the emergence of the era of Liberalisation, Privatisation and Globalisation, the concomitant reforms introduced have revolutionised the investment climate impacting various sectors of the economy. Representing this shift towards the neo-liberal paradigm initiated by the different political regimes, the Special Economic Zone (hereinafter SEZ) policy was introduced in April 2000 as part of the Export-Import Policy in India.[1]

The characterisation of such zones as "engines of growth" has unambiguously signified the policy bias for trade liberalisation and greater private sector involvement culminating into the concretisation of the policy in 2005 via enactment of the SEZ Act which came into effect in February 2006.[2] Through this paper, the author seeks to examine the impact of such inception of Special Economic Zones on the labour law regime in India critiquing the initial governmental intent to relax labour laws in these specific areas.

Commenting upon the neo-liberal philosophy governing the legislative move, the paper will critique this promise of "Legislating for Growth" and the adversities caused to the labour class in light of the promotion of a regime of non-implementation and labour law flexibility in these economic zones single-mindedly directed towards attracting foreign investment[3]. Ultimately, the paper will conclude by culling out the worrying trend of the newly elected government to continue on the path of trading off labour rights for the attainment of economic goals reflecting upon the short-sighted nature of the approach.

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[1] Nishith Desai Associates, 'Special Economic Zones' (*Nishith Desai Associates*, April 2006) <http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Special_Economic_Zones.pdf> accessed 25 March 2015.

[2] ibid.

[3] Atulan Guha, 'Labour Market Flexibility: An Empirical Inquiry into Neoliberal Propositions' (2009) 44(19) Economic Political Weekly <http://www.jstor.org/stable/40279336> accessed 25 March 2015.

II. THE SEZ ACT 2005- EXPOSING THE NATURE OF THE POLICY DISCOURSE

The SEZ Act 2005, which developed as a product of the policy dispensation of the Congress-led United Progressive Alliance (hereinafter UPA) Government at the Centre, has been the centre of constant academic and media-based discourse for a long period of time. The legislation directed towards instilling confidence in prospective investors has reflected the neo-liberal ideological rationale governing its inception focussing on instrumentalisation of law as a means of generation of wealth.[4]

Representing an effort to imitate the Chinese SEZ System often characterised as the structural foundation of its economic ascendancy, the author seeks to argue for caution against arriving at some premature conclusions in the Indian context.[5] The initial bill introduced in the Indian Parliament in May 2005 included provisions under Section 50 of the bill statutorily mandating denial of basic rights to old-age pensions, conditions of work and maternity benefits in such zones. Furthermore, requests made by state governments of Andhra Pradesh, Gujarat and Maharashtra for relaxation of labour law policies in such zones reiterated the predominance of the neo-liberal philosophy informing the legislative intent.[6]

Since labour forms a concurrent subject under entries 22-24 of List III of Seventh Schedule of the Constitution of India, such requests for easing of labour norms were rejected by the Central Government. Subsequently, responding to the active protest and uproar caused by the Left parties, the UPA Government retracted on the move to create an exception of SEZs from the country's labour law regime.[7] Despite such change in governmental position, the author argues that the SEZ Act represents the interface between political interactions and dynamic policy approach of developing economies contributing towards the eminence of the neo-liberal economic agenda centralising the deregulation model.

The Act forms a legislative instrument to incentivise substantial commitment of funds by foreign investors in Indian economy and utilies the mode of fiscal packages offering duty-free import, exemptions vis-à-vis sales tax, service tax, customs tax and income tax and ease

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[4] L Lakshmanan, 'Evolution of Special Economic Zones and some Issues: The Indian Experience' (*Reserve Bank of India*, 22 September 2009) <http://www.rbi.org.in/scripts/PublicationReportDetails.aspx?UrlPage=&ID=558> accessed 26 March 2015.

[5] Jaivir Singh, 'Labour Law and Special Economic Zones in India' (*Centre for the Study of Law and Governance Jawaharlal Nehru University Working Paper Series*, April 2009) <http://www.jnu.ac.in/cslg/workingPaper/08-Labour%20Economic(Jaivir%20Singh).pdf> accessed 26 March 2015.

[6] M Suchitra, 'SEZs: Economic or Exploitation Zones?' (*Info Change News & Features*, February 2007), <http://infochangeindia.org/agenda/cost-of-liberalisation/sezs-economic-or-exploitation-zones.html> accessed 26 March 2015.

[7] Jaivir (n 5).

of external commercial borrowings.[8] Subsequently, the development route favoured by the SEZ Policy has placed the virtues of free market forces above the values of social and economic intervention by the State.[9] While fulfilling its promise of generating export-centric growth through private parties, the contentious legislation has promoted the culture of "accumulation by dispossession"[10] as articulated by David Harvey wherein the state-guided growth accentuates the disparities existing within the socio-economic status quo.

It is against such a backdrop featuring the rampant explosion of SEZs across the country and the government promise to ensure the continued application of labour norms that the questions of labour law enforcement and the SEZ policy promoting a culture of indifference towards labour rights have relegated in importance. The characterisation of the political move to prevent casualization of labour by relaxation of the statutory regime as an impediment to economic reforms and the often publicised suspicion of compliance with conditions of work in SEZs necessitates a scrutiny of the labour rights controversy plaguing such zones.[11]

With the global financial institutions such as the World Bank influencing the Indian legal regime, the conceptualisation of labour-market norms securing minimum wages, social security and job security as increasing costs of formal labour in its development reports highlights a disconcerting shift in the policy paradigm.[12] Therefore, it is in light of such market-centric rule exemplifying the successful extraction of predatory concessions by the corporate sector from the governments at the centre and state that the issue of the trade-off between market efficiency and labour rights has assumed relevance.

III. TREADING TOWARDS A STATE SPONSORED REGIME OF NON-COMPLIANCE

Since the integration of the SEZ Act within the Indian legislative framework, the labour law experience in these zones exemplifies the hollowness of the explicit statement made by the government in the past of preventing dilution of labour laws within the Act. Commenting upon the legislative and judicial fate of labour laws in SEZs, it is essential to appreciate that these, "foreign territories"[13] were created with the objective of attracting foreign investment

[8] A Aggarwal, 'Special Economic Zones: Revisiting the Policy Debate' (2006) 41(44) Economic Political Weekly, 4534, 4535.
[9] Euzeby and Van Langendonck, *Neoliberalism and Social Protection: The question of privatisation in EEC countries*, (International Labour Organisation Report Geneva, 1990).
[10] David Harvey, *Spaces of Global Capitalism: A Theory of Uneven Geographical Development* (*Verso*, May 2006) 91, 92.
[11] Atulan (n 3).
[12] ibid.
[13] Suchitra (n 6).

with cheap labour and capital. The introduction of SEZs operationalises the idea of graduated sovereignty as argued for by *Aiwha Ong* wherein the government voluntarily gives up control over certain areas in the name of "neoliberalism by exception"[14]. However, the author argues that the economic philosophy has played out as the normative foundation for contemporary policy action.

i. ORGANISING WORKER INTERESTS- A FARCE IN SEZS

The idealisation of trade unions as integral components of contemporary industrial relations directed towards securing interests of workers assumes relevance especially in the context of SEZs. Trade Unions providing a platform for organised representation of labour interests and collective bargaining to counter employer domination are critical to the state of affairs in such zones, enabling workers to acquire an equitable share in the wealth generated by the exponentially rising corporate bodies.[15]

Such unionisation of worker grievances and effectuation of collective bargaining rights has not been a common feature of SEZs in light of the stark imbalance of social power existing between the companies campaigning against such trade union activities and workers threatened by the prospects of unemployment.[16] It is unfortunate that the State has failed in instrumentalising labour legislations to tackle such power inequilibrium between the employer and the employee as argued for by *Otto Kahn Freund* as the core of labour law jurisprudence.[17]

Freedom of Association enshrined as a fundamental right under Article 19 of the Constitution has created the jurisprudential foundation for the workers' demand for a right to form and join labour unions.[18] However, the judicial position in *All India Bank Employees Association v National Industrial Tribunal*[19] demonstrates the dilution of such right wherein the court recognised such right to form unions yet refraining from including the right to collective bargaining within its ambit.

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[14] G Ritzer and Z Atalay, *Readings in Globalization: Key Concepts and Major Debates* (*Wiley-Blackwell* 2010) 72.
[15] P Ghosh and Geetika, 'Unionisation: A Feasibility Study for the Indian Software Industry' (2007) Russian Management Journal 46, 47.
[16] Suchitra (n 6).
[17] Joanne Conaghan, 'Gender and the Idea of Labour Law' (2014) 4(1) feminists@law University of Kentpara <http://journals.kent.ac.uk/index.php/feministsatlaw/article/view/102/265> accessed 26 March 2015.
[18] Constitution of India 1949, art 19(1)(c).
[19] *All India Bank Employees Association v National Industrial Tribunal* [1962] 3 SCR 269.

Furthermore, the legislative device of "illegal strikes" has played a critical part in jeopardising the ability of such workers in SEZs to effectively bargain via collectivisation of interests. Under Section 22 of the Industrial Disputes Act, 1947 (hereinafter ID Act), any person employed in a public utility service will be held liable for a breach of contract and if they go on strike without giving notice during conciliation proceedings then the strike will be declared illegal under Section 24.[20] The statutory emphasis on notice and prohibition on strikes in specific situations restricts the utilisation of strikes as an instrument of organisation and representation of worker interests.

Such stringent conditions were statutorily laid down vis-à-vis specific services of public emergency/interest as defined under Section 2(n) of the ID Act, justifying the legislative intent. However, the problematic inclusion of SEZs within the ambit of such public utility services can be argued to be tantamount to committing fraud on the scheme of the legislation with units of corporate interests contributing to environmental concerns and displacement of population classified as providers of services of public interest.[21]

While the Supreme Court, in the case of *TK Rangarajan v State of Tamil Nadu*,[22] explicitly argued against holding the right to strike as a fundamental right within the constitutional framework, the public utility service status attached to SEZs further impinges upon its efficacy as a statutory right as well. Ultimately, Section 46 of the SEZ Act 2005 requires provisions of identity cards to every person employed/residing/required to be present in SEZ. The impact of such a provision has been that the employers can effectively regulate the entry of workers in these zones enabling them to neutralise trade union attempts to organise workers.[23]

Such provision of statutory safeguards against trade union activities provided to the corporate entities in these zones has been further complicated by the nature of executive involvement as observed in the *Foxconn Case*. The issue involved a Centre of Indian Trade Union (hereinafter CITU) affiliated union submitting a charter of demands on behalf of the workers followed up by the failure of government authorities to act in this regard and the Foxconn Management's refusal to cooperate inducing the union to go for a strike.[24]

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[20] Jaivir (n 5).
[21] Shatadru Chakraborty, 'Discrimination against workers under the Special Economic Zones Act 2005: A Hindrance to India's Development' (2009) 27 Singapore Law Review 189, 190.
[22] *TK Rangarajan v State of Tamil Nadu* 2003(6) SCC 581.
[23] Jaivir *(*n 5).
[24] S Dorairaj, '*Spirited Fight*' (*Frontline*, November 2010) <http://www.frontline.in/static/html/fl2723/stories/20101119272303700.htm> accessed 27 March 2015.

Unfortunately, the response of the state authorities to such strike has been prompt arrests and subjecting them to police custody. The political repercussions of a dispute, wherein the State government criticised CITU for obstructing the operations of the company and tarnishing the ruling party's image, represents the subversion of labour welfare.[25]

Such conscious effort of the government endorsing the management's action to penalise workers running contrary to such prohibition of discrimination against union members and union organisers under Trade Unions Act 1926[26] demonstrates the diminishing significance of labour norms in SEZs. Therefore, the failure of the Indian State to ratify the International Labour Organisation (hereinafter ILO) Conventions on Freedom of Association, Right to Organise and Collective Bargaining evidence the political scepticism surrounding such trade union activities visualised as impediments to corporate interests.[27]

ii. STATUTORILY-SANCTIONED RELAXATIONS AND LABOUR LAW FLEXIBILITY- SENSING DESPERATION IN A DEVELOPING ECONOMY

In this section, the author seeks to argue that the denigrating position enjoyed by labour legislations in SEZs has been a result of rare implementation complemented by statutory loopholes directed towards easing the compliance requirements in the name of developing an investor-friendly climate.

Section 49 of the SEZ Act 2005 enables the Central Government to declare any Central Act, Rules/Regulations inapplicable to SEZs subject to exceptions with respect to laws relating to trade unions, industrial and labour disputes or welfare of labour, such as working conditions, provident funds, employer's liability, workmen's compensation, invalidity and old age pension and maternity benefits in the SEZ. The provision has attracted criticism in light of its futility as state governments can still through notifications and administrative orders formulating SEZ Policies utilising its concurrent powers under the Constitution effectively modifying the coverage of such labour legislations.[28]

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[25] Nivedita Menon, 'The New Cellular Jail: Madhumita Datta and Venkatachandrika Rradhakrishnan' (*Khafila*, 23 January 2011) <http://kafila.org/2011/01/23/the-new-cellu-lar-jailmadhumita-dutta-venkatachandrika-radhakrishnan/> accessed 27 March 2015.

[26] Kingfisher, 'Employee Human Rights: Policy Standard' (*Kingfisher plc*, June 2013) <http://files.the-group.net/library/kgf/responsibility/pdfs/cr_09.pdf> accessed 26 March, 2015.

[27] International Labour Organisation, '*Challenges, Prospects and Opportunities of Ratifying ILO Conventions No 87 and 98 in India*' (*International Labour Organisation* 2009) <www.ilo.org/wcmsp5/groups/public//wcms_165765.pdf> accessed 27 March 2015.

[28] Jaivir *(*n 5).

Such governmental willingness to modify the impact of labour laws and regulations without offending the rationale of Section 49 has been exemplified in the case of Kerala which, under its SEZ Policy has granted the powers of labour commissioner to the development commissioner. It is submitted that such transfer of administrative power represents a systematic dilution of the labour law regime. Under Section 12(3) of the Act, such development commissioners are responsible for the administration and control of the zone and ensure its sufficient earnings.[29]

Consequently, the operational objective of such development commissioners directed towards export promotion is principally distinct from the directive of labour commissioners who are mandated to- "to determine labour market outcomes, both with regard to working conditions or firing decisions".[30] The statutory requirement of the State Government to approach the development commissioner for inspection before inspecting the industrial units in SEZs further condemns the issue of enforceability of labour rights to the realms of uncertainty.[31]

Furthermore, it is interesting to observe that the phenomenon of employment through contract labour has assumed normalcy in such economic zones attributing a position of criticality to the implementation of the Contract Labour (Regulation and Abolition) Act, 1970 (hereinafter CLRA). The employment practice is characterised by third-party agencies supplying workers to the companies wherein the contractual arrangement involves the agency constituting the employees of the contract workers and such workers are often used for perennial work crucial to the nature of business in contravention of Section 10(2) of the CLRA.[32]

In light of the fact that such workers are usually not provided any proof of employment and subject to migration from one industrial unit to another within the SEZ, the factum of non-implementation acquires prominence. Such contractual labour forming the primary source of employment generated by the SEZs represents the political compromise made by the executive authorities privileging corporate goals of generation of cheap and flexible labour over the quality of employment.[33]

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[29] ibid.
[30] ibid.
[31] Shatadru (n 21).
[32] ILO ACTRAV Bureau for Workers' Activities, *Trade Unions and Special Economic Zones in India*, 31-32, (Pallavi Mansingh, Suneetha Eluri and Sreejesh N P Centre for Education and Communication'1st edn' March 2012) <http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/publication/wcms_221002.pdf> accessed 26 March 2015.
[33] ibid.

Such relegation of questions of labour rights has been further re-emphasised when the Gujarat State Government under the Gujarat SEZ Act, 2004, utilising the powers granted under Section 31 of the CLRA, provided for the exemption of such SEZs from the application of the Act. Such state-sanctioned exemption legitimised the perpetual employment of workers devoid of statutory protection subject to a hire-and-fire policy.[34]

Reiterating the instrumental value of simplifying procedural compliances representing a voluntary state-sponsored compromise of labour rights for investment benefits, the self-certification practice in SEZs has permanently immunised employers from violation of social security/wage-based statutory provisions.[35] While executing the concept of self-certification provided under the SEZ Rules 2006, the industrial units are merely mandated to furnish consolidated annual reports to the development commissioner concerning their periodic returns under acts such as the Minimum Wages Act 1948, Workmen's Compensation Act 1923 and Payment of Bonus Act 1965.[36]

The result of such reliance on self-certification has been treated as a license to abuse labour norms by employers in SEZs as evidenced in the case of Nokia production units in SEZs in Chennai exploiting such silence on the applicability of the Minimum Wages Act to the economic zones. Studies have reported allegations of differential payment of contract workers despite the performance of same work as trainees/regular employees in contravention of the Equal Remuneration Act 1976.[37]

On the other hand, the judicial precedents as laid down in the cases of Official Liquidator v Dayanand[38] and Secretary, State of Karnataka v Umadevi[39] justifying such differential wage payment to separate classes of workers indifferent to the nature of work have not enabled critics of the policy to harbour a sense of optimism in this regard. The refusal of the Apex Court to adjudicate upon a petition challenging the SEZ policy utilising the grounds of deference to the legislature in issues of economic policy demonstrates the neoliberal paradigm pervading the contemporary judicial philosophy.[40]

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[34] 'Race to the Bottom' (2014) 50(23) Economic and Political Weekly <http://www.epw.in/journal/2014/26-27/editorials/race-bottom.html?0=ip_login_no_cache%3D3c8e04d96fb9f925eed917ddc600cbd0> accessed 21 February 2017 7–8.

[35] SH Iyer, 'Analysis of the Structure and the Practice of the Legal Machinery of SEZs' (Volume 6, Issue number 4, 5 Labour File Journal 2008) 14, 15.

[36] ibid 16.

[37] ILO (n 32).

[38] *Official Liquidator v Dayanand* (2008) 10 SCC 1.

[39] *Secretary, State of Karnataka v Umadevi* (2006) 4 SCC 1.

[40] Shatadru (n 21).

Ultimately, the central concerns revolving around working conditions and social security have suffered from the conscious government attempts to shroud its interventionist image viewed as a deterrent to foreign investor capital entry into the Indian economy. The SEZ Act has promoted privatisation of inspection mechanisms vis-à-vis compliance with labour rights norms. Under Section 20 of the Act, the Central Government can institute accredited agencies to carry out surveys or inspections for securing of compliance with the provisions of any Central Act such as the Factories Act, 1948 and Employees' State Insurance Act, 1948.[41]

Studies carried out by Society for Participatory Research in Asia reveals the disparaging status of the work environment in SEZs characterised by workers suffering from dehydration, heat rashes and respiratory disorders in light of the absence of insufficient basic human facilities at the working places and substandard protective equipment.[42] The reluctance of industrial units in SEZs to invest in occupational health and safety as reported by studies conducted by Asia Monitor Resource Centre demonstrates the deteriorating status of labour rights in the neoliberal economic paradigm assuming predominance.[43]

Therefore, the contemporary conception of labour reforms fixated on the idea of labour market flexibility preferring market forces over government intervention in the attainment of economic growth and prosperity reflects the primacy assumed by the Market View of Labour Law.[44] Such political rationalisation of deregulation in SEZs has necessitated an argumentative discourse around the idealisation of 'Decent Work' as a legal entitlement drawing from the observations of the Reports of the National Commission for Enterprises in the Unorganised Sector.[45]

IV. CHANGE OF GOVERNMENT REFLECTING A CHANGE IN APPROACH? - FINDING A WAY FORWARD

Subsequent to the general elections in 2014 leading to the landslide majority of the Bhartiya Janta Party Government at the Centre, the precarious status quo of the labour rights regime has often been a source of debate. Seeking to replicate the model of governance employed in

[41] Iyer (n 35).
[42] ILO (n 32).
[43] M Murayama and N Yokota, 'Revisiting Labour and Gender Issues in Export Processing Zones: Cases of South Korea, Bangladesh and India' (2009) 44 EPL (22), 78, 79 <http://ir.ide.go.jp/dspace/bitstream/2344/793/3/ARRIDE_Discussion_No.174_murayama_yokota.pdf> accessed 26 M arch 2015.
[44] "Operation of market forces is more conducive to the attainment of efficient allocation of resources than state intervention". Creighton and Stewart, Labour Law: An Introduction, 5-6, (3rd edn).
[45] Lalit Deshpande, 'NCEUS' Indian Gospel of Decent Work' (2008) 51(2) Indian Journal of Labour Economics 182-183.

the State of Gujarat with one of the highest numbers of SEZs in the nation, the Narendra Modi-led government's labour policy seems to reflect an even more aggressive reformulation of the United Progressive Alliance (hereinafter UPA) government. With the newly elected government declaring the need to counter the rigidity of Factories Act 1948, Apprentices Act 1961 and the Labour Laws Act 1988, the 'flexible labour market' model has experienced unprecedented emergence.[46]

The author submits that such labour norms flexibility couched in terms of economic growth and increased employment generation is a farcical claim aimed at convincing the Indian working class to accept an oppressive regulatory regime favouring the capitalist class.[47] It is against such a backdrop that the Economic and Political Weekly Research Foundations' (hereinafter EPWRF) study on the empirical relationship between casualisation of labour and employment and output assumes relevance. The EPWRF conclusively held that such politically motivated labour market flexibility ceases to have an influence on output/employment growth merely redistributing income generated towards the capitalist class widening the socio-economic gap.[48]

The inordinate focus on SEZs and the voluntary trade-off between labour rights and foreign investment-centric economic growth in a developing economy such as India can be attributed towards a misplaced idea of development and efficiency. Viewing the SEZ model as a single transaction involving a worker voluntarily taking up employment gives rise to an image of such a worker gaining productive employment and wage at the cause of exploitative work conditions. However, when such a single transaction is simultaneously carried out at an organisational level, the welfare enhancing image of the SEZ model assumes the shape of an illusion with the effects of an unregulated regime outnumbering the beneficial effects of a meagre wage and uncertain employment granted to such individual workers as also argued by *Kaushik Basu*.[49]

The recent demand for the appointment of a committee to inquire into the persistent large-scale labour law violations in the Cochin SEZ industrial units demonstrates the urgency of the matter. The rampant growth of such economic zones culls out the status quo wherein the

[46] Race to the Bottom (n 35).
[47] ibid.
[48] Atulan (n 3) 47, 48.
[49] Jaivir, (n 5) 22; Kaushik Basu, 'The Economics and Law of Sexual Harassment in the Workplace' (2003) 17(3) Journal of Economic Perspectives <https://cae.economics.cornell.edu/Sexual%20Harassment%20JEP%20fin%201.pdf> accessed 21 February 2017 141−157.

policy goals of "labour flexibility" articulated as labour reforms have eroded the value of labour rights imposing exponentially rising negative costs on the labour class as a group.[50]

The conceptualisation of labour standards as fundamental human rights is the need of the hour and requires the government policy framework to integrate such an approach within the SEZ model. The issues of insecurity, wage stability and sufficiency and ill-treatment by employers represent concerns which demand compelling moral claims and concomitant universal entitlements.[51] Therefore, recognition of labour rights as human rights statutorily conceptualising such rights as normative entitlements ought to inform the theoretical foundation of the contemporary economic policy framework in the Indian context.

Furthermore, the author argues for the need to integrate the capabilities approach, as argued for by Sen, recognises the rights of workers as central to the process of development rather than its conceptualisation as antithetical to the economic goals of the nation.[52] The statutorily-sanctioned placement of economic development at a pedestal needs to be replaced with such philosophy wherein the labourers are viewed as ends of the development process guarding against the capitalist instrumentalisation of the labour class to attain short-term profit-making agendas.[53]

The misplaced idea of development ignores the value of human resource development in the Indian context which has been argued for by Professor Sen in his approach. Consequently, the present neo-liberalist political philosophy informed by the neo-classical school of development requires serious re-thinking.[54] Cognizant to the fallouts of excessive state intervention, the emerging view termed as an "enlightened neo-classical school of development"[55] as argued for by Professor Bob Hepple has been in favour of protection of worker rights directed towards an equitable distribution of the returns of such institutionalisation of free-market based economies.[56]

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[50] R Nagaraj, 'Fall in Manufacturing Employment: A Brief Note' [2004] 39 Economic and Political Weekly <http://www.igidr.ac.in/faculty/nag/Fall%20in%20Organised%20manufacturing%20Employment.pdf> 87-90 accessed 26 March 2015.

[51] Virginia Mantouvalou, 'Are Labour Rights Human Rights?' [2012] European Labour Law Journal <http://www.ucl.ac.uk/laws/lri/papers/VMantouvalou_Are_labour_rights_human_rights.pdf> 10 −11 accessed 26 March 2015.

[52] Amartya Sen, *Development as Freedom* (Oxford University Press 1999) 3, 4.

[53] ibid 112, 113.

[54] Ricardo Contreras, 'Competing Theories of Economic Development' (1999)Journal of Transnational Law and Contemporary Problems, para 94, 95 <http://fileserver.net-texts.com/asset.aspx?dl=no&id=53188> accessed 25 March 2015.

[55] Shatadru *(*n 21).

[56] B Hepple, '*Labour Laws and Global Trade*' (Oxford Hart Publishing 2005).

V. CONCLUSION- DEMYSTIFYING THE POLICY DILEMMA

Through this paper, the author has attempted to highlight the manner in which the current political dispensation has failed to strike a balance between the role of the state as a facilitator within a protectionist model and the emergent model of deregulation in the neoliberal economic paradigm. With the government opting for restrained intervention within the deregulatory model, the policy-based shift in paradigm has unfortunately promoted the "commodification of labour" viewing the labour class as means to an end[57] side-lining the central issue of a rights-based perspective forming the jurisprudential foundation of labour law. Therefore, the SEZ Act 2005 is characteristic of a state-sponsored scheme enabling capitalist structures to engage employment models based on unorganised contractual labour representing a calculated move to avoid granting protection to a set of workers in the name of furthering the cause of economic development.[58]

[57] B Langille, *Labour Law's Theory of Justice* (Oxford University Press 2011) 103-104.

[58] Race to the bottom *(*n 34).

MAKE IN INDIA AND DIRECT TAX: A CRITICAL ANALYSIS OF DIRECT TAX REFORMS 2015

– *Prabhansu Gupta & Raunaq Kapoor*[*]

I. INTRODUCTION

India is one of the fastest growing economies in the world. It has been ranked number one attractive destination for foreign investment by the Baseline Profitability Index (hereinafter BPI), coined by Daniel Altman, an adjunct professor of New York University's Stern School of Business.[59] Almost two decades of economic liberalisation, alongside vigorous domestic demand, a developing middle class, a young population, and an exceptional return on investment have enticed multinational companies and investors to invest in India.[60] Today Indian markets have immense potential and offer prospects of high profitability and an effective regulatory framework which make India a credible investment destination. It is once again creating an interest and excitement in the global arena as hopes build for its reforms agenda to be carried forward. Industry anticipates tax reforms to be the prime concern in this agenda.[61]

In today's globalising world tax policies and reforms have become a major topic of discussion around the world. India's tax policy is no exception and is having tremendous reforms in comparison to global developments. The tax rates have been rationalised and tax laws have simplified resulting in better compliance, ease of tax payment and better enforcement.[62] Still, India needs to strike a balance between checking tax avoidance and

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[*] Students, Gujarat National Law University.

[59] Puja Mehra, 'India Ranked Best for Investment' (*The Hindu*, 27 June 2015) <http://www.thehindu.com/business/Economy/india-ranked-best-for-investment/article7359257.ece> accessed 23 October 2015.

[60] Stephanie Johnson, 'India: An Attractive Investment Destination - Market Realist' (*Marketrealist*, 2015) <http://www.marketrealist.com/2014/10/india-can-attractive-investment-destination> accessed 23 October 2015

[61] Ernst & Young, 'Make in India Through Effective Tax Reforms' (*Ernst & Young*, 2015) <http://www.ey.com/Publication/vwLUAssets/EY-cii-whitepaper-17-dec/$FILE/EY-cii-whitepaper-17-dec.pdf> accessed 23 October 2015.

[62] 'Welcome to India in Business' (*Indianbusiness*, 2015) <http://indiainbusiness.nic.in/newdesign/index.php?param=investment_landing/293/6> accessed 23 October 2015.

making the tax environment more efficacious and favourable compared to other countries competing for investment.[63] With the agenda to make India a world-class global manufacturing sector, Government of India on 25 September 2014 launched "Make in India", a major national program to promote and facilitate investment, enhance skill development, foster innovation, protecting intellectual property and build best-in-class manufacturing infrastructure.[64] The key thrust of the program is to revive domestic investment and attract foreign investors. Secretaries across all the departments in cabinet presented a blueprint for the 25 identified sectors for the Make in India initiative to Prime Minister Narendra Modi. These sectors include automobiles, chemicals, Information Technology (hereinafter IT), pharmaceuticals, textiles, ports, aviation, leather, tourism and hospitality, wellness, railways, auto components, design manufacturing, renewable energy, mining, biotechnology, pharmaceuticals, and electronics among others. Some of the proposals include direct tax exemptions during the first three years for micro, small and medium enterprises, tax holiday for local manufacturing of defence and aerospace products, standard operating procedures for research and development, and tax benefits to attract electronics and telecom manufacturers among others.[65]

Finally, on 28th February 2015, Finance Minister, Arun Jaitley presented the Union Budget 2015-16. The Budget proposes a number of foreign investment and tax reforms with important consequences for investors including lower compliances costs, increased certainty in the tax regime, and an improved business environment.[66] The main focus of the budget is "Make in India" concept followed by initiatives to tap the black money, ease of doing business and benefits to middle-class taxpayers. On the direct tax front, various positive changes have been made such as; General Anti Avoidance Rules (hereinafter GAAR) has been deferred by another two years admitting that it is not the best time to introduce it when the tax department (revenue) is yet to be fully equipped. To attract fund managers to operate from India it is being clarified that they will not be treated as a business connection or permanent establishment and that the offshore fund (hereinafter OFS) which is managed from

[63] Ernst & Young (n 61).
[64] 'Make In India' (*Makeindia*, 2015) <http://www.makeinindia.com/about> accessed 23 October 2015.
[65] Partha Priya Dutta, 'Make In India: An Academic Perspective-' (*Indian Institute of Management, Calcutta*, 2015) <https://www.iimcal.ac.in/make-india-academic-perspective-prof-partha-priya-dutta> accessed 23 October 2015.
[66] Chris Devonshire- Ellis, Tarun Manik and Nishant Dixit, 'India's FY 2015-16 Budget: Meaning and Implications For Foreign Investment - India Briefing News' (*India Briefing News*, 4 March 2015) <http://www.india-briefing.com/news/indias-fy-201516-budget-meaning-implications-foreign-investment-10182.html/> accessed 23 October 2015.

India will also not be treated as an Indian fund through controlled from India to avoid Indian taxes. Further, benefits to the sponsors of real estate investment trust (hereinafter REITs) and Infrastructure Investment Trust (hereinafter InvITs) through concessional capital gains treatment, Reduction on withholding tax (hereinafter WHT) for royalty and fees for technical services (hereinafter FTS) payments abroad, steps to make Rules to provide Foreign Tax Credit (hereinafter FTC) and reduction in corporate income tax from 30% to 25% etc. are some of the major reforms major reforms which have an impact on nearly all segments of the economy.[67] From the perspective of the International community, the measures taken by the government through the budget to present new tax incentives will play a major role to change India into a global manufacturing hub and attract huge scale investment.[68] It also gives a bold roadmap for improving the ease of doing business in India.

II. NEED FOR TAX REFORMS IN INDIA

The Indian manufacturing sector contributed fifteen percent to the India's Gross Domestic Product (hereinafter GDP) in 2013-14 and involves a share of only two percent in the world's manufacturing output as per the economic survey of 2013-14. In order to boost the manufacturing sector, the government of India has set a target to increase manufacturing's share in the GDP to 25 percent and create about 100 million jobs by 2022. To accomplish this goal, the government introduced the "Make in India" program in September 2014 which underlines on cutting down delays in manufacturing projects clearance, introducing new labour reforms, developing infrastructure and taking India to new heights by not only encouraging domestic manufacturing but making India a manufacturing hub and an investment destination.[69]

There are certain difficulties confronted by manufacturers, like inverted duty structure due to free trade agreements (hereinafter FTAs) that make Indian manufacturing uncompetitive for white goods such as washing machines, refrigerators, and air conditioners. There has been a

[67] Karthik Ranganathan, 'Union Budget 2015 Direct Tax ' (*Mondaq*, 2 March 2015) <http://www.mondaq.com/india/x/378478/Capital+Gains+Tax/Knowledge+Sharing+Alert+Union+Budget+2015+Direct+Tax> accessed 23 October 2015.
[68] Kamlesh Chainani, 'Opinion: Tax Support Needed to Turn 'Make In India' A Reality - NDTV' (*NDTV Profit*, 26 February 2015) <http://profit.ndtv.com/budget/opinion-tax-support-needed-to-turn-make-in-india-a-reality-742501> accessed 23 October 2015.
[69] 'Union Budget 2015 Inspiring Confidence, Empowering Change In India' (*KPMG*, 2015) <https://www.kpmg.com/IN/en/services/Tax/unionbudget2015/Documents/KPMG-Union-Budget-Manufacturing-PoV-2015.pdf> accessed 23 October 2015.

rise in imports from low-cost regions such as China and South East Asia. Additionally, Modified Special Incentive Package Scheme (hereinafter MSIPS) is not applicable to the aforementioned consumer durable products. Moreover, insufficient and immature local supplier base and the high cost of capital and other manufacturing costs due to frequently revised energy efficiency requirements do not provide the local manufacturers with a positive and favourable environment.[70] Disputes on indirect transfers and issues of shares have had gigantic proportions. Similarly, disputes on transfer pricing do not seem to wane away. Though the taxpayer has been granted relief at the higher appellate levels, it has created a negative adversarial image of the government.[71]

The primary question is the present scenario is that 'Why would somebody risk his big-ticket investment when such direct tax risks emanate in India?'. Foreign investors have been quite scared in terms of safety and stability in the direct tax policy of the government. In 2014 Budget, Government has stepped to changes tariff which has ameliorated some of the negative perceptions about the Indian taxation. Such steps include the introduction of roll back provision in the Advance Pricing Agreement (hereinafter APA) scheme, amendments in some litigation-related aspects of transfers pricing, tax holidays for power generating units and so on. However, this is not enough to make India an attractive destination for investment. From India's perspective, it would be a great accomplishment, but from a foreign investor's point of view it may not be sufficient; more so when other countries around the world are providing a host of tax impetuses to the global players for investment into their respective nations. Some of these are appropriately made to the requirement of the global companies and may vary based on the size of the investment and their contribution and commitment to the economic and financial development of the respective country. Hence, if India wants to accumulate a greater cut of interest in the manufacturing sector, it needs to make reforms to its existing direct tax laws.[72]

Keeping in mind the end goal to reverberate well with the 'Make in India' program, it is necessary that certain tax benefits are given to investors, which will go far in giving a quite required momentum to the manufacturing area and make India a viable and easier option for

[70] Manish Sharma, 'Union Budget 2015-16: Government Should Undertake Next-Generation Tax Reforms' (*Businesstoday*, 27 February 2015) <http://www.businesstoday.in/union-budget-2015-16/expectations/govt-should-undertake-next-generation-tax-reforms/story/216208.html> accessed 23 October 2015.
[71] Ajay Kumar, 'Make in India needs a tax boost' (*The Financial Express*, 17 December 2014) <http://www.financialexpress.com/article/fe-columnist/make-in-india-needs-a-tax-boost/19992/> accessed 23 October 2015.
[72] ibid.

companies to engage in business with.[73] The government's main concern has been the revival of growth in the Indian economy and crucially enough, it has chosen to give the industrial sector a structural push to achieve its goal.

III. CRITICAL ANALYSIS OF PROPOSED DIRECT TAX REFORMS

India's tax laws and policies have always been a major area of uncertainty for foreign investors. Every Indian citizen who is either directly or indirectly affected by union budget has a keen eye on the budget 2015-16. Apart from such citizens, global investors, venture capitalists, Small and Medium Size Enterprises (hereinafter SME's) across the globe, investment banks, etc., scrupulously observed the budget speech given by the Finance Minister of India. The major reason behind everyone's eagerness towards union budget of 2015-2016 was 'Make in India' campaign because tax reforms introduced by the government in the budget will play a crucial role to transform India into a manufacturing hub. Thus, it becomes pertinent to understand these reforms with utmost clarity because these reforms are key deciding factors in the success of the campaign. This Budget contains several announcements which should help bring clarity to the otherwise complicated tax regime. The tax reforms which are mainly targeting towards attracting investments and easing norms will also allow new ventures to flourish in India. The Major Direct tax reforms presented in Finance Bill, 2015 are followings:

i) DEFERENCE OF GAAR BY TWO YEARS

One of the key steps taken in the finance bill, 2015 was deference of GAAR by two years. The previous government had proposed the implementation of the GAAR from April 1, 2015. However, in the present budget, it was explicitly made clear that GAAR will be made applicable from 1st April 2017. Thus all the investments made in the next two years until 31 March 2017 are free from the ambit of GAAR. This move by the union government was a relief for Foreign Institutional Investors (hereinafter FII's) and other investors.[74] In order to discuss implications of GAAR on the Indian market and various sectors, it becomes essential to discuss and understand GAAR. This concept was introduced after the Vodafone tax case in 2007. Finance Minister Mr. Pranab Mukherjee in his budget speech in 2012 proposed this

[73] 'Make In India Through Effective Tax Reforms' (*Ernst & Young*, 2015) <http://www.ey.com/Publication/vwLUAssets/EY-cii-whitepaper-17-dec/$FILE/EY-cii-whitepaper-17-dec.pdf> accessed 23 October 2015.
[74] Anshu Khanna, 'Finance Bill, 2015 & Taxation Of Foreign Investors' (2015) 12 Int Taxation Rev 193.

concept with the ambition to check tax evasion and avoidance. Originally, when GAAR was first introduced in the year 2012, it was very controversial because it gave immense power to taxing authorities. It empowers officials to deny the tax benefits of transactions or arrangements which do not have any commercial substance or consideration other than achieving tax benefit. It contains a provision allowing the government to retroactively tax past overseas deals involving local assets. GAAR could also give powers to the tax department to deny double taxation treaty benefits to foreign funds based out of tax havens like Mauritius. India has a Double Taxation Avoidance Agreement with Mauritius. Overseas portfolio investors, routeing their investments via countries like Mauritius, currently do not pay any tax on short-term capital gains.[75] So if any private equity and other investors invest in India through jurisdictions like Mauritius and Singapore to claim tax treaty benefits, then arrangements could potentially be questioned under the GAAR. Thus, it gave very wide discretionary powers to the already powerful revenue authorities to allow or disallow benefit of double tax avoidance agreements. However, an extension of implementation of the GAAR until April 1, 2017, provides some comfort to foreign investors, particularly those looking to invest through jurisdictions like Singapore and Mauritius. When implemented, GAAR will have no retrospective effect, i.e., it will apply only to investments made on or after April 1, 2017. It is also expected that the government will provide more clarity and guidance on the GAAR provisions before implementation.[76]

Having discussed the nature of GAAR, it becomes important to discuss the benefits to the business community by the deference of GAAR. It is argued that deference was done because of two major reasons first being the wide power given to authorities and the other being the participation of India in OECD's BEPS plans which will make it necessary to incorporate GAAR as an integrated part of legal framework dealing with tax avoidance.[77] Thus deferring of GAAR is a sign of relief for all the investors and business companies who find their way through tax havens such as Singapore, Mauritius, etc.

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[75] '5 Facts About The General Anti-Avoidance Rule (GAAR)' (*NDTV Profit*, 14 May 2012) <http://profit.ndtv.com/news/corporates/article-5-facts-about-the-general-anti-avoidance-rule-gaar-300693> accessed 23 October 2015.

[76] 'India Budget 2015 – Key Takeaways for Foreign Investors' (*Debvoise & Plimpton*, 2015) <http://www.debevoise.com/~/media/files/insights/publications/2015/03/20150304indiabudget.pdf> accessed 23 October 2015.

[77] 'International Tax Update' (*Deloitte*, 2015) <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/tax/in-tax-indiabudget2015-international-tax-alert-noexp.pdf> accessed 23 October 2015.

The impact of deferring could be best understood from the analogy of 2007 market collapse. It is undoubted that most part of investments of FII's in India is handled by way of Participatory Notes (hereinafter P notes). In 2007, mere news that government is planning on prohibiting or restricting P notes led to the market crash.[78] With the implementation of GAAR, it is still not clear that whether P notes will be in the scope of GAAR or not. Thus, if GAAR is passed it will be discouraging on the part of FIIs to invest in India. Thus, deferring GAAR and making it clear that all investments made till 31st March 2017 are outside the purview of GAAR will encourage investments and business functions in the Indian market because they will not have to prove any commercial interest in the transaction. However, most of the investor's request are that the GAAR should be modified to make it less of a broad spectrum anti-avoidance rule, instead of targeting only high abusive contrived and artificial arrangements.[79]

ii) RATIONALISATION OF MINIMUM ALTERNATE TAX

In the Finance Bill 2015, application of Minimum Alternate Tax (hereinafter MAT) on FIIs in case of capital gains was rationalised. Income from transaction in securities (other than short-term capital gains arising on which securities transaction tax is not chargeable) arising to FII excluded from the ambit of MAT by excluding both, the income and corresponding expenses, in the computation.[80] In order to understand this rationalisation one needs to understand situation prior to the passing of Finance Bill. In cases of security market, FII were asked to pay 15% tax on Short Term Capital Gain (hereinafter STCG) and nil tax in cases of long-term capital gain. However, the revenue was subjecting such FIIs to MAT as the gains made by them will be added to their book profits and therefore, were asked to pay MAT. The cornerstone benefit of tax exemption to FIIs was denied due to MAT levy.[81] Thus, in effect, no benefit was conferred on FII in case of long term capital asset.

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[78] R Vaidyanathan, 'Why Participatory Notes Are Dangerous' (*The Hindu Business Line*, 24 October2007) <http://www.thehindubusinessline.com/todays-paper/why-participatory-notes-are-dangerous/article1672845.ece> accessed 23 October 2015.

[79] Matthew Gilleard, 'Indian Budget To Focus On 'Make In India' And FDI Incentives' (*International Tax Review*, 26 February 2015) <http://www.internationaltaxreview.com/Article/3431841/Indian-Budget-to-focus-on-Make-in-India-and-FDI-incentives.html> accessed 23 October 2015.

[80] 'Union Budget 2015 Inspiring Confidence, Empowering Change In India' (*KPMG*, 2015) <https://www.kpmg.com/IN/en/services/Tax/unionbudget2015/Documents/KPMG-Union-Budget-Manufacturing-PoV-2015.pdf> accessed 23 October 2015.

[81] Karthik Ranganathan, 'Union Budget 2015 Direct Tax ' (*Mondaq*, 2 March2015) <http://www.mondaq.com/india/x/378478/Capital+Gains+Tax/Knowledge+Sharing+Alert+Union+Budget+2015+Direct+Tax> accessed 23 October 2015.

In the Finance Bill 2015, it is proposed that MAT provisions will not be applicable to capital gains income of FII's. In order to give the requisite benefit, it was decided to amend section 115JB of the Income Tax Act which deals with MAT. It is provided company's share of income such as long terms capital gains (hereinafter LTCG) credited to its profit and loss account (on which no income tax is payable as per normal provisions) that shall not be included in the book profits for the purpose of MAT provisions and consequentially, the book profits shall be increased by the amount of expenditure relatable to that income.[82] Accordingly, FII's are not required to pay MAT on the capital gains which are exempted by the income tax act. However, the amendment continues to be prospective in nature and will not impact or benefit FPIs that have been receiving tax notices in the past couple of months on the basis of applicability of MAT to past gains on investments.[83]

The main impact of this amendment is the benefit of exempting income on capital gains of FII and living up to the true spirit of not taxing income of FII's. It must be quite common notice that bidding for large Engineering Procurement Construction (hereinafter EPC) Contracts are undertaken by a consortium consisting of foreign and Indian contractors due to the varying skill sets, technology requirements, etc. One of the significant risks in such consortium arrangements is the taxation of Association of Persons (hereinafter AOP). Budget 2015-16 proposes to exclude the share of income earned by a member on AOP from the ambit of MAT liability. Any expenditure incurred in relation to the share of income of the member of the AOP would be added back in the MAT computation.[84] This is also favourable move because it is in line with the view that MAT cannot apply to foreign companies that do not prepare an account in accordance with Indian company laws, i.e., foreign companies not having a place of business in India. However, the applicability of MAT to FIIs which do not have a presence in India, an issue which is pending adjudication by the Supreme Court of India has not been addressed. Similarly, the interplay of MAT provisions with the provisions of a treaty to a corporate entity has not been addressed by the amendments. But in light of positive factors of the reforms, it can be agreed that this amendment is clearly a welcome move and is also aligned to Government's intention to eliminate unnecessary litigation as well as provide an impetus to the infrastructure sector.

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[82] Anshu Khanna, 'Finance Bill, 2015 & Taxation Of Foreign Investors' (2015) 12 Int Taxation Rev193.
[83] Shipra Padhi, TP Janani and Rajesh Simhan, 'Nishith Desai Associates: Finance Act, 2015 Passed Into Law: Some Creases Ironed' (*Nishith Desai &Associates*, 18 May 2015) <http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/finance-act-2015-passed-into-law-some-creases-ironed.html?no_cache=1&cHash=2a4665bf6c388949a1208b2dff192ef2> accessed 23 October 2015.
[84] Rajesh H Gandhi and Anita Nair, 'Finance Bill 2015 & MAT Provisions' (2015).

iii) ELIGIBILITY PERIOD OF CONCESSIONAL TAX RATE EXTENDED

In 2013, a major step was taken by the UPA government towards foreign debt investment in India while presenting the budget. It was proposed that on the applicability of certain ceilings, tax on the income earned from interest at the hands of Qualified Foreign Investors (hereinafter QFI) or FII was reduced to 5 % from 40%. This step taken by the government in 2013 was a major boost for QFI and FII. This new step was incorporated by way of amendment in section 194LD. It provides that interest payments made to QFIs and FIIs in form of rupee denominated bond of an Indian company or government security will be subject to tax at the rate of 5%.[85] This section was applicable to income generated from March 2013 to May 2015. However, in the present budget section 194LD is sought to be amended and interests earned till 30th June 2017 will be taxed at the rate of 5%. This is similar to the benefits extended in Finance act, 2014 for External Commercial Borrowings (hereinafter ECB) under section 194LC of Income Tax Act.

The step was taken by the government of extending the time limit period of concessional tax rate till 2017 is another positive move in inviting foreign investments. The impact of this provision can be imagined from the fact that the rate of interest is reduced to 5% from 40%. It clearly shows the benefit which will occur to both QFIs and FIIs. Both these class of investors will be highly benefited because one of the major sources of revenue for such class is from interest earned. Thus, reduction of the tax rate will give direct monetary benefit to the investors and will also encourage new investments and thus will foster the aim of Make in India.

iv) REDUCTION IN RATES OF TAX FOR ROYALTY AND FEE FOR TECHNICAL SERVICE

In order to allow free flow of transfer of technology, expertise and ease to small entities government introduced to bring down withholding tax (hereinafter WHT) rate for royalty and Fee for Technical Service (hereinafter FTS) on payments non-residents to 10%.[86] This reduction in the tax rate will take effect from 1st April 2016. Earlier in the case of a non-resident taxpayer having an income by way of royalty and fees for technical service received from government or Indian concern after 31.03.1976 shall be liable to a WHT rate of 25% on

[85] Income Tax Act 1961, s 194 LD.
[86] Karthik Ranganathan, 'Union Budget 2015 Direct Tax' (*Mondaq*, 2 March 2015) <http://www.mondaq.com/india/x/378478/Capital+Gains+Tax/Knowledge+Sharing+Alert+Union+Budget+2015+Direct+Tax> accessed 23 October 2015.

such gross income provided the non-resident has no permanent establishment in India.[87] The earlier higher rate of the tax created a lot of confusion, in the case of an existing Double Tax Avoidance Agreement (hereinafter DTAA) with the country of non-resident, as to which rate would be applicable to income tax and DTAA. However, in the case where the resident belongs to a country where there is no DTAA, the non-resident suffers the loss and is taxed under the provisions of Income Tax Act. Reducing tax rate minimises the variance between the income tax provisions and the various DTAAs in terms of tax rate, resulting in reduced litigations and also quicker resolutions.[88] If recent trends of SMEs are any kind of indication, then it will be correct on our part to term this era as "start-up era". One of the key requirements of a start-up is a free flow of technology and technical know-how. Most start-ups have innovative ideas and these ideas and their success are mainly dependent on the transfer of technical knowledge and innovation. Before this budget, 25% was paid as a royalty due to which foreign companies were compelled to Treaty-shop to transfer technology into India via a jurisdiction which imposes fewer tax rates. By bringing it back to 10% not only will there be a free flow of transfer of technology but also treaty shopping vis-à-vis reduced WHT for royalty and FTS will be reduced.[89] This can be best explained with the following example: As per terms of DTAA between India and Mauritius, 15% will be paid as a tax of royalty. Thus, if the technology is transferred from Mauritius, 15% will be paid as a tax but if a person is a resident of a country with whom India has not signed a DTAA, they will be taxed at 25%. However, with a reduction in rates of WTH, the presence or absence of DTAA will not matter because effectively the rates under DTAA and Income tax act are almost same and thus this move of the union government will be welcomed by small and medium scale enterprises. Thus, reduced rates of royalty and FTS will allow free flow of technology because more technology will be transferred owing to a reduction in tax rates. One of the key concerns of skill development and innovation is a lack of technical knowledge amongst the local developers. Thus, small ventures can now avail best services from the globe and this will lead to the successful transfer of technology which in turn facilitates "Make in India" project.

[87] Ankit Banka, 'Reduction In Rate Of Tax On Royalty & Fees For Technical Services In Case Of Non-Residents' (*Taxguru*, 4 March 2015) <http://taxguru.in/income-tax/reduction-rate-tax-royalty-fees-technical-services-case-nonresidents.html> accessed 23 October 2015

[88] Anshu Khanna, 'Finance Bill, 2015 & Taxation Of Foreign Investors' (2015) 12 Int Taxation Rev193.

[89] Karthik Ranganathan, 'Union Budget 2015 Direct Tax' (*Mondaq*, 2 March 2015) <http://www.mondaq.com/india/x/378478/Capital+Gains+Tax/Knowledge+Sharing+Alert+Union+Budget+2015+Direct+Tax> accessed 23 October 2015.

v) CHANGE IN BUSINESS CONNECTION OF OFFSHORE FUNDS

Section 9 of the Income Tax Act provides for income which is deemed to accrue or arises in India. One of the main conditions to tax non-resident is the existence of business connection in India. Once such a connection is established, all the activities arising out of such connection are taxable in India. According to the previous position, the presence of an independent fund manager in India for an OFS will constitute a business connection. In a situation where fund manager is situated in India and he manages investments related to an OFS or investments which are made outside India, such profits were taxable in India because of the presence of the fund manager is in India. Thus mere presence of fund manager in India will constitute business connection and may induce taxability for an OFS. Hence not only fund manager's fee is taxable, the mere fact that the fund is controlled India will also make it taxable.[90] This has been a long-standing irritant for foreign institutional investors and even private equity (hereinafter PE) funds.

In order to change the pre-existing norms of taxability, a new regime on the basis of international standards is suggested in the 2015 Budget. It has been suggested to add section 9A, which provides that income from investments made outside India will not be taxable solely on the ground that such investments are handled by a fund manager located in India.[91] In simpler terms, a fund manager acting on behalf of anyone and maintaining the fund will not constitute a business connection in India. Thus, this would reduce taxability of the profits made through such investments. However, this benefit is only available to a select offshore and fund managers who fulfil certain conditions. These conditions are:

The OSF (Officers' Superannuation Fund) has to fulfil:[92]

- The OSF should not be an Indian resident and it should be located in a jurisdiction which has comprehensive or limited DTAA
- Participation in such OSF by Indian residents (directly or indirectly) should not be more than 5% and that such fund has at least 25 unrelated members who directly or indirectly are not connected

[90] Anshu Khanna, 'Finance Bill, 2015 & Taxation Of Foreign Investors' (2015) 12 Int Taxation Rev 193.
[91] Debevoise & Plimpton (n 76).
[92] 'Make In India' Through Effective Tax Reforms' (*Ernst&Young*, 2015). <http://www.ey.com/Publication/vwLUAssets/EY-cii-whitepaper-17-dec/$FILE/EY-cii-whitepaper-17-dec.pdf> accessed 23 October 2015.

- No member of the fund along with other members should have controlling interest more than 10%
- No more than 50% participation interest should devolve upon 10 or fewer members of the fund
- The fund shall not invest more than 20% of its corpus in an entity and the fund should have a monthly average of INR 10 million including at the time of its creation
- The fund shall not function any business in India and should not have business connection in India other than fund manager who acts on behalf of the OSF
- The remuneration paid to the fund manager by the OSF for his services should be at arm's length.

To qualify as eligible Fund Manager (hereinafter FM) the following conditions have to be fulfilled:

- The person should not be an employee of the fund or its connected person
- The person should be registered with concerned regulators or should be registered as investment advisor in accordance with specified regulation
- The person should be acting in the ordinary course of his/her business as fund manager
- The person along with his connected persons shall not be entitled more than 20% of the OSF profits as remuneration.[93]

Further, it has also provided in the amendment that an eligible investment fund shall furnish a statement containing information in connection with the fulfilment of conditions in a prescribed manner failing which will attract a penalty of INR 500,000.[94]

Before insertion of this section, any OFS being managed by a fund manager in India was considered to have a business connection and was taxable in cases of profit. Section 9A was added to attract global fund managers to come and operate from India. This section was passed with the ambition that dispersed fund managers should be attracted to India in order to manage from India. However, while section 9A may be well intentioned, it employs a

[93] The Income Tax Act 1961, s 9A.
[94] Karthik Ranganathan, 'Union Budget 2015 Direct Tax' (*Mondaq*, 2 March 2015) <http://www.mondaq.com/india/x/378478/Capital+Gains+Tax/Knowledge+Sharing+Alert+Union+Budget+2015+Direct+Tax> accessed 23 October 2015.

number of rigid criteria that would be impossible for PE funds and difficult for FPIs to satisfy.

vi) PASS THROUGH STATUS FOR CATEGORY-I AND CATEGORY-II ALTERNATIVE INVESTMENTS FUNDS (AIF)

Securities Exchange Board of India (hereinafter SEBI), by virtue of AIF regulations 2012 has divided AIF into three categories. Based on certain fulfilling criteria these funds are classified into three categories of funds. In this year's budget pass through status for Category –I and Category-II funds are provided. It must be noted that Category-I funds are those funds which invest in early ventures and are also known as angel investments. Category-II funds are like private equities which invest in more developed ventures.[95] A new chapter, XII FB has been introduced in the act to deal with pass through the status of AIF. The succinct new reforms are:

- Taxability in the hands of AIF will only be done for PGBP. Income from other sources and capital gains will be exempt.
- Taxability in the hands of the unit holder will be exempt in case of PGBP provided it is received from AIF. Income from other sources and capital gains will be taxed at normal rates.
- Income received by AIF will be free from TDS requirements.
- Losses shall be allowed to carry forward or set off to AIF but same shall be disallowed in the case of Unit holder.
- Business income on which tax is paid by AIF when repatriated to Unit Holders no tax will be paid on the same by unit holders. This is allowed to avoid double taxation.
- Buy back distribution of tax and division distribution of tax shall not be applicable in cases of distribution of income from AIF to UH.
- The fund, however, will have to file its return of income and other documents as required.

[95] 'International Tax Update' (*Deloitte*, 2015) <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/tax/in-tax-indiabudget2015-international-tax-alert-noexp.pdf> accessed 23 October 2015.

- WHT at the rate of 10% will be applicable in the case of income from other sources where no tax is paid at the fund level.[96]

This is one of the key changes brought in the budget of the year 2015. This step by the government clearly gives an indicative that government is also encouraging innovative ideas and start-ups. One of the key objectives of Make in India campaign is to foster investments in India.[97] Thus by giving pass through status to AIF, it is sought by the government to achieve a good investment in the Indian sector.

If we talk about startups like Flipkart, Snapdeal, Ola, Grofers, Paytm, Jabong, etc. All these start-ups require a good amount of investment to excel. Fundraising in any start-up is divided into many stages. The first stage of funding is known as Angel Investments. Angel investment is an essential funding because it helps the new ventures which are at conceptual or developing stage. Other rounds of funding include State-II funding which includes Venture capitalists funding. Then higher levels of funding come into the picture. In the new regime suggested in the budget both angel investors and the State-II funding companies will be benefited. This will broaden the horizons of Indian start-ups because new companies who are interested in funding will enter the market and will help start-ups excel.[98] The main aim of this status is to protect the fund and with the onset of the new regime, it is expected that new investment funds are incorporated to fund Indian start-ups.

vii) REDUCTION IN CORPORATE INCOME TAX

Another major step taken by the government is by reducing Corporate Income Tax from 30% to 25%. This move was welcomed by everyone because it will decrease the taxability of the company. In the budget speech, FM pressed the fact that India is looked as Tax jurisdiction. Thus, reduction in the tax rate will in effect help the company because cess and surcharges are based on the tax levied and thus a reduction in tax will benefit the company. However, this reduction is only levied on domestic companies. Thus, this is a major benefit to domestic companies incorporated according to domestic laws.

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[96] 'Achieving Together India - Budget 2015 Analysis Of Tax Changes On Business' (*Rodl & Partner*, 2015) <http://www.roedl.com/fileadmin/user_upload/Roedl_India/Roedl-Partner-India-Budget_-2015pdf> accessed 23 October 2015.

[97] Anshu Khanna, 'Finance Bill, 2015 & Taxation of foreign Investors', (2015) 12 Int Taxation Rev 193.

[98] M Govinda Rao, 'The Tyranny Of The Status Quo: The Challenge Of Reforming India's Tax System' (*National Council of Applied Economic Research*, 2015) <http://www.ncaer.org/uploads/photo-gallery/files/1436711357IPF%202015%20Govinda%20Rao%20Conference%20Version%20Draft.pdf> accessed 23 October 2015.

viii) OTHER ANCILLARY CHANGES

Apart from major changes suggested in the new regime, there are certainly other changes which are adopted in order to foster investment and skill development. These changes are:

- The proviso to section 32(1) provides that in order to claim 100% depreciation benefit machinery has to be used for at least 180 days. However, by way of the amendment, it is suggested that even if the machinery are used for less than 180 days depreciation benefit can be claimed.[99] This will help the machinery used in electricity and manufacturing sectors.
- Section 86 of the Income-tax provides that in the case of an AOP if the income is distributed to its member companies no tax will be levied on the company. However, such income is calculated in the books of account as per section 115JB and MAT is levied. Thus, in order to avoid double taxation, an amendment is sought by which this income by companies will not be included in the calculation and thus not MAT will be levied.
- An amendment in section 32D is sought by way of which an investment made in the region of Andhra Pradesh and Telangana additional investment deduction by 15% is allowed and additional depreciation by 35% is sought in order to foster investment in Andhra Pradesh and Telangana.[100]
- Initially, preferential tax treatment was not allowed to the sponsors of REITs at the time of selling of such units which were acquired by way of exchange against shares in unlisted SPV. On the other hand, the tax benefit was given to sponsors who hold share in SPV instead of exchanging them for REIT. Due to such denial, they were forced to pay tax. However, by way of an amendment, it is provided that sponsors of REIT (which have acquired bonds by way of exchange against shares in SPV) should be given tax benefit at the time of selling of REITs.[101] This amendment is invited by the real estate players and it is expected that it will

[99] Karthik Ranganathan, 'Union Budget 2015 Direct Tax' (*Mondaq*, 2 March 2015) <http://www.mondaq.com/india/x/378478/Capital+Gains+Tax/Knowledge+Sharing+Alert+Union+Budget+2015+Direct+Tax> accessed 23 October 2015.

[100] Meghna Kapoor, 'Budget 2015-16 For The Corporates - Government, Public Sector - India' (*Mondaq*, 2 April 2015) <http://www.mondaq.com/india/x/387462/Fiscal+Monetary+Policy/Budget+201516+For+The+Corporates> accessed 23 October 2015.

[101] Karthik Ranganathan, 'Union Budget 2015 Direct Tax' (*Mondaq*, 2 March2015) <http://www.mondaq.com/india/x/378478/Capital+Gains+Tax/Knowledge+Sharing+Alert+Union+Budget+2015+Direct+Tax> accessed 23 October 2015.

encourage people in participating in real estate market as well. Another major change which is suggested is no taxing of income earned by REITs by way of rent or least. Initially, income received by SPV's as rent was not taxed while distributing it to REITs. However, similar income earned by REITs was taxed if it was not with the help of SPV. However, by way of an amendment a change is proposed which allows to not tax income received by way of rent or lease. Thus, before the amendment, if any rent income or lease income was earned by SPV, it was not subject to tax when it was distributed to REIT.[102] However, after the proposed amendment it is sought that even if REIT receives any income by way of rent or lease without any participation of SPV, such income will be given tax benefit.

IV. CONCLUSION

It has been aptly said that the Growth has to come from domestic factors and you can't rely on consumption growth as much as investment growth.[103] The direct tax was one of the most important obstacles to India's growth in manufacturing and inviting foreign investment. The BJP government has appropriately provided a new direction of tax reforms in India and restored the hopes of Indian economy resuming its journey on the high growth direction.

There are several amendments which are positives from foreign investor's standpoint. Thus direct tax proposals introduced are a welcome step and should attract foreign direct investment and create a hassle free business environment. Going forward, these reforms are the fundamental base for achieving "Make in India" vision.[104] Some financial specialist thinks that this budget does not provide the big bang that many investors wanted. However, the majority of the business analysts think that the budget marks a continuity of India's progress and competitiveness through these reforms.

Some of the proposals announced in the budget would bring clarity, increase predictability, and in turn rejuvenate the investment outlook of the world towards India. There are high

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[103] Prosenjit Datta and Shweta Punj, 'What Mr Jaitley Should Do' (*Businessinsider*,1 March 2015) <http://www.businesstoday.in/magazine/cover-story/arun-jaitley-union-budget-panel-discussion-investment-jobs/story/215483.html> accessed 23 October 2015.

[104] Satya Poddar, 'Tax System Reforms to Put Economy On Growth Path- Business News' (*Businesstoday*, 4 January 2015) <http://www.businesstoday.in/magazine/cover-story/satya-poddar-ey-on-indian-tax-system-reforms-gst-for-economy/story/213485.html> accessed 23 October 2015.

expectations that tax revenue of India and stimulate investment into the Indian manufacturing sector might be increased as result of the tax reforms. Coupled with a reduction in profits tax rates, these tax reforms may be considered a long overdue structural change that marks a shift in India's position and development as a foreign investment-friendly destination.[105] While it is the commendable effort of government's tax reforms that has led government's "Make in India" program, however, a lot more reforms are expected from "Modi Sarkar" in order to make India a global player in manufacturing and investment sector. It is also important to study the reforms from the point of view of indirect taxation. The total benefits which investment and manufacturing sector will receive are a combination of both direct and indirect tax reforms. There were many substantial changes in the indirect taxes which mainly were concerned with Basic Customs Duty, Export Obligation for certain products under Foreign Trade Policy, excise regulations and other such regulations. Owing to the limitation of the topic only direct tax reforms were discussed. However, with the content of reforms and the pace at which India is developing the scheme of "Make in India" will be a big success.

[105]Chris Devonshire- Ellis, Tarun Manik & Nishant Dixit, 'India's FY 2015-16 Budget: Meaning and Implications for Foreign Investment - India Briefing News' (*India Briefing News*, 4 March 2015) <http://www.india-briefing.com/news/indias-fy-201516-budget-meaning-implications-foreign-investment-10182.html/> accessed 23 October 2015.

EXTRATERRITORIAL JURISDICTION AND EFFECTS DOCTRINE

- *Raghuveer Singh Meena*[*]

I. INTRODUCTION

In a world where businesses and individuals are increasingly operating in a global scenario, the issue of the extraterritorial application of national laws is assuming progressively greater importance to deal with new issues where markets are affected by these extraterritorial practices. Traditionally, the exercise of jurisdiction by a state was generally limited to persons, property and acts within its territory.

In this paper, the researcher is studying the evolution of the 'Effects Doctrine' in the United States of America (hereinafter 'US'), European Union (hereinafter 'EU') and India to understand the concept of effects doctrine and extra-territorial jurisdiction efficiently. As in the globalised world, it's easy to draft laws to regulate markets but when it comes to the practical implementation, the real problem arises. In addition, the researcher is also dealing with the powers and procedures followed by the Competition Commission of India (hereinafter 'CCI') to deal with such cases.

The scope of this paper is especially vast as almost every country uses this concept to prevent anti-competitive practices by other countries which affect their market directly. This paper has been limited by the researcher to a comparison of US, EU and India by understanding various other aspects which are used by the competition authorities such as CCI in India. The hypothesis of the paper is that even though we have come far enough to deal with anti-competitive practices, the only solution to such issues will be bilateral agreements with other countries.

II. OVERVIEW OF EXTRATERRITORIAL JURISDICTION

To keep apace with the perpetual evolutionary process of changing, communal competition authorities must adopt regulations to deal with such issues which directly have an impact on

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their markets. To prevent such practices nations are entering into bilateral agreements with other nations and groups such as OPEC (Organization of the Petroleum Exporting Countries) in this constantly developing world.[106] These agreements make it easy for countries to resolve such issues and provide better protection to their markets without getting involved in cumbersome legal practices and political processes.[107]

This is a matter of public international law where there are limits imposed upon the state jurisdiction and subsequently upon the country's ability to implement its laws outside its jurisdiction over undertakings which are overseas. It can be said that there are two fundamental elements to a state's jurisdictional competence.[108]Firstly, a state frames laws with the help of its legislative, executive and judicial bodies to lay down general laws. This is also known as subject matter jurisdiction of the state.[109]Secondly, it becomes an issue of enforcement of these general rules, where sometimes even coercion is used by the authorities.[110] This is called enforcement jurisdiction of a state.[111]

Subject matter jurisdiction is considered as part of Public International Law as this concept provides power to state to regulate its citizens within its territory. Under laws such as taxation or corporate law, even corporate entities which are registered in a country will be considered as citizens. Due to trans-border transactions and events taking place at so many different levels, it has been tried by various scholars and judicial bodies to even include the acts which are originating outside but ending within the territory of that particular state under the definition of subject matter jurisdiction. Even certain connections are considered as acts being completed within the territory of a country.[112]

To include anti-competitive practices within the principles of territoriality and nationality, the definitions of the concepts have been widened in recent decades through various judicial decisions in the US and the United Kingdom (hereinafter 'UK'). Examples of these practices include taking over a competitor or charging predatory prices within the territory of the State concerned to apply its law, or because an agreement will have been made between a foreign

[106]Einer Elhauge and Damien Geradin, *Global Competition Law and Economics* (Hart 2007) 152.
[107] ibid 154.
[108]Elhauge (n 106) 155.
[109]Joseph Drexl, *The Future of Transnational Antitrust- From Comparative To Common Competition Law* (Kluwer Law International, 2003) 112.
[110] ibid.
[111]Drexl (n 109) 115.
[112]Tran Van Hoa, *Competition Policy And Global Competitiveness In Major Asian Economics* (Edward Elgar 2003) 245.

undertaking and firm established within the State in question.[113]Such practices are considered as anti-competitive practices and these examples are show that they have a direct effect on the concerned country's economy.[114]

In these cases, it is easy to apply a subject matter jurisdiction over an individual who is outside the territory of the state, but the fundamental problem here is about enforcement of its laws in the territory of other states. To prevent such practices, states have incorporated regulations, which block other states to enforce their laws in their territory. India itself faces the problem of enforcing its judgments in the territory of other states, but as said earlier, there are a lot of jurisdictional issues involved in such cases.[115]

The issues of enforcement bring a lot of issues along with them. It has been seen in past that even though one state has a subject matter jurisdiction in relation to an individual in another state but it becomes contentious once the enforcement comes into the picture without the permission of that state. Here enforcement is not just about imposing penalties but also includes all other acts such as service of summons, investigation privileges etc.[116]

The fundamental problem for the competition authorities is a collection of information of the act which took place outside its own jurisdiction.[117] The problem here is that laws which were framed in the19th century to deal with issues of that time are not equipped to deal with issues in the present times where the whole globe is connected with transactions taking place at various levels and sometimes even in more than one jurisdiction. Hence, these all laws must be modified to deal with current issues.[118]

Bilateral agreements and other treaties have tried to resolve this problem up to certain extent, for example, India is signatory to the Hague Convention on the Taking of Evidence[119], and hence India is assisted in collecting evidence for any issue which occurs in the territory of the state signatory to the Hague Convention. Similarly, Private International Law becomes important when it comes to enforcement of foreign judgments in any territory. Sometimes, it comes under enforcement of foreign judgments especially in the matter of currency

[113] ibid.
[114] E Montgomery Graham and J David Richardson, *International Trade And Competitive Policy: CER, APEC And WTO* (KerrinVautier and Peter Llyod, New Zealand Economic Papers 1997) 103.
[115] ibid.
[116] G Bruce Doern and Stephen Wilks, *Comparative Competition Policy, National Institutions In A Global Market*(OUP 2001) 25.
[117] ibid.
[118]Lennart Goranson, *Competition Law Today, Concepts, Issues And The Law In Practice: The Efficient and The Effective Competition Authority*(Vinod Dhall, 2nd edn, OUP 2008) 601.
[119] ibid.

conversion, e.g. *Miliango case.*[120] However, cooperation on evidence and the enforcement of judgments is often not provided by one State to another where the former takes exception to an attempt by the latter to affirm its law extraterritorially, and most legal systems contain restrictions on the disclosing by competition authorities of confidential information.[121]

III. DIFFERENCE BETWEEN US AND EU APPROACH

i) US APPROACH

Effects Doctrine in the US has developed through legal interpretation of antitrust law provided by the courts in cases dealing with commercial law jurisprudence. This was to put an end to activities which were taking place outside US but still were affecting its market and economy. The first instance of Effects Doctrine came into the picture in 1909 when American Banana Case[122]was brought to the court. In this case all the acts which were found to be violative of laws in US were committed outside its territory where the Costa Rican government was influenced to monopolise the banana trade. Unfortunately, in the absence of clear laws regarding enforcement of laws in a jurisdiction outside US's territory, the court rejected the matter saying they have no power to impose their laws over other country or a citizen of another country.[123]

Later on, in the case of American Tobacco[124], the issue of anti-competitive practices came before the court. This time court said that the interpretation of Anti-Trust Act is so vague that every other matter of extraterritoriality can be rejected from even admitting into the court. Here the matter was about monopolising the tobacco industry. Hence, in this case as well the matter was not dealt with effects doctrine and subsequently was rejected.[125]

Later on with time, US Supreme court became more flexible about territoriality principle. In the Sisal case[126], US Supreme court interpreted the rules more flexibly and hence they exercised the jurisdiction in this case where the defendant was outside US. The explanation behind it was that even though the agreements were entered into outside US by foreigners, they have the power to exercise jurisdiction over performance and intention of the parties which was within US. Subsequently, the Alcoa case[127], came to the US Supreme Court,

[120] *Miliangos v George Frank Ltd*[1976] AC 443 (HL).
[121] Elhauge (n 106) 178.
[122] *American Banana Co v United Fruit Co* 148 F 2d 416 (2nd Cir 1945).
[123] *American Banana Case* 148 F 2d 416 (2nd Cir 1945).
[124] *United States v American Tobacco Co* [1969] US 106 221.
[125] *American Tobacco Case* 221 US 106 (1911).
[126] *United States v Sisal Sales Corporation* 274 US 268 (1927).
[127] *United States v Aluminum Co of America* 213 US 347 (1909).

where the action was taken by US against Aluminium Company of America (hereinafter 'ALCOA') because defendants had entered into an agreement to conspire so that trade can be monopolized. This was considered as unlawful under the Sherman Anti-Trust Act, Sec. 4 and 15U.S.C.A.[128]. This was the first case where the Effects Doctrine was used to give a decree. This gave a new start to the courts to apply this doctrine in matters affecting US markets directly from the territory outside its jurisdiction.[129]

With time, all these judicial precedents started laying down several different conditions to apply effects doctrine. The case which brought all this together was the Timberlane case[130]. In this case, the court came up with the list of the tests which can be used when there is any kind of dilemma about the application of Effects Doctrine. This was to assert that the practice was anti-competitive and was affecting the market of the concerned nation. Court expressly said in the case that they have the power to exercise jurisdiction over matters which takes place outside its jurisdiction but to prevent any kind of flaw on their part, these three tests are as follows:[131]

- The first requirement was about having some effect whether direct or indirect over American Trade and Business (or for this matter over any other nation which follows these rules to exercise their jurisdiction)
- There cannot be any other matter regarding anti-competitive practices being dealt by the court. There must be an injury felt by the US potentially large which can be brought under the category of cognizable one. In addition, there must be an infringement of antitrust laws.
- There must be sufficient reason for the US court to exercise their jurisdiction outside their territory; hence the anti-competitive practice must be large enough to even affect the international comity and fairness.

ii)APPROACH ADOPTED BY THE EU

The position in EU is a bit complex with regard to the applicability of extraterritorial jurisdiction principles. In EU, the Treaty of Rome and the competition law of European Commission (hereinafter 'EC') does not say much about the extraterritorial jurisdiction. Still, EC has adopted it to maintain the pace with Developing World and to deal with such issues

[128] United States Code, s 4.
[129] Andrew Mitchell,'Broadening the Vision of Trade Liberalisation: International Competition Law and the WTO' 24(3) World Competition (2001) 343-365.
[130] *Timberlane Lumber Co v Bank of America* NT & SA 549 F 2d 597 (9th Cir 1976).
[131] ibid.

of anti-competitive practices.[132]EC uses three legal concepts to deal with issues of extraterritoriality namely the Implementation Doctrine, the Economic Entity Doctrine, and the Effects Doctrine. This was developed by implementing Articles 81[133] and 82[134] of EC in the matters of extraterritoriality through judicial decisions.[135]

However, in the EU the effects doctrine is still not recognized by the European Court of Justice (hereinafter ECJ), hence there is always a doubt whether this doctrine enjoys the same status as other doctrines. But, at the same time, courts have established in several cases over a period of time that this non-recognition will not bar the courts to exercise their subject-matter jurisdiction over an undertaking which is outside the EU territory.[136] It has been said by the courts that Effects Doctrine will be applicable in cases to deal with anti-competitive practices to provide safety to EU consumers. They also said that the effect of such anti-competitive practice on the economy must be reasonably foreseeable, immediate and substantial.[137]

It can be said that despite being in non-recognition of the doctrine, the Commission and Courts have presumed the power over extraterritorial matters with them.[138] In the Wood Pulp Case[139], the matter was about American, Canadian and Finnish wood pulp producers coming together and forming a price cartel outside the jurisdiction of EC and subsequently charging EC members with predatory prices. The reason for exercising jurisdiction over the defendants was that they were doing business in EU through their agents, branches, and subsidiaries situated in EU. They charged inflated prices from the customers which lead to the loss of 60% of wood pulp market.[140]

Later on, when the case went on to the appellate court, Advocate-General Darmon said that Effects Doctrine should be recognized by EC law.

He specifically said that effects doctrine is the most reliable rule which laid down the criteria of substantial, foreseeable and direct effect.[141]This doctrine was again discussed in the Gencor case[142] where the issue was about the merger of two South African companies. In this

[132] Elhauge (n 106) 192.
[133] European Community Law, art 81.
[134] European Community Law, art 82.
[135] Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004) 338.
[136] ibid.
[137] Motta (n 135) 336.
[138] The 6thReport on Competition Policy, 1977.
[139] *A Ahlstrom Osakeytio v Commission Mkt Rep* (CCH) 491 (27 September 1988).
[140] *Wood Pulp Case* 491 (27th September 1988).
[141] ibid.
[142] *Gencor v Commission* [1999] ECR II-753.

case, the court discussed merger regulations and international law to apply the principles of extraterritorial jurisdiction.[143]*Gencor case*[144]reiterated the three components namely immediate, foreseeable and substantial effect while deciding the case.

So it has been observed by the researcher that both US and EU developed their mechanism to implement this doctrine through cases and interpretation of anti-trust laws. India has its CCI in its nascent stage as we need a lot of change and better implementation of Competition Law.

IV. PROCEDURE AND POWERS OF CCI (INDIAN APPROACH)

i) COMPETITION COMMISSION OF INDIA (CCI):

CCI in India assumes its powers of extraterritorial jurisdiction under section 32[145] of the Competition Act, 2002. Unlike section 14[146] of its forerunner Act, i.e., the Monopoly and Restrictive Trade Practices (hereinafter 'MRTP') Act, 1969, it mandates some extraordinary power to the Commission to investigate into and also to pass such orders as it deems fit if it finds any anti-competitive agreement or misuse of dominant position or combination such as merger which constitutes any violation of the provisions of the Competition Act or the party to such anti-competitive practice are outside the territory of India.[147]

Neither the European competition law nor US competition law gives its competition authorities such tremendous power in such an unequivocal manner. Section 32, in very clear words, gives these two powers to the Competition Commission even if the anti-competitive practice has been taken place outside the territory of India or the party to such agreement is outside India. Before 2007 amendment Act[148], the Commission had power to only conduct an inquiry in such cases but the 2007 amendment to the Competition Act has made the Commission more dynamic in all respects. It broadened the scope of its powers which lead to more stringent against anti-competitive practices.[149]

If the provisions of Indian Competition law with the EU competition law or US competition law are compared then it is clear that the Indian Competition Commission is very strong than the competition authorities of EU or US. The reason behind this may be that we have learned

[143] ibid.
[144] ibid.
[145] The Competition Act 2002, s 32.
[146] Mitsuo Matsushita, *Competition Law and Policy in the Context of the WTO System*, 44 (1995) De Paul Law Review 1097-1109.
[147] ibid.
[148] The Competition (Amendment) Act 2007.
[149] ibid.

from their mistakes and made the necessary amendments. The other reason can be that Article 81 and 82 of European Community Law or the concerned provision of US competition law does not specifically authorise the commission to exercise such jurisdiction. Such exercise of extraterritorial jurisdiction in US or EU is a judicially created power of these competition authorities and is based on three doctrines such as Implementation Doctrine, Economic Entity Doctrine and Effects Doctrine.[150]

Before the Competition Act, 2002 there was no provision in MRTP Act which discerns the extraterritorial jurisdiction of the competition authority. However, in 1996, one case came before the MRTP commission which first time brought up the issue of extraterritorial jurisdiction of the Commission. The Alkali Manufactures Association of India case (hereinafter AMAI)[151], whose members, which included the major Indian soda ash producers, filed a complaint saying that American Natural Soda Ash Corporation (ANSAC) had violated several provisions of India's MRTP Act, 1969.[152]

Analysis of various factors in this case was done by applying effects doctrine and judicial precedents of US and EU courts.[153] But at that time, the doctrine in India[154] was at a nascent stage and hence the Commission could not take action against foreign cartels or the pricing of exports to India[155], nor could it prevent imports.[156]Hence, a need for the specific provision in the statute itself was felt, and later on the new Act came up with such provisions.[157]

ii) PROCEDURE FOR CCI

After 2007 amendment of the Act, the Commission has both inquiry power as well as the power to pass an order against such anti-competitive practices. The phrasing of section 36[158] before amendment leads to the assumption that the legislatures were not of the view that the Commission should follow procedure laid down in Code of Civil Procedure, 1908[159] as

[150] Motta (n 135) 116.
[151] *Alkali Manufacturers v American Natural Soda Ash* (1998) 3 CompLJ 152 MRTPC.
[152] *The Alkali Manufactures Association of India (AMAI) Case* (1998) 3 CompLJ 152 MRTPC.
[153] ibid.
[154] The Monopoly and Restrictive Trade Practice Act 1969, s 14.
[155] ibid (n 152).
[156] *The Alkali Manufactures Association of India (AMAI) Case* (1998) 3 Comp LJ 152 MRTPC.
[157] ibid.
[158] The Competition Act 2002, s 36.
[159] The Civil Procedure Code 1908.

clause 1 of section 36 in very clear words exempts the Commission from the procedure laid down in Code of Civil Procedure.[160]

Paragraph 12 of the general regulation[161] 2 of 2009 provides the mode of filing of information or reference.[162] The commission shall within sixty days form and record its opinion of the existence of prima facie case of the contravention of the provisions of the Competition Act.[163]

The commission may, if it thinks necessary call the primary conference for the formation of opinion on the existence of prima facie case. The direction of investigation to the Director General shall be deemed to be the commencement of the inquiry under section 26[164] of the Competition Act. The report of the Director shall contain his findings on each of the allegations made in the information or reference as the case may be together with all theevidences or documents or statements or analyses collected during the investigation.[165]

Section 19[166] of the Act gives the Commission power to inquire into certain agreements or misuse of dominant position of the enterprise. Section 26 of the Act read with paragraph 21 of the Competition Commission (General) Regulations, 2009[167] gives the procedure for the inquiry in such matters.[168]

Except in the case where the inquiry is to be conducted against government or public officers, neither the General regulation, 2009 nor the Code of Civil Procedure, 1908 make it mandatory to give a notice to the defendant.[169] So it is upon the wish of the commission or the party to give notice to the alleged violator of the Act. However Order V of Code of Civil Procedure and paragraph 22 of General Regulations, 2009 of Competition Commission gives the mode of service of summons, notices and other documents.[170]

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[160] P J Lloyd and Kerrin M Vautier, *Promoting Competition in Global Markets- A Multi-National Approach* (Edward Elgar 1999) 1015.
[161] The Competition Commission of India (General) Regulations 2009 (No 2 of 2009).
[162] Motta (n 135) 336.
[163] Andrew T Guzman, 'Is International Antitrust Possible' (1998) 73 NYU LRev 1501-1505.
[164] The Competition Act 2002, s 26.
[165] Lloyd (n 160) 500.
[166] The Competition Act 2002, s 19.
[167] Lloyd (n 160) 245.
[168] William E Kovacic, 'Extraterritoriality, Institutions, and Convergence in International Competition Policy' (2001) 77 Chicago Kent LR260.
[169] Lloyd (n 160) 246.
[170] Lloyd (n 160) 146.

Though the regulation does not give any procedure for the examination of the parties or witness but for this purpose, sub-section 2 of section 36 of the Competition Act[171] gives the Commission same power as the Civil Court under Code of Civil Procedure.[172] The substance of such examination shall be reduced to writing by the members and shall form part of the record.[173] If the party or his pleader or such authorise person is unable to do so[174] or does not answer any material question which the Commission thinks necessary to answer[175], the commission may pronounce its order[176] against such party if the commission thinks fit.[177]

iii) POWERS OF CCI

The amended Competition Act has empowered the Commission not only to inquire into such anti-competitive practices but also to pass such orders as the commission deems fit. Now if after an inquiry under sections 19, 20, 26, 29 and 30 of the Act, the commission finds there is no contravention of the provisions of the Act, then it shall approve by order such agreement or combination.[178]

If Commission finds there exist any anti-competitive agreement or abuse of dominance or combination which causes or likely to cause appreciable adverse effect on the Indian competitive market, it shall direct the person or enterprise or group of person or enterprise to discontinue and not to re-enter such agreement or abuse of dominant position irrespective of the fact that the concerned act has been taken place outside.[179]

Sections 27[180]and 31[181] of the Competition Act give certain remedial measures which can be taken by the Commission after the completion of the inquiry procedure. Section 27 talks about the orders by Commission after an inquiry into agreements or abuse of dominant position whereas section 31 says about the orders of the Commission on certain combinations.[182]

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[171] Brendan Sweeney, 'Globalisation of Competition Law and Policy' (2004) 15 Mel J Int L48.
[172] ibid.
[173] The Code of Civil Procedure 1908, sch 1.
[174]Maria Johansson, General Counsel, US Federal Trade Commission, 'Extraterritorial Jurisdiction in Competition and Anti-trust Matters'(2003) 97 American Society of International Law 319.
[175] Lloyd (n 160) 145.
[176] Johansson (n 174) 309.
[177]Fod Barne*set al*, 'Evidence Remedies: Lessons from the Decision of the Cat in Tesco Plc v. Competition Commission' 08(04) Comp L J 329 (2009).
[178] Johansson (n 69) 309.
[179]Richard Whish, *Competition Law*(5edn, OUP 2003) 745.
[180] The Competition Act 2002, s 23.
[181] The Competition Act 2002, s 31.
[182] Johansson (n 174) 315.

While the Commission exercising its extraterritorial jurisdiction under section 32 of the Act imposes any penalty undersections 27, 31 or others provisions of Chapter VI of the Act, and the party upon whom penalty has been imposed does not comply with such order of the Commission then section 39[183] of the Competition Act gives the commission power to proceed to recover such penalty in such manner as may be specified by the regulations.[184]

While enforcing its order under section 32 of the Act Commission may face two situations, first, the party against whom the order has been passed is ready to comply with the order of the Commission, and second, the party against whom the order has been passed is not ready to comply with the orders of the Commission.[185]

Where the Commission imposes any monetary penalty against such party for the contravention of the provisions of the Competition Act and the party is ready to comply with the orders of the Commission then the penalty shall be paid. The party who has to make payment shall give the notice either through the commission or independently to the party in favour of whom orders have been passed.[186]

V. CONCLUSION

India is at its nascent stage in terms of having rules and regulations for its own Effects Doctrine. Section 32 of the Competition Act, 2002 has been a major step taken by the Indian Government where Competition Commission is empowered with special powers to conduct an inquiry into anti-competitive practices which have an adverse effect on India, irrespective of the fact that it has taken place outside the territory of India. Still, the problem is about enforcement of its decisions in other territories. To take the benefits of these new rules and regulations, India will have to enter into bilateral agreements so that the anti-competitive practices can be prevented and the orders of the courts in India can be enforced easily.

The researcher, on the basis of his research and because of the fact that the Commission is in infancy right now, suggests that it should adopt the comity principle which has been recognized and adopted by many of the strongest competitive and antitrust authorities of the world. The researcher also suggests that the Government of India should make more bilateral agreements for the reciprocal enforcement of the judgments.

[183] The Competition Act 2002, s 39.
[184] Johansson (n174) 306.
[185] T Ramappa, *Competition Law In India, Policy, Issues And Developments* (3edn, OUP 2006) 56.
[186] ibid.

FRACKING OF SHALE OIL AND GAS: THE FORTUNES AND FATE OF INDIA'S NEXT BIGGEST RESOURCE FRONTIER

- *Dhruv Tiwari & Anand Swaroop Das*[*]

I. INTRODUCTION

The ever compounding demand for energy fuel in the world pushed many countries on a frantic search mission to discover alternative sources of energy to meet the worrying demand-supply balance of energy. After years of research, the world found a promising panacea – 'shale gas', an unconventional natural gas resource, which had the potential to give the global energy industry, a momentous turnaround. The shale gas and oil (hereinafter shale gas) Exploration and Production (hereinafter E&P) in the United States (hereinafter US) was a major game changer as it turned tables for the country which was once in a deficit of natural gas; making it a self-sufficient natural gas nerve-centre of the world. The revolutionary natural gas reversal in the US caused a stir globally and soon enough a rapid development of shale gas resources around the world gradually metamorphosed the global gas market outlook.

Drilling for shale gas in India is only at a nascent exploratory phase. The domestic shale gas reserves in India once unlocked could minimize the energy demand as well as significantly reduce its energy imports. Ironically, India is the largest producer and exporter of 'guar gum' (cluster bean), a key ingredient in the extraction of shale gas; but India is yet to cash in on the production of shale gas. As promising and efficacious the idea of shale gas exploration is, it has its own share of concerns. A number of pressing questions linger around the issue of shale gas exploration in India like the viability of the similar *modus operandi* of shale gas extraction which worked for the US; will it also do the trick for India? Despite the huge untapped shale gas repository in India, will the dearth of requisite water supply and other factors cause a setback to the country's maiden endeavour at achieving self-sustenance?

II. SHALE GAS AND HYDRAULIC FRACTURING: AN OVERVIEW

Natural gas from unconventional sources is called 'unconventional gas', a type of which is

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called ‘shale gas’, found within the rich organic shale-beds or layers of low-permeability rocks. These are sedimentary rocks which contain quartz, clay and other minerals. The US Geological Survey holds that shales have only recently been known to be reservoir rocks than the earlier view, which suggested that shales were source rocks for oil and natural gas.[187] This latest development has spurred extensive research on shales for their resource potential and has revolutionised the US gas regime.[188] According to the World Energy Council, shale gas is usually found in proximity to conventional reservoirs and there is also a variation in their depths.[189] The extraction of shale gas in typically done between 5,000 ft. to 9,000 ft. below the surface.

The shale rock is however at times found 3,000 metres below the surface. This poses technical difficulties to the exploration companies which have to use higher pressures, temperature, fracking pressure, etc.[190] Thus, in order to extract the shale gas, mere deep vertical drilling does not suffice as horizontal drilling for substantial distances in different directions have to be coupled with it for successful extraction.[191] It is here that the process of “hydraulic fracturing” or “fracking” comes in. To release the shale gas from the shale bed, an admixture of water, sands and chemicals is injected into the well at high pressure (8,000 psi) to create perforations in the rocks, through which minute particles of sand enter and keep them open and allow the gas to escape to the surface, where it is collected.[192] The injecting process is repeated multiple times and the number of wells drilled for extracting unconventional gases far exceeds that of their conventional counterparts.

The latest report from Public Health England shows that the depth at which fracking is carried out along with proper construction of the drilling well will not contaminate the groundwater.[193] Proponents of shale gas exploration argue that the water used in the process can be treated before it is released into the drilling wells and also recycled for further extraction. The British Department of Energy and Climate Change in one of its report said

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[187] World Energy Council, *2010 Survey of Energy Resources* (2010)<www.worldenergy.org/wp-content/uploads/2012/09/ser_2010_report_1.pdf> accessed 27 October 2015.

[188] World Energy Council, *Survey of Energy Resources: Focus on Shale Gas* (2010) <www.worldenergy.org/wp-content/uploads/2012/10/PUB_shale_gas_update_2010_WEC.pdf> accessed 27 October 2015.

[189] ibid.

[190] MA Mian, ‘Shale Gas Development Prospects’ (*CWC School of Energy*) <http://www.cwcschool.com/shale-gas-development-prospects/> accessed 27 October 2015.

[191] The Energy and Resource Institute, *Shale Gas in India: Look Before You Leap* (June 2013)<www.teriin.org/policybrief/docs/Shale_gas.pdf> accessed 27 October 2015.

[192] ibid.

[193] Environmental Protection Agency, *Assessment of the Potential Impacts of Hydraulic Fracturing for Oil and Gas on Drinking Water Resources* (United States Government, June 2015)<http://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id=523539> accessed 27 October 2015.

that the intensity of the greenhouse gas (hereinafter GHG) emissions for shale gas is lower than that of Liquefied Petroleum Gas and coal.[194]

III. SOCIO-ENVIRONMENTAL ISSUES: CHALLENGES AND SOLUTIONS TO IMPENDING ROADBLOCKS

Development almost always comes at the cost of environment or the lives of the people. Though the process of fracking is being hailed as path-breaking in the energy sector, it is not free from pitfalls and challenges. A special report on the world energy outlook by the International Energy Agency (hereinafter IEA) on unconventional gas titled "Golden Rules for a Golden Age of Gas" said that boosting energy diversity and security through unconventional resources should be done in an environmentally acceptable manner.[195] The report takes into account the fact that the exploration of unconventional gas is a more intensive industrial process than that used for exploration of conventional gas and hence it leaves a bigger environmental footprint. The process of hydraulic fracturing throws a number of challenges at every country ranging from environmental to social to economic in nature. India, as per the estimates of US Department of Energy, has close to 96 trillion cubic ft. of recoverable shale gas reserves.[196] However, India has not been able to chance upon the commercialisation of shale gas production because of the myriad impediments that it faces.

i) CONTINUOUS INCREASE IN CARBON EMISSIONS

It is argued that generation of electricity with the use of unconventional resources like shale gas is much cleaner when in comparison to coal-fired generation.[197] The key to cleaner renewable or more nuclear generation lies in the production of more gas.[198] The US Environmental Protection Agency has attributed the 9% fall in the carbon emissions to shale

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[194] Department of Energy and Climate Change, *Potential Greenhouse Gas Emissions Associated with Shale Gas Extraction and Use* (Government of United Kingdom, September 2013)37, para 106<www.gov.uk/government/uploads/system/uploads/attachment_data/file/237330/MacKay_Stone_shale_study_report_09092013.pdf> accessed 27 October 2015.

[195]World Energy Outlook, *Golden rules for a Golden Age of Gas* (International Energy Agency, 29 May 2012)<www.worldenergyoutlook.org/media/weowebsite/2012/goldenrules/WEO2012_GoldenRulesReport.pdf> accessed 27 October 2015.

[196]Energy Information Administration, *Technically Recoverable Shale Oil and Shale Gas Resources: An Assessment of 137 Shale Formations in 41 Countries Outside the United States*(United States Government, June 2013)<www.eia.gov/analysis/studies/worldshalegas/pdf/overview.pdf> accessed 27 October 2015.

[197]Malcolm Brinded, 'The case for shale and tight gas'(Foundation for Science and Technology, London,9 November 2011)<www.shell.com/global/aboutshell/media/speeches-and-articles/2011/brinded-london-09112011.html> accessed 27 October 2015.

[198] Fred Pearce, 'Fracking: the monster we greens must embrace' *The Guardian* (15 March 2013)<www.theguardian.com/commentisfree/2013/mar/15/fracking-monster-greens-must-embrace> accessed 27 October 2015.

gas use.[199] However, in a recent statistical review of world energy by British Petroleum (BP), it was said that despite the enormous growth of shale gas, there has been a drastic rise in carbon emissions globally. In its global energy outlook, BP said that 27% of the global energy consumption would be taken up by gas while the global emissions will rise to 29% by 2035.[200] In India, coal consumption increased by 7.6% (accounting for 21% of global growth) and there was a proportionate increase in the carbon emissions.[201] The uninterrupted increase in the carbon emissions could pose an obstacle to the future shale gas development in the country.

ii) ECOLOGICAL IMPACTS OF FRACKING

The Indian Ministry of Environment and Forests has expressed concerns over the impact of shale gas drilling on the environment as the process would use different chemicals and that might have an adverse ecological impact.[202] Environmentalists argue that shale gas extraction in India will not only increase GHG emissions but also pollute water aquifers which will eventually damage public health and ecosystems. Some others argue that the use of chemicals during extraction pollutes groundwater and soil. The water which is flowed back to the surface after the fracking process might have a copious amount of dissolved solids and other contaminants, the treatment of which becomes vital. India also lacks the adequate geoscientific data which is essential while conducting a shale gas exploration to determine the possible environmental impacts of the process.

iii) LAND ACQUISITION AND DISPLACEMENT DUE TO FRACKING

Another pertinent difficulty surrounding fracking of shale gas is the disposal mechanism of flow back water from the fracking process and the eventual land acquisition and displacement of people. Loss of land due to acquisition uproots and displaces people from their socio-cultural environment and makes them completely insecure financially by forcing them to move from their homes and the natural resources which sustain them.[203] Acquisition of lands

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[199] Michael Brooks, 'Frack to the Future' New Scientist219(2929)36.
[200]Fiona Harvey and Terry Macalister, 'Shale or not emissions will continue to rise' (*The Hindu*, 18 January 2014)<www.thehindu.com/opinion/op-ed/shale-or-not-emissions-will-continue-to-rise/article5587066.ece>accessed 27 October 2015.
[201]Cuckoo Paul, 'Despite rising emission, India's coal use soars' (*ForbesIndia*,11 July 2014)<http://forbesindia.com/article/checkin/despite-rising-emission-indias-coal-use-soars/38164/1>accessed 27 October 2015.
[202]Gaurav Agnihotri, 'Does Fracking have a future in Asia?'(*Oilprice*, 31 March2015)<http://oilprice.com/Energy/Crude-Oil/Does-Fracking-Have-A-Future-In-Asia.html>accessed 27 October 2015.
[203]Anand Swaroop Das, "*Right to Fair Compensation: Can it ever be crystallized?*" (2015) 288(5) MadLJ46.

for the purposes of development affects hundreds of people in a myriad manner and is not necessarily limited to people living in the affected region. Development-induced displacement is rarely limited to the people in the identified project area.[204] Thus, considering the fact that very large land masses are required in the process of fracking, the problem of displacement arises because of acquisition of land can prove to be a hurdle for the shale gas explorers.

In this regard, the new Land Acquisition Act, 2013 provides for some of the most stringent provisions for acquiring a land whereby if the compliance is to be made then it would take 48 months (approximately) to complete the entire procedure. Furthermore, the severity of the provisions concerning the Social Impact Assessment coupled with the 'consent' clause[205] would act as a serious impediment to the growth of shale oil and gas sector.

Therefore, it is required on the part of the concerned government authority to provide adequate relaxations in hydraulic fracturing projects which can be included in a separate legislation (as discussed later)or by way of an amendment under the LARR Act itself.

iv) THE UNFORTUNATE TALE OF WATER SCARCITY

However, the biggest hurdle India faces is the availability of the enormous amount of water required for shale gas exploration; which runs into 3-4 million gallons per well. Even the cost of drilling the wells is very steep. The British Royal Society in its report on Hydraulic Fracturing recommended re-use and recycling of wastewater and planning of water disposal options from the outset.[206] In comparison with conventional reservoirs, the shale gas reserves are more diffuse and hence the productivity of the shale wells drop very quickly. Keeping the same situation in light, the IEA considers that the availability of sufficient land and water are the most important above-ground considerations for the extraction of unconventional resources.[207] It further notes that access to water might act as a hindrance to shale gas development through technological developments are pursuing to reduce the amount of water required.[208]

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[204]ibid.

[205] The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013, s 2 (2).

[206]The Royal Society, 'Shale gas extraction in the UK: A Review of Hydraulic Fracturing'(2012)6 DES2597<https://royalsociety.org/~/media/policy/projects/shale-gas-extraction/2012-06-28-shale-gas.pdf> accessed 27 October 2015.

[207]Edward White, *Shale Gas and Fracking*(HOC Library, Number 6073 2016) <http://researchbriefings.files.parliament.uk/documents/SN06073/SN06073.pdf>accessed 27 October 2015.

[208]International Energy Agency, *World Energy Outlook Report* (2009)415<www.worldenergyoutlook.org/media/weowebsite/2009/WEO2009.pdf> accessed 27 October 2015.

Considering the opinion of the IEA in the Indian scenario, availability of sufficient land and water are the biggest roadblocks to shale gas exploration and extraction. Physical and economic water scarcity has marred India since ages. The water worries that India suffers from ranks higher than a number of other countries in the world. And in comparison with developed countries like Europe and the US, the aforementioned issue presents further alarming statistics.

India Water Portal, a web-based interactive platform, presents certain worrying figures of the future Indian water scarcity scenario. According to its estimates, in the next decade, water consumption in India will increase by over 50% whereas the water supply will only increase by a meager 5-10%, thus leading to drastic water scarcity.[209] The Energy and Resources Institute (hereinafter TERI) also conducted a study in 2010, which highlights the fact that India has already become a water-stressed country and is quickly approaching the scarcity benchmark figure of 1000 m^3 per capita. The study further pointed that there would be a rapid growth in the irrigation sector and similar growth in domestic and industrial water demand. By 2025, the per capita water availability will further drop down to 1341 m^3 per capita and to 1140 m^3 per capita in 2050.[210] The UNICEF and Food and Agriculture Organisation (hereinafter FAO) collaborated to release a study in January 2013 titled "Water in India: Situation and Prospects" which also raises the aforementioned concerns. According to the water basins projections for 2030 by the Water Resources Group in 2010, the potential shale gas bearing areas like Gondwana, Indo-Gangetic Plains, Cambay, Krishna-Godavari will face severe water stress by 2030.[211]

IV. OVERCOMING EXISTING POLICY CONSTRAINTS: THE WAY AHEAD

In 2000, when the US successfully extracted the shale gas through the process of hydraulic fracturing, it opened the floodgates for similar extraction of the potentialities of one of the most sought after unconventional hydrocarbons worldwide. Following suit, the Government of India issued a 'Draft Policy for the Exploration and Exploitation of Shale Oil and Gas in

[209] NG Hegde, 'Water Scarcity and Security in India' (*India Water Portal*,3 April 2012)<www.indiawaterportal.org/articles/water-scarcity-and-security-india> accessed 27 October 2015.
[210]ibid.
[211]The 2030 Water Resources Group, '*Charting Our Water Future- Economic frameworks to inform decision-making'* (2010)55 <http://www.mckinsey.com/~/media/mckinsey/dotcom/client_service/sustainability/pdfs/charting%20our%20water%20future/charting_our_water_future_full_report_.ashx> accessed 27 October 2015.

India, 2012',[212]which was later on approved by the Indian Government with certain modifications. The new Policy Guidelines for Exploration and Exploitation of Shale Gas and Oil in India, 2013 (Approved Policy)[213]has allowed only the National Oil Companies (hereinafter NOCs) such as Oil and Natural Gas Corporation (hereinafter ONGC) and Oil India Limited (hereinafter OIL)to explore and exploit the shale gas from the shale rocks.

The need for having a separate government policy regulating the exploration of shale gas arises due to the fact that the existing legal paradigm governing the oil and gas industry, specifically excludes, inter alia, the regulation of shale oil.[214]The Oilfields (Regulation and Development) Act, 1948 regulates the oilfields and development of mineral oil resources,[215] which include natural gas and petroleum.[216] However, the term "petroleum" means naturally occurring hydrocarbons which do not include any substance which may be extracted from coal, shale or other rock by application of heat or by a chemical process.[217]The Approved Policy while listing out the responsibilities and duties of the licensees, expressly mandates that the licensee entities are required to adhere to the international best practices such as Good International Petroleum Industry Practices (hereinafter GIPIP) and American Petroleum Guidance document "Practices for Mitigating Surface Impacts Associated with Hydraulic Fracturing".[218]It is pertinent to note that even the aforesaid Approved Policy on shale gas has its own shortcomings.

i) PRIVATISING THE EXTRACTION OF SHALE GAS

Privatisation, as a concept, refers to the reduction in the State's ultimate ownership over the resources by way of disinvestment of government-controlled assets in order to subject them to the private market.[219] Though the Indian Government has already taken an initiative in this regard by allowing the privatisation in the oil and gas sector *per se* through the introduction

[212]Ministry of Petroleum & Natural Gas, '*Draft Policy for the Exploration and Exploitation of Shale Oil & Gas in India'* (GOI, 2012)<www.dghindia.org/admin/Document/notices/25.pdf> accessed 27 October 2015.
[213]Ministry of Petroleum & Natural Gas, *Policy Guidelines for Exploration and Exploitation of Shale Gas and Oil by National Oil Companies under Nomination Regime* (GOI, 2013)<http://petroleum.nic.in/docs/oidb.pdf> accessed 27 October 2015.
[214]The Petroleum Act 1934 (30 of 1934). See also Petroleum and Natural Gas Rules 1959; Oilfields (Regulation and Development) Act 1948 (53 of 1948); Petroleum Rules 1976; New Exploration License Policy 1999.
[215] The Oilfields (Regulation and Development) Act 1948 (53 of 1948).
[216]ibid 3(c).
[217]The Petroleum and Natural Gas Rules 1959, r 3(k).
[218]Ministry of Petroleum (n 213)9, paras III, IV.
[219]OECD, *Privatisation in the 21st Century - Summary of Recent Experiences* (2010)7<www.oecd.org/daf/ca/corporategovernanceofstate-ownedenterprises/43449100.pdf> accessed 27 October 2015.

of NELP in 1997 (effective from 1999),[220] the similar benefit has not been extended to the field of shale oil and gas.

The Approved Policy has restricted the E&P activities in shale oil and gas sector only to the NOCs,[221] whereby the ONGC and OIL were given the right to exploit the shale oil and gas under their existing Petroleum Exploration Lease/Petroleum Mining Lease granted on nomination basis, as contrary to the current regime of auction basis or competitive bidding.[222]However, domestic players like Reliance Industries Limited (RIL) and Cairn-India had to invest outside India in the absence of a governing legal framework allowing them to contribute in the indigenous production of the shale oil and gas. As a result, these domestic companies' foreign investment became highly dependent upon the oil prices in the host country, e.g. "the shale gas investment made by the RIL in the US went bad in the June quarter"[223] due to the falling prices of crude oil in the US.[224]

Other countries like Mexico, UK, US have already privatised their shale gas sector in order to enhance the competition in that sector, and for India, the Vijay Kelkar Committee has recommended the involvement of private players in the field of shale gas in order to reduce the import dependency of hydrocarbons.[225]Thus, the aforementioned scenario builds a strong case for privatization in the Indian context which can additionally benefit the country in reducing its import bill and augment its indigenous E&P of shale gas.

ii) NEED FOR A SEPARATE LEGISLATION

Under the existing legal regime, the US Government has recently, in March 2015, finalised the rules pertaining to the extraction of oil and gas through hydraulic fracturing (US Fracking Rules),[226] thereby replacing the existing three-decade old rules. These federal rules were formulated with the objectives of protecting water supplies, managing the residual of the fracking process in an environmentally protected manner, and making public disclosures of

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[220]Ministry of Petroleum & Natural Gas, *New Exploration Licensing Policy (NELP)*(GOI, 1999)<http://petroleum.nic.in/docs/exp.policy.NELP2015.pdf>accessed 27 October 2015.

[221]Draft Policy (n 212)5, para 3(1).

[222]Ministry of Petroleum (n 213) para 3.

[223]'Reliance shale gas returns turn negative in US'(*Anirudh Sethi Report*, 28 July 2015)<www.anirudhsethireport.com/reliance-shale-gas-returns-turn-negative-in-us/>accessed 27 October 2015.

[224]'US shale oil boom masks declining global supply' (*The Finaincial Times*,11 February 2015)<www.ft.com/cms/s/0/a623e1e8-b11a-11e4-831b-00144feab7de.html#axzz3hQhpWV4B>accessed 27 October 2015.

[225]Ministry of Petroleum and Natural Gas, *Roadmap for Reduction in Import Dependency in the Hydrocarbon Sector by 2030* (GOI, September 2014)20, para 2(5)(2)<http://petroleum.nic.in/docs/FinalReportKelkarCommittee2014.pdf>accessed 27 October 2015.

[226]Land Management Bureau, '*Oil and Gas Hydraulic Fracturing on Federal and Indian Lands'* (United States Government,26 March 2015) <www.federalregister.gov/articles/2015/03/26/2015-06658/oil-and-gas-hydraulic-fracturing-on-federal-and-indian-lands#h-8> accessed 27 October 2015.

chemicals used in the process.[227] Despite the existence of such a comprehensive governmental policy addressing various fracking-related issues effectively, US proposed an entirely different legislation for the sole and direct regulation of the fracking and water injecting processes, namely, the Fracturing Responsibility and Awareness of Chemicals Act (hereinafter FRAC Act).[228] The FRAC Act aims to amend the Safe Drinking Water Act by inserting provisions like the primary enforcement of the State to be only in relation to fracking operations and the mandatory disclosure provision concerning the chemical constituents used in the fracking process to the public. Thus, the importance of enacting a separate legislation for a particular process which has changed the face of the energy and gas industry of a country like the US can't be overlooked.

Unlike the US, the Indian scenario of the extraction of shale oil and gas is still at an emerging stage but carries a lot of potential. In order to explore such potential, it is required on the part of the government to involve both public as well as private players in it. Considering the fact that such an expansion of the oil and gas sector would attract various socio-environmental as well as regulatory challenges, it becomes indispensable to regulate such an issue with a suitable piece of legislation.

The legislation, enacted by the legislature, provides a clear mandate regarding the applicability of such a normative law. Unlike government policies, a parliamentary law creates rights and corresponding obligations of its subjects upon whom it shall be applicable. Taking into account the challenges faced by the shale gas exploration such as scarcity of fresh water in India, rehabilitation and consent clause in case of newly promulgated Land Acquisition Ordinance, sustainable development, regulatory mire over the supervisions and environmental clearances between the Central and State nodal agencies; a governmental policy regulating the same cannot sustain for a long time. Taking a cue from the FRAC Act which directly regulates the hydraulic fracturing process and enacting a legislation in India, which will not only address the above-mentioned challenges effectively but also bring uniformity in the regulation process, is vital.

The need for the enactment of a governing legislation becomes compelling when millions of lives of a country could be positively affected by this decision of the government.

[227] ibid.
[228] The Fracturing Responsibility and Awareness of Chemicals Act 2015 (HR1482).

V. CONCLUSION

Although the process of fracking has existed for about five decades now, it has boomed only recently because of the global energy crisis and the depletion of conventional natural resources. India being the newest member of the club has a long way ahead at fully exploiting its vast untapped repository of unconventional natural resources. However, muddying the Indian shale gas exploration venture is a raft of issues, which could push back the whole process if not addressed at the earliest. The foremost concern of India will be to counterbalance water scarcity on one hand and achieving self-sustenance on the other. In the process of formulating a regulatory regime in our quest to achieve sustainable and inclusive growth, water should not play a constraining factor.

Also, the issue of privatization in this sector becomes a major concern as the involvement of private players would immensely contribute to increasing the country's independence in the oil and gas industry and ensuring bona fide competition among all players. The recent speculations suggest that the Indian Government may soon allow the private players to extract the natural gas from the shale resources along with the NOCs, but only for those blocks held by these private entities where the lease is set to expire within two years.[229] Though at the proposal stage, the same has attracted a lot of criticism and protest from the private players who seek equal exploration rights.

The Government is also looking into possible alternatives to restrict the negative impact posed by the water-related issues. On February 18, 2015, ONGC has signed a Memorandum of Understanding with the Bengaluru-based Super Wave Technology Limited for developing Shock Wave Assisted Fracking Technology as an alternative to the conventional use of hydraulic fracturing.[230] If successful, this could possibly solve the issue of fresh water scarcity which proves to be the biggest hurdle in the development of shale oil and gas sector.

However, in a haste to extract essential natural resources, the regulators must not turn a blind eye to the surrounding risks concerning fracking in the country. The entire process began with the dual purpose of ensuring growth and sustenance, and human well-being. Thus, public health and quality of the environment must not be cast aside as mere obstacles to progress.

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[229]Subhash Narayan, 'Oil firms may be allowed to explore shale under NELP round' (*The Financial Chronicle*,17 June 2015)<www.mydigitalfc.com/news/oil-firms-may-be-allowed-explore-shale-under-nelp-round-335> accessed 27 October 2015.

[230]'ONGC to look for environmental friendly alternative to hydro-fracturing; inks an important MoU for R&D' *ONGC* (18 February 2015) <www.ongcindia.com/wps/wcm/connect/ongcindia/home/media/press_release/ongc-to-look-for-environmental-friendly> accessed 27 October 2015.

253 LAW COMMISSION REPORT- IS THE JUDICIAL SYSTEM READY FOR SUCH A CHANGE?

- Swapnil Tripathi[*]

I. INTRODUCTION

The 20th Law Commission headed by Justice A.P. Shah, came up with its 253rd Law Commission Report, on 29th January 2015.[231] The report put forward the proposal for setting up Commercial Courts in India. The report also proposed a bill called the 'The Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015' (hereinafter referred to as the 2015 Bill) which would provide for the constitution of such Courts for adjudicating certain commercial disputes.[232]

The main aim of this bill is to do away with the backlog of cases in various Courts across the country. The bill aims at disposing of these cases. The report puts forward that this bill, if adopted, will facilitate economic growth of the country, by disposing of, certain pivotal cases. The distinguishing feature of these Courts will be the nature of disputes they would deal with, i.e. the ones arising out of mercantile documents, joint ventures and partnership agreements, intellectual property rights, insurance etc.[233] This, in turn, has widened the ambit of civil disputes and has provided a specific means to settle disputes of matters of a certain nature.

Another aim behind this Bill is to deal with high profile matters, and also the ones which cross the benchmark of certain pecuniary jurisdiction. The faster the settlement, the better are the economic gains for the country.

II. HISTORY OF COMMERCIAL COURTS IN INDIA

The Indian judiciary has time and again been criticised for its long pending judgements. As on March 31 2014, the number of pending cases in the High Courts was 3 million. These

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[231]Utkarsh Anand, 'Need exclusive Commercial Courts: Law Commission'*The Indian Express* (30 January 2015) 7.

[232]Law Commission of India, *The Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015*(Law Com No 20, 2015) <http://lawcommissionofindia.nic.in/reports/Report_No.253_Commercial_Division_and_Commercial_Appellate_Division_of_High_Courts_and__Commercial_Courts_Bill._2015.pdf> accessed 29 February 2016.

[233]ibid 61.

numbers ironically include just the civil matters and not the criminal ones, as they, if included, will only exorbitantly increase the number.[234]

In the past, various steps have been initiated by the Government of India, to curb this problem of an exorbitant number of cases. One such step was the 188th Report, wherein international practice of setting up of commercial courts for cases of high value was acknowledged.[235] Further, another unique idea that was propounded was the system of high-tech video conferencing facilities similar to the ones used in foreign courts.[236] The unique feature of the report was the introduction of 'case management conferences' which has never been implemented in India.

The next step towards the setting up of Commercial Courts was the 'Commercial Division of High Courts Bill, 2009'. The pecuniary jurisdiction fixed was Rs. 5,00,00,000.[237] Further, a retrospective application of the governing law was proposed as all pending commercial disputes were to be transferred to the newly setup Commercial Courts.[238] The impact this bill had on the Civil Procedure Code, was that it overrode the latter, in cases of conflict.[239]Another feature of the Bill was that any decree or order of the Commercial Division was directly appealable to the Supreme Court.[240]

However, the Bill did not get the approval of the Rajya Sabha and came to a standstill. The recent report of the Law Commission has brought it back to life.

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[234]AshishKabra and Vyapak Desai, 'Will India get its Commercial Courts*?*'(*The Firm*,28 August2015) <http://thefirm.moneycontrol.com/story_page.php?autono=1370224> accessed 29 February 2016.
[235]Law Commission, *Proposals for Constitution of Hi-tech Fast-Track Commercial Divisions in High Court*, (Law Com No17,2003) <http://lawcommissionofindia.nic.in/reports/188th%20report.pdf>accessed 29 February 2016.
[236]Law Commission, *Arbitration and Conciliation (Amendment) Bill (2001*)' (Law Com No 16, 2001) <http://lawcommissionofindia.nic.in/arb.pdf>accessed 29 February 2016.
[237] Commercial Divisions of High Courts Bill 2009.
[238]ibid.
[239]Law Commission of India, *The Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015* (Law Com No 20, 2015) 66<http://lawcommissionofindia.nic.in/reports/Report_No.253_Commercial_Division_and_Commercial_Appellate_Division_of_High_Courts_and__Commercial_Courts_Bill._2015.pdf> accessed 29 February 2016.
[240] Law Commission of India, *The Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015*(Law Com No 20, 2015) 68-69<http://lawcommissionofindia.nic.in/reports/Report_No.253_Commercial_Division_and_Commercial_Appellate_Division_of_High_Courts_and__Commercial_Courts_Bill._2015.pdf> accessed 29 February 2016.

III. DRAWBACKS IN THE REPORT

The Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill was introduced in the parliament with a noble idea of reducing the backlog of cases and providing speedy justice and disposition of certain cases. However, despite the bill being an innovative step, it has certain flaws:

a) LACK OF ORIGINAL JURISDICTION

A major flaw in the provision of vesting the court with original jurisdiction is the lack of power with the Courts to vest jurisdiction in itself.[241] However, the Bill provides for original jurisdiction to the Courts to constitute a Commercial Division of the High Court.[242]

b) DIFFERENT PECUNIARY JURISDICTION

Another flaw in the bill is with respect to differing pecuniary jurisdictions of various High Courts across India. The Delhi High Court has a pecuniary jurisdiction of Rs. 20 lakhs,[243] whereas that of Madras High Court is above 25 lakhs.[244] The problem here being that value of commercial disputes has been fixed to 1 crore, without actually increasing the pecuniary jurisdiction of the Court.

Therefore, the position this Bill puts forward is that the same High Court will deal with similar cases, by applying two different procedures.[245]

c) INCONSISTENCY WITH OTHER LAWS

The bill provides jurisdiction to the Courts, however, there might be a situation wherein the provisions of the Bill and the High Court rules might be inconsistent with each other. The problem here is that no clear solution for the same has been provided in the bill even though the Central law prevails over state laws in such matters. The High Court's come into the

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[241] *C Arulsamy & S Ubagaram vState of Tamil Nadu* [2003] 4 CTC 670.
[242] Law Commission, *The Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015* (Law Com No 20, 2015) 63-64, 67 <http://lawcommissionofindia.nic.in/reports/Report_No.253_Commercial_Division_and_Commercial_Appellate_Division_of_High_Courts_and__Commercial_Courts_Bill._2015.pdf> accessed 29 February 2016.
[243] Delhi High Court (Amendment) Act 2003.
[244] Tamil Nadu Civil Courts and Chennai City Civil Court (Amendment) Act 2010.
[245] Law Commission Of India, *The Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015* (Law Com No 20, 2015)<http://lawcommissionofindia.nic.in/reports/Report_No.253_Commercial_Division_and_Commercial_Appellate_Division_of_High_Courts_and__Commercial_Courts_Bill._2015.pdf>accessed 29 February 2016.

ambit of state laws[246] and therefore, the Bill should override the High Court rules. But since there is no settled position on this issue, it seems to be a probable solution.

d) COMMERCIAL DIVISION CANNOT BE SETUP IN ALL HIGH COURTS

The Bill proposes that Commercial Divisions will be set up only in those High Courts that have original jurisdiction and pecuniary jurisdiction of not less than Rupees One Crore. However, the flaw in this feature is that as of now only five High Courts, i.e. Bombay, Calcutta, Delhi, Himachal Pradesh, and Madras have original jurisdiction.[247]

Therefore, implementation of this feature of the Bill will require amendments to the respective acts of the High Courts, increasing their pecuniary jurisdiction and also providing the other High Courts original jurisdiction, which seems to be a very far-fetched task.

e) DIGITALISATION OF THE PROCEEDINGS OF THE COURT

The Bill provides for digitalisation of all the proceedings of the Commercial Courts, which includes e-filling and all facilities for audio-visual recording. Though the idea is noble, it cannot be legally implemented, as a three-judge bench headed by Chief Justice HL Dattu of the Hon'ble Supreme Court bench held that there can be no recording of the proceedings of any court.[248] Therefore, the centre cannot implement this aspect of the Bill, as it is against a set precedent of the Hon'ble Court.

IV. NEED FOR COMMERCIAL COURTS AND SUGGESTIONS

The proposed creation of Commercial Courts is a very useful and viable idea. The author tries to bring out the salient features of the Bill which make it paramount to accept the Bill.

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[246]Department-Related Parliamentary Standing Committee On Personnel Public Grievances Law and Justice *Delhi High Court (Amendment) Bill,* (2014) <http://www.prsindia.org/uploads/media/Delhi%20high%20court/SCR-Delhi%20High%20Court.pdf> accessed 29 February 2016.

[247]The Bombay High Court (Original Side) Rules(9 September, 2015) <http://bombayhighcourt.nic.in/libweb/rules/OSrules/bhcosrules.html#1> accessed 29 February 2016.

[248]Pradeep Thakur, 'SC Panel rejects audio-video recording of trials' (*The Times of India*, 18 November 2014) <http://timesofindia.indiatimes.com/india/SC-panel-rejects-audio-video-recording-of trials/articleshow/45185944.cms>accessed 29 February 2016.

i) CASE MANAGEMENT CONFERENCE

The Civil Procedure Code, which is the law governing the majority of commercial and civil matters,[249] is silent when it comes to case management conferences. However, countries like England and Singapore, which are known to be the major hubs of trade and commerce, have it as a feature in their courts. This feature is used by the Courts in England to exercise their broad case management powers, fix case management direction and review the litigants' compliance with previous directions of the Courts.[250]

The basic idea behind this concept is to keep a check on the frivolous nature of a case. Further, it promotes out- of - court settlement, as the dispute might be settled even before going to trial, thereby reducing the number of cases. This approach is also followed in Singapore, where, Order 108, Rule 3(8) of the Rules of Courts provides for pre-action protocols and practices.[251]

In the case of Rameshwari Devi v. Nirmala Devi,[252] the apex court discussed the concept of case management conferences and held that the Courts should adopt and adhere to this mechanism as it fixes dates for every step to be taken by the Court during a case.

ii) SPECIALISED JUDGES

Another idea which was raised in the report was of specialised judges, i.e. judges having specialised knowledge in a certain subject matter or law, and handling matters in that field only. In India, no such practice is followed but various countries in the world do follow it and reap its benefits too. Tokyo and Hong Kong are two of the best examples of specialised judges. Both have on and off the job training for judges and every judge has a specialisation under a certain law, and he deals with matters pertaining to that law only.[253]

[249] *Setun Bibee v Abusally Marikar* [1953] 55 NLR 236.
[250] 'Case Management Conference'(*Drukker Solicitors*, 12 May 2013) <http://www.drukker.co.uk/publications/reference/case-management-conference/#.VecH7vaqqko>accessed 29 February 2016.
[251] ibid.
[252] *Rameshwari Devi v Nirmala Devi* (2011) 8 SCC 249.
[253] Keith Steele and Belinda Bell, *Economic Consequences of Litigation in the World* (Kluwer Law International1998) 12.

iii) COURT FEES

Court fees for filing cases in India is not very high, and by paying a certain sum, a case can be filed in the Courts. However, such liberty is often misused by wealthy parties, which is why the concept of Singapore High Courts should be adopted here.

The courts in Singapore increase the Court fees with every passing day while a suit is being argued in the Court.[254] This increase is dependent on the nature of the parties, wealth of the parties and valuation of the suit. This step not only deters frivolous suits but also initiates speedy disposal of cases, as no party wants to lose money just by holding on to the case.

iv) TIME BOUND

a) FILING OF DOCUMENTS

The Courts in India, witness inordinate delays while giving out judgement.[255]The primary reasons for the same are reserving of judgements for long and the delay in filing of court documents. However, the commercial courts do not face this bane, as it has been proposed that via changes in the Civil Procedure Code, the proposed action is non acceptance of written statements after 120 days from the day of issuing of summons.

c) PRONOUNCING THE JUDGEMENT

Further, another idea proposed by the Hon'ble Supreme Court in the case of Anil Rai v. State of Bihar [256] is of vital importance here. The Court in the above case criticised delay in writing of judgements by the judges and therefore held that where a judgement is not pronounced within three months of reserving it, an application can be filed in the High Court, for the same. Moreover, a delay of six months in pronouncing of a judgment can lead to fresh arguments being heard in front of another bench. However, the said guidelines have not been applied by the Courts, but can be applied with a view to cut down on the inordinate delay.[257]

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[254]'Court hearing and fees', (*Singapore Supreme Court*), < http://www.supremecourt.gov.sg/rules/court-processes/civil-proceedings/commencement-of-an-action/court-fees-and-hearing-fees>accessed 29 February 2016.

[255]IANS Ghaziabad, 'India not concerned about delay in justice: SC judge'(*The Indian Express*, 9 March 2013) <http://www.newindianexpress.com/nation/article1494933.ece>accessed 29 February 2016.

[256]*Anil Rai v State of Bihar* [2003] AIR 3173(SC).

[257]Mohamed Imranullah S, 'Chief Justice wants to cut excessive delay in judgements*',* (*The Hindu*, 11 September 2014)<http://www.thehindu.com/news/national/tamil-nadu/chief-justice-wants-to-cut-excessive-delay-in-judgments/article6398588.ece>accessed 29 February 2016.

d) ORAL ARGUMENTS

One of the primary reasons for the delay in delivery is the duration of time involved in oral arguments. A proposed solution to this problem is time bound oral arguments. In India, there exists no law which limits the time for arguments in a case. However, there exist legislation and rules like the Pension Fund Regulatory and Development Authority Rules, 2014[258] and the Security Appellate Tribunal Rules, 2000[259] which provide for time bound oral arguments during appeals in disputes. Therefore, such a procedure can be adopted and implemented in the Civil Procedure Code and commercial courts.

v) DIRECT APPEAL

The Hon'ble Court in the case of Mahendra Lal Das v. the State of Bihar [260]has held that the main purpose of litigation is to ensure speedy justice. The option of a direct appeal to the Supreme Court provided in the bill furthers this aim. This provision will reduce the unnecessary barriers and hurdles and dispose of the matter faster.

All of the above steps, if followed, will lead to shorter trials and eventually to the adjudication of cases at a better speed.[261]

V. IMPACT ON CIVIL PROCEDURE CODE

The 2015 bill proposed by the Government seriously affects the Civil Procedure Code, 1908 and creates a situation which requires an amendment to the said law. The bill provides for amendments to the Code in respect of direction for filing written statements and documents and various other provisions.[262]

i) DIRECTIONS FOR FILING WRITTEN STATEMENTS WITHIN SPECIFIED PERIOD

The current position of law for the filing of written statement is that a written statement is to be filed after 30 days from the serving of a summons,[263] and the same can be extended by the

[258]Pension Fund Regulatory and Development Authority Rules 2014,s 16(1).
[259]Security Appellate Tribunal(Procedure) Rules 2000, s 16(1).
[260]*Mahendra Lal Das v State of Bihar*[2001] AIR2989 (SC).
[261]Civil Procedure (Amendment No 4) Rules 2015.
[262]Prapti Patel, 'How The Proposed Commercial Courts Will Speedily Resolve Disputes In High-Value Commercial Transactions'(*My Law Net*,1 September 2015) <http://blog.mylaw.net/how-the-proposed-commercial-courts-will-speedily-resolve-disputes-in-high-value-commercial-transactions/#sthash.3GmucZeY.dpuf> accessed 29 February 2016.
[263]Civil Procedure Code 1908.

Court after the 90 days period.[264] This power is at the discretion of the Court. However, the bill makes it mandatory for the Court to not accept the written statement after 120 days. Therefore, Order 8, Rule 1 of the Civil Procedure Code will have to be amended.

ii) STRICTER COURT FEES

The 2015 Bill also provides for a model for the Court fees, wherein the longer the case proceeds, the larger is the sum of the fees. However, Section 35 and 35A of the Civil Procedure Code, 1908 which deal with costs mention no such facet. Therefore, to implement this provision of the Bill an amendment will be required in the Act.

iii) TIME BOUND ORAL ARGUMENTS

Another new provision which the 2015 Bill provides for, is putting a cap on the duration of the oral arguments. The problem here is that no such cap exists in court cases. Therefore, implementation of this feature also requires amendment of the Civil Procedure Court or the respective Acts of the High Courts.

iv) SUMMARY JUDGEMENT AND CASE MANAGEMENT HEARING

Two new provisions given by the 2015 Bill are of summary judgements and case management hearings. The foreign courts in the past have discussed the two in various pronouncements,[265] but they have not been implemented by the Courts in India. Therefore, the introduction of them will require the legal validity to be provided to them in form of a legislation or amendment to the Civil Procedure Code, 1908.

VI. APPLICABILITY AND PRESENT STATUS

The Bill was presented in the parliament in the year 2015, and even before a verdict from the parliament came on the same, certain courts started following the guidelines provided in the Bill. The Delhi High Court became the first court which set up Commercial Divisions in its premises.[266]

Further, internationally the concept of Commercial Divisions and Courts has been appreciated. The finest example of the same is Singapore, where The Singapore International

[264] *A Sathyapal vYasmin Banu Ansari* [2009] ILR1399(KAR).

[265] *Pierce v Ford Motor* 190 F2d, 910 (1951) (U); *Al Raw v The Security Service*(2012)1 AC 531 (UK).

[266] Abhinav Garg, 'Delhi HC sets up commercial courts to ensure speedy disposal of trials*'*(*The Times Of India*, 26 March 2015) <http://timesofindia.indiatimes.com/india/Delhi-HC-sets-up-commercial-courts-to-ensure-speedy-disposal-of-trials/articleshow/46695899.cms> accessed 29 February 2016.

Commercial Court has been launched in January 2015.[267] The main objective behind such a Court is to dispute settlement for the litigants by a panel of specialist judges. This idea is very similar to the one proposed in the Bill, with respect to the specialist judges.

Another example on the same lines is that of New York where the Courts have separate divisions for commercial matters altogether.[268]

VII. CONCLUSION

The 2015 bill with the recommendation of the Law was introduced in the parliament with an aim of economic growth and faster disposal of cases. However, certain apprehensions regarding its applicability were raised. It was also contended that the Bill will require several amendments to the Civil Procedure Code, 1908. The inception for this demand for separate Commercial Courts started with the 188th Law Commission report. Later, various other reports and Bills were presented and the final one was 2015 one, which gathered lots of debate.

The Bill truly does have certain drawbacks, one of them being the jurisdiction issue. The Bill provides for setting up of Commercial Division in courts having original jurisdiction. However, the issue with the same is that not every high court in India has original jurisdiction. Therefore, setting up of Commercial Division in all high courts will require amendments. Secondly, the pecuniary jurisdiction of every high court also differs. Therefore, to attain the goal of a lower or upper limit for entertaining plaint, a uniform pecuniary jurisdiction has to be provided to the courts. Thirdly, the Bill provides for recording of proceedings, which is legally not possible as a supreme court precedent categorically denies it.

However, despite these drawbacks, the Bill does put forward certain new and innovative ideas, which surely will ensure better functioning of the judicial system. The ideas put forward include a time cap on the arguments, time limits for deciding a case, increase in costs

[267] Yu-Jin-Yay, 'Singapore Launches International Commercial Courts' (*DLA Piper*, 30 March 2015) <https://www.dlapiper.com/en/asiapacific/insights/publications/2015/03/international-arbitration-newsletter-q1-2015/singapore-launches-international-commercial-court/> accessed 29 February 2016.

[268] 'Commercial Divisions - NY Supreme Court' (*New York Courts*) <http://www.nycourts.gov/courts/comdiv/>accessed 29 February 2016.

according to the duration of the suit and one of the best feature being that of specialist judges, which will deal with matters where their specialisation rests. These steps will provide for better decisions given by the judges.

These provisions and features of the Bill, however, will affect the Civil Procedure Code too as certain provisions of the Bill are not present in the legislation and some require amendments to be made. However, *in toto* the Bill, if accepted by the parliament, will indeed be beneficial for the economy and the public at large. All of this is however conditioned upon the removal of the ambiguities that still exist in the Bill.

BRINGING ELECTRONIC RETAIL UNDER THE CONSUMER PROTECTION ACT, 1986

- *Rishima Rawat*[*]

I. INTRODUCTION

The e-commerce sector has witnessed tremendous growth in the recent past. Riding on the advancements in internet penetration and cell-phone technology, this sector has started generating sales of over 150 billion US dollars in revenue in countries such as US and China.[269] There has been a paradigm shift in the conduct of business, with traditional business houses looking to establish their presence online. E-commerce primarily consists of the following business models– business-to-business (hereinafter B2B), business-to-consumer (hereinafterB2C), consumer-to-consumer (hereinafter C2C), consumer-to-business (hereinafter C2B), business-to-government (hereinafterB2G) and government-to-business (hereinafterG2B). E-commerce offers many advantages like low transaction costs, convenience, the expedient flow of goods and information, engaging a wider consumer base and improved customer service. Various factors like favourable demographics, wider reach of online shopping portals in smaller towns, greater internet penetration and accessibility, convenience and a conducive, regulatory environment have contributed to this growth.[270]A major aspect of the e-commerce sector is electronic retail (hereinafter-tail) which is the primary focus of this paper. It involves selling goods to the consumer over an online platform. The companies who engage in e-tail are known as e-tailers.

The Indian economy has witnessed a tremendous boom in its e-tail sector. The rapid rise of home-grown portals like Flipkart and entry of multi-national players like Amazon have changed the trajectory of the e-tail market. According to the global analytics company, Credit Rating Information Services of India Limited(hereinafter CRISIL), online sales in India are set to touch $8.3 billion by 2016.[271] If the growth of e-tail continues at the current rate, the

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[269]Price Waterhouse Coopers,*Evolution of E-commerce in India: Creating the Bricks Behind the Clicks*(August 2014)<www.pwc.in/assets/pdfs/publications/2014/evolution-of-e-commerce-in-india.pdf>accessed 20 December 2015.

[270]RajatWahi, 'Hot & Happening' (*The Aware Consumer*, October 2014)<www.consumerconexion.org/pdf/ACQ_OCTOBER_ISSUE.pdf> accessed 26December 2015.

[271] N Nagarajan, 'Online Shopping Needs to be Regulated in India' *The Statesman* (11 September 2014).

size of the industry is estimated to reach 102 billion US dollars by 2020.[272] Both Flipkart and Amazon follow two different business models. Flipkart follows the 'marketplace' model where it brings the buyer and seller together on one platform, facilitates a transaction and gets a commission for its services. On the other hand, 'warehousing-based' model is followed by Amazon whereby it stores the goods and sells them to consumers.[273] While e-tail serves as a lucrative sector for investors and will lead to economic growth, there are certain issues related to its functioning that need to be addressed. These issues came into limelight after Flipkart's ignominy from its 'Big-Billion Day Sale' in 2014 attracted the attention of enforcement and regulatory agencies towards the e-tail market. Issues related to competition law, like predatory pricing and internet law, like data protection, surfaced. From the perspective of consumer law, the major issues concerned the liability of online portals for delivery of defective goods, non-delivery of goods and the existence of a grievance redressal mechanism.

This paper is divided into five parts. Part A discusses the issues in respect of consumer protection when an Indian consumer purchases goods from an e-tail portal. Part B examines the arguments presented by the government in favour of regulation of e-tailers and the counter arguments given by the online shopping companies. Part C looks into the governance of e-commerce in the United Kingdom and the United States of America and how the authorities there have been quick in adapting the laws to the changing business environment. Part D discusses the proposed amendment to the Consumer Protection Act, 1986 (hereinafter CP Act) and its effectiveness. The concluding Part E emphasises the need for consumers to undertake responsibility in order to maintain the efficacy of the consumer protection framework.

II. ISSUES IN E-TAIL

The Indian e-tail sector was fairly active prior to the period of its exponential growth. Rediff Shopping and Indiatimes Shopping were some of the first e-tailers in the market. Even then, consumer protection issues had become common. One of the first online portals to get embroiled in controversy was Timtara. It faced numerous complaints from consumers

[272] Malini Bhupta, 'India set to become world's fastest growing e-commerce market' (*Business Standard*, 6 February 2015) <http://www.business-standard.com/article/companies/india-set-to-become-world-s-fastest-growing-e-commerce-market-115020601227_1.html>accessed 1 December 2015.
[273] Sangeeta Thakur Verma, Interview with G Gurucharan, Additional Secretary to the Government of India, Department of Consumer Affairs, 'The Aware Consumer: Unlocking Consumer Potential'(October 2014)<www.consumerconexion.org/pdf/ACQ_OCTOBER_ISSUE.pdf>accessed20 November 2015.

regarding delivery of defective products and non-delivery even after payment.[274] There were allegations of fraud against the company which eventually led to the arrest of its founder and CEO and complete shutdown of the company.[275]This incident brought to light a host of issues related to the business practices in this field which still continue to be relevant. On perusal of available literature, some specific issues can be pointed out – jurisdiction, defective goods, delay/non-delivery of goods and cancellation/refund of orders.

As a business practice, e-tailers have contracts in a standard form. These enlist the terms and conditions (hereinafter 'T&C') that bind the consumer when he buys goods online. Clicking on 'Confirm Order' indicates that the consumer has read and accepted the T&C. Besides laying down conditions for the use of the website, these T&C contain clauses that limit the liability of these portals and exclude jurisdiction. They also contain return/cancellation policy governing certain goods while excluding other types of goods from this facility. As is the case with the standard form of contracts, these T&C are unilaterally decided by the e-tailer without consulting the consumer. The consumers hardly read the terms governing their use of the website. Even if they do, the terms are worded in such a manner that it becomes difficult for a layman to understand their implications.

The CP Act, at present, does not cover consumers who shop online under its ambit. Thus, a consumer cannot approach the consumer forums against these online sites. Consumers have to rely on the grievance redressal mechanism of the portal from which he/she has purchased the goods. The government seeks to resolve this issue by including e-commerce in the CP Act through the Consumer Protection (Amendment) Bill 2014 (hereinafter the Bill).[276]

i) JURISDICTION

The most important and contentious issue involved in electronic transactions is that of jurisdiction. Since the internet cuts across boundaries, determining appropriate jurisdiction is a tedious task. As far as the CP Act is concerned, consumer complaints can be filed where the company carries on business or has a branch office or where the cause of action, wholly or in

[274]Mamta Sharma, 'Noida-based Portal Timtara in a Fix' (*The Economic Times*, 18 May 2012) <articles.economictimes.indiatimes.com/2012-05-18/news/31765519_1_customer-care-e-commerce-portal-sales-forecast>accessed 6 November 2015.
[275]K Brindaalakshmi, 'E-commerce Shop Timtara Shuts Down: Report'(*Medianama*, 6 May 2013) <www.medianama.com/2013/05/223-timtara-shuts-down/> accessed 5 November 2015.
[276]'Consumer Protection (Amendment) Act, 2014.

part, arises.[277]But in the case of online shopping, the consumer may be in city X and the company may be having its branch office at city Y. Such situations give rise to complexities. The consumer will have to prove that the cause of action arose in his city in order to sue the e-tailer there.

The issue of jurisdiction was meticulously considered in ABC Laminart Pvt Ltd v AP Agencies, Salem.[278] Whether a court has exclusive jurisdiction over a dispute depends upon the language of the contract. All e-tailers exclude the jurisdiction of other courts by using the word 'exclusive'. The contract being one of a standard form poses difficult for the consumer to challenge it. Although the ABC Laminart case held that a suit can be filed at the place where the contract was made or where it should have been performed,[279]application of same to cases of online shopping can be problematic – should the contract be deemed to have been made at the place where the acceptance was communicated or where the goods were delivered?

While there is no settled position on the issue of jurisdiction in online shopping transactions, the West Bengal State Commission held in a case that the courts of place from where online purchases were made would have jurisdiction.[280] The issue was extensively considered by the Meghalaya State Commission in The Managing Director, Air Deccan v Ram Gopal Agarwal.The commission, after examining various judgments and the scheme of the CP Act held that the place from where the consumer made the online purchases will also have jurisdiction over a dispute. It reiterated that CP Act was a beneficial legislation and it had to be interpreted in a way which is favourable to the consumer.

ii) DEFECTIVE GOODS

Often the e-tailers supply goods which are defective. While in an offline transaction, the consumer would fall within the definition given in the CP Act and such a conduct on part of the retailer would amount to a deficiency in service,[281] the online purchases will not be governed by the CP Act since it does not extend to e-tailing and e-consumers yet. The general recourse taken by the consumer is to contact the e-tailer for making good the defect. In most of the cases, the companies do not respond and the consumer is left with no remedy but to

[277] Consumer Protection Act 1986, s 11, s 17.
[278] *ABC Laminart Pvt Ltd v AP Agencies, Salem*AIR 1989 SC 1239.
[279] ibid 15.
[280] *Col (Retd) PK Choudhury v M/s Make My Trip (India) Pvt Ltd and National Aviation of Company Ltd* West Bengal SCDRC SC Case No FA/288/20009.
[281] Consumer Protection Act 1986, s 2(1)(g).

bear the loss. The standard technique adopted by the companies is to issue a unique complaint ID corresponding to the order number. The consumer is left with the job of following up on the complaint.

iii) DELAY/NON-DELIVERY OF GOODS

Another common issue in online shopping is the delay and non-delivery of goods. According to a survey conducted among consumers, 32% of them had faced problems relating to delay/non-delivery of products.[282] Many times, the website had furnished no reasons for the inconvenience.[283]This irregularity was a pertinent reason for the shutdown of many earlier e-tailing websites. Non-redressal of consumer's grievances leaves the consumer helpless and results in reducing his trust in e-tailing. It may have larger implications for the e-tail sector as a whole if the consumer loses faith in its functioning.

iv) CANCELLATION/EXCHANGE/REFUND OF ORDERS

Every e-tailer has its respective policy for dealing with these issues. These are incorporated in the T&C and are subject to be modified by the e-tailer without notifying the consumer. In instances where the online site does not offer the consumer an option to cancel exchange or get a refund of the order, the consumer is left with no remedy. However, eBay India Private Limited v Ajay Kumar[284]was an appeal from a judgment of district forum which admitted the complaint of the consumer against the online shopping website. The state commission held that eBay was liable to refund the amount to the consumer for the defective product and could not exclude its liability by arguing that it was merely an intermediary.

III. REGULATING E-TAILERS

The meteoric rise of e-tail has got the brick and mortar retailers worried who have started lobbying the government to regulate these online portals.[285] From the consumer protection perspective, the government has proposed to include e-commerce under the purview of the CP Act; thereby allowing consumers who shop online to take these companies to court in the case of dispute. The government argues that e-commerce involves the interplay between

[282] Priyanka Joshi and Hemant Upadhyay, 'E-tailing in India' (*Consumer Voice*, January 2014) 39.
[283] ibid.
[284] 2014 Indlaw SCDRC 103.
[285]Anubhuti Vishnoi & Ravish Tiwari, 'Casting a Net' (*India Today*, 22 October 2014) <http://indiatoday.intoday.in/story/e-commerce-online-shopping-consumer-protection-act-flipkart-sale/1/397164.html> accessed 5 November 2015.; 'No proposal under consideration to regulate e-commerce: Ram Vilas Paswan' *Press Trust of India* (13 March 2015) <http://ibnlive.in.com/news/no-proposal-under-consideration-to-regulate-ecommerce-ram-vilas-paswan/533748-37-64.html>accessed 5 November 2015.

different departments such as financial services, electronic, consumer affairs and commerce. The stakes involved are high. In order to ensure that e-tailers bear liability, there is a need to include them in the CP Act.[286]

The e-tailers, on the other hand, argue that they are mere intermediaries who bring buyers and sellers together and facilitate transactions between them. They exclude their liability in the T&C by stating that the buyers and sellers themselves shall be responsible for the contractual terms. Section 2(w) of the Information Technology Act, 2000 (hereinafter 'IT Act') defines 'intermediaries' and section 79[287] of the Act provides a safe harbour to intermediaries from liability in certain cases. Then there are the Information Technology (Intermediary Guidelines) Rules, 2011 that the intermediaries are required to follow in order to comply with the IT Act. But these considerations hail from the technological perspective required to run the e-tail website. With respect to consumer protection, the e-tailers argue that they have a fairly liberal consumer protection framework.[288] Each website has its own policy to deal with consumer complaints but their effectiveness is questionable considering the number of disputes that arise and are left unresolved.

IV. E-COMMERCE REGULATIONS IN UK AND USA

While India lags behind in addressing the issue of consumer protection in e-commerce, the European Union (hereinafter 'EU') has been quick in responding to the changes taking place. The EU adopted the Electronic Commerce Directive in 2000 (which became effective in 2002) to address issues relating to jurisdiction, data, and consumer protection, information requirements for online service providers and limited liability of intermediaries. Its primary aim is to create a uniform legal regime for electronic commerce. It allows an EU consumer who has purchased goods online to sue the seller "either in the EU country in which the consumer resides or in the EU country in which the seller is physically located, even if the seller has no business operations or employees in that country."[289]

To incorporate this into its domestic law, UK passed the Consumer Protection (Distance Selling) Regulations, 2000 which were later replaced by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations, 2013. These regulations

[286] Verma (n 275).
[287] The Information Technology Act 2008.
[288] Anubhuti (n 287).
[289] Kah-Wei Chong , Len Kardon & others, 'E-Commerce: An Introduction, Sessions 5: Disputes' <http://cyber.law.harvard.edu/ecommerce/disputes.html#jurisdiction> accessed 22 February 2015.

generally apply the 'country-of-origin-principle' to contracts. According to this principle, as long as a business established in the UK complies with the Regulations, it does not have to comply with the laws of every other member nation that deals with the same subject matter. However, this principle does not apply to consumer contracts. It means that the terms and conditions of an e-commerce site in the UK have to comply with the laws of all the member states that can buy its products. With respect to entering into online contracts, these regulations lay down the requirements to be fulfilled in order to transact business.[290]Before entering into a contract with the consumer, the sellers are required to bring certain 'pre-contract information' to the consumer's knowledge. This includes delivery charges and the seller's complaint policy.[291] In the case of distance contracts, it has to be clarified to the consumer that confirming an order will impose an obligation upon the consumer to pay the required amount.[292]The legislation also governs the procedure for cancellation, delivery, and refund of the transactional amount.

In the US, the Uniform Commercial Code contains a major portion of the commercial law. It is supplemented by various commercial laws of all the states dealing with B2B and B2C transactions. In addition to this, the Federal Trade Commission oversees all business transactions. In 2010, the US congress enacted the Restore Online Shoppers' Confidence Act (hereinafter 'ROSCA') to deal with two important aspects of online shopping, namely 'data passing' and 'negative option marketing'.'Data passing' refers to the situation when a company passes a customer's information to a third party seller who may sell his goods or services to such customer without latter's consent. The consumer is left with the impression that he is buying from the company but in reality, he is transacting with a third party who will charge him/her for the purchase. The ROSCA prevents a company as well as a third party from passing on the data or charging the consumer without his/her consent. It also lays down condition for 'negative option marketing,'[293] that is when the seller interprets the consumer's silence as an acceptance of the offer if the consumer fails to reject the goods or cancel the agreement.[294]ROSCA has been strictly implemented in the US. Recently, a complaint filed against Internet Order, a company carrying on business online, alleged violations of the provisions of ROSCA, more specifically the negative option marketing. The court ordered the

[290] The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations, 2013 <www.legislation.gov.uk/uksi/2013/3134/contents/made> accessed 5 November 2015.
[291] ibid.
[292] ibid.
[293] Confidence Act 2010, s 4.
[294] Federal Trade Commission's Telemarketing Sales Rule, pt 310, Title 16, Code of Federal Regulations.

company to pay one million dollars in restitution to consumers nationwide.[295]

V. PROPOSED AMENDMENT TO THE CP ACT 1986

Realising the growing trend of online shopping and the need to protect its consumers, the government proposed amendments to the CP Act by introducing the Bill. It seeks to amend the definition of 'consumer' by adding explanation 2 to section 2(1)(d). This will include those consumers who buy goods or hire/avail services online. As seen from the cases mentioned above, some consumer forums already consider such class of consumers to be 2015 covered by the CP Act. This inclusion gives such consumers a concrete status under the CP Act. Another addition to the Act is section 2(1)(hh)which defines 'electronic intermediary' to include online marketplaces. They are also proposed to come under unfair trade practices by including the words 'including by way of electronic record' in section 2(1)(r) which defines unfair trade practices. Section 2(1)(r)(7) mandates sellers to provide a transaction record, like cash memos or bills, along with the products. This has been added to ensure action against fraudulent sellers since a bill acts as an important tool to prove that the consumer is a bona fide consumer. While reputed e-tailers provide a bill, there are some who do not follow the practice. Making it mandatory under the CPA will help rein in such e-tailers. In a bid to impose liability on sellers who sell their products through online marketplaces, the Bill proposes to add a new clause to unfair trade practices in terms of section 2(1)(r)(8). Consumers will be able to file a complaint against sellers who refuse to take back goods and refund consideration within thirty days of their receipt if the consumer finds them defective as long as he/she failed to inspect them and bought them through advertisements. This will be a strong safeguard for consumers and should act as an effective tool to redress their grievances. For example, all the online shopping portals have their respective policies governing cancellation/return and refund of orders. A condition made applicable by one portal may not be applicable to the other. With numerous options available to consumers, their rights vary according to the T&C of the respective portal. By introducing this provision, consumers will be assured of their right regardless of the e-tailer they choose.

It is yet to be seen whether the Bill is passed and to what extent it proves to be effective in its objective. However, the government could have utilised this opportunity to come up with a

[295]*State of Washington v Internet Order LLC* (2015) (Case 2:14-cv-01451-JLR, filed on 31 August 2015, United States District Court)<http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Internet%20Order.pdf>

set of guidelines for e-tailers to make them more consumer-friendly. They should be mandated to simplify an essential T&C of their policy and make it known to the consumer. These should be placed at a prominent place on their online portal where the consumer can easily notice them. Usually, e-tailers place their T&C at the far end of the website in fine print which is not readily noticeable. This practice should be eliminated to ensure that the consumer makes an informed choice. All other relevant information regarding the portal's contact details and consumer helpline numbers should be prominently displayed. These measures will be fruitful if all the e-tailers, and not just a few reputed ones, incorporate these into their modus operandi.

VI. CONCLUSION

While developing consumer protection models for these e-tailers, we need to take into account their changing roles as intermediaries and suppliers.[296] The safeguards offered to the intermediaries by the IT Act should be kept in mind while formulating consumer protection guidelines to ensure that the latter does not infringe on the former. E-commerce offers numerous prospects both in terms of economic capabilities and consumer satisfaction. Therefore, if consumer protection is strengthened, it will eventually lead to improved consumer trust as more consumers will switch to online shopping given its convenience. This, in turn, will have economic implications and will lead to further growth of e-commerce. However, it is a tedious process as it involves the interplay between consumer protection and information and communication technology. While liability of the e-tailers is continuously debated, consumers present at the other side of the bargain also need to be aware of their responsibilities. Observing basic safeguards such as getting information about the company, giving only relevant personal information, knowing the company's privacy policy and more importantly, shopping with reputed e-tailers can prevent disputes. But in cases where disputes arise, consumers need to bring them to the forums so that the authorities can take necessary action and the entire framework of consumer protection is able to function effectively.

[296] Prasad Krishna, 'Minimizing Legal Risks of Online Intermediaries while Protecting User Rights' (*The Centre for Internet and Society)* <http://cis-india.org/internet-governance/events/minimising-legal-risks-of-online-intermediaries-while-protecting-user-rights> accessed 5 November 2015.

THE "*BALCO-BHATIA* DICHOTOMY", 'IMPLIED EXCLUSION' & THE CASE OF *SAKUMA EXPORTS V/S LOUIS-DREYFUS*

- Akhil Raina *

I. INTRODUCTION: THE MENACE THAT IS JUDICIALINTERVENTION

In the maiden edition of the Indian Journal of Arbitration Law, Professor Martin Hunter describes India's tryst with arbitration as "journey to the only game in town".[297] There is possibly no better way to articulate the situation. Though India was one of the first signatories to the New York Convention in 1958 and even amended its laws in 1996[298] to initiate its proper rite of passage into the world of international arbitration, the reality has been far from satisfactory. In the past, India has been at the receiving end of immense criticism for several aspects of its regime. Her need for a robust arbitration system has now escalated to the status of a necessity. A large part of the blame lies with the proclivity of Indian courts in adopting, what has been described as an "overzealous interventionist attitude."[299]Engagement in excessive judicial intervention with respect to enforcement and annulment of awards, particularly foreign (or "outside-seated") awards, has been the cause of much discomfort in the world of international arbitration, invoking strong reactions.[300] While Indian courts find themselves burdened with matters as colossal in numbers, the interested parties have been rallying the call for a more efficient regime for dispute settlement – one that protects their interests by providing swift and certain relief.

In this respect, all three components of the title of this work, merit examination. The decisions of the Supreme Court of India in Bhatia International v. Bulk Trading S.A.[301]and Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.[302] (hereinafter BALCO)have been two of the most influential contributions by the Apex court regarding the question of involvement of domestic courts in arbitral proceedings.

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[297] J Martin Hunter, 'Journey to the Only Game in Town' [2012] (1) Ind J Arb L1.
[298] The Arbitration and Conciliation Act 1996.
[299] Ajay Kumar Sharma, 'Judicial Intervention in International Commercial Arbitration: Critiquing the Indian Supreme Court's Interpretation of the Arbitration and Conciliation Act 1996' [2014] (1) (3) Ind J Arb L6.
[300] S Rai, 'Proposed Amendments to the Indian Arbitration Act: A Fraction of the Whole?' [2011] (1) (3) J Int Disp Settl 169<http://connection.ebscohost.com/c/articles/84669876/proposed-amendments-indian-arbitration-act-fraction-whole> accessed 6 March 2016.
[301]*Bhatia International v Bulk Trading SA* (2002) 4 SCC 105.
[302]*Bharat Aluminum Company v Kaiser Aluminum Technical Services Incorporation* (2012) 9 SCC 552.

These cases have implications that go beyond the realm of arbitration and the debate surrounding them, has bifurcated the issue's timeline into the new 'BALCO regime' and the erstwhile 'Bhatia regime'. The debate is underlined by the concept of segregation between Parts I and II of the Arbitration and Conciliation Act, 1996 (hereinafter A&C Act) dealing with domestic and foreign awards, receptively. In 2002, Bhatia International notoriously held that in the absence of express or implied exclusion, Part I of the A&C Act would apply to foreign-seated arbitrations as well. This opened the door for massive judicial intervention on account that a variety of Part I matters were now applicable to foreign awards. A decade later, in BALCO the Supreme Court had the opportunity to revisit this position of law. Overruling Bhatia International, albeit prospectively, the Court now ruled that Part I would not apply if the parties had chosen a foreign jurisdiction as the "seat" of their arbitration. This implied that parties could not apply to domestic courts for relief against a foreign award, including moving applications for interim measures, appeals against such interim measures, challenge to awards and appeal against an order of the arbitral tribunal on the ground that it does not possess the required jurisdiction. It bears note that it took the Indian judiciary, punch-drunk on the ever-expanding judicial powers granted to it by Bhatia, a solid ten years to restore its image as an arbitration-friendly jurisdiction.

The debates in the two cases (and a host of others) turn quite a bit on the idea of "implied exclusion" – that by choosing to seat their arbitration in a foreign (non-Indian) law, parties to an arbitration agreement impliedly oust the jurisdiction of the Indian courts in their dispute. Though there are various facets to the BALCO-Bhatia debate, the culmination of one of those strands is the case of Sakuma Exports Ltd.[303]The Division Bench of the Bombay High Court in the matter ruled that Indian courts would have no jurisdiction in challenging an award issued by the Refined Sugar Association in London because in choosing London as the seat of their arbitration, the parties had impliedly ousted the jurisdiction of Indian courts.[304]

Dismissing the Special Leave Petition (hereinafter SLP) issued to vide Section 37 of the A&C Act; the Supreme Court declared that the High Court was correct in rejecting the Section 34[305] application made to it because it was based on correct appreciation of the law.

[303] *Yograj Infrastructure Limited v Ssang Yong Engineering and Construction* 2011 (9) SCC 735.
[304] *Sakuma Exports Limited v Louis Dreyfus Commodities and Uisse SA* 2015 (5) SCC 656.
[305] The Arbitration and Conciliation Act 1996.

The controversy stems from the fact that the overruling in BALCO was prospective, implying that it applies only to disputes that arise out of arbitration agreements concluded after 6th September 2012. This would result in pre-BALCO arbitrations being exclusively governed by the dicta of Bhatia International, which would allow for judicial involvement through Part I. However, in Sakuma Exports (and several other post-Bhatia pre-BALCO judgments) the courts have chosen to deny itself the opportunity to intervene in matters, which legally, was completely within the periphery of its rights. This may, on the first impression, seem to fly in the face of the principle laid down in Bhatia and this work is dedicated to finding out whether the same is true. Even though the policy behind the cases has been to promote the pro-arbitration face of India, it must be seen whether the same is being done on a legally sound footing. The concerns on part of the critics seems fair enough – legal propriety should not be sacrificed unjustifiably on the altar of policy. This work is an attempt to lay some of these concerns to rest.

This piece is in three parts. Part I deals with the problem, while Part II deals with the "BALCO-Bhatia dichotomy" and the debate regarding implied exclusion of the jurisdiction of Indian courts. Part III analyses whether, in coming to its decision against a Section 34 application, the Supreme Court in Sakuma Exports Ltd. has correctly appreciated the law, as laid down by decisions preceding and Part IV concludes the same.

II. HOW FAR CAN YOU GO WITH BALCO?: REMEDYING A DECADE-LONG HANGOVER

It would be apt to begin by noting that the A&C Act, vide Section 2(2) has incorporated the UNCITRAL Model Law principle of territoriality with respect to arbitral awards. In line with the same, the drafters of the A&C Act chose to dedicate the first part of the Act to domestic and international commercial arbitration in India, while the second was reserved for foreign-seated awards.

Despite this, the Supreme Court in Bhatia International added to the arsenal of its supervisory powers and enabled Indian courts with the ability to provide a variety of reliefs to disputing parties with respect to arbitrations seated outside India. The Court ruled that "even though Part I was originally intended to be limited to domestic arbitrations and arbitral awards unless it was expressly or impliedly excluded by agreement between the parties, it would also apply to foreign ones." It is pertinent to note that the powers of Indian courts under Part I are quite extensive, including grant of interim measures (Section 9), appointment of arbitrators absent

agreement by the parties (Section 11), obtain evidence for re-examination (Section 27) and most importantly, the power to set aside arbitral awards (Section 34). This paved the way for the holding in Venture Global Engineering, [306]which allowed for the annulment of a foreign award after reviewing the tribunal's decision on merits – two things the Court could not have achieved with the assistance of the Act, as intended. By making the expansion of Part I the order of the day, the Bhatia-era of judicial intervention will be remembered for its utter disregard towards la règle du jeu, or the 'rules of the game'.

The decision of BALCO has been hailed as a "truly excellent judgment" by learned Professor Gary B. Born.[307]In the case, a five-judge bench of the Supreme Court prospectively overruled its earlier judgments in Bhatia International and Venture Global Engineering, declaring that Part I cannot be applied to international arbitrations. With this corrected perspective, India has said to set itself in the right direction in international arbitration.[308]There are two palpable positive changes that the BALCO regime has ushered in. First, even though the overruling was brought into effect prospectively, the change in attitude brought in by the case had a massive positive effect on "pre-BALCO" agreements.

In cases like Sakuma Exports Ltd. and Yograj Infrastructure[309], which involve arbitration agreements executed before the BALCO judgment, the law of Bhatia International is to prevail. Yet courts have exercised restraint regarding their position in the dispute settlement mechanism and have decided to conclude that even by following the dicta in Bhatia International, one can arrive at a situation where agreement between the parties regarding the selection of a foreign seat would result in the ouster of the court's jurisdiction. Though the legal correctness of this will be discussed subsequently, it is sufficient to note that this "spilling over" effect of the BALCO decision has proven to be a saving grace for those arbitrations that were executed pre-BALCO; otherwise sentenced to the Bhatia International fate.

The second change has to do with the legitimate power of review of Indian courts under Part II of the A&C Act. After its judgment in BALCO, the Supreme Court has curtailed its ability

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[306] *Venture Global Engineering v Satyam Computer ServicesLimited* 2010 (8) SCC 660.
[307] Gary B Born and S A Spears, 'International Arbitration and India: "A Truly Excellent Judgment!"' [2012] (1)(1) Ind J Arb L 4<http://www.ijal.in/sites/default/files/IJAL%20Volume%201_Issue%201_Gary%20Born%20%26%20Suzanne%20Spears.pdf>accessed 6 March 2016.
[308] Talat Ansari and Ila Kapoor, 'India is Moving in the Right Direction on Int'l Arbitration' (*Law360*, 11 April 2014) <http://www.kelleydrye.com/publications/articles/1825/_res/id=Files/index=0/1825.pdf> accessed 6 March 2016.
[309] ibid (n 306).

to review the decision of the tribunal on merits. Another important point to be noted here is that the post-BALCO judgments have provided for a limited scope of refusing enforcement of awards on the grounds of "public policy". Specifically, the Shri Lal Mahal case refused to include "patent illegality" of a decision as a ground for challenge of the award.[310] Declaring that review on the basis of legality was impermissible since it amounted to the subject matter, i.e., the substance of the dispute. Thus it has now been held that the scope of review should be limited to the grounds of the challenge of domestic award under Part I.[311]In this sense, the Indian courts would have no "supervisory" jurisdiction and it would not be in their duty to assess whether some error has occurred in the original decision.

Hence, by virtue of the law laid down by the Supreme Court in Renusagar Power Plant,[312]an award will be annulled on the basis of "public policy" only if it is contrary to:

- The "fundamental policy" of Indian law
- Interest of India
- Justice or morality[313]

The court also clarified that the award sought to be enforced was a foreign award under Part II of the A&C Act [Section 48(2) (b)] and it would be impermissible to import the wider interpretation of "public policy" from cases like Saw Pipes[314]because they were concerned with respect to a domestic award under Section 34(2) (b) (ii). It can be seen that the Court has denied itself the opportunity of expanding its powers through the medium of review by limiting its scope to these three factors and chose not to include the ground of "patent illegality" in the said scope. This is indeed a very positive development keeping in mind that in the past, with cases like Saw Pipes[315]and Phulchand Exports, were going 'the Bhatia-way' with Part I expansion.

It is encouraging to note that post BALCO, there has been a flurry of cases that endorse a less intrusive approach to foreign arbitration. On the point of the relationship existing between foreign arbitral tribunals and domestic courts, it is imperative to discuss three significant cases. First, in World Sports Group[316]the Supreme Court refused to apply a decision, which mandated that, only the domestic courts could look into allegations of fraud. One of the

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[311] ibid.
[312] *Renusagar Power Plant Co Ltd v General Electronic Co,* (1994) AIR SC 860.
[313] ibid.
[314] *Oil & Natural Gas Corporation Ltd v Saw Pipes* 2003 (5) SCC 705.
[315] ibid.
[316] *World Sport Group (Mauritius) Ltd v MSM Satellite (Singapore) Ltd* (2014) 11 SCC 639.

parties attempted to escape the jurisdiction of the arbitral tribunal, taking assistance from this earlier decision. The Court clarified that the decision does not apply to foreign awards. Instead, the Court found applicability of Section 45 of the A&C Act that reads as follows:

"45. Power of judicial authority to refer parties to arbitration - Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

In conclusion, the court ruled that the courts could refuse to make a reference to arbitration only if it comes to the conclusion that the arbitration agreement is "null or void, inoperative or incapable of being performed".[317]

Since the arbitration agreement was not made inoperative or incapable of being performed simply on account of an allegation of fraud, the court could not refuse to refer the parties to arbitration.

Enercon (India),[318]which is another significant case in the debate, deals with a long-standing dispute between joint venture partners where the primary question was regarding the valid conclusion of the arbitration agreement. Several attempts were made to vitiate the "workability" of the agreement but the Court highlighted the principle of "severability" dictates that the invalidity of the main contract would not prevent the arbitration clause from becoming operative. For example, it was argued that the agreement did not provide for a selection mechanism for a 3rd arbitrator and therefore the same was "unworkable". However, the Court ruled that it was so obvious that the two selected arbitrators would select the third that a "practical" (not a "pedantic") approach would still allow for the workability of the agreement.

The Court clarified that its duty, as far as foreign arbitration goes, was to interpret agreements so as to "make them work" and not to defeat their purpose through intervention.[319] In this sense, the BALCO era represents a significant departure from the earlier prevailing judicial

[317] ibid (n 23).
[318] *Enercon (India) Ltd v Enercon Gmbh* 2014 (5) SCC 1.
[319] ibid (n 14) (Talat Ansari).

mindset. After a laborious 10-year exile, arbitration-friendliness has become the catch phrase of 21st Century Indian arbitration.

III. THE INBETWEENERS: GETTING IN THE MIDDLE OF BHATIA AND BALCO

As has been mentioned above, the concern seems to stem from the fact that though legally, pre-BALCO agreements are to be governed by the erstwhile law as laid down by Bhatia International, and yet Indian courts seem to be applying the pro-arbitration stance of BALCO to such cases by repeatedly denying themselves the opportunity of involvement. The error is in our understanding of the two regimes as distinct, rigid, watertight components – that the law in Bhatia International totally mandates judicial intervention and that in BALCO completely excludes it.

The matter is not so black and white; there exists immense scope for gray areas. In order to respond to the controversy and before getting into an exploration of the Bombay High Court verdict in Sakuma Exports Ltd., two recent cases require attention.

The first one is Harmony Shipping.[320]This case involved an agreement that was signed before the BALCO decision of 6th September 2012 with an addendum that was executed after the said date. In this regard, Harmony Shipping is the leading case discussing the fate of such "in-between" agreements. The court had to consider two distinct questions: First, whether Bhatia International or BALCO law would apply? And second, if agreements were indeed able to oust the jurisdiction of Indian courts, would it be done utilising the principles of Bhatia International or BALCO? The appellants in the case relied on the case of Bhatia International and the 2006 decision of Citation Infowares to argue that since there was no express exclusion mentioned in the agreement, it would not be permissible to oust the jurisdiction of Indian courts. On the other hand, the Respondent brought to light that the juridical seat in the case, as decided by agreement between the parties, was London. It was argued that BALCO's "seat-centric" approach to international arbitration should be adopted and since the addendum was executed post-BALCO, the law of Bhatia International ceased to

[320] *Harmony Innovation Shipping Ltd.vGupta Coal India Ltd* AIR (2015) SC 1504. See also Chakrapani Misra, 'Harmony: The Ship that Sailed'(2015) 4(1) Ind J ArbL,<http://www.ijal.in/sites/default/files/Volume%20IV%2C%20Issue%201.pdf> accessed 6 March 2016.

exist with respect to the dispute and should not apply. In this regard, reliance was placed on the recent Reliance Industries[321] case.

The Court took bits from both sides of the argument. It held that though the addendum made no material change to the arbitration clause and for the same, Bhatia International would be the law to be applied. Since the main agreement pre-dated the BALCO judgment the application of the principles laid therein was rejected on account of the doctrine of prospective overruling. However, the court mentioned that utilizing the dicta of Bhatia International regarding the fact that the jurisdiction could still be impliedly excluded and applying the fact matrix to the same, it had reached the conclusion that there indeed had been such an implied exclusion in the present matter.

In case, the three factors that were given analytical weight were: that the arbitration was seated in London, the arbitrators were London Arbitration Association members and the fact that the contract stipulated English law as the law applicable to the substance of the dispute. Thus, even though the application of BALCO was rejected, the final conclusion of employing the dicta of Bhatia International was that, after giving due regards to the facts of the case, the jurisdiction of the Indian courts would be ousted.

The second case in this category is that of Konkola Copper Mines,[322] in which two significant questions of law were adjudicated upon. Firstly, it held that the question of whether Part I is applicable or not i.e. whether or not it has been expressly or impliedly excluded by agreement between parties is to be decided with respect to the principles of Bhatia International. Secondly, it established that once it was decided that Part I applies, the question of which court would have jurisdiction to entertain Section 9 or Section 34 applications would be guided by the principles of BALCO, where the seat is the centre of gravity for deciding which court can exercise jurisdiction.[323]

Thus, for pre-BALCO arbitrations agreements, which would otherwise be amenable to the Bhatia International dicta, courts have shown a clear intention to avoid excessive judicial intervention.

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[321] *Reliance Industries Ltd v Union of India* 2014 (7) SCC 603.
[322] *U&M Mining Zambia Ltd v Konkola Copper Mines* [2013] EWHC 260.
[323] Alipak Banerjee, 'India: Have you amended your Arbitration Agreement post BALCO?*' (Mondaq,* 23 April 2015*)*<http://www.mondaq.com/india/x/391864/trials+appeals+compensation/Have+You+Amended+Your+Arbitration+Agreement+Post+BALCO> accessed 6 March 2016.

The leading case in this respect is that of Vale Australia[324]where the Court decided to refuse reassessment of an award on its merits because it was a foreign seated award. Further, the Delhi High Court in NNR Global Logistics[325]has held that the word "may" in Section 48 is reflective of the legislative intent behind the provision; that it should be discretionary and applied only when the enforcement is truly opposed to public policy. The problem of continued application of Bhatia International, despite the BALCO judgment, has been remedied to a considerable extent by the judgment of Konkola Copper Mines,[326]which held that the general observations on arbitration law made by the Court in BALCO would not operate prospectively.

The judgment further clarifies that the Supreme Court's verdict in BALCO is declaratory, with regard to several established positions of arbitral law.[327] Thus, if any judgment before BALCO prescribes that the selection of an arbitral seat is irrelevant, it would not be the correct position of law and thus cannot be relied on.

The significance of this is that the reasoning of BALCO would apply to arbitrations despite the fact that the arbitration agreement was entered into before 6th September 2012.

IV. CONCLUSION: BHATIA WITH A LITTLE FLAVOR OF BALCO

The above section deals comprehensively with the possibility of implied exclusion of the jurisdiction of Indian courts in foreign seated arbitrations, even when the arbitration agreement was signed before 6th September 2012 and therefore subject to Bhatia International. The Bombay High Court decided the case of Sakuma Exports Ltd. on 15th November 2011. The agreement in question was executed between an Indian sugar importing/exporting company (Appellants in the SLP) and a Swiss Company by the name of Louis Dreyfus Commodities (the Respondent).

The contract was for the purchase of 27,000 metric tons of Brazilian white sugar, which was entered on 12th January 2010 and executed on 15th February 2010.[328]The terms of the condition of the same mandated that any dispute arising from the same would be referred to arbitration to the Refined Sugar Association in London for settlement.Further, it was

[324] *Vale Australia Pty Ltd vSteel Authority of India Limited* (2012) 2 Arb LR 132.
[325] *NNR Global Logistics v Aargus Global Logistics* (2012) SCC Online Del 5181.
[326] ibid (n 29).

[328] *Sakuma Exports Ltd v Louis Dreyfus Commodities Suisse SA* (2015) 5 SCC 656.

stipulated that English law would govern the contract. The order of the tribunal constituted therein was challenged under Section 34 before the High Court of Bombay, which came to the conclusion that U.K law would be the substantive law of the dispute since the seat of arbitration is in London (by virtue of Rule 8 of the RSA) and therefore Part I is implied excluded. This is because the parties expressly and unmistakably decided English law as the governing law, thereby making the award of the RSA a foreign-seated award. The Supreme Court in Paragraph 7 of the judgment, completely in line with the law set out as before dismissed the SLP, because it envisioned the application of Bhatia International in light of the principles laid down in BALCO, and therefore, finding a workable middle ground.

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