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TRANSBORDER FLOW OF PERSONAL DATA: COMPARING THE EU-INDIA APPROACHES AND A POSSIBLE COOPERATION FRAMEWORK

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&
ANNA-MARIA OSULA^{#1}

Abstract

The regulation of transborder flow of personal data is a global challenge to which countries and regions have responded to differently. While the protection of personal data is important, too many restrictions and regulations may impede trade and commerce. At the same time, compatibility between various frameworks and approaches is important to facilitate transborder flows of personal data, carried out for commercial purposes or cooperation between public authorities such as law enforcement. The General Data Protection Regulation (GDPR) is in place in the European Union (EU). The Personal Data Protection Bill (PDPB) 2019 is about to be passed in India. In light of close relations between EU and India, it is important to examine significant differences between these frameworks in terms of for example, conditions for data processing, data subject rights, localization, breach handling, audit requirements. This article attempts to study the major challenges between the EU and India in transborder data flows and also suggests options for a possible cooperation framework. It is hoped that this paper would be relevant for policy makers and researchers working on data protection issues between the two geographies and help in closing the gap for reaching a common understanding on the regulation of transborder data flows.

Keywords: *personal data, GDPR, EU, India, data protection, privacy.*

I. INTRODUCTION

Transborder data flow is the normality in today's globalized and interconnected world. The social and economic integration between different countries and within specific geographical regions has substantially increased transborder movement of personal data, accompanied by the diversification of applicable regulation. This has rendered reaching a common understanding on the applicable legal rules to transborder data flows a substantial challenge.

Recent times, a growing amount of data is being produced and processed. This is related to the explosive use of emerging technologies such as social media, smart grids, Internet of Things, wearable devices, surveillance techniques like CCTV,

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big data applications, etc. Cloud computing increases the jurisdictional complexity as data may be stored on remote servers across multiple locations. We also see how this data is more and more exchanged between public and private actors, including natural persons, associations and undertakings of different countries, and how common it is to make private information publicly available.

At the same time the easy access and vast amounts of data have increased its vulnerability and raised concerns with regard to the protection of personal data. There is a worry that personal data of individuals may be used for unauthorised behavioral targeting, identity theft, location tracing, genetic identification, profiling and discrimination. Moreover, States are troubled by the lower level of data protection in the third countries² where the data of their citizens may be processed. This is the reason why some countries such as the Member States of the EU pay specific attention to the transfers of personal data to recipients in the third countries or to international organisations and foresee that such transfers may only be carried out in full compliance with the EU regulation.

Also, while undoubtedly the protection of personal data is important, too many restrictions and regulations may impede trade and commerce. Furthermore, the need for sharing information between the law enforcement agencies of different countries as well as between the law enforcement agency of one country and the commercial organization of another country necessitates the need for well thought out privacy models. The private sector may use personal data to create new demands and build relationships for generating revenue from their services.

Keeping in mind the above, the regulation of transborder data flows is important to prevent circumvention of national data protection and privacy laws, guard against data processing risks in other countries, address difficulties in asserting data protection and privacy rights abroad and enhance the confidence of consumers and individuals.³

II. DISCUSSION ON EU-INDIA DATA PROTECTION PRACTICES

The global challenge of transborder data flows needs global solutions. It is clear that greater compatibility between different data protection frameworks would facilitate transborder flows of personal data, carried out for commercial purposes

2 Countries with no specific agreement in place.

3 C. Kuner, *Regulation of Transborder Data Flows under Data Protection and Privacy Law: Past, Present and Future*, Working Paper No 187 - OECD Digital Economy Papers, OECD, vol. 7 (2011).

or cooperation between public authorities.⁴ Clearly, adjusting the data protection frameworks between the two important economic regions such as the EU and India will benefit digital trade and the economy as a whole for both. As the EU has a long legacy in the data protection regime, and has recently adopted the GDPR, it has been able to identify lessons learned and be better about its application and practice. India can take stock from these and therefore better positioned to tailor its approach to fit its particular needs and purposes. EU's challenges with the harmonisation and interpretation of the GDPR will serve India as a proof of concept for the possible regulatory framework, as well as help to avoid unpredictable reactions and consequences of the planned regulation.

However, various nations have responded to the data protection issues differently and there is no consensus on a baseline data protection mechanism across nations. Moreover, there is a lack of a common understanding of the classification and principles of transborder data flows. This is especially relevant for the relationship between the EU and India, since the lack of clarity regarding transborder data flows and the safeguards integrated within should not hinder the active economic relations and cooperation between these countries.

A. European Union

The General Data Protection Regulation (GDPR) is applicable in the EU and the European Economic Area (EEA). While focusing on privacy and data protection, it also addresses the transfer of personal data outside the EU and EEA areas. The GDPR was adopted in April 2016, and became enforceable in May 2018. As the GDPR is a regulation, not a directive, it is directly binding and applicable, but does provide flexibility for certain aspects of the regulation to be adjusted by individual Member States. The European Data Protection Board (EDPB) assesses that the application of the GDPR has in general been successful as the new regulation has strengthened data protection as a fundamental right and harmonized the interpretation of data protection principles, reinforced data subjects' rights as well as provided for increased investigative and corrective powers, including significant fines.⁵

As for the basic terminology used in the GDPR, it focuses on the broad concept of "personal data" which means "any information relating to an identified or identifiable natural person ('data subject')". The regulation explains that an identifiable natural person is anyone who can be directly or indirectly identified by reference to

4 Communication from the Commission to the European Parliament and the Council Exchanging and Protecting Personal Data in a Globalised World, COM/2017/07 final, p. 1.

5 Available at: <https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_contribution_gdprevaluation_20200218.pdf>, p. 3 accessed on 10 January 2020.

an identifier such as a name, an identification number, location data, etc.⁶ The key here is the ability to be identified which makes data personal even if the link to a specific individual is not straightforward. While “sensitive data” is not a separate category of data in the strict sense, the regulation acknowledges that there are elements of personal data which are particularly delicate in relation to fundamental rights and freedoms. These include “personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person’s sex life or sexual orientation” the processing of which shall be prohibited, unless on the conditions outlined in the regulation.⁷ The EU also recognizes the need for the Member States to specify some of its rules, for example for the processing of special categories of personal data such as genetic data, biometric data or data concerning health.⁸ However, the regulation itself does not impose further rules on these categories of data.

B. India

The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution of India. In August 2017, the Right to data privacy was pronounced as part of the fundamental rights under the Indian Constitution. It is necessary to protect personal data as an essential facet of informational privacy. India has not yet enacted specific legislation on data protection. However, the Indian legislature amended the Information Technology Act (2000) (“IT Act”) in 2008⁹ to include Section 43A and Section 72A, which gives a right to compensation for improper disclosure of personal information. Additionally, the data privacy rules were introduced in the Act in 2011.¹⁰ *Inter alia*, the rules require firms to obtain written permission from customers before collecting and using their personal data. There is no international convention especially with respect to data protection, though

6 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) *OJL 119, 4.5.2016, p. 1–88*, Article 4 (1). *Hereafter GDPR*.

7 GDPR, Article 9 (1).

8 GDPR, Article 9 (4).

9 Available at: <<https://www.meity.gov.in/content/information-technology-act>> accessed on 26 April 2020.

10 Available at: <[https://meity.gov.in/sites/upload_files/dit/files/GSR313E_10511\(1\).pdf](https://meity.gov.in/sites/upload_files/dit/files/GSR313E_10511(1).pdf)> accessed on 26 April 2020.

free flow of data and data privacy provisions are being mentioned in some international declarations and agreements. However, India has adopted or is a party to other international declarations and conventions such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which recognise the right to privacy.

In July 2017, the Ministry of Electronics and Information Technology (MeitY), Government of India (GoI), constituted a committee with the responsibility of preparing comprehensive data protection laws. The committee submitted the draft Personal Data Protection Bill (PDPB)¹¹, in July 2018. The bill was put for a review for the public, various stakeholders, ministers and consultants based on which a revised Personal Data Protection Bill (Draft Bill) was tabled in the Indian Parliament by the MeitY, GoI in December 2019. The Bill is being analyzed by a Joint Parliamentary Committee (JPC) in consultation with various groups. The Bill is expected to become a law or an Act in 2020. Till such time that the Bill is passed, the relevant provisions of IT Act (Amended), 2008 and Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal data or Information) Rules, 2011 continue to apply. Since the Bill is yet to be passed, the discussion on transborder flows in this article is with reference to 2019 draft of PDPB.

The PDPB 2019 applies to the processing of personal data where such data has been collected, disclosed, shared or otherwise processed within the territory of India or by an organization incorporated under Indian law. It is also applicable to the processing of personal data by data fiduciaries or data processors not present within the territory of India, if such processing is in connection with any business carried on in India, or any systematic activity of offering goods or services to data principals within the territory of India.

The PDPB 2019 defines personal data (PD) as “*data about or relating to a natural person who is directly or indirectly identifiable, having regard to any characteristic, trait, attribute or any other feature of the identity of such natural person, or any combination of such features, or any combination of such features with any other information.*” The sensitive personal data (SPD) is defined separately and covers personal data related to financial, health, official identifier, sex life and orientation, biometric and genetic data, transgender status, intersex status, caste data and religious or political belief or affiliations. Also, it allows the government to define additional categories of sensitive data. Additionally, the PDPB 2019 defines a separate category of data as critical personal data (CPD) which shall be notified by

11 Available at: <https://meity.gov.in/writereaddata/files/Personal_Data_Protection_Bill,2018.pdf> accessed on 26 April 2020.

the central government from time to time. The government is granted broad discretion to define CPD but the concept appears to be related to national security and military intelligence.

The revised PDPB 2019¹² includes objective of the Personal Data Protection Bill which is “ *to provide for protection of the privacy of individuals relating to their personal data, specify the flow and usage of personal data, create a relationship of trust between persons and entities processing the personal data, protect the fundamental rights of individuals whose personal data are processed, to create a framework for organisational and technical measures in processing of data, laying down norms for social media intermediary, cross-border transfer, accountability of entities processing personal data, remedies for unauthorised and harmful processing, and to establish a Data Protection Authority of India for the said purposes and for matters connected therewith or incidental thereto.* ”

As explained in section 2A, the GDPR framework¹³ includes the above identifiers as special categories of personal data. While the PDPB 2019 categorizes financial information as SPD, the GDPR does not include it. Appendix¹⁴ compares the personal data definitions in the two frameworks. The PDPB 2019 also includes exemptions for the government from certain rules applicable to the collection and storage of personal and sensitive data if such processing was required for the functioning of the Government or the Parliament. The State can collect and process SPD when required, without an explicit consent from the data principals. Such provisions can be misused and hence need to be properly examined.

III. TRANSBORDER DATA FLOWS

Specifically, this article focuses on the comparison on the EU and Indian rules on transborder flow of personal data.

A. European Union

In the case of personal data being transferred to third countries (outside the EEA) or international organisations, special safeguards are foreseen to make sure that the data remains protected. Such transfer may take place only if the controller and

12 Available at: <<https://www.prsindia.org/billtrack/personal-data-protection-bill-2019>> accessed on 27 April 2020.

13 GDPR, Article 9 (1).

14 A. Kaushik, Dissertation: *Data Protection On Cyber Space- Issues and Concerns, Post Graduate Diploma in Cyber Law and Cyber Forensics* (National Law School of India University, Bangalore, 2017), Reg. Number: CLCF/352/15).

processor follow the GDPR rules for such transfers. This also applies to any onward transfers of personal data from the third country or an international organisation to another third country or to another international organisation.¹⁵

The approach to third country transfers is based on the decision of adequacy (GDPR Article 45) which the European Commission takes in order to ensure an adequate level of protection for the personal data. Normally, if all rules are followed, such a transfer shall not require any specific authorisation.¹⁶

To date, the European Commission has recognised Andorra, Argentina, Canada (commercial organisations), Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, Switzerland, and Uruguay as providing adequate protection; adequacy talks being ongoing with South Korea. Until recently, the United States of America and the EU-US Privacy Shield framework also belonged to this list, but the mechanism was declared invalid by the Court of Justice of the European Union (CJEU) in the July 2020 *Schrems II* judgement.¹⁷

In order to enter such an agreement on adequacy, the countries' domestic legislation as well as international commitments are assessed, and the adoption of an adequacy decision involves approval of many instances including the representatives of EU Member States. The third country's level of protection of personal data must be "essentially equivalent" to that ensured within the EU (recital 104 of Regulation (EU) 2016/679), but it is relevant to keep in mind that this does not require an identical level of protection. In particular, the means to which the third country in question has recourse may differ from the ones employed in the EU, as long as they prove, in practice, effective for ensuring an adequate level of protection.¹⁸ Such agreement may at any time be requested to be amended or

15 GDPR, Article 44.

16 GDPR, Article 45 (1).

17 Judgement of the Court (Grand Chamber) of 16 July 2020 in case C-311/18 *Data Protection Commissioner v Facebook Ireland Limited and Maximilian Schrems*.

18 Court of Justice of the European Union, Case C-362/14, *Maximilian Schrems v. Data Protection Commissioner* ("Schrems"), ECLI: EU: C:2015: 650, paras. 73-74.

withdrawn by the European Parliament and the Council on the grounds that it exceeds the implementing powers provided for in the GDPR.¹⁹

An example of such an agreement is in place with Japan.²⁰ The agreement with EU and Japan details the differences between the two systems and outlines the conditions for transborder data flows. In addition to focusing on relevant definitions, the document also lays down the common ground of sectoral exclusions and conditions for the access and use of personal data transferred from the EU by the Japanese public authorities. Importantly, the topics of safeguards, rights and enforcement are addressed, ensuring that data subjects have the right to turn to an independent supervisory authority and that there are possibilities to obtain redress if an EU individual is not satisfied with how his or her data have been processed or his or her rights respected.²¹

In addition to the adequacy decision procedure, data transfers may also be based on Standard Contractual Clauses (SCCs) as outlined in the Directive 95/46/

19 Read more: <https://ec.europa.eu/info/law/law-topic/data-protection/data-transfers-outside-eu/adequacy-protection-personal-data-non-eu-countries_en>. Importantly, the transborder data flow as outlined in GDPR must not be confused with the rules established for the data exchange in law enforcement purposes. In addition to the so-called “Police Directive”, access to data needed for example for criminal investigations are regulated by the EU E-Evidence framework and domestic criminal procedure laws, keeping in mind that EU Member States are Parties to the Council of Europe Budapest Convention. In February 2019, the European Commission proposed to start international negotiations on cross-border access to electronic evidence with the United States and for the participation in negotiations on a second Additional Protocol to the Council of Europe Convention on Cybercrime. Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA OJ L 119, 4.5.2016, pp. 89–131; See for more <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/e-evidence-cross-border-access-electronic-evidence_en>.

20 Commission Implementing Decision (EU) 2019/419 of 23 January 2019 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by Japan under the Act on the Protection of Personal Information (Text with EEA relevance) C/2019/304/.

21 Commission Implementing Decision (EU) 2019/419 of 23 January 2019 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by Japan under the Act on the Protection of Personal Information (Text with EEA relevance) C/2019/304/. Relevant topics are also covered in the Supplementary Rules under the Act on the Protection of Personal Information for the Handling of Personal Data Transferred from the EU based on an Adequacy Decision, and Official representations, assurances and commitments, Annexes to the same original document.

CE.²² However, these SCCs do not take into account the developments installed by the GDPR and do not fully address a number of legal and operational issues for concerned actors on the differences between the previous Directive 95/46/CE and the currently adopted GDPR. These issues were somewhat clarified with the CJEU *Schrems II* judgement.

While the CJEU *Schrems II* judgement has been welcomed in upholding EU's strong stance on data protection, it has also brought along several concerns. According to EDPB, data processors and controllers (acting as data exporters) who rely on SCCs have to identify and implement appropriate and necessary supplementary measures to ensure an essentially equivalent level of protection to the data they transfer to third countries. However, such an obligation for assessment places a heavy burden on EU businesses and other data exporters, with limited direct assistance from the EU as there is no one-size-fits-all solution readily available. As a consequence, we may see more data exporters storing their data on the territory of the EU, possibly to the detriment of the global digital economy. Another trend may include an increasing number of data exporters basing data processing on explicit and informed consent as required by GDPR. The EDPB has issued a roadmap together with a non-exhaustive list of examples of supplementary measures, as well as elements to examine in terms of third country's surveillance framework,²³ but the final decision on the level of adequacy will be made by the data exporter who will also be held accountable for any breaches.²⁴

B. India

The PDPB 2019²⁵, Section 33 and 34 of Chapter VII deal with the restrictions on the transfer of data outside India. Section 33 states that the SPD may be transferred

22 Article 46(5) GDPR allows the decisions adopted by the European Commission on the basis of Article 26(4) of Directive 95/46/CE to remain in force until amended, replaced or repealed. SCCs are established on this basis still being used by organizations as appropriate safeguards under Article 46.

23 European Data Protection Supervisor, Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data, 2020, available at: <https://edpb.europa.eu/sites/edpb/files/consultation/edpb_recommendations_202001_supplementarymeasurestransferstools_en.pdf> accessed on 24 April 2020.

24 Other relevant adopted documents include: European Data Protection Supervisor, Strategy for Union institutions, offices, bodies and agencies to comply with the "Schrems II" Ruling, 2020, available at: <https://edps.europa.eu/sites/edp/files/publication/2020-10-29_edps_strategy_schremsii_en_0.pdf> accessed on 22 April 2020 and Recommendations 02/2020 on the European Essential Guarantees for surveillance measures, 2020, available at: <https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_recommendations_202002_europeanessentialguaranteessurveillance_en.pdf> accessed on 20 April 2020.

25 Available at: <<https://www.prsindia.org/billtrack/personal-data-protection-bill-2019>> accessed on 27 April 2020.

outside India, but such data shall continue to be stored in India. Such data can be processed outside the country with the explicit consent of the individuals concerned or under contractual clauses that have been approved by the Data Protection Authority. In the latter case, the contract should provide effective protection of the rights of the data principal under PDPB 2019, including in relation to possible further transfers to any other person. The Central Government, after consultation with the Authority, may allow transfer to a country on the basis that the SPD shall be subject to an adequate level of protection, having regard to the applicable laws and international agreements. Section 34 mandates that all “critical” information related to individuals shall be stored and processed only in India. The CPD may however be transferred outside India when such transfer is to a person or entity engaged in the provision of health services or emergency services where such transfer is necessary for prompt action. The CPD may also be transferred where such transfer in the opinion of the Central Government does not prejudicially affect the security and strategic interest of the country. In such cases, the transfer of data outside the country shall be notified to the Data Protection Authority (DPA) within such period as specified under the regulations.

IV. LEGAL BASIS FOR INFORMATION EXCHANGE BETWEEN INDIA AND EU

As explained previously, a data controller may only transfer personal data outside the EEA to a country whose data protection laws have not been approved by the European Commission as providing adequate protection for data subjects’ rights if there is an adequate level of protection for the rights of data subjects. As India is not part of the secure countries listed by the EU, international transfer must be based on other grounds.

In the absence of an adequacy decision, the personal data transfer between India and EU may be based on the existence of “appropriate safeguards”, and on the condition that enforceable data subject rights and effective legal remedies for data subjects are available.²⁶ These safeguards can be included in an individual contract or SCC which are either standard contractual clauses adopted by the Commission or adopted by a supervisory authority and approved by the Commission, or private clauses subject to the authorisation from the competent supervisory authority. These clauses should define the subject-matter and duration of the processing, the nature and purposes of the processing, the type of personal data and categories of data subjects, taking into account the specific tasks and responsibilities of the processor in the context of the processing to be carried out

26 GDPR, Article 46.

and the risk to the rights and freedoms of the data subject.²⁷ An example of such an agreement is the recently invalidated EU-US Privacy Shield which facilitated transferring personal data to the US for commercial purposes.²⁸

Also, for certain derogations, listed in the Regulation such as the consent of the data subject, it is allowed to transfer data to a third country even in the absence of an adequacy decision or appropriate safeguards. These include, *inter alia* explicit consent to the proposed transfer, the transfer being necessary for the performance of a contract between the data subject and the controller, transfer being necessary for important reasons of public interest, etc.²⁹

Other options for international transfers between India and the EU may include:³⁰

- Binding corporate rules (BCR) - these are an internal code of conduct operating within a multinational group, which applies to restricted transfers of personal data from the group's EEA entities to non-EEA group entities. BCRs must be submitted for approval to an EEA supervisory authority in an EEA country where one of the companies is based. The criteria for choosing the lead authority for BCRs is endorsed by the EDPB.³¹ One or two other supervisory authorities will be involved in the review and approval of BCRs.³²
- Code of conducts - these must include appropriate safeguards to protect the rights of individuals whose personal data transferred, and which can be directly enforced; and be approved by a supervisory authority.³³

27 GDPR, (81).

28 *Data Protection Commissioner v Facebook Ireland Limited and Maximilian Schrems*, note 17.

29 GDPR, Article 49.

30 Available at: <https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_contributiongdprvaluation_20200218.pdf> p. 4, accessed on 27 April 2020.

31 For this purpose, the Article 29 Data Protection Working Party has developed a toolkit for the organisations. See Article 29 Data Protection Working Party, Working Document setting up a table with the elements and principles to be found in Binding Corporate Rules, available at: <https://ec.europa.eu/newsroom/article29/document.cfm?action=display&doc_id=49725> accessed on 26 April 2020.

32 Available at: <<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/international-transfers/>> accessed on 26 April 2020.

33 See, UK Information Commissioner's Office, Code of Conduct, available at: <<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/accountability-and-governance/codes-of-conduct/>> accessed on 27 April 2020.

- Certification mechanisms - this option is newly introduced by the GDPR and no approved certification schemes are yet in use. The GDPR encourages the establishment of such mechanisms for the purpose of demonstrating compliance with this Regulation of processing operations by controllers and processors.³⁴
- Administrative arrangements for transfers between public authorities - this option can be used by public authorities or bodies which do not have the power to enter into legally binding and enforceable instruments, however, the agreement must nevertheless include enforceable and effective individual rights.

V. CHALLENGES

A. GDPR Compliance

The implementation of the GDPR has not been without challenges. Some of the main concerns within the EU have been GDPR compliance for SMEs and cooperation and consistency mechanisms in the cooperation among data protection authorities due to differences in complaint handling procedures, position of the parties in the proceedings, admissibility criteria, duration of proceedings, and deadlines.³⁵ Continuing efforts towards greater harmonisation include Commission's bilateral dialogues with national authorities, where the focus areas are:

- effective independence of data protection authorities,
- national laws possibly restricting the rights of data subjects,
- the fact that national legislation should not introduce requirements going beyond the Regulation when there is no margin for specification, such as additional conditions for processing, and
- reconciling the right to the protection of personal data with freedom of expression and information, taking into account that this obligation should not be misused to create a chilling effect on journalistic work.³⁶

34 GDPR Articles 42 and 43, see also available at: <https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_201801_v3.0_certificationcriteria_annex2_en.pdf> accessed on 27 April 2020.

35 Available at: <https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_contribution_gdprevaluation_20200218.pdf>, p. 4 accessed on 26 April 2020.

36 Communication from the Commission to the European Parliament and the Council, Data protection rules as a trust-enabler in the EU and beyond – taking stock, COM/2019/374 final.

Another recent concern involves the relationship between the GDPR and the United Nations (UN). According to the UN, the GDPR and other EU instruments have had an adverse impact on the activities of UN System Organizations. Difficulties relate to transferring data to/from third parties, service providers and receiving voluntary funding from the European Commission and the EU Member States. The UN concludes that these issues appear to have arisen, because of the unprecedented reach of the GDPR,³⁷ and *inter alia* refers to lack of guidance from the EU in addressing such circumstances. The UN has advanced legal objections to few measures of the regulation and called on the EDPB to issue comprehensive guidelines specifically addressing the situation of United Nations System Organizations. In fact, the main question seems to be the applicability of GDPR not only on international organisations such as the UN, but also whether respecting the privileges and immunities of the UN would equally bring along concessions as to adhering to the EU data protection regime to private entities to the extent of their relationship with the UN.³⁸ In response, the EDPB has posited that while the application of the GDPR is without prejudice to the provisions of international law (e.g. regarding the privileges and immunities of international organisations), entities subject to the GDPR that exchange personal data with international organizations have to comply with the GDPR, including its rules on international transfers³⁹.

B. India-EU Compliance

The discussion below is on the differences between the GDPR and PDPB 2019 and covers the issues which may pose operational challenges in the transborder data flows.⁴⁰

- Scope and application: The scope of PDPB 2019 is potentially broader than that of GDPR as an organization may fall within the scope when it is processing personal data in India (through the use of a processor in India and the data may not relate to Indian data subjects).
- Definition of Personal/ Sensitive Personal data: There is a significant overlap in the way sensitive data is defined under each framework (see Appendix-1). The definitions of sensitive data are generally broader under the PDPB

37 UN letter to EDPB, 2020, available at: <https://edpb.europa.eu/sites/edpb/files/webform/public_consultation_reply/2020.05.14_letter_to_edpb_chair_with_un_comments_on_guidelines_2-2020.pdf> accessed on 16 June 2020.

38 *Ibid.*

39 EDPB letter to UN, 2020, available at: <https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_letter_out2020-0109_un.pdf> accessed on 16 June 2020.

40 Available at: <https://www.cov.com/-/media/files/corporate/publications/file_repository/comparison-chart—gdpr-vs-india-pdpb-2019-feb-03-2020.pdf> accessed on 25 April 2020.

2019. It includes 'financial data' as SPD. Apart, the PDPB 2019 allows the government to define additional categories of sensitive data (in consultation with the DPA) which is not the case with GDPR i.e. the list of categories is finite under the GDPR. The broader definition of SPD under the PDPB 2019 means that a wider spectrum of activities will be affected by these conditions of processing. The GDPR concept of personal data relates to the likelihood of identifying a natural person through that data and also covers racial or ethnic origin data, philosophical beliefs and trade union membership. The GDPR also provides for additional rules for processing criminal convictions and processing data, the PDPB 2019 does not include any such provisions.

- Localization and cooperation framework: The SPD has to be stored in the country but can be processed extraterritorially, subject to certain conditions. For instance, such data can be processed outside the country with the explicit consent of the individuals concerned or under contractual clauses that have been approved by the DPA. In that case, a copy of data may be transferred outside India for processing. However, the requirement for mirroring of sensitive data in India can further add to the complexity. This would require implementation of mirroring standards and infrastructure and would add to the cost. This may adversely impact the smaller organizations as they may not be able to meet the additional costs. The PDPB 2019 mandates that all "critical" information related to individuals shall be stored and processed only in India. However, there is no clarity on CPD in PDPB 2019 as this shall be notified by the central government from time to time. However, the transborder regulations for this category are different. This can create problems in operationalization of the data flows across India-EU.
- Lawfulness of processing: At an overall level, there is a high convergence between the two frameworks (see Appendix-2). The PDPB 2019 requirement for accuracy is more specific than under GDPR. It requires accuracy to be assessed on a number of factors including whether the data is a fact or an opinion or personal assessment. The PDPB 2019 storage limitation requirements are also more specific than under GDPR. While the GDPR allows retaining the data in a form that no longer identifies an individual, the PDPB 2019 requires deletion. It also requires periodic reviews to decide whether personal data must be retained.
- Legal basis for processing of personal data: The GDPR includes six lawful bases for processing personal data which are, consent, performance of contract, legal obligation, legitimate interests, life protection, vital interests

and public interests. The EU member states can add more legal basis for processing of personal data. Under PDPB 2019, the lawful bases include consent, legal obligation, reasonable basis, medical emergency, health services, safety of individuals during disaster and employment interest. The PDPB 2019 does not include 'performance of contract' as a legal basis. The reasonable purpose basis under PDPB 2019 is similar to the GDPR's legitimate interest's basis. Organizations tend to rely on legitimate interests under GDPR for a wide range of activities that are not enumerated in the PDPB 2019, including marketing and product development and improvement. The PDPB 2019 is a little more stringent than the GDPR as it assigns responsibility for defining reasonable purposes to the DPA rather than to the controller/ data fiduciary. It also requires significant data fiduciaries to register with DPA.

- Conditions for data processing: The conditions for consent are more stringent in GDPR. In PDPB 2019, the consent is considered "informed" as long as the privacy notice is made available and it is not necessary to provide the request for consent separately from the privacy notice. The 'storage limitation' clause is addressed differently. While the GDPR permits retaining data in a form that no longer identifies an individual, the PDPB 2019 requires deletion. It also requires that the data fiduciaries conduct periodic reviews to determine whether it is necessary to retain the personal data in their possession. Transparency and accountability requirements: The transparency requirements are handled differently in both the frameworks. A Privacy notice drafted under PDPB 2019 requires additional disclosure requirements such as the details on the procedure for handling individual requests and grievances, providing the contact details of the Data Privacy Officer (DPO) and to provide privacy notice in multiple languages. As per GDPR, processing by processors must be subject to detailed contracts, with requirements set out in Article 28 of the GDPR. The PDPB 2019 requirements for contracting with processors are less prescriptive than the equivalent GDPR provisions.
- Data Subject Rights: The PDPB 2019 distinguishes two separate rights of data subjects - one for erasure and the other for disclosure of personal data i.e. the "Right to be forgotten". In case of PDPB 2019, the adjudicating officers decided by the Data Protection Authority (and not the data fiduciary) decide on the scope of application of the right to be forgotten. In case of GDPR, the decision on right to be forgotten is with the controller and may therefore be more accommodative.
- Role of Public authorities: Under the PDPB 2019, the Central Government has broad discretion to form policy, add or remove requirements, and to

exercise control over the operations of DPA. Some of the provisions leave authority to the DPA to promulgate regulations that may affect important requirements. Apart, the PDPB 2019 grants the Central Government broad authority to exempt itself and its agencies from any or all requirements. The GDPR applies to public entities, subject to narrow exemptions. Law enforcement and other “competent authorities” are subject to a separate, but similar framework where they are processing personal data for law enforcement purposes. Activities that fall outside the scope of EU law, such as national security and intelligence services, are subject only to national law.

- The GDPR provides for additional rules for processing criminal convictions and offenses data. PDPB 2019 includes no similar provision.
- Data Protection Impact Assessment: The PDPB 2019 requires all impact assessments to be submitted to the DPA for review. This is unlike the GDPR which requires the controllers to conduct impact assessment for “high risk” activities such as systematic and extensive profiling, processing sensitive personal data on a large scale etc.
- Breach handling: The PDPB 2019 requires the DPA to establish when the breach would be notified to the individuals. The data fiduciaries report the breach to the DPA. There are no explicit requirements on processors to notify the breach to data controllers. In GDPR, the controllers must notify the breach to individuals without undue delay if it is likely to result in high risk to individuals.
- Audit requirement: The PDPB 2019 mandates that the data fiduciary shall have its policies and the conduct of its processing of personal data audited annually by an independent data auditor under the Act. The data auditor has to be from the list approved by the DPA. The data auditor may assign a rating in the form of a data trust score to the data fiduciary based on the data audit. Apart, the DPA may direct the data fiduciary/ controller to conduct an audit where it views that the processing of personal data is in such manner that it is likely to cause harm to a data subject.

In addition to the above points, miscellaneous provisions such as on anonymized data and on social media intermediaries may be looked into.

VI. LOOKING FOR SOLUTIONS AND A POSSIBLE COOPERATION FRAMEWORK

PDPB is one of the recent examples illustrating how the GDPR framework is being considered as a model also outside of the EU. At first sight it may seem that by

choosing to design their data protection regulation largely along the same lines as the EU, India signals its broad acceptance of the GDPR and desires to build up a similar approach. However, as outlined in the previous section, aside from some similarities with the GDPR and the PDPB, there are a number of significant differences which need to be bridged before bilateral discussions between the regions could move towards substantial talks on reaching the adequacy criteria. Currently, official discussions on the adequacy criteria have not been initiated. If the differences between the GDPR and the PDPB remain substantial (which will be determined by the final content of PDPB), the agreement on the adequacy decision and its conditions may not be reached. At the same time, the EU-Japan agreement illustrates how certain inconsistencies in e.g. definitions can be overcome by negotiations and supplementary agreements.

Instead, the EU-India framework should focus on the common baseline, and further on a separate bilateral agreement between the two regions. For that purpose, a Negotiation Committee, comprising relevant stakeholders, between the two sides may be helpful to determine the objectives as well as priorities on both sides. A bilateral agreement could be based on SCC which can offer grounds for transferring personal data to and from India on commercial purposes. In that regard, the European Commission is encouraged to expand their work on bringing the existing set of SCCs in line with the GDPR and to draft additional SCCs that cover new transfer scenarios.⁴¹

Another option would be to move on with the development of certification schemes, despite these still being under discussion. It has been proposed that accredited certification bodies could assess and approve organisations and issue a certificate which would demonstrate compliance with the provisions on data protection by design and by default⁴²; show appropriate technical and organisational measures to ensure data security⁴³ and thereby support transfers of personal data to third countries or international organisations⁴⁴.

VII. CONCLUSION

The article suggests the PDPB 2019 may be aligned to other significant frameworks such as the GDPR for cross border data flows and support the Internet economy in a holistic manner. Since GDPR is in place from the EU side, it may be reasonable

41 Also suggested by the EDPB, available at: <https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_contributiongdprevaluation_20200218.pdf>, p. 4, accessed on 12 April 2020.

42 GDPR, Article 25(3).

43 GDPR, Article 32(3).

44 GDPR, Article 46(2)(f).

to focus on a cooperation framework between India and the EU. Certain amendments may be considered to the PDPB before it is sanctioned as a law. A harmonized legal order will be more readily acceptable to data controllers as well as processors as presently they have to comply with multiple jurisdictional legal requirements which often result in enhanced operational costs.

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Appendix-1

Definition of Personal Data

| | EU GDPR, 2016 (enforced in May 2018) | Draft Personal Data Protection Bill, India, 2019 |
|--|---|---|
| Racial or Ethnic Origin | Y | |
| Caste or Tribe | | Y |
| Political Opinions | Y | Y |
| Religious or Philosophical beliefs | Y | Y |
| Trade Union Membership | Y | |
| Sex Life/ Sexual Orientation/ | Y | Y |
| Transgender status or Intersex status | | Y |
| Official Identifier | | Y |
| Genetic Data | Y | Y |
| Biometric Data | Y | Y |
| Data of Minors | Y | Y |
| Data on an individual's Geo-location | Y | |
| Financial information | | Y |
| Health including Physical, physiological, mental health condition | Y | Y |
| Medical Records and History | Y | Y |
| Critical Data | | |

Comparison of Core Data Protection Principles⁴⁵**Appendix-2**

| S. No | Data Protection Principle | Description | EU GDPR, 2016 (enforced in May 2018) | Draft Personal Data Protection Bill, India, 2019 |
|--------------|--|--|---|---|
| 1 | Accountability | organizations accountability towards personal information | Y | Y |
| 2 | Notice | Notice in clear language for collection, policy notification | Y | Y |
| 3 | Consent and choice | For collection and use | Y | Y |
| 4 | Collection Limitation, Data minimization | Restricting the collection to the identified purpose only | Y | Y |
| 5 | Purpose legitimacy and specification/ Use Limitation/lawful processing | Restricting the use for the stated purpose only/ for lawful purpose only | Y | Y |
| 6 | Data Quality | To ensure info is complete, relevant, accurate and up to date | Y | Y |
| 7 | Retention/ Storage Limitation | Cease to retain documents containing personal data, or remove hen no longer required by business or legal need | Y | Y |
| 8 | Privacy by design policy | Approach to data processing that promotes privacy and data protection compliance from the point of collection to deletion of personal data | Y | Y |
| 9 | Openness, Transparency and Fair Processing | Policies clearly Published and Available | Y | Y |
| 10 | Information security/Security of Processing | To prevent loss, misuse and unauthorized access | Y | Y |
| 11 | Breach Notification | Data breaches should be notified to affected individuals and the supervisory authority | Y | Y |
| 12 | Data Protection Impact Assessment | For processing involving new technologies or large scale profiling or use of sensitive personal data | Y | Y |

45 Kaushik, *note 14*.

| | | | | |
|----|---|--|---|--------|
| | | such as genetic data or biometric data, or any other processing which carries a risk of significant harm to data principals | | |
| 13 | Maintenance of Records | Records of important operations in the data life-cycle including collection, transfers, and erasure of personal data to demonstrate compliance | Y | Y |
| 14 | Audit of policies and conduct of processing etc | Annual audit by an independent data auditor | | Y |
| 15 | Data Protection Officer | Appointment of DPO | Y | Y |
| 16 | Processing by entities other than data fiduciaries. | A data fiduciary / controller shall engage a data processor to process personal data on its behalf through a formal contract. | Y | Y |
| 17 | Establish Grievance redressal Process | Have in place the procedure and effective mechanisms to redress the grievances of data principals | Y | Y |
| 18 | Establish Grievance Officer to address discrepancies of service providers | Contact details of Privacy Officer and grievance officer for filing complaints should be made available to data subject | | Y |
| 19 | Disclosures /Cross border Transfer | Terms to disclosure to Third parties | Y | Y |
| 20 | Enforcement / Penalties Data Localization | Assurance over adherence to policies and complaints resolution. Data to be stored in respective country only (European region / India) | Y | Y Y |

Rights of Data Principal/Subject

| | | | | |
|---|---|---|---|---|
| 1 | Individual participation, confirmation and access/ Right to Rectification | Individual's access to his info and update/ correct his info | Y | Y |
| 2 | Right to Erasure | Erasure of personal data which is no longer necessary for the purpose for which it was processed | Y | Y |
| 3 | Right to object profiling and automated decision making | object to the processing of their personal data | | Y |
| 4 | Right to data Portability | Enable the data subjects to transfer their personal data "from one electronic processing system to and into another, without being prevented from doing so by the controller | Y | Y |
| 5 | Right to be forgotten | Erasure of historical personal data held by the data controller for a data subject | Y | Y |
| 6 | Right to Opt-out | Option to withdraw his/her consent given earlier to the data controller | Y | |
| 7 | Right to restrict the processing | The data subject shall have the right to obtain from the controller restriction of processing | Y | |
| 8 | Right to confirmation | The data principal shall have the right to obtain confirmation whether the data fiduciary is processing or has processed personal data of the data principal; | | Y |
| 9 | Right to Compensation | Any data principal who has suffered harm as a result of any violation of any provision under this Act or the rules or regulations made thereunder, by a data fiduciary or a data processor, shall have the right to seek compensation from the data fiduciary or the data processor | Y | Y |

DIALECTIC OF AN AUTHORITY: THE ULTRA VIRES OF THE STATE'S AGENT BEFORE THE ICJ

SIAMAK KARIMI* & REZA ESMKHANI#

Abstract

International case law and doctrine have shown that the State representative (agent) before the International Court of Justice (ICJ or Court), in addition to defending the views of the appointing State, has the authority to accept a commitment on behalf of the respective State during the proceedings. Acknowledgement of such an authority bears a serious challenge: Out of authority actions by the agent. The agent, like all persons representing a State in the international arena, may accept obligations in violation of the internal law of the appointing State or beyond his/her respective mandates and authorities. In light of the significant role that the agents play in leading the States' judicial efforts before the Court, as well as examining their authority to establish an obligation to the States, it is critical to determine the legal effects of the out of authority statements made by the agents. Some of these statements are binding on the appointing State and some are avoidable. This essay seeks to specify the legal effects of statements made by the agents and to determine how and under what mechanism States can invalidate the binding effects of such statements before the Court. The following research concludes that since the agent before the Court, unlike other types of State representatives, enjoy the authority to accept two forms of procedural and substantive obligations, therefore a special mechanism should be developed to invalidate the accepted commitments. This special mechanism must be applied, considering the necessity of securing stability in international legal relations on the one hand and the consent-based nature of legal obligations in international law on the other hand.

Keywords: *state agent, VCLT, forum prorogatum, Ultra Vires, Statute of ICJ.*

I. INTRODUCTION

Appearing before the International Court of Justice (hereafter ICJ or Court) whether as an Applicant or Respondent State, and laying out legal strategies to be pursued in the course of the litigation is the result of numerous and extensive consultations between different officials and stakeholders inside the relevant State. One of the most effective officials in this process is the "agent" who is appointed by the States, which are the dispute parties before the Court, to represent them during the

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proceedings of a specific case.¹ All legal efforts and reflections of a State shall be made available to the judges through the agent.² The State dependence on their representatives is unavoidable as the performance of the State's functions, in principle, rests entirely in their hands. In fact, States as artificial beings, inevitably have to act through their representatives whenever they need to take an action in international arena.³ Generally, this fact alone shows why the competence of individuals who can act on behalf of a State, to accept an obligation, or to state a position is of a significant importance.

With the rise of complicated bureaucracies and the expansion of administrative structures in the modern States, the number of people who can be considered competent to act on behalf of a State has increased and that's why in recent years, this issue has been of great interest to the international case law and the legal doctrine⁴ as to which person or institution should be considered competent to make a particular State committed. In the context of conventional law, this issue was addressed in Articles 7, 46 and 47 of the Vienna Convention on the Law of Treaties (VCLT). But there is not a similar provision and precedent in non-conventional law and practice.

Although it has been argued that the issue of the competence of persons or organs acting on behalf of a State in the international arena has nothing to do with international law and is a matter of domestic law,⁵ it is well established today that

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- 1 Shabtai Rosenne, "The Agent in Litigation in the International Court of Justice", in William Kaplan & Donald McRae (eds), *Law, Policy and International Justice: Essays in Honour of Maxwell Cohen* (McGill-Queen's University Press, Montreal, 1993), p. 41; Shashank P. Kumar & Cecily Rose, "A Study of Lawyers Appearing before the International Court of Justice, 1999–2012", *European Journal of International Law*, vol. 25, no. 3 (2014), pp. 893-917 at p. 897. It is worthy to note that authors in recent work, in addition to emphasizing the official and determining position of the agent before the ICJ, explain the importance of the role of other representative present in the delegation team such as co-agent, advocate, etc. *Ibid.*
 - 2 Michael J. Matheson, "Practical Aspects of the Agent's Role in Cases Before the International Court", *The Law and Practice of International Courts and Tribunal*, vol. 1 (2002), p. 467.
 - 3 Hoffmeister examined in detail the evolutionary history of the functional use of individuals in the international relations of States. See Oliver Dorr & Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer, New York, 2012), p. 122.
 - 4 Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law* (Oxford University Press, Oxford, 2014), pp. 1-3.
 - 5 James Garner, "The International Binding Force of Unilateral Oral Declarations", *American Journal of International Law*, vol. 27, no. 3 (1933), pp. 493-497 at p. 496.

international law has its own rules in this regard⁶ and any theory other than this means the supremacy of domestic law over the international law and is therefore rejected.⁷ Besides, at the same time, if we are to consider only the internal regulations of the States regarding the competent authorities or institutions to accept the obligation, then we will encounter a completely ambiguous situation because the Constitutions while usually specifying competent authorities and institutions to accept treaty obligations, have remained silent on the competent agents toward other measures and practices.

As this article will show, the agent, among those through whom the States take actions or make statements⁸ has more specific features. Basically it is a discretionary right of States to choose their agents, advocates and counsels before Court and they do not need to observe any requirement.⁹ That is why the ICJ Statute is silent on representatives who are qualified to be chosen as State agent before the Court. Unlike the European Court of Human Rights, there is not even a requirement for State agents and advocates to have legal expertise in the Court.¹⁰ The agents may in accordance with their mandate, make statements inclining the acceptance of a new commitment on behalf of their respective States and are not merely considered defensive arguments by such a State. Neither the Statute nor the Rules of Court,

6 Michael Reisman & Mahnoush Arsanhani, “The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes”, *ICSID Review*, vol. 19, no. 2 (2004), pp. 328—343.

7 A Gigante, “The Effect of Unilateral State Acts in International Law”, *New York University Journal of International Law and Politics*, vol. 2 (1969), p. 357.

8 In the following discourse, the word “agent” will be used to refer specifically the representative of a State before the ICJ, as is used in the Statute of the ICJ. Meanwhile to refer other persons who represent a State in other arenas, the word “representative” or “authority” will be used, depending on the case.

9 Franklin Berman, “Article 42”, in Andreas Zimmermann et. al. (eds.), *The Statute of The International Court of Justice: A Commentary* (Oxford University Press, Oxford, 2006), p. 972.

10 Philippe Sands, “Interaction Between Counsel and International Courts and Arbitral Tribunals: Ethical Standards for Counsel”, in Wolfrum Rüdiger & Ina Gätzschmann (eds), *International Dispute Settlement: Room for Innovations?* (Springer, London, 2013), p. 128; Matheson, note 2, p. 475.

addressed directly the issue of the binding effects of agents statements. Despite some opposing views,¹¹ the majority of Doctrine¹² and practices of the PCIJ¹³ and ICJ¹⁴ demonstrates that the statements made by agents before the Court are binding on the appointing State. These two principal bodies of judicial settlements of

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- 11 Vladimir-Djuro Degan, “Unilateral Act as Source of Particular International Law”, *Finnish Yearbook of International Law*, vol. 5 (1994), p. 174; Csatlós, Erzsébet, “The Legal Regime of Unilateral Act of States”, *Miskolc Journal of International Law*, vol. 7 (2010), p. 41; Gigante, note 7, pp. 355-356; *ILC Yearbook*, vol. I (2002), p. 111, para 34; Also Statement of France Representative in 6th Committee of UN General Assembly, UN Doc. A/C.6/53/SR.16, para 8.
- 12 Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005*, 3rd edn, (Martinus Nijhoff, Leiden, 2006), p. 1128; Christian Eckart, *Promises of States under International Law* (Hart Publishing, Portland, 2012), pp. 76-77; Alfred P. Rubin, “The International Legal Effects of Unilateral Declarations”, *American Journal of International Law*, vol. 71, no. 1 (1977), pp. 1-30 at p. 3; Andreas Ziegler & Kabre Jonathan, “The Legitimacy of Private Lawyers Representing States Before International Tribunals”, in Freya Baetens (ed.), *Legitimacy of Unseen Actors in International Adjudication* (Cambridge University Press, Cambridge, 2019), p. 549; Alain Pellet, “The Role of the International Lawyer in International Litigation”, in Chanaka Wickremasinghe, *The International Lawyer as Practitioner* (British Institute of International and Comparative Law, London, 2000), p. 154; Gregory Messenger, “The Practice of Litigation at the ICJ: the Role of Counsel in the Development of International Law”, in Moshe Hirsch & Andrew Lang (eds), *Research Handbook on the Sociology of International Law* (Edward Elgar Publishing, Massachusetts, 2017), p. 211.
- 13 See *Mavrommatis case*, that PCIJ found “the binding character of British agent’s statement is beyond question”, in *Mavrommatis Jerusalem Concessions (Greece v Britain)*, Judgment of 26 March 1925, [1925] PCIJ, Series A, No. 5, p. 37; The Court reached the same conclusion in case of upper Savoy and district of Gex about the statement made by the respondent’s agent. In *Free Zones of Upper Savoy and the District of Gex, (France v. Switzerland)*, Judgment of 7 June 1932, [1932] PCIJ, Series AB, No. 46, p. 13;. Also, See *Upper Silesia Case*, in which the Polish agent declared that his State is no longer intended to continue the confiscation of the properties of the applicant State’s nationals. So, the Court concluded: ‘... [Court] can be in no doubt as to the binding character of all these declarations’, in *Certain German Interests in Upper Polish Silesia, (Germany v Poland)*, Judgment of 25 May 1926, [1923] PCIJ, Series A, No.7, p. 13.
- 14 In the course of hearings, which was raised to determine, *inter alia*, sovereignty over a disputed peninsula (Bakassi Peninsula), Cameron’s agent stated before the Court that his country is ‘faithful to its traditional policy of hospitality and tolerance’ on ‘to Nigerians living in the [Bakassi] Peninsula’. Consequently ‘the Court takes note with satisfaction of the commitment thus undertaken...’ in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)*, Judgment of Judgment of 10 October 2002, [2002] ICJ Rep, p. 452, para 317; In *Pulp Mills*, Argentina, the applicant party requested the Court to indicate that Uruguay, the respondent party shall cooperate in good faith with Argentina with a view to ensuring the rational utilization of the River Uruguay. During the course of oral proceedings, agent of Uruguay expressly reiterated his government’s intention to cooperate with Argentina. That’s why, the Court declares in response to the request for provisional measures that: ‘Whereas, having regard to...of these commitments affirmed before the Court by Uruguay, the Court does not consider that there

international disputes, have dealt with the issue of the binding effects of agents statements in at least seven cases, and in all of them except one case have found such statements to be binding. The case of *Questions Relating to the Seizure and Detention*, is the only case that the Court did not attribute the binding effects to the agents statements. However, such findings were not because of the denial of the capacity of agent to make the binding statement on behalf of the State, but due to the fact that basically the judges did not recognize any intention the agent might have to make such statements.¹⁵ Therefore, there is no doubt that the State agents

are grounds for it to indicate the remaining provisional measures requested by Argentina.’ in *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Order of 13 July 2006, [2006] ICJ Rep, p. 134, para 84. It is therefore obvious from the Court’s point of view that the statements of the agent of Uruguay have been binding on his State. This is the same conclusion that was reached by Court in *Habré case*. On February 2009, Belgium filed an Application instituting proceedings against Senegal to Prosecute or Extradite of Mr. Hissène Habré, the former President of Chad, who was accused of committing torture and crimes against humanity during his presidency. At the same time, Belgium filed a request for the indication of provisional measures, asking the Court to order ‘Senegal to take all the steps within its power to keep Mr. H. Habré under the control and surveillance of the judicial authorities of Senegal.’ Senegalese agent asserted on several occasions that the respective State is not contemplating lifting the surveillance and control imposed on Mr. H. Habré. During the hearings, the Court asked the agent of Senegal to explicitly reiterate this commitment in the proceedings. See *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Order of 28 May 2009, [2009] ICJ Rep, p. 154, para 68. Needless to say that if the Court did not believe that the statements of the Senegal agents were binding, it would not have made such a request. The Court taking note of the assurances given by Senegalese agent, found that the risk of lifting the surveillance and control imposed on Mr. H. Habré is not apparent and subsequently the indication of provisional measures is not justified. (*Ibid.*, p. 155, paras 72-73)

- 15 To better understand rationale behind the ICJ judgement, it is appropriate to explain briefly some aspects of this case. After Australia, seized certain documents and data from Timor-Leste’s legal adviser who resided in Canberra, on alleged security grounds, the latter State instituted proceedings against Australia, requesting the Court, to indicate, *inter alia*, the provisional measure that Australia must immediately return to the nominated representative of Timor Leste, all of the documents and data. See *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, Order of 3 March 2014, [2014] ICJ Rep, p. 148, para 1. After that, Australian Attorney-General who had Timor-Leste’s seized documents, pledged that the documents ‘will not be used by any part of the Australian Government for any purpose other than national security purposes.’ (*Ibid.*, p. 156, para 38) During the hearings, the Australian agent also made the following remarks regarding the statements of the Australian Attorney-General: ‘The Attorney-General...of Australia has the actual and ostensible authority to bind Australia...I need say no more. Again, as I said yesterday Australia has made the undertakings. Australia will honor them’, available at: <www.icj-cij/docket/files/156/17926.pdf>, accessed on 22 March 2019. Since ‘the Court has no reason to believe that that undertaking...will not be implemented by Australia’, because of “national security” reservation contained in the statements of Australian Attorney-General and its agent, the Court could not extract the binding obligation from those statements. (*Ibid.*, pp. 158-159, paras 44-47)

should be considered as the competent authorities to announce the commitment of the concerned State during the course of proceedings. Resolving the issue of the agent's competence to accept commitment on behalf of the appointing State raises another issue: out of authority statements made by the State agent before the Court and the extent which the State is committed to such statements. Since the agent may not have an employment relationship with the appointing State in the administrative sense, it is more likely that State would invoke the invalidity of the agent's statement because of the deviation from their authority. That's why it is necessary to look thoroughly at this issue.

Compared to Heads of State, Heads of Government and Ministers for Foreign Affairs who are commonly referred to as "Troika" because of their similarity in representing a State in international relations¹⁶, authority of other State officials and representatives to express consent to a commitment are subject to certain limitations.¹⁷ That's why whenever it comes to the eligibility of State officials to express consent of a State concerned to a commitment, it is inevitable to discuss the *ultra vires* actions of these officials. The scope and times of authority of the State agent before the Court to accept a commitment is somewhat different from that of other representatives of States, because depending on the case, a State before the court can express its consent in two types in two different stages: procedural consent and substantive consent. The first one involves the consent expressed by a State regarding the jurisdiction of the Court to hear a dispute to which that State is a party. Pursuant to Article 36 of the Statute of the Court, the acceptance of jurisdiction is a prerequisite for the commencement of the Court's proceedings on the case and must be determined *in limine litis* whether it is existed or not. But substantive consent, which is usually being expressed in merit phase, is not necessary and according to it, a State can, under various considerations, be committed to a new obligation due to the statements made by its agent during the proceedings. Thus, the out of authority actions by the agent in the proceedings can occur both through consent expressed to procedural and substantive issues.

16 Foakes, *note 4*, p. 5.

17 In the case of *Cameroon and Nigeria*, the Court declared that the restriction on Troika's acts is not presumed and must be publicized. See *Land and Maritime Boundary under between Cameroon and Nigeria*, *note 14*, p. 430, para 265. The Court, by doing so, made a clear distinction between how to invalidate the acts of these persons and other State officials under Article 46 of the VCLT. The Court also in *Armed Activities in Congo*, restricted the acts of other officials and representatives who represent a State "in a specific field" stating that they 'may be authorized by that State to bind it...in respect of matters falling within their purview.' See *Armed Activities on the Territory of the Congo (Congo v Rwanda)*, *Jurisdiction and Admissibility, Judgment of 3 February 2006*, [2006] ICJ Rep, p. 27, para. 47.

Accordingly, this essay is divided into three sections, to examine the effects of out of authority statements made by agents in jurisdictional (first section) and merits (second section) phases separately. In the first section, it turns out that among forms of jurisdiction granted to the Court, logically out of authority statements made by agents could only lead to the jurisdiction of the Court through *forum prorogatum*. On the contrary in the second section, it becomes clear that the appointing State could encounter a wide range of unintended substantive obligations due to *ultra vires* statements. Despite this difference, there is a common thread in both sections that involves the authority of appointing State which under certain mechanisms could invoke the *ultra vires* of agent's acts and become exempt from both the Court's jurisdiction and substantive obligations. (third section)

II. *ULTRA VIRES* ACTS OF STATE AGENT AND PROCEDURAL OBLIGATION

Although States have discretionary power on how to declare consent to the jurisdiction of the Court¹⁸, the Statute and the Rules of the Court, as a kind of guiding principle underpin that the Court generally obtains jurisdiction in three ways: 1-special agreement of the parties to refer a dispute to the Court. This agreement may also be in the form of jurisdictional clauses in treaties and conventions, providing that certain disputes shall or may be referred to the Court. (Articles 36(1) & 40 of Statute) 2-the so called "optional clause" under which State parties declare separately the acceptance of the Court's compulsory jurisdiction. (Article 36(2) of Statute) 3-*forum prorogatum* (Article 36(5) of Statute). Logically, State agents do not play a role over the first and second forms of jurisdictions and out of authority acts in expressing consent by the agent is possible only in third scenario, namely *forum prorogatum*. In practice there were cases in which the PCIJ found the jurisdiction through the act of an agent. For example, in the *Mavrommatis* case, although the Court did not have jurisdiction over some of the disputed privileges, the Britain's agent in his written statements accepted extension of the Court's jurisdiction.¹⁹ In *Chorzow Factory* case, also the defendant State (Poland) made a counter-claim, which was essentially outside the jurisdiction of the Court, but the agent of applicant State (Germany) declared in response that it accepted the jurisdiction of the Court to hear this claim.²⁰ So, the *forum prorogatum* is a possible way for agents to declare the Court's jurisdiction.

18 Shabtai Rossene, *The Law and Practice of the International Court, 1920-2005*, 3rd edn (Martinus Nijhoff Publication, Leiden, 2006), p. 558. Also see *Corfu Channel (Britain v Albania)*, Preliminary objection, Judgment of 25 March 1948, [1948] ICJ Rep, p. 27.

19 *Mavrommatis* case, note 13, p. 28.

20 *Factory at Chorzow (Germany v Poland)*, Judgment of 13 September 1928, [1928] PCIJ, Series A, No. 17, p. 37.

The best definition of *forum prorogatum* was introduced by Judge Lauterpacht in his separate opinion on *Genocide* case: '[*forum prorogatum*] is the possibility that if a State A commences proceedings against State B on a non-existent or defective jurisdictional basis, State B can remedy the situation by conduct amounting to an acceptance of the jurisdiction of the Court.'²¹ The reference to conduct amounting to an acceptance of the jurisdiction of the Court indicates that there are a variety of ways that ICJ can be competent upon them in the context of *forum prorogatum*. Therefore, one should not limit himself to the narrow minded formulation of Article 38(5) of the Rules of the Court. The Court also stipulates in the case of *Djibouti v France* that: "The jurisdiction of the Court can be founded on *forum prorogatum* in a variety of ways, by no means all of which fall under Article 38, paragraph 5."²²

Therefore, there are several ways to recognize the jurisdiction of the Court through *forum prorogatum*.²³ Among these ways, there are assumptions that the agent may recognize the Court's jurisdiction on behalf of the concerned State without having appropriate authority. In the *Anglo-Iranian Oil Co*, the Court declared that filing a preliminary objection by one party 'for the purpose of disputing the jurisdiction' could not mean acceptance of the Court's jurisdiction to enter merit phase.²⁴ A rare assumption would be that an agent, instead of objecting to the Court's jurisdiction, would resort to defense on the merits and pave the way for the *forum prorogatum*, and consequently the appointing State would declare that it has not given such consent to the jurisdiction of the Court. The *forum prorogatum* can also occur when 'Applicant's submissions go beyond the scope of the relevant title of jurisdiction' and the respondent's agent, contrary to the alleged will of the appointing State, 'does not object to that extension *ratione materiae*.'²⁵ In such situations, is the State entitled to invoke the omissions or *ultra vires* nature of its

21 Separate Opinion of Judge Ad hoc Lauterpacht, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v Serbia and Montenegro)*, Order of 13 September 1993, [1993] ICJ Rep, p. 416.

22 *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Merits, Judgment of 4 June 2008, [2008] ICJ Rep, p. 205, para 64. Furthermore, PCIJ in *Rights of Minorities in Upper Silesia* declared that: 'acceptance by a State of the Court's jurisdiction in a particular case is not, under the Statute, subordinated to the observance of certain forms...' See *Rights of Minorities in Upper Silesia (Minority Schools) (Germany v Poland)*, Judgment of 26 April 1928, [1928] PCIJ, Series A. No. 15, p. 23.

23 Orfeas Chasapis Tassinis, "Preliminary Issues Posed by the Doctrine of *Forum Prorogatum* and the Case of *Djibouti v. France*", *International Community Law Review*, vol. 15 (2013), p. 494.

24 *Anglo-Iranian Oil Co. Case (United Kingdom v Iran)*, Preliminary objections, Judgment of 22 July 1952, [1952] ICJ Rep, p. 114.

25 Christian Tomuschat, "Article 3", in Andreas Zimmermann et. al. (eds), *The Statute of The International Court of Justice: A Commentary* (Oxford University Press, Oxford, 2006), p. 614.

agent's acts and argue that the Court is incompetent to enter the merits stage or to expand scope of its jurisdiction?

A. Methodological Usage of VCLT

Contrary to the significant practice of the Court and Permanent Court in acknowledging that the agents are competent on accepting a new commitment on behalf of their States, which was discussed briefly in the introduction, there is no case law on *ultra vires* act of agents. In fact, in all cases where PCIJ and ICJ have recognized their jurisdiction through *forum prorogatum*, there is no objection from the relevant State on the acts that has led to the recognition of the Court's jurisdiction.²⁶ The Court instead, has repeatedly faced the claim that the declaration of consent to its jurisdiction has been stemmed from out of authority of the other State officials.²⁷ Interestingly, except one case, all of these instances were concerned

26 Basically, this was not the case with the ICJ. In the *Corfu Channel*, the Court's initial jurisdiction was based on a letter sent by the Albanian Deputy Foreign Minister. See *Corfu Channel*, note 18, p. 27; Although, there are differing opinions as to whether this case should be categorized in the list of cases in which the Court upheld its jurisdiction on the basis of *forum prorogatum*. For more on this See e.g. C. H. M. Waldock, "Forum Prorogatum or Acceptance of a Unilateral Summons to Appear before the International Court", *The International Law Quarterly*, vol. 2, no. 3 (1948), pp. 377-391, at p. 380 *et seq*; Sienho Yee, "Forum Prorogatum in the International Court", *German Yearbook of International Law*, vol. 42 (1999), p. 171 *et seq*. In the case of *Certain Criminal Proceedings in France*, the Court's jurisdiction to hear a lawsuit initiated by the Congo was based on a letter sent by the French Foreign Minister. However, this case was finally removed from the list of the Court cases. The same thing happened about *Djibouti v France* Case, where the Court found jurisdiction based on a letter from the French Foreign Minister. Therefore, in none of these cases the statements of an agent brought on the Court's jurisdiction. See Tassinis, note 23, pp. 494-495; In the PCIJ era also, in the cases of *Mavrommatis*, *Minority Schools in Upper Silesia* and the *Chorzow Factory* the court upheld its jurisdiction through *Forum prorogatum* derived from actions of State agents, but this was not objected by the States. See the section 2 of this article.

27 Turkey in *Aegean Sea case*, arguing, *inter alia*, that joint communiqué between Greece and Turkey was introduced as a basis for Court jurisdiction 'does not amount to an agreement under international law' adding 'if it were one, it would need to be ratified at least on the part of Turkey.' See *Aegean Sea Continental Shelf (Greece v Turkey)*, *Questions of Jurisdiction and/or Admissibility, Judgment of 19 December 1978*, [1978] ICJ Rep, p. 39, para 95. In *Nicaragua Case*, it was contended that US 1984 Notification about the ICJ jurisdiction has been issued in contrary to 'Constitution of the United States as to the power of making treaties.' See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, *Jurisdiction and Admissibility, Judgment of 1984*, [1984] ICJ Rep, p. 421, para 66. Also in, *Nottebohm case*, Guatemala stated that it can't appear before the Court because of its internal law concerning international treaty making. See *Nottebohm (Liechtenstein v Guatemala)*, *Preliminary Objection, Judgment of 18 November 1953*, [1953] ICJ Rep, p. 116. In a similar way, Bahrain in *Maritime Delimitation and Territorial Questions argued*, in declaring its consent to Court jurisdiction, its constitution hasn't been observed. See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, *Jurisdiction and Admissibility, Judgment of 1 July 1994*, [1994] ICJ Rep, p. 121, para 26.

alleged breaches of internal laws related to the capacity to express consent to the treaties. The exception occurred in the case of *Genocide*, in which the defendant State claimed that under Bosnia and Herzegovina Constitution, representation in international relations lies in the capacity of 'Presidency as a collective organ' and since the expression of consent to the jurisdiction of the Court is an example of the management of international relations, the consent expressed by Allja Izetbegovic who was serving as President of the Presidency at a time at which he granted the consent, was an act out of his authority.²⁸ Regretfully in all these cases, the Court without addressing the claims, considered them to be ineffective in the course of proceedings.²⁹

It seems that the connection between the Court's jurisdiction and the law on treaties has some guidance about the present issue. Also the Court in *Nicaragua* case admits that the issue of its jurisdiction is 'governed in many respects by the principles of treaty law.'³⁰ Rosenne also believes that the authority to accept the Court's jurisdiction, is the same authority as set forth in Articles 46 and 47 of the VCLT, which deal with the claim of invalidity of a treaty on the basis of violation of a fundamental internal law and non-observance of specific restrictions by the representative, providing a very narrow space for claiming invalidity. Indeed, these two articles have been battleground for two conflicting principles of State sovereignty and the security of treaties,³¹ or two conflicting schools of thought namely Constitutionalism and Internationalism.³² Although there are many theoretical and practical conflicts, in particular regarding the contents of the Article 46 of VCLT, in the history of drafting this Article,³³ eventually ILC, relying on the contemporary practice of States, took the side of the security of treaties. That's why both of the Articles have been drafted with negative formulation to reflect as

28 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v Serbia and Montenegro), Preliminary objections, Judgment of 11 July 1996*, [1996] ICJ Rep, p. 416, para 44.

29 *Ibid.*, *Nottebohm*, note 27, p. 123; *Nicaragua case*, note 27, p. 421, para 66; *Aegean Sea*, note 27, p. 39, paras 95-96.

30 *Nicaragua case*, note 27, p. 421, para 66.

31 Dorr & Schmalenbach, note 3, p. 805.

32 Malgosia Fitzmaurice and Olufemi Elias, *Contemporary Issues in the Law of Treaties* (Eleven International Publishing, Utrecht, 2005), p. 373; Hannah Woolaver, "From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal", *European Journal of International Law*, vol. 30, no. 1 (2019), pp. 73-104, at p. 90.

33 To study these conflicts and the history that at some points reflected in the Constitutionalist School and in recent era was inclined to the Internationalist School, See e.g. Hans Blix, *Treaty-Making power* (Stevens & Sons, London, 1960), pp. 371-388; Luzius Wildhaber, *Treaty Making Power and Constitution: An International and Comparative Study* (Helbing & Lichtenhahn, Basle, 1971), p. 152; Dorr & Schmalenbach, note 3, pp. 776-780.

much as possible the exceptional aspect of the permission granted by these Articles to declare the invalidity of treaties.³⁴

It may be argued that the Court's jurisdiction does not concern the requirements of security of treaties and therefore it could expand the scope of State's power to invoke the invalidity of out of authority acts of their agents. Accordingly, whenever the consent of the agent to the Court's jurisdiction, is expressed in violation of any internal law concerning the declaration of consent to an obligation, regardless of whether it is of fundamental importance or not, the concerned State may declare the invalidity of such consent and refrain from appearing before the Court. Indeed, there are other considerations other than the security of treaties, such as the priority of the consent and sovereignty of States, regarding the Court's jurisdiction because it is an inalienable fact that 'international Judicial Jurisdiction is based on and derives from the consent of States'³⁵ and the UN Charter 'explicitly set forth that the parties to any dispute have the right to resort to methods of settlement of their choice.'³⁶ Besides, if States are forced to appear before the Court against their real will, the compliance with the Court's decision on that case would be "abysmal."³⁷

Lister introduces the most radical theory on the relationship between the jurisdiction of judicial institutions and the consent of States. Trying to create a link between the consent of State and functional and normative legality of the ICJ, he writes: "Consent of the parties" is the most important basis of the legitimacy of international courts and these judicial bodies 'cannot hope to be effective without this legitimacy.'³⁸

34 *ILC Yearbook*, vol. II (1966), p. 241, para 8; Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, Leiden, 2009), p. 588; Anthony Aust, *Modern Treaty Law and Practice*, 2nd edn (Cambridge University Press, Cambridge, 2007), p. 313.

35 Hugh Thirlway, "The Law and Procedure of the International Court of Justice 1960–1989: Part Nine", *British Yearbook of International Law*, vol. 69, no. 1 (1998), pp. 1-83 at p. 4.

36 Tomuschat, *note 25*, p. 602.

37 *Ibid.*

38 Matthew Lister, "The Legitimizing Role of Consent in International Law", *Chicago Journal of International Law*, vol. 11 (2011), p. 665. In a time in which at least the doctrine sees a reduction in the role of State in international law as a way to further its development, the work of Liester should be deemed unique. In this work, he tries to use Lockean's state of nature and his social contract theory to show that how the consent of the States brings about legitimacy in international law but as he has written, a significant part of his work has been devoted to justify the consent of States to establish jurisdiction for international tribunals. Like Kelsen, he sees coercion as the distinguishing feature for any legal order, including international law and then without making any reference to it, influenced by John Austin's theories he tries to distinguish between lawful and unlawful force. He believes that the State consent is the factor legitimizing the force in international law. Therefore Liester should be categorized as non-Hartian positivists.

It is true that the Court's jurisdiction does not address the security of treaties, but there are other fundamental concerns which can't be substituted solely with the consent and will of States. It must be admitted that expanding the grounds for the claim of invalidity of the consent expressed by agents to the jurisdiction of the Court on the basis of his *ultra vires* acts, means the preference of "real will" doctrine over the "declared will" of State doctrine, which is rightfully described by Melescanu, a former member of ILC as "dangerous enterprise", because such a preference "introduces an element of instability" in international law.³⁹

By prioritizing the real will, every time the Court upholds its jurisdiction based on the *forum prorogatum* through agent's conduct, one must inevitably expect the Court to explore all relevant internal laws and regulations to ensure that the agent has not violated any internal law or acted beyond his authority by expressing consent on behalf of the party concerned. This will become even more challenging when we recall that even some internal laws have ambiguities that it is difficult to interpret even for internal competent organs and jurists, let alone that the judges of the Court want to get a clear interpretation and meaning.⁴⁰ According to Klabbers, even the declared will in international law is "an awkward concept" due to difficulties associated with its identification, not to mention the real will.⁴¹ Therefore, expanding the scope of Articles 46 and 47 of VCLT and extending to the issue of recognizing the Court's jurisdiction through *forum prorogatum* would further complicate an already complicated concept. Most importantly, the need for the consent of a State on the Court's Jurisdiction, which is basically a procedural issue no matter how principled or normative, will categorically not be more important than the consent to a substantive commitment.

When international law (i.e. VCLT) on the choice between declared will and real will puts the declared will ahead of real will, it is not clear why similar approach should not be pursued *a fortiori* on expression of consent to the Court's jurisdiction which is basically a procedural matter. It is true that 'no State can, without its consent, be compelled to submit its disputes with other States... to any...kind of

39 *ILC Yearbook*, vol. I (2001), p. 199, para 46. In fact, during the ILC's deliberations on unilateral acts of States in 2001, Melescanu give this explanation in the midst of discussions on whether the real will commits States to their unilateral acts or their declared will. Zemanek also precisely believed that going beyond the declared will to gives a chance to instability in international relations. See: Karl Zemanek, "The Legal Foundations of the International System: General Course on Public International Law", *RCADI*, vol. 266 (1997), p. 213.

40 Gigante, *note 7*, pp. 356-357.

41 Jan Klabbbers, *The Concept of Treaty in International Law* (Kluwer Law International, Hague, 1996), p. 65.

peaceful settlement',⁴² but allowed cases of invoking the invalidity of consent as described in the Articles 46 and 47 of VCLT are sufficient to save the State from being caught in the middle of a case which is inconsistent with its superior considerations and the State has not consented to it.

B. Methodological Usage of *Forum Prorogatum's* Nature

It should also be noted that giving absolute priority to the State consent is also in conflict with the flexible nature of *forum prorogatum*. In fact, *forum prorogatum* is the product of the conciliation between two competitive norms: will and consent of State to appear before an international trial and "permanent system of adjudication."⁴³

So this is a correct argument that: 'As a unique compromise between the need for flexibility and the appearance of formality, the doctrine of *forum prorogatum* has evolved.'⁴⁴ Consequently, from legal rationale point of view, the use of provisions of Articles 46 and 47 of VCLT in regulation of competence and authority of State agent to declare procedural and substantive consent to the Court's jurisdiction shall not impeded⁴⁵ and specially for the time being, in the absence of any case law and State practice, it can be used as the most reliable guidance. Thus it must be assumed that appointing of agent by State grants "full powers" to him/her or at least constitutes 'the practice of the States concerned or from other circumstances implying that their intention was to consider that person as representing the State'⁴⁶ to express the consent. Therefore the agent has the ostensible authority to express the State consent to the jurisdiction of the Court.⁴⁷ But 'if consenting to the Court's jurisdiction is of fundamental importance and if the defect {of internal law} is manifest'⁴⁸ the State concerned may 'invoke the fact that its consent' to the ICJ's jurisdiction 'has been expressed in violation of a provision of its internal law regarding competence'⁴⁹

42 *Eastern Carelia, Advisory Opinion of 23 July 1923, PCIJ, Series B, No. 5, p. 27.*

43 Tassinis, *note 23*, p. 484.

44 *Ibid.*

45 Krzysztof Skubiszewski, "Unilateral Acts of States", in Mohammad. Bedjaou (ed.), *International Law: Achievements and Prospects* (Martinus Nijhoff, London, 1991), p. 230. Skubiszewski seeks to extend the rules regarding the declaration of consent to the treaty, enshrined in VCLT, to the unilateral acts of States. According to him, these rules also apply, by *mutatis mutandis*, to the unilateral acts of States. It should not be forgotten that the acts of agents on declaring consent to the Court's jurisdiction have similarities with the model of unilateral acts of States.

46 Article 7 of VCLT.

47 Yee, *note 26*, p. 185.

48 *Ibid.*

49 Article 46(1) of VCLT.

to declare that consent. Furthermore, “if the authority of” an agent ‘to express the consent of a State to’ participate before Court in a particular case ‘has been made subject to a specific restriction, his omission to observe that restriction’ may be invoked ‘as invalidating the consent expressed by him...’⁵⁰

III. *ULTRA VIRES* OF STATE'S AGENT AND SUBSTANTIVE OBLIGATION

The findings of the previous section are applicable on accepting a substantive obligation by the agent before the Court which is alleged to be in violation of fundamental internal law and specific restrictions. Even considerations involving the expression of consent to the Court's jurisdiction which were discussed before, would not be raised up regarding the acceptance of substantive obligations and the provisions on treaty law can be applied with more certainty.⁵¹

Formality of the Court's proceedings, attention to good faith, the importance of peaceful settlement of disputes, and most importantly the Court's efficiency requires that the opportunities to claim the invalidity of obligations accepted by the agents, just like international treaty law to be limited. Therefore if the agent accepts a substantial obligation on behalf of the appointing State during the proceedings before the Court, the State concerned may only invoke the invalidity of that obligation should the consent to be bound by the obligation has been expressed in violation of fundamental internal law or special restrictions imposed on his authority. Internal law of fundamental importance could consist of a wide range of rules and regulations and fundamental nature of these laws would only be judged with ‘reference to the constitutional structure of the specific State at issue.’⁵² Even it has been said that in the light of recent evolutions of human rights concepts, the fundamental rights and freedoms enshrined in the Universal Declaration of Human Rights, two International

50 Article 47 of VCLT.

51 The Special Rapporteur on the Unilateral Acts of States, while drafting a rule on the act by State representatives that violates internal law or specific restrictions, tries to get closer to the provisions of Articles 46 and 47 of the VCLT. He writes in his third report: ‘A State may invoke the invalidity of a unilateral act:... (h) If the unilateral act as formulated conflicts with a norm of fundamental importance to the domestic law of the State formulating it.’ Compared to Article 46 of VCLT, the specification “manifest” as a characteristic to prove the violation of internal law was omitted and practically any kind of violation of a rule of fundamental internal law could lead to invalidity of unilateral act of State. This formulation was strongly criticized by other members of the ILC. See *ILC Yearbook*, vol. I (2000), pp. 126-127, para 23. The criticisms led to the Special Rapporteur to put away the topic of the inconsistency of unilateral acts with internal law of respective State until his last report. In this report, he reiterated the formulation of his previous reports. But frequent criticisms never let this topic to be reflected in the Commission's guideline on unilateral declaration of States.

52 Dorr & Schmalenbach, *note 3*, p. 790.

Covenants and some other fundamental human rights instruments can be recognized as fundamental law.⁵³ “Specific restrictions” are also derived from a kind of internal law and therefore can affect the State consent expressed to an obligation.⁵⁴ But contrary to internal law of fundamental importance which, by its very nature, is generally well known among other subjects of international law, they lack such a feature and must be pre-notified. In the following section it will be discussed how to invoke these legal impediments to explain invalidity of agent’s acts.

A. Timing and Framing of Invoking *Ultra Vires* Statement of Agent

The VCLT requires to notify the specific restrictions of the representative to declare the consent to be bound by a treaty “to the other negotiating States.” On declaring the State consent before the Court, notifying about the specific limitations of the agent reasonably will be valid when it is made to the Court itself and not to the other party to the dispute. Because in the case of procedural consent, the addressee of this consent is directly the Court itself, and it is the consent that is the basis of the Court’s jurisdiction. In the case of substantive consent, also it is ultimately the Court that identifies the State’s commitment through its judgement. On the other hand, the requirements of good faith and estoppel or the prohibition of contradictory behaviour have made the VCLT to declare explicitly that such a notification should be made prior to expression of State’s consent. This is because in the field of treaties, the acts of the State representative has an immediate effect and creates a legal relation promptly, so States must be estopped from relying on actions beyond specific restrictions by their representative -which are not typically known to other parties- to invalidate such a relationship. On the contrary, statements made by the agents need passage of time and issuing a judgement by the Court to become at least judicially binding and take legal effect. Therefore, there is no need for pre-notification of the specific restriction on the agent’s actions, prior to his/her remarks. Nevertheless, this notification can’t be postponed until the judges enter into deliberations to adopt their judgement, since the statements of the agent definitely affect the statements and arguments made by the other party in the course of litigation.

On the other hand, the relationship between the parties to the dispute and the Court is not absolutely unrestricted, and is subject to the provisions set forth in Articles 45 and 54 of Rules of the Court. As a result, the State in question, at the earliest opportunity after the agent’s *ultra vires* action, must invoke the invalidity of the action before the Court. According to the two phases of written and oral proceedings in the Court, the stages of communication between the parties to a

53 *Ibid.*

54 Olivier Corten & Pierre Klein (ed.), *The Vienna Conventions on the Law of Treaties: A Commentary*, Vol II, (Oxford University Press, Oxford, 2011), p. 1103.

dispute with the Court are as follows: presentation of Memorial or Counter-Memorial, providing Reply and Rejoinder if the Court authorize in accordance with Article 45(2) of the its Rules, using the possibilities provided in Article 61(1) of Rules of the Court to draw the Court's attention to "any points or issues to which" the parties would like the Court "specially to address", the oral proceedings which may be held in several sessions, and eventually providing final submissions, pursuant to Article 60(2) of Rules of Court. Each of these steps is considered to be the first opportunity for the previous step. Given the speedy flow of communication in the present era and media coverage of the Court's hearings, it should be noted that the relevant State is merely and ultimately allowed to invoke invalidity of the agent's remarks which has led to its procedural or substantive commitment, at the earliest opportunity to communicate with the Court. The phases and means of communication between the parties and the Court, like procedure of all courts, are clear and rigid and it is not possible to act beyond them.⁵⁵ Although in some cases communications have been made between the parties to the dispute beyond the above mentioned schedule with the Court and the judges of the Court have examined them, but especially when these communications have an effect on the rights of the other party, the Court was reluctant to consider legal effects for them.⁵⁶ An

55 Of course, the Court has shown flexibility whenever necessary and has provided the ground for the parties to communicate to the Court by issuing orders. For instance, in *Oil Platform*, the Court allowed the parties to have totally nine communications to the Court. Available at: <<https://www.icj-cij.org/en/case/90/written-proceedings>>, accessed on 2 June 2020; Also see *Genocide Case*, in which the parties frequently allowed to communicate to the Court and make comment. Available at: <<https://www.icj-cij.org/en/case/91/written-proceedings>>, accessed on 2 June 2020.

56 In the case of *US Diplomatic and Consular Staff*, Iran preferred not to appear before the Court and instead, to send two communications signed by its Foreign Minister. These communications did not fit into the framing and procedural requirements, but the Court decided to consider them. Interestingly, the Court presumed that Iran's communications have to be based on the requirements of Article 53 of the Statute and pointed out: 'in accordance with its settled jurisprudence, the Court, in applying Article 53 of its Statute, must first take up, *proprio motu*, any preliminary question, ... that appears from the information before it to arise in the case ...' See *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, *Jurisdiction and Admissibility, Judgment of 24 May 1980*, [1980] ICJ Rep, p. 18, para 33. Therefore, if legal grounds based on requirements enshrined in the Statute and Rules of Court do not allow so, there is no reason to scrutinize the state communications and declarations beyond the Court's proceedings. The Court stipulates in this case that some of Iran's claims, as described in its communications, 'if invoked in legal proceedings must clearly be established...' *Ibid.*, p. 38, para 82. Therefore according to the Court, claims and statements out of "legal proceedings" or the communications and declarations made outside the framework of the Statute and the Rules of Court, *ipso facto* are not of legal value. On the other hand, it should be noted that the exceptional attention to Iran's unusual communications can be analyzed in the context of the Court's judicial diplomacy.

approach other than this, could endanger the principle of “equality of arms” which the Court considers it ‘a central aspect of the good administration of justice.’⁵⁷ Also, if oral and written proceedings are in common in accordance with Article 47 of the Rules of Court, or if an oral proceeding is held in one session, these cases would be similar to the situation in the VCLT and the statement of agents has instant effect, so the principles such as estoppel and good faith require that the State concerned pre-notify about the specific restrictions in order to avoid being committed. It should be reminded that in the case of treaties subject to ratification, the State can remedy any breach of its consent in ratification stage⁵⁸ but such a solution does not work on the statements made by State agents before the Court and consequently the best buffer for the States is to notify the specific restrictions of their agents to accept a particular commitment in advance. The advantage of this strategy is that it eliminates the need for State to prove the fundamental importance of the internal law, which claims has been violated by its agent.

IV. CONCLUSION

The precedent of the ICJ and the PCIJ leave no doubt that the agent is the competent authority to declare reliable obligation on behalf of the concerned State. Yet the main challenge arises when the agent takes *ultra vires* act because there is no formal regulation governing the matter. Although in recent years, the Court has sought to fill gaps in its Rules, it has not paid yet any attention to the issue of *ultra vires* act of agent.

Perhaps the initial vision that this issue is subject to the general rules governing the acts of other representatives of the State has led neither the judges of the Court nor the doctrine to consider the matter. However this article showed that in principle, the dual function of the agent (i.e. formal and substantive competence) distinguishes these persons from other representatives of a State. The second reason for this gap or negligence can be related to the fact that so far there has been no case that specifically involves the Court on deciding about those acts that fall beyond the competence of agents and subsequently the relevant State has objected to such an act. However, in the future, it is likely that the Court will clearly face the contention

57 *Judgment No.2867 of the Administrative Tribunal of the ILO, Advisory Opinion of 1 February 2012*, [2012] ICJ Rep, pp. 10 and 25, para 35. In this case, the Court explicitly considers application of the principle of equality of arms as a way to create equal opportunity for attendance before the Court. *Ibid.*, p. 27, para 39. For the comprehensive and detailed study of the equality of arms principle in the ICJ’s case law See e.g. Stefania Negri, “Equality of Arms – Guiding Light or Empty Shell?”, in Michael Bohlander (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (Cameron May, London, 2007), p. 13. Also See Separate opinion of Judge Cançado Trindade, *Judgment No.2867 of the Administrative Tribunal of the ILO*, [2012].

58 Aust, note 34, p. 315.

of invalidity of the agents' *ultra vires* acts. Until the Court mentions certain provisions in this regard in its Rules, It is necessary to have a clear mechanism for dealing with this issue.

The first guiding principle for formulating a rule in this regard is the methodological use of the VCLT. Invoking the existing mechanism in this Convention is justified in two ways. First, the VCLT provides the most complete and clear mechanism for managing the *ultra vires* actions of State representatives. Second, since the jurisdiction of the Court in many respects is subject to the rules of law of treaties, it would be possible to use the VCLT rules to invalidate the commitments derived from *ultra vires* acts of the State's agents. However, using this mechanism only as a starting point can be useful, and after that it should be abandoned immediately. Because this mechanism can be as misleading as it is useful. This article shows that contrary to the immediate effect of the consent declared by the representatives and other State's officials towards a treaty, the acts of agents have no immediate effect. Studies conducted in this essay demonstrates that the time factor in the process of transforming statements of an agent into a binding obligation for the relevant State, plays a determining role in specifying the procedure of invalidating such an obligation. This special feature makes the mechanism of invalidity of the acts of the agent before the Court, as in the case of the VCLT, quite exceptional. On the contrary, this mechanism is more procedural and provides different opportunities for the relevant State to declare the invalidity of its agent's statement depending on the stages of the proceedings in the ICJ. Therefore, in this case, it is not necessary for States to announce the functional limitations of their agents in advance, but depending on the concerned phase of proceeding, the opportunity for such an announcement extends until affecting the arguments of the other party on the one hand, and determining the fate of judicial proceedings before the Court on the other.

BUSINESS AND HUMAN RIGHTS INITIATIVES IN INDIA- CORPORATE SOCIAL RESPONSIBILITY SPENDING AND NATIONAL VOLUNTARY GUIDELINES

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Abstract

The UN Guiding Principles on Business and Human Rights (UNGPs) prepared by John Ruggie and endorsed by the United Nations General Assembly on 16 June 2011, seeks to implement a “protect, respect and remedy” framework. Corporate Social Responsibility (CSR) is the aspect of ‘respect’ for human rights. Multi-national corporations (MNCs) along with their complex supply chains have to ensure that the human rights principles are not violated at any step of production and supply. CSR has thus become the theme of a number of legislative endeavours as well as international normative instruments. This article intends to analyse the Indian experience with the concept of CSR in terms of the Company Act 2013. It traces the evolution of CSR and its development in India and comparatively analyses it in the context of the developments at the international level. In this context, the paper dealt with the recently adopted National Guidelines on Responsible Business Conduct by the Government of India.

Keywords: *business and human rights, corporate social responsibility, business responsibility report, national guidelines on responsible business, company law*

I. INTRODUCTION: CSR

There have been growing concerns about the ‘cost’ of economic development and its effect on human life. As a result there is an increasing emphasis on the social impact of the corporate activities. CSR as concept has invited a lot of attention both nationally and internationally. CSR is not merely charity done by the business community, it involves a dynamic process by which business is conducted so as to promote public good and mitigate any adverse impact of the business projects on the society. Thus as defined by the Commission of the European Communities (2003), CSR “is the continuing commitment by business to behave fairly and responsibly and contribute to economic development while improving the quality of life of the work force and their families as well as of the local community and society at large.”

This paper traces the historical background of the concept of CSR in India and explores initiatives undertaken by the current Government of India to exhibit that CSR is gaining recognition among companies as determined by the government. An attempt will be made under this paper to critically examine Section 135 of the Company Act 2013 to find out whether the mandatory contribution of the CSR is complied by the companies. The paper is divided into seven broad sections

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highlighting Indian experience on Business and Human Rights (BHR) and it will describe measures undertaken recently in the Indian context. The study also aims to find out whether CSR development in India are in conformity with international development of BHR or whether the Government of India is following its unique approach in ensuring compliance by the companies of CSR. This study also includes a section on the reporting process under the National Voluntary Guidelines (NVG) in India which addresses the needs of Indian stakeholders. Lastly, this article will also demonstrate the transformation undertaken with the enactment of the SEBI guidelines which directed certain listed companies to disclose their Business Responsibility Reports (BR) Practices adhering to the NVG framework and also its further strengthening with the adoption of the National Guidelines on Responsible Business Conduct (NGRBC) on 10 December 2018.

A. History of Business and Community in India

CSR is not a novel concept for India, corporate philanthropy has been part of the practises of the Indian business class since before the coining of the phrase CSR. India had a tradition of business charity and, to some extent, social responsibility as well. This deeply rooted tradition continued to influence business leaders and business houses right down to modern times.¹ The trader community enjoyed a high status in Indian society. It was considered an asset to society and was treated with respect and civility. In India reference to business responsibility can be found as long ago as 600 BC. During those days the merchant was considered an asset to society and was treated with respect and civility as is recorded in the *Mahabharata* and the *Arthashastra*.² Over the centuries, this strong tradition of charity in almost all the business communities of India has acquired a secular character. The emergence of Buddhism and Jainism improved the status of merchants in society. Merchants organised their own guilds and the leaders of the guilds were men of great wealth who served as intermediaries between the State and the guilds, between different guilds and among guild members. Charity was an ingrained part of business in most merchant communities. It was aided by the fact that there was little outlet for merchant wealth at the time. The single most important motive was religious belief. All the religious philosophers prevalent in India of the time promoted to giving for community benefit. For the Hindus, religious charity was two kinds:

1 Balakrishnan Muniapan, “ Corporate Social Responsibility: A Philosophical Approach from an Ancient Indian Perspectives”, *International Journal of Indian Culture and Business and Management*, vol.1, no. 4 (2008), pp. 408-420.

2 P. Radhakrishnan, *Kautilya Arthshastra*, (2005) Available at < <http://www.chinfo.org/%5Cdownloads%5CScholars%5CEssay1.pdf>> visited on 15 March 2020 ; E.M. Epstein, “Religion and Business – The Crcritical Role of Religious Traditions in Management Education”, *Journal of Business Ethics*, vol. 38 (2002), pp.91–96.

purtha and *istha*, that is secular and related to sacrifice respectively.³ Examples of *purtha* gifting were the dedication for public use of wells, tanks and temples, the distribution of food, the maintenance of public gardens, planting of trees by the road side and building of rest houses for travellers. Over the years *purtha* works became more popular than *istha charity*.⁴ In the pre-industrialized period philanthropy, religion and charity were the key drivers of CSR. The industrial families of the 19th century had a strong inclination toward charity and other social considerations.

The beginning of industrialisation and the establishment of British rule marks the transition from merchant charity to industrial philanthropy. Merchants continued to build temples and wells, donated liberally for the establishment of *pranjrapoles*, *dharamshalas* and bathing ghats, and fed the poor and needy during calamities, support of education changed from opening pathshalas and madarsas to modern school and colleges, especially for girls. Business involvement in social welfare and development has been a tradition in India and its evolution from individuals' charity or philanthropy to CSR,⁵ Corporate Citizenship and Responsible Business can be seen in the business sector over the years.

Also, many of India's leading businessmen were influenced by Mahatma Gandhi, and his theory of trusteeship of wealth⁶ contributed liberally to his programmes for removal of untouchability, women's emancipation and rural reconstruction. In the last few decades the role of business in society has undergone a profound transformation driven by advances in information technology and communication, growth in cross-border trade, global capital flows, and the emergence of new

3 P. Sundar, *Business and Community: The Story of Corporate Social Responsibility in India* (Sage publications, New Delhi, 2013), p. 79.

4 *Ibid.*

5 Corporate Social Responsibility (CSR) is neither synonymous with Corporate Philanthropy nor an alternative. In Corporate Philanthropy, corporations donate a certain portion of their profits to charitable causes. According to the World Business Council for Sustainable Development, CSR could be defined as, "the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large".

6 He wrote : 'Everything belonged to God and was from God. Therefore it was for His people as a whole, not for a particular individual. When an individual had more than his proportionate portion he became a trustee of that portion for God's people. God who was all-powerful had no need to store. He created from day to day; hence men also should in theory live from day to day and not stock things. If this truth was imbibed by the people generally, it would become legalized and trusteeship would become a legalized institution'. R. B. Upadhyaya, *Social Responsibility of Business and Trusteeship Theory of Mahatama Gandhi* (Sterling Publishers, New Delhi, 1976).

constellations of actors.⁷ The last decade of the twentieth century witnessed a shift in focus from charity and traditional philanthropy toward more direct engagement of business in mainstream development and concern for disadvantaged groups in the society. It has been realized by the companies in India that the business cannot succeed in isolation and social progress is equally necessary for sustainable growth. No doubt, CSR practice has both ethical and political dimensions, particularly in India where there exists a wide gap between sections of people in terms of income and standards as well as socio-economic status.

II. BUSINESS AND HUMAN RIGHTS: INDIAN EXPERIENCE

Traditionally protection against human rights violations has been the responsibility of the States, thus most of the human rights documents are directed at the State actors i.e. protection of individuals against the human rights violations by State actors. However, in the last few decades with the advent of globalisation the territorial/jurisdictional boundaries have become permeable and the scope human rights issues have become more diverse to include MNCs. Businesses are increasingly focused on the impact they have on individuals, communities and the environment. It is clear that one of the central measures of a company's social responsibility is its respect for human rights.⁸ And while most companies recognize the moral imperative to operate consistent with human rights principles, recognition is growing that respect for human rights also can be a tool for improving business performance.⁹ Ensuring that business operations are consistent with these legal principles helps companies to avoid legal challenges to their global activities. In recent years in the United States and in other countries, courts have considered law suits alleging that multinational companies, sometimes through their business partners, have contributed to human rights violations in their global operations.¹⁰ MNCs often have complex supply chains which include various third-party suppliers and other sub-contractors; and many of these actors along these long supply chains may be involved in human rights violations in terms of non-adherence to basic labour law standards. MNCs have often failed to ensure that all the actors included in these supply chains adhere to basic human rights standards for the people employed by them.

7 A. Sood and B. Arora, "The Political Economy of Corporate Social Responsibility in India", United Nations Research Institute for Social Development (UNRISD), Technology, Business and Society Programme Paper No.18, (November 2006), available at < <https://www.researchgate.net/publication/5219574>> accessed on 4 June 2020.

8 D. Nayyar, "Alleviating Poverty: Role of Good Governance and Constitutional Reform", *Economic and Political Weekly*, vol. 35 (2000), pp. 3739-42.

9 G. Alfredsson, *Human Rights and Good Governance. Building Bridges* (Martinus Nijhoff Publishers, The Hague, 2002).

10 International Human Rights Law Group, *U.S. Legislation Relating Human Rights to U.S. Foreign Policy* (W.S. Hein, New York, 1991).

The UNGPs prepared by John Ruggie have received needed endorsement from the United Nations Human Rights Council on 16 June 2011. It seeks to implement a “protect, respect and remedy” framework.¹¹ The UNGPs are grounded upon the three pillars i.e. it emphasizes the State’s duty ‘to protect’ against human rights abuses from third parties, including business; the corporate responsibility ‘to respect’ human rights, implementing due diligence to avoid infringement and address adverse impacts; and access ‘to effective remedy’ for victims of human rights abuses.¹²

The State’s ‘duty to protect’ against human rights violations is linked with developing a ‘standard of conduct’ by evolving a legal system that guarantees and protects the human rights of its citizens.¹³ The extraterritorial aspect of the States’ duty to protect includes the home States’ responsibility to encourage the multinational corporations registered within their jurisdictions to comply with the human rights standards while functioning in a foreign country.¹⁴ Further the Guiding Principles accords ‘corporate responsibility to respect human rights’ on the business enterprises (Principle No.15). Here the ‘human rights due diligence’ prescribed the corporations or business enterprises to both be aware as well as audit the ‘human rights impact’ of its business undertakings.¹⁵ And this assessment of ‘human rights impact’ is expected to inform further business decisions of the corporations. Further, the corporations are also expected to track and report the ‘human rights impact’ of their business operations. The ‘human rights due diligence’ is termed as the very essence of the corporate social responsibility as envisaged in the UN Guiding Principles. The ‘human rights due diligence’ by the corporations is supposed to be an ongoing process including all the above mentioned elements.

Initiatives were taken by all stakeholders to ensure effective implementation of UNGPs, however, the Indian Government is yet to take adequate steps to facilitate adherence to guidelines by the MNCs in their operations and supply chain. Moreover, the contributions of NGOs and civil society’s organization in the field of Business and Human Rights are minimal in India and that affects the implementation of UNGPs. There is an urgent need for active involvement of NGOs and civil society

11 HR/PUB/11/04, available at: <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed on 25 May 2020.

12 *Ibid.*

13 John Gerard Ruggie, “Protect, Respect And Remedy: A United Nations Policy Framework For Business And Human Rights”, *International Law As Law: Proceedings of the Annual Meeting (American Society of International Law)*, vol. 103 (2009), pp. 282-287.

14 *Ibid.*

15 Björn FASTERLING and Geert DEMUIJNCK, “Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights”, *Journal of Business Ethics*, vol. 116, no. 4 (2013), pp. 799–814.

organizations to play an active role in dissemination and implementation of UNGPs framework.

In the wake of economic reforms in the early 1990s, the Indian government realised that many provisions of the Companies Act had become obsolete and were not conducive to the growth of the Indian Corporate Sector in the changing environment. In the past 57 years during which the Companies Act, 1956 has been in existence, the corporate and business environment has evolved significantly and hence there was a need to revamp the legislation governing Companies. This led to the adoption of the Companies Act, 2013 on 29th August 2013, which replaced the Companies Act of 1956.¹⁶ The Companies Act, 2013 was enacted on 29th August, 2013 after receiving President's assent. The Companies Act 2013 is more of a rule-based legislation containing only 470 sections, which means that the substantial part of the legislation will be in the form of rules.¹⁷ The Companies Act 2013 provides the corporate sector an opportunity for self regulation, while mandating greater transparency and enhanced disclosure for improved compliance. The Companies Act came into effect on 1 April 2014 and makes it mandatory for certain companies to spend 2% on CSR activities. Its Section 135 requires CSR from the companies which have had a net profit of Rs.50 million or more or net worth of Rs. 5000 million or a turnover of Rs.10000 million or more in any financial year.¹⁸ The Act applies to a holding company, its subsidiary, and even a foreign company with a branch or project office in India.¹⁹ Every company that meets the net profit, net worth, or turnover criteria of the Act has to constitute a CSR committee of its Board. The CSR committee has to formulate and recommend a CSR Policy for the company to the Company Board. The CSR policy must indicate the activities to be undertaken by the company as per Schedule VII of the Companies Act.

16 The Companies Act, 2013 has been notified in the Official Gazette on 30th August, 2013, available at: <<http://www.mca.gov.in/MinistryV2/companiesact2013.html>> accessed on 20 May 2020.

17 Arjya B. Majumdar, "India's Journey with Corporate Social Responsibility – What Next?", *Journal of Law and Commerce*, vol. 33, no. 2 (2015), pp. 164-205.

18 *Ibid.*

19 Section 2(42) of the Companies Act.

Schedule VII (the Company Act 2013) enlists a range of activities which will serve as a guide to the companies while devising their CSR projects. This list is based on the contemporary needs of the society.²⁰

A large number of companies in India had been contributing towards charitable work much before the concept of CSR had crystallised at the international level. Notable among these company are Birla and Tata, both have established educational institutions, hospitals and temples in many parts of the country. Interestingly, several associations of trade and industry in India have already incorporated CSR principles and UN Global Compact principles in their code of conduct.²¹ However, practice in the corporate sector is uneven and much remains to be done to persuade trade and industry that human rights is good for business, not in conflict with it. After independence, the Government of India adopted socialistic policy agenda, which aimed at a more equitable distribution of resources, restricted the concentration of wealth to the hands of a few industrialists through strategies of import substitution, foreign exchange control, reservations for and protection of small-scale enterprises, industrial licence, and quota systems for raw material and production. The shift in the business policy of the government had its impact on corporate philanthropy. The wave of liberalisation, privatisation and globalisation (LPG), together with a comparatively relaxed licensing system, led to a boom in the country's economic

20 Activities which may be included by companies in their Corporate Social Responsibility Policies Activities relating to:

- eradicating extreme hunger and poverty
- promotion of education
- promoting gender equality and empowering women
- reducing child mortality and improving maternal health
- combating human immunodeficiency virus, acquired immune deficiency syndrome, malaria and other diseases
- ensuring environmental sustainability
- employment enhancing vocational skills
- social business projects
- contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government or the State Governments for socio-economic development and relief and funds for the welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women; and such other matters as may be prescribed
- contributions or funds provided to technology incubators located within academic institutions which are approved by the central government.
- rural development projects
- slum area development

21 Sundar, *note 3*.

growth. This further led to an increased momentum in industrial growth, making it possible for companies to contribute more towards social responsibility.

The Companies Act, 2013 being a modern legislation enables growth and greater regulation of the Indian corporate sector. Through its better and improved provisions, the new Act facilitates improvement in corporate governance norms, enhancement of the accountability of auditors and companies, increased levels of transparency and as a result protection of the interest of all stakeholders including shareholders.

III. NATIONAL VOLUNTARY GUIDELINES ON SOCIAL, ENVIRONMENTAL & ECONOMIC RESPONSIBILITIES OF BUSINESS

The business sector has been increasingly required to act in a socially and environmentally responsible manner by contributing to environmental protection, human rights, and poverty reduction although non-compliance with national social and environmental laws remains challenge in developing countries. In response to these developments, CSR has evolved into a global phenomenon spanning both developed and developing economies. Various frameworks for socially and environmentally responsible business such as the Millennium Development Goals (MDGs)²², the UN Global Compact²³, the 2011 OECD Guidelines on Multinational Enterprises²⁴, and now Sustainable Development Goals (SDGs)²⁵ testify to the global dimension of CSR.²⁶ Prior to adoption of Companies Act 2013, it was mandated

22 United Nations Millennium Declaration, Resolution adopted by the General Assembly, 18 September 2000, A/RES/55/2, available at: <<https://undocs.org/A/RES/55/2>> accessed on 15 May 2020.

23 The UN Global Compact's governance framework was adopted by then UN Secretary-General Kofi Annan on 12 August 2005, following a year-long international process co-led by Georg Kell, then Executive Director of the UN Global Compact and Professor John Ruggie, then Special Advisor to the Secretary-General. A call to companies to align strategies and operations with universal principles of human rights, labour, environment and anti-corruption, and take actions that advance societal goals. Available at: <<https://www.unglobalcompact.org/what-is-gc>> accessed on 15 May 2020.

24 The updated Guidelines and the related Decision were adopted by the 42 adhering governments on 25 May 2011. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards.

25 Transforming Our World: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1, available at: <<https://undocs.org/A/RES/70/1>> accessed on 15 May 2020.

26 J. G. Ruggie, "The Social Construction of the UN Guiding Principles on Business and Human Rights," Corporate Responsibility Initiative Working Paper No. 67, available at <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/crri/files/workingpaper_67_0.pdf> accessed on 15 July 2020.

that a company would spend 2% of Profit after Tax (PAT) on CSR activities. Their contribution has been considered noteworthy in this field.²⁷ The private corporate sector has come a long way from the days of *ad hoc* charity. The concepts of CSR, corporate citizenship and, increasingly, Responsible Business become salient aspects of many companies in India. They undertake the social, environmental and economic responsibilities such as establishing charitable trusts, foundations and mega institutions for public causes, directly running community development programmes, forming partnerships with the Government or NGOs, etc.²⁸

The CSR has gained momentum in Indian companies after the adoption of NVG.²⁹ The genesis of NVG could be linked to the address of then Prime Minister Manmohan Singh who delivered an address to the business community at the Confederation of Indian Industries (CII) in year 2007.³⁰ In his speech, he stressed the need for businesses to adopt a holistic approach to business responsibility and rise to the challenge of making India's growth processes both efficient and inclusive. In his 10 point Social Charter,³¹ the Prime Minister outlined the economic, environmental, and social responsibilities of businesses and defined the practices of good governance, signaling a paradigm shift in policy leadership's expectations for businesses. Manmohan Singh's landmark address was, decidedly, a turning point in the Indian policy landscape and the first in a series of signals by policy makers that they were not only interested in increasing business participation in nation building, but also making businesses accountable for the social and environmental impact of their operations.³² Subsequently, many directives and policy consultations followed in the wake of the Ten Point Social Charter and that led to development of the NVGs. It is important to note that all three tenets of ESG-

27 S. G. Sharma, "Corporate Social Responsibility in India: An Overview", *The International Lawyer*, vol. 43, no. 4 (2009), pp. 1515-1533, available at <<http://www.jstor.org/stable/40708084>> accessed on 12 May 2020.

28 *Ibid.*

29 National Voluntary Guidelines: Creating a Conducive Policy Environment for Responsible Business and Responsible Environment in India", available at < http://sblf.sustainabilityoutlook.in/file_space/NVG%20Genesis%20Document.pdf> accessed on 24 April 2020.

30 *Ibid.*

31 Ten Principles are namely, 1: Responsibilities toward employees; 2 Responsibilities toward businesses; 3. Responsibility as an equal opportunity employer; 4. Responsibility as an economic equalizer; 5. Responsibility toward skill development; 6. Responsibility as a 'fair competition player'; 7. Responsibilities toward the environment; 8. Responsibility toward social and market innovation; 9. Responsibility toward anti-corruption agenda and 10. Responsibility toward consumers.

32 National Voluntary Guidelines, *note 29*.

socially sustainable development, environmental sustainability, and good governance are contained within these guidelines and in the broad definition of business responsibility, which has been adopted- businesses must become responsible actors in society in a way that their every action leads to sustainable growth and economic development. Prior to the launch of the NVGs, the ESG measurement and reporting was primarily driven by various laws and acts implemented by a variety of ministries.³³ These regulations, mandatory and otherwise, had and continue to have an important role to play – they provide for a regulatory infrastructure for implementing the NVGs. Additionally, they provide a regulatory precedent which could potentially drive the transition from voluntary guidelines to mandatory guidelines for integrated reporting. The NVGs were conceived as a blueprint to guide Indian businesses on developing strategies to improve their ESG management systems.³⁴

A. Adoption of NVGs

The process for NVG began in the end of 2009 by establishment of Guidelines Drafting Committee (GDC), the committee submitted its final recommendations of the draft NVGs to the Ministry of Corporate Affairs (MCA) in November 2010.³⁵ The NVGs are designed to be used by all businesses irrespective of size, sector or location and therefore touch on the fundamental aspects – the ‘spirit’ - of an enterprise. It was expected that all businesses in India, including multi-national companies that operate within the country, would consciously work towards respecting and implementing the NVGs. The NVGs outline a proper framework for responsible business action for Indian MNCs planning to invest or already operating in other parts of the world. Businesses are encouraged to move beyond the recommended minimum provisions articulated in the document. For business leaders and managers entrusted with the task of deploying the principles of Responsible Business, it is worthwhile to understand that business boundaries today extend well beyond the traditional walls of a factory or an operating plant and all the way across the value chain. Businesses are therefore encouraged to ensure that not only do they follow the NVGs for areas directly within their immediate control or within their sphere of influence, but that they encourage and support their vendors, distributors, partners and other collaborators across their value chains to follow the NVGs as well. The NVGs are applicable to all such entities, and are intended to

33 *Ibid.*

34 *Ibid.*

35 The first review process was structured around the feedback received in March 2010. The feedback pointed out the need to include a special section on MSMEs, broad level operational guidance for implementation of the principles and their core elements, greater specificity, consistency, clarity and value-neutrality in terms used in the Guidelines document.

be adopted by them comprehensively, as they raise the bar in a manner that makes their value creating operations sustainable. The comprehensive nature of the NVGs urges businesses to embrace the “triple bottom-line” approach whereby their financial performance can be harmonized with the expectations of society, the environment and the many stakeholders they interface with in a sustainable manner. It needs to be emphasized that all Principles are equally important and non-divisible – this implies that if a business endeavours to function responsibly, it would have to adopt each of the nine Principles³⁶ in their entirety rather than picking and choosing what might suit them. The NVGs have been articulated in the form of nine Principles with the Core Elements to actualize each of the Principles. Following the release of the NVGs, they were notified by the SEBI for the top 100 listed companies by market capitalization. By SEBI’s notification, the NVGs have been officially accepted by the regulator as a framework to be used by listed companies.³⁷

B. Implementation of NVGs

To ensure effective implementation, a section is included on developing ‘Management Systems and Processes for Responsible Business, and Indicators’ that businesses can adopt to self-steer and regulate their journey towards becoming sustainable and responsible businesses. Since these NVGs are applicable to large and small businesses alike, a special section has also been devoted to how micro, small and medium enterprises (MSMEs) can be encouraged to adopt it.³⁸ Typically, the argument that MSMEs do not have the capacity or resources to implement the changes has been juxtaposed with the idea that, without a conscious effort to adopt the NVGs, MSMEs would lose out on future business opportunities and their ability to remain viable and socially relevant. MSME is widely regarded as the backbone of the Indian economy, and the MSME sector is highly diverse and

36 The nine Principles are namely: **Principle 1:** Businesses should conduct and govern themselves with Ethics, Transparency and Accountability; **Principle 2:** Businesses should provide goods and services that are safe and contribute to sustainability throughout their life cycle; **Principle 3:** Businesses should promote the well-being of all employees; **Principle 4:** Businesses should respect the interests of, and be responsive towards all stakeholders, especially those who are disadvantaged, vulnerable and marginalized; **Principle 5:** Businesses should respect and promote human rights; **Principle 6:** Business should respect, protect, and make efforts to restore the environment; **Principle 7:** Businesses, when engaged in influencing public and regulatory policy, should do so in a responsible manner; **Principle 8:** Businesses should support inclusive growth and equitable development and **Principle 9:** Businesses should engage with and provide value to their customers and consumers in a responsible manner.

37 Circular of Securities and Exchange Bank of India, 13 August 2012.

38 *National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business* (Report of Ministry of Corporate Affairs, Government of India, New Delhi, 2011)

heterogeneous in its structure.³⁹ The enterprises range from an entity having just a single self-employed person to one employing hundreds of people; and from one supplying goods to a next door neighbour, to one producing high-tech goods for global supply chains. The framework of these NGVs and the extent to which they are applicable to such a sector needs to be understood in the context of the realities of these enterprises. A major part of the Indian MSME sector is 'local' in its operations and outlook.⁴⁰ Yet it impacts the environment and society in its own way, despite the small numbers of its employees, the localized buyers and the confined surroundings of its place of business.⁴¹ Due to the increasing integration of the Indian economy with the global economy, especially during the last decade, enterprises of all sizes have been gradually exposed to global competition. Global buyers are basing their sourcing decisions not only on traditional commercial considerations such as price, quality and delivery commitments, but also on compliance with social and environmental norms in the workplace, covering, for instance, health and safety, social equity in employment and production, and ecological compatibility of products and processes.⁴² Many Indian buyers too are beginning to incorporate these requirements into their purchasing decisions. MSMEs not sensitive to these expectations run a serious risk of isolation and rejection by buyers as well as consumers, whereas those that are responsive to these expectations might find new business opportunities opening up for them.⁴³

On 8th July 2011, the then Union Minister of Corporate Affairs Murli Deora released the "National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business" which intends to mainstream the subject of business responsibilities".⁴⁴ He emphasised that the beginning of industrialization marked the transition from merchant charity to industrial philanthropy in India which was more secular, more inclusive in terms of caste, creed and community and more oriented to bringing progress to society through western style modern institutions.

39 *Ibid.*

40 R. Tewari & T. Pathak, "Sustainable CSR for Micro, Small and Medium Enterprises", *Journal of Management & Public Policy*, vol. 6, no. 1 (December 2014), pp. 34-44.

41 A.P. Pandey, "Indian SME's and their Uniqueness in the Country", MPR Paper No. 6086, (2007), available at: <<http://mpr.ub.uni-muenchen.de/6086/>> accessed on 15 February 2020.

42 H. Jenkins, "Corporate Social Responsibility- Engaging Small and Medium Sized Enterprises in the Debate", *The Centre For Business Relationships, Accountability, Sustainability and Society (BRASS Centre), Cardiff University, UK, Working Paper Series No. 18, (2004).*

43 N. K. Nair & J. S. Sodhi, "CSR Practices by SMEs in India: Lessons from Five Case Studies", *The Indian Journal of Industrial Relations*, vol. 47, no. 4 (April 2012), pp. 583-597.

44 National Voluntary Guidelines, *note 29.*

NVGs encourages businesses to embrace the “triple bottom-line” approach whereby its financial performance can be harmonized with the expectations of society, the environment and the people it interfaces with, in a sustainable manner. The adoption of these NVGs would also improve the ability of businesses to enhance their competitive strengths, improve their reputations, their ability to attract and retain talent and manage their relations with investors as well as the society at large.

IV. REPORTING PROCESS UNDER NVGs

The NVGs can be adopted by all companies irrespective of their size or sector and are a unique Indian version of a reporting framework, which addresses the needs of Indian stakeholders. Due to their universal applicability, a special section has been included in the NVGs on ‘the adoption of these guidelines’ by the resource constrained MSME to enable greater future business opportunities and to help them remain socially relevant.⁴⁵

NVGs are flexible for companies who are already following an internationally accepted sustainability reporting framework. Such companies are not required to publish a separate report, but can map the nine core principles of NVGs to the disclosures made in their existing sustainability/business responsibility reports.⁴⁶ Companies who have decided to adopt the NVGs but don’t have the necessary capacity to furnish a full-fledged report can provide a statement of commitment to adoption of NVGs to their stakeholders and furnish primary details on activities undertaken in relation to these NVGs. The companies who would like to adopt NVGs to the full extent can furnish reports detailing their performance on environmental, social and governance factors.⁴⁷ Disclosure regarding the environmental, social and economic responsibilities of business has multiple benefits in terms of enhanced revenue growth and market access, cost savings, increased access to capital, better risk management and improved brand value and greater reputation.

V. SEBI GUIDELINES

In the case of the business enterprises, sustainability emerges stronger with every passing year, thus policy-makers and regulators across the world have been urging companies to adopt better disclosure procedures in order to induce the corporate sector to acknowledge and manage the environmental and social externalities of their business operations and to make their governance processes more robust and transparent. In the process, investors too are getting more involved

45 *Ibid.*

46 *Ibid.*

47 *Ibid.*

in incorporating responsible investment factors into their decision making. It is believed that mandatory disclosures on extra financials result in benefits for both, the national socio-economic context as well as the reporting company in question. In this context, the Securities and Exchange Bank of India (SEBI) *also issued a circular and made it mandatory for the top 100 BSE and NSE listed companies to disclose their Business Responsibility Reports (BRR) Practices through a report adhering to the NVGs framework.*⁴⁸ *The SEBI guidelines put emphasis on company in its annual report must disclose the steps taken from an environmental, social and governance perspective.* The requirement to include BR Reports as part of the Annual Reports shall be mandatory for the top 100 listed entities based on market capitalisation at BSE and NSE as on March 31, 2012.⁴⁹ Stock exchanges in India made provisions in their listing agreements to incorporate the submission of BRR by companies that came under the SEBI mandate. These listing agreements also provide the format for the BRR. SEBI has also encouraged other listed companies to voluntarily disclose information on their ESG performance in the BRR format. By mandating companies to report on their ESG initiatives, SEBI has joined a select but increasing number of governments and market regulators that seek ESG disclosures from listed companies. The step taken by SEBI is path-breaking as voluntary sustainability reporting among companies in India is still in a nascent stage. Reporting could then become the potential catalyst that facilitates companies to evaluate their own business case for sustainability, determine their sustainability objectives, and gradually evolve towards integrating the management of ESG performance into their strategic approaches for the Indian market.⁵⁰

VI. NATIONAL GUIDELINES ON RESPONSIBLE BUSINESS CONDUCT (NGRBC)

On 10th December 2018, the Government of India adopted the National Guidelines on Responsible Business Conduct (NGRBC).⁵¹ The NVGs have been revised and reformulated in the context of the various developments that have taken place since 2011. For example: it incorporates the Sustainable Development Goals for 2030 adopted by the UN General Assembly in 2015 in annexure 4 of the NGRBC.⁵² Further India has ratified the ILO Core convention 138 (minimum age of employment

48 Circular of Securities and Exchange Bank of India, (13 August 2012).

49 *Ibid.*

50 Report, Business Responsibility Disclosures: Sustainability in Practice in India: An Analysis of the top 100 Listed Companies in India 2014, available on < <https://www.bseindia.com/downloads1/FinalBRR.pdf>> accessed on 13 June 2020.

51 National Guidelines on Responsible Business Conduct, 2018, available at <www.mca.gov.in/Ministry/pdf/NationalGuideline_15032019.pdf> accessed on 15 March 2020.

52 Annexure 4: SDGs Mapped Against NGRBC Principles.

of children) and Core Convention 182 (worst forms of child labour) in 2017⁵³, also added to the NGRBC. At the time of ratification, India's Minister of Labour, Mr. Bandaru Dattatreya, said that ratification of the two ILO Conventions reaffirmed India's "commitment to a child labour free society". He further stated that "the momentum of the recent initiatives taken to eradicate child labour has to be maintained as elimination of child labour is also crucial for the attainment of Sustainable Development Goals by 2030".⁵⁴

NGRBC is applicable to all types of business enterprises functioning within the jurisdiction of India irrespective of their size (i.e. small scale or large scale), it is also applicable on Multinational Corporations (MNCs) in India, as well guide MNCs from India in their foreign operations. The NGRBC are inter-related and inter-dependent principles for responsible business conduct. It consists of nine core principles and several annexure for details.⁵⁵ The core principles of NGRBC are: "Principle 1: Businesses should conduct and govern themselves with integrity, and in a manner that is ethical, transparent, and accountable; Principle 2: Businesses should provide goods and services in a manner that is sustainable and safe; Principle 3: Businesses should respect and promote the well-being of all employees, including those in their value chains; Principle 4: Businesses should respect the interests of and be responsive to all its stakeholders; Principle 5: Businesses should respect and promote human rights; Principle 6: Businesses should respect and make efforts to protect and restore the environment; Principle 7: Businesses, when engaging in influencing public and regulatory policy, should do so in a manner that is responsible and transparent; Principle 8: Businesses should promote inclusive growth and equitable development; Principle 9: Businesses should engage with and provide value to their consumers in a responsible manner."⁵⁶ The adoption of NGRBC by

53 On 13 June 2017, the Government of India deposited with the International Labour Office the instruments of ratification of the two fundamental ILO Conventions concerning the elimination of child labour, the Minimum Age Convention, 1973 (No. 138) and the Worst Forms of Child Labour Convention, 1999 (No. 182) .

54 Available at: <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_557295/lang-en/index.htm#:~:text=India%20is%20the%2017th%20ILO,light%20work%20and%20artistic%20performances>..

55 Annexure 1: Guidance on Adoption of NGRBC
Annexure 2: Guidance for Micro, Small and Medium Enterprises
Annexure 3: Business Responsibility Reporting Framework
Annexure 4: SDGs Mapped Against NGRBC Principles
Annexure 5: Business Case Matrix
Annexure 6: Guidance for Businesses on Using the BRRF as a Self-Assessment Tool
Annexure 7: Indian Laws Principles (Indicative)
Annexure 8: Resources

56 *Ibid.*

the Government of India demonstrates its commitment in ensuring that companies must remain sensitive towards the need of the Society and also assist government in addressing socio-economic needs of the people. The NGRBC also tied the loose ends which were not adequately covered under NVGs.

VII. CONCLUSION

The importance of business in improving the quality of life is well recognized. However, there is growing awareness that, in an increasingly complex world, businesses also have significant and long-lasting impacts on people, our planet and our ability to sustain the levels of holistic development that we all aspire to. This realization has also brought an increasing concern amongst all stakeholders, who are demanding that businesses of all types and sizes need to function with fairness and responsibility. Specifically, this calls for businesses being thoroughly aware and conscious of their social, environmental and economic responsibilities, and balance these different considerations in an ethical manner. When businesses are supported by an appropriate government policy regime that encourages systematic movement towards responsible thinking, decision-making, and a progressive movement towards sustainability, the trajectory of overall growth and development takes a positive turn. Such a responsible approach on the part of business duly supported by the government alone would secure our future and ensure that whole some benefits accrue to people, and our planet; even as businesses continue to make surpluses that can be re-invested for the growth of the economy. The essence of CSR comprises philanthropic, corporate, ethical, environmental and legal as well as economic responsibility. An alternative, synonymous to CSR, is people, planet, and profit also known as triple bottom line. In the last decade, CSR has rapidly evolved in India with some companies focusing on strategic CSR initiatives to contribute toward nation building. Hence it is at the national level that detailed business and human rights rule-making should occur, informed by local contexts and priorities, but within a global framework of universal principles, in this case, the UNGPs, that can be interpreted in a way that is responsive to both a dynamic global business environment and evolving human rights discourse.

In the last five years, Government of India has also enhanced its focus on persuading companies to participate in addressing social and developmental issues, not only as a part of their social responsibility but also their business practices. Setting an example for the private sector, guidelines regarding expenditure on CSR activities for Central Public Sector Enterprises (CPSE) were issued by Department of Public Enterprises.⁵⁷ According to these “Guidelines on CSR and Sustainability

57 F. No. 15(13)/2013-DPE (GE), dated 21 October 2014, available at: <https://dpe.gov.in/sites/default/files/Guidelines_on_CSR_SUS_2014.pdf> accessed on 19 May 2020,

for Central Public Sector Enterprises” revised by the Department of Public Enterprises (DPE), Ministry of Heavy Industries and Public Enterprises every year, each CPSE shall with the approval of its Board of Directors make a budgetary allocation for CSR and Sustainability activities/projects for the year. The new CSR Guidelines also include a dedicated section on sustainability reporting and disclosure.

Due to the general public perception towards business as a cause of social, environmental, and economic problems, there is an urgent need for businesses to function more responsibly and to create value for all stakeholders. Twenty-first century businesses must integrate sustainability into the core of their business strategy instead of sidelining it to the periphery, stuck in the mold of “social responsibility” in order to have a sustained competitive advantage. Businesses are increasingly beginning to realize that their actions impact society and the environment. They have to focus their attention on achieving the ‘triple bottom line’ - people, planet and profit. The NVGs were designed for use by businesses across sectors and touch on the fundamental aspects – the ‘spirit’ – of an enterprise. However, owing to the varied nature, size, stakeholder groups and multiplicity of players involved, there was a need for developing sector specific guidelines to address the critical issues of the particular sector.

NVGs and NGRBC are positive step and would help bring about awareness around the need of taking into account both financial and non-financial metrics while assessing company’s performance. It will also help bring to speed laggards like India in the area of sustainability reporting. A shift in mindset of companies is required – they need to see sustainability from an opportunity lens instead of seeing it as a cost burden and need to adopt a long term view of incorporating sustainability in their core business strategy. Hopefully the guidelines will help hasten this process.

EXPLORING COMPETENCE OF ICSID TRIBUNALS OVER INTERNATIONAL INVESTMENT CORRUPTION CASES AND THE WAY FORWARD

HONGWU YIN*

Abstract

Corruption issue has attracted more and more attention in international investment law study and practice during the recent years. After taking prudent consideration of corruption defense invoked by the host States in some international investment arbitration cases involved with corruption element, ICSID tribunals made the final awards accordingly. But some part of the arbitral jurisprudence aroused strong criticism especially about the ICSID tribunals' reasoning that arbitrators have no jurisdiction over corruption-tainted international investments. The ICSID tribunals are legitimately supposed to exercise the jurisdiction and lawfully obliged to probe into the nature of corrupt activities instead. The tribunals are strongly proposed to adopt the balancing approach in deciding the merits and weighing up fairly the obligation, right and interest between both disputing parties. It is preferable to strengthen the collaborative interaction between ICSID proceedings and domestic anti-corruption enforcement mechanism on combating against the corruption activities in the field of international investments. The existing international treaties (or specific treaty provisions) on combating corruption in international business transactions and calling for international cooperation, as well with domestic anti-corruption enforcement legislation actually have laid solid legal foundations for the establishment of such an anti-corruption coordinative mechanism between ICSID and domestic corruption regulatory authorities on the global level.

Keywords: *corruption defense, arbitral jurisdiction, balancing approach, international anti-corruption coordinative mechanism*

I. INTRODUCTION

Corruption is becoming an increasingly stern challenge to international investment activities partly because lots of investments are bound for developing countries which are of somehow pre-mature legal systems and high probabilities of corrupt behaviours. In recent years, the corruption issue has been attached more and more significance both in international investment law studies as well as in practices. Specific ICSID arbitral jurisprudence indicates that the increasing awareness about the adverse effects of corruption should not be overlooked.¹

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1 Tamar Morchiladze, "Impact of Investment Wrongdoing on Arbitration Proceedings: How Far Should an Investment Wrongdoing Get?", available at: <<https://www.duo.uio.no/handle/10852/3564>> accessed on 26 February 2019.

Undoubtedly, corruption is unable to be controlled effectively on the national dimension alone. Within the past two decades, numerous international conventions have been enacted handling the corruption problem including 2003 United Nations Convention against Corruption (UNCAC) which is the most instrumentally far-reaching international anti-corruption document owing to many compulsory provisions. By concluding these anti-corruption conventions, contracting parties recognize that corruption is a widespread phenomenon in international economic operations, which is morally and legally unacceptable. An increasing awareness about the adverse effects of corruption on global economy has rendered corruption a hotly-debated issue in international investment arbitrations recently.

II. ICSID TRIBUNAL'S APPROACH IN HANDLING HOST STATE'S CORRUPTION DEFENSE

A. Corruption Defense Invoked by Host State

Up to now, the corruption defense² invoked by the host State in the investment arbitration proceedings has developed into an adversarial strategy aiming at frustrating foreign investors' various claims even in cases where foreign investors and the host State government (public officials) are both involved in corruption schemes. As the investment arbitration tribunals are increasingly inclined to confirm the corruption defense raised by the host State, more respondent countries tend to rely on it as a favorable arbitral skill. Subsequent to *SGS v. Pakistan Case*³, there arose some typical international investment arbitration cases in which the host State invoked the corruption defense: e.g. *World Duty Free v. Kenya case*; *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines case*; *Inceysa Vallisoletana S.L. v. Republic of El Salvador case*; *Metal-Tech Ltd. v. Republic of Uzbekistan Case and MOL v. Republic of Croatia case* etc. In these

2 The earliest ICSID investment case in which one disputing party raised corruption defense is exactly the *Wena v. Egypt Case*. However, the arbitral tribunal eventually decided that the corruption issue in the case had nothing to do with international investment law. See *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), para. 46.

3 The *SGS v. Pakistan* tribunal historically recognized the significant legal meaning entailed in the investment dispute case, especially concerning the consent of the arbitral tribunal jurisdiction which is based on Article 25 of the ICSID Convention and the relevant provision in Switzerland- Pakistan Bilateral Investment Treaty. Regrettably, owing to the insufficiency of evidence to conduct an exhaustive evaluation of the corruption issue, the tribunal was finally unable to solve the problem in a more detailed approach, thus the corruption defense was suspended and unsettled. See *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Award, August 6, 2003. paras. 141-143.

cases, given the host State's corruption assertion had been testified⁴, ICSID tribunals all approved the corruption defense against foreign investors by host States, and decided the cases that tribunals are lacking in jurisdiction over the investment disputes and finally the investors' claims get dismissed.

B. Two Basic Reasons for ICSID Tribunal's Denial of Jurisdiction over Corrupt International Investment Cases

1. "Corrupt Investment" Violates Fundamental Principles of Law

The foreign investment made within the host State territory must both substantively and procedurally comply with the fundamental principles of law (e.g. the engagement in corrupt activities is strictly forbidden) which are generally understood as international public policy.⁵ Thus, it has become relatively well-settled in ICSID jurisprudence that corruption is contrary to international public policy and that compliance with international public policy is relevant for determining whether investment wrongdoings should result in the denial of jurisdiction. In cases where corruption defense had been successfully invoked, the tribunals considered investments procured through corruption contrary to international public policy and decided that they had no competence to deal with the investment claim because they lacked the jurisdiction and exclude the corrupt investors beyond the scope of treaty protection.

Among the cases, *Inceysa v. El Salvador* tribunal holds that both Spain-Salvador Bilateral Investment Treaty and the ICSID Convention are international treaties, the interpretation of treaty is supposed to take the fundamental principles of law into consideration, which are also applicable according to Article 42 (1) ICSID Convention. The tribunal finally decides *Inceysa* is unable to resort to ICSID arbitration according to such general principles of law as good faith, *Nemo auditur propriam turpitudinem allegans*, international public policy and unjust enrichment.⁶

4 ICSID tribunals generally holds that the evidentiary burden be placed upon the host state for asserting the defense. See Michael A. Losco, "Note: Streamlining the Corruption Defense: A Proposed Framework for FCPA-ICSID Interaction", *Duke Law Journal*, vol. 63, no. 5 (2014), pp. 1201-1242 at p. 1203. Although the uniform testifying criterion applicable to all the ICSID tribunals is not yet certain at present, it is however supposedly to adopt a relatively higher standard (say "clear and convincing proof" standard). But one Chinese scholar points out that the traditional reason and potential motivation for international commercial arbitral tribunal to adopt the "higher testifying criterion" actually does not exist in international investment arbitration. See also Hailang Wang, "On the Testifying Criterion of Bribery in International Investment Arbitration", *Law Science*, vol. 2, no. 1 (2012), pp. 158-167.

5 Jarrod Hepburn, "In Accordance with Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration", *Journal of International Dispute Settlement*, vol. 5, no. 3 (2014), pp. 531-559.

6 *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26), Award, August 2, 2006, para. 53.

In *World Duty Free v. Kenya* case, the tribunal concluded itself lacking in jurisdiction for that both disputing parties chose English law as the applicable law to settle the dispute on the basis of Article 42 (1) ICSID Convention, while the law stipulates no one is allowed to gain any benefits by way of his own criminal behavior (*ex dolo malo non oritur action*).⁷ The tribunal further pointed out that the investor's bribery was against "most (if not all) international public policy of the country", thus conflicting with the transnational public policy. Though narrower in scope than international public policy, transnational public policy is also widely used given that the principle includes "fundamental natural law rules, principles of law recognised, *jus cogens* [norms of] ... international law, and the general principles of morality accepted by 'civilized nations.'"⁸

2. "Corrupt Investment" Does not Fall within the Qualified One Owing to the "in Accordance" Provision in International Investment Agreements

The "investment" definition provision of the bilateral investment treaty generally stipulates that the investment shall be made "in accordance with the host State's laws (and regulations)", which means any illegally-made investment is excluded from the domain of "qualified investment" on the basis of host State's domestic laws. The underlying intention is obvious: the host State government refuses to grant any benefit to the unlawful investment by way of foreign investment protection under bilateral investment treaties, which is also the rule according to the municipal law. As corruption is illegal activity within nearly all the internal laws worldwide, the foreign investment's compliance with the host State laws is relevant to the jurisdiction of the investment arbitral tribunal.⁹

In some ICSID investment arbitration cases, tribunal eventually declined its own jurisdiction and dismissed the investor arbitration claims under the jurisprudence that specific investment which had been made did not comply with the "in accordance" requirement asked by the investment treaties, thus the investment concerned was categorized into an unlawful one and should be excluded from the protection of the investment treaty. Take *Inceysa v. El Salvador* case as an example, the tribunal decided that Salvador government's consent to ICSID jurisdiction agreed in its BIT (1995) with Spain couldn't be extended to the fraudulently-made investment since it violated Salvador laws and therefore became unqualified. The tribunal consequently refused to exercise jurisdiction over the arbitration case.¹⁰

7 *World Duty Free v. Kenya* (ICSID Case No. ARB/00/7, Award, October 4, 2006, para. 161, available at <<http://www.italaw.com/documents/WDFv.KenyaAward.pdf>>.

8 Losco, *note 4*, pp. 1205, 1213, 1218, 1235, 1238.

9 Hepburn, *note 5*.

10 *Inceysa case*, *note 6*, para. 83.

III. ICSID TRIBUNALS' CURRENT DIFFICULTIES IN HANDLING HOST STATE CORRUPTION DEFENSE

Although ICSID tribunals uphold prudential considerations of host State (the respondent) corruption defense invoked in the international investment cases and correspondingly make such decisions as to decline their own jurisdiction over certain cases. However, such parts of the final award normally constitute the most controversial issues in international investment arbitration cases (mainly ICSID arbitration case) involving corruption defense. To be exact, ICSID tribunals' arbitral jurisprudence on tribunals' lacking in jurisdiction over the corruption-involved investment disputes is subject to strong criticism. Therefore, the academia challenged or even questioned the now prevalent arbitral jurisprudence¹¹, among whom certain western scholar commented in a somehow radical way that "for a very long period in investment arbitration, tribunals have been myopic if not ignorant vis-à-vis allegation of corruption".¹²

A. ICSID Tribunal's Denial of Jurisdiction over Corrupt Investment: Suspicious of Infringing Procedural Justice

In deciding the foreign investment disputes cases involving corruption (or other unlawful activities) defenses as introduced above, ICSID tribunals make the reasoning as follows: Given the corruption of investment is against the host State laws, it means the making of the investment does not abide by the host State laws, hence the certain investment does not fall within the category of protected "investment" which is defined in Article 25 of ICSID Convention or specific bilateral investment treaties, therefore, no agreement has been reached on the consent to investment arbitration between foreign investors and host State, and the final decision that tribunals lack of jurisdiction concludes.

Whenever tribunal testifies its own jurisdiction, it cannot escape from making a preliminary judgment on such issues as whether the investment is qualified and the arbitration agreement exists since bilateral investment treaties usually provide "in accordance with host State laws" stipulations. But tribunals tend to make "hasty" decisions that certain foreign investment is to be excluded from the scope of BITs protection just because investment activities get involved with corruption, thus

11 Losco, *note 4*; Michaela Halpern. "Corruption as a Complete Defense in Investment Arbitration or Part of a Balance", *Willamette Journal of International Law and Dispute Resolution*, vol. 23 (2016), pp. 297-312; Margareta Habazin, "Investor Corruption as a Defense Strategy of Host States in International Investment Arbitration: Investors' Corrupt Acts Give an Unfair Advantage to Host States in Investment Arbitration", *Cardozo Journal of Conflict Resolution*, vol. 18, no. 3 (2017), pp. 805-828.

12 Anderas Kulick, *Global Public Interest in International Investment Law* (Cambridge University Press, Cambridge, 2012), p. 314.

conclusion comes that no existence of arbitration agreement between foreign investors and host State. Nevertheless, the whole reasoning process is seemingly “rough, rush-to-conclusions and defective”: it is hard to say the award was rendered in compliance with the spirit of procedural justice. As is known that the criteria of “investment” is firstly proposed by *Fedax v. Venezuela* tribunal, and further elaborated by other arbitral tribunals, among which the five-factors standard initiated by *Salini v. Morocco* tribunal gained popular recognition, namely (1) a certain period of duration; (2) regularity of profit and return; (3) assumption of risks; (4) substantial commitment; and (5) significance for the host State’s development.¹³ It’s easy to find out “in accordance with host State laws” requirement does not constitute the objective factor to evaluate a “qualified” investment. Special attention needs to be drawn to the reality that lots of China’s BITs concluded in recent years actually excluded the “in accordance” element from the “investment” definition provision. Taking China-Germany BIT as an example, although the “in accordance” factor explicitly required in defining the “investment” in 1983 version¹⁴, the revised one (2003) does not make such a requirement.¹⁵ The 2004 China-Uganda BIT stipulates the same type of “investment” definition provision as in 2003 China-Germany BIT.¹⁶

Moreover, tribunals drop the hot potato issue of corruption at an early stage, avoiding the tricky business of getting into the facts of the details of the greasing process — as for some important substantive issues (such as how to define the scope of domestic laws in host State, the illegality of the corrupt investments and severity of the corruption, whether host State has fulfilled its regulatory duties with regard to supervising the making and operating of the said “corrupt investment” and whether host State needs to assume contributory duties related to corrupt activities) supposed to be clarified in the fact-finding process have been rashly decided at the preliminary jurisdictional stage without further conducting a substantive examination, by doing so it is obviously insufficient to safeguard the foreign investor claimants’ procedural rights (e.g. court appearance and cross-examination, as well as submission of the evidence and arguments making etc.),

13 *Biwater Gauff (Tanzania) Ltd v. Tanzania* (ICSID Case No ARB/05/22, Award of 24 July 2008, para. 310.)

14 Article 1 Definitions For the purpose of this Agreement: 1. The term “investment” means assets as permitted by each Contracting Party according to its respective laws and regulations and includes mainly: ...

15 Article 1 Definitions For the purpose of this Agreement 1. the term “investment” means every kind of asset invested directly or indirectly by investors of one Contracting Party in the territory of the other Contracting Party, and in particular, though not exclusively, includes: ...

16 Hongwu Yin, *The Evolution of Chinese Bilateral Treaties - The Multilateralization of International Investment Law as the Setting* (China University of Political Science and Law Press, Beijing, 2017), p. 105.

factually going against the procedural justice, and eventually deviating from the original aim and purpose of the establishment of the investor-state disputes settlement mechanism, since investment arbitration is essentially designed for the protection of private investors.

B. Existing Uncertainties in Applying the “In Accordance” Provision in Investment Arbitration Practice

As for the present investment tribunals’ prevalent arbitral reasoning, one question is easily to be asked: Is such a reasoning generally convincing? In fact, there arise as many as three uncertainties while interpreting and applying “in accordance” provisions in investment treaties. The first uncertainty is that which laws and regulations within the territory of the host State must a foreign investor abide by, and what amounts to “in accordance” criterion? Must a prospective investor conduct a full legal-compliance audit for every investment, ensuring that it “complies with each and every provision of domestic law”? This could make the “in accordance” provision become an “Achilles Heel of investment arbitration” since any violation of the domestic law could conclude that the investment does not meet the “in accordance” requirement, thus the host State’s corruption defense would be successfully invoked. Undoubtedly, such interpretation entails great uncertainty and the specific purpose for ICSID mechanism as well as Bilateral Investment Treaties to provide foreign investment with effective protection gets frustrated.

The second uncertainty lies in determining whether “in accordance” provisions impose a continuous obligation upon the investor to monitor the compliance of an investment, or whether such provisions only apply to the initiation period of the investment. The *Fraport* tribunal suggests that “in accordance” provisions only apply to the initiation of an investment, and subsequent violations of the host State’s law “might be a defense to claimed substantive violations of the BIT, but could not deprive the tribunal acting under the authority of the BIT of its jurisdiction.”¹⁷ However in practice, the investment tribunals haven’t reached consensus on the investment time of applying the “in accordance” provisions.

The final uncertainty concerns whether such mitigating factors exist as might excuse violations of the applicable law. The *Fraport* tribunal hypothesizes that an investor who breaks the law might still be allowed to bring a claim if one of several factors is present, which include a good-faith mistake by the investor regarding an unclear host-state law, reliance on incorrect legal advice, or a violation “not central to the profitability of the investment, such that the investor might have made the investment in ways that accorded with local law without any loss of projected

17 *Fraport AG Frankfurt Airport Servs. Worldwide*, ICSID Case No. ARB/03/25, Award, para 345.

profitability.”¹⁸ Moreover, an investor could potentially assert an affirmative defense of “estoppels” to block the corruption defense if the host State endorsed the investment while “knowingly overlooking” the investor’s conduct not in compliance with its laws.¹⁹ Up to now, though no tribunal has yet invoked “estoppels”²⁰ or any of the above mitigating factors (so they remain only hypotheticals) when confronted with the corruption defense, tribunals are naturally responsible for a comprehensive consideration of all these factors as well as the “estoppels” principle.

C. Tribunals’ Preliminary Denial of Jurisdiction Incurring Substantial Unbalance of Interests between the Disputing Parties

When faced with host State’s corruption defense, some ICSID tribunals consequently refused to exercise the jurisdiction for reason of protecting public interest. The arbitral tribunal underlines that the aim of international public policy is to keep the public away from the harmful misbehaviors such as bribery. Given the corruption going against international public policy, investment tribunals seem to treat it as a principle that they are naturally disabled to (1) enforce the contract involved with corruption element; (2) provide investment treaty protection to the investment concerned essentially because it has been tainted by corruption.²¹ Hence, ICSID tribunals prefer to make unfavorable awards for the purpose of punishing those foreign investors who have engaged in the corrupt activities. However, the decisions did not truly provide protection for the public. On the contrary, the awards function in effect as encouragement for the host State officials’ corrupt misconduct. According to the awards, even though the host State violated its treaty obligation of investment protection, it is almost impossible to pursue its potential legal responsibilities since the tribunals decline to exercise the jurisdiction over the investment disputes. As a result, the corrupt officials in the host State need not worry about (let alone be afraid of) their past corrupt misconduct on account of the fact that even if they have committed the corruption misbehaviours, their “unjust enrichment” remains untouched under the present ICSID arbitral jurisprudence. In fact, some governments like the Kenyan one under Daniel arap Moi – note the facts

18 *Ibid.*, p. 396 (listing several arguments in favour of a liberal policy of granting jurisdiction to investors’ claims).

19 *Ibid.*, p. 346.

20 The *World Duty Free* tribunal did not attribute the then president’s bribe-taking to host government and declined the “estoppels” assertion raised by foreign investor accordingly (*World Duty Free Case*, note 7, para. 183). Hence, some scholars show concerns that if future tribunals continue to adhere to the same arbitral jurisprudence, the “estoppels” cause will rarely be asserted. See Jason Webb Yackee: “Investment Treaties and Investor Corruption: An Emergent Defense for Host States?”, *Virginia Journal of International Law*, vol. 52, no. 3 (2012), pp. 723-745, at pp.741-742.

21 Habazin, note 11, p. 816.

underlying *World Duty Free Case*— make the collection of bribes a national sport and in reality require anyone who wants to make a substantial investment in that country to pay hefty bribes. Why should such a government, for which bribery is a major business, actually be rewarded for its graft?

In other word, the denial of ICSID tribunals' jurisdiction over investment disputes involved with corruption will just incur unfavorable consequences to foreign investors. Unlike host State, foreign investors are obliged to rely on international investment arbitration proceedings to achieve the protection of their interests and rights. In fact, for purpose of Article 27 (1) ICSID Convention²², once the investors choose international arbitration as the means to settle the investment disputes between them and host States, the back road accessible to home State's diplomatic protection has been blocked and arbitration almost becomes the only approach to obtain a fair adjudication. Although investors' wrongful corrupt activities shall naturally be subject to legal punishment accordingly, the investors need not definitely become the sole one to bear all the negative results of the wrongful acts.

As the other disputing party, host State is in a quite different situation. State usually resorts to public power to fulfill its value-pursuit and self-interest protection instead of totally relying on international arbitration. As a fact, host State has accepted the foreign investors' investment before tribunals refuse to exercise the jurisdiction over the disputes. With the final decision being made, host State is suspicious of gaining unjust enrichment: Based on tribunal's current prevailing arbitral jurisprudence, the investment contract shall be treated as void since corruption infringed the public order, hence the host State's duty of returning certain investment emerges (in practice, host State has probably expropriated the investors' assets instead). Now in the case that the tribunals decline to exercise the jurisdiction, the foreign investors' assertions concerned have no venue to be claimed. From this point, tribunals' arbitral jurisprudence at hand did not take any prudential consideration of the ancient principle "Unjust Enrichment" in civil law.²³ By recognizing the corruption defense raised by those States whose officials solicit bribes, future ICSID tribunals would "unfairly" permit corrupt host States to reap the rewards of their own misconduct.

Concluded from the above discussion, ICSID tribunals have permitted host States to invoke corruption defenses and have refused to exercise jurisdiction over

22 (1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

23 Kulick, *note 12*.

the disputes whenever an investor commits bribery to win a government contract. In so doing, tribunals' original purpose is to truly protect the public interests, but contrarily the respondent host States (even the officials) have been able to evade any potential liability for investment violations and obligation of compensation and factually profit from the violation of international investment law, the respondent's one-sidedly unjust advantageous position consequently results in the grave unbalance between the foreign investors and the host State. Obviously, the conclusion that "Against the Laws, Lose All" on the part of foreign investors is manifestly unfair from the perspective of weighing up the rights and obligations between the foreign investors and the host State.

D. Tribunal's Lacking in Power to Investigate Corruption

Undoubtedly, the incident that arbitral award was later found to be incorrect just like 2007 *Siemens AG Case*²⁴ to some extent reveals the "ruthless" reality that investment tribunals lack sufficient instruments and techniques to pursue anti-corruption criminal investigation. Traditionally, arbitration (including investment arbitration) was not perceived as an ideal venue for adjudicating claims of bribery or corruption. The questioning of or even resistance to the arbitrability of corruption-related claims in international investment arbitration proceedings was based on a limited view of the investment tribunals' jurisdiction, which covered concerns about the tribunals' restricted power to compel the production of evidence – particularly as compared with that of domestic regulatory authorities whose natural functions are supposed to investigate and prosecute crimes of corruption (say, bribery) – what's more, the tribunals are lacking in authority to impose criminal penalties.²⁵

24 In 1996, Siemens AG won a \$ 1 billion concession for services related to the production of Argentine national identification cards. With subsequently deteriorating domestic economy and in an effort to keep the economy afloat, Argentine legislature passed the *Economic-Financial Emergency Law* allowing the president to renegotiate or terminate any government contracts. Siemens brought an arbitration claim against Argentina before ICSID, alleging that the country's actions constituted an expropriation of its investment. The tribunal found that Argentina's actions over the course of the crisis constituted a "creeping" expropriation and ordered Argentina to compensate Siemens in the amount of \$ 217 million. The issue of corruption never arose during the arbitration proceedings. Shortly after the tribunal issued its award, however, "German prosecutors discovered Siemens had engaged in rather astonishing acts of systematic bribery around the world", including the aforesaid ID card contract with Argentine government (actually, Siemens had paid \$ 105 million in bribes to Argentine officials over the course of a decade). Consequently, Siemens waived the \$ 217 million arbitration award. *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, para 78 (Feb. 6, 2007), 14 ICSID Rep. 518 (2009).

25 Andreas Kulick & Carsten Wendler, "A Corrupt Way To Handle Corruption?: Thoughts on the Recent ICSID Case Law on Corruption", *Legal Issues Economic Integration*, vol. 37 (2010), pp. 61, 83.

Although it is undeniable that investment tribunals are facing some realistic difficulties, this does not necessarily mean that the investment tribunals shouldn't or unable to engage in combating the corruption in international investment activities. After all, tribunals have enough leeway and leverage to settle the investment disputes and eventually conclude a fair and just result. It is the case that certain anti-corruption functions overlap between ICSID (notwithstanding ICSID tribunals are inherently insufficient engaging in corruption investigative power) and domestic enforcement authorities. Therefore, on condition that an anti-corruption coordinative legal framework could be established successfully between these two kinds of anti-corruption organs, the effectiveness of internationally corruption-combating campaign will surely be guaranteed. Meanwhile, once the global public interest in international investment law is practically protected, the ultimate goal of constructing a "clean and beautiful"²⁶ international investment community on earth is not far to be fulfilled.

IV. POSSIBLE SOLUTIONS TO OVERCOME THE CURRENT DIFFICULTIES FACED IN ICSID INVESTMENT ARBITRATIONS

When confronted with the aforesaid difficulties encountered by ICSID tribunals while dealing with the corruption defenses usually invoked by host States, it is preferably recommended that the investment arbitral tribunals should ensure to combat the corrupt investment. The following suggestions are strongly proposed: *Firstly*, ICSID tribunals should commit themselves in exercising the jurisdiction over the case and probing into the nature of the corruption activities; *Secondly*, ICSID tribunals should adopt the balancing approach to weigh up the rights and interests between the disputing parties; *Thirdly*, ICSID tribunals should strengthen their collaboration and interaction with the domestic anti-corruption authorities in combating corruption tainted international investment. In other words, a coordinative framework is strongly proposed to be constructed between ICSID and domestic anti-corruption enforcement authorities.

A. ICSID Tribunals Must Exercise Jurisdiction over Investment Disputes and Explore the Nature of Corrupt Activities

As for the host state's corruption defense, it is preferable for tribunals to assume the quasi-judicial responsibility of deciding the merits of the investment disputes instead of discarding its legally-empowered abilities and functions. Hence, one of

26 Under China's Concept of "A Common Community for Mankind with a Shared Future", the Common Community is characterized by "perpetual peace", "universal security", "common prosperity", "openness and inclusiveness", and "cleanness and beautifulness". The construction of a "clean and beautiful" international investment community is the indispensable part of building "A Common Community for Mankind with a Shared Future".

the continuing missions unavoidable for tribunals to fulfill in the jurisdiction-exercising stage is to probe into the nature of specific corruption activities and adopt a balancing approach in measuring the interests and obligations between foreign investors and host State.

1. Unilateral or Bilateral Corruption Activity?

Unilateral corruption involves corrupt activities on the part of only one party. More often than not, this has meant fraud only on the part of the investor in international investment. Practically, such corruption as bribery usually involves both parties' illegal activities, i.e. foreign investor's bribe-offering and host State official's bribe-taking. Based on this classification criteria, *Inceysa* case, *Fraport* case and *Kardassopoulos* case can be categorized into one type of arbitration cases (To be noted, it is the investor's unilateral misbehavior that has been examined in *Inceysa* case as well as in *Fraport* case, whereas in *Kardassopoulos* case the focal point switched to the host State's unilateral misconduct), only *World Duty Free* case involved common corruption activities on both sides.²⁷ Undoubtedly, investment tribunals permit the host State to invoke corruption defense in the case of investor's unilateral corruption activity.

2. Hard or Soft Corruption?

Corruption may be either "hard" or "soft". According to Article 1(1) in Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, "hard corruption" refers to the offer or promise of an undue advantage to a public official to gain an improper advantage. It may be done directly or through an intermediary. It entails an intentional act pursued with the purpose of influencing a public official in the performance of his or her official duties, which in turn is directed at gaining an undue business advantage. The "soft" form of corruption (also called "influence peddling") is essentially an attenuated form of "hard corruption". It entails the offer or promise of an undue advantage to a person who claims to be able to exert an undue influence on a public official. "Influence peddling" by definition involves an intermediary, but in contrast to "hard corruption", the intermediary need not actually pay a bribe to the official who really conducts the administrative duties. Moreover, a foreign investor engaging in "influence peddling" need not intend to influence specific conduct on the part of the public official. Whereas a number of ICSID tribunals have upheld the corruption defense in cases of "hard corruption", no tribunal has allowed a State to invoke the defense merely for the reason of "influence peddling", and history suggests that future tribunals will also hesitate to do so.²⁸

27 Kulick, *note 12*.

28 *Wena Hotels case*, *note 2*.

3. Contract the Object of Corruption or Contract Procured by Corruption?

Corruption may be found in a contract's object or in its procurement. Both give rise to a successful corruption defense. In the first case, the consideration (bribery) offered by one party is an illegal act, the contract is legally unenforceable. Such a contract is equivalent to a "contract for murder".²⁹ Parties to the contract of course are unable to make good on committing bribery. However, it is the second situation that most ICSID tribunals encounter practice, i.e. getting involved with corruption in procuring a contract. Say, an overseas corporation commits fraud or bribery to win a public concession, and while settling the investment dispute the tribunal has generally permitted States to invoke the corruption defense, even if the contract itself is free from defects.³⁰

4. Corruption a Minor Breach of Law or Significant Contravention of Law?

Inceysa v. El Salvador tribunal decides that the exemption of the host State's compensatory responsibilities shall be based on the occasion where "an investment is made through a significant contravention of the applicable law, for example, by way of bad misrepresentation or fraud in the government bidding proceedings."³¹ In the case at hand, as foreign investor made the "investment" under the protection of bilateral investment treaty through its own fraudulent actions (including the forgery of various documents or the submission of false financial statements), investor concerned shall bear the full responsibilities for his illegal acts.

However in *Tokios Tokels* case, though the form of corporation indicated in the name is slightly noncompliant with the regulatory requirement, it is still no such significant fraudulent act as the investor did in *Inceysa* case. Therefore, it is strongly suggested that arbitral tribunals make deliberate distinctions of the illegal actions according to its severity, and never roughly categorize any investment involving investor's unlawful activities into "unqualified investment" beyond the protection of international investment law. For those investments only involved with slight law-breaking misbehaviours, tribunals shall not decline jurisdiction over the investment disputes for the reason of corruption defense.

29 Yackee, note 20, p. 729.

30 *Fraport AG case*, note 17, paras. 401-06; *Inceysa case*, note 6, paras 250-52; *Plama Consortium Ltd.*, ICSID Case No. ARB/03/24, Award, para. 321; *World Duty Free case*, note 7, para. 157.

31 *Inceysa case*, note 6, para. 202.

B. Balancing Approach in ICSID Tribunals

To be noted, all the international investment disputes involving corruption element reveal that an intertwined and interactive relationship obviously exists between foreign investors and host State. Whether the arbitration concerns common misconducts or only illegal acts on one side, the balancing approach is expected to provide a more flexible solution to coordinate rights and duties between both disputing parties who enjoy unequal social powers.

A scholar puts forward that investment tribunals should conduct a completely necessary balancing test and make the final award based on the merits of the case. Such a regime will (1) prevent the favoring of one party unfairly over the other; (2) make government officials hesitant about engaging in corruption activity; and (3) encourage States to create and implement anti-corruption measures. For example in *World Duty Free Case*, *restitutio in integrum* cannot be employed for the returning of 2 million dollars bribe which the investor has paid, but what about the other expenses and assets WDF had invested? In relation to voidable agreements, *restitutio in integrum* can restore the parties back to the position they would be in had the contract not been performed. Thus *restitutio in integrum* could act to unwind the contract and place both parties in their prior positions minus the two million paid bribe. A compromise is much fairer than what could be seen in *World Duty Free Case* in which WDF lost everything for committing a less serious illegal act.³²

1. Preconditions to Ensure Successful Invocation of Corruption Defense by Host States

With regard to the practical use of balancing approach, scholar suggests that the successful invocation of corruption defense by the host State be imposed preconditions (say, the host State has initiated the public prosecution procedure against its domestic corrupt governmental officials).³³ Besides, in order to invoke corruption defense, host State shall definitely commit that it has implemented the anti-corruption rules as required within its legal framework, or has adopted powerful countermeasures to combat corrupt criminal activities.³⁴ What's more, R. Zachary Torres-Fowler calls on tribunals to adopt comparative fault rules and strongly

32 Halpern, *note 11*, 314.

33 Brody Greenwald, "The Viability of Corruption Defenses in Investment Arbitration When the State Does Not Prosecute", available at: <<https://www.ejiltalk.org/the-viability-of-corruption-defenses-in-investment-arbitration-when-the-state-does-not-prosecute/>> accessed on 16 December 2018.

34 Tidarat Sinlapapiromsuk, "The Legal Consequences of Investor Corruption in Investor-State Disputes: How Should the System Proceed?", *Transnational Dispute Management (Corruption and Arbitration)*, vol. 3 (2013), p. 33.

proposes that host State invoke corruption defense only to the extent that it is free of guilt.³⁵

2. Host State Assuming Liabilities for Official's Contribution in Corruption

When examining the legality of the investment involving corruption, tribunals are proposed to explore the nature of corrupt activities (say, make further distinctions between one-party involvement and both-party involvement) and decide ultimately the proportion of corruption liabilities on each party. *MOL v. Republic of Croatia* tribunal insists on taking a balancing consideration of both State and foreign investor's wrongful actions, thus in no way of approving host State corruption defense totally or unconditionally. In case that the governmental officials performing administrative duties get involved in the specific corruption, ICSID tribunals shall handle host State's misconduct simultaneously and prevent host State evading its legal responsibilities that it is supposed to assume on the basis of "Attribution Doctrine"³⁶, which is quite different from the present approach adopted by investment tribunals of simply declining to exercise jurisdiction and dismissing the case in a rash way.³⁷ Even if investor's corruption has been verified in the arbitration proceeding, it is still irrational that the host State benefit solely from all the interests of foreign investment (e.g., without compensating foreign investors after expropriating the investments concerned).³⁸ Michael A. Losco submitted that the State would be held responsible for compensating the investor for a percentage of its claim corresponding to the percentage of fault attributable to the State. Tribunals are supposed to take serious consideration of the damages caused by investors' mere pursuit of economic interest by way of bribe-paying on one hand, and on the other hand seeing through the fact that it is high-ranking officials' usual voluntary bribe solicitation that seduces investors' corrupt doings. Therefore, if a foreign investor who seeks out and bribes a low-level official might only be able to recover 25 percent of its claim, whereas the host State in which high-level officials regularly extort bribes might be responsible for 75 percent of the investor's claim.³⁹

35 R. Zachary Torres-Fowler, "Undermining ICSID: How the Global Antibribery Regime Impairs Investor-State Arbitration", *Virginia Journal of Transnational Law*, vol. 52, no. 4 (2012), pp. 995-1039, at pp. 1029-1030.

36 Article 4 of Chapter: "Attribution of conduct to a State" in Draft Articles on Responsibility of States for Internationally Wrongful Acts provides, "1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State."

37 Hepburn, *note 5*.

38 Tamar Morchiladze, "Impact of Investment Wrongdoing on Arbitration Proceedings: How Far Should an Investment Wrongdoing Get?", available at: <<https://www.duo.uio.no/handle/10852/3564>> accessed on 26 February 2019.

39 Losco, *note 4*.

In practice, if certain foreign investment has obtained the market access permit granted by the host State administrative authorities in charge after the host State has implemented “case by case” review and approval system for accepting foreign investments, the specific investment would be treated as having been made in compliance with the conditions required by laws and regulations in the territory of host State. In such cases, the host States concerned are difficult to excuse themselves from the legal responsibilities which they are supposed to assume for “the conduct of any State organ shall be considered an act of that State under international law”.

C. A Proposed Internationally Coordinative Mechanism between ICSID and Domestic Anti-corruption Enforcement Authorities

Only by way of coordination or communication between ICSID tribunals and domestic anticorruption authorities responsible for international investment can ensure that neither the investor nor the host State reaps the rewards of its own corrupt behaviour. As has been discussed above, ICSID arbitration may completely overlook covert corruption. The ICSID dispute settlement system is not designed to ferret out covert corruption in the foreign-investment context (in practice, covert corruption is likely to be far more common than the open bribery seen in *World Duty Free Case*). Undoubtedly, the authorities tasked with investigating and enforcing domestic anticorruption statutes are likely to be much more adept at rooting out corruption (especially in the aspect of uncovering evidence of covert corruption unknown to a prior ICSID tribunal), and *Siemens AG Case* proved this point.

Meanwhile, the *Siemens AG Case* reflects alternative proposition that it is completely necessary to establish a kind of communicative and collaborative mechanism between ICSID tribunals and domestic anticorruption authorities as there is lack of appellate procedure in ICSID arbitration. Moreover, domestic anticorruption authorities’ investigation (a conviction, civil judgment, or prosecution agreement) may give host States an incentive to expropriate an investor’s assets and excuse corrupt governmental officials from punishment, thus leading to an obviously unfair outcome. Therefore, it is strongly proposed to promote the interaction and counterbalance between domestic anticorruption mechanism and ICSID arbitration proceedings.

1. The Legal Framework for the Establishment of a Coordinative Mechanism between ICSID and Domestic Anti-corruption Authorities

Actually, the existing treaties (or specific treaty provisions) which aim at combating corruption in international business transactions call strongly for international cooperation. And meanwhile the domestic anti-corruption enforcement legislation has also laid solid legal foundations for the global governance over international investment corruption. Therefore, the establishment of such an international anti-

corruption coordinative mechanism between ICSID and domestic corruption regulatory authorities turns out to be instrumentally guaranteed.

(i) The Anti-corruption Instruments on International Level

The Convention on Combating Bribery⁴⁰ of Foreign Public Officials in International Business Transactions (concluded by the Organization for Economic Co-operation and Development in 1997)⁴¹, the Criminal Law Convention on Corruption of the Council of Europe (1999) and 2003 UNCAC are the forerunners in fighting corruption in international commercial transactions.

To draw special attention, the US-Mexico-Canada Agreement (USMCA) 2018 emphasizes the relevance of collective countermeasures against corruption by the contracting States and the importance of anti-corruption cooperation and coordination with other international organizations.⁴² Chapter 27 titled “Anticorruption” by way of totally 9 Articles, namely “Definitions”; “Scope”; “Measures to Combat Corruption”; “Promoting Integrity among Public Officials”; “Participation of Private Sector and Society”; “Application and Enforcement of Anticorruption Laws”; “Relation to Other Agreements”; “Dispute Settlement”; and “Cooperation”.⁴³

(ii) Trends in the Domestic Legislation on Combating International Investment Corruption

Given that international commercial corruption committed by foreign investors is unfairly competitive activity usually seen in and jeopardizing host State’s market

40 Factually, “bribery” defined in Article 1 (1) of the OECD Convention refers mainly to “bribe-offering”, not covering “bribe-taking”.

41 The practice proves that the OECD Convention’s influence is quite limited in the context of international investment arbitration for the reasons: (1) whereas most countries have ratified ICSID Convention, only a few ICSID Convention signatories are Contracting Parties to OECD Convention; (2) OECD Convention only stipulates the criminalization of bribe-offering activity within the territory of foreign investors’ home country, which neglects the well-known fact that the major investment disputes focus on the treatment to foreign investors by host States. Therefore, the significance of OECD Convention is better to be said that it transmits a signal to international community: the corruption problem which international public policy concerns should be drawn increasing attention and be addressed in various ways.

42 Article 27.9: Cooperation 4. The Parties acknowledge the importance of cooperation and coordination internationally, including the OECD Working Group on Bribery in International Business Transactions, the UNCAC Conference of the State Parties and the Mechanism for Follow-Up on the Implementation of the IACAC, as well as their support to the APEC Anti-Corruption and Transparency Working Group and the G20 Anti-Corruption Working Group.

43 Available at: <<https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement>> accessed on 1 February 2020.

economy, a lot of countries (or regions) have enacted domestic legislation to govern this type of commercial misconduct (From 2004 to 2009 alone, the number of new enforcement laws increased from as few as five to over forty). Take America as an example, with the stipulation of laws and regulations such as 1977 Foreign Corrupt Practices Act (FCPA), Trade and Competitive Act (1988) and International Anti-Bribery and Fair Competition Act (1998), a sizable, intricate and comprehensive domestic legal framework targeting at combating overseas commercial corruption has been established within the territory.

To draw special attention, in order to ensure the normal conduct of international criminal judicial assistance, International Criminal Judicial Assistance Law of the People's Republic of China was promulgated and became effective on October 26, 2018. The Law is enacted to "strengthen international cooperation in the field of criminal justice, effectively punish crime, protect the legitimate rights and interests of individuals and organizations, and safeguard national interests and social order."⁴⁴ Since the Law stipulates the collaborative mechanism between China and foreign countries (or such international organizations as ICSID) in order to ensure the normal conduct of international criminal judicial assistance, it is undoubtedly China becomes the forerunner in proposing a legally interactive mechanism between domestic anti-corruption authorities and ICSID, an arrangement designed to solve corruption problems by promoting justice and transparency on the global stage.

2. The Interactive Strategies Employed between ICSID Tribunals and Domestic Anti-corruption Authorities

The interactive and collaborative strategies employed in three distinct situations classified under the criteria of temporal order in relation to the initiation time of ICSID arbitration and domestic anti-corruption enforcement proceeding are to be discussed in the following section.

Situation One: ICSID Arbitration Preceding the Domestic Anticorruption Investigation

As *Siemens* case shows, when an arbitral award is issued before the commencement of the domestic anticorruption investigation, ICSID tribunals can reach to incorrect conclusions due to its failure to find out evidence of covert corruption. If the incorrect award has already been rendered and paid, the domestic anticorruption authorities should ask the foreign investor involved to waive or disgorge the award.

44 Article 1 in "Chapter 1 General Principles" of International Criminal Judicial Assistance Law of the People's Republic of China.

(i) Waiver of Unlawful Rights or Disgorgement of Unjust Compensation Gained by Previously-made Defective ICSID Awards

The ICSID tribunal found that Argentina's actions over the course of the crisis constituted a "creeping" expropriation and ordered Argentina to compensate Siemens the amount to the tune of \$ 217 million.⁴⁵ Shortly after the tribunal issued its award, however, "German prosecutors discovered Siemens had engaged in rather astonishing acts of systematic bribery around the world."⁴⁶ Following its FCPA settlement in 2008, Siemens waived its right to the \$ 217 million award that it had won against Argentina. Though it is unclear precisely why Siemens did so, its forfeiture of the award appears to be a normatively desirable result. If the ICSID tribunal had been aware of the Siemens' corruption facts, it almost certainly would have approved a corruption defense in favour of Argentina. Alternatively, had the investigation by German prosecutors never occurred, Siemens would have succeeded in reaping the benefits of its own corrupt conduct by exploiting the dispute-resolution provisions in a treaty whose protections it was not entitled to enjoy.⁴⁷ Accordingly, to ensure correct outcomes in the future, domestic anticorruption authorities (in America, such as Department of Justice (DOJ) and Securities and Exchange Commission (SEC) should require investors to waive their rights to ICSID awards (or to disgorge awards already paid) as a condition of prosecution agreements. In conformity with the maxim of "*restitutio in integrum*", the claimant's waiver of an award restores the parties to the positions they would have enjoyed had the respondent host state succeeded in asserting the corruption defense.⁴⁸

When a respondent host state has already paid the specific compensation rendered in an award, the "disgorged" payment might be used as follows: (i) to be forfeited to the investigating country's government; (ii) to implement changes to the reporting and bookkeeping practices within the claimant corporation; (iii) or to be placed into an anticorruption fund to support anticorruption efforts in the host State. Alternatively, the investor could return the funds to the host State, but doing so would achieve the same result as if the tribunal had recognized the host State's corruption defense.⁴⁹ However, this would essentially permit the host State as the sole subject to reap the benefits of its corrupt conduct in the case that the officials are involved in corruption (say bribe-taking etc.). Actually, the best solution might incorporate several of these elements, based on the subsequent domestic prosecuting

45 *Siemens AG case*, note 24.

46 *Torres-Fowler*, note 35.

47 *Losco*, note 4.

48 *World Duty Free case*, note 7, paras 164 & 186.

49 *Losco*, note 4.

authorities' best judgment in the given circumstances aimed at achieving the most just result.

(ii) Loss to Foreign Investors in ICSID Arbitration Offsetting Subsequent Domestic Anti-corruption Penalties

Supposing that ICSID tribunal has made unfavourable award against corrupt foreign investors before domestic anticorruption authorities initiate commercial corruption investigation, are the final monetary penalties imposed by domestic anti-corruption authorities able to be offset by the amount of economic losses foreign investors suffered in anterior ICSID arbitration? Some commentators say yes. Among them, Bhojwani proposes that "domestic anti-corruption penalties be offset by the amount an investor loses in arbitration".⁵⁰ This proposal entails reducing the violator's corruption penalty by the amount of its failed ICSID claim in the event that the host state invokes the corruption defense. The proposal is attractive because it seeks to temper the price paid by corrupt investors so that the combined effect of domestic anti-corruption enforcement and the corruption defense successfully invoked in investment arbitration do not act as a deterrent to foreign direct investment.

But the different argument against offsetting rests on an assumption that the offsetting "could potentially undermine the FCPA's supply-side approach to corruption. Both parties to mutual corruption are culpable, and capitulating to investors could do more harm than good by weakening the appearance of certainty attached to FCPA sanctions."⁵¹ Actually, such concerns could be greatly relieved for at least two reasons: (i) ICSID tribunals are strongly inclined to adopt the balancing approach to provide a more flexible solution to coordinate rights and duties between foreign investors and host State, both parties enjoying unequal social powers. Taking account of host State's officials' contributory liabilities in joint corrupt misconduct when deciding foreign investors' penalties could never mean "capitulating to investors". (ii) Following the Principle of "No One Is to Be Punished Twice for One Offense", the amount of economic losses awarded in anterior ICSID arbitration on the part of foreign investors is reasonably able to offset the final monetary penalties imposed by domestic anti-corruption authorities.

Situation Two: Domestic Anticorruption Investigation Preceding ICSID Arbitration

When investigation conducted by domestic anticorruption authorities reveals that an investor has corruptly procured an investment contract, the corrupt misbehaviour

50 Rashna Bhojwani, "Deterring Global Bribery: Where Public and Private Enforcement Collide", *Columbia Law Review*, vol. 112, no. 1 (2012), pp. 66-111.

51 Losco, *note 4*.

creates a perverse incentive for the host State to expropriate the investor's assets by offering the state immunity from claims. However, host States might also attempt to renegotiate the investment contract to insert burdensome new terms, securing in the knowledge that they are protected by the corruption defense.

(i) Opportunity for Cure

When foreign investor has been found getting involved in corruption (which renders a contract voidable or unenforceable) during the course of investment, one plausible solution would be to mandate an opportunity for the investor to cure its breach of the investment contract: investor is supposed to make payment to compensate the host State for all the actual damages incurred by investor corruption. Once the compensation having been paid, the host State shall relinquish any claim to the corruption defense upon payment of damages to the host State for all actual harm incurred as a result of the corruption. Practically speaking, actual injury resulting from bribery might be difficult to assess. In the event that no actual damages can be calculated, an alternative could be the payment of nominal damages or a contribution to an anticorruption fund in the host State.

Cure provisions can be adopted by amending existing BITs. However, it would likely be more difficult to revise investment treaties. So individual investors could alternatively negotiate cure provisions into their investment contracts. The main advantage of such provisions is that they would negate host States' incentive to expropriate (especially in the case that the result of corruption investigation by domestic anticorruption authorities comes out positive), thus ensuring both that investors retain access to a neutral forum for protecting their assets and that unscrupulous host States do not benefit from their own wrongdoing.⁵²

(2) Disclosing the Details of Domestic Anticorruption Enforcement Actions upon the Request of ICSID Tribunals

In practice, aiming at keeping with the principle of "*restitutio in integrum*" and the doctrine of "unclean hands", before the domestic anticorruption investigation begins, the American anticorruption authorities usually sign a prosecution-agreement with investor in which the latter should be required to agree not to bring an ICSID claim against the host State for any expropriation that has already occurred. Domestic authorities could give teeth to this obligation by threatening to release evidence to the arbitral tribunal in the event that the investor does bring a claim. Although such an approach might prevent host States from utilizing domestic anti-corruption enforcement actions as signals to expropriate, it would introduce further opacity

52 Losco, *note 4*.

into the application of the domestic anti-corruption legislation, and for that reason might not be desirable. By doing so, when the result of anticorruption comes out (especially on occasion of positive result), the expropriation action of the foreign investment by host State becomes a natural thing.

However as the subject whoever engaged in corrupt activities target to be penalized, foreign investors' fortune can be described as "life floating and sinking as duckweed", and international investment arbitration becomes instead the main "life-saving" mechanism for investors. With regard to the situation of "Domestic Anticorruption Investigation Preceding ICSID Arbitration", anticorruption authorities could possibly refuse to share any evidence with an ICSID tribunal. In any way, such an approach might be suspicious of host States' utilizing domestic anticorruption enforcement actions as instruments to expropriate investor assets. What's more, it would introduce further opacity into the future operation of domestic anticorruption enforcement. Therefore, strengthening the interaction and counterbalance between domestic anticorruption enforcement mechanism and ICSID arbitration proceedings evolves into a critical issue urgent to be solved in international investment arbitration study and practice.

Fortunately, with China's pioneering efforts to have promulgated and implemented the International Criminal Judicial Assistance Law of the People's Republic of China (2018), the legal barriers of mutual assistance in such activities as criminal inquiry, investigation, prosecution, trial and execution between Chinese government and international organization (like ICSID etc.) have been successfully removed (Article 67)⁵³. To be specific, the general rules of international criminal judicial assistance embodied in "Chapter 2 Proposing, Receiving and Processing Criminal Judicial Assistance Requests", "Chapter 3 Service of Documents", "Chapter 4 Investigation and Evidence Collection", "Chapter 5 Arrange for Witnesses to Testify or Assist in Investigation" and "Chapter 6 Seize, Detain, and Freeze the Properties Involved" defines the responsibilities and functions of China's foreign relations agencies in providing criminal judicial assistance, thus underlying the domestic legal basis for the establishment of the coordinative mechanism between China's anticorruption authorities and the ICSID system, which results in setting up the "responsible power" image for China as far as her innovation and contribution in combating international investment corruption are concerned.

53 Article 67, The People's Republic of China and relevant international organizations that carry out criminal judicial assistance shall be governed *mutatis mutandis* to the provisions of this Law.

Situation Three: Simultaneous Proceedings between ICSID Arbitration and Domestic Anti-corruption Enforcements

Although ICSID tribunals do have the legal power to command or compel the disputing parties to submit evidence and documents, that power is greatly different from the investigatory power vested in the domestic anticorruption authorities (such as DOJ, SEC and Federal Bureau of Investigation (FBI) under the FCPA in USA: after all, the clues of foreign investors' corruption are more easily noticed or even more effectively controlled by investors' home country or host State, and the domestic anticorruption authorities responsible for investigations and enforcement enjoy evident advantages in evidence collecting and site investigating as well. This becomes one of the reasons why ICSID tribunals are recommended to await for the results of domestic investigations.

(i) ICSID Tribunals to Suspend the Arbitral Proceedings

In America, FBI is capable of uncovering evidence that may entirely escape from an arbitral tribunal's notice. So as to benefit from the investigative resources of the bodies tasked with anticorruption enforcement, ICSID tribunals should make it their policy to ask for (and the DOJ should be prepared to make) recommendations about whether to stay proceedings pending an FCPA outcome. At the same time, investors are encouraged to stay ICSID claims pending the results of FCPA investigations in order to ensure correct arbitral awards. By doing so, it makes domestic anticorruption authorities possible to conduct full investigations on one side, and the results of investigations could valuably help inform the outcome of the ICSID claim on the other side.

However in practice, ICSID tribunals may be reluctant to wait for the outcome even when anticorruption investigation of investor's misconduct is still in process. E.g., *Fraport* tribunal did refuse to grant a stay requested by respondent host State during the arbitral proceeding.⁵⁴ *Fraport* case indicates that it will never be an easy job to make future tribunals accept the stay claims raised by the disputing parties. As for this situation, it seems it is beyond comprehension. As far as the arbitration efficiency is concerned, tribunals should be more willing to grant a stay requested by the claimant because the claimant could ultimately decide upon whether to drop or proceed with its claim after all. What's more, in order not to follow in the step of *Siemens* case, future ICSID tribunals should be especially eager to collect as much information from domestic anticorruption proceedings as possible so as to assure they render correct awards.

54 *Fraport AG case*, note 17, paras. 5, 27 & 47.

(ii) The Bridging between Domestic Anticorruption Investigation and ICSID Arbitration

ICSID arbitral proceedings could resume after domestic anticorruption investigation get concluded. Depending on the outcome of the investigation, domestic anticorruption enforcement authorities may take different steps to cooperate with ICSID tribunals. If a domestic authority investigation uncovers no evidence of corruption, the authority could convey to the investment arbitration tribunal that nothing was found. On the contrary, in case an investigation does uncover evidence of corruption, the domestic authority may not understandably hesitate to share that evidence with an ICSID tribunal and the tribunal should reach possibly correct decisions as of its impartiality and neutrality.

In this way, ICSID tribunals could gladly enlist domestic anticorruption authorities as “detectives” to ensure that an award is rendered based on accurate and complete facts. Meanwhile, domestic authorities should willingly offer their assistance because ICSID awards based on correct information will reward honest investors while punishing corrupt ones, which are nevertheless the international liabilities shared by domestic anticorruption enforcement authorities.

V. CONCLUSION

When confronted with foreign investors’ ICSID arbitration claim, host State certainly would spare no efforts to assert its exemption from legal liabilities. Corruption defense thus is more and more frequently employed by host State in investment arbitration to frustrate investors’ claim. Therefore, corruption issue attracts more and more attention in ICSID arbitration practice, and sometimes even evolves into the critical or focal point in the arbitral trial. While deciding corruption-involved international investment cases, some ICSID tribunals conclude their lacking of jurisdiction even at the preliminary jurisdictional stage without conducting following substantive examinations of the disputes. Such arbitral jurisprudence is readily subject to strong criticism: ICSID tribunal’s denial is suspicious of infringing procedural justice; there exist uncertainties of examining the “in accordance” requirement in investment process and arbitration practice; tribunals’ denial of jurisdiction incurs substantial unbalance of interests between the disputing parties and so on. For purpose of overcoming such defects in ICSID arbitration, ICSID tribunals are lawfully supposed to exercise the jurisdiction and probe into the nature of corrupt activities; Tribunals should adopt the balancing approach in deciding the cases and weigh up fairly the obligations, rights and interests between the disputing parties; It is strongly proposed to strengthen the collaborative interaction between ICSID proceedings and domestic enforcement mechanism of combating against corrupt activities in international investments.

THE SANCTITY OF RULE OF LAW, NATIONAL SECURITY AND PERSONAL LIBERTY IN NIGERIA: WE ARE NOT YET OUT OF THE WOOD

L. O. TAIWO*

It is better for the law to rule than one of its citizens... so; even the guardians of the law are obeying the laws-

Aristotle (384BC-322BC)

Abstract

The above statement encapsulates the need for adherence to the rule of law in political governance. This has more than ever before brought the primacy between national security and personal liberty of individuals in Nigeria to the front burner. The partisans of rule of law say, it is the font et origo, the father and grundnorm which takes precedence and priority over national security. It is a paradigm shift from the logic of empire, kingdom and fiefdom. The crux of the matter in this piece is which arm of government determines when national security or interest is in jeopardy? This paper therefore examined the concept of the rule of law and the extent to which it can be sacrificed on the altar of national security in a democracy. Using primary and secondary sources of information, the study found that it is dangerous to national security or interest for the executive arm to whimsically deprive citizens of their constitutionally guaranteed rights because of perceived or actual threat to national security. The study concluded that the determination of when national security takes prominence over the rule of law should be the exclusive preserve of the judiciary. To do otherwise would amount to the ruins of law.

Keywords: *sanctity, rule of law, national security, personal liberty*

I. INTRODUCTION

After scorning many positive orders of court concerning the personal liberty of certain individuals, President Mohammed Buhari stirred the hornets' nest when he publicly declared his disposition to the rule of law. The occasion was at the 58th Annual Nigerian Bar Association Conference in Abuja, August 26, 2018. With great enthusiasm, he declared;

“Our apex court has had cause to adopt a position on this issue in this regard and it is now a matter of judicial recognition that; where national security and public interest are threatened, the individual rights of those allegedly responsible must take second place in favour of the greater good of society¹.”

In other words, where the rule of law and the imperatives of national security or interest collide, the arc of supremacy would bend in favour of national security

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1 Sekoni Ropo, “Recognising Liberty and Security”, *The Nation*, (Sunday, September 2, 2018), p. 18.

or interest. With this, the President has deliberately kicked up legal dust over an issue that has bedeviled government in most of the third world countries and has renewed the fear that we are not yet out of the wood. The source of inspiration for this proposition is from judicial observation made by Hon. Justice Tanko Mohammed, (JSC) now Chief Justice of Nigeria, over an application for bail in the case of *Asari Dakubo v. FRN*.² The President's statement seemed to be an elaboration of a kite earlier flew by Attorney-General of the federation Mr. Abubakar Malami (SAN) to justify the detention of the Islamic Shite leader, Malam El Zakzaky, his wife, Zainab and former National Security Adviser, Col. Sambo Dasuki in persistent violation of positive court orders to the contrary. On a superficial level, the declaration is a notorious fact since there can be no issue of national security or interest if there is no nation, and therefore may be constitutionally right and legally sound; the danger however, is in the details, its political implications and our fidelity to democracy if adopted as a state ideology.

There can be no doubt that the maintenance of national security and peace in any country is the solemn responsibilities of the government that should be handled with seriousness and commitment. However there is a thin line between the maintenance of national security and violation of the constitutionally protected Human Rights of the citizens. The line is usually crossed when government security agencies decide to carry out their constitutional duties using unconstitutional methods. Thus, the President's declaration may simply be regarded as striking a chord in his heart to give the impression that the ruling of the court should serve as a rule of general application in cases of violation of Human Rights at least to suit his predilections. Hence, the declaration can at best be regarded as belated justification for his disdainful disposition to the rule of law and Human Rights or an eleventh hour rationalisation of deprivation of liberty of individuals whose actions were perceived to be prejudicial to national security. Indeed, there is growing evidence to suggest that since coming to power of the Buhari's administration, respect for the rule of law seems to be waning, while arbitrariness in the use of state power seems to be gaining ascendancy. The corollary is that the President's declaration has triggered a controversy as to whether chapter IV, especially Section 35(1) of the 1999 Constitution of the Federal Republic Nigeria (as amended) (hereinafter cited as CFRN) which is a derivative of rule of law is subordinate to national security or interest. If the answer is in the affirmative, at least for a moment, two questions are relevant. First, what is national security or interest? And, two who defines it? This is exactly the reason why the novel proposition of the President is interrogated in this study with a view to determining what constitutes national security or interest and the ultimate source of authority to decide when it is in jeopardy.

2 (2007) ALL FWLR (375) p. 588.

Thus, this paper examined the long term political implications of this proposition and its effects on the rule of law as a pillar of constitutional democracy which is indispensable not only for the stability of the state but also for the liberty of the citizens. To achieve this objective, the paper is structured as follows: section one clarified the various relevant concepts. Section two examined the political implications of the proposition. Section three discussed the consequential or legal effects of subjugating the rule of law to a specious or nebulous alibi called national security or interest. Section four undertook a comparative analysis of national security and the rule of law in other jurisdictions. Section five is the conclusion which reiterated unconditional adherence to the rule of law for the triumph of democracy and good governance in both municipal and international law.

A. The Rule of Law

The rule of law is a concept of considerable antiquity. It simply means the predominance of law as opposed to the use of arbitrary power. Its origin dates back to early history. It had being a principle of the English unwritten constitution from the Middle Ages and its supremacy had formed the basis of the struggle between the king and the Parliament which was resolved in favour of the supremacy of the rule of law.³ It is the foundation upon which democracy and democratic governments all over the world rest. It distinguishes and differentiates democracy as a proffered system of government. It also presumes that the society in which it operates is governed by laws derived from their constitution and that is why the constitution is rightly seen and recognised as the *groundnorm* of all laws.⁴ According to the Black's Law Dictionary,⁵ the rule of law is the supremacy of regular law as opposed to arbitrary power. Every person is subject to the ordinary law within the jurisdiction⁶ In Dicey's exposition:

It is the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness, prerogative or even of rule of wide discretionary authority on the part of government...⁷

3 P. Ehi Oshio, "Rule of Law, Military Government and Dilemma of Nigerian Courts", *Journal of the Indian Law Institute*, vol. 30, no. 4 (1988), pp. 456-472, available at <<https://www.jstor.org/stable>> accessed on 31 March 2020

4 Ubani Tony, "In Defence of Rule of Law in Nigeria", (2020), available at <<https://www.worderpaper.ng/defence-rule-law-Nigeria>> accessed on 24 April 2020.

5 B. A. Garner, *The Black's Law Dictionary*, 7th Edition, (West Group Publishing Co, St Paul, 1999), p. 332.

6 *Ibid.*, p. 332.

7 A. V. Dicey. *Introduction to the Study of the Law of the Constitution*, 10th Edition, (Liberty Classics, USA, 1885), p. 199.

The concept of rule of law is a globally acceptable democratic tenet that places prominence on strict adherence to the due process of law. It presupposes *ipso-facto* that everyone is equal before the law and that due process of law must necessarily take the centre stage in administering the affairs of the State. A late Nigeri'n jurist, John Idowu Taylor profoundly captured this position while delivering judgment in *Mohammed Olayori & 2 Ors*⁸ as follows:

If we are to have our actions guided and restrained in certain ways for the benefit of society in general and individual members in particular then, whatever post we hold, we must succumb to the rule of law. The alternative is anarchy and chaos.⁹

The immediate significance of rule of law regime is that it ensures that there is a supreme check on political power used against the peoples' rights.¹⁰ The rule of law guarantees consistency and certainty of outcomes in every possible way in a democratic society such that nothing is left to the whimsicality of political power or individuals within the society. The rule of law collectively symbolises the most important features of democratic governance such as government of the people, by the people and for the people.¹¹ The rule of law being a constitutional concept remained the cornerstone of governance in any given polity. It is a nebulous concept whose meaning and centre vary from place to place¹² and which Lord Coke colourfully spoke of as "golden and straight net wand of law as opposed to the uncertain and crooked cord of discretion."¹³

Late Justice Chukwudifu Oputa (JSC) said in the case of *Government of Lagos State v. Ojukwu*¹⁴ that "the state is subject to law and that the judiciary is a necessary agency of the rule of law".¹⁵ The long history of absolute rule in human experience led those seeking a more just order to articulate the need to be more trustful of laws

8 (1969) 2 All NLR, p. 298.

9 *Ibid.*, p. 308.

10 Ubani Tony, *note 4*.

11 The 16th President of the United States Abraham Lincoln (1809-1865) made this statement in his address at the dedication of the Military cemetery at Gettysburg, Pennsylvania on 19th, November, 1863.

12 Ojo .A, *Constitutional Law and Military Rule In Nigeria* (Evans Brothers Limited, Nigeria, 1987), p. 239.

13 Quoted from *Miscellaneous Offences Tribunal v. Okoroafor*, 10 NWLR (2001), p. 310. See also Olanipekun Wole, "Assault on the Rule of Law: A Veritable Threat To Democracy Being The Text of The First", Annual Emeritus Professor David. A, Ijalaye Lecture delivered on 27 February 2006, at the Faculty of Law, O.A.U. Ile-Ife., p. 16.

14 1986 NWLR (18), p. 621.

15 *Ibid.*, p. 647.

than the heart of man. As John Adams, the second President of the United States said, “the executive shall never exercise the legislative power or judicial powers or either of them to the end that it may be a government of law and not of men.”¹⁶

In other words, without the rule of law, there can be no rule at all.¹⁷ Cicero was therefore right during the heydays of Roman jurisprudence when he said that “we are all slaves of law so that we may be free.”¹⁸ It is worthy of note that the rule of law and the rule of force are mutually exclusive. The Court of Appeal in the case of *Nwadijuebowe v Nwawo & Ors*¹⁹ observed that “law rules by reason and morality, force rules by violence and immorality.”²⁰ However, the world no longer has a choice between the rule of force and rule of law. Indeed, if civilization is to survive, it must choose the rule of law through an independent judiciary. Despite God’s omnipotence, His unfathomableness and wisdom, He still chose to govern man through the rule of law. This is embodied in the Ten Commandments given through his servant, Moses on mount Sinai.²¹ The whole essence of this is that the rule of law itself was an expression first created by God directing man not to be governed by power or might but by laid down laws.²² Thus, “where the rule of law operates, the rule of self help by force is abandoned.”²³ In fact, the rule of force makes monsters of the citizens. Although, unlike 1989 Constitution which provides that the “State shall... enforce the rule of law”²⁴ there is no direct provision in the 1999 Constitution. However, section 17(1) thereof states that “The state social order is founded on ideals of freedom, equality and Justice.” To a discerning mind, these ideals are encapsulated in the rule of law which enables the citizens to experience

16 Pat Utom, “The Rule of Law, Property Rights and Challenge of Prosperity in Nigeria”, *The Advocate*, The International Journal of Law Student’s Society, Obafemi Awolowo University, Ile-Ife, vol. 24 (2004), p. 132, the Journal is in Honour of Hon’ble Justice Muhammed Lawal Uwais (JSC), p. 132.

17 Felix Nwaneri, “Rule of Law on Test”, *New Telegraph*, Nigeria, (December 9, 2019), p. 11.

18 Chukwudifu Oputa, “The Independence of the Judiciary in a Democratic Society. Its Needs, Positive and Negative Aspects”, *Justice Journal: A Journal of Contemporary Legal Problems*, vol. 1, no. 3 (1990), p. 21; See also Ekweonu Cristie C., “The Federal Ministry of Justice, The Rule of Law and the Challenges of Justice Administration in an Era of transformation”, *The Justice Journal: A Journal of Contemporary Legal Issues*, vol. 5 (2013), p. 1.

19 (2004) 6 NWLR (869), p. 439.

20 *Ibid.*, Augie JCA, p. 455.

21 See the Book of Exodus 20, verses 3- 17. See also, Roman’s 13, verse 9.

22 Olanipekun Wole (SAN), “Assault on the Rule of Law: A Veritable Threat to Democracy”, The First “Annual Emeritus Professor David A. Ijalaye Lecture, the Faculty of Law, O. A. U. Ile – Ife (February 27, 2006), p. 7.

23 *Government of Lagos State v. Ojukwu*, 1986 NWLR (18), p. 621.

24 Section 16 (6) of the 1989 Draft Constitution of the Federal Republic of Nigeria.

life that is “nice”, “beautiful and safe”.²⁵ When fully imbibed in Nigeria, we shall be proud of the legacy which the former President of the country, late Umaru Yar’dua would have loved to bequeath to Nigerians, and that is, the establishment of respect for the rule of law.

It must be emphasized at this stage, that the rule of law is not peculiar to Nigeria as a country alone. In fact, it is one of the bed rock or pillars on which the United Nations is built and it is fundamental to the maintenance of peace, security and stability on the international stage.²⁶ The General Assembly of the United Nations first considered it at its World Conference on Human Rights in Vienna in 1993. Significant progress was made by the UN Human Right Council in 2006 when it developed the international normative framework and specific aspects of the rule of law.²⁷ For the United Nations system, the rule of law is a principle of governance in which all persons, institutions and entities, public and private institutions including the States itself are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with international Human Rights norms and standard. It requires measure to ensure adherence to principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision making process, legal certainty, avoidance of arbitrariness and procedural and legal transparency.²⁸

The rule of law is also fundamental to achieve international economic and social progress and development. It is the foundation to people’s access to public service, curbing corruption, and restraining the abuse of power. It also establishes the social contract between the people and the State.²⁹ The United Nations General Assembly enjoins all member states to abide by the Charter of United Nations and the wider body of international law and the rule of law. Member states are expected to be subject to the laws and to apply them in their international relations and to be equal before them. The United Nations also promotes the rule of law within member states by fostering the development of norms, social practices and institutions that

25 Idris Musa & Hamza Abdulahi Yusuf, “Rule of Law, Personal Safety and National Security in Nigeria”, *International Journal of Arts & Science*, vol. 9, no. 1 (2016), pp. 125-134.

26 United Nation and the Rule of Law, available at: <[https://www.un.org/rule of law](https://www.un.org/rule%20of%20law)> accessed on 20 December 2020.

27 UNGA, available at <[https://www.un.org/rule of law/general Assembly](https://www.un.org/rule%20of%20law/general%20Assembly)>. The Third Committee of the General Assembly continues to regularly consider the rule of law in the administration of justice, extrajudicial, summary or arbitrary executions, human rights and fundamental freedoms. They are also countering terrorism and encouraging reforms in criminal justice system). The rule of law has also featured prominently in the Assembly’s consideration of other topics such as counter-terrorism.

28 United Nations and the Rule of Law, *ibid*.

29 *Ibid*.

ensure good governance institutions. This strengthens the decision-making process to which political leaders are subject by curbing arbitrary process of political power.³⁰

In many countries that practice democracy, the rule of law is an ideal. For instance, it is an epitome of the English Bill of Rights 1689 and the American Declaration of independence July 1776. It motivated the declaration of African Charter for Human and Peoples' Rights on October 21, 1986. It engineered the French Declaration of Rights of Man on August 27, 1789 and the United Nations Declaration of Human Rights in 1948. It therefore represents Man's triumph over arbitrariness, prejudices, personal hunches and morbid predilection.³¹ It is no surprise therefore that in modern times, the rule of law appears more fully to be identified with human Rights incorporated into the constitution of modern states.³²

B. The Concept of National Security

There is no single universally accepted definition of national security or interest both in municipal law and international law. It means different things to different people. The concept is widely interpreted by different scholars and analysts. However, under municipal law, it is always discussed in the context of the ability of a nation state not only to protect its citizens from internal and external aggression but also to pursue those things that promote their welfare in an environment free from hostility. It is conceived as freedom from danger or threats to a nation's ability to protect and develop itself, promote its cherished values and legitimate interest.³³ In the context of this discussion, national security "refers to the capacity of a State to promote the pursuit and realization of the fundamental needs and vital interests of man and society and to protect them from threats which may be economic, social, environmental, political, and military in nature."³⁴ It is also within this context that former Nigeria's President, Olusegun Obasanjo said

30 Eliasson Jan, "The Role of the UN in Promoting the Rule of Law: Challenges and New Approaches", available at: <<https://www.un.org/en/chronicle/article/role-un-promoting-rule-law>> accessed on 15 April 2020.

31 Taiwo L.O., "Democracy, Court, and Rule of Law in Nigeria: Problems and Prospects", *East African Journal of Peace and Human Rights*, vol. 13, no. 2 (2007), p. 270.

32 Oshio, *note 3*, p. 458. The demolition of a hotel and auctioning of vehicles seized on alleged violation coronal virus lockdown regulations by Governor Wike of Rivers state in Port-Harcourt was a good example of show of power and might which constitutes reckless violation of rule of law.

33 C. Jaja Nwanegbo and Jude Odigbo, "Security and National Development in Nigeria: The Threats of Boko Haram", *International Journal of Humanities and Social Sciences*, vol. 3, no. 4 (2013), pp. 285-291, at p. 286.

34 Patrick E. Igbinovia & Blessing A. Igbinovia, "The National Security Advisor in the United States and Nigeria: A Comparative Perspective", *The Constitution*, vol. 13, no. 1 (2013), p.71.

The primary objective of National Security shall be to strengthen the Federal Republic of Nigeria to advance her interests and her objectives to curtail instability, control crime, eliminate corruption, enhance genuine development, progress and growth and improve the welfare and well being and quality of life of every person.³⁵

The United Nations Development Programme (1994 & 1996) posits that human security (an aspect of National security) refers to “freedom from fear, freedom from want and safety from chronic threats such as hunger, disease and repression from sudden and harmful disruption in the patterns of daily life...”³⁶

The former United States Secretary of Defence, Brown Harold stated that “national security is the ability to preserve the nation’s physical integrity and territory to maintain its economic relations with the rest of the world on reasonable terms to preserve its nature, institution and governance from disruption from outside and to control its borders.”³⁷ In year 2000, the Obasanjo’s administration developed the strategic security policy document for Nigeria. In it, national security is identified as “the aggregation of security interest of all individuals and institutions in the territory of Nigeria.”³⁸ Thus, the world over, the concern for security for sustainable development and good governance takes the centre stage of national discourse. A country is therefore secured to the extent that the political leadership is able to anticipate, recognize and respond effectively to these threats using the available national resources to ensure the safety of life and property of the citizens.³⁹ In other words, a secure environment provides a safe haven for other important socio-economic, religious, and political development. The inability of a nation to guarantee the safety of life and property of her citizenry negates the very existence of the government of the nation and especially, that of social contract between the rulers

35 *Ibid.*, p.71.

36 Gubak Happy D. & Bulus Kwopnan, “National Security Challenges and Sustainable Development in Nigeria: A Critical Analysis of the Niger Delta Region”, *Global Journal of Political Science and Administration*, vol. 6, no. 4, pp. 32-50, at p. 35, available at <<https://www.eajournals.org>> accessed on 19 March 2020.

37 Brown Harold, “Thinking About National Security, Defence and Foreign Policy in a Dangerous World (1983), cited in Cynthia Ann Watson, *US National Security: A Reference Handbook*, 2nd Edition, (ABC-CLIO, 2008), p. 281.

38 Olusegun Obasanjo is a Nigerian military and political leader who served as military head of state from 1976 to 1979 and later as President of Nigeria from 1999 to 2007. Ideologically a Nigerian nationalist, he was a member of the People’s Democratic Party. His government developed in 2000 a Grand Strategy on National Security.

39 Igbinoia, et. al., *note 34*, p.11

and the ruled.⁴⁰ In order to ensure that the safety of life and properties of Nigerians are of paramount consideration, the 1999 CFRN provides in the fundamental objectives and directive Principles of state policy that the security and welfare of the people shall be the primary purpose of government.⁴¹ This provision places onerous responsibilities on the Nigerian government to develop adequate capacity to cater for the protection, and defence of her citizenry.⁴² However, many of the fundamental rights of individuals contained in Chapter IV of 1999 CFRN cannot invalidate any law that is reasonably justifiable in democratic society in the interest of defence, public safety, and public order.⁴³

At international scene, the concept of international or global security is a term which refers to the measures taken by States and international organisations to ensure mutual survival and safety. It was initially equated with the use of force between nations with particular focus on the role of great powers. This reflected the view that international security involves the territorial integrity of nations, and the greatest threat to such territorial integrity was posed by war between States particularly between great powers.⁴⁴ However, the concept of international security has gone beyond security among States. It evolved from the necessity that nature and many other activities, particularly globalization have placed on States. These are demands that no national security apparatus has the capacity to handle on its own, and as such calls for the cooperation of States. The global inter-dependence among States that the world has experienced makes it necessary for States to cooperate more and work together. Threats to international security are no longer coming from States They are coming from ethnic groups obsessed by hyper-nationalism, from epidemic, AIDS, and COVID 19. Others are terrorism, poverty, over population and economics mismanagement. One gratifying thing is the fact that the world more than ever in history has become one in fighting those factors

40 Social contract theory concerns the legitimacy of authority of the state over individuals. Social contract posits that individuals have consented either expressly or by necessary implication to surrender some of their freedom and submit to the authority of the ruler in exchange for the protection of their remaining rights or maintenance of social order. The term takes its name from a 1762 book written by Jean-Jacques Rousseau and emerged as the leading doctrine of political legitimacy.

41 Section 14 (2) (b) of the 1999 CFRN.

42 With the commencement of democratic norms in 1999, Nigeria's security outlook remains precarious, The country continues to witness oil-fuelled militancy in the Niger Delta, the farmers/ herders clash mostly in Benue state, kidnapping all over the country and proliferation of small arms and light weapons are adjudged potential sources of disaffection and discontent that could adversely affect the country's quest for national security, stability, unity and development.

43 Section 45 of the 1999 CFRN

44 Available at: <<https://www.diplomat.online.com>> accessed on 10 April 2020.

that are threatening international peace and security. The political and the structural conditions to realise a secured world are better than ever.⁴⁵

C. Personal Liberty

The right to personal liberty is the “right not to be subjected to imprisonment, arrest, and other physical coercion in any way that does not admit of legal justification.⁴⁶ It is the ability to live without undue interference from government or its agencies. It involves the capacity to choose between good and evil. Right to personal liberty is one of the most important of all rights with a wider scope that encompasses other rights such as right to movement, right to assemble and associate.⁴⁷ Democracy as a form of government enhances personal liberty. It should be noted that personal liberty is not the total absence of restraint. The intention is to ensure the freedom of every person to make full use of his faculties as long as he does not harm other persons while doing so.”⁴⁸ It means not only freedom from bodily restraint but rights to contract, to have an occupation or acquire knowledge, to marry, have a home, children, to worship and have privileges recognized at law for happiness of free men.⁴⁹ To achieve these objectives, the constitution provides that

Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law.⁵⁰

Thus, in the case of *Unyirioha, v. IGP*⁵¹, the court held that “by virtue of the provisions of Section 35 (1) and 36(6) of the 1999 constitution, every citizen is entitled to his personal liberty and no person shall deprive of his liberty except as stipulated by the constitution or statute.”⁵² The court further held that “a Nigerian

45 Available at: <<https://www.eolss.net/samole>>. accessed on 13 April 2020

46 J. O. Bebo Akande, *The Constitution of the Federal Republic of Nigeria 1999* (MIJ Professional Publishers, Lagos, 2000), p.78. See also A. Appadorai, *The Substance of Politics* (Oxford University Press, New York, 2004), p. 68.

47 Innocent Okoronye & Mathew Okiri Okeyim, “Assessment of the Right to Personal Liberty under Nigeria’s Democracy: 1999-2013, *Net Journal of Social Science*, vol. 1, no. 2 (2013), pp. 40-46.

48 Ridgway K. Foley Jr., “Individual Liberty and the Rule of Law”, (June 1, 1971), available at: <[www.https://fee.org/articles/individual-liberty-and—the-rule-of-law](https://fee.org/articles/individual-liberty-and—the-rule-of-law)> accessed on 15 May 2020.

49 Akande, *note 46*, p. 78; O. Oluwadare Aguda, *Understanding the Nigerian Constitution of 1999* (MIJ Professional Publishers, Lagos, 2000), pp. 67-68.

50 Section 35(1) of the 1999 FRN. .

51 2009 3 NWLR(pt 128), p.342.

52 *Ibid.*, p. 362.

citizen is entitled to his God given natural rights free from incarceration save in accordance with all the fundamental laws of the land, that is, the CFRN and other relevant legislations which are not inconsistent with the former.”⁵³ Since an accused person is presumed innocent until his guilt is established, it will not be fair to detain him pending the determination of his case hence the institution of bail by criminal law to take care of the situation.⁵⁴

In spite of the high premium placed on the fundamental rights of the citizenry, some of the rights are not after all inviolable. The violation of these rights must however conform to the circumstances and procedures that espouse the rule of law, the letters, substance and the spirit of the provisions of the constitution.⁵⁵ The liberties and rights of Nigerians under the constitution also remain the concern of the judiciary. This is well adumbrated in the case of *Director of SSS vs. Olisa Agbakoba*⁵⁶, where the Supreme Court courageously held that no right of Nigerians should be arbitrarily and capriciously denied.⁵⁷ Thus, since the adoption of 1979 constitution which was consolidated in the 1999 constitution, Nigeria has adopted democratic system of government with the rule of law as its underpinning. The extent that the protection of these rights is guaranteed indicates the democratic strength of the country. Indeed, Human Rights and the rule of law are important to the well being of any democratic society. It includes not only civil and political rights but also economics, social and cultural rights They are all well articulated in, and entrenched in many national constitutions and the Charter of the United Nations, the Universal Declaration of Human Rights and other Human Rights Treaties to which Nigeria and many other States are signatory.⁵⁸

II. THE POLITICAL IMPLICATIONS OF SUBJUGATING THE RULE OF LAW

May 29, 1999 was a defining day for Nigeria when it transited from military rule to a constitutional democracy. It was an historic return of democracy when Chief Olusegun Obasanjo was sworn in as a democratically elected President with the 1999 CFRN as the *font et origo*, i.e. *the groundnorm*.⁵⁹ The 1999 CFRN unequivocally provides that the Federal Republic of Nigeria “shall be a state based

53 *Ibid.*, p. 375.

54 Akande, *note 46*, p. 79.

55 Section 45(1) (a-b) of The 1999 CFRN.

56 (1999) 3 NWLR (pt. 595), p. 340.

57 *Ibid.*, p. 358.

58 Femi Falana, “Rule of Law and Security”, (August 29, 2018), available at <<https://thisdaylive.com>> accessed on 23 March 2019.

59 Section 1(1) of the 1999 CFRN.

on the principle of democracy and social justice.”⁶⁰ The excitement of the arrival of democracy the second time⁶¹ was so palpable that Nigerians heave a sigh of relief from military despotism. Expectations are also high to the extent that people believed that democracy, if properly nurtured and sustained will ensure the protection of their fundamental rights⁶² which were routinely denied by the military political adventurers. The rights embody the principles of the rule of law as variously defined and applied such that any legislative or executive acts contrary to the provisions are rendered void and unconstitutional.⁶³

What then is the definitional imperative of democracy and its alluring features that make even the most conspicuous form of despotism sing its virtues in order to sanctify and legitimize its existence? One defence of democracy has been that, “it is a means of safeguarding the liberty of individuals, of protecting them against unnecessary constraint on their action.”⁶⁴ Prof. Ben Nwabueze says constitutional democracy is

about the use of the constitution as a supreme and fundamental law to regulate and limit the powers of government ... constitutional democracy is, in a word, concerned to secure not only a government of the people, but more importantly a government of laws rather than of men.⁶⁵

The former Governor of Central Bank of Nigeria sees democracy as a form of civilian led governance in which all citizens have fundamentally equal rights, votes, and privileges.⁶⁶ Today democracy is undoubtedly becoming the only acceptable system of government over the world as any other system is taken as unacceptable.⁶⁷

60 Section 14(1) of the 1999 CFRN.

61 The first time was between 1960-1966 during the First Republic.

62 The Fundamental Human Rights are as contained in Chapter IV Sections 33-44 of The 1999 CFRN.

63 Oshio, *note 3*.

64 Ozoemenam Mbachu, “Democracy and the Rule of Law: A Case Study of Nigeria”, *The Indian Journal of Political Science*, vol. 53, no. 3 (1992), p. 374 available at: <<https://www.jstor.org>> accessed on 13 March 2020.

65 *Ibid.*, p. 380.

66 Soludo Charles C., “The Political Economy of Sustainable Democracy in Nigeria”, 2005 Democracy Day Lecture of the Federal Republic of Nigeria held at the Main Hall, ECOWAS Secretariat, Asokoro Abuja (May 29, 2005), p.16.

67 The Eastern Europe which used to operate a close (communism) system has been opened up due to Mikhail Gorbachchev’s twin policy of Glasnost and Perestroika of the 1980s. Democracy has also moved to the hitherto impenetrable Arab world as dictatorship is giving way in places like Afghanistan and Iraq. The rule of man of Austin’s ‘Uncommanded Commander’ is fast becoming archaic.

From the foregoing, it is clear that nothing distinguishes a free country from a country under arbitrary rule than observance of rule of law. The significant question now is, what political model are we now advocating for the country if the novel proposition of the President is allowed to hold sway or adopted as a state ideology? Are we gradually sliding back to dictatorship after over twenty-one years of constitutional democracy? A detailed examination of the President's proposition in this study will determine whether we have got to the enviable stage to roll out the drums in celebration of democracy and its supporting pillar- the rule of law, or whether we should use the conclusion which we shall arrive at the end of this study for a sober reflection.

With regards to the determination of when national security is in jeopardy, it is conceded that it is an important condition in the job description of an elected President in a free democratic society. He is to preserve law and order by guaranteeing the security of life and property.⁶⁸ Chidi Amuta, a political commentator is of the view that "it is only fair that we trust the President in determining what constitutes national security and what acts of citizens could put it in danger." This is because according to him, "there is in the management of national security an implicit assumption that the President has privilege access to intelligence that is not available to the rest of us."⁶⁹ To that extent, we can assume that the President's judgment on such matters will be in the highest national interest and in conformity with the values that inform every democracy. However, it is often the case that the executive finds it difficult to rise above its own narrow and political interest. Therefore, great caution needs to be applied in granting the President the prerogative of determining what constitutes national security *suo motu*.⁷⁰ Thus, where the definition of national security is skewed to resemble partisan or personal or political interest, then there is danger to the entire society. In this situation, only the courts can intercede to decide the extent of the President's authority and where the fundamental rights of individuals begin. This is exactly the gravamen of the decision in *Agbaje v. Commissioner of Police*.⁷¹

Professor Ernest Ojukwu (SAN), holds the view that the President should not have made the statement. According to him, "There is a fundamental problem which we need to address on the issue. If our President says that the rule of law must be subject to national interest, it is an ominous sign that our democracy has

68 Chidi Amuta, "Rule of Law and National Security", available at: <<https://www.thisdaylive.com>> accessed on 9 September 2018.

69 *Ibid.*

70 *Ibid.*

71 (1969) N. M. L. R, p. 137.

failed.⁷² Similarly, Abeni Mohammed (SAN), another political commentator asked this rhetorical question. “What is national interest that the rule of law must be sacrificed for?” In his own perspective, he says that

It is in the national interest of any government to obey and subject Nigeria to the rule of law. Where there is rule of law, every interest, including that of the nation is safeguarded. A country without the rule of law is a lawless jungle.⁷³

However, there is a segment of Nigerians who believe that like every concept, the rule of law is not cast in iron i.e. there are limitations to its application and therefore should not be made sacred and inviolable in spite of the will and convenience of the people.⁷⁴ In fact, Judges are often advised to balance competing values of freedom and equality in ways that correspond with popular democratic sentiment which may not always be consistent with the rule of law.⁷⁵ If the war against corruption is to be fought and won, they contend, the rule of law must be tampered with.⁷⁶ To this group of Nigerians, that includes disobedience of court orders sometimes as well as trampling upon the citizen’s fundamental human rights to be able to have a sane society that will be beneficial to all.⁷⁷ This group seems to be on the same page with the President and the Attorney-General of the federation. They contend that the rule of law precept is an unnecessary hurdle when national security and interest is under actual threat of being jeopardized. They are of the firm view that because of the exigency inherent in national security and the tardiness of the rule of law, national security should take the place of primacy⁷⁸. In justification,

72 Ishola Adebayo, “President Buhari, the Rule of Law and National Interest: Matters Arising?”, (August 31, 2018), available at: <<https://www.shineyoureya.org/blog/president-buhari-the-rule-of-law-national-interest-matters-arising-ishola-adebayo>> accessed on 5 March 2020.

73 *Ibid.*

74 Mohammed Adamu, “Ain’t the Rule of Law a Bitch?”, *The Nation*, (Thursday, September 27, 2018), p. 19.

75 *Ibid.* Examples of when the rule of law was sidelined both in Nigeria and outside were cited as follows: (a) During the 7th Senate, the Senate invoked the doctrine of necessity in year 2010 to make the then Vice President, Goodluck Jonathan, Acting President to save the country from constitutional precipice. At that time, national security and interest had become threatened, hence the lawmakers’ intervention (b) If the rule of law had been allowed to take precedence over the exigency of security, the masterminds of the abduction in 1984 of fugitive Umaru Dikko, former Minister of Transport under Buhari’s Military administration would have successfully brought him to Nigeria concealed in a crate under the cover of diplomatic immunity.

76 Sunday Ani, “Between Rule of Law and National Security: Fresh Anxiety”, *The Sun*, Nigeria, (December 19, 2019), available at: <<https://www.sunnewsunline.com/between-rule-of-law-and-national-security>> accessed on 13 April 2018.

77 *Ibid.*

78 Adamu, *note 74*.

they draw inspiration from the laws that guide the conduct of war. According to Adamu Monammed:

... The rules of war are imposed on combatants by law, but expediency alone governs when to shoot and how to avoid being shot. The concept of national security supersedes the principle of rule of law to the extent that the demands of national security often cannot brook the lethargy of the rule of law. It is incumbent on national security sometimes to assert outside of the due process of law in much the same way that in war situations, the laws are silent amidst the rumblings of arms.⁷⁹

They are also of the view that national security is a veritable sanctuary, a safe haven for all including the rule of law. Adamu Mohammed concluded that;

Everything including the rule of law bleeds when the security of a nation is put in harm's way, but the rule of law itself can afford to bleed without occasioning harm to national security... if the exigencies of national security must wait on the tardiness of rule of law, then it is the law that is served by man and not the other way round.⁸⁰

There is no doubt that this view is in support of the President's proposition. Professor Saggy,⁸¹ one of the acclaimed constitutional lawyers in the country is also an ally of the President on this issue. Instead of advocating the cause of the rule of law as he has done in previous occasions,⁸² he advocated for another legal framework – the “rule of justice,” to take precedent over the rule of law. He put the matter thus:

I agree with him (the President) absolutely, I will even go further ... my own extends to robbers and looters and criminals in the society who jump at human rights and the rule of law forgetting that there is rule of justice. When you loot and subvert the economy of the country and millions of Nigerians are suffering, the interest of the country should override any rule of law.⁸³

79 *Ibid.*, p. 19

80 *Ibid.*, p. 19.

81 Professor I.S agay is the Chairman of the Presidential Advisory Committee Against Corruption

82 Busia K. A., “The Ingredient of Democracy”, in Gideon-Cyrus Makau Mutiso, S W Rohio (eds), *Readings in African Political Thought* (Heinemann Books, London, 1975), p. 456.

83 *Note 72.*

He reinforced his deep conviction that the rule of law and the virtues of fundamental human rights have been a veritable refuge for economic saboteurs. He said with an incisive voice, laden with anger and frustration that “alleged criminals should not feel secure in the arms of the law when millions of our countrymen are going down because of their sabotaging our economy. I completely agreed with the President and concluded that the rule of justice for Nigerians is superior to rule of law for individuals.”⁸⁴

The above statement of the learned Professor must have been motivated by the seemingly exasperating war against elites’ corruption in the country. There is no doubt that corruption is very pervasive in the country. It has become endemic and it has always been the bane of our democracy.⁸⁵ It exists in public and private sectors and has also become a monster that is ravaging our society. A concerned historian profoundly captured the deleterious effect of corruption in the following words.

Pathetically, the mindset of the Nigerian political leadership has been that of self-service as some of the leaders are mired in the pursuit of selfish and personal goals at the expense of broader national interest. Consequently, emphasis has been on personal aggrandisement and self-glorification with the result that corruption has become a euphemism for explaining political leadership in Nigeria in relation to the management of national wealth.⁸⁶

This in no small measure has undermined development which has affected all social sectors including education, health care, housing and employment.⁸⁷ It has also become a scourge that if drastic measures are not taken, the country may collapse under the heavy yoke of corrupt oligarchs, and if we play the ostrich, the devastation which corruption will inflict on the economic well being of the country

84 *Ibid.* Professor Femi Odekunle, an expert in criminology and also a member of the Presidential Advisory Committee against Corruption also shares the same sentiments. He said he did not believe in unmediated rule of law in which the rights of the individual will be so hyperbolised and override those of the collectives.

85 Adegboyega S. Awomolo, “Nurturing Nigeria’s Democracy through the Law”, The 1st Distinguished Guest Lecture, the Faculty of Law, Bowen University, Iwo (Thursday, April 7, 2016), p. 33.

86 Michael M. Ogbeidi, “Political Leadership and Corruption in Nigeria Since 1960: A Socio-economic Analysis”, *Journal of Nigeria Studies*, vol. 1, no. 2 (2012), pp. 1-25, at p. 3.

87 Chimere Arinze Obodo and M. I. Anushiem, “Right to Development in Nigeria: An Index of Democracy” *African Journal of Law and Human Rights*, vol. 1 (2017), pp. 180-189, at p. 185.

may be more serious than that of corona virus.⁸⁸ However, “the rule of justice” as proposed by Professor Sagay is not known to democracy as a political system of governance anywhere in the world. It is perhaps a feature of political system characterised by dictatorship or absolutism. What the learned professor is probably advocating for, in our own view, is trial by courts or tribunals whose decisions are final or subject to the confirmation of the ruling cabal reminiscence of the trials by the Military Tribunals during the military administration of Major-General Muhammad Buhari.⁸⁹ Or is the learned professor calling for a hybrid regime, partly democratic and partly authoritarian? It is submitted with the greatest respect to the learned Professor that whatever be the meaning and scope of the ‘rule of justice’ it may not be a better alternative in solving the problems of corruption in the country. Graft is an attitudinal problem and it is better minimised by the combination of the present regime of rule of law under a viable democracy and re-orientation of the citizenry through moral persuasive entreaties. This is preferable to adopting the nebulous “rule of justice,” or any other rule the extent of which it can advance good governance and fundamental human rights of our citizenry we do not know.

However, it is conceded that democracy and *ipso facto*, the due process of rule of law, may be slow, cumbersome and lethargic, it constitutes the best form of government such that any assault on it like disobedience to court orders constitutes a threat and potent danger. As stated earlier, the world no longer has a choice between the rule of force or any other rule, and the rule of law. In a nation where open defiance to court orders has been turned to state ideology, the rule of law is seriously imperiled. To constantly scale the wall of rule of law by citing national security as an absolute, unquestionable prerogative of the executive is to veer in the direction of autocracy and medieval absolutism reminiscence of the reign of Louis the XIV⁹⁰ who, at the height of his despotic rule in France *declared L’etat c’est moi* i.e. I, am the state. While no court will overrule a President on a genuine national security assessment or decision as it happened in *Dokubo’s case*⁹¹, no credible

88 *A-G (Ondo state) v. A.-G. (Fed)*, (2002) 9 NWLR (772)222. The Supreme Court (Honourable Justice Uwaiifo) bared the mind of the Court on the level of corruption and its seriousness in Nigeria by affirming the constitutionality of the ICPC Act 2000 Cap A65 LFN 2004 inspite of strenuous argument of the states to the contrary. See also Awomolo, *Ibid.*, p. 33-39.

89. Oshio, *note 3*, p. 460. The trials did not meet the standard of the rule of law as it contravened the provisions of Section 33(3) of 1979 Constitution.

90 Louis the XIV was the King of France until his death in 1715. His reign of over 72 years was the longest in recorded history of any monarch in European history. He was a leader in centralization of power. He sensed that warfare was the ideal way to enhance his glory and believed he was a direct representative of God. He further believed that Kings are divinely chosen and saw any disobedience to his Edicts as sinful.

91 *Ibid.*

court will grant a President the authority to violate individual rights under the guise of the exigency of national security.⁹²

III. THE CONSEQUENCES OF SUBJUGATING THE RULE OF LAW

The consequences of subjugating the rule of law to national security in a democracy are no less important than the political implications. More than twenty-one years after the adoption of constitutional democracy, there has emerged a frightening threat to what should have been the benefits of a new found political order in Nigeria, i.e. unqualified observance of human rights (except as limited by law)⁹³ by the government. On the contrary, what has been witnessed so far is a phenomenon that constitutes serious danger to the sustenance of the rule of law. This is manifested in among other things, conscription of civic space, intolerance of opposition elements⁹⁴, willful disobedience of court orders⁹⁵, and reckless invasion of the temple of justice.⁹⁶

It will be recalled that two cases were in the public domain when the President made the statement. The cases of former National Security Adviser Sambo Dasuki, and that of the Shiite leader, El Zakzaky and his wife Zainab, all detained by Department of State Security Service allegedly for breach of national security offences. The facts in *Dokubo Asari's* case were not on *all fours* with these two cases. The President extrapolated his statement from the lead judgment of the case. In these two subsequent cases the court granted bail. Nevertheless, the government treated the orders of court with disdain encouraging its agency (the DSS) to trot out cynical excuses for disobedience in the name of nebulous alibi called national security.⁹⁷

Disobedience to court orders has however become a phenomenon in Nigeria which is considered as the height of executive lawlessness and a veritable threat to the very essence of law in the society.⁹⁸ No doubt; the sanctity of the law depends

92 Amuta, *note 68*.

93 Section 45(1) (a-b) of the CFRN.

94 The DSS on Monday August 5, 2018 invaded and barricaded the National Assembly by its masked operatives and prevented the lawmakers from entering the Chambers of the National Assembly.

95 The cases of Sowore, El-Zazaky, and some others are good examples.

96 The DSS on Friday November 6, invaded the hallowed Chambers of Justice Ijeoma Ojukwu's court room in a Gestapo manner in a bid to re-arrest Omoyele Sowore who was granted bail a day before.

97 Ahuraka Yusuf Isah, "Dissecting PMB's Concept of Rule of Law and National Security", *Leadership Newspaper*, (September 3, 2018), available at: <<https://leadership.ng/dissecting-pmbs-concept-of-rule-of-law-and-national-security/>> accessed on 20 December 2019.

98 M. I. Jegede, *What is Wrong with the Law?* (Nigerian Institute of Advanced Legal Studies, Annual Lecture Series 12, 1993), p. 56.

on the respect for the judicial process through which orders according to the law are made. Disobedience to court orders is definitely an act of rebellion against the law and a society which continues to tolerate and condone such a conduct negates the very essence of rule of law.⁹⁹ The inevitable consequence of subordinating the rule of law to national security in a democracy is the enthronement of anarchy and chaos in the society. This is because the coercive power of the court is authorised by law. If the law is suspended, the citizenry would not obey the law and respect the rights of others. Prof. Wole Soyinka noted with serious concern that disobedience of court order by government can lead to a situation in which there is general civil disobedience in the society. According to him;

it is so obvious-state disobedience leads eventually to civil disobedience, piecemeal or through collective withdrawal of recognition of other structures of authority. That way leads to chaos but who set it in motion? As often the case, the State. Unquestionably, such a State bears full responsibility for the ensuing social condition known as anomie.¹⁰⁰

The ensuing chaotic situation is demonstrated in plethora of judicial pronouncements especially by the Supreme Court. The *locus classicus* being the case of *Ezekiel Hart vs. Ezekiel Hart*¹⁰¹ where Honourable Justice Walis (JSC) cited the dictum of *O'Leavy in Canada Metal Co Ltd vs. Canada Broadcasting Corp.* No 2¹⁰² as follows

To allow courts' order to be disobeyed would be to tread the road towards anarchy. If orders of courts can be treated with disrespect, the whole administration of justice is brought to scorn...¹⁰³

Similarly, in *Military Governor of Lagos state v. Chief Emeka Ojukwu*¹⁰⁴ the government of Lagos state refused to comply with the order of the Court of Appeal to reinstate the respondent after his forceful ejection from the subject matter of the suit. The former Chief justice of Nigeria Honourable Justice Mohammed Lawal Uwais (JSC) stressed that "it is a matter of grave concern that the military Government of Lagos State should be seen to disregard a lawful order

99 *Ibid.*, p. 57.

100 Quoted from Ayorinde Oluokun, "Nigeria: The Road to Dictatorship", *PM News*, (December 20, 2019), available at: < <https://www.pmnewsnigeria.com/2019/12/20/nigeria-the-road-to-dictatorship/>> accessed on 19 April 2020.

101 (1990) 1NWLR (pt.126), p. 276.

102 (1980) A.C., p. 952.

103 *Ibid.*, p. 289.

104 (1986) NWLR (pt. 18), p. 621.

issued by a court of law.”¹⁰⁵ According to the learned Justice, “if governments treat court orders with levity and contempt, the confidence of the citizens in the courts will be seriously eroded and the effect of that will be the beginning of anarchy in replacement for the rule of law.”¹⁰⁶ The court concluded that “if anyone should be wary of orders of court, it is the authorities; for they, more than anyone else, need the application of the rule of law in order to govern properly and effectively.”¹⁰⁷ Also, the Supreme Court emphasized the sacrosanct duty of obedience to court order when the federal government suspended statutory allocation to the local government in Lagos state.¹⁰⁸

The routine flouting of court orders made the unassuming and the conservative former Chief Justice of Nigeria Honourable Mohammed Lawal Uwais (JSC) to lament and warn of the dangers inherent in government’s condescending attitude to court orders at year 2005 All Nigerian Judge’s Conference in Abuja He said:

Our various governments are threatening the rule of law by rampant disobedience of court orders. This in my humble opinion is not a good testimonial for democratic government anchored on the rule of law.¹⁰⁹

The 1999 CFRN also underscores the sanctity of judicial pronouncement. This in effect means that the functionaries of government, no matter how highly placed are duty bound not only to observe, but also to enforce any judgment of court of records.¹¹⁰ By the letters, substance and spirit of these provision, the executive authorities are not given the discretion to pick and choose which order or judgment to obey. It is therefore disheartening to note that in Nigeria, instances of blatant and willful disobedience of court order by the executive are replete. This creates the impression that the executive is above the law. It is our considered view that the decision of the government to ignore the court orders by keeping the applicants and many others in similar situation in perpetual detention amounted to executive

105 *Ibid.*, p. 639.

106 *Ibid.*

107 *Ibid.* Hon’ble Justice Kayode Eso (JSC) in the same case also held the view that it is a serious matter for anyone to flout a positive Order of a Court and proceeds to taunt the Court further by seeking a remedy in a higher Court while still in contempt of the lower Court.

108 *A-G (Lagos state) v. A-G (Fed)* (2004) NWLR, p. 1.

109 Mark Ellis, *The Rule of Law and Institutions Building in Africa* (Nayee Law Publication Ltd, Lagos, 2005), available at: <<https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=0E9510C9-08BD-42BC-963E-7AEF30A2E34F>> accessed on 15 December 2019.

110 Section 287 (1) (2) (3) of the 1999 CFRN.

lawlessness and governmental capriciousness. It is also a mockery of rule of law and a flagrant recourse to the rule of man which can only and always be arbitrary. This is not a good testimony for the rule of law whose foundation is democracy. The reasonable option for the DSS in such situation if it professes the rule of law is to appeal the decision of the Federal High Court Abuja to a higher Court. The executive has to be reminded that if it has to govern effectively, it has to abide by the rule of law even when it is not convenience. After all, the Judiciary as a third arm of leadership in any country is created by God. The Magistrate and Judges are God's own Ministers who bear the sword to execute and dispense justice in the society. All souls must therefore be subject to them to avoid the wrath of God.¹¹¹ Thus, no man or authority on earth is above or below the law. The law does not ask any man's permission when it asks for obedience. Obedience to it is demanded as a right, not asked as a favour, for there could only be the peace of the grave yard when the values espoused under the rule of law are trampled upon.

It is instructive to note that, the systemic desecration of the sanctity of rule of law especially by way of defilement of judicial pronouncements is not peculiar to Nigeria alone. It is commonplace in many countries in Africa. For instance, in Swaziland, the government raised the level of disobedience to court orders into an art. This prompted all the Judges to resign in protest. After almost two years, the judges returned to work after the government assured them that it would adhere to their decisions.¹¹² In late Mugabe's Zimbabwe, disobedience to court orders was not regarded as an aberration. In fact, legal practitioners were routinely threatened by members of the Police simply because they are carrying out their legitimate duties.¹¹³ However, history reminds us that many autocratic regimes that African continent has become notorious for, started by openly defying the courts. For instance, Mobutu Sese Seko of Democratic Republic of Congo made nothing of courts' orders. He went ahead to sack judges whose judgment he did not agree with. He eventually condescended to the barbaric level of getting judicial officers murdered for daring to give judicial pronouncement against his government.¹¹⁴ In the Caribbean nation of Haiti, the poor state of the judicial system was a result of the progressive desecration of the courts. The government chose the judgment to obey and ignored the rest.¹¹⁵

111 *Ibid.*

112 Ellis, *note 109*.

113 *Ibid.*

114 L. A. Taiwo, "Democracy, Courts and the Rule of Law in Nigeria: Problems and Prospects", *East African Journal of Peace and Human Rights*, vol. 13, no 2 (2007), pp. 270-293, p. 283.

115 *Ibid.*, p. 283.

IV. STATE PRACTICES ON RULE OF LAW AND NATIONAL SECURITY IN SOME SELECTED JURISDICTIONS

A. United Kingdom

The rule of law is one of the longest established common law fundamental principles of government of the United Kingdom dating to *Magna Carta* of 1215. It is employed through many separate ideas. Among them is that law and order in contrast to anarchy i.e. the running of government in line with the law and normative discussion about the right of the state as compared to the individual.¹¹⁶ It is often contrasted with the rule of men in which a powerful strong man sets policy and rules for everybody else by fiat at his whim but himself subject to no law. The rule of law is an aspect of the British constitution that has been emphasized by A.V. Dicey and it is an important aspect of British politics. In his exposition of the supremacy of the rule of law in the English society, A.V. Dicey said:

When we say that the supremacy of the rule of law is a characteristics of English constitution, we generally include under one expression of at least three distinct though kindred expressions. We mean in the first place that no man is punishable or can be made to suffer in body or goods except for a distinct breach of law ... every official, from the Prime Minister down to a constable or a collector of taxes is under the same responsibility for every act done without legal justification as any other citizen ... and all subordinates, though carrying out the commands of their official superior, are as responsible for any act which the law does not authorise as if, any private and unofficial person.¹¹⁷

The summary of the concept of the rule of law as examined from Dicey's position is under three fundamental headings; *firstly*, no man could be punished or lawfully interfered with by the authorities except for breaches of the law. *Secondly*, no man is above the law and everyone, regardless of rank, is subject to the ordinary laws of the land; and *thirdly* there is no need for bill of rights because the general principles of the constitution are the result of judicial decisions determining the rights of the private persons.¹¹⁸

The significant feature of rule of law in the United Kingdom is that individual liberties depend on it and it involves the absence of arbitrary power on the part of

116 Wikipedia, Rule of Law in the United Kingdom, available at: <www.en.wikipedia.org/wiki/ruleoflaw-inthe-unitedkingdom> accessed on 12 November 2019.

117 Anuye Steve Paul et. al., *The Doctrine of Rule of Law: A Necessity to Democratic Governance* (LAP Lambert Academic Publishing, 2017), p. 33.

118 *Ibid.*

the government and prevents it from making retrospective laws. This means that no man is punishable except for a distinct breach of the law of the land.¹¹⁹ This however requires that law should be open and accessible, clear and certain. This creates a lot of challenge in British society as law is hard to read and inaccessible as many laws are passed through delegated legislation.¹²⁰

In the UK, the rule of law does not exist to the same extent as it does in the US. For instance; the Queen is above the law. Civil and Criminal proceedings cannot be taken against her (the sovereign) as a person under UK law.¹²¹ Acts of parliament do not apply to her in her personal capacity unless they expressly stated to do so.¹²² In fact obedience to law in the UK is a function of proximity to the crown.¹²³

B. The United States

In the US, the constitution is the nation's fundamental law. It codifies the core values of the people. Under it, the court has the responsibility to interpret the constitution and any other law passed by the Congress. The rule of law in the US, as in any other country is a principle under which all persons, institutions and entities are accountable to the laws that are publicly promulgated, equally enforced, independently adjudicated and consistent with international human right principles. The American concept of rule of law also stems from *magna carta* in 1215 which stated that "No free man shall be seized or imprisoned, or stripped of his rights, or possessions, or outlawed, or exiled, or deprived of his standing in any way, nor we will proceed with force against him or send others to do so, except by the lawful judgment of his equals or by the law of the land."¹²⁴ A former United States Ambassador to Nigeria, John E. Reinhardt is of the view that every nation has a legal system for the maintenance of rule of law. According to him;

119 The Lawyer jurist "Rule of Law: British Constitution" available at <[www.lawyersjurists.com/article/rule of law-British constitution](http://www.lawyersjurists.com/article/rule-of-law-British-constitution)> accessed on 12 November 2019.

120 *Ibid.*

121 Philosophical Politics, "Does the United Kingdom have the Rule of Law", available at: <serewicz.worldpress.com> accessed on 19 November 2019. This is similar to immunity clause in Section 308 of the 1999 CFRN.

122 *Ibid.*

123 A good example is the phone hacking trial in the UK. The private secretary to Prince Charles, Sir Michael Peat, refused to answer a relevant question on the ground that he did not see the relevance of the question. The hacking trial judge refused to compel him to answer the question and carried on within the question being answered.

124 "Rule of Law Undermined in the United States", *The Washington Times*, available at: <www.washingtontimes.com/news/2019> accessed on 20 December 2019.

Some of these systems may be more successful than others in providing order with justice. But equal justice for all mankind is still the ideal for which most peoples of the world hope.¹²⁵

The former Ambassador is of the view that man has progressed as his civilization has developed. As a result, “years ago, in almost every society, the community demanded and obtained laws ending the practice of dueling among individual as a means of settling disputes”. On the struggle to establish the supremacy of rule of law within and among nations the ambassador in retrospect said

In my country – and in some others – we fought a bloody civil war to establish the supremacy of a rule of law within the borders of our nation. Why can we not aspire to a system of rules which we lessen the chances of conflict between nations.¹²⁶

Two cases in particular exemplified that the rule of law is well rooted in the US and that no one is above or beyond the law. The first is the case of President Richard Nixon of the Watergate fame. He refused for a full day to respond to a *subpoena* by the House Committee that was investigating the case. At the last minute, he complied i.e., he respected the rule of law. He however resigned before he had to answer the law’s question.¹²⁷ The second was in respect of President Bill Clinton in Monica Lewinsky case. As a sitting President, he swore under oath to answer specific questions about his relationship with Ms Monica Lewinsky. He could not avoid answering the investigator’s questions. He respected the rule of law.¹²⁸

The importance of reconciling personal liberty and national security is also emphasized in the US after 9/11 terrorists attack. Soon after, the executives seeming repressive approach quickly roiled citizens about arbitrary and abusive treatment of suspects. Under pressure from citizens and the media, the Congress quickly introduced legislations to ensure that response to terrorism is in consonance with the culture of rule of law.¹²⁹ Thus, the Congress foreclosed the probability of concentrating too much power in the executive. Before this step was taken, it was not uncommon for ordinary citizen to cry foul about deprivation of suspect freedom during interrogation and detention of suspects.¹³⁰ The duty of government which is

125 T.O. Elias (ed.), Lecture Delivered at the Third Annual Conference of Nigerian Society of International Law (Ethiopia Publishing Corporation, Benin City), p. 151.

126 *Ibid.*

127 Philosophical politics, *note 121*.

128 *Ibid.*

129 Sekoni, *note 1*.

130 *Ibid.*

committed to the rule of law is to ensure that court orders are complied with by the executive and all per persons.¹³¹ This is well adumbrated in 1957 in the US case of *Brown v. Topeka*¹³² when President Dwight Eisenhower placed 10,000 members of Arkansas National Guard under Federal control and dispatched 1,000 United States Army Paratroopers to assist them in enforcing the judgment of a Federal Court for the admission of nine black students in Central High School, Little Rock, Arkansas. The ruling of the court had abolished segregation in public schools in the United States.¹³³ In justifying this action, President Eisenhower said that “the very basis of our individual rights and freedom rests upon the certainty that the President and the executive branch will support and ensure the carrying out of the decisions of the federal courts even, when necessary with all the means at the President’s command.”¹³⁴

C. China/Hong Kong

The understanding of rule of law in China/Hong Kong presents another proposition. Recall that Hong Kong was formerly a British colony which was handed over to China in 1997 under a unique arrangement – a mini-constitution called the Basic Law and a so-called “one country, two systems” principles. Beijing has a mandate to take over full-fledged rule over Hong Kong after fifty years from the date of hand over. However, during the transition period, Hong Kong is to remain semi-autonomous with her distinct common law heritage. Under the political arrangement Beijing is supposed to protect certain freedoms for Hong Kong among which are freedom of assembly and speech and independent judiciary that no one in other part of mainland China has.¹³⁵ Thus, there is a dichotomy of conception of rule of law between China and Honkong. To the Chinese, the rule of law is a western concept associated with societies regulated solely by law. In such society as stated earlier, the law is a set of general rules that apply to its citizens, particularly the State and the ruling elites, and which covers nearly all areas of life. Such rules are always enforceable by a court of law according to a procedure free from interference from other sources of behavioural rules.¹³⁶ However, after much public debate, by political leadership, China enacted in 1999 a constitutional amendment making a

131 This is similar to Section 287 (1) (2) and (3) of the 1999 CFRN.

132 347 U.S. 483 (1954).

133 Falana, *note 58*.

134 Sekon, *note 1*.

135 Anthony Wallace, “Hong Kong Security Law: What is It and Is It Worrying?”, (June 30, 2020), available at: <<https://www.bbc.com/news/world-asia-china>> accessed on 30 June 2020.

136 Ignazio Castellucci, “Rule of Law With Chinese Characteristics”, *Annual Survey of International & Comparative Law*, vol. 13, no. 1 (2007), pp. 35-92.

reference to a concept akin to that of the rule of law. Thus, in the evolutionary trend of the Chinese legal system, the rule of law is different from the Western one.¹³⁷ One of the legacies of the British common law system inherited by Honkong is the rule of law with all its attributes. This includes freedom of speech and personal liberty which are limited to certain extent in mainland China.

Recently, the Chinese authority passed a wide-ranging National Security Law for Hong Kong. The legislation grants Beijing broad powers to crack down on variety of political crimes like separatism and collusion with foreign elements. The sweeping new National Security Law aimed at stamping out opposition to the ruling Communist Party in Hong Kong. The Hong Kong had always wanted to have Security Law but it was not popular with the people. The new law however triggered country-wide protest across Hong Kong. The peculiar features of this new law imposed by China on Hong Kong are that the law is conceived in secrecy; crimes under it are vaguely defined with harsh penalties and it is without serious input from Hong Kong authority. The prevailing question is; did the new National Security Law enacted by China to protect national security of Hong Kong pass the test of rule of law. In other words, is the Law in conformity with democratic tenets which the Hong Kong people are used to? The answer is in the negative. It is humbly submitted that, if anything at all, such law passed in secrecy, vaguely defined, and without the inputs of the people the law is supposed to serve is not only the breach of rule of law but also a breach of one country two systems principle. The whimsical and peremptory manner in which the law is passed is nothing but a sudden abridgment of Human Rights of the people of Hong Kong. Discussion of the rule of law is not new to Hong Kong. In fact, Hong Kong prides itself on how it exercises the rule of law, guaranteeing that everybody, regardless of race, rank, politics or religion is equally subject to the laws of the land. It is conceded that the rule of law absolutely does not mean weak leadership, but strengthened party leadership, improvement of party's capacity to rule by the law as earlier claimed by the Chinese President Xi Jinping.¹³⁸ The rule of law requires total compliance with the law making procedures for its legitimacy and reverence. Any law that is shrouded in secrecy and vaguely defined cannot be said to meet the requirement of the rule of law. In fact, in such a situation, it becomes the rule of man rather than the rule of law. It simply means what the politicians want it to mean. The new law, in our considered view, is meant to serve as a sword of Damocles dangling over the head of Human Rights activists, journalists and many others who may stand in opposition to the Communist ruling Party. It is humbly submitted that instead of a sweeping National Security Law to stifle fundamental rights of the people of Hong Kong in the name of nebulous national security, Beijing would have done better if it had had regard for the Human Rights antecedent of the

137 *Ibid.*

138 Available at: <<https://www.latimes.com>>.

people of Hong Kong. The motive for protection of national security of any country becomes suspect when an unlawful means is adopted. Indeed it is in the national security of the government of mainland China and Hong Kong to obey and subject itself and the people to the rule of law.

V. SUMMARY AND CONCLUSION

This piece has examined and argued that the rule of law is the bedrock upon which any democratic state is built. It is the political and constitutional principle that stipulates the supremacy of the law over the ruler, the ruled and all the decisions taken in the country. The paper further argued that in the absence of rule of law, what obtains is chaos, lawlessness, arbitrariness, abuse of power and unabashed absolutism. The key questions to which answers have been proffered are; how best can we protect national security and fundamental rights of citizens? Secondly, who determines what constitutes a threat to national security. It is unequivocally asserted with humility in this paper that the power to determine when national security takes prominence over the rule of law is the exclusive preserve of the judiciary. It does not domicile in any other arm of government. This decision is usually reached after a careful evaluation of evidence and material particulars presented before the court. Nigeria and international community cannot afford to stoop so low to discountenance the rule of law for executive whimsicality. The corollary is anarchy which can endanger the nation that has had too many miraculous reprieves. The country needs more than a case over bail application that fizzled out before jettisoning the constitution backed belief in the rule of law. Although corruption has become endemic, gripping the body and soul of the nation. It has become the sword of Damocles, an albatross hanging on the neck of the country. However, fighting corruption is good, protecting national security and peace is excellent. The drawback is when unlawful means are adopted to facilitate these actions, it becomes suspect. Even at international law, steps must be taken by states to ensure that the rule of law is adhered to in their efforts to maintain international peace and security. When government gives the impression or creates the perception that protecting national and international security is being exploited as a convenient *alibi* to deny citizens of their fundamental Human Rights, silence critics, and intimidate opposition elements, it means that the rule of law and democracy are under siege. The existing laws in Nigeria's statute books and many international instruments are adequate to combat the deleterious effects of corruption, terrorism, hyper nationalism and maintain national and international security. To suddenly abandon the rule of law for a nebulous "rule of justice" or any other rule by whatever name, is to embark on a wild goose chase. It is a whirlwind that blows nobody any good.

The cost of living in a society where the rule of law is not protected cannot be justified. The cost will certainly be too high. Unconditional respect for supremacy

of rule of law is the surest way to enhance good governance which will engender unrivalled national development. It will also ensure that the aspiration of A.V. Dicey *et al* that there is a need to be more trustful of law than the heart of man will not perish from the surface of the earth. Until this is achieved, there will be no cause to roll out the drums in celebration of democracy. Instead our immediate challenge now is a deep introspection of the past in order to determine what the future holds for us. Nevertheless, it is submitted most humbly that, as long as the rule of law is subservient to national security in Nigeria, so long will it serve as a sad reminder of the dark days of the military political predators when the sacred chapter IV of the 1979 Constitution of the Federal Republic of Nigeria was suspended and citizens detained for months. The sustenance of the proposition of the President as a state ideology in Nigeria is to walk down that path of perdition again.

INDIAN PRACTICE RELATING TO INTERNATIONAL LAW

VINAI KUMAR SINGH, ANWAR SADAT, PARINEET KAUR
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This section exhibits the Indian practice on international law which has been drawn from decisions of the Indian Judiciary, enactment or amendment made by the Indian Legislature and statements put forth by the Indian Executive during the period January - June 2020. The year 2020, the UN is celebrating its 75th Anniversary which provided opportunity to the Indian government to reflect their views on various topics, importantly on United Nations Security Council (UNSC) Reform, Sustainable Development Goals and the Revitalization of the UN General Assembly etc. The Indian legislatures, during January - June 2020, have proposed new laws or amended several pre-independent laws to keep pace with the growth and development of international law on several aspects particularly in the matters related to transportations by air and shipping.

I. INDIAN JUDICIARY

A. Public International Law

(i) UN Human Rights Chief Made Intervention Over CAA in Supreme Court of India and Response of the Government of India

On 3 March 2020, the United Nations High Commissioner for Human Rights, Michelle Bachelet Jeria, filed an intervention in the Supreme Court on the Citizenship (Amendment) Act, 2019 (CAA). She sought to intervene as an amicus in a petition of *Deb Mukherji v. Union of India*¹ challenging the constitutionality of the Section 2 to Section 6 of the CAA. She relied to claim this intervention “by virtue of her mandate to *inter alia* protect and promote all human rights and to conduct necessary advocacy in that regard, established pursuant to the United Nations General Assembly resolution 48/141”. The Supreme Court is hearing a total of 143 petitions seeking to examine the constitutional validity of the Citizenship Amendment Act. In response, Ministry of External Affairs, Govt of India spokesperson Raveesh Kumar stated on 3 March 2020, “The Citizenship Amendment Act is an internal matter of India and concerns the sovereign right of the Indian Parliament to make laws. We strongly believe that no foreign party has any *locus standi* on issues pertaining to India’s sovereignty. We are confident that our sound and legally sustainable position would be vindicated by the Hon’ble Supreme Court.”²

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1 WP (Civic) No. 1474 0F 2019 and In the Matter of *Deb Mukharji v. Union of India*, Application for Intervention.

2 Available at: <http://mea.gov.in/press-release.htm?dtli/32449/Press_Note> accessed on 20 April 2020.

(ii) The Italian Republic v. The Republic of India - concerning - The “Enrica Lexie” Incident, Award 21 May 2020 and Indian Judiciary³

On February 15, 2012, Italian marines on board of the commercial oil tanker MV Enrica Lexie shot and killed two of the 11 crew members of the Indian fishing vessel. The vessel was seized by the Coast Guard after it was redirected to the Kochi port. The two Italian marines Massimiliano Latorre and Salvatore Girone, who were on guard duty at the time of the incident, were arrested on February 19, 2012 on the charge of murder under Section 302 of the Indian Penal Code. The Kerala High Court held that Italy has violated Article 97 (1) of the United Nations Convention on Law of Seas (UNCLOS). Subsequently, Italy filed a writ petition in the Supreme Court of India, challenging the proceeding in the Kerala High Court. On 26 June 2015, Italy took up the matter with the International Tribunal for the Law of the Sea (ITLOS) pursuant to Annex VII of UNCLOS and requested provisional measures. ITLOS directed the case to the Permanent Court of Arbitration (PCA), the PCA addressed the claims and counter-claims of Italy and India respectively.

India requested the Arbitral Tribunal to adjudge and declare that its counter-claims are admissible and that, “by firing at the St Antony and killing two Indian fishermen on board, Italy” has violated India’s sovereign rights under Article 56 of UNCLOS. India also claimed that Italy has breached its obligation to have due regard to India’s rights in its EEZ under Article 58(3) of UNCLOS. India argued that Italy has also violated India’s freedom and right of navigation under Articles 87 and 90 of UNCLOS; Further, Italy has infringed India’s right to have its EEZ reserved for peaceful purposes under Article 88 of UNCLOS. India further requests that the Arbitral Tribunal may order Italy to “make full reparation for its breaches of Article 56, 58(3), 87, 88 and 90 of UNCLOS”. Other hand, Italy requested the Arbitral Tribunal to dismiss “India’s counter-claims in their entirety and all requests consequential on them”.

The Arbitral Tribunal constituted under the auspices of Permanent Court of Arbitration (PCA) at the Hague, found, unanimously, (a) that India has not acted in breach of Article 87 (1)(a) of the Convention; (b) that India has not violated Article 92 (1) of the Convention; (c) that Article 97 (1) and (3) of the Convention are not applicable in the present case; (d) that India has not violated Article 100 of the Convention and that therefore Article 300 cannot be invoked in the present case. The Arbitral Tribunal decided, by three votes to two, in respect of Italy’s submission that the Marines are entitled to immunity in relation to the acts that they committed during the incident of 15 February 2012, and that India is precluded from exercising

3 Available at: <<https://pca-cpa.org/en/cases/117/>>.

its jurisdiction over the Marines. (In favour: President Golitsyn; Arbitrators Paik, Francioni and against Arbitrators Robinson, Pemmaraju Sreenivasa Rao).

The Arbitral Tribunal decided, by three votes to two, in respect of Italy's commitment expressed during the proceedings to resume its criminal investigation into the events of 15 February 2012, that India must take the necessary steps to cease to exercise its criminal jurisdiction over the Marines, and that no other remedies are required (In favour: President Golitsyn; Arbitrators Paik, Francioni, and against: Arbitrators Robinson, Pemmaraju Sreenivasa Rao), It found, (a) by three votes to two, that Italy has not violated India's sovereign rights under Article 56 of the Convention; (b) by three votes to two, that Italy has not violated Article 58 (3) of the Convention. (In favour President Golitsyn; Arbitrators Paik, Francioni and against: Arbitrators Robinson, Pemmaraju Sreenivasa Rao). (c) unanimously, that Italy has not infringed India's rights under Article 88 of the Convention.

The Arbitral Tribunal, found, unanimously, that by interfering with the navigation of the "St. Antony", Italy has acted in breach of Article 87, paragraph 1, subparagraph (a), and Article 90 of the Convention, and therefore, constitutes adequate satisfaction for the injury to India's non-material interests. It decided that as a result of the breach by Italy of Article 87 (1) (a) and Article 90 of the Convention, India is entitled to payment of compensation in connection with loss of life, physical harm, material damage to property (including to the "St. Antony") and moral harm suffered by the captain and other crew members of the "St. Antony", which by its nature cannot be made good through restitution and further decided that the Parties are invited to consult with each other with a view of reaching agreement on the amount of compensation due to India. The Arbitral Tribunal shall retain jurisdiction should either Party or both Parties wish to apply for a ruling from the Arbitral Tribunal in respect of the quantification of compensation due to India, in which event the Arbitral Tribunal would fix a timetable for further proceedings, and that, should no such application be received within one year after the date of the present Award, the proceedings shall be closed. In relation to the costs of these proceedings, the Arbitral Tribunal, decided that each Party shall bear its own costs.⁴

(iii) Government of India Gave Effect to the Arbitral Award Rendered on *the Enrica Lexie Case*

The Government of India, on 3 July 2020, has filed a special leave petition before the Supreme Court of India and sought disposal of all criminal proceedings against the two Italian marines in the eight-year-old Enrica Lexie case in which a fishing boat was fired at off shores of Kerala on February 2012, resulting in the death of

4 *Ibid.*

two Indian fishermen.⁵ The Indian Government submitted that it had “decided to accept and abide” by the order passed by the Arbitral Tribunal constituted under the United Nations Convention on the Law of the Sea, which held that “India is precluded from exercising its jurisdiction over the marines and entitled to claim compensation from Italy”.

B. Private International Law

(i) Mankastu Impex Pvt. Ltd. v. Airvisual Ltd., 2020 SCC Online SC 301⁶

On 5 March 2020, the Supreme Court has considered the issue of choice of seat in arbitration agreements in *Mankastu Impex Pvt. Ltd. v. Airvisual Ltd.*⁷ In this case, Mankastu (an Indian company) and Airvisual (a Hong Kong company) had entered into an MoU containing an arbitration agreement. The arbitration agreement provided that “[a]ny dispute, controversy... shall be referred to and finally resolved by arbitration administered in Hong Kong” and “[t]he place of arbitration shall be Hong Kong...”. The governing law clause in the MoU provided that “[t]his MoU is governed by the laws of India... and courts at New Delhi shall have the jurisdiction.” Once dispute arose between the parties, Mankastu approached the Supreme Court under the Indian Arbitration and Conciliation Act, 1996 for appointment of a sole arbitrator. Mankastu argued that since Indian law was the governing law and Courts at New Delhi had jurisdiction, the seat of arbitration was New Delhi, and accordingly, the Supreme Court could appoint a sole arbitrator. It further argued that Hong Kong was only the venue of arbitration and not the seat and relied on Hardy Exploration for this purpose. On the other hand, Airvisual contended that since the arbitration agreement provided that the place of arbitration shall be Hong Kong and such arbitration shall be administered in Hong Kong, the seat of arbitration was Hong Kong. Accordingly, Indian courts had no jurisdiction to appoint a sole arbitrator. It relied on Soma JV for this purpose. The Supreme Court of India on 5 March 2020 (Justice R. Bhanumathi, Justice A. S. Bopaanna, and Justice Hrishikesh Roy) noted that the use of the expression “place of arbitration” could not decide the intention of the parties to designate that place as the seat of arbitration and such intention had to be determined from other clauses in the agreement between the parties and their conduct. The Supreme Court held that the choice of Hong Kong as the “place of arbitration” itself did not lead to the conclusion that the parties had chosen Hong Kong as the seat of arbitration. However, because

5 Special Leave Petition [C] NO.20370 OF 2012, *In the Matter of Chief Master Sargeant Massimiliano Latorre & ors. v. Union of India & ors.*

6 Available at: <https://main.sci.gov.in/supremecourt/2018/27079/27079_2018_5_1502_21165_Judgement_05-Mar-2020.pdf> accessed on 15 May 2020.

7 2020 SCC Online SC 301.

the parties had also agreed that such arbitration was to be administered in Hong Kong, the Supreme Court ultimately held that the parties had chosen Hong Kong as the seat of arbitration.⁸

(ii) Jubilant Pharmaceuticals Nv v. Synchron Research Services on 10 February, 2020⁹

Jubilant Pharmaceuticals Nv is the Belgian subsidiary of Jubilant Organosys Ltd. It is the owner of registration documentation concerning the generic medicine “Cetirizin”. It entered into agreement dated 17.3.2003, with the Synchron Research Services company for conducting bio-equivalence study (BE C/FA/2696/2018 JUDGMENT study) to demonstrate that generic product “Cetirizin” has the same therapeutic effect as the reference product “Zyrtee”. As per the agreement, the Synchron Research Services was required to conduct bio-equivalence studies which were necessary in obtaining these authorisations. On 26 April 2006, the health authorities of Netherlands decided to suspend the existing marketing authorisations obtained by the Jubilant Pharmaceuticals Nv in the light of the fact the Synchron Research Services (SRS) was not GCP/GLP compliant and its quality control as well as the quality assurance measures were insufficient. On the same ground, BE studies of the Synchron Research Services were rejected. As a consequence of rejection of these existing marketing authorisations for the product and also because of the termination of the Mutual Recognition Procedure (MRP), the Jubilant Pharmaceuticals Nv has suffered huge losses. Jubilant Pharmaceuticals Nv pleaded that the respondent has utterly failed to conduct the necessary BE study in a proper manner and due to the acts and omissions on the part of the respondent, the appellant is entitled to damages.

On 27 February 2009, the Ghent Commercial Court, Belgium held that the claim of the Jubilant Pharmaceuticals Nv is admissible and ordered the Synchron Research Services to pay an amount of EU 1,73,193.00 plus a provisional amount of EUR 1.00, plus EUR 571.36 costs of summons, plus EUR 468.66 costs made by the Judicial Officer on the side of the claimant, totaling to EUR 199,217.69. As Belgium does not fall under the reciprocating territory, the execution of judgment and order passed by Ghent Commercial Court, Belgium was not possible. In view of this, the Jubilant Pharmaceuticals Nv filed a substantive suit being Special Civil Suit No.378 of 2010 in the court of learned Principal Senior Civil Judge, Ahmedabad *inter alia* to pass a decree for an amount of EUR 199,217.69 and costs in favour of the Jubilant Pharmaceuticals Nv. The trial court dismissed the suit filed by the

8 *Ibid.*

9 C/FA/2696/2018, Judgment in the High Court of Gujarat at Ahmedabad, R/First Appeal No. 2696 of 2018.

Jubilant Pharmaceuticals Nv. Being aggrieved, the Jubilant Pharmaceuticals Nv filed an appeal in the Gujarat High Court at Ahmadabad. The Jubilant Pharmaceuticals Nv argued that section 13 read with section 14 of the Civil Procedure Code contains provisions on the conclusiveness of a foreign judgment which is subject to certain exceptions. It was submitted that the court shall presume that the judgment is pronounced by a court of competent jurisdiction unless the contrary is proved by the defendant. It was pointed out that a foreign judgment is enforceable by a suit upon the foreign judgment.

The Gujarat High Court on 10 February 2020 held that the trial court has failed to appreciate the contents of the judgment of the Ghent Commercial Court in proper perspective while arriving at the conclusion that such judgment is not on merits and therefore, falls within the exception contained in clause (b) of section 13 of the Code. The impugned judgment passed by the trial court therefore, cannot be sustained. In the light of the above discussion, the appeal succeeds and is accordingly allowed with no order as to costs. It is held that the Jubilant Pharmaceuticals Nv is entitled to a decree in terms of the judgment dated 27.2.2009 passed by the First Section of the Ghent Commercial Court in No. A/08/00303.

(iii) Influence of Private International Law Principles in Tax Matters (Bombay High Court in *Aberdeen Asia Pacific Excluding Japan Equity Fund v. Deputy Commissioner of Income Tax (International Taxation), Mumbai and another*¹⁰)

Prior to conversion, AICFL (Aberdeen Institutional Commingled Funds, LLC) was a trust by the name of Aberdeen Delaware Business Trust which was set up as a trust under the Trust Act of Delaware State. It had three sub-trusts briefly known as Ex Japan Sub-Trust, Inc Japan Sub-Trust and Emerging Markets Sub-Trust i.e., the earlier avatars of the present three writ petitioners. After conversion from statutory trust to LLC, Aberdeen Delaware Business Trust came to be known as Aberdeen Institutional Commingled Funds, LLC (already referred to as AICFL). AICFL sought an advance ruling from Authority of Advance Rulings (AAR) on the question as to whether it was entitled to carry forward accumulated capital loss as disclosed in the application filed before it in the assessment year 2011-12 and thereafter under Section 74 of the Income Tax Act (ITA) 1961 notwithstanding its reorganization from a statutory trust to a limited liability company (LLC). Revenue's stand in the proceedings before AAR was that the loss was not incurred either by the AICFL or by its earlier avatar Aberdeen Delaware Business Trust. The loss

¹⁰ *Aberdeen Asia Pacific Excluding Japan Equity Fund v. Deputy Commissioner of Income Tax (International Taxation), Mumbai and another*, Bombay High Court, WRIT PETITION NO.3525 OF 2019, Decided on 6 March 2020.

stood in the name of the three trust funds which was claimed to be carried forward by the three new LLC funds (i.e., the present three writ petitioners), which have separate legal existence from AICFL. While the AAR acknowledged that under the Delaware law, AICFL may be deemed to be the same entity as Aberdeen Delaware Business Trust, but the permissibility of carrying forward and setting off of accumulated loss has to be examined under the provisions of Indian tax law, where no such deeming fiction exists. It held that the deeming fiction under Delaware law cannot be invoked in the absence of similar deeming fiction under Indian tax law. Ruling against AICFL, the AAR held that Section 70 of the ITA limits a claim to carry forward of loss to a taxpayer who incurred the losses, and that since AICFL was never an assessable entity in India, and had never filed any income tax returns in India, therefore, it could not be permitted to carry forward and set off the losses incurred by the taxpayers, which were separate taxable entities. Against the order of the AAR, AICFL and the taxpayers filed a writ petition before the Bombay High Court. The Bombay High Court on 6 March 2020 held that there could be no dispute to the proposition that AICFL both as a Trust and as LLC in terms of the laws of Delaware, USA continues to be the same person. Noting that this position is accepted in India, the Bombay High Court held that gain and loss earned by AICFL in its earlier avatar would in law not be denied only because of change in status from Trust to LLC. However, Bombay High Court noted that AAR had answered the question posed before it in the negative not because of change of status of AICFL but on the ground that AICFL was not an assessee in India and had not filed any return of income. Therefore, question of any claim as to loss or carry forward of loss or setting off of loss by AICFL did not arise. This decision has become first ever judgment in the international tax space that explicitly gives effect to private international law principles in tax matters on question of legal status.

(iv) Quippo Construction Equipment Ltd v. Janardan Nirman Pvt Ltd, Civil Appeal No. 2378 of 2020 (arising out of SLP (C) NO.11011 of 2019)¹¹

The Appellant (Quippo Construction Equipment Ltd) and the Respondent (Janardan Nirman Pvt Ltd.) entered on 1 August 2010 into four separate agreements consecutively for the purpose of their business, each agreement containing an arbitration clause as the dispute resolution mechanism. The first three agreements contains provision that Courts and Tribunals at New Delhi would have exclusive jurisdiction and the venue for holding arbitration proceeding would be New Delhi. While the fourth agreement provided that the Courts and Tribunals at Kolkata would have exclusive jurisdiction and the venue for holding arbitration proceeding would be Kolkata. It is further provided in all four arbitration agreements for arbitration in

11 Available at: <https://main.sci.gov.in/supremecourt/2019/13391/13391_2019_32_1505_21906_Judgement_29-Apr-2020.pdf> accessed on 20 June 2020.

accordance with the arbitration Rules of the Construction Industry Arbitration Council (“CIAC Arbitration Rules”). The terms and conditions of the agreements were being duly complied by the parties until the respondent defaulted in payment of the amount due to the Appellant. The Respondent was sent notice regarding the amount due, non-compliance of which led the Appellant invoking the arbitration clause. Notice invoking arbitration was issued stating the appointment of a Sole Arbitrator, who would be conducting the proceedings at New Delhi. The Respondent was duly served notices of the arbitration proceeding; however it chose not to formally participate in the proceedings. It instead chose to challenge the existence of the agreements itself, wherein it preferred a suit before a Civil Court at Sealdah. Respondent continued its battle through litigation. Before the Arbitrator, the Respondent only sought adjournments citing the pendency of the appeal and did not raise any jurisdictional objections or any objections against the claims raised by the appellant. The Arbitrator, after conducting the proceedings ex-parte, decided on claims arising out of all the four agreements, allowed the claim of the Appellant and passed a common award in its favour. After the passing of the Award, Respondent preferred a petition under Section 34 of the Arbitration and Conciliation Act 1996 before the Court of District Judge, Alipore. The Court of District Judge, Alipore dismissed the petition on the ground of lack of jurisdiction, which led to the Respondent approaching the Kolkata High Court under Section 37 of the Arbitration and Conciliation Act. The Kolkata High Court allowed the appeal and remanded the matter back to the Court of District Judge, Alipore. Respondent challenged the existence of the agreements and disputed the venue of the arbitration. The Kolkata High Court relied on the Judgement of *Indus Mobile Distribution Pvt. Ltd. vs. Datavind Innovations Pvt. Ltd.* [(2017) 7 SCC 678] which held that the jurisdiction to decide an application under Section 34 lies with the Court within whose jurisdiction the arbitral award was passed or with the Court located in the seat of arbitration as agreed by the parties. In view of this, the Respondent then filed an Appeal at High Court of Calcutta under Section 37 of the Act, which was allowed. The Kolkata High Court ordered that the Alipore Court was to adjudicate the dispute under Section 34 of the Act. Thereafter, the Appellant impugned the Kolkata High Court Order before the Supreme Court. The main contention before the Supreme Court was ‘whether in view of Section 4 of the Act, the Respondent had waived its right to challenge the jurisdiction through its conduct during the arbitral proceedings’. The Supreme Court of India on 29th April, 2020 has ruled that a party cannot challenge/question the venue of the arbitration and contend the jurisdiction of the Tribunal at a later stage if it did not object to the proceedings being so conducted. It will be deemed to have waived all such objections.

(v) HT Media Ltd & Anr v. Brainlink International Inc on 28 April 2020¹²

HT Media sought a permanent injunction to restrain Brainlink International from: using the domain name ‘www.hindustan.com’ or adopting any mark deceptively similar or identical to its registered trademarks HINDUSTAN and HINDUSTAN TIMES; proceeding with a suit already filed before the US District Court for the Eastern District of New York; and instituting or filing in a court any other suit, application or proceeding relating to the impugned domain name or any issue which forms the subject matter of the present suit. HT Media has been continuously using the trademarks HINDUSTAN and HINDUSTAN TIMES since 1920. Brainlink International, a corporation providing IT-related services, bought the disputed domain name in 1996, leading to HT Media’s present allegations of infringement and cybersquatting in violation of its trademark rights. In December 2019 HT Media sent Brainlink International, a cease and desist letter to acquire the disputed domain name for \$1 million. In February 2020, HT Media received a response from Brainlink International requesting \$3 million for the disputed domain name. HT Media proposed a counter offer, but Brainlink International filed a non-infringement suit against HT Media. The Delhi High Court observed that a domain name is akin to a trademark and relied on the Supreme Court’s ruling in *Satyam Infoway Ltd v Siffynet Solutions (P) Ltd* [(2004) 6 SCC 145] which held that the use of an identical or similar protected domain name may cause internet users to mistakenly access one domain name instead of another. The Delhi High Court also relied on *Mr Arun Jaitley v Network Solutions Pvt Ltd*, [2011 SCC Online Del 2660] in which the court set out the importance of domain name protection and held that: the use of a well-known name without any reason by the Defendants as a Domain name and keeping in possession the disputed domain name without sufficient cause is violative of the [Internet Corporation for Assigned Names and Numbers] policy and can be safely held to be a bad faith registration. Agreeing with HT Media, the court observed that it had personal jurisdiction over the matter as the trademarks were registered in, and Brainlink International carried out business within, its jurisdiction. The court also agreed that on denial of injunction, HT Media would have to approach the New York court for redress, which “has no jurisdiction over the Plaintiffs or the subject matter of the dispute”. The court also observed that notice and email correspondence showing HT Media’s interest in buying the disputed domain name took place in Delhi and preceded the New York suit, thereby being merely a counterblast to HT Media’s legitimate exercise of their rights and availment of remedies, thereby generating a substantial and integral part of the cause of action for HT Media to file a suit. The court therefore granted an interim ex-parte injunction in favour of HT Media, temporarily restraining Brainlink International from proceeding with the

12 In the High Court of Delhi at New Delhi, Hon’ble Ms. Justice Jyoti Singh, CS (COMM) 119/2020 and IAs 3767-3771/2020.

suit in New York or instituting in any other court any proceeding relating to the disputed domain name or issue which formed the subject matter of the present suit. The court also restrained Brainlink International from creating third-party rights in the disputed domain name or using any other mark identical or deceptively similar to HT Media's trademarks.

II. INDIAN LEGISLATURE

(i) The Aircraft (Amendment) Bill, 2020

The Aircraft (Amendment) Bill, 2020 was introduced in Lok Sabha by the Minister of State for Civil Aviation, Mr. Hardeep Singh Puri, on February 4, 2020.¹³ The Bill was passed by the Lok Sabha (Lower House) on 17 March 2020. The Bill seeks to amend the Aircraft Act, 1934. The Act regulates the manufacture, possession, use, operation, sale, import and export of civil aircrafts, and licensing of aerodromes. The Bill converts three existing bodies under the Ministry of Civil Aviation into statutory bodies under the Act. These three authorities are: (i) the Directorate General of Civil Aviation (DGCA), (ii) the Bureau of Civil Aviation Security (BCAS), and (iii) the Aircraft Accidents Investigation Bureau (AAIB). Each of these bodies will be headed by a Director General who will be appointed by the centre. The DGCA will carry out safety oversight and regulatory functions with respect to matters under the Bill. The BCAS will carry out regulatory oversight functions related to civil aviation security. The AAIB will carry out investigations related to aircraft accidents and incidents. The central government may issue directions to these authorities on matters related to their functions, if considered necessary in public interest. Under the Act, the central government may make rules on several matters. These include: (i) registration of aircraft, (ii) regulating air transport services, and (iii) prohibition of flight over any specified area. The Bill adds the regulation of air navigation services to this list. It also allows the centre to empower the Director General of BCAS or any authorised officer to issue directions and make rules on certain matters. These matters include: (i) conditions under which an aircraft may be flown, (ii) inspection of aircrafts, and (iii) measures to safeguard civil aviation against acts of unlawful interference. Under the Act, the penalty for various offences is imprisonment of up to two years, or a fine of up to Rs 10 lakh, or both. These offences include: (i) carrying arms, explosives, or other dangerous goods aboard aircraft, (ii) contravening any rules notified under the Act, and (iii) constructing building or structures within the specified radius around an aerodrome reference point. The Bill raises the maximum limit on fines for all these offences from Rs 10 lakh to one crore rupees.¹⁴

13 Available at: <<https://www.prsindia.org/billtrack/aircraft-amendment-bill-2020>> accessed on 10 January 2020.

14 *Ibid.*

(ii) The Major Port Authorities Bill, 2020

The Major Port Authorities Bill, 2020 was introduced in Lok Sabha by the Minister of State for Shipping, Mr. Mansukh Mandaviya, on March 12, 2020.¹⁵ It seeks to replace the Major Port Trusts Act, 1963. The Bill seeks to provide for regulation, operation and planning of major ports in India and provide greater autonomy to these ports. The Bill will apply to the major ports of Chennai, Cochin, Jawaharlal Nehru Port, Kandla, Kolkata, Mumbai, New Mangalore, Mormugao, Paradip, V.O. Chidambaranar, and Vishakhapatnam. Under the 1963 Act, all major ports are managed by the respective Board of Port Trusts that have members appointed by the central government. The Bill provides for the creation of a Board of Major Port Authority for each major port. These Boards will replace the existing Port Trusts. The Bill defines Public-Private Partnership (PPP) projects as projects taken up through a concession contract by the Board. The Bill provides for the constitution of an Adjudicatory Board by the central government. This Board will replace the existing Tariff Authority for Major Ports constituted under the 1963 Act.¹⁶

(iii) Draft Bill on the Aids to Navigation Bill, 2020

Recently on 10 July 2020, the Ministry of Shipping has issued the draft of the Aids to Navigation Bill, 2020.¹⁷ This Bill is to provide for development, maintenance and management of aids to navigation in India, for training and certification of operator of aids to navigation, development of historical, educational and cultural value of aids to navigation, to ensure compliance with the country's obligation under the maritime treaties and International Instruments to which India is a party for matters connected. India is signatory to maritime treaties and international instruments such as International Convention for the Safety of Life at Sea, 1974, as amended; and IALA Maritime Buoyage System. It provides for empowering Directorate General of Lighthouses and Lightships (DGLL) with additional power and functions such as vessel traffic service, wreck flagging, training and certification, implementation of other obligations under International Conventions, where India is a signatory.¹⁸ It aims to regulate state-of-the-art technologies of marine navigation which was earlier tangled in statutory provisions of Lighthouse Act, 1927. A navigational aid is any kind of marker which aids the traveler in navigation, usually nautical or aviation travel. Common types of such aids include lighthouses, buoys, fog signals, and day beacons. Briefly, the new law encompasses a major shift from lighthouses to modern aids of navigation.

15 Available at: <<https://www.prsindia.org/billtrack/major-port-authorities-bill-2020>> accessed on 20 June 2022.

16 *Ibid.*

17 Available at: <<http://shipmin.gov.in/division/shipping>> accessed on 13 June 2020.

18 *Ibid.*

(iv) Draft Transgender Persons (Protection of Rights) Rules, 2020

The Transgender Persons (Protection of Rights) Act, 2019 was passed on November 26, 2019.¹⁹ It allows persons to self-perceive their gender identity, provides for the identification of transgender persons, and confers them with certain rights and benefits. Following the notification of the Act, the government circulated the Draft Rules to the Act on April 16, 2020.²⁰ The Transgender Persons (Protection of Rights) Act, 2019 was enacted in the conformity of General Comment 18 of the International Covenant on Civil and Political Rights (ICCPR) and the Yogyakarta Principles 2006 and 2017. The Act 2019 states that a person who is recognised as 'transgender' shall have the right to 'self-perceive' their gender identity. Once a person identifies as transgender, they may apply for a Certificate of Identity issued by a District Magistrate. Such a certificate will be proof of their identity as 'transgender' and confer rights and benefits under the Act. The Draft Rules specify the manner, form and process by which persons may apply for a certificate, and in which the certificate will be issued.

(v) The Inland Vessels Bill, 2020

The Inland Vessels Bill, 2020 is to promote economical and safe transportation and trade through inland waters, to bring uniformity in application of law relating to inland waterways and navigation within the country, to provide for safety of navigation, protection of life and cargo, and prevention of pollution that may be caused by the use or navigation of inland vessels, to ensure transparency and accountability of administration of inland water transportation, to strengthen procedures governing the inland vessels, their construction, survey, registration, manning, navigation and such other matters connected therewith or incidental thereto.²¹ This Bill defines 'Inland vessel' to include all mechanically propelled inland vessels or non-mechanically propelled inland vessels and registered, plying in the inland waters, but does not include, (i) fishing vessels registered under the Merchant Shipping Act, 1958 and the Marine Products Export Development Authority Act, 1972; (ii) vessels that are specified as not to be inland vessels by notification by the Central Government.

(vi) Lok Sabha Unstarred Question no. 576 on UNSC Reform

Shri A. Ganeshamurthi, MP in the Lok Sabha sought information regarding the UN Security Council Reform (a) whether the United Nations Security Council (UNSC)

19 Available at: <prsindia.org/billtrack/the-transgender-person-protection-of-rights-bill-2019> accessed on 15 May 2020.

20 Available at: <prsindia.org/billtrack/draft-transgender-person-protection-of-rights-rules-2020> accessed on 15 May 2020.

21 Available at: <http://www.shipmin.gov.in/sites/default/files/final_draft_IVBILL29_Apr%202020.pdf> accessed on 12 May 2020.

has been reformed and if so, the details thereof; (b) whether the Union Government is taking any efforts to include India as a member in the reformed UNSC; and (c) if so, the details thereof?²² Shri V. Muraleedharan, the Minister of State in the Ministry of External Affairs, Government of India responded on 5 February 2020 and stated that (a) The matter of reform of the United Nations Security Council (UNSC), including expansion of its membership, has been pending for several years. India in collaboration with other pro-reform countries has been consistently making efforts to build support among the UN Member States for early reform and expansion of the UNSC, in both permanent and non-permanent categories of its membership in order to reflect contemporary geo-political realities. (b) & (c) Government of India has accorded the highest priority of getting permanent membership for India in an expanded UNSC. A series of initiatives involving bilateral and multilateral engagements have been undertaken by the Government towards this objective. India is actively engaged in the ongoing Inter-Governmental Negotiations on UNSC reform at the UN. India is working alongside other reform-oriented countries through its membership of the G-4 Group (India, Japan, Brazil and Germany) and the L.69 Group (cross-regional grouping of developing countries of Asia, Africa and Latin America). As a result of India's sustained efforts, a large number of countries have supported India's candidature for permanent membership in an expanded UNSC.

(vii) Questions regarding the Facts relating to Jammu & Kashmir and also on the Citizenship Amendment Act 2019 in the Lok Sabha, Unstarred Question no. 642

Imtiaz Jaleel Syed and Asaduddin Owaisi asked questions regarding the facts relating to Jammu & Kashmir and also on the Citizenship Amendment Act 2019 (a) whether many countries have given statement against the Citizen Amendment Act (CAA) and eradication of Article 370 in Jammu and Kashmir after nation-wide protest against it; (b) if so, the details thereof; (c) the number of countries who have given statement and countered by India; (d) whether United Nations has also given statement opposing CAA which has not been opposed so far by the Government; (e) if so, the details thereof and the reasons there for; (f) whether CAA has compelled the Government to change its foreign policy especially after statement given by many countries against CAA; and (g) if so, the details thereof and the response of the Government to those countries and future strategy chalked out by the Government to give response to such countries?²³ Shri V. Muraleedharan, the Minister of State

22 Lok Sabha Unstarred Question No.576 on UNSC Reform: Answered on 5 February 2020, available at: <<http://164.100.47.194/Loksabha/Questions/Qministrysearch.aspx>> accessed on 15 May 2020.

23 Unstarred Question no. 642, Answered on 5 February 2020, available at: <<http://164.100.47.194/Loksabha/Questions/Qministrysearch.aspx>> accessed on 15 May 2020

in the Ministry of External Affairs, Government of India responded on 5 February 2020 and stated that Spokesperson for the UN High Commissioner for Human Rights in a press briefing note on 13 December 2019 made inaccurate and unwarranted references to the Citizenship Amendment Act 2019. Government immediately registered its protest with the office of the High Commissioner for Human Rights and clearly conveyed that the legislation is a humanitarian measure and is in line with India's international human rights obligations. Government completely and unequivocally rejected any efforts to internationalize the issues which are internal to India, in particular on laws passed by the Parliament of a sovereign nation. The Government has also taken note of some statements made by China, Malaysia and Turkey on the issue of Jammu & Kashmir. It has been conveyed that India expects these countries to not comment on the internal affairs of India; respect India's sovereignty and territorial integrity; and develop a proper understanding of the issue.

III. INDIAN EXECUTIVE

(i) Union Cabinet Approved Agreement between India and Brazil on Mutual Legal Assistance in Criminal Matters

The Union Cabinet, chaired by the Prime Minister Shri Narendra Modi, in its meeting held on 22 January 2020, has given its approval for the Agreement between the Republic of India and the Federative Republic of Brazil on Mutual Legal Assistance in Criminal Matters.²⁴ The Agreement aims to enhance effectiveness of both the countries in investigation and prosecution of crime through cooperation and Mutual Legal Assistance in Criminal Matters. In the context of transnational crime and its linkages to terrorism, the proposed Agreement will provide a broad legal framework for bilateral cooperation with the Federative Republic of Brazil in investigation and prosecution of crime as well as in tracing, restraint and confiscation of proceeds and instruments of crime as well as the fund meant to finance terrorist acts. Exchange of Agreement among both countries is yet to take place.²⁵

(ii) Exchange of Instrument of Investment Cooperation and Facilitation Treaty between India and Brazil

The Union Cabinet chaired by the Prime Minister Shri Narendra Modi in its meeting held on 30 November 2017 has given its approval for signing and ratification of the

24 Available at: <https://www.pmindia.gov.in/en/news_updates/cabinet-approves-agreement-between-india-and-brazil-on-mutual-legal-assistance-in-criminal-matters/> accessed on 10 March 2020.

25 List of MoUs/Agreements Exchanged during State Visit of President of Brazil to India, available at: <<https://mea.gov.in/bilateral-documents.htm?dtl/32325/List+of+MoUs+Agreements+exchanged+during+State+Visit+of+President+of+Brazil+to+India>> accessed on 20 March 2020.

Investment Cooperation and Facilitation Treaty (ICFT) between India and Brazil.²⁶ The exchange of treaty between India and Brazil took place on 25 January 2020 during State Visit of President of Brazil to India.²⁷

(iii) Union Cabinet Approved Extradition Treaty between India and Belgium

Union Cabinet in its meeting held on 20 March 2020 (chaired by the Prime Minister of India, Shri Narendra Modi) has approved the signing and ratifying of the Extradition Treaty between the Republic of India and the Kingdom of Belgium.²⁸ The treaty will enable the two countries to repatriate from each other any person who is accused of or convicted in an extraditable offence. Under the treaty, extradition shall be refused if the offence involved is political in nature. After ratification, the treaty will enter into force from the date of exchange of instruments of ratification between India and Belgium.

(iv) India's Statement in ECOSOC Committee on NGOs on 20 January 2020:²⁹

India expressed, on 20 January 2020 in the regular session of ECOSOC Committee on NGOs, her satisfaction on the decision of the NGO Committee to include additional screening questions for the NGOs seeking consultative status with ECOSOC, related to their possible associations with entities and individuals sanctioned by the UN Security Council. Ms. Paulomi Tripathi, Counsellor, made an intervention and expressed that it is India's proposal to corroborate the NGO applications with the sanctions list of the UN Security Council before granting consultative status. It has resulted in an important first step in strengthening the review process by the Committee aiming to ensure that NGOs affiliated with individuals and entities proscribed by the UN Security Council shall not enter into a Consultative Status with ECOSOC. India noted that there has been at least two instances in recent years, in July 2017 and in June 2019, when the Committee's decision to grant Consultative Status to two organizations had to be reversed by the ECOSOC, based on information received about their alleged links with terrorism.

26 Cabinet Approves Investment Cooperation and Facilitation Treaty between India and Brazil, available at: <<https://pib.gov.in/newsite/PrintRelease.aspx?relid=174004>> accessed on 15 February 2020.

27 26 List of MoUs/Agreements Exchanged during State Visit of President of Brazil to India, available at: <<https://mea.gov.in/bilateral-documents.htm?dtl/32325/List+of+MoUs+Agreements+exchanged+during+State+Visit+of+President+of+Brazil+to+India>> accessed on 15 February 2020.

28 Cabinet Approves Signing and Ratifying of the Extradition Treaty between India and Belgium, PIB Delhi, available at: <<https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1607481>> accessed on 25 April 2020.

29 ECOSOC Committee on NGOs, available at: <<https://pminewyork.gov.in>> accessed on 12 March 2020.

Such situations called for further strengthening of scrutiny of NGO applications at the Committee itself, before they are recommended for Consultative status. The additional information received through the amended questionnaire will help in verifying the NGO applications with the sanctions list of the UN Security Council before granting consultative status. This step addresses a gap in the method of exercising due diligence while granting consultative status. It also seeks to bring the work of the NGO Committee in alignment with the measures taken by the Security Council on behalf of all UN Member States. It is in this spirit of trust that the Committee seeks further information from the NGOs regarding their possible linkages with individuals and entities in UNSC Consolidated List. Indian representative said, “We believe that only through such collective commitment to combat terrorism, we can ensure that no individual or entity sanctioned by the UNSC can enter into a relationship of trust with the United Nations. The current measure also ensures that greater scrutiny does not pose any hindrance in the process of granting consultative status. We thank all members of the Committee for their cooperation in the work of the Informal Working Group which deliberated upon this issue and agreed upon the amendments to the application just adopted.”³⁰

(v) India on the Report of the Secretary-General on the Work of the Organization³¹

In response to the Report of the UN Secretary-General of the Work of the Organization (A/74/1), setting priorities for 2020, India’s Ambassador K. Nagaraj Naidu, Deputy Permanent Representative, expressed in 74th Session of the United Nations General Assembly on 22 January 2020 that India is grateful to the President of the General Assembly for his innovation of introducing an interactive question and answer format in this session, thus moving this debate beyond an annual ritual to a real opportunity for reflection and exchange of views. Indian ambassador welcomed the UN Secretary General’s initiatives to modernize and reform the Secretariat, and to make the United Nations “fit for purpose”, including streamlining the peace and security architecture, achieving gender parity, and addressing the financial sustainability of the organization. India will continue to support the Secretary-General in the implementation of these initiatives, including through voluntary contributions, as appropriate. Indian representative acknowledged that we operate in a world that is more interconnected and interdependent. Yet today,

30 *Ibid.*

31 India Ambassador K. Nagaraj Naidu, Deputy Permanent Representative, Permanent Mission of India (PMI), New York, on the Report of the Secretary-General on the Work of the Organization, 74th Session of the United Nations General Assembly, Agenda Item – 110: Report of the Secretary-General on the Work of the Organization, 22 January 2020 available at: <<https://pminewyork.gov.in>> accessed on 12 March 2020.

the spirit of global partnership is showing clear signs of strain battered by a steadily rising tide of protectionism and unilateralism.

While welcoming and appreciating the numerous efforts of UN Secretary-General, for instance, on the agreement on a work programme to implement the 2015 Paris Agreement on climate change; the Global Compact for Safe, Orderly and Regular Migration; and the report of the High-level Panel on Digital Cooperation, including the efforts to strengthen the UN's partnership with troop and police contributing countries through the Action for Peacekeeping initiative, Indian Ambassador raised concern that "Our inability to seriously address terrorism – the most dangerous of scourges faced by States and societies since World War II – casts doubt on the relevance of this Organization to the very people whom the Charter obliges us to protect. The UN is yet to agree on a common definition, let alone craft a coherent and well-coordinated policy to tackle terrorism and dismantle its enabling networks. We have failed ourselves by continuing to procrastinate on concluding the Comprehensive Convention against International Terrorism." Indian Ambassador further stated that "Pakistan needs to reflect that there are no takers for its false rhetoric and should get down to the normal business of diplomacy."

While raising concerns on issue of terrorism, Indian Ambassador further observed that "What holds the UN back from truly invigorating action on issues of pressing global concern? The answer lies in something that unfortunately does not find mention in the report. The effectiveness, relevance and longevity of any institution lies in its dynamic character, and its ability to adapt itself to the changing times. As long as the key organs of this Organization remain anchored in a governance architecture that is frozen in a bygone era, the crisis of legitimacy and performance will persist. Four decades have gone by since the inscription of the item on reform of the Security Council on the Agenda of the General Assembly. As we mark the 75th anniversary of the UN, let us strive to ensure that this milestone year is the one that finally delivers some concrete progress towards a Council that reflects the realities of the contemporary world."

(vi) India's Statements on the Implementation of Sustainable Development Goals

This section captures India's statements made at various occasion on the implementation of Sustainable Development Goals (SDGs).

On the front of centrality of education in achievement of SDG, Indian representative Ambassador K. Nagaraj Naidu, Deputy Permanent Representative, Trusteeship Council Chamber on 24 January 2020, stated that "In the spirit of South-South cooperation, we established the Indian Technical and Economic Cooperation (ITEC) Programme which provides capacity building assistance to

160 partner countries. With the focus on our immediate neighborhood and our African partners, it offers around 13,000 scholarships every year to professionals across a wide range of expertise. We have recently initiated a project under India-UN Development Partnership Fund to upgrade the infrastructure of an educational institution in Palau which will also be used as a venue for a forthcoming international conference.”³²

On 4 February 2020, India in the UNDP Segment of the First Regular Session 2020 of the Executive Board of UNDP/UNFPA/UNOPS has reiterated and reaffirmed the importance of implementation of the key reform measures without adversely affecting the overarching original objective: eradication of poverty in all its forms and dimensions and ensuring sustainable development, which was reaffirmed in General Assembly Resolution 72/279.³³ Ms. Vidisha Maitra, First Secretary, stated that for India, and indeed most of the developing world, there cannot be any compromise on the ambition of the Agenda 2030 and its fulfilment. And the reforms cannot, and should not, become an impediment in speedy implementation of the Country programs.³⁴

At the event of the 2nd Ocean Conference to implement SDG 14 held on 4-5 February 2020, for stocktaking the progress made in the implementation of SDG 14, India reaffirmed her view that the 1982 UN Convention on Law of the Sea (UNCLOS) should continue to remain as the legal framework for all activities in the Oceans and seas.³⁵ At the same time, India also welcomed the process of governance of areas beyond such jurisdiction, in view of the rapid advances in technology and our scientific understanding. Indian representative Mr. Siddharth Malik, First Secretary, on 4 February 2020, urged that there is an urgent case to

32 Statement by Ambassador K. Nagaraj Naidu, Deputy Permanent Representative, PMI, New York, High-Level Interactive Dialogue Aligning Inclusive Quality Education Policies with Sustainable Development Goals: 21st century education system needs to focus on developing human skills such as compassion, creativity, critical thinking and communication, 24 January 2020, available at: <<https://pminewyork.gov.in>> accessed on 12 March 2020.

33 Statement by Ms. Vidisha Maitra, First Secretary, PMI, New York, UNDP Segment of the First Regular Session 2020 of the Executive Board of UNDP/UNFPA/UNOPS: For India, and indeed most of the developing world, there cannot be any compromise on the ambition of the Agenda 2030 and its fulfilment , 4 February 2020, available at: <<https://pminewyork.gov.in>> accessed on 12 March 2020

34 *Ibid.*

35 Marine plastic litter is the fastest growing environmental concern. India has made a voluntary commitment to eliminate single-use plastic by 2022. Statement by Mr. Siddharth Malik, First Secretary, PMI, New York, Preparatory Meeting, 2020 UN Conference to support the Implementation of SDG 14: Conserve and substantially use the oceans, seas and marine resources for sustainable development, 4 February 2020, available at: <<https://pminewyork.gov.in>> accessed on 12 March 2020.

develop and implement effective adaptation and mitigation measures that contribute to increasing and supporting resilience and addressing harmful impacts of climate change on the ocean. There is need for more action to fight illegal and unmonitored fishing.³⁶ India emphasized that we should not only identify additional and new ways of enhanced finances along with ensuring transfer of marine technology, but also identify effective global partnerships that are necessary for capacity building, generate greater marine awareness and share scientific knowledge especially with SIDS and LDCs to help them develop as a sustainable ocean-based economies.³⁷

At the 51st Session of the United Nations Statistical Commission, India reflected her views on data and indicators for the 2030 Agenda for SDG.³⁸ Mr. Pravin Srivastava, Chief Statistician of India *cum* Secretary, Ministry of Statistics and Programme Implementation on 3 March 2020 appreciated the efforts of UNSD and Inter-Agency and Expert Group for Sustainable Development Goal Indicators (IAEG-SDG) towards their efforts for improvement of global indicator framework including tier classification updates, the 2020 comprehensive review of the global indicator framework for the SDGs. Indian representative acknowledged their works “on proposed replacement indicators, revisions to existing indicators and proposal for additional indicators are commendable.” UNSD, in partnership with Custodian Agencies (CAs), are continuously working on development of methodologies and assisting NSOs in compilation of data for the SDGs. However, there still exist a good number of indicators which are difficult to compute for large economies. Further these methodologies are often pilot tested in smaller countries and are not directly scalable in large countries which have different limitations in their data systems as also technical capacities. UNSD may like to address these issues as well.

While supporting the 2020 comprehensive review, Indian representative suggested for both the proxy indicators and additional indicators to be relevant to the target; have clear methodology and standards; and satisfy the criteria of Tier-I indicator. In order to ensure availability of timely data on SDGs, which are internationally comparable, India recommends the development of guidelines and training modules which will facilitate the adoption of SDMX-based data and metadata exchanges by countries and CAs. Presently, India participates as an observer in proceedings of the Group, Indian representative requested for renewal of

36 *Ibid.*

37 *Ibid.*

38 Mr. Pravin Srivastava, Chief Statistician of India *cum* Secretary, Ministry of Statistics and Programme Implementation, Fifty first Session of UN Statistical Commission, Agenda Item 3(a): Data and indicators for the 2030 Agenda for Sustainable Development: India supports the 2020 comprehensive review of the global indicator framework for the SDGs, 3 March 2020, available at: <<https://pminewyork.gov.in>> accessed on 20 March 2020.

membership on the IAEG-SDGs and also seeks to be represented as a member on various expert/technical groups, task teams, working committees etc. constituted by UNSC for revolving and finalizing statistical standards so that the diversities in developing economies is adequately captured.

Mr. Siddharth Malik, First Secretary, PMI, New York in *the High-level Panel on International Financial Accountability, Transparency and Integrity (FACTI) for Achieving the 2030 Agenda Briefing by Panel for Member States* on 24 April 2020 has highlighted challenges in the implementation of SDG.³⁹ Indian delegation recommended the following actions to the Panel for promoting greater financial accountability, transparency and integrity and for achieving the 2030 Agenda: a) We need to expand the scope of Illicit financial flows by including its three components - corruption, transnational organised crime and tax related issues especially tax evasion and tax avoidance, which are currently not covered under international instruments. b) Tax avoidance in an era of digital economic activity: The growth of e-commerce and digital business models has increased challenges for states to collect tax. Digitalization has made it easier for MNCs to operate in markets without triggering tax residency rules resulting in evasion of taxes on corporate profits. There is a need to better align taxation with the location of real economic activity. The panel should look into the issue of allocation of taxation rights in an era of digitalized economic activity. This will enable developing countries to mobilise resources and provide a level and equitable playing field. c) There is need for an equitable and representative global economic and financial platform for tax related matters: Currently, there is no inclusive intergovernmental body where member states can negotiate on an equal footing and agree to effective solutions to tax related issues. Therefore, we see the need to initiate a transparent intergovernmental process under the auspices of the UN to address this. The UN Committee of Experts on International Cooperation in Tax Matters should be upgraded to an intergovernmental UN Global Tax body. This will provide a more equitable and representative tax body, where developing countries will have greater say in framing of global taxation policies. The panel should provide solutions to foster universal participation in international legal instruments on tax matters, enhance information sharing so that developing countries can benefit from the existing norms and standards. d) Strengthening existing institutions: While discussing FACTI issues, care must be taken to ensure that no parallel structures are set up to pursue the same objectives. For instance, to promote effective implementation of legal,

39 India Statement by Mr. Siddharth Malik, First Secretary in High-level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda Briefing by Panel for Member States: The FACTI panel must ensure that existing institutions are strengthened and no duplicate structures are created to pursue the same objectives, 24 April 2020, available at: <<https://pminewyork.gov.in>> accessed on 20 June 2020.

regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system we have the FATF. The FATF has worked intensively to generate the necessary political will to bring about national legislative and regulatory reforms in areas such as combating money laundering and terrorist financing. There are more than 200 countries and jurisdictions committed to implementing them. In such instances, the panel should ensure that existing institutions are strengthened, and no duplicate structures are created.

(vii) India at the Intergovernmental Negotiations on Security Council Reform

This section presents India's statement made at several occasions on the topic of Security Council Reform. It highlights India's response on this aspect.

In response to letter of Ambassador Wronecka, President, UNGA dated 31 January inviting delegations to share views on Security Council Reform, India's Ambassador Syed Akbaruddin, Permanent Representative, Permanent Mission of India, New York, on behalf of G4, supported the Common African Position as contained in the Ezulwini Consensus and the Sirte Declaration.⁴⁰ In line with this support, G4 on 13 February 2020, unequivocally welcomed the inclusion of "Common African Position" in the next iteration of the 7 June 2019 paper. While noting the current format of the IGN has long outlived its sell by date, Indian representative urged the IGN must be transparent. G4 suggested inclusion of practices: greater transparency through web-cast maintenance of records of proceedings, adoption of the General Assembly rules of procedure to overcome differences, discussion in the IGN as intrinsically linked to the outcome to be decided in the General Assembly etc. Indian representative on behalf of G4 concluded that the mandate of the IGN is to achieve reform, not to endlessly debate it. "If you want something new, you have to stop doing something old".

In response to discussions namely the regional representation cluster and the principles, India made few brief points in an informal meeting of the Plenary of the Intergovernmental negotiations held on 4 March 2020.⁴¹ India aligns with the

40 Joint G4 Statement by Brazil, Germany, India and Japan delivered by Ambassador Syed Akbaruddin, Permanent Representative, Informal Meeting of the General Assembly on the Intergovernmental Negotiations on Security Council Reform: If you want something new, you have to stop doing something old, 13 February 2020, available at: <<https://pminewyork.gov.in>> accessed on 12 March 2020.

41 Statement by Ambassador Syed Akbaruddin, Permanent Representative, An informal meeting of the Plenary of the Intergovernmental negotiations on the question of equitable representation on and increase in the membership of the Security Council and other matters related to the Council: India for African solutions to African concerns on Security Council reforms, 4 March 2021, available at: <<https://pminewyork.gov.in>> accessed on 12 June 2020.

statements delivered by the Permanent Representative of St. Vincent and Grenadines, on behalf of the L 69, and the Permanent Representative of Japan, on behalf of the G 4. Ambassador Syed Akbaruddin, Permanent Representative, PMI, New York stated that “We have discussed principles in previous sessions. We all adhere to the principles of representativeness, democracy, transparency and accountability. Similarly, all of us aim for reforms that will help make the Security Council more legitimate, more effective and more efficient. Our commitment to these principles and those of the UN charter is reflected in the General Section of the 7 June 2019 paper. What is required now is to convert these principles into concrete options for a reformed Security Council, while addressing the issue of regional representation.” Ambassador Akbaruddin further added that “Any discussion of the notion of regional representation needs to begin by acknowledging that the term ‘regional representation’ is not something mentioned in the UN Charter. The nearest reference in the Charter is to ‘equitable geographical distribution’. Regional representation we must remember is therefore a subset of the broader principle of equitable geographical distribution to address a unique situation. It pertains to a vast region, covering an entire regional group which has evolved institutions and organisations to such an extent that it is able to unanimously agree to address issues of peace and security through a collective prism. Regional representation is, therefore a unique paradigm. It is not a paradigm which all regions can replicate. Discussions have made it clear that neither are all regions prepared or required to do so. It is a paradigm designed to celebrate and appreciate a rare effort at unity, not a one size fits all. Where it fits, as demonstrably in the case of Africa, we welcome it; where it doesn’t, we have to fall back to the charter established notion of equitable geographical distribution. In this format, that is now in operation all states represent themselves it is only in a regional representation paradigm that states represent a region in accordance to the consensual agreement of the regional group. Individual states may today say that they represent a region, that is an individual choice, not a regional choice or a charter mandated choice.” Amb. Akbaruddin mentioned that “Africa is the lone instance where, over the years, a unique common approach towards international peace and security has evolved. This has no parallel in any regional group. Africa has also converged on a unanimous approach to region-wide Common African Position on the issue of Security Council Reform – the only regional group to do so. There is no other parallel.” Ambassador Akbaruddin reminded that “We have all agreed, under the ‘Commonalities’ section of regional representation of the Revised elements of commonality paper of 7 June 2019 under 6d (page 4) that Africa should be ‘equitably’ represented in a reformed Security Council. Since we are discussing principles today, I would like to ask - exactly how would it be ‘equitable’ for African aspirations as espoused through the Common African Position to be accommodated through a model of representation that will not entail expansion in the permanent category? How will there be equitable representation on the Council

if we are to adopt a model of expansion that will lead to no representation for two of the 5 current regional groups - Africa and Latin America- at all in the permanent category? We look forward to hearing a response from those who advocate otherwise.” Amb. Akbaruddin responded that “Now, let us see how this applies in the case of regional representation. We have a situation where a regional group, working at the highest level, has come to a collective decision of the model of representation they wish to see for themselves. They clearly envisage that equitable representation means their region be represented in both the permanent and non-permanent categories. It is a simple model, known to the charter. It is a model that they have taken considerable time to develop and it is a model that they have held firmly firmly to. Yet what is being offered to them is an alternative model that is contrary to what they aspire for. An option crafted with no African participation is 4 promoted as a panacea for all of Africa’s objectives. This offering prepared from outside is being promoted as better serving Africa’s needs than a home grown product.” Amb. Akbaruddin asserted that “the pathway of regional representation is a creative notion to provide for a unique mechanism for an entire region - Africa. Regional representation can only make sense if it is designed by the region for itself, or seen by the region concerned as meeting the aspirations of that region, even if conceived elsewhere. These criteria are met only by one option of the options listed in the 7 June 2019 paper, under the issues for further consideration. That is the option that provides for expansion in both categories. No other model does so. More specifically, the model articulated by Africa as a model for itself in the Ezulwini consensus and the Sirte Declaration is the only model of regional representation designed and acceptable to an entire region. There is no other model of regional representation that is either designed or acceptable to an entire region or complete regional group, despite decades of discussion of regional representation. If a model for a region’s representation agreed to unanimously by all its leaders at the Summit level and supported by numerous others repeatedly here and elsewhere can’t pass muster at the IGN, what else can? If we have to seriously address regional representation then we have to acknowledge that Africa’s representation as postulated in the Ezulwini consensus and Sirte Declaration as the only means of equitable representation of Africa in a reformed Security Council. This, therefore, has to be reflected in the commonalities part of any text that emerges from our current discussion”.

(viii) India Statement in the Special Committee on Peacekeeping Operations

While acknowledging that the Action for Peacekeeping (A4P) initiative is commonly agreed template to improve the efficiency and effectiveness of peacekeeping within the contours of shared understandings, India’s Ambassador Syed Akbaruddin, Permanent Representative, in the General Debate on Special Committee on Peacekeeping Operations, 17 February 2020 suggested few measures: Requiring

effective follow-up and implementation includes: Inclusion of all stakeholders and all phases of peacekeeping operations in the Performance and Accountability Mechanism, Development of a common culture of UN Peacekeeping without the privileges of caveats, Enhancing participation of women by prioritising offers of women peacekeepers, Medical mapping of all Missions comprehensively so that existing gaps are attended to.⁴²

(ix) India Statement in the Meeting of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization: Application of Sanctions by UN Security Council

Indian representative, Mr. Yedla Umasankar, First Secretary/Legal Adviser, PMI, New York, on 18 February 2020 has reflected on three specific issues, which are under consideration of the Special Committee.⁴³ These are: peaceful settlement of disputes; maintenance of international peace and security; and assistance to third States affected by the application of sanctions. Indian representative said, “Though in some cases, sanctions could serve as an important tool in the maintenance of international peace and security, but they should not be used as punitive measures. They serve their purpose only if they are used, when necessary as a measure of the last resort having tried all other options, and are applied so long as are necessary, in accordance with the provisions of the UN Charter and do not violate the principles of international law. He further observed that “Article 50 of the UN Charter confers the right on third States confronted with special economic problems, which may arise because of the Security Council sanctions, to consult the Security Council for the solution. This obliges the Security Council to find a definitive solution to the problems of the affected third States.”⁴⁴

While pointing out that the Security Council is now increasingly issuing targeted sanctions against individuals and entities, Indian representative reminded the Special Committee earlier deliberations dealing with several proposals on issues of sanctions in the context of international peace and security. Therefore, the Committee has before it some proposals, which need to be discussed. In this context, India appreciated the proposal of Ghana, which in general is aiming at strengthening the

42 Statement by Ambassador Syed Akbaruddin, Permanent Representative, PMI, New York, General Debate on Special Committee on Peacekeeping Operations: Not a good augury to avoid data based decision making in Peacekeeping, 17 February 2020, available at: <<https://pminewyork.gov.in>> accessed on 12 March 2020.

43 Statement by Mr. Yedla Umasankar, First Secretary/Legal Adviser, Meeting of the Special Committee on the Charter of the United Nations and On the Strengthening of the Role of the Organization: India’s vision has been of a world as one large family, 74th Session of the UN General Assembly, 18 February 2020, available at: <<https://pminewyork.gov.in>> accessed on 12 March 2020.

44 *Ibid.*

cooperation between the United Nations and the regional organizations. Where appropriate, the regional organizations could play an important role in the peaceful settlement of disputes between/among their member States in accordance with the provisions of the Charter. Ghana's proposal is worth exploring, especially those concerning the measures and institutional mechanisms for effective and timely cooperation and coordination between the UN and the regional organizations in peaceful settlement of disputes under Chapter VIII of the Charter.⁴⁵

India further supported the Russian Federation's proposal with a view to establish a website on the peaceful settlement of disputes and updates to the Handbook on the Peaceful Settlement of Disputes between States, which would be useful to all member States. The Repertory of Practice of United Nations Organs and the Repertoire of the Practice of the Security Council have considerable significance as sources of reference and as effective means of maintaining the institutional memory of the Organization, as well as in dissemination of the work of the Organization.⁴⁶

(x) India's Initiatives for Multilateralism

Ambassador K. Nagaraj Naidu, Deputy Permanent Representative, PMI, New York in the Informal Consultations on the Declaration for the Commemoration of the Seventy-Fifth Anniversary of the United Nations on 21 February 2020 called to reaffirm our collective commitment to multilateralism.⁴⁷ While we all may not agree on the specifics of reform, we can all agree that tangible progress on reform of the key organs of the UN, in particular the Security Council, is essential if we are to better address the many challenges and opportunities of the 21st century.”

While supporting the efforts of “Alliance for Multilateralism”, Ambassador Syed Akbaruddin, Permanent Representative of India, PMI, New York in the High Level Event on “Alliance for Multilateralism” on 27 February 2020 called for ‘Advocating Human Rights in the 21st Century—building bridges between Geneva and New York’.⁴⁸ India made three general points. *First*, the 21st century is in many ways

45 *Ibid.*

46 *Ibid.*

47 Ambassador K. Nagaraj Naidu, Deputy Permanent Representative in the Informal Consultations on the Declaration for the Commemoration of the Seventy-Fifth Anniversary of the United Nations: Reform of the key organs of the UN, in particular the Security Council, is essential if we are to better address the many challenges and opportunities of the 21st century, 21 February 2020, available at: <<https://pminewyork.gov.in>> accessed on 12 March 2020.

48 Remarks by Ambassador Syed Akbaruddin, Permanent Representative of India, PMI, New York in High-Level Event on “Alliance for Multilateralism”: Advocating Human Rights in the 21st Century –building bridges between Geneva and New York, 27 February 2020, available at: <<https://pminewyork.gov.in>> accessed on 12 March 2020.

from a human rights paradigm, unlike anything in the past. “We the people” is more than a cliché. In terms of human rights in the 21st century, space needs to be provided for these “newcomers” also. *Second*, if Climate Change is an emergency, then Climate Justice is an imperative. *Third*, the 21st century provides opportunities like never before across an array of human rights issues, from achieving greater progress in gender equality and empowerment of women, to harness potential of emerging technologies, to make people’s lives better, and climate change mitigation and adaptation.⁴⁹

(xi) India’s Remarks on Revitalization of the Work of the General Assembly⁵⁰

Mr. Asokan Amarnath, Counsellor, PMI, New York, in the Ad Hoc Working Group on the Revitalization of the Work of the General Assembly, on 2 March 2020 proposed the following two proposals: Restoration of the sanctity of the Annual General Debate by reducing the multiple high-level events running parallel to the Annual General Debate to ensure the salience of this most important event on the UNGA calendar and importance of preserving the intergovernmental, inclusive and democratic nature of the UN. India recalls that the UN General Assembly should take the lead by ensuring a greater representation of women in its leadership position.⁵¹

In Ad Hoc Working Group on the Revitalization of the Work of the General Assembly held on 12 March 2020, India has stated on “Thematic debate on the role and authority of the General Assembly.”⁵² Mr. A. Amarnath, Counsellor, PMI, New York made few remarks. Indian representative stated that “‘Role’ and ‘Authority’ - are the two key words to today’s debate. The role of the General Assembly is clearly laid out in Article 10 of the UN Charter, wherein it is empowered to discuss any question or matter within the scope of the Charter or relating to the powers and functions of other UN organs. Any outsider, without the knowledge of how the UN system works, would presume, by just reading the above mandate, that General Assembly is the most authoritative body in the UN system. Indeed, this was the vision envisaged for the Assembly. But, unfortunately the reality is different. Over

49 *Ibid.*

50 Mr. Asokan Amarnath, Counsellor, PMI, New York, in the Ad Hoc Working Group on the Revitalization of the Work of the General Assembly: General Assembly should take the lead by ensuring a greater representation of women in its leadership position, 2 March 2020 available at: <<https://pminewyork.gov.in>> accessed on 12 March 2020.

51 *Ibid.*

52 Statement by Mr. A. Amarnath, Counsellor in the Ad Hoc Working Group on the Revitalization of the Work of the General Assembly, Thematic debate on the role and authority of the General Assembly, 12 March 2021, available at: <<https://pminewyork.gov.in>> accessed on 20 June 2020.

the years, we have witnessed the progressive erosion of Assembly's authority by Security Council. The Council has redefined its mandate through wider interpretations of what constitutes a threat to international peace and security and has been engaging in discussions on issues that clearly fall within the purview of the General Assembly. This must be remedied and a proper relationship, based on respect for the respective mandates of General Assembly and Security Council in the spirit of the Charter, should be established. Relieving the Council from some of its overburdened agenda will also enable it to focus on the real hotspots that constitute a clear and present danger to international peace and security. Part of the blame for this situation must also be taken by the General Assembly. A closer look at the agenda items of the Assembly last year will reveal that around 40% pertain to organisational, administrative and other such matters. Issues like humanitarian assistance, combating international terrorism constitute only than 1% of Assembly's agenda items. This is not the role intended for the Assembly in the Charter. General Assembly must be in the vanguard of global agenda-setting, particularly on important challenges faced by the world. We must ask ourselves a frank question. Do we, the member states, have the will and commitment required to reinforce the authority of the Assembly as mandated by the UN Charter? If the answer is yes, then there is no better time to act on this question than 2020, which marks the 75th anniversary of establishment of the United Nations. We should galvanize our efforts towards strengthening the multilateral system by restoring the leadership role of the General Assembly on issues of global importance."⁵³

(xii) India's Statements on Climate Change

Ambassador K. Nagaraj Naidu, Deputy Permanent Representative, PMI in Virtual Meeting on the Member State Advisory Group on Climate Change has provided update on efforts of the group on the Leadership Group for Industry Transition that was launched by Government of Sweden and India supported by World Economic Forum, at the UN Climate Action Summit in New York in September 2019.⁵⁴ "The Leadership Group is an initiative to drive climate transition in the energy intensive industry sectors. The Group is envisioned as a group of countries, companies, and other actors committed to enhance climate action and to support the implementation of NDCs of the countries. The purpose of the Leadership Group is to provide policy and decision support for industry transition roadmaps towards

53 *Ibid.*

54 Statement by Ambassador K. Nagaraj Naidu, Deputy Permanent Representative, Virtual Meeting of the Member State Advisory Group on Climate Change: Industry Transition Leadership Group provides policy and decision support for industry transition roadmaps towards low carbon emissions, 8 April 2020, available at: <<https://pminewyork.gov.in>> accessed on 20 June 2020.

low carbon emissions, strengthen the implementation of Paris Agreement, enable collaboration for high-level dialogues, and facilitate sharing know-how, technologies and financing for transitions to strengthen NDCs. It seeks to complement and add value to existing initiatives from the private and public sectors on industry transitions. With the assistance of Stockholm Environment Institute, which has been designated as secretariat for the initiative, a first working meeting for the Leadership Group members, WEF and other supporting partners was arranged in Stockholm on 19th to 21st November 2019. In December, a minister level meeting for the Group was arranged at COP-25 in Madrid. In both the meetings, issues of governance structure and management of the Leadership Group, existing gaps in the climate actions of countries as indicated in the NDCs, workplan for the Group were discussed. Building on this, a work program for the Leadership Group has been developed, focusing on key activities for 2020 and key deliverables to be presented and discussed at COP26. The leadership Group is proposing to work on three work streams, namely Partnerships for Change; Evidence for Action; and Industry Transition Roadmaps. The first work stream is to provide a partnership building including high level meetings, public-private cooperation. The second work stream area is to gather and share the knowledge and evidence that is needed for low carbon transitions. The third work stream is to support countries and industries to develop roadmaps for low-carbon industry transformation.”⁵⁵

“The leadership Group is also working to increase the membership of the Group. Similar efforts are being made to have more industries on board. So far, Sweden and India are joined in the Leadership Group by ten countries including Argentina, Finland, France, Germany, Ireland, Luxembourg, the Netherlands, South Korea, Australia, and UK. Many industrial groups and airports have also joined the Leadership group. The Group will strive to work with other organizations and existing initiatives including Energy Action Track initiatives. Denmark which is leading the Energy Track had also participated in the first working group meeting held in Stockholm in September 2019. India and Sweden with the support of Stockholm Environment Institute are carrying forward the action plans and strategies of the Leadership Group.”⁵⁶

(xiii) India Statement on the Developmental Initiatives

India in *the Economic and Social Council Operational Activities Segment: General Debate* on 19 May, 2020, thanked the UN Secretary-General for his Report entitled “Implementation of General Assembly resolution 71/243 on the quadrennial comprehensive policy review of operational activities for development of the United

55 *Ibid.*

56 *Ibid.*

Nations system (QCPR)” which provides an update on the implementation of the 2016 QCPR and the reforms of the UN Development System (UNDS).⁵⁷ India also thanked the Deputy Secretary-General for her personal commitment and continuous engagement on the re-positioning of the UNDS.⁵⁸ Mr. Siddharth Malik, First Secretary, PMI, New York in his opening statement said, “This year’s Operational Activities Segment is significant as it will be a stepping stone to our substantive deliberations in the QCPR negotiations later this year. Moreover, the segment will deliberate upon and will also give an opportunity to complete the remaining mandates of the re-positioning of UNDS – the Regional Review and the Multi-Country Office Review. Thus, in terms of the implementation of the reformed UNDS, the discussions are timely and important.”⁵⁹ “India attaches great importance to the UNDS and its guiding principles.The UN System must in fact sharpen its tools to attack the problem of poverty more directly especially in view of the COVID-19 pandemic.....Externally imposed prescriptions should be avoided and national policy space respected. We expect RCs to be transparent and fully accountable to the host national government. This includes effective and timely reporting from RC and UN Country Team (UNCT) to the host government. The UN Sustainable Development Cooperation Framework should be developed in full consultation and agreement with the respective host government. The Regional Collaborative Platforms and Issue Based Coalitions must be established after consultation with the respective Member States. These mechanisms should be based on priorities of the region decided by respective Member States of the region and not by UNCTs.”⁶⁰ “We want to underscore the voluntary and non-binding nature of the Funding Compact. The ability to meet various commitments will vary as different Member States may pursue different elements of the Compact, from different starting points, progressively and at different speeds. The quality and volume of resources for implementation of the new arrangement must lead to improvement in system’s predictability and impartiality, as per objective set out by the Secretary General at the beginning of the proposed reforms. We have to ensure that resources meant for core development programmes are not diverted; else it will have a deleterious effect on the development agenda of the developing countries, in particular on LDCs, LLDCs and SIDS.”⁶¹

57 India Statement by Mr. Siddharth Malik, First Secretary, Economic and Social Council Operational Activities Segment: General Debate-India attaches great importance to the UN Development System and its guiding principles. It is of utmost importance that the system does not slacken its focus on the needs of the poorest and the most deprived, on 19 May, 2020, available at: <<https://pminewyork.gov.in>> accessed on 20 June 2020.

58 *Ibid.*

59 *Ibid.*

60 *Ibid.*

61 *Ibid.*

Ambassador Nagaraj Naidu, Deputy Permanent Representative, PMI, New York on 23 June 2020 in *the Informal Meeting of the UNGA and the Members of the Alliance For Poverty Eradication* has emphasized the importance of the alliance for poverty eradication and asked that it should contribute to the policy discourse that seeks to analyze poverty from the perspective of multiple deprivations. For instance, people experience poverty differently even within the same household. While data is limited, there is evidence that women and children are disproportionately affected by poverty. Hence, gender mainstreaming is vital for policy design and implementation.⁶² The alliance among others should call for inclusion and empowerment of those left behind as a priority, targeting those furthest behind. The alliance should brainstorm about sectors where jobs could be generated in the age of digitization and automatization. The alliance should distribute successful case studies from member states that have successfully integrated economic, social and environmental policies that have helped in poverty alleviation. The alliance should also use the United Nations development system to enable it to bring together its special expertise and policy portfolios to focus on integrated system-wide action for poverty eradication.⁶³

Ambassador T.S. Tirumurti, Permanent Representative of India to the United Nations, in *the High-Level Meeting (HLM) on Poverty Eradication* held on 30 June 2020 has shared India's experience and good practice in poverty eradication in few select areas of poverty eradication in the context of development initiatives: "Sharing Experience & Good Practices in Poverty Eradication."⁶⁴ "In India, we are implementing a comprehensive development strategy to end poverty in all its forms, through, *inter alia*, accelerated economic growth and development, strong focus on vulnerable groups, special focus on women and children and broader social safety nets. A wide range of programs for promoting gainful employment, and improving accessibility to basic services, such as health, nutrition, sanitation, education, skills, and clean fuel, have been operationalized. Targeted digital intervention is making a huge impact. *First*, India's rural population is protected against unemployment under the National Rural Employment Guarantee Act which

62 India Statement by Ambassador Nagaraj Naidu, Deputy Permanent Representative, Informal Meeting of The President of The General Assembly and Members of the Alliance for Poverty Eradication, on 23 June 2020, available at: <<https://pminewyork.gov.in>> accessed on 30 June 2020.

63 *Ibid.*

64 Statement by Ambassador T.S. Tirumurti, Permanent Representative of India to the United Nations, High-Level Meeting (HLM) on Poverty Eradication "Trends, Options and Strategies in Poverty Eradication Across the World", Speaking Segment-3: "Sharing Experience & Good Practices in Poverty Eradication", 30 June 2020, available at: <<https://www.pminewyork.gov.in/IndiaatUNGA?id=NDaxMA>> accessed on 1 July 2020.

provides a legal guarantee of 100 days of wage employment per household in a year. 54% beneficiaries of this scheme are women. *Second*, through the use of ICT, we have achieved universal financial inclusion by linking people's banking accounts, their identification numbers and mobile phones. We have brought over 393 million people into the mainstream financial system, including 200 million women, accelerating their economic empowerment. *Third*, universal health coverage is being delivered through the National Health Protection Mission (Ayushman Bharat), the world's largest, cashless and paperless, health protection scheme providing an annual cover of \$7,000 to 100 million poor and vulnerable families, covering 500 million people. *Fourth*, to make India malnutrition free by 2022, we have launched the Holistic Nutrition program (Poshan Abhiyan) which aims to improve nutritional outcomes for children, adolescents, pregnant women, and lactating mothers by leveraging ICT for real-time monitoring. *Fifth*, access to housing for the economically disadvantaged households is being ensured under the 'Housing for All' initiative. Villages of India now have access to electricity. *Sixth*, to achieve universal sanitation, we launched the Clean India Mission in 2014 and over the last 6 years, over 110 million toilets have been built. We have also launched a US\$ 50 billion project to provide safe and piped drinking water to all households by 2024. *Seventh*, to strength livelihood opportunities in the agriculture sector, we have taken an array of measures to improve agricultural productivity while simultaneously seeking to double farmers' income by 2022. *Eighth*, we will increase the income levels of low-income groups through better skilling and entrepreneurship opportunities and more productive employment, by introducing measures such as "Skill India" and "Startup" India.⁶⁵

(xiv) India at UN Human Rights Council

On 28 February 2020, India has exercised in the UN Human Rights Council its right of reply to Pakistan's statement under Agenda Item 2.⁶⁶ In this reply, India responded to Pakistan's allegation on the disturbed situation of minority in the Jammu and Kashmir. "We would like to inform the Council that the situation in Jammu and Kashmir is fast returning to normalcy despite serious attempts by Pakistan to derail the positive developments through its active support to terrorist groups and related entities.The international community cannot be misled by Pakistani hysterical reactions at all international fora to malign India. The world knows about the dismal human rights records of Pakistan and a tight control cannot hide it all. Let us advise Pakistan for its own good and for the peace and prosperity of the South Asian region." India in support of her argument mentioned ten important

65 *Ibid.*

66 Right of Reply by India under Agenda Item 2 at the 43rd Session of the Human Rights Council, February 28, 2020, available at <mea.gov.in> accessed on 15 May 2020.

measures: *First*, end illegal and forcible occupation and reverse the demographic changes in Pakistan occupied Jammu and Kashmir; *Second*, stop terror funding and dismantle terrorist camps operating in Pakistan and territories under its control; *Third*, stop public advocacy and support for terrorists by Pakistani leadership at the highest level; *Fourth*, take structural reforms to develop a semblance of democracy in Pakistan; *Fifth*, end harassment and execution of minorities through misuse of blasphemy law; *Sixth*, end forced conversions and marriages of women and girls from Hindu, Sikh and Christian religions; *Seven*, stop killing and targeting political dissidents and legitimate criticism in Sindh, Balochistan and Khyber Pakhtunkhwa; *Eight*, prevent enforced disappearances and extrajudicial killings of journalists and human rights activists by its security agencies; *Nine*, stop religious persecution against Shias, Ahmadiyas, Ismailia and Hazaras; *Tenth*, stop recruitment of children for terror activities including suicide bombing in other countries. And the list is endless. India further mentioned that “Blasphemy law against Aasia Bibi, persecution of Abdul Shakoor, an Ahmadiya, Jagjit Kaur, a minor Sikh girl subjected to abduction and forced marriage are the norms of the day for minorities in Pakistan. As regards OIC, it has no *locus standi* to comment on the internal affairs of India. Jammu and Kashmir was, is and shall forever remain an integral part of India. As far as Belgium’s comment on NRC is concerned, as a close partner of India, we wish, Belgium could have checked the factual position with us before coming to any conclusion on the issue. Our Prime Minister has clearly said that no discussions have taken place on NRC anywhere except following Supreme court directives in Assam.”

(XV) India’s Election as a Non-permanent Member of the Security Council for the Term 2021-22

The United Nations General Assembly on 17 June 2020 has elected India with an overwhelming majority of 184 out of 192 votes as a non-permanent member of the Security Council for the term 2021-2022.⁶⁷ There were five vacant seats in the UNSC, out of which four were filled by the first round of voting held on 17 June 2020. Along with India, Kenya, Ireland, Mexico and Norway obtained the requisite two-thirds majority in the General Assembly. India was the sole candidate for a non-permanent seat from the Asia-Pacific category for the 2021-22 term. This will be the eighth term of India in the UN Security Council.⁶⁸ Previously, India has been

67 Available at: <<https://www.pminewyork.gov.in/press?id=eyJpdil6lmt0M3hKMxN5dVVH ZjRSK3VSS3grbXc9PSIsInZhbHVlIjoiaWITU29jbXkxSlhEaUVVHYW1RYTRuZz09Iiw ibWFjIjoiaWZmMxMWNiYzE2MDcyMWU4M2YxNTFIMTk1ODZhMTg3ZmYyZTEwZmFk OWVmMzBiNmQ1NmM4NTgwMmY3NDg5YyJ9>> accessed on 15 June 2021.

68 *Ibid.*

elected as a non-permanent member of the Council for the years 1950-1951, 1967-1968, 1972-1973, 1977-1978, 1984-1985, 1991-1992 and most recently in 2011-2012.⁶⁹

⁶⁹ India Elected Non-Permanent Member of UN Security Council, Bloomberg, available at: <<https://www.bloombergquint.com/politics/india-elected-non-permanent-member-of-un-security-council-2#:~:text=lost%20the%20elections.-,India%20was%20elected%20a%20non%2Dpermanent%20member%20of%20the%20United,Security%20Council%20elections%20held%20Wednesday>> accessed on 18 June 2020.

OFFICIAL DOCUMENTS

INVESTMENT COOPERATION AND FACILITATION TREATY BETWEEN THE FEDERATIVE REPUBLIC OF BRAZIL AND THE REPUBLIC OF INDIA

PREAMBLE

The Federative Republic of Brazil

and

The Republic of India

(hereinafter referred to as the "Parties" collectively or individually as "Party");

Wishing to strengthen and to enhance the bonds of friendship and the spirit of continuous cooperation between the Parties;

Desiring to promote cooperation between the Parties with respect to bilateral investments;

Recognizing that the cooperation in and facilitation of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity, to the development of economic cooperation between them and to the promotion of sustainable development, including poverty reduction;

Reaffirming the right of Parties to regulate investments in their territory in accordance with their law and policy objectives;

Seeking to create and maintain favourable conditions for the investments of investors of a Party in the territory of the other Party;

Recognizing the importance of fostering a transparent and friendly environment for investments by investors of the Parties;

Wishing to encourage and strengthen contacts between investors and the governments of the Parties; and

Seeking to maintain a dialogue and foster government initiatives that may contribute to an increase in bilateral investments.

Agree, in good faith, to the following **Investment Cooperation and Facilitation Treaty**, hereinafter referred to as "Treaty", as follows:

PART I – Scope and Definitions

Article 1

Objective

The objective of this Treaty is to promote cooperation between the Parties in order to facilitate and encourage bilateral investments, through the establishment of an institutional framework for the management of an agenda for further investment cooperation and facilitation, as well as through mechanisms for risk mitigation and prevention of disputes, among other instruments mutually agreed to by the Parties.

Article 2

Definitions

2 For the purpose of this Treaty:

2.1 **“Confidential information”** means business confidential information, e.g. confidential commercial, financial or technical information which could result in material loss or gain or prejudice to competitive positions, and information that is privileged or otherwise protected from disclosure under the law of a Party.

2.2 **“Enterprise”** means:

- a) any legal entity constituted, organized and operated in compliance with the law of a Party, including any company, corporation, limited liability partnership or a joint venture; and
- b) a branch of any such entity established in the territory of a Party in accordance with its law and carrying out business activities there. Nothing in this Treaty shall be construed to require any Party to authorize the provision of financial services by branches.

2.3 **“Host State”** means the Party where the investment is made.

2.4 **“Investment”** means an enterprise, including a participation therein, in the territory of a Party, that an investor of the other Party owns or controls, directly or indirectly, or over which it exerts a significant degree of influence, that has the characteristics of an investment, including the commitment of capital, the objective of establishing a lasting interest, the expectation of gain or profit and the assumption of risk. The following assets of the enterprise, among others, are covered under this Treaty:

- a) shares, stocks and other forms of equity instruments of the enterprise or in another enterprise;
- b) debt instruments or securities of another enterprise;
- c) licenses, authorizations, permits, concessions or similar rights conferred in accordance with the law of a Party;

- d) loans to another enterprise;
- e) intellectual property rights as defined or referenced to in the Trade-Related Aspects of Intellectual Property Rights of the World Trade Organization (TRIPS); and
- f) movable or immovable property and related rights.

2.4.1 For greater certainty, "Investment" does not include the following:

- i) an order or judgment sought or entered in any judicial, administrative or arbitral proceeding;
- ii) debt securities issued by a Party or loans granted from a Party to the other Party, bonds, debentures, loans or other debt instruments of a State-owned enterprise of a Party that is considered to be public debt under the law of that Party;
- iii) any expenditure incurred prior to the obtainment of all necessary licenses, permissions, clearances and permits required under the law of a Party;
- iv) portfolio investments of the enterprise or in another enterprise;
- v) claims to money that arise solely from commercial contracts for the sale of goods or services by a national or an enterprise in the territory of a Party to an enterprise in the territory of another Party;
- vi) goodwill, brand value, market share or similar intangible rights;
- vii) claims to money that arise solely from the extension of credit in connection with any commercial transaction; and
- viii) any other claims to money that do not involve the kind of interests or operations as set out in the definition of investment in this Treaty.

2.5 "Investor" means:

- a) any natural person of a Party that makes an investment in the territory of the other Party; or
- b) any enterprise constituted and organized in accordance with the law of a Party, other than a branch, that has substantial business activities in the territory of that Party and that makes an investment in the territory of the other Party.

2.6 "Local government" includes:

a) an urban local body, municipal corporation or village level government;
or

b) an enterprise owned or controlled by an urban local body, a municipal corporation or a village level government.

2.7 **“Measure”** includes a law, regulation, rule, procedure, decision, administrative action, requirement or practice.

2.7.1 For India, “law” includes:

a) the Constitution, legislation, subordinate/delegated legislation, laws and bylaws, rules and regulations, ordinance, notifications, policies and guidelines in accordance with an enactment or legislation, procedures, administrative measures/executive actions at all levels of government, as amended, interpreted or modified from time to time;

b) decisions, judgments, orders, awards and decrees by Courts, regulatory authorities, judicial and administrative institutions having the force of law within the territory of a Party.

2.8 **“Natural person”** means a national, citizen or a permanent resident of a Party in accordance with its law.

2.9 **“PCA Optional Rules”** means the Permanent Court of Arbitration Optional Rules for Arbitration Disputes between Two States, signed on 20 October 1992.

2.10 **“Pre-investment activity”** means any activity undertaken by the investor or its investment pursuant to compliance with sectorial limitations on foreign equity, and other specific limits and conditions applicable under any law relating to the admission of investments in the territory of the Party, prior to the establishment of the investment.

2.11 **“Sub-national government”** means a State Government and a Union Territory administration in the case of India but does not include local governments; and, in the case of Brazil, means the States, the Federal District and the Municipalities.

2.12 **“Territory”** means:

a) in respect of Brazil, the territory, including land and air space, the exclusive economic zone, the territorial sea and the continental shelf and its seabed and subsoil, in which the country exerts sovereign rights or jurisdiction in accordance with international law and its national legislation.

b) in respect of India, the territory in accordance with the Constitution of India, including its territorial waters and the airspace above it and other maritime zones including the Exclusive Economic Zone and continental shelf over which the Republic of India has sovereignty, sovereign rights, or exclusive jurisdiction in accordance with its law

and the 1982 United Nations Convention on the Law of the Sea and international law.

2.13 "WTO Agreement" means the Marrakesh Agreement Establishing the World Trade Organization, done at Marrakesh on 15 April, 1994.

2.14 The Annexures, Provisos and Footnotes in this Treaty constitute an integral part of this Treaty and are to be accorded the same effect as other provisions in this Treaty.

Article 3

Scope and General Provisions

3.1 This Agreement shall apply to measures adopted or maintained by a Party relating to investments of investors of another Party in its territory, in existence as on the date of entry into force of this Treaty or established, acquired, or expanded thereafter, and which have been admitted by a Party in accordance with its law and policies as applicable from time to time.

3.2 The Parties shall encourage investments of investors of the other Party through cooperation and facilitation of investments as set forth in this Treaty.

3.3 This Treaty shall not limit the rights and benefits which an investor of a Party enjoys under national law in the territory of the other Party.

3.4 This Treaty shall not prevent the adoption and implementation of new legal requirements or restrictions to investors and their investments, as long as they are consistent with this Treaty.

3.5 Subject to the provisions of Part III, nothing in this Treaty shall apply to any Pre-investment activity, to any measure related to such Pre-investment activity, or to the terms and conditions of admission of an investment, which continue to apply post-establishment.

3.6 This Treaty shall not apply to:

- a) any measure by a local government, provided that it is consistent with Article 5 of this Treaty;
- b) any law or measure regarding taxation, including measures taken to enforce taxation obligations;
- c) the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the international obligations of Parties under the WTO Agreement;

- d) government procurement by a Party;
- e) subsidies or grants provided by a Party to vulnerable groups in accordance with its law;
- f) services supplied in the exercise of governmental authority by the relevant body or authority of a Party. For the purposes of this provision, a service supplied in the exercise of governmental authority means any service which is not supplied on a commercial basis; or
- g) claims arising out of events which occurred, or claims which have been raised prior to the entry into force of this Treaty.

3.7 A Party may decide not to apply this Treaty to an investor or an investment of an investor of that Party or of a non-party in the territory of that Party, unless inconsistent with this Treaty.

PART II – General Obligations of the Parties

Article 4

Treatment of Investments

4.1 Based on the applicable rules and customs of international law as recognized by each of the Parties and their respective national law, no Party shall subject investments made by investors of the other Party to measures which constitute:

- a) denial of justice in any judicial or administrative proceedings;
- b) fundamental breach of due process;
- c) targeted discrimination, such as gender, race or religious belief;
- d) manifestly abusive treatment, such as coercion, duress and harassment;
or
- e) discrimination in matters of law enforcement, including the provision of physical security.

4.2 Nothing in this Treaty shall be construed as to prevent a Party from adopting or maintaining affirmative action measures towards vulnerable groups.

4.3 A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.

4.4 Subject to its laws and regulations and policies on the entry of foreign nationals, each Party shall provide the facilities and the necessary permissions for the entry, exit, residence and work of the investor of the other Party and any national of the other Party having a permanent or temporary relationship with the investment, including administrators, experts and technicians.

4.5 Existing investments shall not be affected by subsequent changes in admission requirements.

Article 5 National Treatment

5.1 Without prejudice to the measures in force under its legislation on the date of entry into force of this Treaty, each Party shall accord to investors of the other Party or to investments by investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors or to investments by its own investors, with respect to management, conduct, operation, sale or other disposition of investments in its territory.

5.2 For greater certainty, the treatment accorded "in like circumstances" depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare or regulatory objectives.

5.3 For greater certainty, this Article shall not be interpreted as obliging the Parties to compensate for inherent competitive disadvantages which result from the foreign character of the investors and their investments.

Article 6 Direct Expropriation

6.1 Neither Party may nationalize or expropriate an investment of an investor (hereinafter "**expropriate**") of the other Party, except:

- a) for reasons of public purpose;¹
- b) in a non-discriminatory manner;

¹For the avoidance of doubt, where India is the expropriating Party, any measure of expropriation relating to land shall be for the purposes as set out in its Law relating to land acquisition and any questions as to "public purpose" and compensation shall be determined in accordance with the procedure specified in such Law.

- c) on payment of effective and adequate² compensation, according to paragraph 6.2; and
- d) in accordance with the due process of law.

6.2 Such compensation shall:

- a) be paid without undue delay;
- b) be at least equivalent to the fair market value of the expropriated investment, immediately before the expropriation takes place but not beyond thirty (30) days prior to the date of expropriation, plus interests at a rate determined according to market criteria, accrued since the expropriation date until the payment date, according to the legislation of the Host State;
- c) not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value; and
- d) be completely payable, freely exchanged into a convertible currency and freely transferable, according to Article 9.

6.3 For greater certainty, this Treaty only covers direct expropriation, which occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure.

6.4 Non-discriminatory regulatory measures by a Party or measures or awards by judicial bodies of a Party that are designed and applied to protect legitimate public interest or public purpose objectives such as public health, safety and the environment shall not constitute expropriation under this Article.

Article 7

Compensation for Losses

The investors of a Party whose investments in the territory of the other Party suffer losses due to war or other armed conflict, revolution, state of emergency, civil strife or any other similar events, shall enjoy, with regard to restitution, indemnity or other form of compensation, the same treatment as the latter Party accords to its own investors or the treatment accorded to investors of a third party, whichever is more favorable to the affected investor.

² For the avoidance of doubt, where Brazil is the expropriating Party, for the expropriation of property that is not performing its social function, in accordance with its Constitution and other applicable legislation, compensation may be paid in the form of debt bonds.

Article 8
Transparency

8.1 Each Party shall, as per its law, ensure that its laws, regulations, procedures and administrative rulings of general application in respect of any matter covered by this Treaty are published, or otherwise made available in electronic format, in such a manner so as to enable interested persons and the other Party to become acquainted with them.

8.2 Each Party shall, as provided for in its laws and regulations:

- a) publish any such measure that it proposes to adopt; and
- b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures.

8.3 Whenever possible, each Party shall disseminate this Treaty to their respective public and private financial agents, responsible for the technical evaluation of risks and the approval of loans, credits, guarantees and related insurances for investment in the territory of the other Party.

Article 9
Transfers

9.1 Each Party shall permit all funds of an investor of the other Party related to an investment in its territory to be, in compliance with applicable domestic procedures established by its regulations, freely transferred and on a non-discriminatory basis. Such funds may include:

- a) contributions to capital;
- b) profits, dividends, capital gains and proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;
- c) interest, royalty payments, management fees, and technical assistance and other fees;
- d) payments made under a contract, including a loan agreement, directly related to the investment; and
- e) payments made pursuant to Articles 6 and 7.

9.2 Nothing in this Treaty shall affect the right of a Party to adopt temporary regulatory measures, in a non-discriminatory manner, concerning the balance of payments in a balance of payments crisis, nor will it affect the rights and obligations of the Parties as members of the International Monetary Fund contained in the Articles of

the Agreement of the International Monetary Fund, in particular exchange measures which are in conformity with the Agreement of the International Monetary Fund.

9.3 The adoption of temporary restrictive measures for transfers in case of the existence of serious balance of payments difficulties must be non-discriminatory and in accordance with the Articles of the Agreement of the International Monetary Fund.

9.4 Nothing in this Treaty shall prevent a Party from conditioning or preventing a transfer through application of its law, including actions relating to:

- a) bankruptcy, insolvency or the protection of the rights of the creditors;
- b) compliance with judicial, arbitral or administrative decisions and awards;
- c) compliance with labour obligations;
- d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;
- e) issuing, trading or dealing in securities, futures, options, or derivatives;
- f) compliance with the law on taxation;
- g) criminal or penal offences and the recovery of the proceeds of crime;
- h) social security, public retirement, or compulsory savings schemes, including provident funds, retirement gratuity programs and employees insurance programs;
- i) severance entitlements of employees;
- j) requirement to register and satisfy other formalities imposed by the Central Bank and other relevant authorities of a Party; and
- k) in the case of India, requirements to lock-in initial capital investments, as provided in India's Foreign Direct Investment (FDI) Policy, where applicable, provided that, any new measure which would require a lock-in period for investments will not apply to existing investments.

Article 10

Investment Measures and Combating Corruption and Illegality

10.1 Each Party shall adopt measures and make efforts to prevent and fight corruption, money laundering and terrorism financing with regard to matters covered by this Treaty, in accordance with its laws and regulations.

10.2 Nothing in this Treaty shall require any Party to protect investments made with capital or assets of illicit origin or investments in the establishment or operation of which illegal acts have been demonstrated to occur and for which national legislation provides asset forfeiture.

Part III - Investor Obligations or Responsibilities

Article 11

Compliance with laws

The Parties reaffirm and recognize that:

- a) Investors and their investments shall comply with all laws, regulations, administrative guidelines and policies of a Party concerning the establishment, acquisition, management, operation and disposition of investments.
- b) Investors and their investments shall not, either prior to or after the establishment of an investment, offer, promise, or give any undue pecuniary advantage, gratification or gift whatsoever, whether directly or indirectly, to a public servant or official of a Party as an inducement or reward for doing or forbearing to do any official act or obtain or maintain other improper advantage nor shall be complicit in inciting, aiding, abetting, or conspiring to commit such acts.
- c) Investors and their investments shall comply with the provisions of law of the Parties concerning taxation, including timely payment of their tax liabilities.
- d) An investor shall provide such information as the Parties may require concerning the investment in question and the corporate history and practices of the investor, for purposes of decision making in relation to that investment or solely for statistical purposes.

Article 12

Corporate Social Responsibility

12.1 Investors and their investments shall strive to achieve the highest possible level of contribution to the sustainable development of the Host State and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles and standards set out in this Article and internal policies, such as statements of principle that have been endorsed or are supported by the Parties.

12.2 The investors and their investments shall endeavour to comply with the following voluntary principles and standards for a responsible business conduct and consistent with the laws adopted by the Host State:

- a) contribute to the economic, social and environmental progress, aiming at achieving sustainable development;
- b) respect the internationally recognized human rights of those involved in the companies' activities;
- c) encourage local capacity building through close cooperation with the local community;
- d) encourage the creation of human capital, especially by creating employment opportunities and offering professional training to workers;
- e) refrain from seeking or accepting exemptions that are not established in the legal or regulatory framework relating to human rights, environment, health, security, work, tax system, financial incentives, or other issues;
- f) support and advocate for good corporate governance principles, and develop and apply good corporate governance practices, including anti-corruption measures;
- g) develop and implement effective self-regulatory practices and management systems that foster a relationship of mutual trust between the companies and the societies in which their operations are conducted;
- h) promote the knowledge of and the adherence, by workers, to the corporate policy, through appropriate dissemination of this policy, including professional training programs;
- i) refrain from discriminatory or disciplinary action against employees who submit grave reports to the board or, whenever appropriate, to the competent public authorities, about practices that violate the law or corporate policy;
- j) encourage, whenever possible, business associates, including service providers and outsources, to apply the principles of business conduct consistent with the principles provided for in this Article; and
- k) refrain from any undue interference in local political activities.

PART IV- Institutional Governance, Dispute Prevention and Settlement

Article 13

Joint Committee for the Administration of the Treaty

13.1 For the purpose of this Treaty, the Parties hereby establish a Joint Committee for the administration of this Treaty (hereinafter referred as "Joint Committee").

13.2 This Joint Committee shall be composed of government representatives of both Parties designated by their respective Governments.

13.3 The Joint Committee shall meet at such times, in such places and through such means as the Parties may agree. Meetings shall be held at least once a year and co-chaired by the Parties.

13.4 The Joint Committee shall have the following functions and responsibilities:

- a) supervise the implementation and execution of this Treaty;
- b) discuss and make known opportunities for the expansion of mutual investment;
- c) coordinate the implementation of the mutually agreed cooperation and facilitation agendas;
- d) consult with investors and relevant stake-holders, when applicable, on their views on specific issues related to the work of the Joint Committee;
- e) discuss issues and seek to resolve disputes concerning investments of investors of a Party in an amicable manner; and
- f) supplement the rules for arbitral dispute settlement between the Parties.

13.5 The Joint Committee may establish *ad hoc* working groups, which shall meet jointly or separately from the Joint Committee. The *ad hoc* working groups may invite participation from investors.

13.6 The Joint Committee shall establish its own rules of procedure.

Article 14

National Focal Point or Ombudsman

14.1 Each Party shall designate a single National Focal Point, or Ombudsman, whose main responsibility shall be to support investors from the other Party in its territory.

14.2 In Brazil, the functions of the Ombudsman shall be performed by the Executive Secretariat of the Foreign Trade Board—CAMEX³.

14.3 In India, the National Focal Point shall be established within the Department of Economic Affairs in the Ministry of Finance.

14.4 The National Focal Point/Ombudsman, among other responsibilities, shall:

- a) Endeavour to follow the recommendations of the Joint Committee and interact with the National Focal Point/Ombudsman of the other Party, in accordance with this Treaty;
- b) Follow up on requests and enquiries of the other Party or of investors of the other Party with the competent authorities, including in the state and local levels, and inform them on the results of its actions;
- c) Assess, in consultation with relevant government authorities, suggestions to improve the investment environment and complaints received from the other Party or investors of the other Party;
- d) Address differences in investment matters, in collaboration with government authorities and relevant investors, with a view to helping in the prevention of disputes;
- e) Provide timely and useful information on regulatory issues on general investment or on specific projects, to the extent possible; and
- f) Report its activities and actions to the Joint Committee, when appropriate.

14.5 Each Party shall draw up rules of procedure for the operation of its National Focal Point/Ombudsman, expressly stipulating, where appropriate, time limits for the implementation of its various functions and responsibilities.

14.6 The National Focal Point/Ombudsman shall promptly reply to notifications and requests by the other Party and investors therefrom.

14.7 The Parties as per its law or policies shall ensure the means and resources for the National Focal Point/Ombudsman to perform its functions, as well as ensure its institutional access to its own other government bodies responsible for the terms of this Treaty.

14.8 The National Focal Points, or “Ombudsmen”, shall cooperate with each other and with the Joint Committee with a view to helping in the prevention of disputes between the Parties.

³ The Foreign Trade Board (CAMEX) is part of the Government Council of the Presidency of the Federative Republic of Brazil. Its main body is the Council, which is an inter-ministerial body.

Article 15

Exchange of Information between Parties

15.1 The Parties shall exchange information, whenever possible and relevant to reciprocal investments, concerning business opportunities, procedures, and requirements for investments, particularly through the Joint Committee and its National Focal Point/Ombudsman.

15.2 For this purpose, the Party shall provide, when requested, in a timely fashion, information related, in particular, to the following items:

- a) regulatory conditions for investments;
- b) governmental programs and possible related incentives;
- c) relevant public policies and legal frameworks;
- d) legal framework for investments, including legislation on the establishment of companies and joint ventures;
- e) related international treaties;
- f) customs procedures and tax regimes;
- g) statistical information on the market for goods and services;
- h) available infrastructure and public services;
- i) governmental procurement, public concessions and Public-Private Partnerships (PPPs);
- j) social and labour requirements;
- k) immigration legislation;
- l) currency exchange legislation;
- m) information on legislation of specific economic sectors or segments previously identified by the Parties; and
- n) regional investment projects.

Article 16

Treatment of Protected Information

16.1 The Parties shall respect the level of protection of information provided by the submitting Party, according to their respective law.

16.2 None of the provisions of the Treaty shall be construed to require any Party to disclose protected information, the disclosure of which would jeopardize law enforcement or otherwise be contrary to the public interest or would violate the privacy or harm legitimate business interests. For the purposes of this paragraph, protected information includes confidential information or information considered privileged or protected from disclosure under the law of a Party.

Article 17

Dissemination of information to Investors

Subject to its law, each Party shall disseminate among investors general information on investments, regulatory frameworks and business opportunities.

Article 18

Dispute Prevention Procedure

18.1 If a Party considers that a specific measure adopted by the other Party constitutes a breach of this Treaty, it may invoke this Article to initiate a dispute prevention procedure within the Joint Committee.

18.2 The following rules apply to the aforementioned procedure:

- a) To initiate the procedure, the interested Party shall submit a written request to the other Party, identifying the specific measure in question, and informing the findings of fact and law underlying the submission. The Joint Committee shall meet within ninety (90) days from the date of the request;
- b) The Joint Committee shall have one hundred and twenty (120) days from the date of the first meeting, extendable by mutual agreement, to evaluate the submission presented and to prepare a report;
- c) The report of the Joint Committee shall include:
 - i) Identification of the submitting Party;
 - ii) Description of the measure in question and the alleged breach of the Treaty; and
 - iii) Findings of the Joint Committee.
- d) In the event that the dispute is not resolved upon the completion of the time frames set forth in this Article, or there is non-participation of a Party in the meetings of the Joint Committee convened according to this Article, the dispute may be submitted to arbitration by a Party in accordance with Article 19 of the Treaty.

18.3 If the measure in question pertains to a specific investor, the following additional rules shall apply:

- a) the initial submission shall identify the affected investor;
- b) representatives of the affected investor may be invited to appear before the Joint Committee; and
- c) a Party may deny submission to the dispute prevention procedure matters pertaining to a specific investor which have been previously submitted by that investor to other dispute settlement mechanisms, unless those proceedings are withdrawn from other dispute settlement mechanisms.

18.4 Whenever relevant to the consideration of the measure in question, the Joint Committee may invite other interested stakeholders to appear before the Joint Committee and present their views on such measure.

18.5 The meetings of the Joint Committee and all documentation, as well as steps taken in the context of the mechanism established in this Article, shall remain confidential, except for the report submitted by the Joint Committee, subject to the law of each of the Parties.

Article 19

Disputes between Parties

19.1 Any dispute between the Parties which has not been resolved after being subject to the Dispute Prevention Procedure may be submitted by either Party to an ad hoc Arbitral Tribunal, in accordance with the provisions of this Article. Alternatively, the Parties may choose, by mutual agreement, to submit the dispute to a permanent arbitration institution for settlement of investment disputes. Unless the Parties decide otherwise, such institution shall apply the provisions of this Part.

19.2 The purpose of the arbitration is to decide on interpretation of this Treaty or the observance by a Party of the terms of this Treaty. For greater certainty, the Arbitral Tribunal shall not award compensation.

19.3 A Tribunal constituted under this Article shall examine matters related to Part I, Part II (excluding Articles 8 and 10.1), Article 16, Article 21, and Part VII of this Treaty.

19.4 Such a Tribunal shall be constituted for each individual case in the following way: within two (2) months of the receipt of the request for arbitration, each Party shall appoint one member of the Tribunal. Those two members shall then select a national of a third State who, on approval by the two Parties, shall be appointed Chairman of the Tribunal. The Chairman shall be appointed within two (2) months from the date of appointment of the other two members.

19.5 If within the periods specified in Article 19.4 the necessary appointment(s) have not been made, either Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointment(s). If the President is a national of either Party or if he or she is otherwise prevented from discharging the said function, the Vice President shall be invited to make the necessary appointment(s). If the Vice President is a national of either Party or if he or she too is prevented from discharging the said function, the member of the International Court of Justice next in seniority who is not a national of either Party shall be invited to make the necessary appointment(s).

19.6 Arbitrators must:

- a) have the experience or expertise in Public International Law, international investment rules or international trade, or the resolution of disputes arising in relation to international investment agreements;
- b) be independent of and not be affiliated, directly or indirectly, with any of the Parties or with the other arbitrators or potential witnesses nor take instructions from the Parties; and
- c) comply with the code of conduct detailed in Annex II, or any other standard of conduct established by the Joint Committee.

19.7 The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both Parties, who shall, in accordance with its law, comply with it without delay.

19.8 The Parties to the arbitration shall share the costs of the arbitration, including the arbitrator fees, expenses, allowances and other administrative costs. Each Party shall bear the cost of its representation in the arbitral proceedings. The Tribunal may, however, in its discretion direct that the entire costs or a higher proportion of costs shall be borne by one of the two disputing Parties and this determination shall be binding on both disputing Parties.

19.9 The Tribunal shall decide all questions relating to its competence and, subject to any agreement between the disputing Parties, determine its own procedure, taking into account the PCA Optional Rules.

Part V - Exceptions

Article 20 Tax Measures

20.1 No provision of this Treaty shall be interpreted as an obligation of one Party to give to an investor from the other Party, concerning the investment, the benefit of any treatment, preference or privilege arising out of any agreement to avoid double taxation, current or future, of which a Party to this Treaty is a party or becomes a party.

20.2 No provision of this Treaty shall be interpreted in a manner that prevents the adoption or implementation of any measure aimed at ensuring the equitable or effective imposition or collection of taxes, according to the respective law of the Parties.

20.3 For greater certainty, where the Party in which an investment is made makes it evident to the other Party that a measure alleged to be a breach of its obligations under this Treaty has been adopted in compliance with a specific tax law, such measure of that Party shall not be open for review under Article 19.

Article 21
Prudential Measures

21.1 Nothing in this Treaty shall be construed to prevent a Party from adopting or maintaining prudential measures, such as:

- a) the protection of investors, depositors, financial market participants, policy-holders, policy-claimants, or persons to whom a fiduciary duty is owed by a financial institution;
- b) the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions; and
- c) ensuring the integrity and stability of the financial system of a Party.

21.2 Where such measures do not conform to the provisions of this Treaty, they shall not be used as a means of circumventing the commitments or obligations of the Party under this Treaty.

21.3 Nothing in this Treaty shall apply to non-discriminatory measures of general application taken by a central bank or monetary authority of a Party in pursuit of monetary and related credit policies or exchange rate policies. This paragraph is without prejudice to the rights and obligations of each of the Parties under Article 9.

Article 22
Provisions on Investment and Environment, Labor Affairs and Health

22.1 Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining or enforcing any measure it deems appropriate to ensure that investment activity in its territory is undertaken in a manner according to labor, environmental and health law of that Party, provided that this measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction.

22.2 The Parties recognize that it is inappropriate to encourage investment by lowering the standards of their labor, environmental or health law. Therefore, each Party shall not amend or repeal, nor offer the amendment or repeal of such law to encourage

the establishment, maintenance or expansion of an investment in its territory, to the extent that such amendment or repeal involves decreasing their labor environmental or health standards. If a Party considers that another Party has offered such an encouragement, the issue shall be addressed through consultations with the other Party.

Article 23
General Exceptions

23.1 Nothing in this Treaty shall be construed to prevent the adoption or enforcement by a Party of measures of general applicability applied on a non-discriminatory basis that are necessary⁴ to:

- a) protect public morals or maintaining public order;
- b) protect human, animal or plant life or health;
- c) ensure compliance with law(s) and regulations that are not inconsistent with the provisions of this Treaty;
- d) protect and conserve the environment, including all living and non-living natural resources; or
- e) protect national treasures or monuments of artistic, cultural, historic or archaeological value.

Article 24
Security Exceptions

24.1 Nothing in this Treaty shall be construed:

- a) to require a Party to furnish any information, the disclosure of which it considers contrary to its essential security interests; or
- b) to prevent a Party from taking any action which it considers necessary for the protection of its essential security interests including but not limited to:
 - i) action relating to fissionable and fusionable materials or the materials from which they are derived;
 - ii) action taken in time of war or other emergency in domestic or international relations;
 - iii) action relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried

⁴In considering whether a measure is "necessary", it shall be taken into account whether there was no less restrictive alternative measure reasonably available to a Party.

on directly or indirectly for the purpose of supplying a military establishment;

iv) action taken so as to protect critical public infrastructure including communication, power and water infrastructures from deliberate attempts intended to disable or degrade such infrastructure; or

v) any policy, requirement or measure including, without limitation, a requirement obtaining (or denying) any security clearance to any company, personnel or equipment.

c) to prevent a Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

24.2 Each Party shall inform the other Party to the fullest extent possible of measures taken under Article 24.1 and of their termination.

24.3 Nothing in this Treaty shall be construed to require a Party not to adopt or maintain measures in any legislation or regulations which it considers necessary for the protection of its essential security interests, especially when it relates to a non-Party.

24.4 This Article shall be interpreted in accordance with the understanding of the Parties on security exceptions as set out in Annex I, which shall form an integral part of this Treaty.

PART VI - Agenda for Further Investment Cooperation and Facilitation

Article 25

Agenda for Further Investment Cooperation and Facilitation

25.1 The Joint Committee shall develop and discuss an Agenda for Further Cooperation and Facilitation on relevant topics for the promotion and enhancement of bilateral investment. The topics that shall be initially addressed shall be decided in the first meeting of the Joint Committee.

25.2 The agenda shall be discussed between the competent government authorities of both Parties. The Joint Committee shall invite, when applicable, additional competent government officials for both parties in the discussions of the agenda.

25.3 The Parties shall submit to the Joint Committee the names of government bodies and its official representatives involved in these discussions.

PART VII – Final Provisions**Article 26**

Relationship with other Treaties

26.1 This Treaty or any action taken hereunder shall not affect the rights and obligations of the Parties under any other agreement to which they are parties, including the Agreements of the World Trade Organization.

26.2 Any inconsistency, or question regarding the relationship between this Treaty and another bilateral agreement between the Parties, or a multilateral agreement to which both Parties are a party, shall be resolved in accordance with the Vienna Convention on the Law of Treaties.

Article 27

Amendments

27.1 This Treaty may be amended at any time at the request of either Party. The requesting Party must submit its request in written form explaining the grounds on which the amendment shall be made. The other Party shall consult with the requesting Party regarding the proposed amendment and must also respond to the request in writing.

27.2 This Treaty will stand automatically amended at all times to the extent that the Parties agree, after completion of their respective ratification procedures. Any agreement to amend the treaty pursuant to this Article must be expressed in writing, whether in a single written instrument or through an exchange of diplomatic notes. These amendments shall be binding on the tribunals constituted under Article 19 of this Treaty and an award must be consistent with all amendments to this Treaty.

27.3 Amendments shall enter into force according to the procedure described in Paragraph 28.2.

Article 28

Entry into Force, Duration and Termination

28.1 Neither the Joint Committee nor the National Focal Point/Ombudsman shall replace or impair, in any way, any other agreement or the diplomatic channels existing between the Parties.

28.2 This Treaty shall enter into force ninety (90) days after the date of the receipt of the second diplomatic note indicating that all necessary internal procedures with regard to the conclusion and the entering into force of international agreements have been completed by both Parties.

28.3 This Treaty shall remain in force for a period of ten (10) years and shall lapse thereafter unless the Parties expressly agree in writing that it shall be renewed for

an additional ten (10)-year period. On the occasion of the last Joint Committee meeting immediately prior to the completion of such period and of any additional ten (10) year period, the Parties shall discuss the matter.

28.4 This Treaty may be terminated any time after its entry into force if either Party gives to the other Party a prior notice in writing twelve (12) months in advance stating its intention to terminate the Treaty. The Treaty shall stand terminated immediately after the expiry of the twelve (12) month notice period.


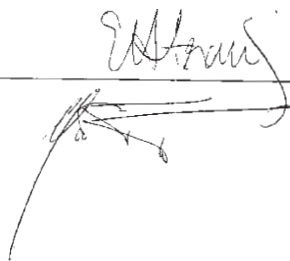
28.5 In respect of investments made prior to the date when the termination of this Treaty becomes effective, the provisions of this Treaty shall remain in force for a period of five (5) years.

IN WITNESS WHEREOF the undersigned, duly authorized thereto by their respective Governments, have signed this Treaty.

DONE at New Delhi, on this 25 day of January, 2020 in two originals each in the Hindi, English and Portuguese languages, all texts being equally authoritative. In case of any divergence in interpretation, the English text shall prevail.

**FOR THE FEDERATIVE REPUBLIC OF
BRAZIL**

FOR THE REPUBLIC OF INDIA



Mr. Atanu Chakraborty
Secretary, Department of
Economic Affairs,
Ministry of Finance.
New Delhi
25.01.2020

Annex I
Security Exceptions

1. The Parties confirm the following understanding with respect to interpretation and/or implementation of Article 24 of this Treaty:

- a) the measures referred to in Article 24.3 are measures where the intention and objective of the Party imposing the measures is for the protection of its essential security interests, and in the case of India, the applicable measures referred to in Article 24.3 are currently set out in the regulations framed under the Foreign Exchange Management Act, 1999 and the rules and regulations made thereunder. India shall, upon request by the other Party, provide information on the measures concerned;
- b) where the Party asserts as a defence that conduct alleged to be a breach of its obligations under this Treaty is for the protection of its essential security interests protected by Article 24, any decision of such Party taken on such security considerations and its decision to invoke Article 24 at any time, whether before or after the commencement of arbitral proceedings shall be non-justiciable. Such a conduct shall not be open for review by any arbitral tribunal.

Annex II
Code of Conduct for Arbitrators

1. Every arbitrator appointed to resolve disputes under this Treaty shall, during the entire arbitration proceedings, be impartial, independent and free of any actual or potential conflict of interest.

2. Upon nomination and, if appointed, every arbitrator shall, on an ongoing basis, disclose in writing any circumstances that may, in the eyes of the disputing Parties, give rise to doubts as to her/his independence, impartiality, or freedom from conflicts of interest. This includes any items listed in paragraph 10 of this Annex and any other relevant circumstances pertaining to the subject matter of the dispute, and to existing or past, direct or indirect, financial, personal, business, or professional relationships with any of the Parties, legal counsel, representatives, witnesses, or co-arbitrators. Such disclosure shall be made immediately upon the arbitrator acquiring knowledge of such circumstances, and shall be made to the co-arbitrators, the Parties and the appointing authority, if any, making an appointment. Neither the ability of those individuals or entities to access this information independently, nor the availability of that information in the public domain, will relieve any arbitrator of his or her affirmative duty to make these disclosures. Doubts regarding whether disclosure is required shall be resolved in favour of such disclosure.

3. A Party may challenge an arbitrator appointed under this Treaty:

- a) if facts or circumstances exist that may, in the eyes of the Parties, give rise to justifiable doubts as to the arbitrator's independence, impartiality or freedom from conflicts of interest; or
- b) in the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of the arbitrator performing his or her functions, provided that no such challenge may be initiated after fifteen days of that Party: (i) learning of the relevant facts or circumstances through a disclosure made under paragraph 2 of this Annex by the arbitrator; or (ii) otherwise becoming aware of the relevant facts or circumstances relevant to a challenge under this paragraph; whichever is later.

4. The notice of challenge shall be communicated to the other Party, the arbitrator who is challenged, the other arbitrators and the appointing authority under Article 19.5, if any. The notice of challenge shall state the reason(s) for the challenge.

5. When an arbitrator has been challenged by a Party, the other Party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge.

6. If, within 15 days from the date of the notice of challenge, the other Party does not agree to the challenge or the challenged arbitrator does not withdraw, the Party making the challenge may elect to pursue it. In that case, within 30 days from the date of

the notice of challenge, it shall seek a decision on the challenge by the appointing authority as specified under Article 19.5.

7. The appointing authority as specified under Article 19.5 shall accept the challenge made under paragraph 3 of this Annex if, even in the absence of actual bias, there are circumstances that would give rise to justifiable doubts as to the arbitrator's lack of independence, impartiality, freedom from conflicts of interest, or ability to perform his or her role, in the eyes of an objective third party.

8. In any event where an arbitrator has to be replaced during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in this Treaty and the arbitration rules that were applicable to the appointment or choice of the arbitrator being replaced. This procedure shall apply even if during the process of appointing the arbitrator to be replaced, a Party to the arbitration had failed to exercise its right to appoint or to participate in the appointment.

9. If an arbitrator is replaced, the proceedings may resume at the stage where the arbitrator who was replaced ceased to perform his or her functions unless otherwise agreed by the Parties.

10. A justifiable doubt as to an arbitrator's independence or impartiality or freedom from conflict of interest shall be deemed to exist on account of the following factors, amongst others:

- a. The arbitrator or her/his associates or relatives have an interest in the outcome of the particular arbitration;
- b. The arbitrator is or has been a legal representative/advisor of the appointing Party, or any of its entities, in the preceding three (3) years prior to the commencement of arbitration;
- c. The arbitrator is a lawyer in the same law firm as the counsel to one of the Parties;
- d. The arbitrator is acting concurrently with the lawyer or law firm of one of the Parties in another dispute;
- e. The arbitrator's law firm is currently rendering or has rendered services to one of the Parties, or any of its entities, out of which such law firm derives financial interest;
- f. The arbitrator has received a full briefing of the merits or procedural aspects of the dispute from the appointing Party or her/his counsel prior to her/his appointment;
- g. The arbitrator has publicly advocated a fixed position regarding an issue on the case that is being arbitrated.

11. The Joint Committee shall by mutual agreement and after completion of their respective procedures adopt a separate code of conduct for arbitrators to be applied in disputes arising out of this Treaty, which may replace or supplement the existing rules in application. Such a code may address topics such as disclosure obligations, the independence and impartiality of arbitrators and confidentiality.

BOOK REVIEW

V. K. Ahuja (ed.), *Human Rights: Contemporary Issues – A Festschrift in the Honour of Professor Upendra Baxi* (Eastern Book Company, 2019), page 720, Rs. 1850/-

Members of academia always have great expectations from an edited book, especially when it is in the nature of a festschrift and when this festschrift is written to pay tribute to a jurist like 'Prof. Upendra Baxi' the expectations soar higher. The Book "*Human Rights: Contemporary Issues, A Festschrift in the Honour of Upendra Baxi*" edited by Dr. V.K Ahuja, is a collection of 30 articles written by some of the most well known names of the legal academia. Not only the authors but the selection of topics for this book has been very carefully done. Though this festschrift intends to cover only the contemporary issues, but all the authors in order to present a complete picture of their chosen theme have beautifully traced the history and development of human rights jurisprudence in India and across the world. A bare look at the table of cases covered by various articles in this book has the capability to impress anyone, one can find a reference to some of the most landmark judgements from courts across the world in this festschrift.

One of the articles in this Festschrift that has the ability to catch everyone's attention and which in true sense can be said to be a tribute to Prof. Baxi is "Prof. Upendra Baxi's Universe of Human Rights Jurisprudence: A Glimpse" written by Dr. Moolchand Sharma. The article wonderfully talks about social action litigation and public interest litigation. This article also introduces to many the concept of "responsible activism" which Prof. Baxi has always advocated. Though, to many the article may not seem to be in line with the theme of the book as it is about contemporary issues but the concepts discussed in this essay are very relevant for everyone even today and also in the times to come and is written in an effortlessly beautiful language. This paper seems to be written by a true admirer of Prof. Baxi.

One of the forerunners of human rights jurisprudence in Indian judiciary, Justice A K Sikri, has also contributed a masterly article titled "Expanding Human Rights Jurisprudence with the Aid of Dignity Concept" in this book. This article with the help of various write ups of Prof. Baxi beautifully discusses about the journey from "Being Human" to "remaining human" and quotes some of the most important observation of Supreme Court of India (SC) on the concept of dignity and sums up its entire jurisprudence wonderfully. This article seems to be a handy guide to all the landmark judgements of SC on the issue of dignity and human rights.

Though, we have complete books talking about the interrelation between IPRs and Human Rights but the essay contributed by Dr. V.K Ahuja in this festschrift on Human Rights approach to IPRs do deserve a mention in this review. In this article

author has very concisely discussed some of the very important areas like farmer's right, right to information, right to education, rights of visually impaired etc. that correlate intellectual property with human rights.

Dr. Manju Chellani has contributed a magnificent article in this festschrift titled "Where do the human rights movement and animal rights movement meet?". This very well researched paper comprehensively discusses the legal scenario surrounding human rights of animals and what are the challenges in achieving the same. Reading this paper is a treat to the eyes, an unconventional issue, beautiful language and writing style makes it worth a read.

Another paper which truly pays tribute to Prof. Uperndra Baxi is co-authored by Dr. A. P Singh and Zubair Ahmed. This paper is a wonderful piece of literature and explains the lifelong obsession of Prof. Baxi towards human rights and points out at some of his major contributions to the human rights jurisprudence of our country.

Without any hesitation it can be concluded that almost all the papers incorporated in this festschrift are well researched and quality write ups that are going to contribute greatly in the literature of human rights. If I was not to worry about the word limit, I can go on writing about every article incorporated in the festschrift but to give a brief overview the book apart from essays discussed above contains essays on diverse issues and from authors like like Dr. Vijay P Tiwari (Right to Dignity Concept: Recent Trends), Dr. Manoj Kumar Sinha (Right to Development as Human Rights in African Perspectives), Dr. Manju Chellani (Where do Human Rights Movement and Animal Rights Movement Meet?), Prof. S K Verma (Human Rights of Indigenous people), Dr. Vijender Kumar & Vidhi Singh (Protection of Victims of Acid Attacks), Prof. V. C Vivekanandan (Right to Access of Visually Impaired as a Human Rights Obligations: An overview of Marrakesh Treaty), Prof. Furqan Ahmad (Human Rights of Muslim Women in the Grab of Muslim Law: Prof. Upendra Baxi's Contribution), Dr. Archa Vashishtha & Ms. Parthvi Ahuja (Protection of Huma Rights of Sexual Minorities: Accepting the Unaccepted), Dr. Amrendra Kumar Ajit (New Dimension of Human Right to Privacy and Its Future Implications), Dr. T S N Sastry & Ms. T. Anooosa Madhu Kiran (Human Rights and Inclusive Responsibility of Corporate Identities), Dr. Amber Prasad Pant (UNCLOS 1982 as a Means to Promote Human Rights of Landlocked Countries), Prof. V.G. Hegde (Indus Water Treaty and Human Rights Obligations), Dr. Yogesh Pratap Singh and Dr. Nachiketa Mittal (The Right to a Dignified Death: A New Human Right), Dr. Arvind P Bhanu (Faith Food & Secularism: A Human Rights Approach), Dr. Anurag Deep (Balancing the Civil Liberties of Accused with Human Rights of Victims of Terrorism: A Study of Supreme Court Cases in India), Dr. K.M. Parivelan (Statelessness and Inclusion: A Human Rights Perspective),

Dr. Ajay Sonawane (Role of United Nations and Indian Legal System for the Protection of Human Rights of Children), Dr. Gargi Chakrabarti (Traditional Knowledge: Differentiation with Geographical Indication and Plant Varieties Protection and Concern of Human Rights Perspective), Dr. Sam Adelman (Upendra Baxi on the Imperative of Human Rights and Climate Justice), Dr. Jaya Vasudevan Seseela (Transparency as a Human Rights in International Commercial Arbitration), Ms. Neha Aneja (Reproductive Health of Women with Disabilities), Ms. B Bhavana Rao (Business and Human Rights: Examining Occupational Health Hazards and Diseases), Dr. M Vishwanath (Has Demonetisation Demolished Human Rights of Common Man), Prof. Amar Pal Singh & Zubair Ahmad Khan (A Tribute to Prof. Upendra Baxi), Dr. Siddharth Mishra (Transition from Human Rights Commission to Human Rights Council: Whether the Successor Benefits its Predecessor?), Guru Prakash (Human Rights and Beggary in India: Analysing the Right to Beg in the Light of Judicial Pronouncements), Shivani Chouhan (Substantiating Human Rights of Women). Some of the most contemporary themes have been discussed very comprehensively in this festschrift.

Prof. Upendra Baxi is a scholar par excellence, a visionary, a deep thinker, it is next to impossible for any member of the legal fraternity to reach at the level where he is today. His qualitative writings and thought provoking lectures has changed the lives of many. I would like to conclude by saying that the book has tried its best to do justice to the name it is associated with. Every author has worked hard to make sure that their write ups meet the expectations of Prof. Baxi. All in all it can be said that it a must read for every legal scholar.

*Archa Vashishtha**

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Anupam Jha, *International Criminal Law: Theory and Practice* (Satyam Law International, 2020), pages 342, Rs. 795/-

Dr. Anupam Jha's recent book "International Criminal Law: Theory and Practice" is a much awaited contribution to the subject from an Indian scholar. The book, divided into eighteen chapters, evolves itself in nuanced ways through each ongoing chapter and highlights both core and critical aspects of International Criminal Law (ICL). The author has established a balanced connectivity among the chapters and shown a remarkable clarity while introducing critical debates of ICL in simple and humble ways.

Though the chapters are not arranged in different parts but the book exhibits a pattern that can be used to club some chapters together with thematic undertones. The first three chapters of the book acquaint readers with such core issues that have always been critical for the proper understanding and application of ICL. Author's engagement with definitions of international crimes and approaches towards it are useful for the readers to understand the concept of ICL in better ways. The discussion on the issues of state jurisdiction, immunities, extradition and mutual legal assistance mechanisms are essentially set the tenor for basic understandings of problems and perspectives of ICL and help readers understand ICL's relationship with Public International Law.

The next four chapters (chapters 4-7) discuss the well-known historical international criminal tribunals, though reviewer admits that Nuremberg and Tokyo tribunals were not the 'international' in the sense that can easily be ascribed to ICTY and ICTR. These chapters are arranged directly with the tribunals' name and hence each chapter engages with tribunal's specific contribution to the subject. In addition to the discussions on need, jurisdiction and jurisprudential contribution of these tribunals, the chapters also present brief historical accounts of important trials conducted at them.

Substantial numbers of pages have been expensed to discuss these historical accounts particularly in chapters on ICTY and ICTR. These historical reiterations of commission of international crimes acquaint the readers with required legal empathy necessary to grasp the theoretical and practical aspirations of ICL. However, while reiterating the historical accounts, the chapters do not compromise on their academic zeal to remain in perspective. The sub-headings like 'The Jurisprudence Laid Down' (pp.69-72) and 'The Judgment: Whither Majority and Dissenting' (pp.80-84) are self-explanatory of the author's desire to keep the critical perspectives alive throughout these chapters.

The next eight chapters (chapters 8-15) discuss the important facets of International Criminal Court (ICC). These chapters give book a relevant and

contemporary outlook. It acquaints the readers with basic understandings of substantive and procedural aspects of ICC. The discussions on composition, trigger-mechanism, admissibility and sources of law are important and help readers to gauge the reach of ICC. However, the critical aspects of some topics of Chapter 8 i.e., the role of the Security Council and the Prosecutorial discretion are again discussed in detail in Chapter 14. Both these chapters, if read together, present a nuanced understanding of trigger mechanisms at ICC.

Chapter 9 discusses the jurisdiction of ICC. This chapter engages readers with fruitful discussions on genocide, war crimes, crimes against humanity and aggression and also reflects upon their historical developments and contemporary positions. The discussion on territorial, personal and temporal jurisdiction of ICC completes the chapter. Chapter 10 discusses the procedures followed at ICC while conducting trials and appeals. It would help readers acquaint with the necessary procedural aspects of ICC during trials and appeals.

The discussions in chapters 11 and 12 seem to go away from what is generally called 'law' but nevertheless they are important to make sense of states' diversified approaches and apprehensions towards ICC. The chapter on India's position vis-à-vis ICC is an important contribution from the author. Readers would enjoy going through this chapter and reading the critique of India's position and India's legal structures on combating international crimes. Author has criticized India's position on some aspects and on some other aspects he seems to be satisfied with. Chapter 13 reiterates in brief the situations and cases before ICC and provides a ready reference for the readers to start research about particular case or cases. Chapter 15 completes the discussion on ICC with deliberation on immunities, appointment of judges and recognition of new crimes at ICC.

The next three chapters (chapters 16-18) discuss special and domestic tribunals viz., Iraqi Special Tribunal (Iraq), International Crimes Tribunal (Bangladesh) and the Extraordinary Chambers in the Courts of Cambodia (Cambodia) constituted by some Asian States to try international crimes. Each chapter is arranged for specific tribunal and critically analyses their contribution. These chapters highlight the importance of invoking domestic legal mechanisms to try international crimes. In addition to discussion on legal points, they also highlight the circumstances and events that led to their establishment.

The book discusses its contents in 18 chapters and 342 pages. These pages *prima facie* appear meager for covering wide facets of ICL but the author has done justice to the subject and effectively reflected upon the basics of ICL throughout these pages. The discussions in the book cover wide areas that vary from the conceptual origin of ICL to the domestic efforts to prosecute international crimes. Given this wide coverage of core and critical aspects in the concise manner, the

book serves as a text book to study ICL. It helps readers start their academic journey of ICL and presents the historical and contemporary debates of the subject in proper ways. Abbreviations, table of cases and index of the book are well drafted. Barring some minor editing concerns, the book justifies its purpose of discussing and analyzing the theory and practice of International Criminal Law and an important contribution to the subject by Dr. Anupam Jha.

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Jai S. Singh and V. P. Upadhyay, *Expanding Horizons of Human Rights under the Constitution of India* (Ashoka Law House, New Delhi, 2017), First Reprint: 2019, pp. 1166, price Rs. 580.

“Human Rights are those minimal rights which every individual must have against the State or other public authority by virtue of his being a ‘member of human family’ irrespective of any other consideration.”

—D.D. Basu

Since the adoption of the UN Charter in 1945, the scope of provisions of human rights has exponentially grown at horizontal and vertical level. Consequently, international and national scholars at times have devoted themselves to explaining the legal regime for promotion, respect and enforcement of human rights, with classic studies completed in the periods surrounding the adoption of the International Bill of Rights consists of the 1948 Universal Declaration of Human Rights (UDHR), the 1974 International Covenant on Civil and Political Rights (ICCPR) and the 1974 International Covenant on Economic, Social and Cultural Rights (ICESCR)). Yet in recent years there have been important developments, especially in the context of regional conventions, which have added considerably to our understanding of the international and national human rights law. The European Court of Human Rights (ECtHR) and the African Court on Human and Peoples’ Rights have been very actively in addressing issues relating to scope of provisions of human rights. Indian courts have also been interpreting fundamental rights provisions stipulated under the Indian Constitution to promote, respect and enforce human rights and in this context *Vishakha v. State of Rajasthan* (1997) 6 SCC 241) has provided further impetus to implementation of human rights in India. In light of these developments, now would appear to be a propitious time for a book looking generally at the range of issues that arise with respect to promotion, protection, respect and enforcement of human rights.

The book entitled “Expanding Horizons of Human Rights under the Constitution of India” is a unique contribution in the field of Human Rights and Fundamental Freedom. The book is divided into IX parts. Part I provides a brief survey of general principles of Human Rights and Fundamental Freedoms, as a means of highlighting the continuing significance of progress in this area. In doing so, concept, meaning, classifications and importance of human rights has been discussed. Human rights and fundamental rights are product of nature. Nature has created natural human beings. Human beings consists of men and women. Men and women play different roles in the world. There are universal rules of nature regarding birth and death of men. To govern the society, the nature has created natural law principles. The natural law principles are universal. In the Charter of United Nations, natural rights are called “human rights and Fundamental Freedoms”. In the Constitution of

India, they are called “Fundamental Rights”. In the Charter of the United Nations, “We the peoples of the United Nations determined to save succeeding generations from the scourge of war”. In the Constitution of India, “we the people of India” have adopted Fundamental Rights and Directive Principles of State Policy. In this chapter the classifications of human rights have been demonstrated in detail. The authors have discussed in detail the importance of human rights to guarantee human dignity.

The Chapter II principally deals with origin and development of human rights at domestic level. The Chapter begins with the words, “Human rights and fundamental freedoms are the basic rights of all human beings... The origin of human rights can be traced out from the time when man took his first breath in the world”. The authors have discussed the Magna Carta of 1215, Petition of Rights 1628, Habeas Corpus Act, 1789, Glorious Revolution and Bill of Rights 1688, the middle Ages, Renaissance and Reformation. The Great Social Contract Theory has been highlighted critically. This part has been strengthened by revisiting the contributions of great social contract theory scholars like Hugo Grotius (1583-1645), Hobbes (1588-1679), John Locke (1632-1704) and Rousseau (1712-1778). The American Independences of War, Virginia Bill of Rights 1776, American Revolution and the Declaration of Independence 1776, the Bill of Rights in the American Constitution have provided the sense of importance of civil and political rights vis-à-vis human dignity. The discussions continue to remind the contributions of the French Revolution and Declaration of the Rights of Men and Citizen (1789) to affirm the rights of human beings against State.

The Chapter 3 concerns with the universalization of Human rights. In this chapter, development of international human rights jurisprudence through international law and international treaties before the First World War, establishment of International Labour Organization in 1919, Human Rights under the Covenant of the League of Nations 1920, Proclamation issued by Institute of International law 1929, Four Freedoms of 1945, the Atlantic Charter 1941, the United Nations Declaration January 1, 1942 and Dumbarton Oaks Conference 1944 have been discussed in detail in order to demonstrate the progress achieved at the political level.

Chapter 4 maps the development of Human Rights after the Second World War. It discusses the provisions of Human Rights stipulated under preamble, principles and purposes of the Charter of the United Nations (UN) to exhibit the fact that the UN functions could be governed by them also. The analysis of provisions of the 1948 Universal Declaration of Human Rights has made an effort to provide the understanding of its customary status.

In exploring enforcement initiatives, chapter 5 seeks to highlight progress achieved with the adoption of the International Covenants on Human Rights and other Human Rights institutions. The highlighting of provisions related to monitoring mechanism under the International Covenant on Civil and Political Rights 1974 and the International Covenant on Economic, Social and Cultural Rights 1974 would have been relevant and useful for readers. The book, indeed, covers Human Rights Institutions and World Conferences on Human Rights 1968 and 1993 to highlight the reaffirmation of human rights by the States.

While locating relevance of the Human Rights and Fundamental Rights in India, chapter 6 brings vast discussions about development of Human Rights in ancient India, medieval India and British India. The references to the Motilal Nehru Committee Report 1928, the Indian Pledge 1930, Fundamental Right and Economics Programme 1931 and the India's Charter of Freedom 1947 provide insight to shaping the human rights in the Indian legal system.

Chapters 7-30 deals with Human Rights under the Constitution of India. The evolution of Human Rights Jurisprudence under the Constitution of India has been described in a beautiful manner. The Supreme Court of India has enriched the concept of Human Rights jurisprudence by dynamic interpretation of the provisions of the Constitution of India. By interpreting the provisions of the Constitution, the Supreme Court of India (SCI) has enriched the ambit and scope of Human Rights jurisprudence. The SCI has recognized the human right to privacy, the human right to travel abroad, the human rights of prisoners and arrested persons, the human rights to speedy trial, the human right to legal aid, the human rights to compensation, the human right to education, the human right to shelter, the human right to health, the human right to environment, the human rights of women and the human rights of refugees. The authors have tried to cover leading decisions of the Indian courts relating to human rights jurisprudence. The principles laid down in decisions have been described carefully beginning from 1951-2015. The authors have also critically discussed the two leadings cases *A.K. Gopalon v. State of Madras*, AIR 1951 SC 27 and *Maneka Gandhi v. Union of India*, AIR 1978 SC 597. The decision of *Maneka Gandhi case* has transcended human rights jurisprudence under the Constitution of India. The concept of Public Interest Litigation opened the doors of Supreme Court and High Courts to common people, poor people and weaker sections of the society. The book covers entire aspect of poverty jurisprudence and its reach to common people.

Part II exhibits important international conventions relating to human rights and fundamental freedoms. Parts-III and IV highlights the progress made with the adoptions of the international declarations dealing with human rights and fundamental

freedoms. Part IV exclusively devotes about the World Conferences on Human Rights and Fundamental Freedoms:-

- (1) The Proclamation of Tehran 1968;
- (2) Vienna Declaration and Programme of Action 1993.
- (3) Declaration on the Sixtieth Anniversary of the Universal Declaration of Human Rights 2008.

Part V covers other United Nations Documents relating to human rights and fundamental freedoms. Part VI deals with Foreign Historical Documents relating to human rights and fundamental freedoms. Part VII deals with India and human rights historical documents. Part VIII deals with special Institutions set up for protection and promotion of human rights. It covers the National Human Rights Commission, the National Commission for Women, Minority and Scheduled Castes and Scheduled Tribes. Part IX covers specific human rights laws made by Government of India.

The book provide understanding of the basic principles of human rights and fundamental freedoms. It covers international and national regime underpinning of human rights and fundamental freedoms. This is a comprehensive book in the field of human rights and fundamental freedoms. The book is helpful for teachers, judges, advocates and students reading and working in the field of human rights and fundamental freedoms.

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