

INHERITANCE RIGHT OF HINDU WOMEN IN AGRICULTURAL PROPERTY: UNCERTAIN JUSTICE

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Abstract

Hindu women who constitute almost 38% of the total Indian population had been hostilely affected by the statutory denial of ownership in agricultural property under Hindu Succession Act, 1956. Later the Hindu Succession (Amendment) Act, 2005 amended Hindu Succession Act, 1956 and omitted the provision dealing with agricultural property. Since the Indian Constitution gives both Parliament and state governments the power to make laws on agricultural property, with state governments having exclusive authority to legislate on agricultural land, after amendment, the ambiguity over the legislative competence of both the Centre and the states has been highlighted by conflicting High Court opinions. The Supreme Court's latest position with regard to application of Hindu Succession Act, 1956 to agricultural property, is shrouded with uncertainty. The present paper analyses the Supreme Court's decision regarding the effect of omission of exemption granted to agricultural property under HSA, 1956 and the uncertainties surrounding the inheritance rights of Hindu women in such property.

I Introduction

THE INDIAN Supreme Court's recent dismissal of a review petition¹ challenging the topical decision in *Babu Ram v. Santokh Singh*² which confirmed the preferential right of heirs of Hindu under section 22³ of the Hindu Succession Act, 1956 (hereinafter

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1 *Babu Ram v. Santokh Singh*, Supreme Court of India, RP (C) No. 1408 of 2019 decided on July 23, 2019.

2 AIR 2019 SC 1506.

3 Hindu Succession Act, 1956, s. reads: 22. (1) Where, after the commencement of this Act, an interest in any immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolves upon two or more heirs specified in class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.

(3) If there are two or more heirs specified In class I of the Schedule proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation.—In this section, “court” means the court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other court which the State Government may, by notification in the Official Gazette, specify in this behalf.

referred to as 'HSA, 1956') after its amendment, even in agricultural property, has reignited the debate over Hindu Succession Act's applicability to agricultural property and its consequences on Hindu women's right to inherit agricultural property. The Hindu Succession Act, 1956, prior to its amendment by Hindu Succession (Amendment) Act, 2005 (hereinafter referred to as 'Amendment Act, 2005') exempted its applicability to agricultural property under section 4(2). The Amendment Act, 2005 has omitted section 4(2) of HSA, 1956. Since the issue in *Babu Ram's* case concerned the preferential rights of Hindu heirs in agricultural property following the omission of exclusion clause dealt with under section 4(2), it has raised a much larger question about whether the codified law under HSA, 1956 now governs the devolution of agricultural property for Hindus, thereby affecting and granting rights also to Hindu women in agricultural property. Prior to omission, section 4(2) of HSA, 1956, read as:

'(2) For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings.'

The dilemma over the rights of Hindu women in agricultural property is now new. Hindu women's right to property has been restricted since time immemorial. Their rights to acquire, inherit, claim and control property in India are decided fundamentally by socially acceptable values and standards, as well as the decision-making and distribution structures within the family.⁴ The uncoded law under Mitakshara system, which existed in almost whole of India, had restricted her right in immovable property in the form of limited estate. She had no right to alienate the property but could only use it during her lifetime after which it devolved on the heirs of last owner of the property. Restricting a woman's right in an agrarian society where the majority of immovable properties were agricultural lands was a huge blow to her socioeconomic status.

Though the equalization of inheritance rights may be a powerful instrument for the empowerment of women,⁵ Hindu women were not given equal rights even by the codified laws. The codification of the old Hindu law has not kept pace with the constitutional mandate of gender equality and in removing gender disparity completely.⁶ The first statutory legislation that granted rights to widows in separate and coparcenary

4 Kanaklatha Mukund, "Women's Property Rights in South India: A Review", 34 *EPW* 22 (June 1999).

5 Sonia Bhalotra, Rachel Brulé, Sanchari Roy, "Women's inheritance rights reform and the preference for sons in India", (146) 102275 *Journal of Development Economics* (Sep.2020).

6 Archana Mishra, "Devolution of Property of the Hindu Female: Autonomy, Relationality, and the Law" 29(2) *International Journal of Law, Policy and the Family* (2015).

property was Hindu Women's Rights to Property Act, 1937 (Act XVIII of 1937) (hereinafter referred as "Act XVIII of 1937") but the status of applicability of the Act to agricultural property was not clear. Its applicability to agricultural property was clarified judicially by the by the Federal Court in *In re Hindu Women's Rights to Property Act*⁷ wherein court decided that Act XVIII of 1937 regulated succession of property other than agricultural land since agricultural land was beyond the legislative powers of the Central Government. Later the Amendment Act 26/1947 made the Act XVIII of 1937 applicable to agricultural land.

II Legislative developments with regard to section 4(2) of Hindu Succession Act, 1956

Act XVIII of 1937 is regarded as a major milestone in the development of the Hindu Code Bill.⁸ Hindu Law Committee had not included 'agricultural land' under Hindu Code nor was it included under Hindu Code Bill of 1948. It was also excluded from the purview of Hindu Succession Bill (No. XIII of 1954) drafted by the Rau Committee. The Rajya Sabha adopted the idea that a female heir should be entitled to a portion of her father's property in all agricultural properties while passing the resolution to refer the Hindu Succession Bill to Select Committee. The Select Committee's Report also stated the Committee's determination to bring all landed properties, including farms and agricultural lands, within the Act's purview. However, when the matter was debated in the Rajya Sabha, H.V. Pataskar proposed the inclusion of section 4(2) in the Hindu Succession Bill, 1954, claiming that the exemption was necessary to avoid jeopardising states' efforts to enact tenurial laws and to clarify that personal law would not be affected. All tenancy rules, including the mechanism of devolution of tenancy rights, applied uniformly to everyone, regardless of whether he was a Hindu, Muslim, Christian, Parsi, or anyone else, and so superseded all their family or personal laws. A majority of Rajya Sabha members voted in favor of the amendment, which was later confirmed by the Lok Sabha. The purpose of section 4(2) of the original Act, according to legislative debates, was solely to clarify that HSA, 1956, as personal legislation, had no bearing on the States' ability to enact laws concerning tenancy rights, succession, ceilings, or the prevention of agricultural holdings fragmentation. It was done to avoid interfering with progressive agrarian reform legislation that had been passed in some states.

III Legislative competence of Parliament and state governments over agricultural land governance in India

The Constitution of India is federal in nature and the legislative powers are distributed between Centre and State government. The Parliament has exclusive power to legislate on subjects under Union List, State has exclusive jurisdiction to rule over subjects

7 AIR 1941 PC 72.

8 John Duncan M. Derrett, *Hindu Law: Past and Present* (A Mukherjee and Co., Calcutta, 1957).

under State List whereas both Parliament and State could legislate on subjects contained in Concurrent List. Different aspects of land governance falls under different lists. For example, subjects such as succession, wills, intestacy, partition and transfer of land excluding agricultural land falls under Concurrent List over which both Parliament as well as States have the power to make laws. State has the power to make laws over agricultural land including transfer of agricultural land.

Since 'succession' falls under Concurrent List, the Parliament enacted the Hindu Succession Act, 1956. HSA, 1956 was enacted to grant equal inheritance rights to Hindu females in property but it expressly exempted its application to fragmentation of agricultural holdings, tenancy rights and ceilings which consequently deprived Hindu women of their statutory rights in agricultural properties, though it converted Hindu female's limited right in property to absolute right, made daughter simultaneous heir with son, laid down rules for devolution of property, expanded the meaning of *stridhan*, recognised descendants through female line of descent among many others. But conservative ideology of male domination over property was strong enough to undermine their inheritance rights. It did not grant equal inheritance right to Hindu women as it retained male-centric coparcenary and joint family system with the rights by birth and survivorship with no inclusion of females within it and at the same time expressly exempted its application to agricultural properties. The grant of absolute rights in property to females under HSA, 1956 was balanced by excluding the application of HSA, 1956 two most important forms of property - joint family property and agricultural property. The continuance of *Mitakshara* coparcenary without females, was a big setback for Hindu female's right.

Further, at the time of the HSA's enactment in 1956, the majority of India's holdings were rural and agricultural. The agriculturist classes made up the majority of the population. The HSA of 1956 had no effect on state-enacted tenurial legislation that prevented the fragmentation of agricultural holdings, fixed ceilings, and governed the devolution of tenancy rights of such holdings. The state tenurial laws apply uniformly regardless of the religion of the land owner or tenant. The state government may lay down express legislation for tenurial laws or may rule for the application of personal laws to deal with agricultural properties while others remain silent on the order of devolution of agricultural property where the courts have applied personal law for devolution of agricultural property. In absence of state legislated tenurial law, HSA, 1956 applied to agricultural properties of Hindus. Majority of state tenurial laws governing agricultural property shows strong preference for agnatic succession i.e., the rights regarding agricultural property devolves on lineal male descendants in the male line of descent. Widow and daughters get right in absence of such descendants. Thus, the state tenurial laws are generally gender biased and against giving rights to females in agricultural property. They are purposely placed in Ninth Schedule of the Constitution to escape constitutional challenge. Due to different kinds of state tenurial

laws, women's rights in agricultural land show vast disparity by region. The non-application of HSA, 1956 to agricultural property denied rights to a significant number of Hindu women in rural India whose parents owned nothing else but agricultural property. Exemption of agricultural property from HSA, 1956 further widened the gap between Hindu males' and Hindu females' rights in property.

The focus of lawmakers in matter of agricultural property was more on protecting state's tenurial laws than its effect on Hindu women's right in agricultural property. Whatever may be the intention of lawmakers when they included an exemption clause for agricultural property, one of the most serious consequences was the denial of Act's beneficial provisions to Hindu females in agricultural estates. Non-application of the Act to joint family property or coparcenary and agricultural property defeated in fact, the very purpose of enacting HSA, 1956. Refusal of all beneficial rights conferred by HSA, 1956 in coparcenary and agricultural property to female heirs, left them very little to inherit. After few decades of enactment of HSA, 1956, some state governments amended Hindu law of succession to grant coparcenary rights to daughter. None of the state amendments⁹ which had granted coparcenary right to unmarried daughter in their states or had abolished joint family system, had made any change to the provisions on agricultural land. At the time of amendment to HSA, 1956 in 2004 the legislature realised that having denied Hindu women right to own agricultural property, the most important form of rural property, have prevented women from achieving social and economic advancement. As a result, the Rajya Sabha proposed the repeal of section 4(2) of HSA, 1956 in Hindu Succession Bill (Amendment) Bill, 2004 which was approved by the Lok Sabha. The Bill after assent of the President of India, became Hindu Succession (Amendment) Act, 2005.

The Hindu Succession (Amendment) Act, 2005 significantly increased women's likelihood to inherit land, although it did not fully compensate for the underlying gender inequality.¹⁰ Land reform policies (land to the tiller, fixation of ceilings, prevention of fragmentation etc.,) have been based both on the principle of redistributive justice and on arguments regarding efficiency; but on neither count are gender inequalities taken into account.¹¹ Women in India do cultivate land but the titles are held by others.¹²

9 Hindu Succession (Andhra Pradesh Amendment) Act, 1986, Hindu Succession (Tamil Nadu Amendment) Act, 1989, Hindu Succession (Maharashtra Amendment) Act, 1994, Hindu Succession (Karnataka Amendment) Act, 1994, Kerala Joint Hindu Family System (Abolition) Act, 1975.

10 Klaus Deininger, Aparajita Goyal, and Hari Nagarajan, "Women's Inheritance Rights and Intergenerational Transmission of Resources in India" 48(1) *J. Human Resources* (2013).

11 Bina Agarwal, "Gender and Land Rights in Agricultural Land in India", 30 *EPW* 12 (Mar 25, 1955).

IV Uncertainty surrounding effect of omission of section 4(2) of Hindu Succession Act

Gender inequality in inheritance of agricultural land in India continues to pose a problem.¹³ The deletion of section 4(2) by the Amendment Act, 2005 which came after more than six decades of the parent Act, did not ease the situation, but rather has created confusion over the inheritance under HSA, 1956 to agricultural property. Instead of stating unequivocally that HSA, 1956 will apply also to agricultural property, the legislature simply omitted the provision. Is it reasonable to presume that HSA, 1956 now applies to agricultural property since the provision has been deleted? The issue becomes more significant as it has direct bearing on the rights of Hindu women in the agricultural property. Does the omission result in the restoration of their statutorily withheld rights? As a result, the Hindu women's claim to agricultural property under HSA, 1956 is in jeopardy.

Contradictory opinions of various High Courts prevailed on the effect of omission of section 4(2). The High Court of Delhi held¹⁴ that Delhi Land Reforms Act, 1954 had protection under section 4(2) of HSA, 1956, therefore after the shield from obliteration given by sub-section (2) was removed, the provisions of the HSA would take precedence over the provisions of the Delhi Land Reforms Act, 1954. On the other hand, the High Court of Allahabad¹⁵ has held that agriculture land is exclusively in the jurisdiction of the state legislatures, and Parliament has no authority to pass legislation on that subject, therefore section 4(2) was merely for the purpose of clarification, and it cannot be stated that the HSA, 1956 *suo-motu* applied to agricultural land after the exemption was repealed.

Larger issue of the effect of section 4(2)'s omission as well as the smaller question of whether heirs of Hindu had preferential right to claim agricultural property under section 22 of HSA, 1956 were yet to be settled by the Supreme Court, though conflicting view of High Courts existed on the applicability of section 22 to agricultural property. Some high courts¹⁶ held that section 22 of HSA, 1956 applied to agricultural land

12 K. C. Roy, C. A. Tisdell, "Property Rights in Women's Empowerment in Rural India: A Review" 29(4) *International Journal of Social Economics* (2002).

13 Shipra Deoi, Akansha Dubey, "Gender Inequality in Inheritance Laws: The Case of Agricultural Land in India" (2019) available at: <https://cdn.landesia.org/wp-content/uploads/Gender-Inequality-in-Inheritance-Laws-The-case-of-agricultural-land-in-India-1.pdf> (last viewed on Apr. 30, 2023).

14 *Nirmala v. Government of NCT of Delhi*, WP (C) 6435/2007, High Court of Delhi decided on Sep. 4, 2010.

15 *Archna v. Dy. Director of Consolidation*, Writ - B No. - 64999 of 2014, High Court of Allahabad decided on Mar. 27, 2015.

16 *Laxmi Debi v. Surendra Kumar Panda*, AIR 1957 Orissa 1; *Basavant Gonda v. Channabasanma*, AIR 1971 Mysore 151; *Nidhi Swain v. Khati Dihya*, AIR 1974 Orissa 70.

whereas other high courts¹⁷ had contrary opinion, therefore the issue needed final adjudication. The recent ruling of Supreme Court in *Babu Ram's* case settles the larger issue of the effect of the omission of section 4(2) of HSA, 1956 on agricultural property as well as on the issue whether heirs of Hindu could claim preferential right in agricultural property.

***Babu Ram v. Santokh Singh* preferential rights of Hindu heirs in agricultural property**

In the instant case, two sons, Santokh Singha and Nathu Ram inherited certain agricultural lands after the death of father. Nathu Ram executed a registered sale deed in respect of his share of land in favour of Babu Ram which was challenged by Santokh Singh in 1991 on the ground that he had preferential right under section 22 of HSA, 1956 to acquire the suit land. The suit was dismissed by the trial court and was partly allowed by the Appellate Court. The substantive question before the High Court of Himachal Pradesh on the second appeal was whether section 22 of HSA, 1956 excluded an intestate's interest in agricultural land, and whether the preferential right over "immovable property" as contemplated in the said provision was confined only to business and such immovable property did not include agricultural land? The suit was filed before trial court in 1991 and while the matter was still pending before the high court, the Amendment Act, 2005 omitted section 4(2) of HSA, 1956. The Division Bench of High Court of Himachal Pradesh in *Roshan Lal v. Pritam Singh*,¹⁸ has observed that immovable property under Section 22 was broad enough to include agricultural land. The high court citing the decision of *Roshan Lal*, held that section 22 would apply to agricultural land and dismissed the second appeal against which the appeal came before the Supreme Court. The high court made no mention of legislative developments or the impact of section 4(2) deletion on agricultural property.

Issues involved in *Babu Ram v. Santokh Singh*

On appeal to Supreme Court, the issue before the court was whether an heir could exercise preferential right under section 22 to agricultural property. The Supreme Court divided the issue into three parts:

- (i) Whether Section 4(2) of HSA, 1956, prior to its omission, exempted the application of the Act to all aspects of agricultural property;
- (ii) Whether succession of agricultural property was governed by HSA, 1956 and the effect of omission of section 4(2); and
- (iii) Whether preferential right of heirs of Hindu under section 22 also applied to agricultural property?

17 *Jaswant v. Basanti Devi*, 1970 PLJ 587; *Prema Devi v. Joint Director of Consolidation (Head quarter) at Gorakhpur Camp*, AIR 1970 All 238; *Jeevanram v. Lichmadevi*, AIR 1981 Raj 16.

18 R.S.A.No. 258 of 2012 decided on Mar. 1, 2018.

Supreme Court's Observation over applicability of Hindu Succession Act, 1956 to agricultural property

The Supreme Court had first to decide on broader question of whether the devolution of agricultural property was governed by HSA, 1956. The question becomes more pertinent in light of omission of section 4(2) of HSA, 1956. The court affirmed the decision of High Court of Bombay in *Tukaram Genba Jadhav v. Laxman Genba Jadhav*¹⁹ wherein the high court had stated that the unqualified notion that the HSA, 1956 did not apply to agricultural property was incorrect since it led to the consequence that succession of Hindu agricultural property was not governed by the HSA, 1956. Section 4(2) did not intend for this to happen, as it only addressed particular features of agricultural property such as prevention of fragmentation of agricultural holdings, fixation of ceilings and devolution of tenancy rights in such holdings. The Supreme Court thus ruled that only those laws which fell within the category of laws specified in section 4(2) of the Act were excluded from the scope of HSA, 1956 and section 4(2) could not be interpreted to mean that HSA, 1956 did not apply to succession in respect of agricultural property.

With regard to second issue of whether succession of agricultural property was governed by HSA, 1956 and the effect of omission of section 4(2), the Supreme Court traced the historical and legislative developments with regard to the competence of State legislature as well as Parliament's power for enacting laws on succession, intestacy, devolution of agricultural properties among others. The Supreme Court then referred to the entries mentioned under Government of India Act, 1935 (hereinafter referred to as 'GOI Act, 1935') and the corresponding changes brought in the Constitution of India.

Entry 21, List II under Government of India Act, 1935 mentioned:

21. Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant and the collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans; colonization; Courts of Wards; encumbered and attached estates; treasure trove.

Whereas, corresponding Entry 18, List II of Constitution of India mentions:

18. Land, that is to say, right in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.

Entries 6 and 7 of List III of Government of India Act, 1935 mentioned:

¹⁹ AIR 1994 Bom 247.

6. Marriage and divorce; infants and minors; adoption.
7. Wills, intestacy, and succession, save as regards agricultural land.

and corresponding Entry 5 of List III under Constitution of India mentions:

5. Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.

The Supreme Court opined that under GOI Act, 1935 the Provincial legislature was exclusively entitled to make laws relating to '*transfer, alienation and devolution of agricultural land*' which was further clarified by Entry 7 of List III by use of expression '*...succession, save as regards agricultural land*' under the Concurrent List. Thus the provincial legislation had exclusive competence to deal with the transfer, alienation and also devolution of agricultural land. The Constitution of India, 1949 brought changes in List II and List III of GOI Act, 1935 *e.g.*, Entry 18 under List II of Constitution retained '*transfer, alienation of agricultural property*' but expression '*devolution*' was taken out as a qualification, the expression '*...save as regards agricultural land*' was absent under Entry 5 of List III of the Constitution which was earlier present under Entry 7 of List III of GOI Act, 1935. The Court emphasised that the State with respect to Entry 18 List II could make laws for transfer, alienation of agricultural land, which were *inter-vivos* transfers, but that when it came to '*intestacy and succession*,' which were essentially transfers by operation of law as per the law applicable to the person whose death was to open the succession, both the Union and State legislatures were competent to deal with the topic, therefore section 22 could be applied to succession of agricultural land in the State. In the absence of any state legislation dealing with the succession to an interest in agricultural land in the State of Himachal Pradesh, the Supreme Court upheld the applicability of section 22 to succession of agricultural property in that state. The court also believed that before the omission of section 4(2), the provision made it clear that it did not apply to the devolution of tenancy rights in respect of agricultural holdings, implying that it applied to the general field of succession, including agricultural property, but section 22 was not applicable to the devolution of tenancy rights in respect of agricultural holdings. The court observed that the exception to the applicability of section 22 has been removed with the repeal of Section 4(2).

The court then returned to the issue of the applicability of section 22 to the succession to agricultural lands particularly when '*right in or over land, land tenures....*' are within the exclusive competence of the state legislatures under Entry 18 of List II of the Constitution. The state legislatures enact pre-emption laws to confer certain categories and classes of holders in cases of certain transfers of agricultural land. The court agreed that when different persons, unrelated to each other, jointly purchased an agricultural holding and one wished to sell of his interest, then the State enacted law,

if any, for preemption granting right of pre-emption to joint holders, could be applied. Similarly, if the joint holders were brothers and sisters who had invested their own funds in jointly purchasing the agricultural property, then in presence of any state enacted preemption laws granted to joint holders would apply. But, if the brothers and sisters instead of purchasing agricultural property out of their own funds, had inherited agricultural holdings, and one of them desired to dispose of his or her interest, then it would be governed by section 22 of HSA, 1956 as the source of interest in such property was only on the basis of succession which was recognised by section 22 of HSA, 1956, the court held. The court further opined that since the right or interest itself was created by HSA, 1956, the manner of exercise of such right could be by that very legislation, therefore the preferential right given to heir of Hindu under section 22 was applicable even when the property was an agricultural land.

IV Conclusion

The Supreme Court decided on the issue of the applicability of section 22 of the HSA, 1956 to agricultural property, as well as the effect of omission of section 4(2) and held that devolution of agricultural property is to be governed by HSA, 1956, but the court's primary focus was on the issue brought before it. It stated specifically that section 22 would apply to agricultural property, as Himachal Pradesh had no state statute controlling the preemption right of agricultural property. While looking into the issue brought before the court, it looked into various aspects covered under section 4(2) as well as section 22 of HSA, 1956 that it is difficult to comprehend clearly the decision of Supreme Court on the applicability of HSA, 1956 to agricultural property.

The Supreme Court's observation, based on the difference in language and content of Entry 5 in List III of the Constitution versus Entry 7 in List III of the Government of India Act, 1935, could be interpreted to mean that the succession of agricultural property, including those aspects of agricultural property that were exempted under section 4(2) prior to the Amendment Act, 2005, is now governed by HSA, 1956. The decision implies that heirs of Hindu to have the right to inherit all kinds of Hindu's property, including his agricultural property under HSA, 1956. Though the Supreme Court's decision in *Babu Ram's* case does not specifically address Hindu women's right to agricultural property, the fact that the decision recognizes the rights of heirs of Hindu in agricultural property could be interpreted to mean that Hindu women also have rights to claim agricultural property under the HSA, 1956.

Inheritance rights securing land property to women, being denied or violated, should be protected and promoted by law through a robust legal framework and an effective enforcement system.²⁰ The codification of Hindu law of succession was to grant better

20 Archana Mishra, "Vicissitudes of Women's Inheritance Right – England, Canada and India at the dawn of 21st Century" 58(4) *Journal of Indian Law Institute* (2016).

rights in property to Hindu females, accordingly the heirs of male under HSA, 1956 are classified in such a way that more number of females are his heirs in first category.²¹ Class I comprises of 16 heirs of which 11 heirs are females. These include mother, widow, daughter, widow of a predeceased son, daughter of a predeceased son, widow of a predeceased son of a predeceased son, daughter of a predeceased son of a predeceased son, daughter of a predeceased daughter, daughter of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased son of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased son. More number of female members of the Hindu family could inherit agricultural property, if HSA, 1956 applies to agricultural property. The Amendment Act, 2005 has further omitted the provision that had disentitled females of Class I from claiming partition of dwelling house and had taken away the residence right of married daughter in father's property. Due to omission of section 4(2), the females also will have the right to claim partition of agricultural property. Section 14 of HSA, 1956 grants absolute right to females in property. The application of HSA, 1956 to agricultural property would entitle her to claim partition of her share in agricultural property, and to control, manage, use it according to her wish. Women generally forgo their claim in property in anticipation of support from their natal family if their relationship gets strained in her matrimonial family. The share to them in agricultural property will boost their self-confidence and increase their bargaining power both within and beyond the family. It may even boost agricultural productivity (in face of male outmigration especially in south India) by enabling women to take loans to invest on their land to which they have formal entitlement and thereby enhance family income.²² They would be in better position to understand the nuances of agricultural activities and agricultural markets *e.g.*, taking decision on matters related to agricultural activities *e.g.*, what to sow, whom to sell products etc., understand the different policies framed by the government for agricultural land etc.

The right to women in agricultural property would ensure more equal power within home and community. 60.4% of India is agricultural land²³ and Hindu forms majority of the population in India. Granting of rights in agricultural property to Hindu female will benefit large percentage of women living in India. Rights in arable land can significantly lower women's risk of poverty and destitution, particularly among

21 The heirs of male under HSA, 1956 are classified as Class I heirs, Class II heirs, agnates and cognates. A person is said to be an 'agnate' of another if the two are related by blood or adoption wholly through males and is 'cognate' of another if the two are related by blood or adoption but not wholly through males.

22 Sanchari Roy, "Female empowerment through inheritance rights: evidence from India." *London School of Economics*, London (2008).

23 Available at: <https://data.worldbank.org/indicator/AG.LND.AGRI.ZS> (last visited on Oct. 29, 2021).

impoverished households, partially due to the general positive effect of women having independent access to economic resources, and partly due to the specific advantages connected with rights to such land.²⁴ The effect of omission of section 4(2) of HSA, 1956, will bring the agricultural land at par with other property, overriding the gender-inconsistent state tenurial laws. The rights in agricultural property will make a significant contribution to Hindu women's empowerment. Clear ruling of Hindu women's right in agricultural property by Parliament or by Supreme Court would be a remarkable step that would remove the gender inequalities in true sense.

Instead of amending the provision that clearly stated the applicability of HSA, 1956 to agricultural property, the lawmakers chose to omit the exemption clause under section 4(2), the effect of which has now been judicially settled to mean that HSA, 1956 also applies to agricultural properties. But the question then arises is whether the Parliament is competent to make laws on subjects mentioned under the State List. Article 246 of the Constitution of India expressly states that the state legislatures have exclusive legislative powers over any of the matters listed in the State List (List II) of the Seventh Schedule to the Constitution. A closer look at the Seventh Schedule to the Constitution shows that the term 'agriculture' appears at 15 places. Under List I it appears at 4 places at Entries 82, 86, 87 and 88 where Parliament's power has been restricted by use of the expression "other than agricultural income" in Entry 82, "exclusive of agricultural land" in Entry 86, "other than agricultural land" in Entries 87 and 88. Under List II it finds place at 6 places in Entries 14, 18 (transfer and alienation of agricultural land), 30 (relief of agricultural indebtedness), 46 (taxes on agricultural income), 47 (duties in respect of succession to agricultural land) and 48 (estate duty in respect of agricultural land). The prohibition in List I by use of words "other than" or "exclusive of" makes it very clear that Parliament is prohibited to enact laws regarding 'agriculture' as 'agriculture' has been categorically placed under State List. The state government has exclusive power to make laws relating to taxes on agricultural income, taxes on the capital value of agricultural land, estate duty in respect to agricultural land and duties in respect of succession to agricultural land. Under List III, agriculture finds mention at Entries 6 (transfer of property other than agricultural land), 7 (contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land) and 41 (custody, management and disposal of property (including agricultural land) declared by law to be evacuee property). The analysis of various entries makes it very clear that Parliament lacks legislative competence under articles 245 and 246 to frame laws with regard to "agriculture" which is clearly covered under Entry 14 of State List except through the gateway of

24 Bina Agarwal, *Widows versus Daughters or Widows as Daughters? Property, Land, and Economic Security in Rural India*, 32(1) *Modern Asian Studies* (1998).

Entry 41 under Concurrent List (List III). The Supreme Court in *Babu Ram*'s case focused exclusively on few entries under List II and List III but ignored the larger context of State's exclusive jurisdiction to rule on agricultural matters.

Further, Entry 18 of State List (List II) includes "land, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents and transfer and alienation of agricultural land" over which only the state legislature has competence to frame laws. The Supreme Court in *Babu Ram*'s case mentions Entry 18 of State List and recognises the right of State to make laws on the subjects mentioned in the Entry giving an example of State enacted pre-emption laws conferred on certain categories and classes of holders in cases of transfers of agricultural lands. The court distinguished between joint owner's pre-emption right in purchased property and the heir's right in succeeded property created by State enacted statute and HSA, 1956, respectively, but goes no further to clarify on the Parliament's competence to enact law on List II's entry "land, rights in or over land" under what circumstances.

The only constitutional way by which Parliament could legislate on matter listed in State List is when Rajya Sabha passes a special resolution as per article 249 in the national interest or under article 252 when two or more states passes a resolution requesting it to legislate on any specific State subject. The uncertainty surrounding Parliament's legislative competence in enacting laws over state subjects combined with lack of a direct judicial precedent guaranteeing Hindu women's right in agricultural property, taking into consideration the various Entries under the Schedule to the Constitution, defeat the very purpose of the Amendment Act, 2005. Further, even if it assumed that deletion of section 4(2) results in Hindu's agricultural properties is subjected to HSA, 1956, it leaves persons of other religions to be governed by state enacted tenurial laws. The best way to address all uncertainties about devolution of agricultural property for everyone, including people of any religion or gender, is for Parliament to pass a uniform statute in consultation with state legislatures.

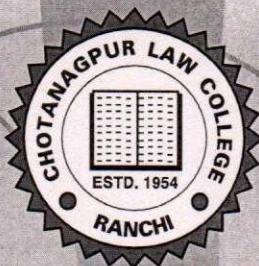
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JUDICIAL REVIEW OF LEGISLATIONS: A COMPARATIVE STUDY

Dr. Shaiwal Satyarthi*, Ms. Prashita Mishra** & Mr. Vaibhav Shahi***¹

Abstract : *Judiciary which is the guardian of the constitution has a very important role to play, a role given to them by the forefathers of the constitution. They undo the harm caused to the constitution by the tyranny of the Legislature and Executives and deliver to its citizens all that which was promised to them long back. There are two concepts by which the courts tackle the tyranny of Legislature and Judiciary on our constitution. First, the concept of "Judicial Activism" which was firstly coined by Arthur Schlesinger in the Fortune Magazine, classifying the sitting Judges of the U.S. Federal Supreme Court as "judicial activists" and "champions of self-restraint". The statement made by Schlesinger in the magazine could be seen in connection to the decision taken in Brown v. Board of Education in which the court reversed its stand as taken in an earlier case, i.e. Dredd Scott v. Sanford, on the subject of slavery. The article presents a comparative study of the legislation of various countries.*

Keywords : Constituion, Comparative Study, Judicial Review, Legislation .

1. Introduction :

In the case of *Marbury v. Madison*, Chief Justice Marshal hinted that the work of Judiciary is just not to *inter se* solve disputes but also to provide equilibrium to society; which in essence, can be understood in terms of Judicial Activism.²

*"There was a time when it was thought almost indecent to suggest that judges make law; they only declare it. Those with a taste for fairy tales seem to think that in some Aladdin's cave there is hidden a common law in its entire splendour and there on a judges appointment there descends on him knowledge of the magic words, 'Open Sesame'. Bad decisions are given when the judge has muddled the password and the wrong door opens. But we do not believe in fairy tales anymore."*³

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2 *Marbury v. Madison*, 5 U.S. 137 (1803).

3 SIR LOUIS BLOM, GAVIN DREWRY & BRICE DICKSON, *THE JUDICIAL HOUSE OF LORDS* 226 (2009).

And *Second*, the concept of *Judicial Review* which was imbibed in our constitution⁴. Renowned Jurist *H. M. Seervai* noted that the principle of *Judicial Review* is a familiar feature of the Constitutions of Canada, Australia and India, though the Doctrine of Separation of Powers has no place in strict sense in Indian Constitution, but the functions of different organs of the Government have been sufficiently differentiated, so that one organ of the Government could not usurp the functions of another⁵.

2. Comparison Between The U.K., U.S.A And Indian Concepts

In England, since there is no Written Constitution and Supremacy of the Parliament exists, there is no judicial review of legislation enacted by Parliament. An English court cannot declare an act of Parliament *ultra vires*. This theoretical position remains unchanged even after the enactment of the European Communities Act, 1972, which makes the community law directly enforceable in the United Kingdom, and Human Rights Act, 1998, which requires the England courts to point out that an act of Parliament is not compatible with European Charter on Human Rights. The courts, however, cannot declare an act of Parliament unconstitutional.⁶

The Indian experience of *Judicial Review* needs to be seen in the light that the Indians saw in a bill of rights an assurance to the minorities of their rights, and a safeguard against arbitrary rule. The Constitution of India of 1950 contained a bill of rights in *Part III* under the caption '*Fundamental Rights*' and declared that any law which are in derogation with the fundamental rights shall be void.⁷ However, while vesting the power of judicial review in the High Courts and the Supreme Courts, maximum vigilance was taken to prevent the courts in India from being more than auditors of legality.

While, the Constitution of United States, gave rights in unqualified terms and left it to the courts to define their limits and legitimize restrictions on them, the Constitution of India enumerated the rights as well as the restrictions. In *England*, the courts have expanded their power through the process of interpretation. They have imposed greater restrictions on the executive by subjecting more and more of its actions to the principles of natural justice⁸,

4 Gurram Ramachandra Rao, "Judicial Review in India" available at <http://www.mondaq.com/india/x/20649/Constitutional+Administrative+Law/Judicial+Review+in+India>. (last accessed on 20-10-17.)

5 H.M. Seervai, *Constitutional Law of India*, 3rd ed., Vol. 1, N.M. Tripathi Private Ltd. Bombay, 1983, p. 237.

6 S.P. Sathe, *Judicial Activism in India*, 1st ed., Oxford University Press, New Delhi, 2002, p. 1.

7 Article 13(1), 13(2) of Constitution of India, 1950.

8 *Ridge v. Baldwin* (No 1) [1963] APPL.R. 03/14

critically scrutinizing the exercise of discretionary powers⁹, and narrowly construing the ouster clauses that made the decisions of the administrative authorities or tribunals final and conclusive. Although courts in England cannot declare an act of Parliament *ultra vires*, they have subjected the administrative action to searching judicial vigilance. This is also '*judicial activism*'.

A written constitution imposes limits on the powers of the legislatures. If it is a federal constitution, the limits are imposed by the distribution of power between the federal government and the units and if the constitution contains a bill of rights, further limits are imposed on the legislature. Judicial review under a written constitution with a bill of rights cannot remain merely technocratic because the expressions used in the bill of rights, such as 'equality before the law', 'equal protection of law', 'personal liberty', 'the procedure established by law', acquire new meanings as society evolves and social change occurs. A constitutional court therefore cannot remain a mere technocratic court forever. A court interpreting a bill of rights is bound to be an activist in its interpretation and its decisions are bound to have political implications.

3. Meaning And Concept Of Judicial Activism

The concept of judicial activism has its roots in the English concepts of 'equity' and 'natural rights'. Whereas in America the theory of 'judicial activism' can be found in the notion of 'judicial review'. The first landmark judgement related to the concept was the case of '*Marbury v. Madison*'¹⁰ where for the first time the judiciary took an active step above the legislative actions. The American Judiciary with the power of judicial review embarked upon the era of Judicial Activism in 1954 in the landmark case of *Brown v. Board of Education*¹¹. In the case of *Plessy v. Ferguson*¹² the Supreme Court not only abolished the laws which treated blacks as a separate class but also guaranteed such rights which were clearly provided for in the Constitution.

4. Meaning And Concept Of Judicial Review

Judicial Review, in its most widely accepted meaning is the power of courts to consider the constitutionality of acts of the other organs of the government when the issue of constitutionality is important for the disposition of law suits properly pending before the

9 Padfield v. Minister Of Agriculture, Fisheries And Food [1968] UKHL 1.

10 Marbury v. Madison 5 U.S (1 Cranch) 137 (1803).

11 Brown v. Board of Education 347 U.S 483 (1954)

12 Plessy v. Ferguson 163 U.S. 537 (1886).

courts. The power to consider constitutionality in appropriate cases includes the courts' authority to refuse to enforce, and in effect invalidate, governmental acts they find to be unconstitutional¹³.

The doctrine of judicial review has acquired different nuances during the course of its evolution in the U.S.A, U.K., and India. While the origin of judicial review can be traced to the United Kingdom which has no written constitution, it has become firmly established in the U.S.A with a written constitution establishing a federal polity¹⁴.

4.1. Models of Judicial Review

There are two models of judicial review. One is a *Technocratic Model* in which judges act merely as technocrats and hold a law invalid if it is *ultra vires* the powers of the legislature. In the second model, a court interprets the provisions of a constitution liberally and in the light of the spirit underlying it keeps the constitution abreast of the times through dynamic interpretation. A court giving new meaning to a provision so as to suit the changing social or economic conditions or expanding the horizons of the rights of the individual is said to be an activist court.

4.2. Types of Judicial Activism

Judicial activism can be positive as well as negative. A court engaged in altering the power relations to make them more equitable is said to be positively activist and a court using its ingenuity to maintain the status quo in power relations is said to be negatively activist. The decisions of the US Supreme Court in *Dred Scott*¹⁵ was example of negative judicial activism, whereas the decision of that court in *Brown v. Board of Education*¹⁶ is an example of positive activism.

In *Dred Scott*, The US Supreme Court upheld slavery as being protected by the right to property. Moreover, in *Brown v. Board of Education*¹⁷, the Court held that segregation on the ground of race was unconstitutional and void. Activism is related to change in power relations. A judicial interpretation that furthers the rights of the disadvantaged sections or

13 Encyclopedia of the American Constitution, Vol 3 (New York, 1986) p.1054.

14 Dr.G.B.Reddy, Judicial Activism in India, Gogia Law Agency, Hyderabad, 2013 ,p.63.

15 *Dred Scott*, 60 U.S. 393 (1856); or *Lochner v. New York* 198 U.S. 45 (1904).

16 *Brown v. Board of Education*, 347 U.S. 483 (1954): 98 L.Ed. 873.

17 *Ibid.*

imposes curbs on absolute power of the State, or facilitates access to justice is a positive activism. '*Judicial activism is inherent in Judicial Review*'.

Whether it is positive or negative activism depends upon one's own vision of social change. Since, through *Judicial Activism*, the court changes the existing power relations, judicial activism is bound to be political in nature. Through *Judicial Activism*, the constitutional court becomes an important power centre of democracy.

5. History And Development Of Judicial Review

5.1. Development in the U.S.A legal System.

The doctrine of Judicial Review is one of the invaluable contributions of the U.S.A. to the political theory. In 1789 the Congress of the United States passed the Judiciary Act, which gave federal courts the power of judicial review over acts of state government. This power was used for the first time by the U.S. Supreme Court *Hylton v. United States*¹⁸. The significance of this case had an important impact on both judicial review and on direct tax laws. Not a decade after this decision, this case was used as precedent in *Marbury v. Madison*¹⁹ to justify the court's use of judicial review. Though the format of judicial review has changed over the centuries, the idea that a court can refrain from reviewing a case is directly linked back to *Hylton v. US*²⁰. as this was the first case with a question of what a direct tax was, it is considered as a stepping stone for all subsequent cases pertaining to the matter.

While *Marbury* cemented the Court's authority to exercise Judicial Review over federal legislation (though that authority would not again be exercised until *Dred Scott v. Sandford*, it took a few more years for the Court to assert its power over state statutes and courts as well. In *Fletcher v. Peck*²¹, the Court invalidated the Georgia legislature's voiding of certain previously made contracts. The Court held this to be a violation of the Contract Clause in Article I, Section 10.

In *Martin v. Hunter's Lessee* (1816)²², the Court both invalidated a Virginia law and overruled the Virginia Supreme Court's opinion on the issue. Virginia had passed a law

18 *Hylton v. United States*: 3 U.S. 171 (1796)

19 *Marbury v. Madison*, 1 Cranch 137 (1803).

20 *Supra Note 18*.

21 10 U.S. 87 (1810).

22 *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

permitting the confiscation of land belonging to British loyalists (during the Revolutionary War). This law was challenged in an earlier case in the U.S. Supreme Court, and the Court held that the law was unconstitutional. The Virginia Supreme Court, however, charged with implementing that decision, refused to comply, holding the U.S. Supreme Court to have no power over state court actions. The case then returned to the U.S. Supreme Court which insisted on, and fomented, its supremacy over state legislative and judicial action.²³

5.2. Development of this Jurisprudence in the U.K. legal System.

Professor Dicey's theory of parliamentary sovereignty²⁴ was an English constitutional incarnation of Austin's theory of sovereignty. The English people felt quite secure with an omnipotent Parliament because they had full faith in the strength of their democracy. Over the years, even in the England, parliamentary sovereignty has been considerably eroded in practice as well as in law. England has joined the European Convention on Human Rights and has accepted the jurisdiction of the European Court on Human rights. Further, the House of Lords in England has held that a European Community law would prevail over an Act of British Parliament.²⁵ This has been provided by the European Communities Act, 1972 but the above decision of the House of Lords whereby an earlier statute of Parliament was held to prevail over a later statute was clearly a constitutional revolution and meant the virtual demise of the Dicean theory of parliamentary sovereignty.²⁶ The United Kingdom has after a long hesitation enacted the *Human Rights Act, 1998*, which contains a declaration of rights. These rights act as limitations upon the executive and though theoretically they do not limit the power of the British Parliament, they would indirectly do so because the courts would presume that the act of Parliament could not be contrary to the rights given by that Act. These developments have doubtless changed the nature of the judicial review in the United Kingdom. There are of course limits to judicial creativity in England. In England, Parliament being supreme, the courts cannot declare a law of Parliament void.

An attempt was made by Lord Coke in 1610 in the *Bonham case*.²⁷ To assert the power to hold an act of Parliament void or it was inconsistent with the common law. Having miserably failed in securing such power of the courts, no judge again made such a claim.

23 *Ibid.*

24 Dicey, *Law of the Constitution* (Macmillan, 1952).

25 *R. v. Secretary of State of Transport, ex. P. Factortame Ltd. (No.2)* [1999] All ER (D) 1173.

26 H. W. R. Wade, 'Sovereignty- Revolution or Evolution', 112 L. Q. R. p. 568

27 *Thomas Bonham v College of Physicians*, (1610) 77 Eng. Rep. 638

Judicial activism therefore was essentially directed against the executive and very subtly and indirectly against Parliament without challenging its authority to legislate.

In administrative law, more and more actions were required to be taken after hearing the affected party (*Ridge v. Baldwin*²⁸), and the exercise of administrative discretion was subjected to strictest scrutiny (*Padfield v. Ministry of Agriculture, Fisheries and Food*²⁹). Statutory efforts to oust jurisdiction of the courts were frustrated by converting every error of law into error of jurisdiction (*Anisminic Ltd. v. Foreign Compensation Commission*³⁰). These were common law methods of dealing with the ouster clauses. The courts do not hold a legislative act invalid but construe it in such a way as not to give effect to the legislative intension to exclude the jurisdiction of the courts.³¹

5.3. Evolution and comparison with the Indian Legal System: Case by Case Analysis

Judicial review has been the special American contribution to the world. But it has been the bone of contention among the constitutional law experts as it is not clear that whether the judicial review is enshrined in the U.S Constitution³². The framers planned to put Judiciary's power of *Judicial Review* beyond any controversy and that is the reason why along with the independence of Courts and the powers of the Supreme Court, Judicial Review was the subject matter that loomed largest in the minds of the framers of the Indian Constitution. Unlike in the United States, Judicial review in India was provided for expressly in the constitution. *Art.13 (1) and (2)* provide for the power of the courts for judicial review. The constitution also divides the legislative power between the centre and the states and forbids either of them to encroach upon the power given to the other. Who is to decide whether a legislature or an executive has acted in excess of its or in contravention of any of the restrictions imposed by the constitution on its power? Obviously, such function was assigned to the courts.³³ It would be prudent to consider the period before independence for tracing the origin of judicial activism. However, there are few instances even prior to that period, where certain judges of the High Court delivered a dissenting judgement.

28 *Ridge v. Baldwin*, [1963] APPL.R. 03/14

29 *Padfield v. Ministry of Agriculture, Fisheries and Food*, [1968] UKHL 1

30 *Anisminic Ltd. v. Foreign Compensation Commission*, [1968] APPL.R. 12/17

31 Rajeev Dhavan, *The Supreme Court of India: A Socio-Legal Critique of its Juristic Techniques*, pp. 63-7 (Tripathi, 1977).

32 Anirudh Prasad, CandrasenPratap Singh, *Judicial Power & Judicial Review*, Eastern Book Company, Lucknow, 2012, p.349.

33 CAD, (Official Report reprinted by the Lok Sabha Secretariat), Vol.7, 1968, p.700.

In 1893, *Justice Syed Mahmood* of Allahabad High Court delivered a dissenting opinion which sowed the seed for judicial activism in India. In that case which dealt with an under trial who could not afford to engage a lawyer, Justice Mahmood held that the pre-condition of the case being "heard" would be fulfilled only when somebody "speaks".³⁴ The Supreme Court of India started off as a technocratic Court in the 1950's but slowly started acquiring more power through constitutional interpretation. In fact the roots of judicial activism are to be seen in the Court's early assertion regarding the nature of judicial review.

In *A.K. Gopalan v. State of Madras*³⁵, although the Supreme Court conceived its role in a narrow manner, it asserted that its power of judicial review was inherent in the very nature of the written constitution. The Constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, the Court has always the power to declare the enactment to the extent it transgresses the limits, invalid.³⁶ The posture of the Supreme Court as a technocratic Court was slowly changed to be activist Court.

In *Sakal Newspapers Private Ltd. v. Union of India*³⁷, it held that a price and page schedule that laid down how much a newspaper could charge for a number of pages was being violative of freedom the press. The Court also conceived a doctrine of giving preferred position to freedom of speech and expression, which includes freedom of the press, over the freedom to do business. The Supreme Court held that at a newspaper was not only a business; it was a vehicle of thought and information and therefore could not be regulated like any other business.

In *Balaji v. State of Mysore*³⁸, the Supreme Court held that while the backward classes were entitled to protective discrimination, such protective discrimination should not negate the right to equality and equal protection of law. It held that backwardness should not be determined by caste alone but by secular criteria though caste could be one of them, and that the reserved seats in an educational institution should not exceed fifty per cent of the total number of seats.

34 Balkrishna, 'When seed for Judicial Activism was sowed', The Hindustan Times|New Delhi, on 01-04-96, p.9.

35 A.K. Gopalan v. State of Madras, A.I.R. 1950 S.C. 27.

36 *Ibid.*

37 Sakal Newspapers Private Ltd. v. Union of India, A.I.R. 1950 S.C. 27.

38 Balaji v. State of Mysore, A.I.R. 1964 S.C. 1823.

In *Chitrallekha v. State of Mysore*³⁹, similar restrictions were imposed on the reservation of jobs in civil services. These are examples of judicial activism of the early 1960s.⁴⁰ In these early years of the Indian Supreme Court, the inconvenient decisions of the Supreme Court were overcome through the device of constitutional amendments. The first, the fourth and the seventeenth constitutional amendments removed various property legislations from the preview of judicial review.

Therefore, a debate on *A.K. Gopalan v. State of Madras*⁴¹, *Sakal Newspapers Private Ltd. v. Union of India*⁴², *Balaji v. State of Mysore*⁴³, *Chitrallekha v. State of Mysore*⁴⁴ and scope of the Parliament's power to amend the Constitution started. A question was raised before the Court in 1951 in *Shankari Prasad v. Union of India*⁴⁵, whether Parliament could use its constituent power under Article 368 so as to take away or abridge a fundamental right. The court unanimously held that the constituent power was not subjected to any restriction. That question was again raised in *Sajjan Singh v. State of Rajasthan*⁴⁶, and this time two judges responded favourably, though theirs was a minority view.

In 1967, *L.C. Golaknath v. State of Punjab*⁴⁷ that minority view became the majority view, by a majority of six against five. It was held that Parliament could not amend the Constitution so as to take away or abridge the fundamental rights. Thus, apart from exercising the power of judicial review in an expansive manner, to assert itself more, in the interest of Constitutionalism, the Indian Supreme Court has exercised even more and wider powers. The court exercises the power to do anything or to give any direction to render complete justice. The court has assumed to itself the power to determine the validity of even a constitutional Amendment effected under Article 368, in the aftermath of *KeshavanandBharti v. State of Kerala*⁴⁸. Probably, no court in the world under any form of constitutional government exercises such power. This it can be cited as the best example of judicial activism in India.

39 *Chitrallekha v. State of Mysore*, A.I.R. 1964 S.C. 1823

40 S.P.SATHE, *Judicial Activism in India*, 2nd edition, 2003, oxford university press, New Delhi, p. 7.

41 *A.K. Gopalan v. State of Madras*, A.I.R. 1950 S.C. 27.

42 *Sakal Newspapers Private Ltd. v. Union of India*, A.I.R. 1962 S.C. 305.

43 *Balaji v. State of Mysore*, A.I.R. 1963 S.C. 649.

44 *Chitrallekha v. State of Mysore*, A.I.R. 1964 S.C. 1823.

45 *Shankari Prasad v. Union of India*, A.I.R 1951 S.C. 458.

46 *Sajjan Singh v. State of Rajasthan*, A.I.R. 1965 S.C. 845.

47 *L.C. Golaknath v. State of Punjab*, A.I.R. 1967 S.C. 1643.

48 *KeshavanandBharti v. State of Kerala*, A.I.R. 1973 S.C. 1461.

After this era, the supreme courts in India has evolved from a positivist court into an activist court over the last fifty years right from *Sankari Prasad case*⁴⁹ to *Judicial review of NJAC*⁵⁰, *Triple Talaq*⁵¹, *Interpretation of Right to Privacy*⁵², *Guidelines for aadhar*⁵³ etc. It has not, as is generally believed, become suddenly activist during last two decades, it has taken longer than that for the court to acquire its present position.

6. Judicial Review Of Legislative Acts: Position In U.K.

The Doctrine of Judicial Review was prevalent in England. *Dr. Bonham Case*⁵⁴ was decided in 1610 by Lord Coke was the foundation of judicial review in England. But in the case of *City of London v. Wood*⁵⁵ Chief Justice Holt remarked that “An Act of Parliament can do no wrong, though it may do several things that look pretty odd.” This remark establishes the ‘Doctrine of Parliamentary Sovereignty’ which means that the court has no power to determine the legality of Parliamentary enactments.

In U.K. there is a system which is based on Legislative Supremacy and Parliamentary Sovereignty. Earlier, there was no scope of judicial review in U.K., but after the formation of European Convention of Human Rights, the scope of judicial review became wider. The enactment of Human Rights Act, 1998 also requires domestic Courts to protect the rights of individuals. In U.K., there is no written Constitution and Parliamentary Supremacy is the foundation. Principle of “Parliamentary Sovereignty” dominates the constitutional democracy in U.K.

6.1. Dimensions of Legislation in U.K.

There are two dimensions of Legislation in U.K.⁵⁶ which are:-

Primary legislation, which are basically legislations enacted by Parliament. Primary legislation is outside the purview of judicial review except in few cases which encroaches

49 Shankari Prasad v. Union of India, A.I.R. 1951 S.C. 455.

50 Supreme Court v. Union of India, W.P. No. (Civil) 13 of 2015.

51 ShayaraBano v. Union of India, W.P. No. (Civil) 118 of 2016.

52 K.S. Puttaswamy v. Union of India, (2017) 10 S.C.C. 1.

53 *Ibid.*

54 Thomas Bonham v. College of Physicians, 77 Eng. Rep. 646 (C.P. 1610).

55 City of London v. Wood, (1701) 12 Mod. 669,687.

56 Mohit Sharma, “Judicial Review - A Comparative Study”, Indian Constitutional Law Review: Edition-I, January 2017, P.44.

the law of European Community law. After the formation of European Union and Human Rights Act 1998, *Primary legislation is subject to judicial review in some cases.*

Secondary legislation, which provides rules, regulation, directives and act of Ministries. Secondary legislation is subject to judicial review. There is no exception to secondary legislation, all the executive and administrative functions, rules, regulations can be reviewed by Courts and any of the actions can be declared as unlawful which is *ultra vires* to the Constitution.

In *Les Verts v. European Parliament*⁵⁷, it was held that the “European Union is a community based on the Rule of law, inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional character.

6.2 Current Position of Judicial Review in U.K

The Courts in U.K. strictly follow the principles of *Judicial Review* with regard secondary legislations only. So far as primary legislations are concerned, they are outside the purview of *Judicial Review* but with some exceptional cases. In, *R. (on the application of Drammeh) v. Secretary of State for the Home Department*⁵⁸, an immigration detainee who had failed to take his medication for schizo-affective disorder and had gone on hunger strike, but who did not lack mental capacity, failed to establish that his detention was unlawful by virtue of his pre-existing serious mental illness where the facts indicated that his actions were calculated to avoid deportation.

The claimant applied for judicial review of the lawfulness of his immigration detention. It was held that there was no doubt that the effect of detention on a detainee’s mental health was a very relevant factor in evaluating what constituted a “reasonable period” of detention. The secretary of state’s policy in *Chapter 55.10 of the Enforcement Instructions and Guidance* in relation to the detention of the mentally ill imposed a duty to inquire into the relevant circumstances of a detainee to assess whether serious mental illness existed and whether it could be satisfactorily managed in detention. Further, it was held that, where a detainee had capacity, his refusal to consent to medical treatment put him outside the scope of the secretary of state’s policy statements.⁵⁹

57 *Les Verts v. European Parliament*, (1986) E.C.R. 1339.

58 *R. (on the application of Drammeh) v. Secretary of State for the Home Department*, [2015] EWHC 2754.

59 *Supra note.42*, p.45.

6.3. Scenario after the Human Right Act, 1998

The White Paper of the Act specifically mentions in its Introduction that:

"Although the courts will not, under the proposals in the Bill, be able to set aside Acts of the United Kingdom Parliament, the Bill requires them to interpret legislation as far as possible in accordance with the Convention. If this is not possible, the higher courts will be able to issue a formal declaration to the effect that the legislative provisions in question are incompatible with the Convention rights. It will then be up to the Government and Parliament to put matters right."

Numerous declarations of incompatibility have been made and some have resulted in amendments of the primary legislations but almost an equal number have been overturned by the House of Lords or the Court of Appeals on an appeal by the Home Office. An illustration of the change in the legislation can be seen in *Bellinger v. Bellinger*⁶⁰ wherein it was declared by the courts that *Section 11(c) Matrimonial Cases Act, 1973* was incompatible with *Section 8 and Section 12* in so far as it makes no provision for recognition of gender assignment. This was remedied by the *Gender Recognition Act, 2004*.

However, the trend is not that it favours declarations of incompatibility with a repeal or enactment by the Parliament but there are numerous cases wherein the formal declaration has had no effect on the Parliament. The impact of Human Rights Act, 1998 is reflected in the words of *Lord Steyn* in the case of *Jackson and others v Attorney General*⁶¹ and are as follows:

"Moreover, the European Convention on Human Rights as incorporated into our law by the Human Rights Act, 1998, created a new legal order. One must not assimilate the European Convention on Human Right with multilateral treaties of the traditional type. Instead it is a legal order in which the United Kingdom assumes obligations to protect fundamental rights, not in relation to other states, but towards all individuals within its jurisdiction. The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom."

Thus, Judicial Review is an accepted norm in respect of legislations in contravention of European Convention on Human Rights and wherein a public official has made an unlawful decision. The question that follows is on what grounds will a decision be subject to judicial

60 *Bellinger v. Bellinger*, [2003] UKHL 21.

61 *Jackson and others v Attorney General*, [2005] 4 All ER 1253.

review? This has been summarized by Lord Diplock in the case of *Council of Civil Services Union v Minister for the Civil Service*⁶² in the following words:

"Judicial Review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the ground on which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety". That is not to say that further development on a case by case basis may not in course of time add further grounds."

In a very recent matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)⁶³, Whether Ss.58 and 59 of the Offences against the Person Act 1861 and s.25 of the Criminal Justice Act (NI) 1945 are incompatible with arts.3, 8 and 14 ECHR in failing to provide an exception to the prohibition on the termination of pregnancy in Northern Ireland in cases of serious malformation of the unborn child/foetus or pregnancy as a result of rape or incest. On appeal and cross-appeal on all issues to the Court of Appeal the respondents' appeals were allowed and the cross-appeal dismissed. The Court of Appeal also agreed to refer two devolution issues raised by the Attorney General for Northern Ireland on the issue of the standing of the Commission to bring the proceedings. So, this is a new trend that can be seen in England regarding the judicial review of legislative acts in U.K.⁶⁴

7. Judicial Review Of Legislative Acts: Position In U.S.A.

The Judicial Review with its entrenched legacy in England travelled to U.S.A. unlike U.K., where a unitary form of government exists under an unwritten Constitution; the U.S.A adopted a written constitution with a federal polity, thus establishing a constitutionally limited or controlled government. The limited constitution can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution, void⁶⁵. The second basis of judicial review is the enactment of constitution with federal set up as the written constitution itself brings the idea of limited government. All the organs derive their power from the

62 Council of Civil Services Union v Minister for the Civil Service,[1983] UKHL 6.

63 Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland), UKSC 2017/0131.

64 Available at <<https://www.supremecourt.uk/cases/uksc-2017-0131.html>> last accessed on 14.11.2017 at 18.00 IST.

65 The Federalist (78), Ed Jacob E.Cooke(Hanover;1961) p.524.

Constitution. The third basis of Judicial is the supremacy clause contending Article 6⁶⁶ of the Constitution. Chief Justice Marshall pronounces in *Marbury v. Madinson*⁶⁷ "it is the peculiar duty and province of the judiciary to interpret the Constitution which has to endure for ages". Thus, the power of Judicial review is firmly established in front footing in U.S.A.

These expressions viz., judicial activism and judicial restraint are used from the angle of the personal or professional view of the right role of the Court. Accordingly, the courts may be condemned or commended for straying from or for conforming to that -right role. In U.S.A., in more than two centuries of judicial review, superintended by more than one hundred justices who have served on the Supreme Court and who have interpreted a constitution highly ambiguous, in much of its text, consistency has not been institutional but personal. Individual judges have maintained strongly diverse notions of the proper or right judicial role.⁶⁸ In America, there are almost as many conceptions of judicial activism as there are commentators. Some discuss activism almost solely in terms of the court's nullifying Acts of congress. Some see activism largely in the Court's violation of its obligation of comity to the other branches of government or to the States.⁶⁹

In U.S.A it is evident that courts are having power to judicial review of the legislative acts of congress. There are so many instances where the supreme court of U.S.A has declared the law as unconstitutional or constitutional by using the power of judicial review. Some of the important case laws are as follows:

66 Article VI of U.S. Constitution-

1. All debts contracted and engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this constitution, as under the confederation.
2. This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.
3. The senators and representatives before-mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

67 *Marbury v. Madinson*, 1 Cranch 137 (1803).

68 'Evolution & Growth Of Judicial Activism In India 3.1 Introduction' available at <http://shodhganga.inflibnet.ac.in/bitstream/10603/11379/9/09_chapter%202.pdf> last accessed on 13.11.2017 on 17.00 IST.

69 *Ibid.*

So this judicial review of legislative acts and the acts of the executive are the trend even in the present time in U.S.A. this is very much evident from the very recent incident in case of *Donald J. Trump, President Of The United States v. International Refugee Assistance Project*⁷³ This case involved challenges to Executive Order No. 13780, Protecting the Nation from Foreign Terrorist Entry into the United States. The order alters practices concerning the entry of foreign nationals into the United States by, among other things, suspending the entry of nationals from six designated countries for 90 days. Respondents challenged the order in two separate lawsuits. It was held by the court that such acts are not as per the basic tenets of the constitution of the U.S.A and it is against the immigration law, therefore the court has given the immediate stay of such orders and the matter is still in hearing.

8. Judicial Review Of Legislative Acts: Position In India

In the landmark judgement of *State of Madras v. V.G.Row*⁷⁴ Patanjali Shastri, C.J. observed that "our Constitution contains express provisions for judicial review of legislations as to its conformity with the Constitution. This is especially true as regards the fundamental rights as to which the court has been assigned the role of *Sentinel on Qui Vive*⁷⁵. In *Kesavananda Bharti v. State of Kerala*⁷⁶ Khanna, J. Observed "if the provision of the statute is found to be violative of any Article of the constitution which is touchstone of the validity of all laws, Supreme Court and the High Courts are competent to strike down the said provisions." The judicial review in India finds firm footing.

8.1 Provisions of the Constitution which ensures Judicial Review.

The Constitution of India incorporates a number of provisions which ensure the court's power of judicial review. They are as follows: -

Article 13(1) provides that pre-constitutional laws inconsistent with fundamental rights to be void.

Article 13(2) provides that post-constitutional laws which take away or abridge the fundamental rights shall be void to the extent of its inconsistency.

73 Donald J. Trump, President Of The United States v. International Refugee Assistance Project, 582 U. S./ (2017), decided on 26th June, 2017.

74 State of Madras v. V.G.Row, A.I.R. 1952 S.C. 196.

75 Dr.G.B.Reddy, Judicial Activism in India, Gogia Law Agency, Hyderabad, 2013, pp. 70-71.

76 Kesavananda Bharti v. State of Kerala, A.I.R. 1973 S.C. 1899.

In the landmark case of *Marbury v. Madison*⁷⁰ When President John Adams did not win a second term in the 1801 election, he used the final days of his presidency to make a large number of political appointments. When the new president (Thomas Jefferson) took office, he told his Secretary of State (James Madison), not to deliver the official paperwork to the government officials who had been appointed by Adams. Thus, the government officials, including William Marbury, were denied their new jobs. William Marbury petitioned the U.S. Supreme Court for a writ of mandamus, to force Madison to deliver the commission. It was held in this case that “*though the Justices agreed that William Marbury had a right to his job, they also ruled that issuing the writ of mandamus to force that to happen did not fall under their jurisdiction as stated in the Constitution. The Supreme Court opinion explained that it is within their power and authority to review acts of Congress, such as the Judiciary Act of 1789, to determine whether or not the law is unconstitutional. By declaring Section 13 of the Judiciary Act of 1789 unconstitutional, the U.S. Supreme Court established the doctrine of Judicial Review.*”

In other famous case of *Ladue v. Gilleo*⁷¹ In 1990, Margaret Gilleo placed a sign in the yard of her home in Ladue, Missouri. The sign said “Say No to War in the Persian Gulf, Call Congress Now.” The city of Ladue had a law against yard signs, and told Ms. Gilleo to take her signs down. Ms. Gilleo sued the city of Ladue for violating her 1st Amendment rights. It was held by the U.S Supreme court that Ladue’s law against yard signs violated the 1st Amendment of the U.S. Constitution. The 1st Amendment protects political speech, and banning yard signs takes away the main avenue by which people traditionally express their personal political views. The value of protecting personal political speech is more important than Ladue’s desire to keep the city free of clutter.

In another case of *Harper v. Virginia Board of Elections*⁷² Annie Harper was not allowed to register to vote in Virginia because she wasn’t able to pay the state’s poll tax. Virginia law required voters to pay \$1.50 tax to register, with the money collected going to public school funding. Ms. Harper sued the Virginia Board of Elections, claiming the poll tax violated her 14th Amendment right to equal protection. Again by exercising judicial review power the Supreme Court declared the *Virginia poll tax law unconstitutional*. By making it more difficult for poor people to vote, the state was violating the 14th Amendment guarantee of equal protection. Voting is a fundamental right, and should remain accessible to all citizens. The amount of wealth someone has should have no bearing on their ability to vote freely.

70 *Marbury v. Madison*, 1 Cranch 137 (1803).

71 *Ladue v. Gilleo*, 512 U.S. 43 (1994).

72 *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

Article 245(1) empowers the Parliament and the state legislatures to make laws subject to the provisions of the Constitution. It empowers the courts to review whether such laws are in accordance with the provisions of the Constitution or not.

If there is inconsistency between laws made by Parliament and the state legislature then this power of the Court evokes. *Article 251* provides that if there is any inconsistency between laws made Parliament under *Articles 249* and *250* and laws made by the legislatures of States then the law made by the Parliament will prevail and the State law will be inoperative to the extent of its repugnancy with the Union law.

Article 254 provides that if there is inconsistency between laws made by Parliament and State Legislature then the law made by the Parliament will prevail and the state law will be void to the extent of its inconsistency.

Article 372(1) provides that there will be continuance in force of existing laws until altered or repealed or amended by a competent legislature or the competent authority.

Under *Article 32* the individuals have been provided with the right to move the Supreme Court for the enforcement of rights conferred by Part III and the Supreme Court has power to issue directions or orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari, whichever may be applicable. Similarly, the High Courts also have power to issue writs as provided under *Article 226(1)*.

Article 131 confers upon the Supreme Court original jurisdiction in matters of federal dispute. In case of disputes between the Centre and one or more state or between states the Supreme Court has original and exclusive jurisdiction.

Article 105(1) and *194(1)* provide freedom of speech in Parliament or in the Legislature of the State respectively *subject to* the other provisions of the Constitution.

There are certain vague terms used in the provisions of the Constitution like “public interest”, “reasonable restriction” and “personal liberty”. These vague terms allows a wide scope of judicial review to the Courts.

8.2. Cases paving the way for Judicial Review

The Constitution can be amended by Parliament if a bill for such amendment is passed in each of its two houses with the support of two thirds of its members present and voting and absolute majority of the total membership of that house. Provisions of the Constitution that have bearing on its federal structure; however, can be amended only when an amendment bill

being passed by both houses in the above manner is ratified by at least half the legislatures of the states. The makers of Constitution provided for a flexible process of constitutional amendment.

In *Shankari Prasad v. Union of India*⁷⁷, it was argued that a constitutional was 'law' for the purpose of *art 13* and therefore it had to be tested on the anvil of the above article. If it violated any of the fundamental rights, it should be void. Chief Justice Patanjali Shastri, speaking on behalf of a bench of five judges in a unanimous judgement, rejected that argument outright and held that the word 'law' in that article did not include a constitutional amendment. That challenge was not renewed for more than a decade. During Nehru's time, the Constitution went through seventeen amendments. The Seventeenth Amendment, which brought ryotwari estates within the definition of the word 'estate' in *art 31 (A)*, became controversial for many reasons. It was, however, after Nehru's death that the challenge to the constituent power of Parliament was renewed.

In *Sajjan Singh v. State of Rajasthan*⁷⁸ the Court consisting of five judges was divided. While Chief Justice Gajendragadkar held on behalf of the majority of three judges including himself that constitutional amendment was not covered by the prohibition of *art 13(2)*, two judges, Justice Mudholkar and Hidayatullah (the latter became the Chief Justice three years later), expressed serious reservations about that interpretation. Justice Hidayatullah observed that if our fundamental rights were to be really fundamental, they should not become 'the plaything of a special majority'⁷⁹

These two dissents opened the door to future attempts to bring the exercise of the power of constitutional amendment under judicial scrutiny. A thought that persuaded the majority justices to stick to the prevision ruling of the Court was that since the Court had upheld Parliament's power to amend the Constitution without any consideration for the fundamental rights in 1951, and seventeenth amendments had been enacted in pursuance of that decision, any reversal of judicial view in 1965 would not only severely jeopardize India's land reforms and other economic programme but also create problems in reverting to the pre-amendments position in respect of property relations. Professor A. R. Blackshield in his path-breaking article had shown how the Supreme Court, if it wanted to change the legal

77 *Shankari Prasad v. Union of India*, A.I.R. 1951 S.C. 458.

78 *Sajjan Singh v. State of Rajasthan*, A.I.R. 1965 S.C. 845.

79 S.P.Sathe, *Judicial Activism in India*, 1st ed., Oxford University Press, New Delhi, 2002, p.65.

position, could do so without upsetting the previously enacted constitutional amendments by prospectively overruling the previous decision.⁸⁰

In 1967, the Supreme Court held in *Golaknath v. State of Punjab*⁸¹ that an amendment passed in accordance with the procedure laid down by art 368 was 'law' within the meaning of that word as used in art 13(2) of the Constitution. The Court by a majority of six against five judges held that Parliament had no power to pass any amendment that would have the effect of abridging or taking away any of the fundamental rights guaranteed by the Constitution. The petitioner had challenged the validity of the *First*(1951), *Fourth*(1955) and *Seventeenth Amendment Acts*(1964), which had foreclosed judicial review of the laws pertaining to property. Chief Justice K. SubbaRao speaking on behalf of five judges invoked the *doctrine of prospective overruling* to save the existing constitutional amendments (*First, Fourth and Seventeenth*) from infirmity while mandating Parliament not to pass a constitutional amendment that would take away or abridge any of the fundamental rights in future. While doing so, the learned Chief Justice promised that the Court would interpret the provisions of the fundamental rights liberally so as not to jeopardize the implementation of the directive principles of state policy.

Justice Hidayatullah, in a separate concurring judgement, reached the same result but by an independent reasoning. Instead of prospective overruling, he conceived the principle of acquiescence to legitimize the *first, fourth and seventeenth amendments*. In his view, since the Court had acquiesced in the validity of those Amendment Acts through its prevision decisions, it was stopped from declaring them invalid. The doctrine of acquiescence was the doctrine of estoppels against the Court itself.

However, in order to reach the policy premise that Parliament's power of constitutional amendment must be checked, the judges had taken recourse to interpretational methods that were traditional and positivist. For example, the interpretation that a constitutional amendment as 'law' for the purpose of art. 13 or that art 368 of the Constitution, which provides for amendment of the Constitution, did not contain the power of amendment but merely prescribed the procedure and the power was to be located in the plenary legislative power of Parliament contained in the residuary clause (art 248 and entry 97 of List I of the *Seventh Schedule*) were exercise in legal positivism. In the context of the Court-Parliament confrontation on right to property, the *Golaknath* decision appeared to be a judicial one-upmanship to claim finality to the court's decisions. It flew in the face of the theory that a

80 A. R. Blackshield, 'Fundamental Rights and the Institutional Viability of the Indian Supreme Court', 8 JILI p. 139(1966).

81 *Golaknath v. State of Punjab*, A.I.R. 1967 S.C. 1643.

Constitution was a *grundnorm* (highest norm) and did not have to be validated. Its validity was *sui juris*.⁸² The distinction between ordinary legislation and constitutional legislation had been the basis of judicial review as originally conceived in *Marbury v. Madison*.⁸³

In the general elections held in 1971 of the Lok Sabha, one of the items in the Congress Party's manifesto was that, if elected to office, it would make basic changes in the Constitution. Mrs. Gandhi's Congress won a landslide victory in those elections and her party secured more than two third of the seats in the Lok Sabha. This could clearly be considered a mandate for amending the Constitution. The government therefore introduced the Constitution (*Twenty-Fifth Amendment*) Act, (1971), the purpose of which was to restore to Parliament the unqualified power of constitutional amendment it had possessed until the decision of Court in *Golaknath*.⁸⁴ Parliament also passed the *Twenty-Fifth Amendment*, which further restricted the right to property, and the *Twenty-Sixth* (1971), which abolished the privy purses. These amendments along with the *Twenty-Fourth* were challenged in the Supreme Court. If, according to *Golaknath*, Parliament did not have the power to amend the Constitution so as to take away or abridge the fundamental rights, how could it empower itself to do that through a constitutional amendment?

This came up for hearing before the Supreme Court in *Kesavananda Bharati v. State of Kerala*.⁸⁵ A bench of thirteen judges sat to hear this case, two more than the number of judges who decided *Golaknath*. While arguing their cases on behalf of the State, contended that Parliament's power to amend the Constitution was unlimited. When the judges asked them to elaborate whether it could be used for changing India from democracy to a dictatorship or from a secular state to a theocratic state the answer had to be in the affirmative. Chief Justice Sikri summarized those arguments as follows:

"The respondents the Attorney General and the Advocate Generals who represented the Union of India, on the other hand, claim that Parliament can abrogate fundamental rights such as freedom of speech and expression, freedom to form associations or unions, and freedom of religion. They claim that democracy can even be replaced and one party rule established. Indeed short of total repeal of the Constitution, any form of Government with

82 P. K. Tripathi, 'Golaknath: A Critique' in Some Insights into Fundamental Rights, p. 1 (Tripathi, 1972).

83 *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803).

84 S. P. Sathe, 'Supreme Court, Parliament and Constitution', *Economic and Political Weekly* vol. VI, 34 and 35 (21, 28 August 1971); S. P. Aiyar and S.V. Raju (cd.), *Fundamental Rights and the Citizen*, pp. 126-38 (Academic Books Ltd., 1972).

85 *Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461.

no freedom to the citizen can be set up by Parliament by exercising its power under art 368."

That doctrine came to be tested when the Constitution *Thirty-ninth Amendment Act (1975)* was challenged in the Supreme Court on the ground of its alleged violation of the basic structure of the Constitution. After the overall perusal the judicial review of the judicial acts continues till present time as well. The best of this is the *Triple talaq verdict*⁸⁶, *Right to privacy*⁸⁷ etc.

9. Concluding Observations:

After throwing a glance on the above discussion it can be safely concluded that the main purpose of judicial review is to ensure that the laws enacted by the legislature conform to the rule of law. The form of judicial review varies in different parts of the world based upon its history and legal system.

It is not right to assume that judicial review of a legislature confers the judiciary with an upper hand over the other two organs of the government. Review of fundamental rights has been accepted as a legitimate practice in a democratic country either in the form of a necessary evil or as a just requirement.

Doctrine of Judicial Review is very dynamic concept in a present scenario. In various countries Judiciary is acting as a guardian of the constitution by help of the doctrine of Judicial Review. It enables the Court to maintain harmony in the State. Judicial Review is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part.

To perform this task, Constitutional Courts have been regarded as the most appropriate branch of government, and thus they currently possess legal monopoly to declare what the constitution must be. *So, Judiciary should not be so eager to declare the law created by the legislature as unconstitutional because the law made by the legislature is the will of the people so it should be set aside very cautiously.*

There are following suggestion regarding the judicial review of the legislative acts:-

86 ShayaraBano v. Union of India and others, Writ petition (Civil) no.118 of 2016, decided on 22 August 2017.

87 Justice K.S. Puttaswamy (Retd.) v. Union of India and Others, Writ petition (Civil) no.494 of 2012, decided on 24th August 2017.

There is always a *strong presumption in favour of the legislative Act* and *Burden lies very heavily on those challenging* to establish beyond doubt that the Act done by legislature as unconstitutional.

A statute cannot be challenged on the grounds of public-policy. The policy behind the statute is not subject to review by the court.

The Act of sovereign legislature are not liable to be annulled by judicial decree given, so long as they do not contravene the guarantees given by the Constitution, if it is *intra vires* to Constitution it should not be declared void.

If the Act of the legislature results into infringement of fundamental rights, there will be no justification for saying that similar Act was done in the power of parliament and the Act will be declared unconstitutional.

As regard interpretation of a validity of Act or an amending Act, the courts have to follow the principle of construction as applicable to the interpretation of the original Act. Where two *Constructions* are possible, the court has to adopt that construction which holds the validity of Law. If court has to declare the Act unconstitutional, they should try to make the effect least painful.



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CLINICAL LEGAL EDUCATION: STUDY OF LAW SCHOOL BASED LEGAL AID CLINICS

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ABSTRACT

Clinical legal education is essential for preparing law students to practice law effectively. The most important development in Clinical Legal Education is establishment of Legal Aid Clinics in law schools. Legal Aid is a Constitutional right of a person who is unable to engage a lawyer because of reasons such as poverty, indigence, etc.

The primary aim of clinical legal education is to ensure that students get experiential exposure to diverse situations and the secondary aim is to ensure that the objectives of social justice are met by providing assistance to those who faced real legal problems in diverse field. The rudimental challenge faced by Legal Aid Clinics is the lack of resources. Lack of resources includes both; human and material resources. Law School Clinics carry out community awareness via legal literacy programs. This will further enhance the link between the society and clinics. If this method would be properly implemented, it will resolve the tremendous backlog of cases pending in courts.

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INTRODUCTION

CLINICAL Legal Education emerged in the early 1960's in United States of America. This was introduced for the purpose of promoting valuable skill-based instruction to students to provide legal services to people who could not afford it otherwise.¹ Clinical legal education is essential for preparing law students to practice law effectively. Indian law schools, however, do not generally offer robust clinical legal education programs.² In the United States, "clinics" are small law school classes taught by full-time faculty where students learn lawyering skills by undertaking legal services, typically on behalf of poor or marginalized people and communities.³

Even though most Indian law schools do not offer clinics defined in this way, many have "legal aid cells" where students, largely without faculty supervision, perform legal services for poor communities.⁴ Clinics are important because they prepare students to practice law by teaching them valuable skills such as fact-finding, investigation, interviewing, and legal research and writing.

CLINICAL LEGAL EDUCATION IN INDIA

Clinical legal education is essential in preparing law students to practice law effectively. It involves teaching students to be lawyers by learning through experience or "*learning by doing*." Indian law schools in the earlier days were not having formal clinical legal education programs. Many schools still do not have "legal aid cells" that are directly supervising or formally incorporated into the curriculum and are often voluntary student-run organizations.⁵ There have been waves of national level reform efforts in India concentrating on the development of a skill-based curriculum.⁶ For

1. Sital Kalantry, Promoting Clinical Legal Education and Democracy in India, 8 N.U.J.S L. REV. 1 (2015).
2. Kuljit Kaur, "Legal Education and Social Transformation" 4 [available at: <http://alsonline.amity.edu/Docs/alwjlegkk.pdf>] [viewed on: 28/07/2019].
3. Frank R. Strong, "The Pedagogic Training of a Law Faculty", 25 JOURNAL OF LEGAL EDUCATION 230-31 (1973).
4. D.W. Tushaus, *India Legal Aid Clinics: Creating Service-Learning Research Projects to Study Social Justice*, 2 AJLE 101 (2015).
5. A.S. Anand, H.L. (1998) Sarin Memorial Lecture: Legal Education in India – Past, Present and Future, 3 SCC (JOUR) 1, 2.
6. Frank Bloch & M.R.K. Prasad, *Institutionalizing a Social Justice Mission for Clinical Legal Education: Cross-National Currents from India and the United States*, 13 Clinical L. Rev. 165 (2006).

example, the Bar Council of India issued a directive in 1997 that requires law schools to include certain classes focused on practical training.⁷

The most important development in Clinical Legal Education is establishment of Legal Aid Clinics in law schools. Legal aid is a Constitutional right of every accused person who is unable to engage a lawyer and secure legal services because of reasons such as poverty, indigence. State is under a constitutional mandate to provide a lawyer to such accused person if the needs of justice so require.⁸ And state is under constitutional mandate to provide free legal aid to accused person;⁹ the same direction is given to governments in cases of under-trials also.¹⁰

LAW SCHOOL BASED LEGAL AID CLINICS

The law schools play a very important role in the provision of legal aid but it has been an aspect which has largely been ignored in academic discourse. Lesser still has been written about their role in alternative dispute resolution in India. It is due to the lack of recognition of the role that Clinical Legal Aid plays that the problems of the institutions continue to plague legal aid in India.

Role of Law Schools in Training Lawyers

The role of law schools in training lawyers is a concept which is relatively new. Law schools traditionally taught the theory of the law while the job of training of legal professionals was left to the Bar in the form of apprenticeships.¹¹ This changed to some extent with the introduction of the case-book method in the 1900s at Harvard. However, this was found to be insufficient and a need was felt to counter-balance this with practical experience.¹²

7. Bar Council of India, Circular No. 4/1997 (Issued on October 21, 1997).

8. *Hussainara Khatoon Vs. Home Secretary State of Bihar*, (1980)1 S.C.C. 108.

9. *Khatri Vs. State of Bihar*, (1981) 1 SCC 627.

10. *Kadra Pahadiya (I) Vs. State of Bihar*, AIR 1981 SC 939.

11. J. Dubin, *Clinical Education for this Millennium: The Third Wave*, CLINICAL L. REVIEW, 1 (2008).

12. "The clinic thus becomes a 'case book' - not, however, of dead letters descriptive of past controversies, but always of living issues in the throbbing life of the day, the life the student is now living.", William Rowe, quoted in Barry, Margaret *et al.* (2000), p. 7.

The solution was found in the form of “legal dispensaries” or clinics, inspired by the model of free medical aid in medical colleges. Here, poor persons could come for free consultation, help and advice.¹³ While most of the work of these clinics focused on poverty-based issues, the bulk of it was in the nature of counseling which was not court-centric.

Pragmatic shift and evolution of Legal Education

With the increasing demand for “relevance in education” legal education attention was shifted to social issues. Over the years, due to the specializations in various areas of law, there has been a diversification in the areas in which these clinics operate and range from areas as diverse as taxation and intellectual property to a specialized branch called “street legal aid” wherein day-to-day issues as well as poverty-centric issues are addressed. These clinics exist in many different forms, depending on local social and political circumstances and sometimes the available sources of funding.¹⁴ In India, the Bar Council, Law Commission, and other important government and non-governmental agencies have recognized the importance of clinical legal education.¹⁵

Objectives of Law School based Legal Aid Clinic

The objective of clinical legal education has been two-fold. Their primary aim is to ensure that students get experiential exposure to diverse situations and the secondary aim is to ensure that the objectives of social justice are met by providing assistance to those who faced real legal problems in diverse field.¹⁶ The origin of legal education in India, however, is quite different. Legal education in India followed the general colonial model of producing clerks, not managers. Its primary goal was to support the existing financial interests of England, certainly not to reform the local legal profession or promote some sense of social justice.¹⁷

13. Dubin, Clinical Education for this Millennium: The Third Wave, CLINICAL L. REVIEW, 1 (2008).
14. F Bloch, Access to Justice and the Global Clinical Movement, 28 WASH U J L & POL'Y, 111(2008).
15. Kuljit Kaur, “Legal Education and Social Transformation” available at: <http://alsonline.amity.edu/Docs/alwjlegkk.pdf> (last cited on 12.03.2013).
16. Frank Bloch & M.R.K. Prasad, Institutionalizing a Social Justice Mission for Clinical Legal Education: Cross-National Currents from India and the United States, 13 Clinical L. Rev. 165 (2006).
17. *Ibid*, 172.

CHALLENGES FACED BY LEGAL AID CLINICS IN INDIA

The rudimental challenge faced by Legal Aid Clinics is the lack of resources. Lack of resources includes both; human and material resources. Lack of human resources include insufficient number of work efficient faculty, lack of expertise, lack of guidance, support staff, indifference of the judiciary and lack of public support and awareness.¹⁸ Problems related to material resources includes financial resources, scarcity of computers and communication infrastructure, minimal pay to the part time faculty, practical difficulties such as conveyance for the students to the rural areas, lack of Training Manuals and study material on Clinical Legal Education.¹⁹

In addition to these problems, Clinics also face problems like mass legal education, low involvement of other faculty in Clinical programs, part time students, supervision and evaluation of Clinical programs, language and cultural differences. Activities of the Legal Aid Clinics are purely based on the needs of the local community and the resources that are at the disposal of the Clinic have disparities in design, approach, evaluation and assessment.

There has been a link between social justice and clinical legal education in India and the United States since the late 1960s and early 1970s, when modern clinical legal education was first coming into its own and law schools in both countries introduced the new clinical teaching methodology through the establishment of legal aid clinics.²⁰ Clinical education has always had a broader goal – to teach law students about what lawyers do and to understand lawyers' professional role in the legal system – but it carried out that goal in its early years almost exclusively in the context of having students provide various forms of legal aid services.²¹

CONCLUSION AND SOLUTIONS

It is our claim therefore, that there needs to be a serious rethinking about clinical legal aid as it has for the most part failed capture the essence of the dynamism in the field of legal education which was sought to be brought about by setting up of law schools across the country. Therefore, the conflation which exists between Clinical Legal Aid and State-sponsored

18. Legal Education in India: Problems and Perspective, 19 J.I.L.I. 337, 337-48 (1977).
19. Mohammad Ghouse, Legal Education in India: Problems and Perspective, 19 J.I.L.I. 337, 337-48 (1977).
20. N. R. Madhava Menon (1998), "Clinical Legal Education", Chapter 2, Pg. 25, Eastern Book Company Lucknow.
21. Frank S. Bloch & Iqbalshar, *Legal Aid, Public Service and Clinical Legal Education: Future Directions From India and the United States*, 12 MICH. J. INT'L L. 96 (1990).

legal aid must be resolved thereby setting to rest the problems of the institution because while State-sponsored legal aid is statute-based and therefore heavily bureaucratic, Clinical Legal Aid due to the lack of regulation offers much more flexibility which goes unutilized.

Legal aid in all courts including tribunals

There should be legal aid in all the court whether it is civil or criminal including different categories of Administrative Tribunals, tribunals dealing with industrial and allied matters, labor Courts and industrial tribunals constituted under the Industrial Disputes Act, 1947, etc.

For this reform to come in action there needs to be change in the law. Under the Advocates Act, 1961 except otherwise provided, only a person who is enrolled as an advocate can practice in court. This act does give discretion to courts to permit any person who is not enrolled as an advocate to appear before the court and make his submissions. Justice Krishna Iyer in his Report, *Processed Justice to the people: Report of the expert committee on the Legal Aid 1973*, also suggested an amendment to the Advocates Act in this regard to allow for law professors and students representative of indigent clients, clients who could not afford to pay a private attorney any way.²² This will help to reduce the backlogs of cases pending in courts.

Re-establishing Legal Aid Clinics.

The most basic and common activity performed by clinics is community awareness. Law School Clinics carry out community awareness via legal literacy programs. This will further enhance the link between the society and clinics. Implementing these techniques will help in spreading the awareness amongst the community of its right this would also inculcate in the clinics and its participants a sense of responsibility, which they have towards others. An effective collaboration with NGOs, government departments and authorities could be of immense importance for Indian clinics to function effortlessly. Unfortunately most clinics lack in this area. Establishing a mediation center at legal aid clinics is another positive reform that could be undertaken. With the help of DALSA retired judges of District Court and High Court can be contacted by clinics. If this method would be properly implemented it will resolve the tremendous backlog of cases pending in courts.

* * *

22. V.R. Krishna Iyer, *The Dynamics of Access to Justice*, The Hindu, 29 May 2007. Available at <http://www.thehindu.com/todayspaper/tp-opinion/the-dynamics-of-access-to-justice/article1848798.ece>.



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EXTENDING FAIR AND EQUITABLE BENEFIT AGAINST INDIAN ENTITIES: JUDICIAL ANTIDOTE TO LEGISLATIVE MALADY

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Farheen Ahmad**

Anmolam***

ABSTRACT

The Uttarakhand High Court has paved a new way for the protection of the rights of local and indigenous communities through its judgement in the case of Divya Pharmacy Vs. Union of India decided in December, 2018. The Court has provided a fresh perspective on the right of benefit sharing for access to traditional knowledge in relation to biological resources by putting the Indian entity on the same pedestal as a foreign entity. It reasoned by acknowledging the purpose of the Biological Diversity Act of India and decided that an Act which protects the indigenous communities against a foreign entity could not have the intention to not protect them against an Indian entity. The comment focuses on the derivation of purposive interpretation utilized by the Court in furthering the human rights object of the legislation. It further examines the approach of the High Court in implementing international law vis-à-vis municipal law. It finally critiques the drafting of the law and concludes that a socially and economically beneficial

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legislation ought to have clarity in order to exclude it from succumbing to the mercy of the judiciary.

The present dispute in the case of *Divya Pharmacy Vs. Union of India and Others*¹ between the petitioner, 'Divya Pharmacy' (business undertaking of the Divya Yog Trust) and respondent 'Uttarakhand Biodiversity Board' pertained to the demand made by the latter under the Fair and Equitable Benefit Sharing provision of the Biological Diversity Act, 2002. Divya Pharmacy admittedly made use of biological resources for the manufacture of *ayurvedic* and nutraceutical medicines. The Petitioner claimed that the Respondent is a State Board and does not have the power or jurisdiction to command compensation in any manner for Fair and Equitable Benefit Sharing (FEBS).

THE CONCEPT OF BENEFIT SHARING

Benefit-sharing means that countries, farmers, and indigenous communities that grant access to their plant genetic resources and/or traditional knowledge should share in the benefits that user derive from these resources.² Access and Benefit Sharing (ABS) became one of the objectives of the United Nations Convention on Biological Diversity, 1992 as a consequence of the opposing interests of developing and developed countries wherein the developing countries opposed a focus on mere biological conservation.³ Thus, the concept of ABS was born to take into account the need to share the costs as well as the benefits of biodiversity conservation between developed and developing countries and to find ways and means of supporting practices and innovations by indigenous and local communities.⁴ Before the CBD came into being, access to biological resources, including traditional knowledge of genetic resources, was freely available and would be commercialized and monopolized without the equitable granting of benefit to the source country or the knowledge holder.⁵ Therefore, ABS is an effort to balance the interest of the user vis-à-vis the knowledge holder or resource provider. The CBD being an international instrument does not mean that the sharing of resources happens only at the international level, in other words, a state may be a

1. *Divya Pharmacy Vs. Union of India*(2018) SCC Online Utt. 1035.
2. Bram De Jonge, "What is Fair and Equitable Benefit-sharing?", 24:2 *Journal of Agricultural and Environmental Ethics* 127 (2011).
3. Greiber, Moreno, et al., "An Explanatory Guide to the Nagoya Protocol on Access and Benefit-sharing", IUCN, 4 (2011).
4. *Id.* at 5.
5. About the Nagoya Protocol, available at <https://www.cbd.int/abs/about/>.

user or a resource provider. Then in 2010, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya Protocol) was adopted in Nagoya, Japan. This Protocol was the legal instrument for the effective implementation of the objective of Fair and Equitable Benefit Sharing.⁶ It goes one step ahead to impose obligations such as the requirement of Prior Informed Consent taken by the user from the resource provider. It also requires states to adopt guidelines on Mutually Agreed Terms to act as a framework.

THE RELEVANT LEGISLATION IN INDIA

The Biological Diversity Act, 2002 (BDA), which was enacted by the Indian Parliament in pursuance of the CBD of which India is a signatory, also has three basic objectives: conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits (FEBS) arising out of the use of biological resources. Although the three objectives are inter-related, the present case is directly concerned with the third objective of FEBS. Under the BDA, there are two authorities created for carrying out its aims and objectives- the National Biodiversity Authority (i.e. NBA) and the State Biodiversity Boards (SBB). The NBA has the authority to regulate access to biological diversity. A foreign entity necessarily needs the approval of NBA to obtain any biological resource or knowledge.⁷ The SBB on the other hand gives advice to the State Government, grants approval and performs such other functions as may be necessary to carry out the provisions of the Act.⁸ Any Indian entity also needs to provide prior intimation to the SBB before undertaking any activity and SBB has the authority to restrict such activities if it is of the view that these activities are contrary to the objectives of conservation and sustainable use of biodiversity or equitable sharing of benefits.⁹

THE JUDGEMENT

The issue worth consideration in the immediate case was – Whether the State Biodiversity Board has got power to impose “Fair and Equitable Benefit Sharing (FEBS)” in respect of persons who have got no foreign element attached to them, and Whether the National Biodiversity Authority (i.e. NBA) has got powers to delegate to SBB power to impose FEBS to persons who are covered by Section 7 of the Act.

6. *Ibid.*

7. The Biological Diversity Act, 2002, Section 3.

8. The Biological Diversity Act, 2002, Section 23.

9. The Biological Diversity Act, 2002, Section 24.

The Court found that the NBA has the authority to frame Regulations under Section 64 and is empowered under Section 18 of BDA to issue guidelines for fair and equitable benefit sharing. One of the processes is "payment of monetary compensation and other non-monetary benefits of the benefit claimers". The NBA in 2014 also issued *Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations* which provide the procedure for access to biological resources and mode of benefit sharing. The Court opined that Benefit Sharing has not been precisely defined in the Act and the NBA has the authority to determine it.¹⁰ The Court also stated that regulating an activity in form of demand of a fee is an accepted practice recognized in law.¹¹ The 2014 Regulations provide that for access to biological resources a person needs to apply either to the NBA or the SBB which would then enter into benefit sharing agreement with the applicant which shall be deemed as grant of approval. Therefore, in the Court's view, if the SBB as a regulator, demands a fee in the form of FEBS from the petitioner when the petitioner is admittedly using the biological resources for commercial purposes, it cannot be said that it has no powers to do so.

KEY HIGHLIGHTS

There are two important facets that must be emphasized. The first is the interpretative exercise adopted by the Court. The court relies upon a purposive interpretation rather than a literal interpretation in this case. The petitioner being an Indian entity claimed that FEBS cannot be imposed upon it. An Indian entity does not require NBA approval and a contribution under FEBS only comes from those who require a prior approval from NBA. There is no provision in the Act where a contribution in the form of "fee/monetary compensation", or a contribution in any manner is required to be given by an Indian entity. Instead of looking into the ordinary meaning of the provisions, the Court relied upon previous decisions to underscore the importance of purposive interpretation. Stressing upon the need to look at the context, it also clarified that any difference in meaning which departs from the ordinary meaning must be attributed to the text for a given reason.

The second focus of the Court was to gather a reason for using purposive interpretation by looking into the significance of FEBS. It delved into the historical movement at the international level for the protection and conservation of biodiversity and interpreted the provisions from the

10. *Divya Pharmacy*, Supra note 1, para 95 to 99.

11. *Id.* at para 104.

prism of the interest of indigenous people. The judgement can be seen as an affirmation for the linkage between human rights of indigenous people and environment.

When India became a signatory to the Rio Convention it was committed to bring an appropriate legislation in order to give effect to the treaty. Thus, the Indian Parliament enacted the Biological Diversity Act in 2002.

This brings us to the impact of international law over municipal law. Reiterating Article 51 of the Constitution which requires the State to foster respect for international law and treaty obligations, the Court referred to different cases in which international obligations were given effect to. For instance, the *TN Godavarman Case* made use of *Vishaka Vs. State of Rajasthan* wherein it was held that in the absence of any inconsistency between the domestic law and the international conventions, the rule of judicial construction is that regard must be had to international conventions and norms even in construing the domestic law.¹²

Moreover, in *Apparel Export Promotion Council Vs. A.K. Chopra* it was held that "court and counsel must never forget the core principle embodied in the international conventions and instruments and as far as possible, give effect to the principles contained in those international instruments. The courts are under an obligation to give due regard to international conventions and norms for construing domestic laws, more so, when there is no inconsistency between them and there is a void in domestic law."¹³ More recently, in *Commr. Of Customs Vs. G.M. Exports*, the court clarified that in "a situation where India is a signatory nation to an international treaty, and a statute is made in furtherance of such treaty, a purposive rather than a narrow literal construction of such statute is preferred. The interpretation of such a statute should be construed on broad principles of general acceptance rather than earlier domestic precedents, being intended to carry out treaty obligations, and not to be inconsistent with them."¹⁴

On this basis, the Court in the immediate case concluded that the real beneficiaries of the Biodiversity Convention and the Nagoya Protocol, 2010 are the "local and indigenous communities". It also concluded that the Regulations of 2014 given by the NBA is a consequence of the Nagoya Protocol. Therefore, the existing ambiguities in the national statute have to

12. *T.N. Godavarman Vs. Union of India* (2002) 10 SCC 606.

13. *Apparel Export Promotion Council Vs. A.K. Chopra* (1999) 1 SCC 759.

14. *Commr. Of Customs Vs. G.M. Exports* (2016) 1 SCC 91.

be seen in the light of the International treaties i.e. Rio and Nagoya and a purposive rather than a narrow or literal interpretation has to be made.¹⁵

ASSESSING THE JUDGEMENT

The Court has discernibly given a progressive judgment that would go miles into protecting the benefits that accrue to traditional communities. It not only distinguishes between foreign entities and traditional communities whose traditional knowledge is exploited and commercially utilized, but also between national entities and traditional communities. In this sense, this judgement goes beyond the general understanding that prevails and puts every such foreign corporation and Indian corporation on the same footing. One of the most essential questions that form the crux of this dispute was the question of Divya Pharmacy being an Indian or *Swadeshi* company and thus not being bound by the obligation to pay compensation. When the Court decided to assess the concept of FEBS it concluded that the "local and indigenous communities" are the focus of both the Biodiversity Convention and the Nagoya Protocol. The laws make no distinction between a foreign entity and an Indian entity, as regards their obligation towards local and indigenous communities. The Court also explains the reason for protecting the interest of these local and indigenous communities. It vets that traditional knowledge is passed on through generations and the exact know-how behind the existence and use of biological resources qualifies as a property right under the Biological Diversity Act. Thus, if the Indian government has passed a law to protect these communities against foreign entities, it could not be the intention of the government to not protect the same community against Indian entities. It is important to observe that while biological resources are definitely the property of a nation where they are geographically located, but these are also the property of the indigenous and local communities who have conserved it through centuries.

The judgement can be viewed as underscoring the impact of FEBS on the human rights of indigenous peoples. The concept of FEBS can be traced back to the first universal human rights covenant, i.e., Universal Declaration of Human Rights 1946 wherein "the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits" was recognized.¹⁶ Later, in 2007, the United Nations Declaration on the Rights of Indigenous Peoples was

15. *Supra* Note 1at Para 72.

16. UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, Article 27(1).

adopted which recognized the "indigenous peoples right to a just, fair and equitable compensation for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent."¹⁷ The recommendations of the UN Permanent Forum on Indigenous Issues bore fruit when the terminology "indigenous peoples and local communities" was adopted by the CBD Conference of the Parties XII/12 in 2014.¹⁸ The Court's invocation of a similar language of "local and indigenous community of Uttarakhand" as the ultimate knowledge preserver of the environment highlights the important link between the human rights of indigenous peoples and the environment.

This judgement is an indication of the issues that would come forth in conservation and utilization of biological diversity. The drafting of the legislation in dispute appears ambiguous in some respect. Notwithstanding the Court's attempt to fill the gap by application of purposive interpretation of law in a socially and economically beneficial legislation, the law ought to have more clarity. It becomes imperative in situations such as the present one where the protection of the traditional property rights of indigenous persons needs to be addressed. This is pertinent as the most important stakeholders are greatly marginalized communities who have inadequate exposure to the legal mechanism. Furthermore, the persons who are to enter into contract be it foreign or Indian corporations, are comparatively powerful entities in terms of material resources, in general. It therefore becomes imperative to enact unambiguous laws which are intelligible to the general populace, free from contradictions and promulgated adequately in even the remotest of places. As a matter of concern, the Act and its supporting Regulations fail to explain the exact modalities of compensation and its distribution among the affected people. Unless, this final step is accomplished, the decision would be half-baked justice.

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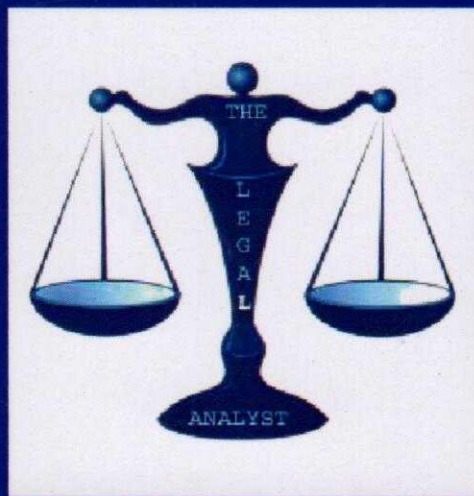
17. UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007, A/RES/61/295, Article 28.

18. Elisa Morgera, "Fair and Equitable Benefit-Sharing at the Cross-Roads of the Human Right to Science and International Biodiversity Law", 4*Laws* (2015) 803, 808.

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RESTORATIVE JUSTICE SYSTEM GUARANTEED UNDER RIGHT TO LIFE

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Abstract: Restorative justice system is an approach to Justice by involving the victim, offenders and the community. Restorative justice brings the aggrieved party and those who are responsible for the aggravation into communication, enabling everyone affected by a particular incident to play a part in restoring the harm and finding a positive way forward. It is a new technique of responding to crime and harm based on ancient practices. The present paper delves into the doctrines and fundamentals of 'restorative justice' to introduce the same in criminal justice administration in India. This paper also discusses whether Death Penalty is constitutionally valid or not? Whether Section 354(3) of Criminal Procedure Code is violative of Article 21, which is the basic structure of the Constitution and Article 6(1) of the International Covenant on Civil and Political Rights as adopted by the General Assembly of the United Nations and reiterated in the Stockholm Declaration. It is further followed by the abolishment of capital punishment or death penalty in India by discussing some of the landmark cases such as *Bachan Singh v. State of Punjab*, 1980. More than 160 Members States of the United Nations with a variety of legal systems, traditions, cultures and religious backgrounds, have either abolished the death penalty or do not practice it.

Paper also deals with the Bentham's penal theory and concludes by discussing about the necessity of implementation of restorative criminal justice system for the dynamic society. This is important for preserving socio-cultural and socio-political factors and right-to-life of the offenders which is inspired by liberalization and can effectively help in the administration of criminal justice. This can also decrease red-tapism and can solve various problems like overcrowding in prison, inordinate delay in criminal trials, victim's dissatisfaction which is prevalent in existing traditional criminal justice adjudication.

Keywords: Death Penalty, Right to Life, Restorative Justice.

Introduction:

Dissatisfaction and frustration with the formal justice system and resurging interest in preserving and strengthening customary law have called for alternatives responses to crime and social disorder.¹ Restorative Justice Theory

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¹ Handbook on restorative Justice Programs, United Nations Publication, 2006, Available at:

https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programs.pdf

and programs have emerged over the past 35 years as an increasingly influential world-wide alternative to criminal justice practice.²

Death penalty is a very controversial and multifaceted subject.³ There is simply no use for it in the 21st Century, from both a monetary and humane point of view.⁴ Most people express various doubts about the death penalty when presented with some of the problems prevalent in the society. The perception of racial injustice within the criminal justice system, symbolized by the image of Rodney King in Los Angeles, is reinforced by the fact that Blacks are represented on death row three and half times their proportion as a whole and defendants who kill a white person in America are many times more likely to get the death penalty than those who kill black person.⁵ Almost three-fourths of Black believes that a black person is more likely than a white person to receive the death penalty for the same crime.⁶ The strongest doubts, however, raised is that innocent people can be executed.⁷ Many innocent lives might have been sacrificed and the same is undoubtedly true of some who are on death row today.⁸

Death penalty and is execution should not become a matter of uncertainty.⁹ In recent years, the Supreme Court has also admitted that the question of death penalty is not free from the subjective element and is sometimes unduly influenced by public opinion. Studies of the cost of death penalty show that death penalty is much more expensive than the alternative of life in prison.¹⁰ With all forms of government experiencing a need for streamlining expensive programs, the death penalty is ripe for a cost and benefit review.¹¹ As the number of death row inmates across the country continues to reach record highs, and as the pace of executions accelerates, the probability of innocent people receiving the death penalty increases.¹² Thus, restorative justice is necessary because it aims at encouraging offenders to take responsibility for the consequences-of their actions; express repentance and repair the harm they have done.¹³ It also emphasizes the reintegration of offenders into communities

² Available at <http://restorativejustice.org/restorative-justice/about-restorative-justice/>

³ Available at <http://www.cuadp.org/>

⁴ *Id.*

⁵ See, e.g., Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities, U.S. General Accounting Office, at 5 (1990)

⁶ A. Gallup & F. Newport, Death Penalty Support Remains Strong, But Most Feel Unfairly Applied, The Gallup Poll News Service, June 26, 1991, at 4.

⁷ Sentencing for Life: Americans Embrace Alternatives to the Death Penalty, Richard C. Dieter, Esq., 1993 Available at <http://www.deathpenaltyinfo.org/sentencing-life-americans-embrace-alternatives-death-penalty>

⁸ *Id.*

⁹ Shankar Kisanrao Khade v. State of Maharashtra (2013) 5 SCC 546

¹⁰ See, e.g., Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty, The Death Penalty Information Center (1992).

¹¹ See, e.g., Tabak & Lane, The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty, 23 Loyola of Los Angeles Law Review 59 (1989).

¹² *Supra*, note 7.

¹³ Haveripeth, Prakash D., Restorative Justice and Victims: Right to Compensation, Int.

rather than their control through strategies of punishment and exclusion.¹⁴ It is imperative to study that a deeper study be conducted to highlight whether the process of awarding capital punishment is fraught with subjectivity and caprice.¹⁵

Restorative Justice System:

"Restorative justice is an approach to justice that focuses on repairing the harm caused by crime while holding the offender responsible for his or her actions, by providing an opportunity for the parties directly affected by a crime – victim(s), offender and community – to identify and address their needs in the aftermath of a crime, and seek a resolution that affords healing, reparation and reintegration, and prevents future harm."¹⁶ Restorative justice seeks to heal and put right the wrongs.¹⁷ Restorative justice emphasizes the importance of role of crime victims and community members through more active involvement in the justice process, holding offenders directly accountable to the people and communities they have violated, restoring the emotional and material losses of victims, and providing a range of opportunities for dialogue, negotiation, and problem solving, whenever possible, which can lead to a greater sense of community safety, social harmony, and peace for all involved.¹⁸

Background: A Brief History of Restorative Justice

In many countries, the idea of community involvement enjoys a large consensus.¹⁹ These include "communitarian justice", "making amends", "positive justice", "relational justice", "reparative justice", "community justice",

Res. J. Social Sci., Vol. 2(2), February (2013) P. 44, Available at <http://www.isca.in/IJSS/Archive/v2/i2/7.ISCA-IRJSS-2012-18.pdf>

¹⁴ *Id.*

¹⁵ Consultation Paper on Capital Punishment, Law Commission of India, Available at <https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwiOpMjdvIzSAhVKqY8KHRm1BeQQFggiMAE&url=http%3A%2F%2Fwww.lawcommissionofindia.nic.in%2Fviews%2Fconsultation%2520papercapital%2520punishment.doc&usq=AFQjCNHAixNPsU9kvf94nlw-WzrFkVUGg&bvm=bv.146786187,d.c2l>

¹⁶ Bonta, J., Jesseman, R., Rugge, T., and R. Cormier, "Restorative Justice and Recidivism: Promises Made, Promises Kept?", in Sullivan, D. and L. Tifft (Eds.), *Handbook of Restorative Justice: A Global Perspective*. London: Taylor and Routledge, (2006).

¹⁷ Zehr, H. "The Little Book of Restorative Justice" Good Books Publication, , Intercourse, PA, 2002, p.67 Available at:

<https://charterforcompassion.org/images/menus/RestorativeJustice/Restorative-Justice-Book-Zehr.pdf>

¹⁸ Bazemore, G. and M. Umbreit, *Conferences, Circles, Boards, and Mediations: Restorative Justice and Citizen Involvement in the Response to Youth Crime*. St. Paul, MN: Balance and Restorative Justice Project (1998) Available at:

https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf

¹⁹ Faget, J., "Mediation, Criminal Justice and Community Involvement, A European Perspective" in *The European Forum for Victim-Offender Mediation and Restorative Justice* (ed.), *Victim-Offender Mediation in Europe—Making Restorative Justice Work*. Leuven: Leuven University Press, (2000) p. 39.

and "restorative justice", among others.²⁰ Any discussion on restorative justice refers to Alternative Dispute Resolution (ADR) which helps to achieve its objectives. ADR includes arbitration, mediation, early neutral evaluation and conciliation which have been institutionalized by many countries of the world to overcome arrears in the courts, rising costs of litigation and time delays continue to plague litigants.²¹ Restorative justice can inform every aspect of the criminal justice process and, when appropriate, build upon traditional practices.²²

Restorative justice programs can be used to reduce the burden on the criminal justice system, to divert cases out of the system and to provide the system with a range of constructive sanctions.²³ The priority of the criminal justice system should be resolving conflict between the offender and the victim therefore; the aim should be to meet to convince the offender his responsibility of the crime.²⁴ What required is a paradigm-shift from punitive justice to restorative justice, which will meet to the need for restitution or reparation of harm to the victims and prevail over demand for punishment.²⁵

International Perspective on Restorative Justice System and Right-To-Life

In only twenty-five years, restorative justice has become a worldwide criminal justice reform dynamic. Well over 80 countries use some form of restorative practice and many of them are at experimental and localized stage which plays a significant role in the national response to crime.²⁶ The *Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century* (2000) encouraged the "development of restorative justice policies, procedures and programmes that are respectful of the rights, needs and interests of victims, offenders, communities and all other parties".²⁷ In August

²⁰ Miers, D., "An International Review of Restorative Justice". Crime Reduction Research Series Paper 10. London (U.K.): Home Office, (2001), p. 88. Available at: <https://restorativejustice.org.uk/sites/default/files/resources/files/An%20International%20Review%20of%20Restorative%20Justice.pdf>

²¹ Bajpai, G S, *Victim in the Criminal Justice Process: Perspectives on Police and Judiciary*, New Delhi: Uppal Publications, 1997.

Available at:

<http://www.forensic.to/webhome/drgsbajpai/towards%20restorative%20justice.pdf>

²² Supra Note 1

²³ *Id.*

²⁴ Supra, note 7.

²⁵ *Id.*

²⁶ In 2001, the Centre for Justice and Reconciliation at Prison Fellowship International identified 80 countries in which some form of restorative justice intervention was being used. (Van Ness, 2001, at 13). The estimated increase by 20 nations is based on two factors: the growing number of countries in which restorative approaches are being tried and the growing literature on the subject which is bringing existing restorative practices to the attention of observers.

²⁷ *The Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century*, 10th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Vienna, 10-17 April 2000, A/CONF. 184/4/Rev. 3, para. 29.

2002, the United Nations Economic and Social Council adopted a resolution calling upon Member States that are implementing restorative justice programmes to draw on a set of *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* developed by an Expert Group.²⁸ In 2005, the declaration of Eleventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (2005) urged Member States to recognize the importance of further developing restorative justice, policies, procedures and programmes that include alternatives to prosecution.²⁹

How does it work? Better Theory For Better Practice

"Everyone has the right to life, liberty and security of person."³⁰ The right to life is to be protected by law.³¹ The death penalty is a denial of the most basic human rights; it violates one of the most fundamental principles under widely accepted human rights law- that states must recognize the right to life.³² Imposition of Death Penalty breaches fundamental enshrined human rights norms.³³ The state should not arbitrarily deprive any person of their lives.³⁴ In fact, more than 160 Member States of the United Nations with a variety of legal systems, traditions, cultures and religious backgrounds, have either abolished the death penalty or do not practice it.³⁵ UN Secretary-General Ban Ki-Moon remarks that "the death penalty has no place in the 21st century" and further declared, calling on all states to take concrete steps towards abolishing this form of punishment.³⁶ The office of the High Commissioner for Human Rights advocates for the universal abolition of the death penalty and argues this position for other reasons, including the fundamental nature of the Right-to-life; the unacceptable risk of executing innocent people; and the absence of proof that the death penalty serves as deterrent to crime.³⁷

The drafters of the International Covenant on Civil and Political rights (ICCPR) had already begun moves for its abolition in International law.³⁸ In

²⁸ *The Bangkok Declaration—Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice*, 11th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Bangkok, 18-25 April 2005, para. 32.

²⁹ Note also that, in 2001, the European Union issued a framework decision stating that member states should promote mediation in criminal cases and bring into force their legal instruments by 2006. See. European Union Council Framework Decision of 15 of March 2001 on the Standing of Victims in Criminal Proceedings, Article 10.

³⁰ Article 3, UN Universal Declaration of Human Rights

³¹ Article 6, International Covenant on Civil and Political Rights

³² *The Death Penalty is a Human Rights Violation: An Examination of the Death Penalty in the U.S. from a Human Rights Perspective*, Available at <http://ccrjustice.org/sites/default/files/assets/files/CCR%20Death%20Penalty%20Factsheet.pdf>

³³ *Id.*

³⁴ *Supra*, note 31.

³⁵ Available at <http://www.ohchr.org/EN/Issues/DeathPenalty/Pages/DPIIndex.aspx>

³⁶ Available at <http://www.un.org/apps/news/story.asp?NewsID=48192#.WKAUkiN94dU>

³⁷ *Supra*, note 7.

³⁸ *Id.*

1989, 33 years after the adoption of Covenant itself, member states which became parties to the Protocol agreed not to execute anyone within their jurisdictions.³⁹ General Assembly urged the states to respect international standards that protect the rights of those facing the death penalty, to progressively restrict its use and reduce the number of offences which are punishable by death.⁴⁰

In 1984, the UN Economic and Social Council adopted safeguards guaranteeing protection of the rights of those facing the death penalty.⁴¹ It is to be noted that worldwide, over 140 countries have abolished death penalty and over 20 other countries though retentionists, have not executed capital sentences in ten years.⁴²

The expanding universe of compassionate criminology must so respond realistically to the new challenge of human rights and social justice to salvage, solace and restitute victims of crime and abuse of power by resorting to new methodologies of reparative, compensatory, preventive and other judicial remedies.⁴³ By taking into consideration the provisions of the International Covenant on Civil and Political rights, the Universal Declaration of Human Rights, the Convention on the rights of Child, Convention against torture and other cruel, inhuman and degrading treatment or punishment and other international conventions, it must be noted that the abolition of death penalty and the reduction of number of offences in statute books which notify capital punishment are stated to be a part of international customary law.⁴⁴

Public Opinion upon Restorative Justice System rather than Death Penalty

This line by Mahatma Gandhi is the thrust of the Reformatory theory of Punishment. Not looking to criminal as inhuman this theory puts forward the changing nature of the modern society where it presently looks into the fact that all other theories have failed to put forward any such stable theory, which would prevent the occurrence of further crime.⁴⁵

Reform in the deterrent sense implied that through being punished the offender recognized his guilt and wished to change. This theory aims at rehabilitating the offender to the norms of the society i.e., into law-abiding

³⁹ A/RES/44/128, Second Optional Protocol to the International Covenant on Civil and Political Rights, 1989 Available at

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/2ndOPCCPR.aspx>

⁴⁰ A/RES/69/186, Moratorium on the use of the death penalty, 2014

Available at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/69/186

⁴¹ Supra, note 7.

⁴² As per death penalty related statistics

Available at <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>

⁴³ Supra, note 12.

⁴⁴ Supra, note 15.

⁴⁵ Sue Rex & Michel Trony, "Reform and Punishment" Willian Publishing.

member. This theory condemns all kinds of corporal punishments.⁴⁶ "Everybody believes that a person sentenced to life for murder will be walking the streets in seven years".⁴⁷ "There is an effective alternative to burning the life out of human beings in the name of public safety. That alternative is just as permanent, at least as great deterrent and – for those who are so inclined— far less expensive than the exhaustive legal appeals required in capital cases. That alternative is life imprisonment without the possibility of parole".⁴⁸

Practical Challenges to Restorative Policy and Practice

In 1966, more Americans opposed the death penalty than favored it.⁴⁹ Support for the death penalty drops precisely to the same low percentage as in 1966 when people are given the choice of stringent alternative sentences.⁵⁰ The several polls done by firms of Greenberg/Lake and the Tarrance Group revealed an increasing trend that Americans would favor certain alternative sentences over the death penalty.⁵¹ Polls conducted in recent years in California, New York, Oklahoma, Virginia and West Virginia concluded that people prefer various alternative sentences to the death penalty.⁵² The state polls reveal a number of other significant public perceptions on the death penalty. For example: Nebraskans twice as many selected alternative sentences over the death penalty;⁵³ a majority of New Yorkers agreed that the best way to reduce crime is to give disadvantaged people better education, job, training, and equal employment opportunities;⁵⁴ respondents of Florida believed that the death penalty is racially and economically discriminatory;⁵⁵ Oklahomans also preferred a sentence of life in prison over the death penalty by a margin of 56-35% if they were convicted that the death penalty discriminates against minorities.⁵⁶

⁴⁶ Ratan Lal v. State of Rajasthan and Ors; 2007 Cri.L.J. 2467

⁴⁷ Late Judge Charles Weltner, Georgia Supreme Court, Savannah News-Press, Mar. 23, 1986, at 7C, (quoted in Paduano & Smith, Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty), Available at:

<https://heinonline.org/HOL/LandingPage?handle=hein.journals/colhr18&div=12&id=&page=>

⁴⁸ M. Cuomo, New York State Shouldn't Kill People, The New York Times, and June 17, 1989.

⁴⁹ H. Zeisel & A. Gallup, Death Penalty Sentiment in the United States, 5 Journal of Quantitative Criminology 285, 287 (1989).

⁵⁰ Available at <http://www.deathpenaltyinfo.org/sentencing-life-americans-embrace-alternatives-death-penalty>

⁵¹ *Id.*

⁵² Information regarding the various polls is on file with the Death Penalty Information Center.

⁵³ Bowers & Vandiver, Nebraskans Want an Alternative to the Death Penalty, Executive Summary, at 7-8(1991).

⁵⁴ W. Bowers & M. Vandiver, New Yorkers Want an Alternative to the Death Penalty, Executive Summary, appendix summarizing other state polls (1991).

⁵⁵ Cambridge Survey Research, Attitudes in the State of Florida on the Death Penalty, Executive Summary, at 5 (1986)

⁵⁶ Grasmick & Bursik, Attitudes of Oklahomans Toward the Death Penalty, Univ. of

The number of people on death rows across the United States also continued to decline in 2016, as the number of prisoners obtaining relief from their convictions or death sentences or dying in custody outpaced the number of new death sentences imposed in most states as states like Georgia, Missouri, and Texas executed more prisoners than they sentenced to death.⁵⁷ The 30 death sentences expected to be imposed in 2016 represent a 39% decline from last year's 42-year low, and are down more than 90% from the 315 death sentences imposed during the peak death-sentencing year of 1996.⁵⁸

Capital Punishment in India: Punishment, Justice and Restoration Today

UN General Assembly adopted Resolution calling upon countries that retain the death penalty to establish a worldwide moratorium on executions with a view to abolish death penalty.⁵⁹ India is, however, one of the 59 nations that retain the death penalty.⁶⁰ It is to be borne in mind that India before it executed Ajmal Kasab and Afzal Guru last year, had an execution free run for a period of 8 years between 2004 and 2013.⁶¹ In 1962, the Law Commission undertook an extensive exercise to consider the issue of abolition of capital punishment from the statute books but released its report in 1967 recommending retention of death penalty.⁶² The report also does not discuss in detail the apprehension regarding the arbitrary use of the Court's discretion in capital sentencing.⁶³ Section 303⁶⁴ of Indian Penal Code which provides for mandatory death penalty violates the guarantee of equality and contained in Article 14 as also the right conferred by Article 21 of the Constitution that no person shall be deprived of his life or personal liberty except according to procedure established by law.⁶⁵

The Supreme Court also struck down Section 27(3) of Arms Act, 1959 providing for mandatory death penalty.⁶⁶ In contemporary judicial developments, with fairness norms more stringent than ever before, the Supreme Court has in the last 5 years repeatedly expressed anxiety about uneven application of death penalty as also miscarriages occasioned in death penalty cases.⁶⁷ In 2003, 187th report was taken up by the commission to consider the fundamental questions relating to death penalty afresh and

Oklahoma, at 21, 25 (1988).

⁵⁷ The Death Penalty Report in 2016: Year End Report Available at: <http://deathpenaltyinfo.org/documents/2016YrEnd.pdf>

⁵⁸ *Id.*

⁵⁹ *Supra*, note 15.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Punishment for murder by life-convict

⁶⁴ *Supra*, note 15.

⁶⁵ *Mithu V. State of Punjab*, (1983) 2 SCC 277

⁶⁶ *State of Punjab v. Dalbir Singh*

⁶⁷ *Supra*, note 15

alternatives to the same.⁶⁸ Judges should never be bloodthirsty.⁶⁹

A real and abiding concern for the dignity of human life postulates resistance to taking life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.⁷⁰ The truth of the matter is that the question of death penalty is not free from the subjective element and the confirmation of death sentence or its commutation by the court depends a good deal on the personal predilection of the judges constituting the bench.⁷¹

On one hand there appears a small band of cases in which the murder convict is sent to the gallows on confirmation of his death penalty by the court and on other hand there is a much wider area of cases in which the offender committing murder of a similar or a far more revolting kind is spared his life due to lack of inconsistency by the Court in giving punishments or worse the offender allowed to slip away unpunished on account of the deficiencies in the criminal justice system.⁷² Capital sentencing system which results in differential treatment of similarly situated capital convicts effectively classifies similar convicts differently with respect to their right to life under Article 21.⁷³ In a capital punishment if this happens with some frequency there is a lurking conclusion as regard the capital sentencing system becoming constitutionally arbitrary.⁷⁴

Therefore, an equal protection analysis of this problem is appropriate and is more than an acknowledgement of an imperfect sentencing system.⁷⁵ Thus the overall picture gets asymmetric and lopsided and presents a poor reflection of the system of criminal administration of justice which is a matter of concern for the court and need to be remedied.⁷⁶ The *rarest of the rare* cases is to be determined by the facts and circumstances and there are no strict guidelines for the same.⁷⁷ The procedure suggested mandates that it should be in the nature of safeguards and should be read with Article 21 and 14.⁷⁸ Equal protection clause ingrained under Article 14 applies to the judicial process at the sentencing stage.⁷⁹

Concluding Observations:

Cases that pursue the death penalty tend to be a lot more expensive

⁶⁸ *Id.*

⁶⁹ *Bachan Singh v. State of Punjab* (1980) 2 SCC 684.

⁷⁰ *Id.*

⁷¹ *Swamy Shraddhananda v. State of Karnataka* (2008) 13 SCC 767

⁷² *Id.*

⁷³ *Santosh Kumar Satishbhusan Bariyar v. State of Maharashtra* 2009

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Supra*, note 69.

⁷⁷ *Supra*, note 67.

⁷⁸ *Id.*

⁷⁹ *Supra*, note 71

and which is a monetary as well as purely practical concerns.⁸⁰ The reports is its analysis of Supreme Court decisions on death penalty recorded that "the death penalty in India has been arbitrary, imprecise and abusive means of dealing with crime and criminals."⁸¹ The members of international civil society, politicians and legal experts should unite to elaborate abolitionist strategies for the years to come at the national, regional and international levels, and to send out a clear message to the world: that universal abolition is essential for a world where progress and justice must prevail.⁸²

Article 21 rights in here in a person so long as he lives and that they are relevant and applicable at all stages of the judicial process: trial, sentence and execution of the sentence.⁸³ In the penal alternatives, death penalty can be replaced by life imprisonment without possibility of parole after serving a minimum of 25-30 years. Life without parole also costs a lot less and allows for mistakes to be corrected. But as we are dealing with restorative and preventive alternatives there should be utilization of financial resources which are wasted in pursuing death penalty.

Early childhood education programs should be effectively implemented to control the crimes at very early stage. "No future without forgiveness".⁸⁴ Restorative justice programs such as victim-offender mediation and facilitated dialogue should be executed in India and in the whole world and it must possess goal-oriented behavior. There should be circles which not only involve victim and offender but also their family members, community members, and government representatives.

There should be offender re-entry support programs in every society. Family and friends are often expected to facilitate reentry by providing housing, financial and transportation and personal support. There should also be offender assistance programs to provide services to offenders while they are in prison and after their release too. Punishment is not only degrading to those on whom it is imposed, but it is also degrading to the society that engages in the same behavior as criminals".

Restitution programs is also one of the way which requires offenders to repay those who have been harmed, generally through monetary payments and in-kind services i.e., unpaid work for the benefits the community and victims as well. All these programs have the potential to reduce the caseload of traditional

⁸⁰ Available at <http://www.cuadp.org/>

⁸¹ Lethal Lottery: The Death Penalty in India, 2008 Available at:

<https://www.amnesty.org/en/documents/asa20/007/2008/en/>

⁸² 5th World Congress Against the Death Penalty, 2013 Available at

<http://www.worldcoalition.org/World-Congress-Against-the-Death-Penalty-madrid-2013-ecpm-coalition-abolition-activists.html>

⁸³ Sher Singh and Ors. v. State of Punjab (1983) 2 SCC 344

⁸⁴ Archbishop Desmond Tutu, "No Future Without Forgiveness", Doubleday Publication, New York, 1999

criminal justice and can also address the issues which are ignored by the former. The restorative justice should be built on a strong base to respond the systematic and political realities which can strongly promote the vision of the same. The implementation is necessary to be in the right criteria which will help the programs to be more restorative in their treatment of victims, offenders and community members.



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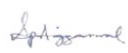
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


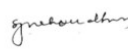
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Non-Precluded Measures Provisions in Bilateral Investment Treaties of South Asian Countries

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Abstract

This paper provides a first-ever detailed study of NPM provisions in all stand-alone BITs which are in force in South Asian countries. It studies 147 BITs of South Asian countries in order to map the NPM provisions in them. It makes an in-depth analysis of the NPM provisions found in these BITs, and then makes an analysis of the consequences of not having NPM provisions in BITs. This follows the dissection of the NPM provisions found, so as to study each and every permissible objective and nexus requirement link in these provisions. This is followed by suggestions and conclusions, where the paper holds that NPM provisions are not sufficiently used in the BITs of these countries and these countries should incorporate this provision more frequently in order to ensure some much-needed regulatory latitude to these countries.

I. NON-PRECLUDED MEASURES: AN OVERVIEW

Non-Precluded Measures (NPM) provisions in Bilateral Investment Treaties (BITs) have acquired a great deal of importance in international investment law. Despite that importance, there is still a dearth of academic literature in this area. While some work has been done in general,¹ country- or region-specific studies are still rare. Except for

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1. William W. BURKE-WHITE and Andreas Von STADEN, “Investment Protection in Extraordinary Times: The Interpretation of Non-Precluded Measure Provisions in Bilateral Investment Treaties” (2008) 48 *Virginia Journal of International Law* 307; Jürgen KURTZ, “Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis” (2010) 59 *International and Comparative Law Quarterly* 325; Andrew NEWCOMBE, “The Use of General Exceptions in IIAs: Increasing Legitimacy or

India,² no study has been done on the NPM provisions in BITs signed by all South Asian countries, or signed by an individual South Asian country. In this regard, this paper aims to make a contribution by studying NPM clauses in BITs signed by South Asian countries. For this purpose, the paper studies 147 stand-alone BITs of South Asian countries which are in force; these comprise seventy-two BITs of India,³ twenty-five BITs of Pakistan,⁴ twenty-three BITs of Sri Lanka,⁵ twenty-one BITs of Bangladesh,⁶ four BITs of Nepal,⁷ and two BITs of Afghanistan.⁸ In undertaking this study, both doctrinal and empirical research methodologies are followed. Therefore, in an attempt to shed some light on NPM provisions in the BITs of South Asia, the paper has focused mainly on the following areas: the importance of studying NPM provisions in context of South Asian countries (Part I); the mapping of NPM clauses in the BITs of South Asian countries (Part II); permissible objectives provided in the BITs of South Asian countries (Part III); and nexus requirement links in the BITs of South Asian countries (Part IV). However, before we address these issues as such, we first need to clarify the concept of NPM provisions.

A. NPM Provisions: An Analysis

NPM clauses are basically exceptions to the scope of the application of BITs. As the text suggests, these provisions allow states to take actions which are otherwise inconsistent with their treaty obligations.⁹ These actions, when taken by states, are usually considered to be consistent with a BIT if they fall under the permissible objectives specified in the NPM clauses. In other words, NPM clauses transfer the cost of harm done to investment from host states to investors in exceptional circumstances.¹⁰ It can also be said that NPM provisions allow the host states to impair

Uncertainty?” in Armand De MESTRAL and Céline LÉVESQUE, eds., *Improving International Investment Agreements* (London: Routledge, 2013), 275.

2. Prabhash RANJAN, “Non-Precluded Measures in Indian International Investment Agreements and India’s Regulatory Power as a Host Nation” (2012) 2 *Asian Journal of International Law* 21.
3. India has signed eighty-four BITs, of which seventy-two are in force (10 December 2014), online: Ministry of Finance, Government of India <http://finmin.nic.in/bipa/bipa_index.asp>.
4. Pakistan has signed forty-six BITs, of which twenty-five are in force; UNCTAD IIA database (21 January 2015), online: Investment Policy Hub UNCTAD <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/160#iiaInnerMenu>>.
5. Sri Lanka has signed twenty-nine BITs, of which twenty-four are in force; UNCTAD IIA database (21 January 2015), online: Investment Policy Hub UNCTAD <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/198#iiaInnerMenu>>.
6. Bangladesh has signed thirty BITs, of which twenty-four are in force; UNCTAD IIA database (21 January 2015), online: Investment Policy Hub UNCTAD <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/16#iiaInnerMenu>>; BITs signed by Bangladesh can also be found at the website of the Ministry of Industries, Government of Bangladesh, Bilateral Agreements (21 January 2015), online: MOIND <<http://www.moind.gov.bd/site/page/f7aa7575-5196-476b-907b-3ea65e885717>>.
7. Nepal has four BITs in force out of six BITs that it has signed, UNCTAD IIA database (21 January 2015), online: Investment Policy Hub UNCTAD <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/147#iiaInnerMenu>>.
8. Afghanistan has signed three BITs; all are in force; UNCTAD IIA database (21 January 2015), online: Investment Policy Hub UNCTAD <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/1#iiaInnerMenu>>.
9. Burke-White and Staden, *supra* note 1 at 314.
10. *Ibid.*, at 401.

the investments covered under BITs by being an instrument of regulation in the hands of host states.¹¹ Therefore, NPM provisions are important and probably the most effective device to ensure sufficient regulatory space for host states to pursue their non-investment policy objectives.¹² Examples of their importance are the cases filed by investors against Argentina during the Argentine crisis, where NPM clauses were invoked by Argentina for the default of investments made in its territory before different investment arbitral tribunals.¹³ The decisions of these tribunals were not consistent, and they had given quite divergent rulings.¹⁴ Nonetheless, these cases not only generated a debate on the interpretative methodology followed by these tribunals but also emphasized the significance of NPM provisions in the BITs for protecting a state's regulatory space.¹⁵ In recent years there has been a plethora of examples where disputes have emerged between foreign investors and host states over regulatory measures taken by the state, such as measures relating to environmental policy,¹⁶ sovereign decisions regarding privatization,¹⁷ urban policy,¹⁸ monetary policy,¹⁹ taxation,²⁰ and many others.²¹ It is clear that these disputes arose when host states tried to broaden the sphere of their regulatory space.

11. Kenneth J. VANDEVELDE, "Of Politics and Markets: The Shifting Ideology of the BITs" (1993) *International Tax and Business Lawyer* 159 at 170.
12. Kurtz, *supra* note 1 at 343.
13. *CMS Gas Transmission Co. v. Argentina*, Annulment Proceedings, [2005] ICSID Case No. ARB/01/8 [CMS Annulment]; *CMS Gas Transmission Co. v. Argentina*, [2005] ICSID Case No. ARB/01/8 [CMS]; *Enron Creditors Recovery Corp v. Argentina*, Annulment Proceedings, [2010] ICSID Case No. ARB/01/3 [Enron Annulment]; *Enron Corporation v. Argentina*, [2007] ICSID Case No. ARB/01/3 [Enron]; *Sempra Energy International v. Argentina*, Annulment Proceedings, [2010] ICSID Case No. ARB/02/16 [Sempra Annulment]; *Sempra Energy International v. Argentina*, [2007] ICSID Case No. ARB/02/16 [Sempra]; *LG&E Energy Corporation v. Argentina*, [2006] ICSID Case No. ARB/02/1 [LG&E]; *Continental Casualty Company v. Argentina*, [2008] ICSID Case No. ARB/03/9 [Continental].
14. See *supra* note 13; Christina BINDER, "Necessity Exceptions, the Argentine Crisis and Legitimacy Concerns" in Tulio TREVES, Francesco SEATZU, and Seline TREVISANUT, eds., *Foreign Investment, International Law and Common* (Routledge, 2014), 71.
15. Kurtz, *supra* note 1 at 347.
16. *Metalclad Corporation v. United Mexican States* 5, ICSID 236; *Methanex Corporation v. United States of America* (2005) 44 I.L.M. 1345; *Ethyl Corp. v. Canada*, Award on Jurisdiction, [1998] 38 I.L.M. 708 (NAFTA Ch. 11 Arb. Trib. 1998); for further study, Mary E. FOOTER, "Bits and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment" (2009) 18 *Michigan State International Law Review* 33.
17. *Eureko BV v. Republic of Poland*, Partial Award, [2005] UNCITRAL Ad Hoc Arbitration; *Aguas del Tunari, S.A. v. Bolivia*, Decision on Respondent's Objections to Jurisdiction, [2005] 20 ICSID REV. 450 (ICSID Arb. Trib. 2005); *Biwater Gauff Ltd. v. United Rep. of Tanzania*, [2008] ICSID Case No. ARB/05/22 (ICSID Arb. Trib. 2008).
18. *MTD Equity v. Republic of Chile*, [2005] 44 I.L.M. 91.
19. *Azurix Corp. v. Argentine Rep.*, [2007] 47 I.L.M. 445 (ICSID Arb. Trib. 2007); *Suez/InterAguas v. Argentina*, [2004] ICSID Case No. ARB/03/17 (ICSID Arb. Trib. 2004); *Suez/Vivendi v. Argentina*, [2004] ICSID Case No. ARB/03/19 (ICSID Arb. Trib. 2004); see *supra* note 13.
20. *Occidental Exploration and Production Co v. Republic of Ecuador*, Award, [2004] LCIA Case No. UN 3467.
21. Rudolf DOLZER and Christoph SCHREUER, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008) at 7–8; Asha KAUSHAL, "Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime" (2009) 50 *Harvard Journal of International Law* 491 at 511–12.

Thus, the question arises: How can states create such regulatory space within the contours of the BIT? States can devise such a mechanism by creating specific exceptions in the treaty to assure that host states have sufficient regulatory latitude.²² Nearly all investment treaties cover one or two exceptions in order to protect the essential interests of the Contracting Parties from the coverage of the treaty obligations.²³ Some of these exceptions are narrowly drafted²⁴ and some are broad in scope.²⁵ However, there are also exceptions which apply to all or many BIT obligations.²⁶ For example, Article 15 of India-Australia BIT provides for:

Prohibitions and Restrictions:

Nothing in this Agreement precludes the host Contracting Party from taking, in accordance with its laws applied reasonably and on a non-discriminatory basis, measures necessary for the protection of its own essential security interests or for the prevention of diseases or pests.²⁷

The above provision allows Contracting Parties to take measures for the protection of their essential security interests and for the prevention of diseases. Even if these measures harm the foreign investments, they shall not be construed as violating any treaty provision. These exceptions are, in general, called non-precluded measures clauses.²⁸ The importance of studying NPM provisions in the context of South Asia will be discussed below.

B. *Why Study NPM Provisions in the Context of South Asian Countries?*

Given the fact that all South Asian countries are either developing countries or least developed countries and tend to invite more and more investments in order to generate capital in their countries, the examination of this important provision in the BITs of these countries becomes necessary.

Thus it is pertinent to go through a brief study of each South Asian country in respect of the following three aspects—which can be the common factors to all the

22. Dolzer and Schreuer, *supra* note 21.

23. Jeswald W. SALACUSE, *The Law of Investment Treaties* (Oxford: Oxford University Press, 2010) at 340–1.

24. E.g. Restricting the application of a specific treaty provision to a particular circumstance or transaction, *Agreement Between the Government of the United Mexican States and the Government of the Republic of Korea for the Promotion and Reciprocal Protection of Investment*, November 2000, art. 6(3).

25. E.g. Controlling exceptions which allows the contracting parties to deny the benefits of treaty to investments of companies controlled by third country nationals if the companies lack “substantial business activities” in the home country—*Treaty Between the United States of America and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment*, 19 May 1992 (entered into force 12 January 1994), art. 1(2).

26. Andrew NEWCOMBE and Lluís PARADELL, *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen Aan Den Rijn: Kluwer Law International, 2009) at 481.

27. *Agreement Between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments*, 26 February 1999 (emphasis added).

28. NPM provisions can also be called by other names, such as General Exception clauses—Ranjan, *supra* note 2 at 25.

South Asian countries—in order to understand the importance of studying NPM provisions in the context of South Asia:

1. The number of BITs signed by South Asian countries;
2. Foreign Direct Investment (FDI) inflows in South Asian countries; and
3. The rise in investment cases globally and against South Asian countries.

For the purposes of a comparative study, the year 1990 is taken as a base year in this section, because most of the South Asian countries started moving towards liberalization after 1990.

1. *Number of BITs signed by South Asian countries*

The number of BITs signed by South Asian countries shows the acceptance of these countries to be held accountable under international law for their regulatory conduct that impacts foreign investment. Hence, if we analyze BITs signed by these countries, Pakistan has signed forty-six BITs to date.²⁹ While it signed its first BIT with Germany in 1959,³⁰ by 1990 it had signed seven BITs with China,³¹ France,³² Germany,³³ Korea,³⁴ Kuwait,³⁵ the Netherlands,³⁶ and Sweden.³⁷ However, between 1990 and 2014 it had signed thirty-nine BITs.³⁸ Sri Lanka has signed in total twenty-nine BITs;³⁹ it had signed seventeen BITs⁴⁰ by 1990, and from 1990 to 2014 it had signed a further

29. *Supra* note 4.

30. Investor-State Dispute Settlement, (UNCTAD Series on Issues in Investment Agreements II, UN 2014) (10 April 2015), online: UNCTAD <http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf>.

31. *Agreement Between the Government of the Islamic Republic of Pakistan and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of the Investments*, 12 February 1989 (entered into force 30 September 1990) [China-Pakistan BIT].

32. *Agreement Between the Government of the French Republic and the Government of the Islamic Republic of Pakistan on the Promotion and Mutual Protection Investments*, 1 June 1983 (entered into force 14 December 2015) [France-Pakistan BIT].

33. *Treaty Between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments*, 25 November 1959 (entered into force 29 July 1961).

34. *Agreement Between the Government of the Republic of Korea and the Government of the Islamic Republic of Pakistan for the Promotion and Protection of Investments*, 25 May 1988 (entered into force 15 April 1990) [Korea-Pakistan BIT].

35. *Agreement on the Promotion and Safeguarding of Capital Movement and Investment Between the Government of the State of Kuwait and the Government of the Islamic Republic of Pakistan*, 17 March 1983 (entered into force 15 March 1986) [Kuwait-Pakistan BIT].

36. *Agreement on Economic Cooperation and Protection of Investments between the Kingdom of the Netherlands and the Islamic Republic of Pakistan*, 4 October 1988 (entered into force 1 October 1989) [Netherlands-Pakistan BIT].

37. *Agreement on the Mutual Protection of Investments Between Sweden and Pakistan*, 12 March 1981 (entered into force on 14 July 1981) [Sweden-Pakistan BIT].

38. *Supra* note 4.

39. *Supra* note 5.

40. *Ibid.*; BITs with the Belgium-Luxembourg Economic Union (BLEU) (1982), China (1986), Denmark (1985), Finland (1985), France (1980), Germany (now terminated, it has signed a new BIT with Germany) (1963), Italy (1987), Japan (1982), Korea (1980), Malaysia (1982), Netherlands (1984), Norway (1985), Romania (1981), Singapore (1980), Sweden (1982), Switzerland (1981), and the United Kingdom (1980).

twelve BITs.⁴¹ Bangladesh has signed thirty BITs⁴² in total; nine BITs by 1990,⁴³ the other twenty-one BITs between 1990 and 2015.⁴⁴ Nepal has signed six BITs⁴⁵ in total to date; two BITs were signed before 1990⁴⁶ and four after 1990.⁴⁷ Bhutan and the Maldives have not signed any BITs with any country to date.⁴⁸ Afghanistan signed all of its three BITs between 1990 and 2015.⁴⁹ India has signed eighty-four BITs to date, all after 1990.⁵⁰ In India, after economic reforms in 1991, foreign investment policy was liberalized and Bilateral Investment and Protection Agreements (BIPAs) were entered into with other countries to protect and promote investments on a reciprocal basis to ensure more FDI inflow in the country.⁵¹ While, in the absence of any literature, it is difficult to say with certainty about other countries in South Asia, there is hardly any doubt that the Indian BITs were signed to attract more FDI inflows.⁵²

It is clear that South Asian countries started entering into BITs with other countries at a faster rate after 1990. It can also be said, though there is little evidence available, that BITs were signed to ensure more FDI inflows in these countries. Therefore, this rapid increase in the number of BITs shows the willingness of these countries to be subjected to treaty obligations in order to attract foreign investments into their territories.

2. *FDI inflows in South Asian countries*

Although increased FDI inflow is considered good for the economy in any country, at the same time it also increases the vulnerability of that country to BIT claims. This is because any policy decision that impacts the investment can bring the state before an international tribunal. Therefore it is pertinent to assess the FDI inflow situation in South Asian countries. FDI inflow in Pakistan was US\$278 million⁵³ to 1990; however, it soared up to US\$1,747 million by 2014.⁵⁴ FDI inflow in Sri Lanka was US\$43 million⁵⁵ to 1990, then increased to US\$944 million to 2014.⁵⁶ FDI inflow

41. *Supra* note 5.

42. *Supra* note 6.

43. *Ibid.*; BITs with BLEU (1987), France (1985), Germany (1981), Korea (1986), Turkey (1987), Canada (1990), Romania (1987), the United Kingdom (1980), and the USA (1986).

44. *Supra* note 6.

45. *Supra* note 7.

46. *Agreement Between the Government of the French Republic and the Government of His Majesty the King of Nepal on the Promotion and Mutual Protection Investments*, 2 May 1983 (entered into force 13 June 1985), and *Treaty Between the Federal Republic of Germany and the Kingdom of Nepal Concerning the Encouragement and Reciprocal Protection of Investments*, 20 October 1986 (entered into force 7 July 1988).

47. *Supra* note 7.

48. 7 December 2014, online: UNCTAD IIA Database <<http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iialInnerMenu>>.

49. *Supra* note 8.

50. *Supra* note 3.

51. Prabhash RANJAN, "India and Bilateral Investment Treaties—A Changing Landscape" (2014) ICSID Review-Foreign Investment Law Journal 419 at 421.

52. *Ibid.*

53. 15 July 2015, online: UNCTADSTAT <<http://unctadstat.unctad.org/wds/TableView/tableView.aspx?ReportId=96740>>.

54. *Ibid.*

55. *Ibid.*

56. *Ibid.*

in Bangladesh was just US\$3 million⁵⁷ to 1990; however, by 2014 this figure had risen to US\$1,527 million.⁵⁸ FDI inflow in Nepal was US\$6 million to 1990,⁵⁹ but by 2014 it had grown to US\$30 million.⁶⁰ FDI inflow in Afghanistan was zero (in US million dollars)⁶¹ to 1990; however, by 2014 it had risen to around US\$54 million. FDI inflow in India grew at an exceptional rate after 1990. While it could manage to attract only US\$237 million as FDI⁶² to 1990, this figure soared to US\$ 34,417 million by 2014.⁶³

There is no doubt that the “economic reforms” that took place after 1990 in most of these countries were crucial to the increased FDI inflow into their territories.⁶⁴ But at the same time, with increased FDI inflow came higher responsibility for the protection of these investments. This, though indirectly, made South Asia more vulnerable to BIT claims.

3. *Rise of investor-state arbitration against states globally and against South Asian countries*

The BIT regime has seen tremendous growth from 1990; this can be determined by the fact that whereas there were only around 300 BITs signed before 1990,⁶⁵ nearly 2,935 BITs existed as of October 2015.⁶⁶ This shows how fast this regime has grown.

However, the downside of this tremendous growth can be seen in the rise of the number of investor-state arbitrations. With the growth in number of BITs, there is also growth in the number of investment disputes. The total number of known treaty-based Investor State Dispute Settlement (ISDS) cases by the end of 2012 was 514.⁶⁷ However, by the end of 2013, the number of known treaty-based cases increased to 568.⁶⁸ And, by the end of 2014, investors initiated forty-two new ISDS cases, thereby taking overall number of known ISDS cases to around 610.⁶⁹ Of all the forty-two cases which were

57. *Ibid.*

58. *Ibid.*

59. *Ibid.*

60. World Investment Report 2015, Country Fact Sheet: Nepal (19 July 2015), online: UNCTAD <http://unctad.org/sections/dite_dir/docs/wir2015/wir15_fs_np_en.pdf>.

61. *Supra* note 53; zero does not denote that there was no FDI inflow at all, it just shows that the figure was not in US million dollars.

62. *Supra* note 53.

63. World Investment Report 2015, Country Fact Sheet: India (19 July 2015), online: UNCTAD <http://unctad.org/sections/dite_dir/docs/wir2015/wir15_fs_in_en.pdf>.

64. Pravakar SAHOO, “Foreign Direct Investment in South Asia: Policy, Trends, Impact and Determinants” (2015), online: ADB Institute Discussion Paper No. 56, <<http://www.adb.org/sites/default/files/publication/156693/adbi-dp56.pdf>>.

65. Jeswald W. SALACUSE, “BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries” (1990) 24 *The International Lawyer* 503 at 655; for a listing of 309 bilateral investment treaties concluded up to 31 December 1988, Anthena J. PAPPAS, “References on Bilateral Investment Treaties” (1989) 4 *ICSID Review—Foreign Investment Law Journal* 189 at 194–203.

66. *Supra* note 48.

67. Investor-State Dispute Settlement (UNCTAD Series on Issues in Investment Agreements II, UN 2014) (10 April 2015), online: UNCTAD <http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf>.

68. UNCTAD, “Recent Developments in Investor-State Dispute Settlement (ISDS)”, IIA Issue Note No. 1 (April 2014), online: UNCTAD <http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf> (25 April 2015).

69. UNCTAD, “Recent Trends in IIAs and ISDS”, IIA Issue Note No. 1, Feb 2015, online: UNCTAD <http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf> at 5.

brought against states in 2014,⁷⁰ sixty percent of them were filed against developing countries and forty percent were filed against developed countries.⁷¹ It is also worth mentioning that the share of cases against developed countries was forty-seven percent in 2013, and thirty-four percent in 2012, while the historical average is twenty-eight percent.⁷² These data show that developing countries are subjected to BIT claims on more accounts than the developed countries globally.

In the case of South Asia, a large number of investor-state cases have already been filed against these countries. Pakistan has been subjected to these cases on eight accounts,⁷³ Sri Lanka on three accounts,⁷⁴ Bangladesh on one account,⁷⁵ and India on sixteen accounts.⁷⁶ In most of the decided cases, decisions have gone in favour of the investors.⁷⁷

Thus, a combination of three factors—a rise in number of BITs signed, increasing FDI inflows, and rising investor-state cases against South Asian countries—clearly shows that all South Asian countries are more vulnerable to BIT claims than ever before. The possibility of the regulatory measures of these countries being challenged by BIT claims is, thus, quite high. Therefore, in order to see whether these countries will have sufficient regulatory latitude to pursue their non-investment policy objectives, a study of NPM provisions is important in the context of South Asia.

70. *Ibid.*

71. *Ibid.*

72. *Ibid.*

73. *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29; *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3 (II); *Agility for Public Warehousing Company K.S.C. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/11/8; *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1; *Mr Ali Allawi v. Pakistan* (12 January 2015), online: Itlaw <<http://www.itlaw.com/cases/2032>>; *Progas Energy Ltd v. Pakistan* (12 January 2015), online: Itlaw <<http://www.itlaw.com/cases/2044>>; *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1.

74. *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3; *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2.

75. *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7.

76. *Bechtel Enterprises Holdings, Inc. and GE Structured Finance (GESF) v. The Government of India*, Tribunal Rules for Bechtel and GE in Dabhol Power Project Arbitration (9 September 2003), online: Bechtel <<http://www.bechtel.com/newsroom/releases/2003/09/tribunal-rules-dabhol-power-project-arbitration/>>; *ABN Amro N.V. v. Republic of India*, (12 April 2015), online: Rimantas Daujotas blog <<http://rdaujotas.com/lt/publikacijos/ol42/-icsid-foreign-investment-requirement-in-case-of-borrowed-funds>>; *ANZEF Ltd. v. Republic of India*; *BNP Paribas v. Republic of India*; *Credit Lyonnais S.A. (now Calyon S.A.) v. Republic of India*; *Credit Suisse First Boston v. Republic of India*; *Erste Bank Der Oesterreichischen Sparkassen AG v. Republic of India*; *Offshore Power Production C.V., Travamark Two B.V., EFS India-Energy B.V., Enron B.V., and Indian Power Investments B.V. v. Republic of India*; *Standard Chartered Bank v. Republic of India Bycell (Maxim Naumchenko, Andrey Polouektov and Tenoch Holdings Ltd) v. India* (28 November 2014), online: Itlaw <<http://www.itlaw.com/cases/1933>>; *Deutsche Telekom v. India* (28 November 2014), online: Itlaw <<http://www.itlaw.com/cases/2275>>; *Khaitan Holdings Mauritius v. India* (28 November 2014), online: Itlaw <<http://www.itlaw.com/cases/2262>>; *Louis Dreyfus Armateurs SAS (France) v. The Republic of India* (28 November 2014), online: <<http://www.pcacases.com/web/view/113>>; *Vodafone International Holdings BV v. India* (28 November 2014), online: Itlaw <<http://www.itlaw.com/cases/2544>>; *White Industries Australia Limited v. India* (30 November 2011), online: Itlaw <<http://www.itlaw.com/cases/1169>>.

77. *AAPL v. Sri Lanka*, *supra* note 74; *Deutsche Bank AG v. Sri Lanka*, *supra* note 74; *Saipem S.p.A. v. Bangladesh*, *supra* note 75; *White Industries v. India*, *supra* note 76.

Against this background, this paper intends to analyze and assess the NPM clauses in the BITs of the South Asian countries. Within this approach, Section II will delve into the detailed study of NPM clauses in the BITs of South Asian countries. In doing such research activity, it will deal in detail with the placement, form, and structure of NPM clauses in these countries. Section III provides a detailed analysis of the different provisions relating to permissible objectives provided in the BITs of these countries. Section IV will then delve into the nexus requirement links provided by these NPM clauses, with some reference to the interpretative methodologies followed by arbitral tribunals during the Argentine crisis. In conclusion, an assessment shall be made in Section V of the BITs signed by these countries with respect to NPM provisions. It will also suggest necessary changes with regard to NPM clauses in these BITs.

II. MAPPING THE NPM PROVISIONS

Whether NPM provisions are a common element in BITs globally is a difficult question to answer. It is more difficult given the fact that hardly any research has been done in respect of NPM provisions in BITs globally. However, there are academic papers available which suggest that NPM provisions are a relatively more common element in BITs than in other international treaties, and that they play an important role in the legal regime of foreign investment;⁷⁸ this seems to be true, bearing in mind that the high frequency of NPM provisions is limited only to the BITs of a certain number of countries.⁷⁹ But at the same time, it would not be right to say that NPM provisions are common elements in all BITs globally. This also tells us that other countries do not very frequently and consistently incorporate NPM provisions into their BITs. The reason for this inconsistency is unknown; according to Salacuse, “NPM clauses are subject to the negotiation dynamics of the states negotiating an investment treaty”.⁸⁰ One can relate this reasoning to the status and negotiation capability of a country to agree or not agree the terms of the BIT. As BITs were signed by developing countries to attract FDI flows into their territories,⁸¹ it is possible that developing countries might have made some compromises on their regulatory powers while negotiating BITs by not including NPM provisions or any other exceptions in their BITs.

If we analyze the frequency of NPM clauses in the BITs of South Asian countries, the outcome is quite surprising. In South Asia, the number of BITs signed by these

78. Burke-White and Staden, *supra* note 1.

79. See BITs signed by the US, Germany, BLEU, India, and Canada.

80. Email from Professor Jeswald W. SALACUSE to author (14 April 2015) (on file with author).

81. Eric NEUMAYER and Laura EPESS, “Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?” (23 February 2015), online: LSE Research <[http://eprints.lse.ac.uk/6271/World_Dev_\(BITs\).pdf](http://eprints.lse.ac.uk/6271/World_Dev_(BITs).pdf)>; Andrew T. GUZMAN, “Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties” (1998) 38 *Virginia Journal of International Law* 639 at 651–7; Zachary ELKINS, Andrew T. GUZMAN, and Beth A. SIMMONS, “Competing for Capital: The Diffusion of Bilateral Investment Treaties 1960–2000” (2006) 60 *International Organization* 811 at 813; Jose E. ALVAREZ, “The Emerging Foreign Direct Investment Regime” (2005) 99 *Proceedings of the Annual Meeting (American Society of International Law)* 94–7; Kenneth J. VANDEVELDE, “Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties” (1998) 36 *Columbia Journal Transnational Law* 501 at 516; Fiona BEVERIDGE, *Treatment and Taxation of Foreign Investment under International Law*, 1st edn (Manchester: Juris Publishing, Manchester University Press, 2000); M. SORNARAJAH, *The International Law on Foreign Investment*, 2nd edn (Cambridge: Cambridge University Press, 2004).

countries is 198;⁸² out of these 198, 152 are in force.⁸³ The surprise comes when one examines the NPM clauses in these BITs.⁸⁴

Table 1. NPM provisions in BITs of South Asian countries

Country	Number of BITs signed	Number of BITs in force	NPM clause (in BITs which are in force)
Afghanistan	3	3	0 ⁸⁵
Bangladesh	30	24	4 ⁸⁶
Bhutan	0	0	NA
India	84	72	70
Maldives	0	0	NA
Nepal	6	4	1
Pakistan	46	25	2
Sri Lanka	29	24	3 ⁸⁷
TOTAL	198	152 ⁸⁸	80

Table 1 shows that India is the only country in this region which has NPM provisions in almost all of its BITs.⁸⁹ It is difficult to ascertain why other countries have not included NPM provisions more frequently in their BITs. Out of these 147 BITs studied, only eighty contain NPM provisions.⁹⁰ These numbers become more surprising when India is excluded from the list. South Asian countries, excluding India, have eighty BITs in force altogether, out of which only ten contain NPM provisions.⁹¹ This number is not even close to ten percent of the total number of BITs signed by these countries. This certainly cannot be said to be an encouraging outcome for countries looking for more and more regulatory latitude. This section will now delve into the specific traits of the NPM provisions found in these BITs.

A. Placement of NPM Clauses in BITs

Generally, any BIT consists of three documents; the main body, the protocol, and the exchange of notes between the parties. NPM provisions in the BITs of South Asian countries are usually found in the main body.⁹² However, “NPM-like provisions” have

82. *Supra* note 48.

83. *Ibid.*

84. *Ibid.*

85. This study does not include the Afghanistan-Iran BIT because of its unavailability in the public domain.

86. Study could be undertaken on only twenty-one BITs, as the other three BITs signed by Bangladesh are not available in the public domain.

87. Sri Lanka-Malaysia BIT could not be studied because of its unavailability in the public domain.

88. Though the total number of BITs which are in force is 152, research could only be done on 147 BITs as the texts of five BITs were not available in the public domain. These five BITs are Afghanistan-Iran, Sri Lanka-Malaysia, Bangladesh-China, Bangladesh-Singapore, and Bangladesh-Canada.

89. India does not have NPM provisions in BITs with Argentina and Russia.

90. See Table 1.

91. *Ibid.*

92. E.g. *Agreement Between the Government of the Republic of India and the Government of the Republic of Armenia for the Promotion and Protection of Investments* (signed 23 May 2003, entered into force 30 May 2006); *Agreement Between the Government of Republic of Finland and the Government of*

also been found in the protocols⁹³ and in the notes of exchange⁹⁴ between the Contracting Parties. The next subsection will examine the form and structure of NPM provisions in these BITs.

B. *Form and Structure of NPM Clauses in BITs*

Study relating to the formulation of NPM provisions can be made on the basis of the following two grounds:

1. Based on textual grounds;⁹⁵ and
2. Based on structural elements.⁹⁶

1. *Textual grounds*

NPM provisions can be studied on the basis of the following textual traits:

- (a) Model NPM provision;
- (b) Modified Model NPM provision; and
- (c) GATT Article XX type.

A model BIT is not a legally binding document.⁹⁷ It is a document drafted to provide a balance between investment and non-investment policies based on a country's own domestic policies by keeping in view the requirements and needs of that country for entering into future BITs. Thus, it provides a guideline to the state as to how the state will advance in future negotiations while concluding a BIT with another state.⁹⁸

(a) *Model NPM provision* and (b) *Modified Model NPM provision*. These approaches basically shed light on the dynamics of NPM provision on the basis of the language of the NPM provision used in the model BIT of a country. Hence, these approaches are best suited for studying a country that has a model BIT. India⁹⁹

Nepal on the Promotion and Protection of Investment (signed 3 February 2009, entered into force 28 January 2011), etc.

93. Ad art. 2, Protocol, Pakistan-Germany BIT; Ad art. 2, Protocol, Afghanistan-Germany BIT, etc.
94. If we see the exchange of letters between the parties in the Nepal-France BIT it provides for exceptions such as public morality and public order for fair and equitable treatment in art. 3. Little evidence has been found of NPM provisions in the exchange of notes in South Asian BITs. For more detail, see Table 2.
95. Inspiration has been taken from Ranjan, *supra* note 2.
96. Inspiration has been taken from Burke-White and Staden, *supra* note 1.
97. *SADC Model Bilateral Investment Treaty Template with Commentary*, 9 January 2015, Southern African Development Community July 2012, online: IISD <<http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf>>.
98. *Ibid.*
99. *Indian Model Text of Bilateral Investment Promotion and Protection Agreement*, 2003, art. 13, online: <http://finmin.nic.in/the_ministry/dept_eco_affairs/icsection/Indian%20Model%20Text%20BIPA.asp>, "nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non-discriminatory basis".

and Sri Lanka¹⁰⁰ are the only countries that have model BITs in the South Asian region. The other countries in South Asia either do not have any model BIT, or are in the process of preparing one.¹⁰¹ Hence, studying NPM provisions using this approach would not be the best way to proceed with the present study. However, a pertinent study relating to GATT Article XX-type provisions can be made through this approach.

(c) *GATT Article XX type*. Those NPM provisions which bear a resemblance to or which are close to the language of GATT Article XX¹⁰² are called Article XX-type NPM provisions. Article XIV of the General Agreement on Trade in Services (GATS) has a similar form to Article XX of GATT.¹⁰³ To date, only around twenty-five to thirty BITs contain GATT- or GATS-like NPM provisions (XX-NPM) out of more than 2,900 BITs signed.¹⁰⁴

In South Asia, XX-NPM provisions are rare. The only BIT which has a XX-NPM provision is the India-Colombia BIT.¹⁰⁵ Article 13 of this BIT contains a broad range of exceptions; however, only Article 13(5) of the BIT can be said to be a XX-NPM provision.¹⁰⁶ Although Article 13(5) resembles GATT Article XX, it varies from Article XX's original form. Still, it can be said that XX-NPM provisions provide enough space for regulatory discretion to host states. With this, I will now move on to the second approach, a study based on structural elements.

100. Hamed AL-KADY, "Revision of Model BITs: Salient Features and Global Trends" (7 March 2015), online: Investment Policy Hub UNCTAD <http://investmentpolicyhub.unctad.org/Upload/Documents/DOWNLOAD13-UNCTAD_Revision%20of%20Model%20BITs.pdf> at 9.

101. Nida MEHMOOD, "Pakistan's BIT Dilemma" (19 January 2015), online: The Nation <<http://nation.com.pk/columns/15-Jul-2013/pakistan-s-bit-dilemma>>.

102. *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187 (entered into force 1 January 1948), art. XX [GATT]; For a detailed study on art. XX jurisprudence, Mitsuo MATSUSHITA, Thomas J. SCHOENBAUM, and Petros C. MAVROIDIS, *The World Trade Organization: Law, Practice, And Policy*, 2nd edn (Oxford: Oxford University Press, 2006); Lorand BARTELS, "The Chapeau of Article XX GATT: A New Interpretation" (2014) University of Cambridge Faculty of Law Research Paper No. 40/2014; Juan OCHOA, "General Exceptions of Article XX of the GATT 1994 and Article XIV of the GATS" (12 April 2015), online: University of Oslo <<http://www.uio.no/studier/emner/jus/jus/JUS5850/h12/tekster/ochoa-general-exceptions.pdf>>.

103. *General Agreement on Trade in Services*, 1869 U.N.T.S. 183 (entered into force 1 January 1995) [GATS], art. XIV.

104. Andrew NEWCOMBE, "General Exceptions in International Investment Agreements", Draft Discussion Paper BIICL Eighth Annual WTO Conference, London, 13–14 May 2008, online: <http://www.biicl.org/files/3866_andrew_newcombe.pdf>.

105. *Agreement for the Promotion and Protection of Investments Between the Republic of Colombia and the Republic of India*, 10 November 2009 (entered into force 3 July 2013) [India-Colombia BIT].

106. Art. 13(5), India-Colombia BIT:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the investors of the other Contracting Party or a disguised restriction on investment of investors of a Contracting Party in the territory of the other Contracting Party, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Contracting Party of measures:

- a) necessary to maintain public order;
- b) necessary to protect human, animal, plant life or health;
- c) relating to the protection of the environment or the conservation of exhaustible natural resources, if such measures are made effective in conjunction with restrictions on domestic production or consumption;
- d) in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2. *Structural elements*

This approach is best suited for the purposes of the present study. It has the following five components:

- (a) Scope;
- (b) Permissible objectives;
- (c) Nexus requirement;
- (d) Self-judging and non-self-judging NPM clauses; and
- (e) Limitations on NPM Provisions.

(a) *Scope*. NPM provisions have a comprehensive scope. This means it precludes the regulatory measures taken by host states from incurring any obligations arising out of any provision of the treaty. However, there are also “limited scope exceptions” which apply only to one or some provisions of the treaty. It is argued here that these limited scope exceptions, which are narrow in scope, should not be conflated with NPM provisions. In this sense, this approach is different from that taken by William Burke-White and Andreas Von Staden, where they say that there can be two types of NPM provisions: first, NPM provisions with comprehensive scope, and second, NPM provisions with limited scope.¹⁰⁷ There is hardly any doubt that the NPM provisions are also called “general exceptions”. *Black’s Law Dictionary* defines the word “general” as “universal, not particularized”.¹⁰⁸ It means that the term “general exception” would act as an exception having universal application. This, in the context of BITs, would mean that it would cover all the BIT provisions. So here the question arises: Can a general exception have limited scope? The answer to this, after making the analysis above, would be “no”. Therefore, it is argued here that NPM provisions have only comprehensive scope. Thus, allowing the proposition that there can be two types of NPM provisions would not be correct; limited scope exceptions are specific treaty exceptions restricted to just one or two treaty provisions, and are different from NPM provisions. However, for the purposes of this section, a study shall be made as follows:

- (i) NPM provisions with comprehensive scope; and
- (ii) Exceptions with limited scope.

Most of the countries in the South Asian region contain both comprehensive scope and limited scope exceptions. Table 2 explains this dynamic. It is worth noting that all of the limited scope exceptions are found either in protocols or in notes of exchange in the BITs of the South Asian countries. Table 2 shows that even limited scope exceptions are not common in these BITs. They are in low numbers in the BITs of these countries.

(b) *Permissible objectives*. These basically specify, within the NPM provision, areas in which the state can exercise its regulatory authority to achieve its non-investment policy objectives without attracting any obligation created by the BIT. In other words, permissible

107. Burke-White and Staden, *supra* note 1 at 331.

108. Henry Campbell Black, *Black’s Law Dictionary*, 4th edn (St Paul: West Publishing, 1968) at 812.

Table 2. NPM provisions with comprehensive and limited scope

Country	NPM clauses with comprehensive scope	Exceptions with limited scope
Afghanistan	0	1 ¹⁰⁹
Bangladesh	4 ¹¹⁰	1 ¹¹¹
Bhutan	NA	NA
India	70 ¹¹²	0
Maldives	NA	NA
Nepal	1 ¹¹³	2 ¹¹⁴
Pakistan	2 ¹¹⁵	1 ¹¹⁶
Sri Lanka	3 ¹¹⁷	1 ¹¹⁸

objectives mean those non-investment policy objectives that are listed in NPM provisions and for which the host country can deviate from its BIT obligations.¹¹⁹ An attempt has been made to identify these permissible objectives in the BITs of South Asian countries in Table 3.

109. Protocol, Afghanistan-Germany BIT, art. 2.

110. *Agreement Between the Government of the Republic of India and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments*, 2 February 2009 (entered into force 7 July 2011), art. 12 [India-Bangladesh BIT]; *Treaty Between the United States of America and the People's Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investment*, 12 March 1986 (entered into force 25 July 1989), art. X [US-Bangladesh BIT]; *Agreement Between the Government of People's Republic of Bangladesh and the Government of Republic of Uzbekistan on Reciprocal Protection and Promotion of Investments*, 18 July 2000 (entered into force 24 January 2001), art. 11 [Uzbekistan-Bangladesh BIT]; and *Agreement Between the Republic of Turkey and the People's Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investments*, 12 November 1987 (entered into force 21 June 1990), art. X [Turkey-Bangladesh BIT].

111. *Agreement Between the Federal Republic of Germany and the People's Republic of Bangladesh Concerning the Promotion and Reciprocal Protection of Investments*, 6 May 1981 (entered into force 14 September 1986), Protocol, art. 2 [Bangladesh-Germany BIT].

112. All seventy BITs (in force) entered into by India except India-Argentina BIT and India-Russia BIT.

113. Art. 14, Finland-Nepal BIT.

114. *Treaty Between the Federal Republic of Germany and the Kingdom of Nepal Concerning the Encouragement and Reciprocal Protection of Investments*, 20 October 1986 (entered into force 7 July 1988), Protocol, art. 3(a) [Nepal-Germany BIT]; *Agreement Between the Government of the Republic of France and the Government of the Majesty of the Kingdom of Nepal on the Reciprocal Encouragement and Protection of Investment*, 2 May 1983 (entered into force 13 June 1985), Exchange of letter 1 para. 2 [Nepal-France BIT].

115. *Agreement Between the Government of the Republic of Mauritius and the Government of the Islamic Republic of Pakistan for the Promotion and Reciprocal Protection of Investments*, 3 April 1997 (entered into force 3 April 1997), art. 12 [Mauritius-Pakistan BIT]; and *Agreement Between the Government of the Republic of Singapore and the Government of the Islamic Republic of Pakistan on the Promotion and Protection of Investments*, 8 March 1995 (entered into force 4 May 1995), art. 11 [Singapore-Pakistan BIT].

116. Art. 2, Pakistan-Germany BIT; Exchange of Notes 3, Pakistan-Germany BIT.

117. *Agreement Between the Government of the Democratic Socialist Republic of Sri Lanka and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments*, 13 March 1986 (entered into force 25 March 1987), art. 11 [China-Sri Lanka BIT]; *Agreement Between the Government of the Democratic Socialist Republic of Sri Lanka and the Government of the Republic of India for the Promotion and Protection of Investment*, 22 January 1997 (entered into force 13 February 1998), art. 12 [India-Sri Lanka BIT]; and *Treaty Between the United States of America and the Democratic Socialist Republic of Sri Lanka Concerning the Encouragement and Reciprocal Protection of Investment*, 20 September 1991 (entered into force 1 May 1993), art. X [US-Sri Lanka BIT].

118. *Treaty Between the Federal Republic of Germany and the Democratic Socialist Republic of Sri Lanka Concerning the Promotion and Reciprocal Protection of Investments*, 7 February 2000 (entered into force 16 January 2004), Protocol, art. 3(a) [Sri Lanka-Germany BIT].

119. Ranjan, *supra* note 2 at 35.

Table 3. Permissible objectives in NPM provisions in BITs of South Asian countries¹²⁰

Country	Permissible objectives						
	Security	Public order	Public health	Public morality	International peace and security	Emergency situations	Misc.
Bangladesh	4	2	0	1	2	2	0
India	65	4	15	1	1	62	8 ¹²¹
Nepal	1	1	0	0	0	1	0
Pakistan	2	0	2	0	0	0	0
Sri Lanka	2	1	1	0	1	1	1 ¹²²

Table 3 shows more emphasis has been placed on either essential security interests or circumstances of extreme emergency. Important permissible objectives like health, public order, environment, and morality have not been able to attract much attention from these countries.

(c) *Nexus requirement links*. Nexus requirement in an NPM clause is the link between adopted measures and the objective sought through those measures.¹²³ As the language of NPM provisions varies from one BIT to another, the wording in a nexus requirement link also varies from one NPM clause to another. For example, the NPM provision in the Armenia-India BIT¹²⁴ has “for” as its nexus requirement link,¹²⁵ whereas the Denmark-India BIT¹²⁶ has “necessary” as its nexus requirement link.¹²⁷ Therefore, the nexus requirement links can be worded differently; some examples are: “for”,¹²⁸ “directed to”,¹²⁹ “necessary”,¹³⁰ and “relating to”.¹³¹ The significance of the nexus requirement

120. Numbers given under every permissible objective are indicative of the number of times these permissible objectives have been used as an independent permissible objective in NPM provisions of the BITs of South Asian countries; for detailed study see Section III.

121. These miscellaneous provisions are: tax (India-Colombia BIT); illegal activities (India-Colombia BIT); measures relating to financial services for prudential reasons (India-Colombia BIT); measures relating to vital interests (India-Uzbekistan BIT); armed conflict (India-Italy BIT); national emergency situations (India-Italy BIT); civil disturbance (India-Italy BIT); and environment related measures (India-Colombia BIT).

122. Art. 11, China-Sri Lanka BIT, provides for, “protection of its national interest”.

123. Ranjan, *supra* note 2 at 47.

124. *Agreement Between the Government of the Republic of India and the Government of the Republic of Armenia for the Promotion and Protection of Investments*, 23 May 2015 (entered into force 30 May 2006) [India-Armenia BIT].

125. Art. 12 of Armenia-India BIT: “nothing in this Agreement precludes the host Contracting Party from taking action for the protection of ...” (emphasis added).

126. India and Denmark, *Agreement Concerning the Promotion and Reciprocal Protection of Investments*, New Delhi, 6 September 1995 (entered into force 28 August 1996) [India-Denmark BIT].

127. Art. 12 of Denmark-India BIT: “Nothing in this Agreement precludes the host Contracting Party from taking necessary measures in accordance with its laws normally and reasonably applied ...” (emphasis added).

128. *Supra* note 124.

129. *Agreement Between the Government of the Republic of Mauritius and the Government of the Republic of India for the Promotion and Protection of Investments*, 4 September 1998 (entered into force 20 June 2000) [India-Mauritius BIT].

130. India-BLEU BIT.

131. India-Colombia BIT.

link lies in the fact that it determines the degree of connection between the measures taken and the objective sought.¹³² Table 4 identifies the various nexus requirement links used in NPM provisions in the BITs of South Asian countries.

Table 4. Nexus requirement links in NPM provisions in BITs of South Asian countries

Country	Nexus requirement links/(number of times used in BITs having NPM clause)
Bangladesh	1. for (1) ¹³³ 2. necessary (2) ¹³⁴ 3. to (1) ¹³⁵
India	1. for (49) ¹³⁶ 2. necessary (20) ¹³⁷ 3. relating to (2) ¹³⁸ 4. directing to (1) ¹³⁹ 5. to (2) ¹⁴⁰ 6. in pursuance of (1) ¹⁴¹
Nepal	1. necessary (1) ¹⁴²
Pakistan	1. directed to (2) ¹⁴³
Sri Lanka	1. directed to (1) ¹⁴⁴ 2. for (1) ¹⁴⁵ 3. necessary (1) ¹⁴⁶

132. Ranjan, *supra* note 2 at 47; e.g. “necessary” is stricter than “related to”; *United States-Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body of World Trade Organization, 21-2, WTO Doc No WT/DS2/AB/R (29 April 1996), at 17-18.

133. India-Bangladesh BIT.

134. US-Bangladesh BIT, and Turkey-Bangladesh BIT.

135. Uzbekistan-Bangladesh BIT.

136. Armenia-India BIT, Bahrain-India BIT, Bangladesh-India BIT, Belarus-India BIT, Brunei-India BIT, Bulgaria-India BIT, China-India BIT, Croatia-India BIT, Cyprus-India BIT, Egypt-India BIT, Greece-India BIT, Hungary-India BIT, Iceland-India BIT, Portugal-India BIT, Indonesia-India BIT, Israel-India BIT, Jordan-India BIT, Kazakhstan-India BIT, Kyrgyzstan-India BIT, Lao-India BIT, Latvia-India BIT, Libya-India BIT, Lithuania-India BIT, Macedonia-India BIT, Mexico-India BIT, Mongolia-India BIT, Mozambique-India BIT, Myanmar-India BIT, Oman-India BIT, Philippines-India BIT, Poland-India BIT, Qatar-India BIT, Romania-India BIT, Serbia-India BIT, Slovakia-India BIT, Sri Lanka-India BIT, Sudan-India BIT, Syria-India BIT, Taiwan-India BIT, Tajikistan-India BIT, Thailand-India BIT, Trinidad and Tobago-India BIT, Turkey-India BIT, Turkmenistan-India BIT, Ukraine-India BIT, United Kingdom-India BIT, Vietnam-India BIT, Yemen-India BIT, Switzerland-India BIT.

137. Australia-India BIT, Austria-India BIT, BLEU-India BIT, Bosnia and Herzegovina-India BIT, Colombia-India BIT, Czech-India BIT, Denmark-India BIT, Finland-India BIT, France-India BIT, Germany-India BIT, Korea-India BIT, Kuwait-India BIT, Malaysia-India BIT, Morocco-India BIT, Netherlands-India BIT, Saudi Arabia-India BIT, Sweden-India BIT, Spain-India BIT; Nexus Requirement Link “necessary” has been used *three times* in India-Colombia BIT in its different subclauses.

138. Colombia-India BIT; Nexus Requirement Link “relating to” has been used *twice* in India-Colombia BIT in its different subclauses.

139. Mauritius-India BIT.

140. Italy-India BIT, and Uzbekistan-India BIT.

141. Colombia-India BIT.

142. Finland-Nepal BIT.

143. Mauritius-Pakistan BIT, and Singapore-Pakistan BIT.

144. China-Sri Lanka BIT.

145. India-Sri Lanka BIT.

146. US-Sri Lanka BIT.

Table 4 shows various nexus requirement links as applied in the NPM provisions. Sometimes one NPM clause uses more nexus links through various sub-clauses in the provision. This can be shown in the case of India, where the total number of nexus requirement links that are shown in Table 4 is seventy-five, while the number of BITs with NPM provisions counts only seventy, which technically means there should have been only seventy nexus requirement links. However, a study of the NPM provision of the India-Colombia BIT reveals that the NPM provision uses four nexus requirement links through several of its sub-provisions.¹⁴⁷

(d) *Self-judging and non-self-judging NPM clauses.* Self-judging clauses appear in a number of treaties (mutual assistance, extradition, trade, investment, private international law).¹⁴⁸ Any provision having self-judging characteristics will have three basic traits or elements: first, the state will have enough space for unilateral considerations, i.e. the state will have the right to ascertain the legality of extraordinary measures; second, the provision allows for independent assessment by the state claiming derogation and thus grants the state discretion to do so; and third, the threshold for the standard of review by the tribunal or court will get diluted to the examination of just good faith by the tribunal.¹⁴⁹

What makes these provisions special is the manner in which they are drafted; therefore, it is the construction of the language of a particular provision rather than its content that is important. The phrase “if the requested state considers” grants the state enough discretion to take any measure to protect its essential interests without being subjected to the external evaluation of measures taken by it. Different drafting techniques are used to grant such kinds of discretion in different international treaties, which is expressed in phrases such as “if the state considers”, “in the state’s opinion”, or “if the state determines”, etc.¹⁵⁰ Also, the presence of self-judging clauses in treaty provision cannot be presumed; it has to be expressly incorporated in the treaty.¹⁵¹

It is pertinent here to also discuss non-self-judging clauses (NSJCs). NSJCs come into play when treaty provisions explicitly or implicitly do not specify the degree of deference to be accorded to the invocation of NPM provisions by one of the parties.¹⁵² In other words, it becomes the job of the tribunal to determine the deference to be given to the state’s determination. Thus it does not grant the parties the discretion to evaluate their own situation. Rather, it posits an objective test of whether the exception is applicable in any given circumstances.¹⁵³ To put it simply, it does not leave any discretion with the parties.

147. Art. 13, India-Colombia BIT.

148. Stephen SCHILL and Robyn BRIESE, “If the State Considers: Self-Judging Clauses in International Dispute Settlement” (2009) 13 Max Planck Yearbook of United Nations Law 61–140.

149. *Ibid.*

150. Burke-White and Staden, *supra* note 1.

151. Schill and Briesse, *supra* note 148.

152. Burke-White and Staden, *supra* note 1 at 376.

153. Schill and Briesse, *supra* note 148.

Table 5. Self-judging and non-self-judging clauses

Country	Number of self-judging clauses (SJC)	Number of non-self-judging clauses (NSJC)
Bangladesh	0	4
India	1 ¹⁵⁴	69
Nepal	0	1
Pakistan	0	2
Sri Lanka	0	3

Table 6. Limitations on NPM provisions

Country	Conditions/Limitations used in NPM provisions
Bangladesh	1. in accordance with its laws normally (2) ¹⁵⁵ 2. reasonably (1) ¹⁵⁶
India	3. non-discriminatory manner (2) ¹⁵⁷ 1. in accordance with its laws normally (62) ¹⁵⁸ 2. reasonably (52) ¹⁵⁹ 3. non-discriminatory manner (67) ¹⁶⁰ 4. good faith (5) ¹⁶¹ 5. no arbitrary or unjustifiable discrimination (2) ¹⁶² 6. judicial review (1) ¹⁶³ 7. in exceptional circumstances (1) ¹⁶⁴
Nepal	1. no arbitrary or unjustifiable discrimination (1) ¹⁶⁵ 2. no disguised investment restriction (1) ¹⁶⁶
Pakistan	NO CONDITIONS
Sri Lanka	1. in accordance with its laws normally (1) ¹⁶⁷ 2. reasonably (1) ¹⁶⁸ 3. non-discriminatory manner (1) ¹⁶⁹

Against this background, where SJCs can provide much discretion to a state to justify its actions without incurring any international obligation, a study of the BITs of South Asian countries is much needed. Table 5 lists the number of BITs that have SJCs or NSJCs. Thus it can be seen here that, except on one occasion, in all NPM provisions the language is of NSJCs only. It means less discretion while justifying the measure taken by the party for breach of treaty provisions.

154. Art. 13(4), India-Colombia BIT.

155. India-Bangladesh BIT, and Uzbekistan-Bangladesh BIT.

156. India-Bangladesh BIT.

157. India-Bangladesh BIT, and Uzbekistan-Bangladesh BIT.

158. India-Armenia BIT, Australia-India BIT, Austria-India BIT, Bahrain-India BIT, Bangladesh-India BIT, Belarus-India BIT, Bosnia and Herzegovina-India BIT, Brunei-India BIT, Bulgaria-India BIT, China-India BIT, Colombia-India BIT, Croatia-India BIT, Cyprus-India BIT, Czech-India BIT, Denmark-India BIT, Egypt-India BIT, Finland-India BIT, France-India BIT, Hungary-India BIT, Iceland-India BIT, Portugal-India BIT, Indonesia-India BIT, Israel-India BIT, Jordan-India BIT, Kazakhstan-India BIT, Korea-India

(e) *Limitations on NPM provisions.* Almost all NPM provisions contain some restrictions or limitations on their applicability. Common conditions/limitations to which NPM provisions are subjected are “non-discriminatory”, “reasonable”, “good faith”, etc. Table 6 lists this dynamic in more detail. Thus it can be seen here that there is no dearth of limitations which restrict the invocation of NPM provisions. This certainly creates balance between the regulatory space of the host state and the protection of investments.

This ends the analysis of the anatomy of NPM provisions. The next section will explain the permissible objectives in the NPM provisions of South Asian countries.

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- BIT, Kuwait-India BIT, Kyrgyzstan-India BIT, Lao-India BIT, Latvia-India BIT, Libya-India BIT, Lithuania-India BIT, Macedonia-India BIT, Malaysia-India BIT, Mexico-India BIT, Mongolia-India BIT, Morocco-India BIT, Mozambique-India BIT, Myanmar-India BIT, Netherlands-India BIT, Oman-India BIT, Philippines-India BIT, Poland-India BIT, Qatar-India BIT, Romania-India BIT, Saudi Arabia-India BIT, Serbia-India BIT, Slovakia-India BIT, Sri Lanka-India BIT, Sudan-India BIT, Sweden-India BIT, Syria-India BIT, Taiwan-India BIT, Tajikistan-India BIT, Thailand-India BIT, Trinidad and Tobago-India BIT, Turkey-India BIT, Turkmenistan-India BIT, Ukraine-India BIT, United Kingdom-India BIT, Uzbekistan-India BIT, Vietnam-India BIT, Yemen-India BIT, Italy-India BIT, Spain-India BIT, Switzerland-India BIT.
159. India-Armenia BIT, Australia-India BIT, Bahrain-India BIT, Bangladesh-India BIT, Belarus-India BIT, Brunei-India BIT, Bulgaria-India BIT, China-India BIT, Colombia-India BIT, Croatia-India BIT, Cyprus-India BIT, Denmark-India BIT, Egypt-India BIT, Hungary-India BIT, Iceland-India BIT, Indonesia-India BIT, Israel-India BIT, Jordan-India BIT, Kazakhstan-India BIT, Korea-India BIT, Kyrgyzstan-India BIT, Lao-India BIT, Latvia-India BIT, Libya-India BIT, Lithuania-India BIT, Macedonia-India BIT, Malaysia-India BIT, Mexico-India BIT, Mongolia-India BIT, Morocco-India BIT, Mozambique-India BIT, Myanmar-India BIT, Oman-India BIT, Philippines-India BIT, Poland-India BIT, Qatar-India BIT, Romania-India BIT, Saudi Arabia-India BIT, Serbia-India BIT, Slovakia-India BIT, Sri Lanka-India BIT, Sudan-India BIT, Sweden-India BIT, Syria-India BIT, Taiwan-India BIT, Tajikistan-India BIT, Thailand-India BIT, Trinidad and Tobago-India BIT, Turkey-India BIT, Turkmenistan-India BIT, Ukraine-India BIT, United Kingdom-India BIT, Vietnam-India BIT, Yemen-India BIT, Italy-India BIT, Spain-India BIT, Switzerland-India BIT.
160. India-Armenia BIT, Australia-India BIT, Austria-India BIT, Bahrain-India BIT, Bangladesh-India BIT, Belarus-India BIT, Bosnia and Herzegovina-India BIT, Brunei-India BIT, Bulgaria-India BIT, China-India BIT, Colombia-India BIT, Croatia-India BIT, Cyprus-India BIT, Czech-India BIT, Denmark-India BIT, Egypt-India BIT, Finland-India BIT, France-India BIT, Greece-India BIT, Hungary-India BIT, Iceland-India BIT, Portugal-India BIT, Indonesia-India BIT, Israel-India BIT, Jordan-India BIT, Kazakhstan-India BIT, Korea-India BIT, Kuwait-India BIT, Kyrgyzstan-India BIT, Lao-India BIT, Latvia-India BIT, Libya-India BIT, Lithuania-India BIT, Macedonia-India BIT, Malaysia-India BIT, Mexico-India BIT, Mongolia-India BIT, Morocco-India BIT, Mozambique-India BIT, Myanmar-India BIT, Netherlands-India BIT, Oman-India BIT, Philippines-India BIT, Poland-India BIT, Qatar-India BIT, Romania-India BIT, Saudi Arabia-India BIT, Serbia-India BIT, Slovakia-India BIT, Sri Lanka-India BIT, Sudan-India BIT, Sweden-India BIT, Syria-India BIT, Taiwan-India BIT, Tajikistan-India BIT, Thailand-India BIT, Trinidad and Tobago-India BIT, Turkey-India BIT, Turkmenistan-India BIT, Ukraine-India BIT, United Kingdom-India BIT, Uzbekistan-India BIT, Vietnam-India BIT, Yemen-India BIT, Italy-India BIT, Spain-India BIT, Switzerland-India BIT.
161. Bosnia and Herzegovina-India BIT, Czech-India BIT, France-India BIT, Korea-India BIT, and Netherlands-India BIT.
162. Colombia-India BIT, and Croatia-India BIT.
163. Israel-India BIT.
164. India-Switzerland BIT.
165. Nepal-Finland BIT.
166. Nepal-Finland BIT.
167. India-Sri Lanka BIT.
168. India-Sri Lanka BIT.
169. India-Sri Lanka BIT.

III. PERMISSIBLE OBJECTIVES IN NPM PROVISIONS

This section undertakes the study of each permissible objective found in the BITs of South Asian countries.

A. *Essential Security Interest*

Out of the eighty BITs having NPM provisions in this region,¹⁷⁰ seventy-three have an essential security interest (ESI) as one of the permissible objectives.¹⁷¹ Given the fact that these BITs use few permissible objectives in the NPM provisions, ESI assumes importance as it can be used for both security and non-security issues.¹⁷² However, before an ESI can be used to exonerate the state from defaulting on its international law obligation, the state will have to prove that the measures taken were “essential” for its security interest. Now the question arises: What is the meaning of “essential” here? Some scholars have argued that the ordinary meaning of essential is “vitally important”.¹⁷³ *Black’s Law Dictionary* provides for the meaning of essential as “indispensably necessary” or “important in the highest degree” or “requisite”.¹⁷⁴ This means that the word “essential” before “security interest” sets a high threshold for a state to prove that the security interests taken are indispensably necessary. Once it is settled that security interests can be applied only in situations of the highest degree of importance, we should turn our attention to the meaning and scope of the term “security interest”. For this purpose, an enquiry should be made into understanding the word “security”. To start with the investment law regime, NAFTA, Chapter XXI, in its Article 2102, contains ESI as an exception and provides an exhaustive list of exceptions under ESI; however, it is mainly concerned with war, traffic in arms, etc.¹⁷⁵ The Energy Charter Treaty, Article 24, on exceptions, provides for the protection of the essential security interests of its signatories. However, it also stipulates ESI in terms of military necessity, war, and armed conflict.¹⁷⁶ In FTAs, Article 10(18)(2)(b) of the India-Korea IIA¹⁷⁷ and Article 6(12)(1)(b) of the India-Singapore IIA¹⁷⁸ also provides for ESI, but again in the context of the military and war, etc. Thus most of these instruments provide for the meaning of ESI in the provision itself. However, what happens if the provision is silent on the scope or meaning of ESI? It has been argued by many scholars that a plain reading should be taken while interpreting ESI;¹⁷⁹

170. See Table 1.

171. See Table 3.

172. Ranjan, *supra* note 2 at 36.

173. *Ibid.*, at 37.

174. Black, *supra* note 108 at 718.

175. *North American Free Trade Agreement*, 32 I.L.M. 289 (1993).

176. *Energy Charter Treaty*, 34 I.L.M. 360 (1995); “Essential Security Interests Under International Investment Law, International Investment Perspectives: Freedom of Investment in a Changing World” (2007 edn, OECD) 93.

177. *Comprehensive Economic Partnership Agreement Between Republic of India and Republic of Korea*, 7 August 2009 (entered into force 1 January 2010), art. 10(18)(2).

178. *Comprehensive Economic Partnership Agreement Between Republic of India and Republic of Singapore*, 29 June 2005 (entered into force 1 January 2005), art. 6(12)(1)(b).

179. August REINISCH, “Necessity in International Investment Arbitration—an Unnecessary Split of Opinions in Recent ICSID Cases?” (2007) 7 *Journal of World Investment and Trade* 191 at 209;

however, there are also many investment law scholars who have argued for a broad meaning of ESI.¹⁸⁰ Also, the broad meaning given to ESI by various investment arbitration tribunals while interpreting Article 11 of the US-Argentina BIT provides an alternate interpretation for ESI.¹⁸¹ These tribunals held that the inclusion of economic emergency within the meaning of ESI was justified;¹⁸² thus they gave a broad meaning to the term ESI.

In the WTO regime, two important exceptions pertinent to the present study are the general exceptions¹⁸³ and security exception¹⁸⁴ of GATT. However, in BITs such types of demarcation have not been observed, which means ESI deals with both security and non-security issues.¹⁸⁵ Thus, ESI in BITs is different from in Article XXI of GATT, which only provides for security exceptions. ESI in BITs is used in a general sense, as it covers more issues than just conventional security related issues.

With the evolution of international law, the meaning of security has also changed from its conventional meaning of state security in war or armed conflict to various other issues.¹⁸⁶ It now encompasses diverse issues such as economic

José E. ALVAREZ and Kathryn KHAMSI, "The Argentine Crisis and Foreign Investors" (2008-09) 1 Oxford Yearbook of Investment Law and Policy 379; William J. MOON, "Essential Security Interests in International Investment Agreements" (2012) 15 Journal of International Economic Law 481.

180. Andrew NEWCOMBE and Lluís PARADELL, *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen Aan Den Rijn: Kluwer Law International, 2009) at 497-9; Tarsicio GAZZINI, "Foreign Investment and Measures Adopted on Grounds of Necessity: Towards a Common Understanding" (2010) 7 Transnational Dispute Management, 1 at 17-18; Prabhash RANJAN, "Protecting Security Interests in International Investment Law" in Mary FOOTER, Julia SCHMIDT, and Nigel D. WHITE, eds., *Security and International Law* (Oxford: Hart Publishing, 2016).

181. *Supra* note 13.

182. CMS, *supra* note 13 at para. 360; LG&E, *supra* note 13 at para. 238; *Sempra*, *supra* note 13 at para. 374; *Enron*, *supra* note 13 at para. 332.

183. GATT, art. XX, *supra* note 102.

184. GATT, art. XXI, *supra* note 102.

185. Ranjan, *supra* note 180.

186. Hitoshi NASU, "The Expanded Conception of Security and International Law: Challenges to the UN Collective Security System" (2011) 3 Amsterdam Law Forum 15-33; for a detailed study on security, David A. BALDWIN, "The Concept of Security" (1997) 23 Review of International Studies 5-26; Barry BUZAN, *People, States and Fear: The National Security Problems in International Relations* (Brighton: Wheatsheaf, 1983) at 6; Jessica T. MATHEWS, "Redefining Security" (1989) 68 Foreign Affairs 162-77; Richard H. ULLMAN, "Redefining Security" (1983) 8 International Security 129-53; Mariano-Florentino CUÉLLAR, "Reflections on Sovereignty and Collective Security" (2004) 40 Stanford Journal of International Law 230-9; Gershon SHAFIR, "Legal and Institutional Responses to Contemporary Global Threats: An Introduction to the U.N. Secretary-General's High-Level Panel Report on Threats, Challenges and Change" (2007) 38 California Western International Law Journal 6-14; William M. REISMAN, "In Defense of World Public Order" (2001) 95 American Journal of International Law 834; Gianluca GENTILI, "European Court of Human Rights: An Absolute Ban on Deportation of Foreign Citizens to Countries Where Torture or Ill-treatment is a Genuine Risk" (2010) 8 International Journal of Constitutional Law 311-22; Lena SKOGLUND, "Diplomatic Assurances Against Torture—An Effective Strategy? A Review of Jurisprudence and Examination of the Arguments" (2008) 77 Nordic Journal of International Law 319-64; David P. FIDLER, "The UN and the Responsibility to Practice Public Health" (2005) 2 Journal of International Law and International Relations 58-9; Lorraine ELLIOTT, "Imaginative Adaptations: A Possible Environmental Role for the UN Security Council?" (2003) 24 Contemporary Security Policy 47-68; Crispin TICKELL, "The Inevitability of Environmental Security" in Gwyn PRINS, ed., *Threats Without Enemies: Facing Environmental Insecurity* (London: Earthscan 1993), 23; UN General Assembly Thematic Debate on Human Security, New York, 22 May 2008 (25 June 2011), online: UN <<http://www.un.org/ga/president/62/ThematicDebates/humansecurity.shtml>>; Gary KING and Christopher J.L. MURRAY, "Rethinking Human Security" (2001) 116 Political Science

security,¹⁸⁷ environmental security,¹⁸⁸ energy and resource security,¹⁸⁹ food security,¹⁹⁰ bio-security,¹⁹¹ and health security,¹⁹² etc. This reasoning bolsters the proposition that the scope of ESI has been broadened to encompass even the conventionally non-security-related issues.

To analyze this aspect in the context of South Asia, almost all ESI provisions in South Asian BITs are silent on their content.¹⁹³ Also, some of the NPM provisions in these BITs use different words, like “vital interests and security”,¹⁹⁴ “war, armed conflict, national emergency or civil disturbances”,¹⁹⁵ and “national interest”.¹⁹⁶ To deal with these terms separately, “vital interest” basically grants the state the freedom from international obligations when circumstances adversely affect its prestige or potentially threaten its existence.¹⁹⁷ “National emergency” is a broad term; it includes more than just security interest. The *LG&E* Tribunal accepted that economic crisis can be subsumed either under “essential security interest” or under “national emergency”.¹⁹⁸ It again should be left to a margin of appreciation decided on by the state, as different states have a different understanding of the matter.¹⁹⁹ “National interest” brings down the threshold of proving an emergency situation, as the more strict term “emergency” is absent; it provides that states will only have to show that the measures

Quarterly 585–610; Amitav ACHARYA, “Human Security: East Versus West” (2001) 56 *International Journal* 442 at 460.

187. Vincent CABLE, “What is International Economic Security?” (1995) 71 *International Affairs* 305–24.
188. Simon DALBY, *Security and Environmental Change* (Cambridge: Polity Press, 2009) at chapter 2; Simon DALBY, *Environmental Security*, 1st edn (Minneapolis: University of Minnesota Press, 2002).
189. Sam RAPHAEL and Doug STOKES, “Energy Security” in Alan COLLINS, ed., *Contemporary Security Studies*, 2nd edn (Oxford: Oxford University Press, 2010), 306–17.
190. Wael ALLAM, “Food Supply Security, Sovereignty and International Peace and Security: Sovereignty as a Challenge to Food Supply Security” in Ahmed MAHIOU and Francis SNYDER, eds., *Food Security and Food Safety* (Leiden: Martinus Nijhoff Publishers, 2006) 325–50; Melaku G. DESTA, “Food Security and International Trade Law: An Appraisal of the World Trade Organisation Approach” (2001) 35 *Journal of World Trade* 449–68.
191. David P. FIDLER and Lawrence O. GOSTIN, *Biosecurity in the Global Age: Biological Weapons, Public Health, and the Rule of Law* (Stanford: Stanford University Press, 2008); Mark WHEELIS and Malcolm DANDO, “Neurobiology: A Case Study of the Imminent Militarisation of Biology” (2005) 87 *International Review of the Red Cross* 553–71; David L. HEYMANN, “The Evolving Infectious Disease Threat: Implications for National and Global Security” (2003) 4 *Journal of Human Development* 191–207.
192. David P. FIDLER, “From International Sanitary Conventions to Global Health Security: The New International Health Regulations” (2005) 4 *Chinese Journal of International Law* 325–92; Lincoln CHEN and Vasant NARASIMHAN, “Human Security and Global Health” (2003) 4 *Journal of Human Development* 181–90.
193. Except for the Nepal-Finland BIT.
194. Uzbekistan-India BIT; Uzbekistan-Bangladesh BIT.
195. Italy-India BIT.
196. China-Sri Lanka BIT.
197. Michael J. HAHN, “Vital Interests and the Law of GATT: An Analysis of GATT’s Security Exception” (1991) 12 *Michigan Journal of International Law* 558 at 562.
198. *LG&E*, *supra* note 13 at para. 244.
199. National emergency provisions in the constitutions of South Asian countries are quite different from each other; art. 352 of the Indian Constitution; arts. 232, 233 of the Constitution of Pakistan; arts. 141A, 141B, and 141C of the Constitution of Bangladesh; art. 220 of the Constitution of Sri Lanka; chapter 9, arts. 143–148 of the Constitution of Afghanistan; and part 19, art. 143 of the Interim Constitution of Nepal.

taken were in the interest of the country. What is “interest” will again have to be left to the host state. The Nepal-Finland BIT is the only BIT having an NPM clause that provides for the protection of ESI in time of war or armed conflict, or other emergency in international relations.²⁰⁰ Thus it imposes upon the state a condition that security interests should be used only in a time of war or armed conflict, or other emergency in international relations. The phrase “other emergency in international relations” can also be found in Article XXI(b)(iii) of GATT, and in Article 2102(1)(b)(ii) of NAFTA.²⁰¹ This term is certainly broader than “war” or “armed conflict”; despite its vague structure, the expression is independent of any other term used here. The term “emergency” is more serious in nature, different from routine tensions or disagreements. The phrase could apply to those international situations which involve the future threat of war or armed conflict. Also, “emergency” can refer to an economic, social, or political situation as well. The best reading of this phrase would thus allow it to be used in almost all situations of a serious nature.²⁰²

As has already been discussed in Section II, self-judging clauses can play a vital role in providing states with a large regulatory space. Therefore, if ESI does not provide for its content, it means that a state through its SJC can determine the meaning of ESI. Among the BITs in South Asian countries, only one BIT has a SJC in its NPM provision;²⁰³ the other BITs having NPM provision are non-self-judging.

Given the fact that all South Asian countries are grappling with various regional problems, for example terrorism, financial problems, or issues relating to natural calamities,²⁰⁴ ESI can play a vital role by providing justification for regulatory measures taken in cases of the above-mentioned regional problems. Since regional problems can best be understood by the countries in that particular region, it is argued here that the margin of appreciation should always be given to the host states.

B. Public Order

Public order as a permissible objective has not been used very frequently in the BITs of South Asian countries. It appears in only eight of these BITs.²⁰⁵ In the context of India, public order appears in four BITs: Colombia-India, Portugal-India, Morocco-India, and Qatar-India. Article 13(5) of the India-Colombia BIT poses a high threshold for the use of this exception as it is qualified by the word “necessary”, which means that only in situations of extreme urgency can the public order exception be invoked. The chapeau of this provision also puts some limitations on the use of exceptions given under it.²⁰⁶ The Portugal-India and Qatar-India BITs do not put any limitation on the

200. Finland-Nepal BIT.

201. *North American Free Trade Agreement*, 17 December 1992, U.S.-Can.-Mex., art. 2102(1)(b)(ii), 32 I.L.M. 605, 699–700 (1993).

202. Matsushita *et al.*, *supra* note 102 at 596–7; Dapo AKANDE and Sope WILLIAMS, “International Adjudication on National Security Issues: What Role for the WTO?” (2003) 43 *Virginia Journal of International Law* 365 at 400.

203. Art. 13(4), India-Colombia BIT.

204. Burke-White and Staden, *supra* note 1 at 407.

205. See Table 3.

206. The chapeau puts limitations on measures; for example, the use of the exceptions must not be arbitrary or unjustifiable, and there must not be disguised restriction on investment.

invocation of this exception except that the measure should be used in a non-discriminatory manner. However, the Qatar-India BIT, apart from having a permissible objective of “public order”, provides for “morality affecting public order” as a separate permissible objective. It means that this permissible objective can be invoked only in those situations where public order is affected by issues of morality. The Morocco-India BIT sets a higher threshold as it provides for “strictly necessary” as a qualification for public order to be used as an exception. This “strictly necessary” requirement is more stringent than the “necessary” requirement. It means a state seeking to justify its actions under an NPM provision will have to show that it fulfils the requirements of the “strictly necessary” test. Pakistan does not have public order as a permissible objective in its BITs. This is surprising given that the public order situation in Pakistan has faced many problems in the past, and indeed in the present;²⁰⁷ in this situation it is suggested that Pakistan should include public order as a permissible objective in its BITs. Bangladesh has two BITs containing public order as a permissible objective: the US-Bangladesh and Turkey-Bangladesh BITs. Both of these BITs require a high-threshold necessity test to be passed in order to justify state action to invoke public order exception. In Sri Lanka, the public order exception appears only in the US-Sri Lanka BIT. It again sets a high-threshold requirement: “necessary”. Nepal, in its Finland-Nepal BIT, contains a public order exception. It also sets a high threshold for exceptions to be invoked by states as it provides for “necessary” as a requirement to be satisfied.

The meaning of “public order” differs from one jurisdiction to another.²⁰⁸ For example, in France, Italy, and Switzerland, it plays a fundamental and even constitutional role; whereas in the US and Germany, it is used to describe a class of offences and sum of behavioural norms, respectively.²⁰⁹ Also, in the *US Gambling* case in the WTO, the panel acknowledged that the meaning of “public order” can vary in time and space and it depends on various factors such as social, cultural, ethical, and religious values.²¹⁰ Thus, an attempt to ascertain the meaning in international law using Article 31 of Vienna Convention on the Law of Treaties (VCLT) shall be made.

1. Ordinary meaning

In the absence of any clear text available in these BITs, the dictionary meaning shall be taken to define the term. The fourth edition of *Black’s Law Dictionary*, though, does not provide for the definition of “public order”; however, it does provide for the definition of “disorder”. It defines “disorder” as “turbulent or riotous behaviour;

207. “Defence Notes” (12 March 2015), online: Defence Journal <<http://www.defencejournal.com/april98/security&defence2.htm>>; Iftikhar Tariq KHANZADA, “Pakistan and the Daily Deteriorating Law and Order Situation” (10 April 2015), online: Liberty Voice <<http://guardianlv.com/2013/11/pakistan-and-the-daily-deteriorating-law-and-order-situation/>>; “Law and Order Situation in Pakistan” (12 March 2015), online: <<http://prh.hec.gov.pk/Chapters/1834-3.pdf>>.

208. Burke-White and Staden, *supra* note 1 at 357; George H. DESSON, “The Technique of Public Order: Evolving Concepts of Criminal Law” (1955) 5 Buffalo Law Review 22.

209. Security-Related Terms in International Investment Law and in National Security Strategies, OECD, May 2009.

210. *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Panel Report, WT/DS285/R (10 November 2004), para. 6.461.

immoral or indecent conduct; the breach of public decorum and morality”.²¹¹ However, the ninth edition of *Black’s Law Dictionary* defines disorder as “A public disturbance; a riot <civil disorder>”.²¹² Thus, the meaning of “public order” can be ascertained as the absence of disorder.

2. *Object and purpose*

The preamble of any BIT can be relied upon to determine the object and purpose of the treaty. However, different BITs have different preambles. Thus, ascertaining one uniform meaning of “public order” is not possible. Therefore, imposing on a country an internationally uniform definition of “public order”, which may not correspond to the country’s own values and might prevent the country from justifying a measure based on its domestic order, would go against the object and purpose of that BIT.²¹³

It is possible that the scope and meaning of “public order” was purposely not included in the BITs. Thus, it is suggested that the arbitral tribunals should give due deference to the country concerned while interpreting “public order”.

C. *Public Health*

Human health has been recognized by the WTO as being “important in the highest degree”.²¹⁴ The safety of public health is no doubt a matter of the utmost importance for any state. However, bound by the obligations of BITs, states sometimes give up on welfare measures that might go against its BIT obligations.²¹⁵ Therefore, it would be wise to include issues like public health exceptions in BITs. To look at the situation in South Asia, public health appears in nineteen BITs of South Asian countries.²¹⁶ This Article includes formulations such as “for the prevention of diseases or pests”,²¹⁷ “the prevention of diseases and pests in animals or plants”,²¹⁸ or “to protect human, animal, plant life or health”,²¹⁹ etc., within the ambit of public health. This paper shall refer to them as “public health-related provisions”. These formulations are broad in scope, as compared to “public health exceptions”, as they also include life and health issues for animals and plants.²²⁰ It means that the host

211. Black, *supra* note 108 at 556.

212. Bryan A. GARNER, *Black’s Law Dictionary*, 9th edn (St Paul, MN: West Thompson Reuters Business, 2009) 538.

213. Nicolas F. DIEBOLD, “The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger And the Undermining Mole” (2008) 11 *Journal of International Economic Law* 43 at 54.

214. WTO Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-containing Products*, WT/DS135/AB/R, 12 March 2001, para. 172; WTO Agreements and Public Health, Summary Executive at p. 11, online: <https://www.wto.org/english/res_e/booksp_e/who_wto_e.pdf>.

215. Ranjan, *supra* note 180 at fn. 38:

While BITs do not prohibit states from adopting regulatory measures of any kind, states will have to pay damages to foreign investors if these regulatory measures are found to be inconsistent with their BIT obligations. This dissuades states from adopting such regulatory measures.

216. See Table 3.

217. Australia-India BIT.

218. China-Sri Lanka BIT.

219. Colombia-India BIT.

220. Ranjan, *supra* note 2 at 46.

state can also take measures in cases of the failure of crops or spread of diseases in animals. Also, it becomes relatively easy to prove the condition of public health emergencies as the host state only needs scientific evidence to prove its existence or continuance, as compared to security-related issues.²²¹ The WTO regime, through the jurisprudence of the cases decided by panels and appellate bodies, also provides guiding principles in understanding public health exceptions and their applicability.²²²

In terms of South Asia, India has fifteen BITs having public health or public health-related provisions: Australia-India,²²³ BLEU-India,²²⁴ Bosnia and Herzegovina-India,²²⁵ Colombia-India,²²⁶ Czech-India,²²⁷ Denmark-India,²²⁸ France-India,²²⁹ Germany-India,²³⁰ Korea-India,²³¹ Kuwait-India,²³² Malaysia-India,²³³ Mauritius-India,²³⁴ Netherlands-India,²³⁵ Italy-India,²³⁶ and Spain-India.²³⁷ Pakistan has public

221. Burke-White and Staden, *supra* note 1 at 361.

222. For further study, Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, paras. 16, 27, WT/DS135/AB/R (12 March 2001); *Thailand-Restrictions on Importation of Cigarettes*, BISD 37S/200; *Agreement on the Application of Sanitary and Phytosanitary Measures*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493, online: WTO <http://www.wto.org/English/tratop_e/sps_e/spsagr_e.htm>; art. XX(b) of GATT.

223. *Agreement Between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments*, 26 February 1999 (entered into force 4 May 2000), art. 15.

224. *Agreement Between the Government of The Republic of India and the Belgo-Luxembourg Economic Union for the Promotion and Protection of Investments*, 31 October 1997 (entered into force 8 January 2001), art. 12(2).

225. *Agreement Between Bosnia and Herzegovina and the Republic of India for the Promotion and Protection of Investments*, 12 September 2006 (entered into force 13 February 2008), art. 12.

226. Art. 13(5)(b), India-Colombia BIT.

227. *Agreement Between the Czech Republic and the Republic of India for the Promotion and Protection of Investments*, 10 October 1996 (entered into force 6 February 1998), art. 12.

228. India and Denmark, *Agreement Concerning the Promotion and Reciprocal Protection of Investments*, 6 September 1995 (entered into force 28 August 1996), art. 12(2).

229. *Agreement Between the Government of the Republic of India and the Government of the Republic of France on the Reciprocal Promotion and Protection of Investments*, 2 September 1997 (entered into force 17 May 2000), art. 12.

230. *Agreement Between the Federal Republic of Germany and the Republic of India for the Promotion and Protection of Investments*, 10 July 1995 (entered into force 13 July 1998), art. 12.

231. *Agreement Between the Government of the Republic of India and the Government of the Republic of Korea on the Promotion and Protection of Investments*, 26 February 1996 (entered into force 5 July 1996), art. 10(2).

232. *Agreement Between the State of Kuwait and the Republic of India for the Encouragement and Reciprocal Protection of Investment*, 27 November 2001 (entered into force 28 June 2003), art. 14(2).

233. *Agreement Between the Government of the Republic of India and the Government of Malaysia for the Promotion and Protection of Investments*, 1 August 1995 (entered into force 12 April 1997), art. 10(2).

234. *Agreement Between the Government of the Republic of Mauritius and the Government of the Republic of India for the Promotion and Protection of Investments*, 4 September 1998 (entered into force 20 June 2000), art. 11.

235. *Agreement Between the Republic of India and the Kingdom of the Netherlands for the Promotion and Protection of Investments*, 6 November 1995 (entered into force 1 December 1996), art. 12.

236. *Agreement Between the Government of the Republic of India and the Government of the Italian Republic for the Promotion and Protection of Investments*, 13 November 1995 (entered into force 26 March 1998), art. 12.

237. *Agreement on the Promotion and the Reciprocal Protection of Investments Between the Republic of India and the Kingdom of Spain*, 30 September 1997 (entered into force 15 December 1998), art. 13.

health exceptions in two of its BITs: Mauritius-Pakistan²³⁸ and Singapore-Pakistan.²³⁹ Sri Lanka has a public health-related exception in only its China-Sri Lanka BIT.²⁴⁰ Bangladesh and Nepal have no public health exceptions in their BITs.²⁴¹ For the purposes of simplicity, an analysis will be made of different “public health-related provisions” separately; the approach for such a study will be as follows:

1. Prevention of disease and pests;
2. Prevention of disease and pests in animals and plants;
3. Public health; and
4. Other formulations.

1. *Prevention of disease and pests*

This kind of formulation appears in five BITs of South Asian countries.²⁴² All of these BITs, except in one case,²⁴³ use “necessary” as a nexus requirement link. The Kuwait-India BIT sets a higher threshold as it provides for the prevention of disease and pests as a specific measure in circumstances of extreme emergency, apart from using “necessary” as a nexus requirement link. It is also pertinent to note here that this formulation does not provide for the bearer of the disease—human or animal. Thereby, it sets the threshold lower than any other provision that makes any such distinction. Therefore, a broad meaning can be given to this formulation so as to include both humans and animals in cases of disease.

2. *Prevention of disease and pests in animals and plants*

This kind of formulation appears in eleven South Asian BITs.²⁴⁴ Six of these BITs use “necessary” as a nexus requirement link;²⁴⁵ four of them use “directed to”;²⁴⁶ and one of them uses “to” as a nexus requirement link.²⁴⁷ It is obvious that “necessary” is more

238. *Agreement Between the Government of the Republic of Mauritius and the Government of the Islamic Republic of Pakistan for the Promotion and Reciprocal Protection of Investments*, 3 April 1997 (entered into force 3 April 1997), art. 12.

239. *Agreement Between the Government of the Republic of Singapore and the Government of the Islamic Republic of Pakistan on the Promotion and Protection of Investments*, 8 March 1995 (entered into force 4 May 1995), art. 11.

240. *Agreement Between the Government of the Democratic Socialist Republic of Sri Lanka and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments*, 13 March 1986 (entered into force 25 March 1987), art. 11.

241. See Table 3. This study does not take account of the NPM provisions with limited scope, as there are instances where Nepal is found to have a limited scope NPM provision in one of its BITs having public health exception. However, Bangladesh does not have any public health exception in any of its NPM provisions.

242. Australia-India BIT, BLEU-India BIT, Denmark-India BIT, Malaysia-India BIT, and Kuwait-India BIT.

243. BLEU-India BIT; it uses “for” as a nexus requirement link.

244. Bosnia and Herzegovina-India BIT, Czech-India BIT, France-India BIT, Germany-India BIT, Korea-India BIT, Mauritius-India BIT, Netherlands-India BIT, Italy-India BIT, Mauritius-Pakistan BIT, Singapore-Pakistan BIT, and China-Sri Lanka BIT.

245. Bosnia and Herzegovina-India BIT, Czech-India BIT, France-India BIT, Germany-India BIT, Korea-India BIT, and Netherlands-India BIT.

246. Mauritius-India BIT, Mauritius-Pakistan BIT, Singapore-Pakistan BIT, and China-Sri Lanka BIT.

247. Italy-India BIT.

stringent, as it sets a higher threshold than “directed to” or “to” as a nexus requirement link. In terms of which is more stringent, a “necessary” > “directed to” > “to” kind of formulation can be made. It is also pertinent to mention here that the word “disease” in this formulation is used only for animals. Thus it leaves human health issues unaddressed.

3. *Public health*

This formulation can be found in four BITs of South Asian countries.²⁴⁸ All of these four BITs use “directed to” as a nexus requirement link; which means states will not have to prove that measures taken by them were necessary. It means that states will have more regulatory latitude in cases of public health.

4. *Other formulations*

The India-Colombia BIT uses the language “to protect human, animal, plant life or health”, and the India-Spain BIT uses “in circumstances of extreme emergency posing a threat to the life or health of human beings, animals or plants”. The India-Colombia BIT uses the language of GATT Article XX(b).²⁴⁹ It covers a wide range of items. It takes into consideration the life and health issues of humans, animals, and plants. Here, life and health terms need some discussion. Protection of life means protection of both life and limb from any possible threat. Health may or may not fall under this category. Also, the phrase “life or health” means that proving either a life threat or a health threat will justify the action taken by the state. Thus, this type of formulation covers in itself a broad range of life- and health-related aspects. The same interpretation can be made for the public health exception in the Spain-India BIT, which uses the phrase “life or health”; but the Spain-India BIT also sets a higher threshold for the measures, as it says that measures should be taken only in circumstances of extreme emergency.

There are 400 million poor people in South Asia,²⁵⁰ and it is a well-established notion that poverty creates ill-health because it forces people to live in environments that make them sick, without decent shelter, clean water, or adequate sanitation.²⁵¹ Sometimes, due to external or internal factors, endemic diseases like Ebola, swine flu, bird flu, and so on spread in public, creating panic among people. And the section of society which gets most affected by these endemic diseases are the poor. Therefore, it is suggested that the host state should maintain maximum regulatory latitude in the area of public health in the BIT itself.

D. *Circumstances of Extreme Emergency*

Ranjan argues that circumstances of extreme emergency (CEE), in *stricto sensu*, is not a permissible objective,²⁵² as CEE refers only to the circumstances and not the objective sought. However, this paper defers from the analysis made by Ranjan on this

248. *Supra* note 246.

249. *Supra* note 102.

250. “South Asia: The End of Poverty” (14 April 2015), online: The World Bank <<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/0,,contentMDK:20969099~pagePK:146736~piPK:146830~theSitePK:223547,00.html>>.

251. “Poverty and Health” (14 April 2015), online: World Health Organisation <<http://www.who.int/hdp/poverty/en/>>.

252. Ranjan, *supra* note 2 at 42.

because the word “circumstances” itself leaves space for any permissible objective term to fall under its purview. For example, the absence of a public health exception or any other permissible objective in an NPM provision can be covered by a CEE permissible objective, subject to the fulfilment of the conditions of “extreme” and “emergency”. Therefore, this paper would label CEE as the “jack of all permissible objectives”, as it may perform the function of all other permissible objectives absent in BITs, thus providing the host state with the maximum discretion and regulatory latitude. Limitations on CEE, i.e. the burden on the host state to prove the existence of circumstances of “extreme emergency”, will have to be examined on a case-by-case basis. Also, the deference of standard of review to a host state may make the task of proving the existence of “extreme emergency” easier for the host state.

In the context of South Asia, in India CEE are found in sixty-two of its BITs.²⁵³ However, the India-Uzbekistan²⁵⁴ and India-Italy BITs²⁵⁵ use a lower level of threshold, as they provide for “national emergency” and “emergency”, respectively, i.e. without the prefix “extreme” in it.²⁵⁶ Bangladesh in two of its BITs use CEE as a permissible objective: India-Bangladesh²⁵⁷ and Uzbekistan-Bangladesh.²⁵⁸ However, the Uzbekistan-Bangladesh BIT uses only the word “emergency” and not CEE.²⁵⁹ Thus, it provides a lower degree of threshold to the host state. Nepal, in its Finland-Nepal BIT,²⁶⁰ uses the phrase “other emergency in international relations”. This can be interpreted to include a wide range of scenarios; however, it will depend mainly on the nature of the standard of review. Sri Lanka in its India-Sri Lanka BIT²⁶¹ uses CEE as a permissible objective.

E. Morality

Two South Asian BITs contain morality as a permissible objective: Turkey-Bangladesh²⁶² and Qatar-India.²⁶³ The phrasing in the Turkey-Bangladesh BIT²⁶⁴

253. See Table 3.

254. *Agreement on Reciprocal Protection and Promotion of Investments Between the Government of the Republic of India and the Government of the Republic of Uzbekistan*, 18 May 1999 (entered into force 28 July 2000), art. 13(2).

255. Art. 12, India-Italy BIT.

256. Ranjan, *supra* note 2 at 43.

257. *Agreement Between the Government of the Republic of India and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments*, 2 February 2009 (entered into force 7 July 2011).

258. *Agreement Between the Government of People's Republic of Bangladesh and the Government of Republic of Uzbekistan on Reciprocal Protection and Promotion of Investments*, 18 July 2000 (entered into force 24 January 2001), art. 11.

259. *Ibid.*

260. *Agreement Between the Government of Republic of Finland and the Government of Nepal on the Promotion and Protection of Investment*, 3 February 2009 (entered into force 28 January 2011).

261. *Agreement Between the Government of the Democratic Socialist Republic of Sri Lanka and the Government of the Republic of India for the Promotion and Protection of Investment*, 22 January 1997 (entered into force 13 February 1998).

262. *Agreement Between the Republic of Turkey and the People's Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investments*, 12 November 1987 (entered into force 21 June 1990).

263. *Agreement Between the Government of the Republic of India and the Government of the State of Qatar for the Reciprocal Promotion and Protection of Investments*, 4 April 1999 (entered into force 15 December 1999).

264. Art. 10 “... maintenance of public order and morals ...”, Turkey-Bangladesh BIT.

bears some resemblance with GATS Article XIV(a)²⁶⁵ and GATT Article XX(a)²⁶⁶. However, what is interesting here is the text of the Qatar-India BIT, which provides for “morality affecting public order”.²⁶⁷ It means morality as an exception can only be invoked when it affects the public order of that country. As it is very hard to prove that there is a violation of the morality norms of a country, the provision is very stringent. This provision requires not only evidence of morality violation but also proof of the breach of public order, and furthermore requires evidence that this breach of public order has taken place solely because of morality issue(s) in a country. This is definitely very stringent and it makes invoking the morality defence almost impossible.

In the *US-Gambling* case,²⁶⁸ the WTO panel analyzed the definition of “public morality” as “standards of right and wrong conduct maintained by or on behalf of a community or nation”,²⁶⁹ and “the content of these concepts for members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values”.²⁷⁰ In the *China Audio-visual* case,²⁷¹ the appellate tribunal accepted that even restrictions on the trading rights of China in violation of China’s accession protocol can be considered as a violation of “public morality”; thus, the tribunal gave a very broad meaning to public morality.²⁷² In the *EU-Seal Ban* case,²⁷³ the appellate body even went to the extent of accepting arguments put forward by the EU that the ban on seal imports to the EU was justified under Article XX(a) of GATT as it clearly addresses the morality of persons in EU territory consuming seal products from inhumane commercial hunts.²⁷⁴

To ascertain the meaning of “public morality” from commonly accepted objective evidence is not only difficult but also seemingly impossible because of social, cultural, political, and economic differences between different jurisdictions and regions.²⁷⁵

265. GATS, *supra* note 103, art. XIV(a).

266. GATT, *supra* note 102, art. XX(a).

267. Art. 11(2), Qatar-India BIT.

268. *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Appellate Body Report, para. 5, 296, WT/DS285/AB/R (2005); *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Panel Report, para. 1.1, 3, 278, WT/DS285/R (2004).

269. *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, *supra* note 268 at para. 6.465.

270. *US—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R (2004) at para. 6.461 [US—Gambling].

271. *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Appellate Body Report, WTO Doc WT/DS363/AB/R, AB-2009-3 (2009).

272. *Ibid.*, at 332. However, the Appellate Body later rejected it as there was an alternative available for China.

273. *WTO European Communities—Measures Prohibiting The Importation And Marketing Of Seal Products*, 22 May 2014, WT/DS400/AB/R, AB-2014-1,3

274. *EU-Seal Ban* case, *ibid.*, at para. 6.1.c.ii-iii; Rob HOWSE, Joanna LANGILLE, and Katie SYKES, “Sealing the Deal: The WTO’s Appellate Body Report in EC—Seal Products” (4 June 2014), online: American Society of International Law <<http://www.asil.org/insights/volume/18/issue/12/sealing-deal-wto%E2%80%99s-appellate-body-report-ec%E2%80%93seal-products>>.

275. Jeremy C. MARWELL, “Trade and Morality: The WTO Public Morals Exception After Gambling” (2006) 81 New York University Law Review 802 at 805; Steve CHARNOVITZ, “The Moral Exception in Trade Policy” (1997) 38 Virginia Journal of International Law 689; Christoph T. FEDDERSEN, “Focusing on Substantive Law in International Economic Relations: The Public Morals of

Therefore, it is submitted that every country should have some leeway to decide what is moral according to its own domestic values.

F. *International Peace and Security (IPS)*

In South Asia, IPS appears in four BITs: India-Colombia, US-Bangladesh, Turkey-Bangladesh, and US-Sri Lanka. The India-Colombia BIT clearly states that obligations are in the context of the UN Charter.²⁷⁶ The rest of the BITs do not refer to the UN Charter as such, but states “maintenance or restoration of international peace or security”.

It is generally understood that this exception refers to obligations under the UN Charter.²⁷⁷ Basically, it saves states from the paradoxical situation that is created by the complex dynamics of interstate relationships; e.g. if a state undertakes a measure owing to a Security Council resolution and thereby affects the investor, it would simply mean a contradiction between the obligations of a state to the UN and the obligations of that state in its BITs. Although, according to Article 103 of the UN Charter,²⁷⁸ obligations to the UN have supremacy over any other obligation in international law, it would still leave the question of the obligations of a state to an investor unanswered. This exception attempts to create a balance between the obligations of a state to the UN, on the one hand, and the obligations in its BITs, on the other hand. It basically says states will not be held responsible for a breach of their obligations under their BITs if they were working under obligations created by the UN. Thus, South Asian countries should incorporate provisions like this so as to avoid any chance of being caught up in a conflict of different norms.

GATT's Article XX (a) and 'Conventional' Rules of Interpretation" (1998) 7 Minnesota Journal of Global Trade 75.

276. Art. 13(5)(d) of India-Colombia BIT.

277. Burke-White and Staden, *supra* note 1 at 355; OECD *Multilateral Agreement on Investment, Commentary to the Consolidated Text*, 41, OECD Doc. DAF/MAI(98)8/REV1 (22 April 1998), online: <<http://www1.oecd.org/daf/mai/pdf/ng/ng988r1e.pdf>>.

278. Art. 103, “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”, UN Charter; for a detailed study on art. 103, Rudolf BERNHARDT, “Article 103” in Bruno SIMMA, *The Charter of the United Nations—A Commentary*, 2nd edn, vol. II (Oxford: Oxford University Press, 2002), at 1292; Rain LIIVOJA, “The Scope of the Supremacy Clause of the United Nations Charter” (2008) 57 International and Comparative Law Quarterly 583–612; Robert KOLB, “Does Article 103 of the Charter of the United Nations Apply Only to Decisions or Also to Authorizations Adopted by the Security Council?” (2004) 64 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 21–35; Bardo FASSBENDER, “The United Nations Charter as Constitution of the International Community” (1997) 36 Columbia Journal of Transnational Law 529; *Separate Opinion of Vice-President Ammoun, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] I.C.J. Rep 16; Derek BOWETT, “The Impact of Security Council Decisions on Dispute Settlement Procedures” (1994) 5 European Journal of International Law 89; Alexander ORAKHELASHVILI, “The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions” (2005) 16 European Journal of International Law 59 at 88; *R (Al-Jedda) v. Secretary of State for Defence* [2007] U.K.H.L. 58.

G. *Miscellaneous*

Miscellaneous exceptions have been found in the BITs of South Asian countries. These are listed in Table 7.

Table 7. Other miscellaneous permissible objectives

Permissible objective	BITs	Remarks
Tax	India-Colombia ²⁷⁹	Tax matters have been expressly excluded from the purview of the BITs.
Investment through illegal activities	India-Colombia ²⁸⁰	No protection under BIT when investment is derived from illegal activities.
Financial services for prudential reasons	India-Colombia ²⁸¹	States are free to take reasonable measures for the wellbeing of their economies; those measures shall not be considered as violating the obligations under the BIT.
Vital interests	India-Uzbekistan BIT ²⁸²	This is a broad exception which can cover not only security but also non-security issues.
Armed conflict	India-Italy BIT ²⁸³	This can be considered as related to security interests.
National emergency	India-Italy BIT ²⁸⁴	This is a broad exception which can cover not only security but also non-security issues.
Civil disturbance	India-Italy BIT ²⁸⁵	This has already been discussed in Section III.B.
Environment	India-Colombia BIT ²⁸⁶	This is the only BIT in the South Asian region which specifically provides for the protection of the environment. Resembles Article XX of GATT.
National interest	China-Sri Lanka BIT ²⁸⁷	This is a broad exception which can cover not only security but also non-security issues that might affect the interests of a nation.

With this, a detailed enquiry into the permissible objectives used in the BITs of the South Asian countries has been completed. The next section will examine the nexus requirement links.

IV. NEXUS REQUIREMENT LINKS (NRLS)

As has already been discussed in Section II, the “nexus requirement link” assumes importance in determining the degree of connection between the measures taken and the objective sought by the host state. Different South Asian BITs use different NRLs, and these different phrases have different meanings. Therefore, studying these NRLs is

279. Art. 13(1).

280. Art. 13(2).

281. Art. 13(3).

282. Art. 13(2).

283. Art. 12.

284. Art. 12.

285. Art. 12.

286. Art. 13(5)(c).

287. Art. 11.

important in helping us to understand their impact and effects on these BITs. These NRLs shall be studied under two broad headings:

- A. “Necessary” as NRL; and
- B. Non-“Necessary” as NRL.

A. “Necessary” as NRL

Twenty-two South Asian BITs use “necessary” as a NRL;²⁸⁸ out of these, India has “necessary” NRLs in eighteen BITs,²⁸⁹ Bangladesh has them in two BITs,²⁹⁰ and Sri Lanka and Nepal both have “necessary” in one BIT.²⁹¹ Necessity serves two purposes. First, it creates a fine balance between an investor’s interests and the state’s interest. Second, it distinguishes between legitimate state actions and illegitimate state actions that are taken as an instrument of protectionism.²⁹² This NRL has acquired significance against the background of interpretations taken by different tribunals while deciding the ISDS cases against Argentina for the measures taken by it during its economic crisis.²⁹³ Tribunals in *CMS v. Argentina*,²⁹⁴ *Sempra v. Argentina*,²⁹⁵ and *Enron v. Argentina*²⁹⁶ conflated the meaning of “necessity” under customary international law (CIL) with the meaning of “necessary” under Article XI of the US-Argentina BIT. Also, those tribunals did not provide any legal justification for such interpretative methodologies. The annulment committees of those tribunals criticized the approaches taken by the tribunals. The CMS annulment committee²⁹⁷ in fact went to the extent of saying that the tribunal made a manifest error of law by conflating two concepts.²⁹⁸

288. See Table 4.

289. *Ibid.*

290. *Ibid.*

291. *Ibid.*

292. Benn MCGRADY, “Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures” (2008) 12 *Journal of International Economic Law* 153 at 154.

293. Jim SEXTON, “Argentina’s Economic Crisis: Causes and Cures” (June 2003) Joint Economic Committee United States Congress; José E. ALVAREZ and Kathryn KHAMSI, “The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime” (2008/2009) *Yearbook on International Investment Law and Policy* 379, online: Columbia Centre on Sustainable Investment <http://www.vcc.columbia.edu/pubs/documents/Alvarez-final_000.pdf>; Institute for International Law and Justice Working Paper 2008/5; William W. BURKE-WHITE, “The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System” (2008) 3 *Asian Journal of International Health Law and Policy* 199; Burke-White and Staden, *supra* note 1; Michael WAIBEL, “Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E” (2007) 20 *Leiden Journal of International Law* 637; Sarah SCHILL, “The ‘Necessity Defense’ and the Emerging Arbitral Conflict in its Application to the U.S.-Argentina Bilateral Investment Treaty” (2007) 13 *Law and Business Review of the Americas* 547; Stephen W. SCHILL, “International Investment Law and Host State’s Power to Handle Economic Crises—Comment on the ICSID Decision in LG&E v. Argentina” (2007) 24 *Journal of International Arbitration* 265; and David FOSTER, “Necessity Knows no Law!—LG&E v. Argentina” (2006) 9 *International Arbitration Law Review* 149.

294. *CMS*, *supra* note 13.

295. *Sempra*, *supra* note 13.

296. *Enron*, *supra* note 13.

297. *CMS Annulment*, *supra* note 13.

298. *Ibid.*, at para. 131.

However, these cases are just one set of class of cases which adopted different methodologies for interpreting the term “necessary”. The tribunal in *LG&E v. Argentina*²⁹⁹ first justified Argentina’s measures under Article 11 of the US-Argentina BIT, and then again tried to support it under Article 25 of Draft Articles on State Responsibility, as in CIL. Though it tried to maintain the distinction between customary claim and treaty claim, it failed to clarify the precise content of Article 11 of the US-Argentina BIT, and thereby fell short of giving reasons for supporting a specific treaty norm with a more general customary norm. The tribunal in *Continental Casualty v. Argentina*³⁰⁰ rejected the suggested equivalence between Article 11 of the US-Argentina BIT and the CIL defence of necessity.³⁰¹ It held that the term “necessary” should be interpreted in line with GATT and WTO case-law.³⁰² In this way, the tribunal in this case moved away from the “no other means available” test to the WTO’s “least restrictive alternative” test.³⁰³

This shows that there is great degree of divergence amongst the tribunals on the meaning of “necessary”. With respect to South Asia, in all twenty-two BITs where a “necessary” NRL has been found, there is no definition of the term “necessary”. The absence of any concrete definition of “necessary” in the treaty exception would anyway force the tribunals to look for the meaning of “necessary” elsewhere. Thus, it is suggested here that arbitral tribunals, while interpreting “necessary”, instead of engaging in finding the balance between the benefits of regulatory measures and the impact on investment by these measures, should try to look into the aspect of whether or not any less restrictive measure is available (the least-restrictive-alternative test).³⁰⁴ When such a less restrictive measure is available, measures taken by host states shall be said to be not “necessary”. Therefore, in the context of South Asian BITs, “necessary” can be interpreted by relying on the WTO jurisprudence that was used in the *Continental Casualty* case. This approach is suitable for the South Asian region; not only will it prevent any excessive restriction on foreign investments from host states, it will also serve the regulatory power of these countries better. This is because arbitral tribunals would focus more on finding whether or not a less restrictive measure is available than on questioning the regulatory objective.³⁰⁵ This can help South Asian countries significantly, as the question of harm done to investments will shift from the intent of the government or state to the availability of any less restrictive measure. With this, a study of Non-“Necessary” NRLs will be made in the following section.

299. *LG&E* (decision on liability), *supra* note 13.

300. *Continental*, *supra* note 13.

301. *Ibid.*, para. 168.

302. *Ibid.*, para. 85.

303. William W. BURKE-WHITE and Andreas von STADEN, “Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations” (2010) 35 *Yale Journal of International Law* 283, 325.

304. Ranjan, *supra* note 2 at 50.

305. *Ibid.*

B. Non-“Necessary” NRLs

Non-“necessary” NRLs include every other NRL except “necessary” NRLs. In this section a study will be made in respect of only those NRLs which are found in the BITs of South Asian countries. These are as follows:

1. *For*

“For” is found in fifty-one BITs of South Asian countries.³⁰⁶ It is one of the most lenient nexus standards found in the BITs of South Asian countries. Such a formulation, at least in its ordinary meaning, suggests a relatively thin nexus, under which measures would appear to be permissible as long as they merely further a permissible objective.³⁰⁷

2. *Directed to*

This type of formulation is found in four BITs of South Asia.³⁰⁸ This suggests that actions are permissible as long as they are intended by the government to further a legitimate end.

3. *Relating to*

This is found in just one BIT of South Asia.³⁰⁹ It simply involves an examination of whether the “means” and “ends” of the measure are reasonably related.³¹⁰ In other words, there must be “a close and genuine relationship of ends and means”.³¹¹ That is, based on an analysis of the text of the measure itself, it must be determined whether the design and structure of the measure are closely related to the goal of the measure.³¹²

4. *To*

“To” is found in three BITs of South Asia.³¹³ It provides a comparatively thin nexus between the measures taken and the objective sought. It provides much deference to the host state in this regard, as states only have to show that the measures taken were under the scope of one of the permissible objectives; no further justification of measures would be necessary.

5. *In pursuance of*

There is only one BIT in South Asia which provides for this type of formulation.³¹⁴ The ordinary meaning of pursuance is “engagement in an activity or course of action”; it basically assumes that the state already has some existing obligation in international law in general, apart from treaty obligations. Therefore, it lays down such a

306. See Table 4.

307. Burke-White and Staden, *supra* note 1 at 342.

308. See Table 4.

309. India-Colombia BIT.

310. Simon LESTER, Bryan MERCURIO, and Arwel DAVIES, *World Trade Law: Text, Material and Commentary*, 2nd edn (Oxford: Hart Publishing, 2012) at 368.

311. Appellate Body Reports, US—Shrimp, para. 136; China—Raw Materials, para. 355; China Rare Earth Appellate Body Report, para. 5.105.

312. See *supra* note 311.

313. See Table 4.

314. India-Colombia BIT.

formulation which can harmoniously resolve the conflict between two different obligations of a state under international law.

Thus, it can be seen that there are in total six NRLs that are used in the BITs of South Asian countries.³¹⁵ Most prevalent among them is the “for” NRL, and then comes the “necessary” NRL. Having “for” as a NRL gives states some leeway to take regulatory measures without much difficulty in justifying their action, which seems to be a reasonable choice for these countries.

V. CONCLUSION

The importance of NPM provisions lies in the fact that they grant host states sufficient regulatory latitude in cases of extreme circumstances to pursue their non-investment policy objectives. In fact, NPM provisions are not only important but also the most effective device to ensure adequate regulatory space for host states.

However, the study done in this paper shows that NPM provisions are not adequately present in the BITs of these countries. Except for India, other countries have incorporated this provision in only a few of their BITs. This approach is confusing in the sense that these countries have included this provision in some of their BITs; therefore not including NPM provisions in their other BITs is difficult to understand. Therefore, it is suggested that these countries should include NPM provisions in their BITs more frequently in order to ensure sufficient regulatory latitude while pursuing non-investment policy objectives.

The in-depth analysis of NPM provisions made in Section II also gives surprising results; regarding permissible objectives, important public policy objectives like public health, environment, public order, and so on have been found in only very few instances. This region, as argued in Section III, is already surrounded by many regional problems. Against this background, it is argued here that countries in this region must specify terrorism, financial crises, or even situations of natural calamities as part of ESI in their NPM provisions. It is also submitted that all South Asian countries should include public health exceptions in all of their BITs. South Asian countries should also include CEE as a permissible objective in their BITs, as it may include in its scope any type of permissible objective that the states might not have been able to include in the NPM provisions while negotiating or drafting. This situation of having few or no permissible objectives dealing with issues like public health, environment, public order, and so on pushes states to the edge of facing BIT claims in cases of default. Thus, it is submitted that these countries should include at least those permissible objectives which are important from a South Asian perspective.

Self-judging clauses are important as they provide the host state with the discretion to assess cases of emergency. In this respect, South Asian BITs seem to have completely ignored the importance of these clauses. Of all the BITs signed by these countries, as studied in this paper, only one contains a self-judging clause. The other BITs contain only non-self-judging clauses. This cannot be considered an acceptable situation as it

³¹⁵. See Table 4.

deprives the state of the ability to assess emergency situations. As the meaning of emergency situations may vary from country to country, it is considered best for the country to assess the situation on its own. Thus, it is submitted that South Asian countries must incorporate self-judging clauses in their BITs.

On the issue of nexus requirement links, not many South Asian countries have “necessary” as a nexus requirement link. This nexus requirement link imposes a very high threshold on the host state to justify its measures taken in the pursuit of non-investment policy objectives. In this sense, it is good that it is not found in many BITs of South Asian countries, as these countries will not have to satisfy its high threshold requirement. A lesson must be learnt from the events which took place in the Argentine crisis and its aftermath. Thus, it is submitted that South Asian countries may avoid or ignore phrases like “necessary”—which impose a high threshold of proving the necessity of state actions—while engaging in BIT negotiations.

As all the countries in this region are developing countries, it would be better for South Asian countries to learn from the Argentine crisis and prepare beforehand for any future problem, rather than waiting for problems to arise and then reacting to those situations.

With this, it is suggested here that South Asian countries must renegotiate their existing BITs so as to incorporate NPM provisions, and these countries must also strive to incorporate NPM provisions in their future BITs.

6-1-2020

An Inquiry into the Scope of MFN Provisions in Bilateral Investment Treaties

Amit Kumar Sinha

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AN INQUIRY INTO THE SCOPE OF MFN PROVISIONS IN BILATERAL INVESTMENT TREATIES

*Amit Kumar Sinha**

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INTRODUCTION: THE MEANING AND SCOPE OF MFN PROVISIONS

The constantly evolving jurisprudence and unique nature of international investment law have exposed this field to latitudinarian interpretations.¹ These interpretations are so varied in nature that it is difficult to find decisions or literature having general acceptability.² This article deals with one such issue: the scope of Most Favoured Nation (MFN) provisions in Bilateral Investment Treaties (BITs).

Continuing the debate about the scope of MFN provisions in BITs, which was initiated by Facundo Perez-Aznar,³ Simon

1. Tony Cole, *The Boundaries of Most Favored Nation Treatment in International Investment Law*, 33 MICH. J. INT'L L. 537, 538 (2012).

2. *Id.*

3. See generally Facundo Perez-Aznar, *The Use of Most-Favoured-Nation Clauses to Import Substantive Treaty Provisions in International Investment Agreements*, 20 J. INT'L ECON. L. 777 (2018).

Batifort, and J. Benton Heath,⁴ this article primarily deals with the scope of MFN provisions in the BIT regime. This article challenges the “conventional wisdom”⁵ of using MFN provisions to import or borrow provisions from a third-party BIT.⁶

Before moving to the issues directly, it is important to understand the meaning and importance of MFN provisions in BITs in general. The MFN provision, without a doubt, is an instrument of non-discrimination.⁷ It ensures that all foreign

4. See generally Simon Batifort & J. Benton Heath, *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, 111 AM. J. INT'L L. 873 (2017).

5. “Conventional Wisdom” in reference to MFN provisions is used to describe the scope of MFN clauses to borrow provisions from third-party BITs. For more on this, see Batifort & Heath, *supra* note 4, at 873; see also Martins Paparinskis, *MFN Clauses and Substantive Treatment: A Law of Treaties Perspective of the “Conventional Wisdom,”* 112 AJIL UNBOUND 49 (2018).

6. For the purpose of convenience, the words “import” and “borrow” will be treated the same and will also be used interchangeably in this article. Also, to bring clarity to some terminology that will be used frequently in this article, “basic BIT” means a BIT signed by original parties (e.g., between A and B) and containing an MFN provision; “third-party BIT” means a BIT signed by one of the original parties with a third state (e.g., between A and C or B and C).

7. For more literature on MFN provisions in BITs, see generally Olivier Accominotti & Marc Flandreau, *Bilateral Treaties and the Most-Favored-Nation Clause: The Myth of Trade Liberalization in the Nineteenth Century*, 60 WORLD POL. 147 (2008); Tomoko Ishikawa, *Interpreting the Most-Favoured-Nation Clause in Investment Treaty Arbitration: Interpretation as a Process of Creating an Obligation?* in RETHINKING INTERNATIONAL LAW AND JUSTICE 127 (Charles Sampford et al. eds., 2014); J.R. WEERAMANTRY, *TREATY INTERPRETATION IN INVESTMENT ARBITRATION* 177 (2012); Scott Vesel, *Clearing a Path through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties*, 32 YALE J. INT'L L. 125, 126 (2007); Christopher Greenwood, *Reflections on ‘Most Favoured Nation’ Clauses in Bilateral Investment Treaties*, in PRACTISING VIRTUE 556 (David D. Caron et al. eds., 2015); Okezie Chukwumerije, *Interpreting Most-Favoured-Nation Clauses in Investment Treaty Arbitrations*, 8 J. WORLD INVEST. & TRADE, 597 (2007); Jurgen Kurtz, *The MFN Standard and Foreign Investment: An Uneasy Fit?*, 5 J. WORLD INVEST. & TRADE 861 (2004); D. H. Freyer & D. Herlihy, *Most-Favored-Nation Treatment and Dispute Settlement in Investment Arbitration: Just How “Favored” is “Most-Favored”?* 20 FOREIGN INVEST. L. J. 58 (2005); Elizabeth Whitsitt, *Application of Most-Favoured-Nation Clauses to the Dispute Settlement Provisions of Bilateral Investment Treaties: an Assessment of the Jurisprudence*, 27 J. ENERGY & NAT. RESOURCES L. 527 (2009); Henrik Horn & Petros C. Mavroidis, *Economic and Legal Aspects of the Most-Favored-Nation Clause*, 17 EUR. J. POLIT. ECON. 233 (2001); Edoardo Stoppioni, *Jurisdictional Impact of Most-Favoured-*

Nation Clauses, in MPI LUXEMBOURG WORKING PAPER SERIES 1–24 (2017); Yas Banifatemi, *The Emerging Jurisprudence on the Most-Favoured-Nation Treatment in Investment Arbitration*, in INVESTMENT TREATY LAW: CURRENT ISSUES III, 241 (A. Bjorklund et al. eds., 2009); Emmanuel Gaillard, *Establishing Jurisdiction Through a Most-Favored-Nation Clause*, 233 N.Y.L.J. 3 (2005); U.N. Conf. on Trade & Dev. [UNCTAD], *Most Favored Nation Treatment*, in SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II, at 14, U.N. Doc. UNCTAD/DIAE/IA/2010/1 (2010) [hereinafter MFN-UNCTAD]; Ylli Dautaj, Thesis, *ITA: The MFN Clause and its Procedural Extension – a Case Study of the RosInvestCo Case: The MFN clause in light of treaty interpretation*, Uppsala U. Publication 1, 35 (2015); Jarrod Wong, *The Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions in Bilateral Investment Treaties*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL. 171, 172 (2008); Stephan W. Schill, *Most-Favored-Nation Clauses as a Basis of Jurisdiction in Investment Treaty Arbitration: Arbitral Jurisprudence at a Crossroads*, 10 J. WORLD INVEST. & TRADE 189, 214 (2009); Stanley K. Hornbeck, *The Most-Favored-Nation Clause*, 3 AM. J. INT'L L. 395, 797–827 (1909); Quincy Wright, *The Most-Favored-Nation Clause*, 21 AM. J. INT'L L. 760 (1927); Aaron M. Chandler, *BITs, MFN Treatment and the PRC: The Impact of China's Ever-Evolving Bilateral Investment Treaty Practice*, 43 INT'L LAW. 1301, 1304 (2009); Stephanie L. Parker, *A BIT at a Time: The Proper Extension of the MFN Clause to Dispute Settlement Provisions in Bilateral Investment Treaties*, 2 ARB. BR. 30, 33 (2012); Yannick Radi, *The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the 'Trojan Horse,'* 18 EUR. J. INT'L L. 757, 758 (2007); Locknie Hsu, *MFN and Dispute Settlement: When the Twain Meet*, 7 J. WORLD INVEST. & TRADE 25, 27 (2006); Julie A. Maupin, *MFN-based Jurisdiction in Investor–State Arbitration: Is There Any Hope for a Consistent Approach?*, 14 J. INT'L ECON. L. 157 (2011); Alejandro Faya Rodriguez, *The Most-Favored-Nation Clause in International Investment Agreements: A Tool for Treaty Shopping?*, 25 J. INT'L ARB. 89, 92 (2008); Mara Valenti, *The Most Favoured Nation Clause in BITs as a Basis for Jurisdiction in Foreign Investor-Host State Arbitration*, 24 ARB. INT'L 447 (2008); Suzy H. Nikiema, *The Most-Favoured-Nation Clause In Investment Treaties*, IISD (Feb. 2017), <https://www.iisd.org/library/iisd-best-practices-series-most-favoured-nation-clause-investment-treaties>; Stephan W. Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses*, 27 BERKELEY J. INT'L L. 496 (2009); Stephan W. Schill, *MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath*, 111 AM. J. INT'L L. 914 (2017); OECD, *Most-Favoured-Nation Treatment in International Investment Law*, OECD Working Papers on International Investment 2004/02, OECD Publishing, <http://dx.doi.org/10.1787/518757021651>; Ruth Teitelbaum, *Who's Afraid of Maffezini? Recent Developments in the Interpretation of Most Favored Nation Clauses*, 22 J. INT'L ARB. 225 (2005); Catharine Titi, *Most-Favoured-Nation Treatment: Survival Clauses and Reform of International Investment Law*, 33 J. INT'L ARB. 425 (2016); Zachary Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, 2 J. INT'L DISP. SETTLEMENT 97 (2011).

investors in the territory of a host state will be treated equally.⁸ MFN provisions are often described as having dual characteristics—that is, providing protection against both internal and external measures.⁹ Internal measures suggest actions taken by the host state within its territory through its laws and regulations.¹⁰ External measures suggest borrowing of favorable provisions from third-party BITs.¹¹ Unlike national treatment provisions, where the comparators¹² are domestic investors, in MFN provisions, the comparators are foreign investors.¹³ This article argues that the scope of MFN provisions should be limited in their application to cases of internal measures only. Allowing an MFN provision to import or borrow provisions from other BITs is questionable and problematic in general international law, which includes, *inter alia*, interpretative methodologies provided under the Vienna Convention on the Law of Treaties (VCLT).¹⁴

Therefore, to substantiate the claims made in the previous paragraph, Part I of this article explains the use of MFN provisions for internal measures taken by the host state. Part II presents a critique of the practice of borrowing provisions from third-party BITs using MFN provisions. Part III then looks into possible interpretations suggesting the proper use of MFN provisions in BITs. Part IV highlights the problems created by the conventional use of MFN provisions, such as treaty shopping, jurisdictional problems, and free-ridership. Part V explores and delves into the reactions from states in response to the practice of borrowing using MFN provisions. Part VI argues that the drafting of MFN provisions is path dependent. Lastly, the conclusion argues that the practice of borrowing using MFN provisions in BITs is problematic and MFNs should be used in cases of internal measures only.

8. MFN-UNCTAD, *supra* note 7.

9. Perez-Aznar, *supra* note 3, at 778.

10. *Id.*

11. *Id.*

12. For the purpose of convenience, “comparator” here means investors who are working in the same area or industry with the aggrieved investor, such that a comparison can be made between them in order to determine discrimination. However, an attempt to establish a more acceptable meaning of comparators is made at the later part of this article. *See infra* Part II.A.

13. Perez-Aznar, *supra* note 3, at 778.

14. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

I. MFN APPLICATION: INTERNAL MEASURES

Internal measures here mean measures taken by the host state within its territory that have affected investments made by a foreign investor. In the context of MFN, such measures by a host state would discriminate between two foreign investors having different nationalities. The analysis below will provide the roadmap for identifying the investors who may be affected by measures taken by the host state.

A. Relevant Comparators for the Purpose of Establishing Discrimination

The importance of ascertaining the meaning of relevant comparators lies in the fact that discrimination between two investors cannot be said to have taken place unless it is established that those two investors are relevant comparators. Therefore, it is important to first determine the comparators and then look for claims of discrimination between them. The meaning of “relevant comparator,” however, is unsettled in the investment regime, and there are widely scattered opinions among different tribunals.¹⁵ Only a limited amount of academic literature is available on this issue.¹⁶ This largely untouched matter is of the utmost importance when delineating the scope of MFN provisions in BITs. Thus, it is relevant to delve into questions like those asked in *Apotex, Inc. v. United States*.¹⁷ The tribunal in *Apotex* posed the following questions:¹⁸ Who are comparators? Are they those who are in the same “economic [or] business sector?”¹⁹ Or are they those who “compete with the inves-

15. *Apotex Holdings Inc. & Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, ¶ 8.15 (Aug. 25, 2014); *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/Z, Award, ¶ 196 (Sept. 18, 2009); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, ¶ 165, Award (Jan. 12, 2011); *Merrill & Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, ¶ 65 (Mar. 31, 2010); *Methanex Corporation v. United States of America*, UNCITRAL, Final Award, Part IV, Chapter B, pp. 8–11, ¶ 16 (Aug. 3, 2005); *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, ¶ 34 (Apr. 10, 2001).

16. See, e.g., Perez-Aznar, *supra* note 3; MFN-UNCTAD, *supra* note 7, at 26.

17. *Apotex v. US*.

18. *Id.* ¶ 8.15.

19. *Id.*

tor . . . in terms of goods and services?”²⁰ Or are they those who are subject to the same legal or regulatory regime?²¹

The tribunal in *Apotex* did not give satisfactory answers to these questions. However, it did state that those who are subject to the same legal and regulatory regime can be considered relevant comparators.²² According to the tribunal, Apotex (a foreign investor) was regulated by Health Canada (a regulatory agency in Canada), and United States (US) domestic manufacturers were regulated by the US Food and Drug Agency (FDA).²³ Therefore, US domestic manufacturers and Apotex were not regulated by the same regulatory regime. Thus, they were not relevant comparators.²⁴ However, the tribunal did find that other foreign investors working in the same area and regulated by the FDA were relevant comparators.²⁵ In other words, according to the tribunal, in order to be identified as relevant comparators, investors must be governed by the same regulatory regime.

As mentioned earlier, the *Apotex* tribunal fell short of giving a concrete answer to the question of who are relevant comparators? There are, therefore, many questions left unanswered. For example, what if the regulatory authority covers a wide range of activity in a sector? Can it be said that the investor who has invested in the production of fertilizer and the investor who has invested in the development of organic seeds are relevant comparators (assuming they are regulated by the same regulatory authority)? For example, the Reserve Bank of India (RBI) is the regulator and supervisor of the financial system in India.²⁶ RBI not only regulates the functioning of banks in India, but it also regulates non-banking financial companies (NBFCs).²⁷ It is true that the functioning of NBFCs is akin to banks in India; however, there are some major differences between the two.²⁸ For example, NBFCs cannot accept demand

20. *Id.*

21. *Id.*

22. *Id.* ¶¶ 8.54–8.55.

23. *Id.* ¶ 2.8, ¶ 8.44.

24. *Id.* ¶¶ 8.56–57.

25. *Id.* ¶ 8.61.

26. *About Us*, RESERVE BANK OF INDIA, <https://www.rbi.org.in/Scripts/AboutusDisplay.aspx> (last visited Jan. 2, 2019).

27. *Frequently Asked Questions*, RESERVE BANK OF INDIA, <https://www.rbi.org.in/Scripts/FAQView.aspx?Id=92> (last visited Jan. 2, 2019).

28. *Id.*

deposits, nor can they issue checks drawn on themselves.²⁹ Despite these major differences, accepting the “subject of the same regulatory regime” test would mean that an investor in an NBFC is a relevant comparator to an investor in a bank.

It would, however, be incorrect to accept such a proposition. As another example, the Indian government treats agriculture and animal husbandry as a single sector for the purposes of regulating foreign direct investment (FDI).³⁰ All FDI channeled through an automatic route³¹ is allowed in this sector.³² This sector includes, *inter alia*, development of seeds and animal husbandry.³³ Can one say that foreign investors in these areas are relevant comparators because they engage in activities incorporated within the same sector? It does not require sophisticated calculations to figure out that foreign investors working in two different industries in the same sector are not relevant comparators. Therefore, it is not satisfactory to identify relevant comparators exclusively on the basis of the “subject of the same regulatory regime/sector” test.

In contrast to World Trade Organization (WTO) law, basic questions in the investment law regime, such as who are relevant comparators, are still far from settled and depend upon the interpretations of investment tribunals.³⁴ Most of the interpretations by tribunals to determine relevant comparators are made in the context of the interpretation of national treatment provisions.³⁵ Thus, in order to determine relevant comparators for MFN provisions, findings of a violation of national treatment provisions made by the tribunals may prove to be

29. *Id.*

30. *FDI Entry Routes in India*, INVEST INDIA, <https://www.investindia.gov.in/foreign-direct-investment> (last visited Jan. 2, 2019).

31. “Automatic route” means that no government approval is required for investment; *see id.*

32. *Sector-Specific Conditions for FDI*, INVEST INDIA, <https://www.investindia.gov.in/foreign-direct-investment> (last visited Jan. 2, 2019).

33. *Id.*

34. Rudolf Dolzer, *National Treatment: New Developments*, Symposium, Making the Most of International Investment Agreements: A Common Agenda, OECD at 2 (Dec. 12, 2005).

35. MFN-UNCTAD, *supra* note 7, at 27; for analysis of comparators for MFN, *see* Marvin Feldman v. Mexico, ICSID Case No. ARB(AF)/99/1, Award, ¶ 181 (Dec. 16, 2002).

helpful because both these provisions share a similar comparison requirement.³⁶

The tribunal in *Pope and Talbot v. Canada*³⁷ pointed out that the determination of relevant comparators should be based on activity in the same business or economic sector.³⁸ A study done by the Organization for Economic Cooperation and Development (OECD) provides that, in the context of national treatment interpretation, enterprises must be working in the same sector.³⁹ There are also a number of other cases where criteria for comparison have been cited to include the same business or economic sector,⁴⁰ the same economic sector and activity,⁴¹ the same legal and regulatory regime,⁴² and less similar⁴³ available comparators.⁴⁴ However, as argued earlier, the “same sector or economic activity” criteria is an important element but not alone sufficient to identify relevant comparators.⁴⁵ It is therefore necessary to look to other elements in order to identify relevant comparators.

There is some guidance from a few tribunals supporting the view that relevant comparators should be in competition with

36. MFN-UNCTAD, *supra* note 7, at 27; Feldman v. Mexico, ¶¶166–69.

37. Pope & Talbot v. Canada, ¶ 78.

38. It is important to point out that this analysis was based on the interpretation of Article 1102 of the North American Free Trade Agreement, which relates to national treatment.

39. OECD Negotiating Group on the Multilateral Agreement on Investment (MAI), *Discussion Of Draft Articles On National Treatment, Non-Discrimination/Mfn And Transparency*, OECD, Doc. No. DAF/MAI/DG2(95)1 at 4 (Nov. 17, 1995), <https://www.oecd.org/daf/mai/pdf/dg2/dg2951e.pdf>

40. SD Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award, ¶¶ 248–50 (Nov. 13, 2000), <https://www.italaw.com/sites/default/files/case-documents/ita0747.pdf>.

41. Feldman v. Mexico, ¶¶164–67; *see also* Champion Trading Company Ameritrade International, Inc. v. Republic of Egypt, ICSID Case No. ARB/02/09, Award, ¶ 130 (Oct. 27, 2006); United Parcel Service of America Inc. v. Government of Canada, ICSID Case No. UNCT/02/1, Award on the Merits, ¶ 83 (May 24, 2007).

42. Apotex v. US, ¶ 8.43.

43. Methanex v. US, ¶ 17 (Part IV - Chapter B). The tribunal here pointed out that it would be perverse to ignore less similar comparators when similar or like comparators are not available. So, the tribunal accepted the comparison of less similar comparators in the absence of similar/like comparators.

44. MFN-UNCTAD, *supra* note 7, at 27.

45. *See supra* notes 30–33 and accompanying text.

each other.⁴⁶ The tribunal in *ADM v. Mexico*⁴⁷ borrowed the WTO panel body analysis of directly competitive or substitutable products from *Mexico - Tax Measures on Soft Drinks*⁴⁸ in order to determine if products invested in by foreign investors are in competition with products targeted by domestic investors.⁴⁹ In other words, the tribunal made an attempt to see if foreign and domestic investors were competitors. It held that foreign and domestic industries share a competitive relationship with each other when a foreign product competes with and may be substituted for a domestic product in the market; therefore, they could be considered comparators.⁵⁰ Similarly, in *CPI v. Mexico*,⁵¹ the tribunal held that a foreign industry and a domestic industry were in competition with each other when the imposition of taxes on foreign products was done to change the terms of competition between the foreign product and the domestic product.⁵² In other words, the tribunal established the competitive relationship between the foreign and domestic products as a predicate to finding a violation of a national treatment provision. Thus, it can be said that, apart from being in the same sector or engaging in the same economic activity, it is required that investors share a competitive relationship with each other in order to be identified as relevant comparators.

This article points to an alternative determination for relevant comparators. Relevant comparators that are not part of treaty texts pose problems with respect to their determination. Therefore, in order to determine relevant comparators, it will be helpful to resort to WTO jurisprudence. Article 1 of the General Agreement on Tariffs and Trade (GATT) identifies relevant comparators, albeit indirectly.⁵³ Those who trade in “like

46. *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/1, Decision on Responsibility, ¶ 136 (Jan. 15, 2008); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award, ¶ 202 (Nov. 21, 2007).

47. *ADM v. Mexico*.

48. Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WTO Doc. WT/S308/R (adopted Oct. 7, 2005).

49. *ADM v. Mexico*, ¶ 92 at 35.

50. *Id.* ¶ 201 at 66.

51. *CPI v. Mexico*.

52. *Id.* ¶ 120.

53. General Agreement on Tariffs and Trade, 30 Oct. 1947, 55 U.N.T.S. 194 [hereinafter GATT].

products” are relevant comparators as per the requirement of the MFN clause in the GATT.⁵⁴ However, the real issue concerns what constitutes like products. This is important because only those who sell like products are relevant comparators. Therefore, it is pertinent to look into WTO jurisprudence and analyze how WTO panels or the Appellate Body have developed standards to determine “likeness” in order to find relevant comparators.

Unlike in the investment law regime, WTO dispute settlement bodies have developed various approaches to determine the likeness of a product. Two such approaches, as put forward by authors Michael Trebilcock, Robert Howse, and Antonia Eliason,⁵⁵ are functional and formal approaches. The formal approach deals with the product’s physical characteristics and tariff classification,⁵⁶ whereas the functional approach deals with the degree of competitive substitutability of a product from the consumer’s perspective.⁵⁷ These elaborate and intricate approaches have been helpful in identifying like products. It is important to be mindful that the WTO analysis of like products cannot simply be adopted by the investment law regime without mending or molding these approaches in a manner that is suitable to the investment regime.⁵⁸ There is hardly any doubt that there exists competition between traders and investors within the same industry in a sector.⁵⁹ Thus, the

54. *Id.*

55. TREBILCOCK, HOWSE, & ELIASON, *THE REGULATION OF INTERNATIONAL TRADE* 70–71 (2013).

56. Panel Report, *Canada/Japan – Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber*, WTO Doc. L/6470 – 36S/167 (adopted July 19, 1989).

57. Panel Report, *Spain - Tariff Treatment of Unroasted Coffee*, WTO Doc. L/5135 – 28S/102 (adopted June 11, 1981); Panel Report, *Indonesia - Certain Measures Affecting the Automobile Industry*, WTO Doc. WT/DS54/14–17/Add.1 Status Report by Indonesia (July 15, 1999).

58. See *Methanex v. US*, Brief for *Amicus Curiae*, ¶ 34 (stating that trade law approaches cannot simply be transferred to investment law); Jürgen Kurtz, *The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents*, 20 EURO. J. INT’L L. 749, 770 (2009); see also Robert Howse & Efraim Chalamish, *The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz*, 20 EURO. J. INT’L L. 1087, 1087–94 (2009).

59. RUWANTISSA ABEYRATNE, *COMPETITION AND INVESTMENT IN AIR TRANSPORT: LEGAL AND ECONOMIC ISSUES* 209 (2016); UNCTAD, *Transnation-*

functional approach, here, can be helpful because it provides for competitiveness.⁶⁰ Further, according to Trebilcock, Howse, and Eliason, likeness should be interpreted in terms of competitiveness as it justifies the economic rationale of the elimination of market distortions through internal measures.⁶¹ The partial applicability of the functional approach thus provides the answer that those investors who are competing with each other may be considered relevant comparators. Therefore, it is not adequate that investors are in the same business or sector—they should also be in competition with each other.

In light of this background, this article proposes that, in order to identify relevant comparators, the following two factors must be fulfilled cumulatively: (1) investors should be in the same industry within a sector or business or otherwise the subject of the same legal or regulatory regime, and (2) investors must be in competition with each other.

It is also pertinent to acknowledge a few issues with respect to the analysis taken thus far before moving to the next part of this article. First, while borrowing provisions from other BITs, why is the assessment of determining relevant comparators ignored completely? Second, is it reasonable to say that there is no need to assess relevant comparators while borrowing provisions from other BITs? Third, how does one find the existence of discrimination in the absence of relevant comparators?

B. Contextualizing the Discourse

When provisions are borrowed using the MFN clause in a BIT, the general practice is to assume the existence of relevant comparators. It is further assumed that these (imaginary) comparators are treated differently through their respective BITs; therefore, borrowing cures any discriminatory behavior that is created by the favorable language of other BITs. In other words, discrimination in such cases is alleged mainly because of the more favorable language of a third-party BIT. However, no inquiries are made to ascertain if any relevant

al Corporations, 11 U.N. Conf. on Trade & Dev. 3, at 31, U.N. Doc. UNCTAD/ITE/IIT/32 (2002).

60. TREBILCOCK, HOWSE, & ELIASON, *supra* note 55.

61. *Id.* at 72; see also Robert E. Hudec, "Like Product": *The Differences in Meaning in GATT Articles I and III*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW 101 (Thomas Cottier & Petros Mavroidis, eds., 2000).

comparator of a different nationality actually exists. It is submitted that this sort of discrimination, for various reasons, is based on a legal fiction.⁶²

First, there are no efforts taken to identify the relevant comparators who may have been given more favorable treatment due to the favorable language in third-party BITs.⁶³ It is possible that a third-party BIT from which a provision is borrowed does not have any investor working in the same sector as the aggrieved investor from the basic BIT. In that situation, investors from third-party BITs are not relevant comparators. In the absence of a relevant comparator, there cannot be any discrimination. Under such circumstances, the question thus arises: what is the basis for borrowing? Therefore, the mechanism for borrowing works through presumption and without any evidence of the existence of a relevant comparator.

Second, there may exist certain circumstances where the determination of a relevant comparator is difficult. For example, it is difficult to find relevant comparators when commercial contracts are accepted by tribunals as being investments and thereby protected by a BIT,⁶⁴ or when an investor argues that an arbitral award should be considered as an investment in claims to money.⁶⁵ Identifying relevant comparators in such cases is certainly very challenging.

Third, with respect to actual treatment, there are no mechanisms to determine the treatment received by virtue of more favorable language. Consider, for example, if the language of a provision in a third-party BIT that is being borrowed says: “rights or claims to money or to any performance under contract having a financial or economic value.”⁶⁶ How does one de-

62. Black’s Law Dictionary defines “legal fiction” as: “an assumption that something is true even though it may be untrue, made esp. in judicial reasoning to alter how a legal rule operates; specif., a device by which a legal rule or institution is diverted from its original purpose to accomplish indirectly some other object.” *Legal Fiction*, BLACK’S LAW DICTIONARY (9th ed. 2009).

63. *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Final Award, Nov. 30, 2011.

64. It is generally accepted that rights arising from contracts may amount to investments for the purposes of BITs. See CHRISTOPH H. SCHREUER ET AL., *THE ICSID CONVENTION: A COMMENTARY* 126 (2009).

65. *White Industries v. India*, ¶¶ 4.1.26–27

66. *Agreement Between the State of Kuwait and the Republic of India for the Encouragement and Reciprocal Protection of Investment*, (India-Kuwait BIT), Nov. 27, 2001.

termine what kind of treatment the investor is talking about? Does treatment relate to a breach of a contract having monetary value or simply the liquidated damages in an arbitration? It depends on the conveniences of the investor alleging discrimination what kind of discriminatory treatment they allege. Based on their alleged discriminatory treatment, it is presumed, without making proper inquiries, that discrimination has taken place. Thus, the justification for the practice of borrowing provisions from third-party BITs is based on a legal fiction. There is no doubt that this legal fiction is used by courts in common law systems as a tool for advancing justice;⁶⁷ however, its use to create a mechanism for borrowing provisions from third-party BITs is questionable.

II. MFN APPLICATION: EXTERNAL MEASURES

The fact that an investor can claim rights from a third-party BIT using an MFN provision appears completely normal because this process has already been accepted, recognized, and entrenched by various investment tribunals⁶⁸ and scholars.⁶⁹ In fact, most of the discussion surrounding MFN interpretation

67. *Staufen v. British Columbia (A.G.)*, 2001 B.C.S.C. 779, ¶¶ 9–11 (Can.).

68. *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, (Aug. 22, 2012); *Teinver SA v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction (Dec. 21, 2012); *Siemens AG v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, ¶ 109 (Aug. 3, 2004); *Gas Natural SDG SA v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Jurisdiction, ¶ 31 (June 17, 2005); *Telefonica SA v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, ¶ 108 (May 25, 2006); *National Grid PLC v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction, ¶ 93, (June 20, 2006); *Suez v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, ¶ 66 (May 16, 2006); *Impregilo SpA v. Argentine Republic*, ICSID Case No. ARB/07/17, Final Award, ¶ 108 (June 21, 2011); *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, ¶ 99 (Oct. 24, 2011); *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, ¶ 64 (Jan. 25, 2000); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, ¶ 178 (Dec. 8, 2008).

69. Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses*, *supra* note 7, at 501; Schill, *MFN Clauses as Bilateral Commitments to Multilateralism*, *supra* note 7; Patrick Dumberry, *The Importation of the FET Standard Through MFN Clauses: An Empirical Study of BITs*, 32 FOREIGN INV. L.J. 116, 131, 134 (2016); *see generally* Patrick Dumberry, *Shopping for a Better Deal: The Use of MFN Clauses to Get 'Better' Fair and Equitable Treatment Protection*, 33 ARB. INT'L 1 (2017).

today revolves around the borrowing of procedural and dispute settlement provisions.⁷⁰ The borrowing of substantive provisions has already been accepted by all except a few scholars and tribunals.⁷¹ Considering the lack of resistance to this practice, this article attempts to look into the rationale for the broad interpretation of MFN treatment below.

It is pertinent to consider the arguments and decisions of courts, tribunals, and scholars relating to the interpretation of MFN provisions. Therefore, this section is divided into three parts. The first part discusses the decisions of the International Court of Justice (ICJ), which dealt with interpretations of MFN provisions. The second part then addresses the decisions of various tribunals that have dealt with the issue of borrowing using MFN clauses. Finally, the third part delves into scholarly contributions on this topic.

A. The Tale of Two Cases

It is axiomatic that juxtaposed interpretations of certain cases by scholars and tribunals have created uncertainty regarding the usage of MFN provisions in BITs.⁷² In this subsection, this article shall deal with two of these cases: *Ambatielos Claim* (Greece v. United Kingdom)⁷³ and *Anglo-Iranian Oil Co. Case* (United Kingdom v. Iran).⁷⁴ The relevance of studying these cases lies in the fact that they provide clarity in terms of understanding the scope of MFN provisions in international law.

70. Ieva Kalnina, *White Industries v. The Republic of India: A Tale of Treaty Shopping and Second Chances*, 3 Y.B. ON INT'L ARB. 285 (2013).; Jose Antonio Rivas, *Application of Substantive Treaty Obligations via the Most-Favored-Nation Clause: ICSID Case Law Evolution*, in A REVOLUTION IN THE INTERNATIONAL RULE OF LAW: ESSAYS IN HONOR OF DON WALLACE, JR., 433–54 (Borzu Sabahi et al. eds., 2014).

71. Batifort & Heath, *supra* note 4; Perez-Aznar, *supra* note 3; Ickale Inssaat Limited Sirketi v. Turkmenistan, ICSID Case No. ARB/10/24, Award, ¶ 329 (Mar. 8, 2016); Ishikawa, *supra* note 7; Greenwood, *supra* note 7; Cole, *supra* note 1, at 538–39.

72. Cole, *supra* note 1; Perez-Aznar, *supra* note 3; *see, contra*, Schill, *Most-Favored-Nation Clauses as a Basis of Jurisdiction in Investment Treaty Arbitration*, *supra* note 7, at 199.

73. *Ambatielos Claim* (Greece v. U.K.), 12 R.I.A.A. 83 (Comm'n of Arb. 1956).

74. *Anglo-Iranian Oil Co. Case* (U.K v. Iran), 1952 I.C.J. Rep. 93 (July 22).

1. Ambatielos Claim

After the ICJ declined to accept jurisdiction, the United Kingdom (UK) and Greece concluded an agreement for settlement through arbitration by virtue of Anglo-Greek Commercial Treaty of 1886.⁷⁵ Article X of this treaty provided:

The Contracting Parties agree that, in all matters relating to commerce and navigation, any privilege, favour, or immunity whatever which either Contracting Party has actually granted or may hereafter grant to the subjects or citizens of any other State shall be extended immediately and unconditionally to the subjects or citizens of the other Contracting Party; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other on the footing of the most favoured nation.⁷⁶

Greece argued that the UK failed to provide rights, equity, and administration of justice to Mr. Ambatielos.⁷⁷ Thus, the UK had breached this MFN provision. The UK responded that its MFN provision protected treatment accorded as a privilege, favor, or immunity but not treatment accorded as a right.⁷⁸ The UK also contended that the provision concerned matters falling under the same subject matter since the treaty is primarily concerned with commerce and navigation and not with administration of justice; therefore, the UK argued that there was no violation of the MFN provision.⁷⁹

The tribunal, while accepting the proposition that the MFN provision attracted matters belonging to the same category of subject matter, ruled that the UK's interpretation could be accepted only when the term "administration of justice" was read in isolation.⁸⁰ According to the tribunal, however, the expression "administration of justice" in the context of commerce and navigation leads to the protection of the rights of traders.⁸¹ Thus, the administration of justice could not be excluded from

75. Ambatielos Claim, 12 R.I.A.A. at 97.

76. Treaty of Commerce and Navigation Between Great Britain and Greece, Greece-Gr. Brit., art. X, Nov. 10, 1886.

77. Ambatielos Claim, 12 R.I.A.A. at 106.

78. *Id.*

79. *Id.*

80. *Id.* at 107.

81. *Id.*

the field of operation of the MFN provision in that case.⁸² Ultimately, however, the tribunal held that there was no violation of Article X.⁸³

The tribunal in *Ambatielos* also acknowledged the principle of *ejusdem generis*, which, in the context of MFN provisions, provides that MFN clauses may apply to matters belonging to the same category of subject.⁸⁴ This principle is also reflected in Article 9 of the Draft Articles on MFN Clauses prepared by the International Law Commission (ILC-MFN).⁸⁵ This should technically mean that MFN clauses are applicable to only those situations where investors or investment are in the same category of subject matter.

Unfortunately, this principle is used in order to interpret MFN provisions with respect to the subject matter, in order to justify borrowing provisions from third-party BITs. Where the subject matter in this context should be understood to be the area relating to actual treatment of investment or investors in the territory of the host state, it has been interpreted to borrow rights or privileges granted in the provisions of third-party BITs.⁸⁶ For example, if the waiting period in a dispute settlement clause is found to be more favorable in a third-party BIT, it would be considered as falling under the same category; therefore, borrowing is justified in these cases. This approach is problematic because two corresponding provisions of two different treaties cannot be understood as belonging to the same subject matter.

The principle of *ejusdem generis* does not, by itself, provide an explanation as to the contours of subject matter. It would be an oversimplification of this principle to justify borrowing. The contours of subject matter depend upon the language of an MFN provision, and it must constitute a class under which alleged measures were applied.⁸⁷ The scope of the subject matter

82. *Id.*

83. *Id.* at 109.

84. MFN-UNCTAD, *supra* note 7, at 24.

85. *Report of the International Law Commission to the General Assembly on the work of its thirtieth session*, U.N. Doc. A/33/10, art. 9 (1978), reprinted in (1978) 2 Y.B. Int'l L. Comm'n 1 (Part II), U.N. Doc. A/CN.4/SER.A/1978/Add.1 [hereinafter ILC-MFN-1978].

86. *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction.

87. A.D. MCNAIR, *THE LAW OF TREATIES* 393 (1986).

must not be contrary to the objective of the parties.⁸⁸ However, there have been instances where this principle has been taken to justify borrowing without making proper inquiries as to the objective of the parties.⁸⁹ As it was aptly put by the English judge Lord Scarman, "the rule is a useful servant but a bad master."⁹⁰ It is submitted that the application and scope of subject matter must be understood to be related to internal measures only. Thus, the meaning of same subject matter has to be found in the nature of actual treatment of investment and investors within the territory of the host state.

2. Anglo-Iranian Oil Co. Case

The Anglo-Iranian Oil Company ("Anglo-Iranian"), incorporated in the UK, entered into an agreement with the Imperial Government of Persia (now Iran) in 1933.⁹¹ The agreement was ratified by the Iranian Majlis (parliament), and it received the imperial assent the following day.⁹² However, in 1951, the Majlis came up with a law nationalizing the oil industry in Iran.⁹³ This led to the dispute between the company and Iran. Exercising the right of diplomatic protection, the UK took up the matter for Anglo-Iranian and instituted proceedings against Iran in the ICJ.⁹⁴

As Iran did not give its consent to try the matter, the UK relied on the compulsory jurisdiction of the ICJ.⁹⁵ Under this jurisdiction, countries may lodge a declaration with the UN with respect to the cases they want to try before the ICJ.⁹⁶ Iran had accepted compulsory jurisdiction in 1930.⁹⁷ However, Iran made a declaration that it would try only those disputes arising out of a treaty directly or indirectly signed subsequent to the

88. *Maharashtra University of Health Sciences & others v. Satchikitsa Prasarak Mandal & others* (2010), 3 SCC 786, ¶ 28 (Ind.).

89. *Maffezini v Spain*, Decision of the Tribunal on Objections to Jurisdiction.

90. *Quazi v. Quazi* (1979), 3 All Eng. Rep. 897, 916.

91. *Anglo-Iranian Oil Co. Case*, 1952 I.C.J. at 102.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 103.

96. Statute of the International Court of Justice art. 36, ¶ 2, June 26, 1945, 33 U.N.T.S. 933.

97. *Anglo-Iranian Oil Co. Case*, 1952 I.C.J. at 103.

date of accepting compulsory jurisdiction.⁹⁸ Therefore, the UK's efforts to impute obligations onto Iran using the treaties signed in 1857 and 1903 were not accepted by the ICJ for lack of jurisdiction in this case because those treaties were signed before 1930.⁹⁹

Lastly, the UK argued for use of the MFN provision contained in Article IX of the Treaty of 1957 signed between the UK and Iran.¹⁰⁰ Referring to Article IV of the Treaty of 1934 between Iran and Denmark, the UK argued that treatment of Anglo-Iranian by the Iranian government was a breach of the principles and practice of international law.¹⁰¹ By the operation of the MFN provision in this matter, the UK argued, the Iranian government was bound to observe these obligations to protect the rights of a British national (in this case, Anglo-Iranian).¹⁰² The UK further argued that access to the ICJ under the Treaty of 1934 between Iran and Denmark, which came after the declaration of 1930, should have been considered as more favorable treatment of the nationals of a third party.¹⁰³ Therefore, the UK should have been allowed to bring the case to the ICJ by virtue of this MFN provision.¹⁰⁴

The ICJ, however, did not accept this contention by the UK. The court held that it did not have jurisdiction with respect to MFN provisions and made the following observation:

The treaty containing the most-favoured-nation clause is the basic treaty upon which the United Kingdom must rely. It is this treaty which establishes the juridical link between the United Kingdom and a third-party treaty and confers upon that State the rights enjoyed by the third party. A third-party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is *res inter alios acta*.¹⁰⁵

While it is true that the ICJ in this case did not address the rationale or basis for borrowing, it did recognize the principle of

98. *Id.*

99. *Id.* at 105.

100. *Id.*

101. *Id.* at 108.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 109.

res inter alios acta explicitly. This means the sovereignty of states does not allow for the automatic application of treaties to third states.¹⁰⁶ Therefore, the use of MFN provisions to borrow clauses from a third-party BIT without the consent of the host state is problematic. It is unclear as to what binds a state, without its consent, to accept such borrowing under general international law.

What is even more problematic is the assumption that the inclusion of an MFN provision in a BIT itself is evidence of consent by states to accept such borrowing. There is literature finding MFN clauses to be a link between basic BITs and third-party BITs, arguing that there is automatic incorporation of third-party BITs into basic BITs through MFN clauses.¹⁰⁷ This assertion has been criticized for being inapposite and misleading because it ignores the validity of the third-party BIT.¹⁰⁸ If the third-party BIT ceases to exist, then the right incorporated through the MFN provision in the basic BIT also vanishes.¹⁰⁹ This has already been established by the ICJ decision in the *Case Concerning the Rights of Nationals of the United States in Morocco*.¹¹⁰ Also, unless the link is established between two treaties beyond any doubt, respective treaties remain *res inter alios acta*. Thus, until this link is established, it is unreasonable to believe that states want third-party BIT provisions to be included in their carefully negotiated bilateral agreements through MFN provisions. This negates the whole purpose of entering into negotiation before signing a new BIT.

B. Investment Tribunals

For the purpose of brevity, only the relevant parts of decisions are discussed here to analyze borrowing using MFN clauses.

106. GENNADY DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 58 (1993).

107. Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses*, *supra* note 7, at 507.

108. Douglas, *supra* note 7, at 106.

109. *Id.*

110. *Case Concerning the Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.)*, Judgment, 1952 I.C.J. Rep. 176 at 191–92 (Aug. 27).

1. Emilio Agustín Maffezini v. The Kingdom of Spain

One of the main objections to the jurisdiction of the tribunal in this case related to the use of an MFN provision, contained in Article 4, paragraph 2 of the Argentina-Spain BIT,¹¹¹ by the claimant to establish the jurisdiction of the tribunal.¹¹² Article 10 of Argentina-Spain BIT provides for the exhaustion of local remedies by the claimant for a period of eighteen months before it can move to arbitration to settle the dispute.¹¹³ However, Article 10 (2) of the Chile-Spain BIT does not provide any pre-conditions before moving to arbitration.¹¹⁴ The claimant argued that Chilean investors were being treated more favorably than the Argentinian investors because of the existence of more favorable dispute resolution provision in the Chile-Spain BIT.¹¹⁵

These contentions were rejected by Spain primarily on three grounds: (1) in accordance with the doctrine of *res inter alios acta*, agreements between Spain and a third party did not create any rights for the claimant; (2) by application of the principle *ejusdem generis*, MFN clauses should be used only in cases of substantive provisions and not in dispute settlement provisions; and (3) MFN provisions could be used to determine discrimination having a connection with material economic treatment but not with procedural matters.¹¹⁶

The tribunal in *Maffezini* made various observations with respect to the use of MFN clauses and Spain's objections. In doing so, the tribunal started with an assessment of the Anglo-Iranian Oil Company Case,¹¹⁷ the ICJ case concerning the rights of US nationals in Morocco,¹¹⁸ and the *Ambatielos Claim*.¹¹⁹

111. Agreement for the Reciprocal Promotion and Protection of Investments, Oct. 3, 1991, 1699 U.N.T.S. 187.

112. *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction, at 14.

113. *Id.* at 15.

114. Agreement between the Kingdom of Spain and the Republic of Chile on the Reciprocal Protection and Promotion of Investments, Oct. 2, 1991, 1774 U.N.T.S. 15.

115. *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction, ¶ 40 at 15.

116. *Id.* ¶¶ 41–42 at 15.

117. Anglo-Iranian Oil Co. Case, 1952 I.C.J. at 93

118. France v. USA, 1952 I.C.J. at 176.

119. *Ambatielos Claim*, 12 R.I.A.A. at 91.

In its assessment of Anglo-Iranian Oil Company case, the tribunal observed that, if the subject matter of a provision in a basic treaty is found to be less favorable than the corresponding provision in a third-party BIT, then the corresponding provision in the third-party BIT is extended to a beneficiary in the basic treaty as being more favorable.¹²⁰ This assessment is problematic. It is not a correct assessment of the Anglo-Iranian Oil Company case because the tribunal in that case categorically held that a third-party treaty is an independent and isolated treaty, and as such it did not create any rights or obligations for the basic treaty between the UK and Iran.¹²¹ Further, it is also not clear what the *Maffezini* tribunal meant by “same” subject matter.¹²² This approach is neither a sound reflection of the Anglo-Iranian Oil Company case, nor does it provide any suitable tools to determine what is the same subject matter. Therefore, this interpretation is vague and not based on sound interpretative tools as provided in Article 31 of the VCLT.

The reference to the *Case Concerning the Rights of Nationals of the United States in Morocco* by the tribunal in *Maffezini* seems to be a mere formality with respect to the assessment taken by the tribunal.¹²³ This is because the case was referred to only to show that the MFN clause was invoked by the US to claim consular jurisdiction, an argument that was ultimately rejected by the court because the treaties from which the US was trying to borrow provisions had ceased to exist.¹²⁴

The tribunal also discussed the *ejusdem generis* principle as incorporated by the *Ambateilos* and conceded that the scope of this principle provided under *Ambateilos* was very broad.¹²⁵ The tribunal also acknowledged that the *Ambateilos* did not allow third-party treaties to be applicable in the dispute.¹²⁶

All three cases left considerable gaps from an interpretative and theoretical standpoint regarding the question of whether MFN clauses can be used to borrow provisions from third-party

120. *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction, ¶ 45 at 16.

121. *Anglo-Iranian Oil Co. Case*, 1952 I.C.J. at 109.

122. *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction, ¶ 45 at 16.

123. *Id.* ¶ 47, at 17.

124. *Id.*

125. *Id.* ¶ 49, at 18.

126. *Id.* ¶ 50, at 18.

BITs. The only reason why these cases are used by various tribunals and scholars to support borrowing is because these cases fell short of making the direct and categorical prohibition on importation or borrowing.

This, in turn, is based on the redundant and anachronistic practice under international law, which is best expressed: “what is not prohibited expressly should be considered allowed in international law.”¹²⁷ This approach is an outdated dictum that was used by the Permanent Court of International Justice in the *SS Lotus* case¹²⁸ and was severely criticized by Judge Bruno Simma in the advisory opinion relating to the Kosovo independence case.¹²⁹ According to Simma, the court’s analysis that “there was no need to demonstrate permissive rules as long as there is no prohibition” was obsolete, and the court failed to answer the questions put before it satisfactorily.¹³⁰ He also criticized the court for upholding the dictum from the *Lotus* case and failing to move beyond the anachronistic and extremely consent-focused vision of international law.¹³¹ According to Simma, the court should have made an attempt to equate the absence of prohibitive rules with the presence of permissive rules; however, it did not.¹³²

Similarly, the tribunal in *Maffezini* failed to undertake any serious attempt to look into the permissive rules of international law to justify borrowing from third-party BITs using MFN provisions. In fact, there are established rules in international law, like Article 34 of VCLT,¹³³ that are prohibitive of such practices.

The reasoning of the tribunal in the later part of its award is even more problematic. In paragraph 52, it argued that, since the UK in most of its BITs included dispute settlement provi-

127. An Hertogen, *Letting Lotus Bloom*, 26 EUR. J. INT’L L. 901, 902 (2016).

128. Case of the S.S. Lotus (Fr. v. Turk.), Judgement, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) (providing that the restrictions on the independence of states cannot be presumed because of the consensual nature of the international legal order).

129. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Declaration by Judge Bruno Simma, 2010 I.C.J. 403 (July 22).

130. *Id.* ¶ 3.

131. *Id.*

132. *Id.*

133. A treaty does not create either obligations or rights for a third state without its consent.

sions under its MFN provisions,¹³⁴ it was doubtful that parties had intended to exclude dispute settlement provisions from the purview of their MFN clause.¹³⁵ Even if one accepts that the UK intended to include dispute settlement provisions under its MFN provisions, by what analogy or principle can it be concluded that Spain or Argentina intended the same?

Most of the tribunal's decision on jurisdiction revolved around Spain's treaty practice and how various textual variations can be seen in treaties signed by Spain with other countries.¹³⁶ The tribunal also spent considerable time ascertaining the intention of the parties through the history of their BIT negotiations.¹³⁷ Unfortunately, none of these approaches has the gravitas to provide any rationale for borrowing provisions from third-party BITs. The problem with the tribunal's assessment is that it focused more on establishing that dispute settlement provisions can fall under MFN provisions, rather than on looking for a justification for borrowing under international law. The decision by the tribunal can hardly be considered a correct statement of the law with respect to its interpretation of MFN provisions.

2. White Industries Australia Ltd. v. The Republic of India¹³⁸

White Industries initiated a BIT claim against India for failure to enforce an arbitral award in favor of White Industries against Coal India, Ltd., a public sector unit in India, due to delay in the judicial process.¹³⁹ White Industries argued that a delay of over nine years in enforcing a foreign award should be considered a breach of India's obligation under the India-Australia BIT.¹⁴⁰ White Industries asserted that the provision concerning "effective means of asserting claims and enforcing rights" from the India-Kuwait BIT¹⁴¹ could simply be borrowed

134. *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction, ¶ 52 at 19.

135. *Id.*

136. *Id.* ¶¶ 58–60.

137. *Id.* ¶ 57.

138. *See* *White Industries v. India*.

139. *See generally* Sumeet Kachwaha, *The White Industries Australia Limited – India BIT Award: A Critical Assessment*, 29 ARB. INT'L 276 (2013).

140. *White Industries v. India*, ¶ 4.3.4, at 37.

141. *India-Kuwait BIT*, *supra* note 66, art. 4(5).

using the MFN provision from the India-Australia BIT.¹⁴² Thus, India's failure to enforce the award constituted a breach of India's obligation under the India-Australia BIT.¹⁴³

With respect to one of India's objections, that borrowing would subvert the carefully negotiated balance of its BIT with Australia,¹⁴⁴ the tribunal held that the authorities cited by India were applicable on the use of MFN clauses for borrowing dispute settlement provisions only, and the situation in the case was qualitatively different because a substantive provision was being borrowed.¹⁴⁵ Therefore, there was no subversion of the carefully negotiated balance of the BIT; in fact, by borrowing substantive provisions, the BIT achieved its objective that was intended by the contracting parties through incorporation of the MFN provision.¹⁴⁶

Fascinatingly, the tribunal evaded the question of subversion of the carefully negotiated balance of the BIT. This requires a serious assessment of the approach of the tribunal. According to the tribunal, the carefully negotiated balance of the BIT cannot be subverted when only substantive provisions of a third-party BIT are being borrowed.¹⁴⁷ This raises a question—what is the basis of this assessment? Further, the tribunal held that contracting parties intended to use the MFN to borrow substantive provisions.¹⁴⁸ It is difficult to understand the basis for reaching this conclusion and how the tribunal determined the actual intention of the contracting parties. It is possible that the tribunal may have assumed that incorporation of MFNs in BITs by sovereign states in itself is evidence that states wanted to allow borrowing from third-party BITs. This presumption, however, must be proved concretely. Even the conclusion that states wanted to allow borrowing using MFNs has to be satisfied beyond any doubt. In fact, recent state behavior provides evidence that states are not willing to accept the proposition allowed by the tribunal.¹⁴⁹ This approach, if it

142. *White Industries v. India*, ¶ 11.1.5, at 106.

143. *Id.*

144. *Id.* ¶ 11.2.1, at 106.

145. *Id.* ¶¶ 11.2.2–3, at 106.

146. *Id.* ¶ 11.2.4, at 107.

147. *Id.* ¶¶ 11.2.1–4, at 106.

148. *Id.*

149. See *Recent New Indian Model BIT (2016)*, https://dea.gov.in/sites/default/files/ModelTextIndia_BIT_0.pdf; see also *Draft Netherland Model BIT*

was indeed the rationale of the tribunal, is incorrect in the absence of any evidence from which intentions of the parties can be ascertained. The tribunal did not provide any justification or reasoning for allowing the importation of a provision from a third-party BIT. Further, it made an assessment as to the meaning of “*effective means and standards*” based on the decisions of different tribunals and writings of scholars without effectively satisfying the basis for borrowing.¹⁵⁰

It seems that the *White Industries* tribunal was already under the impression that borrowing substantive provisions using MFN provisions from third-party BITs was settled in practice and theory. According to the tribunal, as it may be inferred, it was only the borrowing of dispute settlement provisions from third-party BITs that was debatable. This approach is surprisingly problematic for two reasons: first, the tribunal did not cite any authority or source to reach its decision, and second, it did not make an effort to justify borrowing under international law. In other words, the decision of the tribunal with respect to the use of MFN clauses was not a reasoned decision.¹⁵¹ Indeed, it was based on the presumptive assessment of borrowing using MFNs and lacked sound legal principle to back its conclusion.

There is a long list of decisions by investment tribunals that have not undertaken the task of finding justification for the borrowing of provisions from third-party BITs.¹⁵² The problem

(2018), https://globalarbitrationreview.com/digital_assets/820bcdd9-08b5-4bb5-a81e-d69e6c6735ce/Draft-Model-BIT-NL-2018.pdf [hereinafter, Netherlands Draft Model BIT].

150. *White Industries v. India*, ¶ 11.3 at 108.

151. United Nations Commission on International Trade Law [UNCITRAL], Arbitration Rules, art. 34(3) (Feb. 2014), available at <https://www.un-citral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf> (providing for reasoned decisions). For more literature on reasoned decisions in international arbitrations, see Pierre Lalive, *On the Reasoning of International Arbitral Awards*, 1 J. INT'L DISP. SETTLEMENT 55, 55–65 (2010); Stephen Hunter, *A Duty to Give Reasons, But Only Just*, KLUWER ARBITRATION BLOG (Nov. 1, 2016), <http://arbitrationblog.kluwerarbitration.com/2016/11/01/a-duty-to-give-reasons-but-only-just/>.

152. For example: EDF International S.A. et al. v. Argentine Republic, ICSID Case No. ARB/03/23, Award (June 11, 2012); Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award, (Apr. 8, 2013); Hesham T. M. Al Warraq v. Republic of Indonesia, UNCITRAL, Award (Dec. 15, 2014); Ansung Housing Co. Ltd. v. People's Republic of China, ICSID Case No. ARB/14/25, Award (Mar. 9, 2017); Garanti Koza LLP v. Turkmeni-

with this approach is that these tribunals presumed that the importation of substantive provisions from third-party BITs using MFN clauses is not questionable at all. Therefore, it was not necessary, on their part, to seek justification for borrowing MFN provisions. Unfortunately, this practice has been so deeply entrenched in the investment regime that there are hardly any objections to its validity.

There have, however, been attempts to provide a fresh perspective with respect to the use of MFN provisions in BITs. *Kilic Insaat v. Turkmenistan*¹⁵³ and *Ickale Insaat v. Turkmenistan*¹⁵⁴ provide different perspectives on interpreting the use of MFN clauses. The *Ickale* tribunal, for example, categorically held that a common formulation of MFN clauses does not allow borrowing from third-party BITs.¹⁵⁵

3. Ickale Insaat v. Turkmenistan

In *Ickale*, the tribunal asked: “Can the Claimant invoke the FET, FPS, non-discrimination, and umbrella clause protections through the MFN clause in Article II of the BIT or the non-derogation clause in Article VI of the BIT?”¹⁵⁶ The tribunal observed that Article II of the basic BIT, which included MFN treatment, provided for the prohibition of discrimination between investors of two different nationalities.¹⁵⁷ According to the tribunal, this host state obligation to ensure equal treatment has to be observed only when investors are placed in *similar situations*.¹⁵⁸ Conversely, according to the tribunal, MFN obligations do not exist when foreign investors are not placed in similar situations.¹⁵⁹

stan, ICSID Case No. ARB/11/20, Award (Dec. 19, 2016); *Teinver v. Argentina*, ICSID Case No. ARB/09/1, Award (July 21, 2017); *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (June 27, 1990); *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award (May 18, 2010).

153. *Kilic Insaat Ithalat Ihracat Sanayi Ve Ticaret Anonim Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award (July 2, 2013).

154. *Ickale v. Turkmenistan*.

155. *Batifort & Heath*, *supra* note 4, at 899.

156. *Ickale v. Turkmenistan*, ¶ 6.1 at 103.

157. *Id.* ¶ 326.

158. *Id.* ¶ 327.

159. *Id.*

The tribunal further held that the meaning of *treatment in similar situations* has to be determined according to the factual situations of a case, and this cannot be understood to include importing provisions from a third-party BIT.¹⁶⁰ Consequently, the tribunal rejected the claim of the investor to borrow a provision from a third-party BIT.¹⁶¹

This decision is a refreshing illustration of sound application of the rules of treaty interpretation without wandering into the realm of judicial adventurism. According to Batifort and Heath, this decision is significant for moving away from the top-down approach of MFN interpretation and reconsidering the bottom-up approach based on variation in texts.¹⁶²

C. Scholarly Contributions

This article will now present a critique of the major arguments made by scholars in support of importing favorable provisions from third-party BITs using MFN provisions in basic BITs. Most of the discussion today revolves around the importation of dispute settlement provisions from third-party BITs, and there is hardly any question as to the validity of this practice itself.¹⁶³ Schill puts it positively, that the practice of importing more favorable provisions is largely uncontested.¹⁶⁴ Except for a few recent works,¹⁶⁵ there are barely any objections to this practice whatsoever. The following section provides several major arguments that are presented as a justification for this practice.

1. Economic Rationale

One of the major arguments in favor of borrowing provisions from third-party BITs is that this practice allows investors of different nationalities to compete under equal competitive con-

160. *Id.* ¶ 329.

161. *Id.* ¶ 332.

162. Batifort & Heath, *supra* note 4, at 899.

163. Ishikawa, *supra* note 7, at 128; J.W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* 253 (2010); WEERAMANTRY, *supra* note 7, at 177; Vesel, *supra* note 7.

164. Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses*, *supra* note 7, at 519.

165. See generally Perez-Aznar, *supra* note 3; Batifort & Heath, *supra* note 4; Ickale v. Turkmenistan; Faya Rodriguez, *supra* note 7, at 93; Ishikawa, *supra* note 7; Cole, *supra* note 1, at 540–41.

ditions by creating uniform standards of investment protection.¹⁶⁶ Further, scholars argue that multilateral rules on investment protection, such as borrowing of provisions from third-party BITs, ensure fair treatment of investors independent of the source of the investor.¹⁶⁷ This enables capital flow to be allocated in areas where a state may have a comparative advantage over other economies.¹⁶⁸ These assessments are partially correct for several reasons.

First, the assessment that the practice of borrowing ensures equal competitive conditions is based on the presumption that there exist relevant comparators. These comparators, through their respective BITs, are treated differently; therefore, if there are no equal competitive conditions, borrowing will ensure equal competitive conditions. For this premise to hold true, there must be an inquiry, first, to determine if relevant comparators actually exist. In the absence of such an inquiry, it becomes highly subjective to debate whether or not equal competitive conditions exist. It is possible that there may not be any relevant comparator or investor from a third state or third-party BIT from which the provisions are being imported. Thus, there may be no competition at all due to the absence of a relevant comparator. This scenario creates more advantageous conditions for investors asking to import favorable provisions from third-party BITs compared to the other relevant comparators in the same sector. In such cases, borrowing goes against the very objective for which it was created—i.e., to ensure equal competitive conditions. Further, a sound assessment of perfect competitive conditions can be made only by looking into the domestic framework for regulating competition. Therefore, even if one believes that a state has failed to provide equal competitive conditions to an investor, and as a result an investor of a different nationality has gained some favorable conditions in the market, one has to look into the domestic or internal measures that have led to this scenario. It is insufficient to

166. Freyer & Herlihy, *supra* note 7, at 62–63; Chukwumerije, *supra* note 7, at 610; Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses*, *supra* note 7, at 500.

167. Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses*, *supra* note 7, at 498; Chukwumerije, *supra* note 7; Freyer & Herlihy, *supra* note 7, at 62–63.

168. Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses*, *supra* note 7, at 499.

assume that borrowing a provision can ensure equal competitive conditions without looking into domestic measures. Therefore, in the absence of concrete research and studies, it is incorrect to assume that borrowing ensures equal competitive conditions.

Second, this assessment that borrowing favorable provisions creates uniform standards of investment protection is problematic because, in practice, borrowing takes place only in stand-alone instances. Provisions of third-party BITs do not remain attached to the basic BIT after the dispute is over; instead, they vanish once the investor uses them for their specific need or purposes in a dispute. In fact, it is also possible that the same investor may use or borrow a similar provision from a completely different BIT. An illustration will explain this narrative. Consider that A-B is a basic BIT; A-C is a third-party BIT; A-D is another BIT; and X is an investor. A is the host state. Assume X has borrowed a dispute settlement provision successfully from the A-C BIT, reducing the waiting period for initiating an investment arbitration. In another dispute between A and X, X borrows the dispute settlement provision from the A-D BIT to get away with a "fork in the road" clause.¹⁶⁹ To give another example, it is possible that two different foreign investors in two different host states may try to borrow fair and equitable treatment (FET) provisions for different reasons (one may seek it for denial of justice and another may seek it for legitimate expectations) from a third-party BIT. It is difficult to see any uniformity in such practices. Therefore, it is difficult to accept that borrowing creates a uniform standard of investment protection.

Third, discrimination based on the source or nationality of foreign investors is protected under the MFN provision in the basic BIT. Actual discrimination takes place only through internal or domestic measures. In fact, the claim that multinational rules on investment protection ensure no discrimination on the basis of the source of the investor¹⁷⁰ is contradictory because this assessment does not make any inquiry about more

169. "Fork in the road" clauses in BITs provide the investor a choice between pursuing its claims against the host state either through the arbitration mechanisms provided in the BIT or in local courts or other venues under relevant contract.

170. See generally Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses*, *supra* note 7.

favorable treatment to foreign investors from third states. It simply assumes that borrowing ensures the same treatment between foreign investors. It is ironic that when a foreign investor enters into the territory of the host state, the more favorable provisions of a third-party BIT are not questioned until a dispute arises. These *so-called* multinational rules on investment protection play their role only when a dispute arises, which is based on the expediency to the investor; otherwise, they do not appear to play any role.

Fourth, the assessment that borrowing enables capital to flow where it is allocated efficiently is wrong. This is due to the fact that BITs do not leave it to the market to allocate foreign investment.¹⁷¹ It is the host state or home state that governs or regulates foreign investment because they do not trust the market to guide foreign investment and are deeply concerned about the macroeconomic effects of foreign investment.¹⁷² States regulate foreign investments to ensure desired macroeconomic effects.¹⁷³ Therefore, it is difficult to accept the proposition that the practice of borrowing plays any role in the efficient allocation of capital.

Fifth, the proposition that borrowing enables a state to garner specialization in areas where it can have a comparative advantage is also not entirely correct. It is possible that a state may, through low-tariff incentives, promote investment inflow in those areas in which it does not have a comparative advantage.¹⁷⁴ In other words, it completely depends on the state to decide how to steer the inflow of investment into its territory. A BIT does not oblige states to accept capital inflow; it merely creates an obligation to promote and protect investments.

Sixth, the aforementioned analysis by scholars is underpinned by the notion that BITs are related to FDI inflow. This proposition is inconclusive. In fact, there is secondary literature available that shows a weak linkage between BITs and FDI inflow into the territory of host states.¹⁷⁵ Countries like

171. Kenneth J. Valdevelde, *The Economics of Bilateral Investment Treaties*, 41 HARV. INT'L L. J. 469, 498 (2000).

172. *Id.*

173. *Id.*

174. *Id.*

175. JAN PETER SASSE, AN ECONOMIC ANALYSIS OF BILATERAL INVESTMENT TREATIES 69 (2011); see also Jason Webb Yackee, *Do Bilateral Investment*

Brazil and Mexico, which are the major hosts of FDI, were for a long period reluctant to sign BITs.¹⁷⁶ Similarly, the US is one of the largest investor countries in India, despite the fact that India and the US have not signed a BIT.¹⁷⁷ Therefore, the proposition that borrowing can increase FDI inflow in a country by providing suitable competitive conditions is not correct because a BIT, in itself, may not provide any basis for capital inflow.

2. Non-Economic Rationale

Scholars argue that borrowing provisions from third-party BITs, which ultimately leads to multilateralization of investment rules, discourages states from bloc-building¹⁷⁸ behavior and promotes international security and peace through economic interdependence.¹⁷⁹ They also argue that MFN clauses move away from general international law—which allows for the granting of special favors to certain states—and, instead, ensures equal treatment between states.¹⁸⁰ Ultimately, MFN provisions lock states into the framework of multilateralism, which is adverse to bilateral alliances.¹⁸¹

The abovementioned assessment is based on the assumption that bilateralism (or, in fact, regionalism) is not in the best interest of countries. Had this been the case, the GATT, which is itself a multilateral agreement, would not have contained provisions on regional trade agreements (RTAs).¹⁸² The theory of economic integration refers to the policy of reducing or eliminating trade barriers among nations jointly entering into

Treaties Promote Foreign Direct Investment?, 51 VA. J. INT'L L. 397 (2010–2011); Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract Foreign Investment?*, in *THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT* 349–78 (Karl Sauvant et al. eds., 2009).

176. SASSE, *supra* note 175.

177. *Five Countries that are Making it Big in India*, MAKE IN INDIA, <http://www.makeinindia.com/five-countries-that-are-making-big-in-india> (last visited Jan. 2, 2020).

178. Bloc-building refers to the regional collaboration among some states in trade and investment to pursue their interests.

179. Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses*, *supra* note 7, at 501.

180. *Id.*

181. *Id.*; see also Efraim Chalamish, *The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement*, 34 BROOK. J. INT'L L. 304 (2009).

182. GATT, *supra* note 53, art. XXIV.

agreements.¹⁸³ RTAs do not increase the trade barriers for non-member countries, but they do lower the trade barriers among member countries, which, in turn, is seen as a move towards freer trade.¹⁸⁴ Presently, there are more than 450 RTAs, and this number is constantly growing.¹⁸⁵ Each WTO member is currently a member of more than ten RTAs.¹⁸⁶ Krugman explains that RTAs are so popular because (1) there are fewer participants at the regional level than at the global level, which changes the character of negotiations;¹⁸⁷ (2) the changing nature of trade restrictions makes monitoring trade relations very difficult; and (3) the decline of the relative importance of the US in world trade has shaken the hegemonic stability of the global trading system.¹⁸⁸

According to Krugman, regionalism offers to minimize these problems by providing countries with new bargaining opportunities.¹⁸⁹ The increasing prevalence of RTAs, however, creates a number of novel and complex tariff schedules that impose greater transaction costs on producers, raise business costs, and divert trade and associated investments.¹⁹⁰ BITs, unlike RTAs, are free from such inherent problems. In that sense, agreements like BITs provide greater transparency, better legal predictability, and increased security to stakeholders in order to attract FDI.¹⁹¹ Aside from these factors, there can be a

183. DOMINIC SALVATORE, *INTERNATIONAL ECONOMICS: TRADE AND FINANCE* 289 (2014).

184. *Id.*; see generally Rudiger Dornbusch, *Policy Options for Freer Trade: The Case for Bilateralism*, in *AMERICAN TRADE STRATEGY: OPTIONS FOR THE 1990s* (Robert Z. Lawrence et al. eds., 1990).

185. See *Regional Trade Agreements Database*, WORLD TRADE ORG., <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> (last visited Jan. 1, 2020).

186. See TREBILCOCK et al., *supra* note 55, at 90.

187. Fewer participants mean countries have to negotiate with a small number of other countries, thus reducing their negotiation costs to a large extent. Apart from this, countries at the regional level feel more empowered to put forward their interests during negotiations.

188. Paul Krugman, *Regionalism versus Multilateralism: Analytical Notes*, in *NEW DIMENSIONS IN REGIONAL INTEGRATION* 74 (Jaime De Melo et al. eds., 1993).

189. *Id.* at 75.

190. JAGDISH BHAGWATI, *TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE* 70 (2008).

191. W. J. Ethier, *The New Regionalism*, 108 *THE ECON. J.* 1149, 1149–61 (1998).

positive interaction between multi-level rulemaking within regional, bilateral, and multilateral agreements.¹⁹² It is incorrect to assume that these agreements conflict.¹⁹³ Therefore, the proposition that only multinational rules can achieve international peace and security is not well placed.

Further the assertion that MFN provisions create multilateral rules is, in itself, challenged by various scholars. McRae argues that multilateralization in trade happened because states chose to include MFN provisions in the multilateral agreements, not because MFN clauses were designed to affect multilateralization.¹⁹⁴ Perez-Aznar calls multilateralization through MFN clauses a legal fiction.¹⁹⁵ He argues that multilateralization should be based on the cooperation of states rather than one provision contained in a treaty or by the decision of an arbitral tribunal.¹⁹⁶ Perez-Aznar also argues that the use of legal fiction to replace the true legal effect of a rule may undermine the application and context of the rule.¹⁹⁷ He further posits that multilateralization through MFN provisions is not true multilateralism because it is the imposition of rules through the interpretation of MFN provisions by the arbitral tribunals.¹⁹⁸ The underlying idea behind these arguments is that states are the primary lawmakers in international law; therefore, any attempt to create a (multilateral) system without the consensus and cooperation of states is problematic. Thus, an attempt to create multilateral rules through MFN provisions in BITs is a flawed approach.

192. UNITED NATIONS, MULTILATERALISM, REGIONALISM AND BILATERALISM IN TRADE AND INVESTMENT 39 (Philippe De Lombaerde ed., 2006).

193. *Id.*; Douglas A. Irwin, *Multilateral and Bilateral Trade Policies in the World Trading System: An Historical Perspective*, in NEW DIMENSIONS IN REGIONAL INTEGRATION (Jaime de Melo et al. eds., 1993).

194. Donald McRae, *Introduction to the Symposium on Simon Batifort and J. Benton Heath*, in *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, 112 AM. J. INT'L L. UNBOUND 38, 42 (2018).

195. Facundo Perez-Aznar, *The Fictions and Realities of MFN Clauses in International Investment Agreements*, 112 AM. J. INT'L L. UNBOUND 55, 58 (2018). Legal-fiction here, likely points towards the fact that it is tribunals and not states that have created this notion of the use of MFN provisions. In fact, there is little evidence to prove that states also support such use of MFN provisions in BITs.

196. *Id.*

197. *Id.*

198. *Id.*

III. INTERPRETATION OF MFN PROVISIONS

The VCLT provides various tools for the interpretation of treaty provisions.¹⁹⁹ Articles 31, 32 and 34 of the VCLT have been accepted as treaty law applicable to signatories of the VCLT and as rules of customary international law (CIL) between all states.²⁰⁰ Article 31 contains four paragraphs related to treaty interpretation,²⁰¹ which should be read for their overall logic and not in hierarchical order.²⁰² Even though the hierarchical character of these norms is not established, for the purpose of simplicity, each paragraph of Article 31 is explored here in the order that it appears in the treaty text. The following paragraph analyzes the interpretation of MFN provisions.

According to the study undertaken by the ILC on MFN provisions, there are as many as six types of obligations found in MFN provisions.²⁰³ These obligations are reflected in a large number of textually diverse MFN provisions. As each MFN clause is specific to its treaty, no uniform approach should be adopted for its interpretation.²⁰⁴ It would be sound, therefore, to interpret each and every type of MFN provision according to its language. The 2013 Tokyo Resolution²⁰⁵ and the ILC²⁰⁶ take similar approaches. Batifort and Heath also take a comparable

199. VCLT, *supra* note 14, arts. 31–32.

200. Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session, at 17, UN Doc. A/73/10 (2018) *available at* https://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/1_11_2018.pdf&lang=EF (draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries) [hereinafter ILC-Subsequent Treaties and Practice].

201. VCLT, *supra* note 14, art. 31.

202. JEAN-MARC SOREL & VALERIE BORE EVANO, *THE VIENNA CONVENTIONS ON THE LAW OF TREATIES* 807 (Oliver Corten et al. eds., 2011).

203. Int'l Law Comm'n, Final Rep. of Study Group on the Most-Favoured-Nation Clause, ¶¶ 59–65, UN Doc. A/CN.4/L.852 (2015) [hereinafter ILC-MFN-2015]; Ibrahim Jamie Arabi, et al., *Evaluating (In) Consistency in Investor-State Arbitration: A Roadmap*, 13 (Apr. 18, 2018) (unpublished comment, University of Ottawa), *available at* <https://georgetown.app.box.com/s/obdg31rnxjkitrp6aydp46i855nw5g9y>.

204. Schill, *MFN Clauses as Bilateral Commitments to Multilateralism*, *supra* note 7, at 933.

205. Institut de Droit International, *Eighteenth Commission: Legal Aspects of Recourse to Arbitration by an Investor Against the Authorities of the Host State Under Inter-State Treaties*, art. 12 (Sept. 13, 2013), www.idi-il.org/app/uploads/2017/06/2013_tokyo_en.pdf.

206. ILC-MFN-2015, *supra* note 203, ¶¶ 213–14.

stance when they argue for the bottom-up approach to interpret MFN provisions.²⁰⁷ Despite its merit, their bottom-up approach has certain limitations. In most BITs, the ordinary meaning of MFN provisions do not give any reference or evidence with respect to their scope. This lack of clarity concerning the scope of MFN provisions has led many investment tribunals to interpret MFN provisions as a tool to borrow provisions from third-party BITs.²⁰⁸ The assessment proposed by Batifort and Heath, therefore, is helpful only when the MFN provision itself gives some reference point with respect to its scope. In the absence of such reference, MFN provisions will continue to remain a tool for latitudinarian interpretations. For the purpose of providing clarity irrespective of textual variations, this article proposes that there can be two types of MFN provisions; those that provide some reference point or evidence of their scope, and others that do not provide such reference. These MFN provisions shall be discussed in the subsections below.

207. See Batifort & Heath, *supra* note 4.

208. Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S.v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award (July 29, 2008), ¶ 575 at 152, <https://www.italaw.com/sites/default/files/case-documents/ita0728.pdf>; Teinver v. Argentina, Decision on Jurisdiction, ¶ 186 at 42; L.E.S.I. S.p.A. & ASTALDI S.p.A. v. République algérienne démocratique et populaire, ICSID Case No. ARB/05/3, ¶ 150 at 44, Award (Nov. 12, 2008), <https://www.italaw.com/sites/default/files/case-documents/ita0457.pdf>; Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, ¶¶ 148-167, Award (Aug. 27, 2009), <https://www.italaw.com/sites/default/files/case-documents/ita0075.pdf>; White Industries v. India, ¶ 16.1.1 (a); ATA Construction, Industrial & Trading Company v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2, ¶ 125 at 64, Award (May 18, 2010), <https://www.italaw.com/sites/default/files/case-documents/ita0043.pdf>; Sergei Paushok, et al. v. The Government of Mongolia, UNCITRAL, ¶ 254 at 46, Award on Jurisdiction and Liability (Apr. 28, 2011), <https://www.italaw.com/sites/default/files/case-documents/ita0622.pdf>; EDF International S.A. et al. v. The Argentine Republic, ICSID Case No. ARB/03/23, ¶ 929 at 223, Award (June 11, 2012), <https://www.italaw.com/sites/default/files/case-documents/ita1069.pdf>; Arif v. Moldova, ¶¶ 395–396 at 96; OAO Tatneft v. Ukraine, UNCITRAL, ¶ 426, Award on the Merits (Perm. Ct. Arb. 2014), <https://www.italaw.com/sites/default/files/case-documents/italaw8622.pdf>; Al-Warraq v. Indonesia, ¶551, Final Award; MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, ¶¶ 100–104 at 27, Award (May 25, 2004), <https://www.italaw.com/sites/default/files/case-documents/ita0544.pdf>.

A. VCLT Article 31

Article 31(1) of the VCLT provides for treaty interpretation on the basis of plain and ordinary meaning.²⁰⁹ When interpreting treaty provisions, paramount importance has been given to the ordinary meaning in light of the treaty's object and purpose.²¹⁰ This approach incorporates both a textual and a teleological approach to interpretation.²¹¹ It is argued that the first attempt to interpret MFN provisions should be based on the ordinary meaning of the specific language of the provisions.²¹² MFN provisions, which include phraseology or terms such as "in like circumstances,"²¹³ "similar situations,"²¹⁴ or "in its territory,"²¹⁵ therefore, should be considered as having reference to their scope. The use of this phraseology means discrimination is expected to arise between relevant comparators only. As relevant comparators compete with each other in the same sector or business, MFN provisions should be used to determine discrimination based on actual treatment in the territory of the host state.²¹⁶ In this respect, an analysis of the aforementioned phrases by different tribunals is desirable to understand how

209. VCLT, *supra* note 14, art. 31(1). For more literature on treaty interpretation with respect to VCLT, see U. LINDERFALK, ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (2007); *see also* R.K. GARDINER, TREATY INTERPRETATION (Oxford U. Press, 2008); A. ORAKHELASHVILI, THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW (2008); QUEEN MARY U., TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON (M. Fitzmaurice et al. eds., 2010); EUROPEAN U. INSTITUTE, THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW 235 (M.T. Kamminga & M. Scheinin eds., 2009); Liliana E. Popa, *The Holistic Interpretation of Treaties at the International Court of Justice*, 87 NORDIC J. INT'L L. 249, 269 (2018).

210. SOREL & EVANO, *supra* note 202, at 807.

211. Kenneth J. Vandeveld, *Treaty Interpretation from a Negotiator's Perspective*, 21 VAND. J. TRANSNAT'L L. 281, 291 (1988).

212. SOREL & EVANO, *supra* note 202, at 807.

213. North American Free Trade Agreement, Can.-Mex.-U.S., art. 1103, Dec. 17, 1992, 32 I.L.M. 289 (1993).

214. Agreement Between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments, Turk.-Turkm., art. II, May 2, 1992.

215. Agreement Between the Government of The Republic of India and the Government of The Republic of The Philippines for The Promotion and Protection of Investments, India-Phil., art IV, Jan. 28, 2000 [hereinafter India-Philippines BIT].

216. For more on relevant comparators, refer to Part II *supra*.

these phrases have been interpreted. Various tribunals²¹⁷ have interpreted “like circumstances” as factors with the same environment,²¹⁸ trade,²¹⁹ nature of service and functions,²²⁰ and public policy considerations.²²¹ The tribunal in *Cargill v. Mexico* held that “like circumstances” in NAFTA Section 1102 does not refer to “like products” in the GATT, thereby rejecting the claimant’s argument that “like goods” is an essential component of “like circumstances.”²²² The tribunal reasoned that if the NAFTA drafters intended to equate these two terms, they would have done so.²²³ The tribunal further emphasized that even if two investors work in the same sector, that does not necessarily mean they are in “like circumstances.”²²⁴ In *Apotex*, the tribunal held that, while Apotex (a US company) and other foreign pharmaceutical companies were relevant comparators, the companies were not in like circumstances because the US did not put import alerts on other foreign companies.²²⁵ The tribunal, however, made it clear that this assessment must be made only in relation to relevant investors (comparators).²²⁶

“Like circumstances,” according to various tribunals, should be interpreted based on the facts and circumstances of each case.²²⁷ It is accepted that two investors working in the same sector may not always be in “like circumstances,” and it is also noted that “like circumstances” should be decided on a case-by-case basis. It is contended, however, that “like circumstances” can only be applicable in cases of relevant comparators. It is

217. *Merrill & Ring v. Canada*, ¶ 88.

218. *SD Myres v. Canada*, ¶ 250.

219. *Apotex v. US*, ¶ 8.15.

220. *SD Myres v. Canada*, ¶ 249.

221. *Id.* ¶ 246.

222. *Cargill v. Mexico*, ¶ 193.

223. *Id.*; see also *Methanex v. US*, ¶ 25.

224. *Cargill v. Mexico*, ¶ 191.

225. *Apotex v. US*, ¶ 8.15.

226. *Id.*

227. *Pope & Talbot v. Canada*, ¶ 75; *SD Myres v. Canada*; *Merrill & Ring v. Canada*; *Grand River v. US*, ¶ 61. It is important to clarify here that the abovementioned interpretations were made in the context of national treatment provisions, either under NAFTA § 1102 or a particular BIT. However, tribunals, while interpreting MFN provisions, have been influenced by interpretations of national treatment provisions made by previous investment tribunals. *Parkerings v. Lütania*, ICSID Case No. ARB/05/8, Award, ¶¶ 369–70 (Sept. 11, 2007), <https://www.italaw.com/sites/default/files/case-documents/ita0619.pdf>.

thus a qualifier that exists only when relevant comparators exist. The ILC also adopts the notion that an analysis of “like circumstances” can only be made when the investors are relevant comparators.²²⁸ This argument is bolstered by the interpretation of “similar situation” by the tribunal in *Ickale*.²²⁹ In *Ickale*, the tribunal, held that the meaning of “treatment in similar situations” has to be determined according to the factual situations of a case, and this cannot be understood to include importing an MFN provision from a third-party BIT.²³⁰ Consequently, the tribunal rejected the investor’s request to borrow an MFN provision from a third-party BIT.²³¹ This clarified the meaning of “similar situations” as applicable to internal measures only.

The tribunal in *UPS v. Canada*²³² set forth a three-step analysis to determine whether a host state has acted in an inconsistent manner. The first step is to determine whether an investor received treatment.²³³ The second step is to delineate if investors were in like circumstances.²³⁴ The third step is to figure out whether the treatment was less favorable.²³⁵ The inquiry into whether investors are in like circumstances has to start with an analysis of treatment that investors receive. As noted above, the analysis of the treatment of investors can only be made among relevant comparators. Therefore, phrases such as “like circumstances” or “similar situations” give some reference with regard to the scope of MFN; thereby, it should be used only in cases regarding internal measures.

Further, the ordinary meaning of an MFN provision must be ascertained in light of the preamble of the treaty. The preamble of most BITs provides for “[i]ntending to create and maintain favourable conditions for the Investments and Investors of one Contracting Party in the territory of the other Contracting Party.”²³⁶ In this situation, where parties are trying to create favorable conditions for investments *in the territory* of each other,

228. ILC-MFN-2015, *supra* note 203, ¶ 163.

229. *Ickale v. Turkmenistan*.

230. *Id.* ¶ 329.

231. *Id.* ¶ 332.

232. *UPS v. Canada*, ¶ 83.

233. *Id.* ¶ 83 (a).

234. *Id.* ¶ 83 (b).

235. *Id.* ¶ 83 (c).

236. The India-Philippines BIT is one such example.

application of MFN provisions should be sought for internal measures only in the territory of contracting parties.²³⁷ The object and purpose of BITs,²³⁸ however, are often interpreted without consideration of the language in the preamble.²³⁹ Interpreters usually depend on the general idea behind the signing of BITs to interpret its object and purpose.²⁴⁰ They also often construe the object and purpose independent of the treaty provision.²⁴¹

Such an approach may not be a sound way to interpret MFN provisions. The expression “in its territory” means that unless differential treatment has taken place within the territory of the host state, there is no breach of the MFN provision. In fact, the tribunal in *Berschader v. Russia* interpreted the expression as the intention of contracting parties to accord material rights to investors within the territory of contracting states.²⁴² Perez-Aznar argues that the analysis of “in its territory” by the *Berschader* tribunal indicates that substantive provisions contained in other BITs should not be considered as “treatment in the territory” of host states.²⁴³ It is submitted, therefore, that these types of MFN provisions should be applicable only in cases of internal measures, and parties may not borrow any provisions from a third-party BIT.

The abovementioned analysis, however, cannot be made applicable to MFN provisions that do not give reference to their scope. This is due to the fact that the language in these MFN provisions is so plain, general, and vague that it leaves the scope open for all types of interpretation.²⁴⁴ When the interpretation of MFN provisions cannot be ascertained using the ordinary meaning of the texts, it is pertinent to resort to additional

237. Perez-Aznar, *supra* note 3, at 799; *see, e.g.* Hochtief v. Argentina, ¶¶ 105–109.

238. Namely, the promotion and protection of investors and their investments.

239. LINDERFALK, *supra* note 209, at 203; one such example would be Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses*, *supra* note 7, at 554.

240. *Id.*

241. *Id.*

242. Vladimir Berschader & Moïse Berschader v. The Russian Federation, SCC Case No. 080/2004, Award, ¶ 185 (Apr. 21, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0079_0.pdf.

243. Perez-Aznar, *supra* note 3, at 799.

244. Borrowing provisions from a third-party BIT is one example of this.

tools of treaty interpretation. For this reason, it is necessary to explore Article 31 of the VCLT to find a more acceptable interpretation of MFN provisions.

Article 31(3) of the VCLT provides for an external context for interpretation, which includes subsequent agreement, subsequent practice, and any relevant rules of international law to ascertain the meaning of a treaty provision.²⁴⁵ According to the ILC, subsequent agreement presupposes the deliberate common act or undertaking by the parties.²⁴⁶ “The parties” referred to in this article intends to include all of the original parties to the treaty.²⁴⁷ A separate agreement between a few original members of an earlier treaty does not become a subsequent agreement within the meaning of Article 31(3)(a).²⁴⁸ A subsequent agreement should be an attempt to clarify the meaning of a treaty for the purpose of interpretation.²⁴⁹ In *Maritime Delimitation in the Area between Greenland and Jan Mayen*, the ICJ refused to accept the use of a subsequent agreement because that agreement failed to refer to the treaty.²⁵⁰ Thus, it is important that a subsequent agreement is made to clarify the meaning or interpretation of the provisions of a treaty, and the agreement must be between the original members of the treaty.²⁵¹ Subsequent agreements that clarify the meaning of BIT provisions are difficult to find. In fact, most of the annexes of BITs, which include either the exchange of letters, clarifications, or exceptions, are considered part of the BIT itself.²⁵² In the absence of subsequent agreements, it is difficult to interpret MFN provisions through this approach.

245. VCLT, *supra* note 14; *see generally* Luigi Crema, *Subsequent Agreements and Subsequent Practice within and outside the Vienna Convention*, in *TREATIES AND SUBSEQUENT PRACTICE* (Georg Nolte ed., 2013).

246. ILC-Subsequent Treaties and Practice, *supra* note 200, ¶10.

247. *Id.*; LINDERFALK, *supra* note 209, at 162.

248. ILC-Subsequent Treaties and Practice, *supra* note 200, ¶ 12.

249. *Id.* ¶ 14.

250. *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Den. v. Nor.), Judgment, 1993 I.C.J. Rep. 1993 38, ¶ 28 (June 14).

251. *See* VCLT, *supra* note 14, art. 31(3)(a); *see also* LINDERFALK, *supra* note 209, at 162.

252. SALACUSE, *supra* note 163, at 127.

With regard to subsequent practice,²⁵³ the ILC connotes the conduct of the state in the form of actions, omissions, or relevant silence.²⁵⁴ The ILC provides that this conduct must be “in the application of the treaty.”²⁵⁵ This includes not only official acts at the international or domestic level, but also:

inter alia, official statements regarding its interpretation, such as statements at a diplomatic conference, statements in the course of a legal dispute, or judgments of domestic courts; official communications to which the treaty gives rise; or the enactment of domestic legislation or the conclusion of international agreements for the purpose of implementing a treaty even before any specific act of application takes place at the internal or at the international level.²⁵⁶

In other words, subsequent practice must be made to clarify the interpretation of *the treaty* through the aforementioned modes of conduct. In the BIT regime, there are various examples of states making assertions during the course of a legal dispute with respect to the interpretation of an MFN provision.²⁵⁷ However, these statements made by states as respondents in ISDS cases may amount to “self-serving attempts to avoid liability.”²⁵⁸ In such a scenario, it becomes difficult to reach a conclusion with respect to the scope of the MFN clause. It is difficult, therefore, to interpret MFN provisions in BITs through subsequent practices of states.

Before an analysis with respect to Article 31(3)(c)²⁵⁹ can be made, it is pertinent to shed some light onto the interpretative approaches taken by the tribunals with respect to Articles 31(3)(a) and (b). While interpreting an MFN provision, it is expected that the tribunals will look into the subsequent practice or agreement of states with respect to the MFN clause itself.

253. VCLT, *supra* note 14, art. 31(3)(b); *see generally* Anthea Roberts, *Subsequent Agreements and Practice: The Battle over Interpretive Power*, in *TREATIES AND SUBSEQUENT PRACTICE* (Georg Nolte ed., 2013).

254. ILC-Subsequent Treaties and Practice, *supra* note 200, ¶ 17.

255. *Id.* ¶ 18.

256. *Id.*

257. *See, e.g.* Spain in *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction; Turkmenistan in *Ickale v. Turkmenistan*.

258. Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179, 184 (2010).

259. VCLT, *supra* note 14.

Tribunals in general, however, commit two errors while interpreting MFN provisions in BITs. First, in order to ascertain the scope of MFN provisions, tribunals have *not* looked into the MFN provision in subsequent agreements, but have instead looked into the provision they wish to borrow from a third-party BIT.²⁶⁰ The tribunal in *Maffezini*, in order to interpret the scope of the MFN provision, looked into the subsequent agreements of states with respect to dispute-settlement clauses in other BITs.²⁶¹ The correct approach, however, would be an inquiry into subsequent practices or agreements of states in the context of MFN provisions only, and not with respect to any other treaty provisions. It is problematic to look into the subsequent agreements or practices of states for any other provisions.

Second, inquiries into subsequent agreements and practices must be made in the context of *the basic treaty* only.²⁶² Tribunals, however, usually find the intention of the parties by looking to other BITs signed by the host state.²⁶³ These third-party BITs, which do not have any relation to the basic BIT, cannot be said to be sound interpretative tools for determining the actual scope of MFN provisions in the basic BIT.

When the scope of the MFN provision cannot be ascertained through subsequent agreements and practices, it is desirable to resort to Article 31(3)(c) of the VCLT, which provides for the use of “any relevant rules of international law applicable in relations between the parties” to interpret the MFN provision.²⁶⁴ The “rules of international law” refer to its formal sources, such as treaties, customs, and general principles, while “applicable” refers to binding rules.²⁶⁵ Further, “relevant” means touching upon the same subject²⁶⁶ and relating to the context of the treaty.²⁶⁷ McLachlan describes Article 31(3)(c) as the “master key of

260. *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction, ¶ 57; *Berschader v. Russia*, ¶¶ 179, 181.

261. *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction, ¶ 58.

262. ILC-Subsequent Treaties and Practice, *supra* note 200.

263. *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction, ¶ 57.

264. VCLT, *supra* note 14, art. 31 (3)(c).

265. MARK E. VILLIGIER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON LAW OF TREATIES 433 (2009).

266. GARDINER, *supra* note 209, at 260.

267. ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 243 (2007) (ebook).

a large building” and draws an analogy that like a master key is used when a specific key fails to open the door, Article 31(3)(c) helps in a similar manner with the interpretation of a treaty text when the text is not capable of interpretation using its own terms.²⁶⁸ According to Linderfalk, treaties are usually assumed by the interpreters to have been drafted in a manner so as to not contradict relevant rules of international law.²⁶⁹ In other words, there is an assumption that parties did not intend to act inconsistently with respect to their other obligations under international law when entering into a treaty.²⁷⁰ Even if a treaty intends to deviate from a previous obligation, it has to provide reasons for such deviation expressly in the treaty itself.²⁷¹ In the absence of such express intent, a treaty should be interpreted in a manner that is consistent with the relevant rules of international law. For the purpose of interpretation of MFN provisions, therefore, it is proposed that a few relevant rules must be taken into consideration, as discussed below.

B. Article 34 of VCLT

Pacta tertiis nec nocent nec prosunt; res inter alios acta nec prodest nec nocet provides that an agreement neither creates rights nor obligations for third states.²⁷² This principle is often associated with the principle of state sovereignty and independence.²⁷³ It has received validation and recognition from various international decisions.²⁷⁴ The reflection of this princi-

268. Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention*, 54 INT'L. COMP. L. Q. 279, 281 (2005).

269. LINDERFALK, *supra* note 209, at 178.

270. VILLIGIER, *supra* note 265, at 433.

271. McLachlan, *supra* note 268, at 313.

272. VILLIGIER, *supra* note 265, at 467; *see also Article 18-Treaties and Third States*, 29 AM. J. INT'L L. 918, 918–937 (1935); Eric David, *Article 34 (1969)*, in *THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY* 887 (Olivier Corten et al. eds., 2011).

273. VILLIGIER, *supra* note 265.

274. *Certain German Interests in Polish Upper Silesia Case* (Ger.v. Pol.), Judgment, 1926 P.C.I.J. (ser. A) No. 7, at 28–29 (May 25); *Territorial Jurisdiction of the International Commission of the River Oder Case* (U.K. v. Pol.), Judgment, 1929 P.C.I.J. (ser. A) No. 23, at 20 (Sept. 10); *Free Zones Case of Upper Savoy and the District of Gex Case* (Fr. V. Switz.), Judgment, 1932 P.C.I.J. (ser. A/B) No. 46, at 141 (June 7); *Status Eastern Carelia Case*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5, at 27 (July 23); *see generally* *Island of Palmas Case* (Neth. v. U.S.), 2 R.I.A.A. 831 (Perm. Ct. Arb. 1928); *North*

ple can be seen in Article 34 of the VCLT,²⁷⁵ which provides that “[a] treaty does not create either obligations or rights for a third State without its consent.”²⁷⁶

The “third state” here means a state that is not a party to the treaty.²⁷⁷ There is hardly any debate about whether Article 34 has been accepted and recognized as a norm of CIL.²⁷⁸ In *Anglo-Iranian Oil Company Case*, the ICJ explained the concept, stating that “[a] third party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is *res inter alios acta*.”²⁷⁹

In order to create rights and obligations for a third state, two criteria must be satisfied. First, there must be a provision that clearly delineates the rights and obligations for third states as intended by the parties to the treaty. Second, there must be unambiguous consent of the third state to be bound by the obligations arising out of the treaty.²⁸⁰ Neither of these conditions exist in BITs. For the sake of argument, even if one accepts that an MFN provision creates rights for the third states, it is nearly impossible to find the consent of the third states, as well as the BIT makers, to create rights and obligations for third states through an MFN provision.

Article 16 of the ILC’s Draft Articles on MFN Clauses (1978) provides that rights acquired by the beneficiary state are not affected by the treatment of a third state by the granting state.²⁸¹ In other words, the application of MFN provisions is limited to the relationship between the beneficiary state and granting state, and it is not affected by the treatment of a third state by the granting state.²⁸² In this sense, Article 16 supports the general rule of Articles 34 and 35 of the VCLT.²⁸³ Similarly,

Sea Continental Shelf Cases (Den. v. Neth.), Judgment, 1969 I.C.J. Rep. 25 (Feb. 20).

275. See generally VCLT, *supra* note 14.

276. *Id.* art. 34.

277. *Id.* art. 2(1)(h).

278. David, *supra* note 273, at 888. While there are certain qualifications (Articles 35–37) provided in the VCLT with respect to Article 34, those provisions are not relevant in the context of the present study.

279. *Anglo-Iranian Oil Co. Case*, 1952 I.C.J. at 109 (emphasis added).

280. AUST, *supra* note 268, at 257.

281. See generally ILC-MFN-1978, *supra* note 85.

282. *Id.* at 42.

283. *Id.*

Article 17 of the ILC's Draft Articles on MFN Clauses provides that it is irrelevant that the more favorable treatment of the third state by the granting state is extended through a bilateral or multilateral agreement.²⁸⁴ It is evident that the aforementioned articles, which follow Article 34 of the VCLT, clarify the scope of MFN provisions that rights under the third-party BIT is not extended to an investor under the basic BIT. Therefore, the practice of borrowing rights and privileges from third-party BITs with an MFN provision is not only problematic, but also seems contradictory to the accepted norms of general international law.

C. MFN Provisions as Primary Rules Under State Responsibility

A breach of a BIT provision occurs when a state, acting in its sovereign capacity, fails to protect the interest of the investor and their investments.²⁸⁵ Therefore, a combination of two factors gives rise to state responsibility: (1) when states act in their sovereign capacity and (2) when states violate the obligations in a treaty (BIT). There are three basic characteristics of state responsibility: (1) the existence of an international legal obligation between two countries, (2) the violation of such an obligation by either action or omission, and (3) the consequences of such a violation.²⁸⁶ The first characteristic, which imposes particular obligations upon states, is known as primary rules.²⁸⁷ Violation of such rules trigger state responsibility.²⁸⁸

284. *Id.* at 44.

285. UNCTAD, BILATERAL INVESTMENT TREATIES 1995–2006: TRENDS IN INVESTMENT RULEMAKING 29 (2007), https://unctad.org/en/Docs/iteia20065_en.pdf.

286. E. Jimenez de Arechaga, *International Responsibility*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 533 (Sorensen ed., 1968); MALCOLM N. SHAW, *INTERNATIONAL LAW* 781 (6th ed. 2008).

287. Robert Ago, Special Rapporteur, *Second Report on State Responsibility: The Origin of State Responsibility*, at 179, U.N. Doc. A/CN.4/233 (Apr. 20, 1970); for more literature, see J. Combacau & D. Alland, *Primary and Secondary Rules in the Law of State Responsibility: Categorizing International Obligations*, 26 NETH. Y.B. INT'L L. 81, 81–109 (1985); JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLE ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARY* 81 (2002).

288. JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 540 (8th ed. 2008); Int'l Law Comm'n, *Draft Articles on Responsibility of*

An MFN provision in a BIT imposes an obligation upon the host state to not discriminate against foreign investors as relevant comparators in its territory.²⁸⁹ MFN provisions, therefore, serve as primary rules that impose obligations between the two state parties of the BIT. This means that a violation of an MFN provision is an internationally wrongful act and, therefore, invokes state responsibility.

There are two conditions that must be satisfied before an act or omission of a state can be considered as an internationally wrongful act: first, whether the act or omission is attributable to the state (a subjective element), and, second, whether the act or omission has resulted in a breach of an international obligation (an objective element).²⁹⁰ Further, an act cannot be characterized as an internationally wrongful act unless it constitutes a violation of an international obligation.²⁹¹ A mere attribution of conduct to the state, therefore, must be distinguished from the characterization of conduct as a wrongful act.²⁹² As such, even when an act or measure that has affected the interests of an investor is attributed to the state, an independent inquiry into the legality of such measures has to be made to declare such measure an internationally wrongful act. Whether an act attributed to a state constitutes an internationally wrongful act depends primarily upon the precise terms of the primary rules.²⁹³ In other words, when a state, through actions already attributed to it, fails to fulfill the requirements imposed by the primary or secondary rules,²⁹⁴ it becomes an internationally wrongful act.²⁹⁵

To establish that a state has committed a wrongful act, an inquiry into the nature of an MFN provision is necessary. Since MFN provisions are the instruments of non-discrimination, a

States for Internationally Wrongful Acts, art. 1, U.N. Doc. A/56/10 (Oct. 24, 2001) [hereinafter Draft Articles].

289. Perez-Aznar, *supra* note 3, at 778.

290. Draft Articles, *supra* note 289, art. 2.

291. *Id.* art. 3.

292. *Id.* art. 4.

293. *Id.* art. 12.

294. Secondary rules under state responsibility deal with conditions for breach of primary rules and the legal consequences of such a breach. See Ulf Linderfalk, *State Responsibility and the Primary-Secondary Rules Terminology – The Role of Language for an Understanding of the International Legal System*, 78 NORDIC J. OF INT'L L. 53, 55 (2009).

295. *Id.*

determination of whether discrimination has taken place cannot be made without drawing comparisons between relevant comparators.²⁹⁶ As discussed above, however, no such inquiries are made when tribunals interpret MFN provisions to borrow clauses from third-party BITs. In the absence of such inquiries, it is difficult to establish how much injury is caused to the aggrieved investor to determine the quantum of reparation. In such a scenario, it is difficult to establish a causal link between a wrongful act and injury caused to the investor.²⁹⁷ Thus, a state cannot be held responsible for breaching an MFN provision unless an inquiry of discrimination between relevant comparators is made. It is not the function of MFN provisions to import clauses from other BITs; being a primary rule, it requires a comparison between relevant comparators.²⁹⁸

D. Principle of Acquiescence in International Law

It is likely that some BITs signed by the host state have more favorable provisions than other BITs. Negotiations regarding treaty provisions vary from country to country, and this has a huge influence on the final outcome of any BIT.²⁹⁹ This means that there is a possibility of more favorable provisions being implemented in third-party BITs before a dispute arises. Does the existence of more favorable provisions in third-party BITs, in and of themselves, constitute a violation of the MFN provision in the basic BIT? If so, why does the investor have to wait for any dispute to arise when there is already a violation of their rights because of more favorable provisions in third-party BITs? Is the right of an investor not violated the moment it enters into the territory of a host country because the basic treaty may have less favorable provisions as compared to a third-party BIT?

A counter argument to the questions posed above is that a violation only takes place if an investor claims that there has been a breach of an MFN provision. Technically, this means that an investor continues to maintain its relationship with the host state, despite the knowledge of the more favorable provi-

296. Perez-Aznar, *supra* note 195, at 56–57.

297. *Id.* at 57.

298. *Id.*

299. SALACUSE, *supra* note 253, at 127; M. I. Khalil, *Treatment of Foreign Investment in Bilateral Investment Treaties*, 7 ICSID REV.-FOREIGN INVEST. L. J. 339, 350–51 (1992).

sions in third-party BITs, until the host state violates the rights of the investor. The principle of acquiescence, which is recognized in most jurisdictions³⁰⁰ and in international law, states that inaction on behalf of a state may lead to a loss of claims by the state when the state should have shown some form of activity.³⁰¹ In other words, when any person/body/state participates in a process without objecting to any part of the process, that person/body/state loses the right to challenge the final outcome of that process.³⁰²

It is generally understood that a state, by not asserting its claim, has implicitly accepted the extinction of its claim.³⁰³ Tams argues that for the application of the doctrine of acquiescence to apply, three relevant elements must be satisfied.³⁰⁴ First, the state must have failed to assert its claim.³⁰⁵ Second, failure to assert a claim must be extended for a certain period of time.³⁰⁶ Third, a state must have failed to assert claims *in circumstances that would have required action*.³⁰⁷ These elements seem to be met when applied to the relationship between an investor and a host state. An investor should not be allowed to use MFN provisions to borrow a favorable provision from another BIT if they never objected to it, thereby failing to assert their claim. In fact, the investor maintained its amicable relationship for a long period of time with the host state until the dispute arose; therefore, borrowing an MFN provision from another BIT should be barred by the doctrine of acquiescence.

300. Christian J. Tams, *Waiver, Acquiescence and Extinctive Prescription*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 1036 (J. Crawford et al. eds., 2010).

301. *Id.*

302. Draft Articles, *supra* note 289, art. 45(b); *see generally*, David J. Bederman, *Acquiescence, Objection and the Death of Customary International Law*, 21 DUKE J. COMP. & INT'L L. 31, 32 (2010); I. C. MacGibbon, *Customary International Law and Acquiescence*, 33 BRIT. Y.B. INT'L L. 115 (1957); I. C. MacGibbon, *The Scope of Acquiescence in International Law*, 31 BRIT. Y.B. INT'L L. 143 (1954); P. Cuasay, *Borders on the Fantastic: Mimesis, Violence, and Landscape at the Temple of Preah Vihear*, 32 MOD. ASIAN STUDIES 849 (1998); Phil C. W. Chan, *Acquiescence/Estoppel in International Boundaries: Temple of Preah Vihear Revisited*, 3 CHINESE J. INT'L L. 421, 422 (2004).

303. Tams, *supra* note 301, at 1043.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

E. Non-prohibition does not Necessarily mean Permission

For the pupose of avoiding redundancy, a detailed analysis of the rules of international law with respect to the interpretation of MFN clauses is not reproduced here.³⁰⁸ None of the aforementioned rules provide any justification for borrowing clauses from third-party BITs that include MFN provisions. For this reason, it is submitted that a proper interpretation of an MFN provision does not allow it to import provisions from a third-party BIT.

Even if international investment law is considered a self-contained regime having *lex specialis* rules that prevail over the rules of general international law, for matters not governed by *lex specialis*, rules of general law are applicable.³⁰⁹ Thus, there are gaps within this regime that need support from rules of general international law to be resolved. One such area would be the practice of borrowing provisions from third-party BITs; therefore, it is pertinent to look to the rules and principles of general international law to determine if this practice is permitted.

Article 31(4) of the VCLT explores the subjective element of party intention for treaty interpretation, providing that “[a] special meaning shall be given to a term if it is established that the parties so intended.”³¹⁰ In other words, whether the parties to the treaty have given a special meaning to a term that differs from the common meaning has to be established by special evidence in the context of the treaty.³¹¹ The burden of proving that the parties actually intended to give special meaning to a treaty term, however, lies with the party asserting the special meaning.³¹² For the interpretation of the scope of MFN provisions, the burden is on the parties, as well as the interpreters, to provide special evidence to prove their claim that an MFN provision can be borrowed from a third-party BIT. Unfortunately, in none of the cases discussed above or otherwise have

308. *See supra* Part II.A.

309. Int'l Law Comm'n, Rep. on Fragmentation of International Law: Difficulties Arising From The Diversification And Expansion Of International Law, at 179, U.N. Doc. A/CN.4/L.682 (2006).

310. VCLT, *supra* note 14, art. 31(4).

311. GARDINER, *supra* note 209, at 293.

312. *Id.* at 295; AUST, *supra* note 268, at 244; OLIVER DORR & KIRSTEN SCHMALENBACH, VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 569 (Springer ed., 2012).

the parties provided evidence that the treaty makers intended to allow for MFN provisions to be borrowed from third-party BITs.³¹³ In fact, there are ample rules in international law, as discussed in the earlier sections,³¹⁴ that prohibit and contradict this practice. The scope of an MFN provision, therefore, has to be confined to internal measures.

IV. THE PROBLEMS BORROWING MFN PROVISIONS CREATE

The practice of borrowing provisions from third-party BITs creates several normative and practical problems. This part deals with some of these problems, such as jurisdictional issues, treaty shopping, and the problem of free-ridership.

A. The Jurisdiction of Investment Tribunals

There are a number of investor-state dispute settlement (ISDS) cases dealing with jurisdictional issues in investment arbitration.³¹⁵ However, of the cases that have extended the jurisdiction of the tribunal, none is as problematic as *Garanti Koza LLP v. Turkmenistan*.³¹⁶ The tribunal in this case imported the consent of Turkmenistan to an International Center for Settlement of Investment Disputes (ICSID) arbitration from a third-party BIT (Switzerland-Turkmenistan BIT)³¹⁷ into the

313. See *supra* Part II.

314. See *supra* Part III. .

315. *Teinver v. Argentina*, Decision on Jurisdiction; *Berschader v. Russia*; *Wintershall v. Argentina*; *RosInvestCo UK Ltd. V. The Russian Federation*, SCC Case No. V 079/2005, Award on Jurisdiction (Oct. 1, 2007), <https://www.italaw.com/sites/default/files/case-documents/ita0719.pdf>; *Garanti Koza v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent (July 3, 2013), <https://www.italaw.com/sites/default/files/case-documents/italaw1540.pdf>; *Renta 4 S.V.S.A et al. v. The Russian Federation*, SCC Case No. 24/2007, Award (July 20, 2012), <https://www.italaw.com/sites/default/files/case-documents/ita1075.pdf>; *Daimler v. Argentina*; *Plama Consortium Ltd. V. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (Feb. 8, 2005), <https://www.italaw.com/sites/default/files/case-documents/ita0669.pdf>; *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award (Sept. 13, 2006), <https://www.italaw.com/sites/default/files/case-documents/ita0858.pdf>.

316. *Garanti Koza v. Turkmenistan*, Decision on the Objection to Jurisdiction for Lack of Consent.

317. Agreement Between the Swiss Federal Council and the Government of Turkmenistan on the Promotion and Reciprocal Protection of Investments, Switz.-Turkm., May 15, 2008.

basic BIT (UK-Turkmenistan BIT),³¹⁸ despite the fact that Turkmenistan did not give its consent to settle the dispute through ICSID arbitration.³¹⁹ The tribunal, after establishing that Turkmenistan consented to international arbitration by virtue of Article 8(1) of the UK-Turkmenistan BIT,³²⁰ moved to the analysis of Article 8(2) of the UK-Turkmenistan BIT.³²¹ Article 8(2) of the UK-Turkmenistan BIT provides that the parties can submit their disputes to three forums in cases of international arbitration: the ICSID, the International Chamber of Commerce (ICC), and the United National Commission on International Trade Law (UNCITRAL).³²² Disputing parties must give their consent to one of the forums to resolve their claims.³²³

Despite the objection from Turkmenistan that it had not consented to ICSID arbitration, and that it only consented to submit disputes to UNCITRAL, the tribunal used the MFN provision in the UK-Turkmenistan BIT to import the consent of Turkmenistan to ICSID arbitration from a third-party BIT. In the dissenting opinion, Laurence Boisson de Chazournes, who was one of the arbitrators in the case, criticized the majority for ignoring the requirement of consent in Article 8(2) of the UK-Turkmenistan BIT, as well as failing to distinguish between consent to initiate arbitration and consent to arbitration.³²⁴

The majority in *Garanti Koza LLP* ignored one of the cardinal principles of international arbitration; that is, party autonomy. It is the parties who mutually decide which arbitration rules govern the arbitral proceedings.³²⁵ The absence of such consent

318. Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Turkmenistan for the Promotion and Protection of Investments, U.K.-Turkm, Feb. 9, 1995, [hereinafter, UK-Turkmenistan BIT].

319. *Garanti Koza v. Turkmenistan*, Decision on the Objection to Jurisdiction for Lack of Consent, ¶ 9.

320. *Id.* ¶ 29.

321. *Id.* ¶ 34.

322. UK-Turkmenistan BIT, *supra* note 319, art. 8.

323. *Id.*

324. Eric De Brabandere, *Importing Consent to ICSID Arbitration? A Critical Appraisal of Garanti Koza v. Turkmenistan*, INV. TREATY NEWS (May 14, 2014), <https://www.iisd.org/itn/2014/05/14/importing-consent-to-icsid-arbitration-a-critical-appraisal-of-garanti-koza-v-turkmenistan/>.

325. SIMON GREENBERG ET AL, INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA PACIFIC PERSPECTIVE 101 (2012).

not only violates the general law relating to arbitration, but may also render the award unenforceable.³²⁶ Therefore, party autonomy with respect to the governing law of the arbitration has to be respected. Unfortunately, the majority in *Garanti Koza LLP* did not give any relevance to this fundamental, basic principle of arbitration. Dispute settlement provisions in any BIT are a form of the arbitration agreement. Until and unless both the parties agree to be governed by the same arbitral rules, it is not wise or sound to allow any arbitration. As much as an investment tribunal has a right to determine its own jurisdiction (based on the principle of competence-competence),³²⁷ parties to the dispute also have the right to decide the rules that govern their dispute (principle of party autonomy).³²⁸ Tribunals have been criticized for converting a fiction into reality when they assume that a clause in a third-party BIT is automatically incorporated into the basic BIT through the MFN provision and thereby exercise jurisdiction to resolve the dispute.³²⁹ This behavior sparks criticism because these tribunals have acted contrary to the general principles of international law.³³⁰

Further, such interpretation of an MFN provision may lead to forum shopping,³³¹ which is already a problematic factor³³² in

326. GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* 560 (Kluwer Law International 2d ed., 2001).

327. The principle of competence-competence refers to the power of the arbitral tribunals to decide matters relating to its own jurisdiction.

328. The principle of party autonomy refers to freedom of the parties to arbitration to make a varied range of decisions with respect to arbitration. The appointment of an arbitrator and choosing of law governing arbitral proceedings are a few examples.

329. Douglas, *supra* note 7, at 108.

330. *Id.*

331. Katia Yannaca, Small, *Improving the System of Investor- State Dispute Settlement: An Overview* ¶¶ 79–80 (OECD Working Paper on International Investment, No 2006/ 1, 2006), available at http://www.oecd.org/china/WP-2006_1.pdf (explaining that forum shopping is “the process throughout which one of the parties to a dispute attempts to bring a claim before the forum most advantageous to him or her.”).

332. Richard Leung, *Arbitration and Forum Shopping in the Seat*, 2016/SOM1/EC/WKSP1/006 (Feb. 26, 2016), http://mddb.apec.org/Documents/2016/EC/WKSP1/16_ec_wksp1_006.pdf. Leung explains forum shopping as, “obtain[ing] a home advantage, or at least the perception of such an advantage, insofar as a particular seat (and its national law on arbitration) will

international arbitration.³³³ In commercial arbitration cases where forum shopping takes place due to the jurisdictional overlap of different tribunals,³³⁴ it is possible that in investment arbitration cases, a tribunal that ordinarily would not have jurisdiction over the dispute may import it using an MFN clause in the basic BIT. For example, an investor may use the MFN clause in the basic BIT to borrow a completely different dispute settlement forum to resolve the dispute contained in the third-party BIT. In this situation, not only is the principle of party autonomy greatly undermined, but it also encourages the worst form of forum shopping cases to ISDS claims.

B. Treaty Shopping

Treaty shopping, as explained by Jorun Baumgartner, is a practice by investors to access more favorable procedural or substantive provisions aimed at invoking, creating, or changing nationality through structuring or restructuring.³³⁵ There are various policy concerns related to treaty shopping, including, *inter alia*, reciprocity,³³⁶ legitimacy concerns,³³⁷ sustainable development,³³⁸ the threat of regulatory chill,³³⁹ and lack of a level playing field.³⁴⁰ These policy concerns related to treaty shop-

give rise to the selection or appointment of *arbitrators* with a corresponding nationality or background.” *Id.* (emphasis added).

333. See generally Joost Pauwelyn & Luiz Eduardo Salles, *Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, 42 CORNELL INT'L L. J. 77 (2009).

334. *Id.* at 79.

335. JORUN BAUMGARTNER, *TREATY SHOPPING IN INTERNATIONAL INVESTMENT LAW* 33 (2016).

336. *Id.* at 39.

337. *Id.* at 49.

338. *Id.* at 59; for more literature on sustainable development, see GRO HARLEM BRUNDTLAND, *OUR COMMON FUTURE: THE REPORT OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT* (1987), <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>; Markus Gehring & Andrew Newcombe, *Introduction to Sustainable Development in World Investment Law*, in *SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW* 4–5 (Marie-Claire Cordonier Segger et al. eds., 2011).

339. BAUMGARTNER, *supra* note 336, at 62.

340. *Id.* at 63; see generally, Christoph Schreuer, *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*, in *THE LAW & PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS* 1–17 (2005); Wenhua Shan, *From “North-South Divide” to “Private-Public Debate”: Revival of the*

ping disrupt the balance of BITs and the relationship between states. Concerns about disruptive treaty shopping have also been expressed by the tribunals in *Maffezini* and *Salini*.³⁴¹

It is contended that the broad application of MFN provisions to import clauses from third-party BITs leads to treaty shopping. This assessment can be demonstrated by establishing the relationship between actual measures taken by the host state and the provision that is requested to be borrowed from the third-party BIT. The table below explains this relationship illustrated by some cases.

Calvo Doctrine and the Changing Landscape of International Investment Law, 27 NORTHWEST. J. INT'L L. & BUS. 631 (2007).

341. *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction, ¶ 63; *Salini Costruttori S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, ¶¶ 114–15 (Nov. 15, 2004), <https://www.italaw.com/sites/default/files/case-documents/ita0735.pdf>.

Table 1: Relationship between Actual Measures and Provisions Sought for Borrowing

Case	Actual Measure	Basic BIT	Provision requested to be borrowed	Nature of imported provision	Third-party BIT
Garanti Koza v. Turkmenistan ³⁴²	Contractual breach	UK-Turkmenistan BIT	Consent to ICSID arbitration (Dispute Settlement Clause)	Extending jurisdiction	Switzerland-Turkmenistan BIT
Maffezini v. Spain ³⁴³	Flawed advice from public-private entity (SODIGA) to investor's company (EAMSA)	Argentina-Spain BIT	Shorter waiting period for arbitration	Relaxing admissibility	Chile-Spain BIT
MTD v. Chile ³⁴⁴	Failure of the government to rezone agricultural land into residential and commercial land	Malaysia-Chile BIT	FET	Absence of FET in Basic BIT	Chile-Denmark BIT and Chile-Croatia BIT
Ansung Housing v. China ³⁴⁵	Failure of the government to fulfill its assurances to the investor	China-Korea BIT	No temporal limitation for an investor to initiate an arbitration	Relaxation of time-barred claims	Reference to "most Chinese BITs"

Source: Author

As the table shows, there is in fact no relationship between actual measures and the provisions requested to be borrowed

342. Garanti Koza v. Turkmenistan, Decision on the Objection to Jurisdiction for Lack of Consent.

343. Maffezini v. Spain, Decision of the Tribunal on Objections to Jurisdiction.

344. MTD v. Chile.

345. Ansung Housing v. China.

by the investor. As succinctly put by Perez-Aznar, tribunals do not inquire whether there is a prima facie breach of an MFN provision, rather they inquire whether imported provisions have been violated.³⁴⁶ This means the investor is free to choose any provision in any of the third-party BITs signed by the host state that is most advantageous to it, independent of the actual measures taken by the host state. Without a doubt, this is treaty-shopping.

Further, in the absence of a relationship between the actual measures and the imported provisions, what is the deciding factor that allows for a third-party BIT provision to protect the interest of an aggrieved investor in a particular dispute? Are there any guidelines for this analysis? Or does the assessment depend entirely on the will of the investor? For example, if an investor is using an MFN provision in an ISDS case against India, what factors are relevant to decide which of the BITs signed by India the investor will use in its dispute?

To determine whether discrimination has occurred, the first step is to identify the relevant comparator, and the second step is to identify the favorable measure provided to the relevant comparator.³⁴⁷ In the unique practice of borrowing, however, the first step is to decide which measure an aggrieved investor wants to borrow from any of the BITs signed by the host state. Then, the second step is to assert that there is a chance that an imaginary relevant comparator (even if they may not exist in reality) takes advantage of the favorable provision that is being borrowed. If both elements are satisfied, there is discrimination by the host state. In sum, it simply depends on the investor to choose the BIT provision that is most advantageous to them.

C. Free-riders in the BIT Regime?

When two countries agree to a bilateral treaty, a third state that benefits from the treaty without being involved in the negotiation is a free-rider.³⁴⁸ In other words, an investor (or their home country) who is not involved in the process of third-party BIT negotiations but reaps the benefits or rights from the

346. Perez-Aznar, *supra* note 3, at 781.

347. *UPS v. Canada*.

348. Wisarut Suwanprasert, *The Role of the Most Favored Nation Principle of the GATT/WTO in the New Trade Model*, 1, 22 (2016) (unpublished, Vanderbilt U.), available at <https://ssrn.com/abstract=2713416>.

third-party BIT, becomes a free-rider. Even in a multilateral framework like the GATT, the problem of free-riders subsisted until the Uruguay Round.³⁴⁹ The Uruguay Round took special steps to deal with this problem, like the implementation of a single package deal, and the requirement that all parties must accept all parts of the Uruguay Round.³⁵⁰

The problem of free-riders entails two incentive problems;³⁵¹ first, it is possible that countries simply stop entering into treaties and instead enjoy benefits as a free-rider,³⁵² and, second, countries that enter into negotiations may reach an inefficient agreement because they may not internalize benefits of their liberalization.³⁵³ The consequences of allowing free-riders to participate in the investment regime through an arbitral decision³⁵⁴ are evident by the fact that India has removed the MFN provision from its new model BIT.³⁵⁵ Multilateral frameworks like the GATT and the WTO have undertaken steps to tackle the problem of free-riders. In the investment law regime, however, free-riders are promoted for creating a (pseudo) multilateral framework using MFN provisions. Arguably, the use of MFN provisions to borrow clauses from third-party BITs promotes free-ridership. This is certainly not in the interest of the BIT regime, as it disincentivizes states to negotiate efficient BITs.

V. EXAMPLES OF RECENT STATE BEHAVIOR: *LEX LEGE FERENDA*?

It is important to understand how states have reacted to the use of MFN provisions for borrowing clauses from third-party BITs. It is obvious that a state's reaction to this practice de-

349. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 160 (1997).

350. *Id.*, except annex IV-plurilateral agreements.

351. Rodney D. Ludema & Anna Maria Mayda, *Do countries free ride on MFN?*, 77 J. INT'L ECON. 137, 137 (2009).

352. *Id.*; see Jacob Viner, *The Most Favored Nation Clause in American Commercial Treaties*, 32 J. POL. ECON. 101, 105 (1924); see generally Harry G. Johnson, *An Economic Theory of Protectionism, Tariff Bargaining and the Formation of Customs Unions*, 73 J. POL. ECON. 256, 256-83 (1965); Robert Pahre, *Most-Favoured Nations Clauses and Clustered Negotiations*, 55 INT'L. ORG. 859, 859-90 (2001).

353. See Ludema & Mayda, *supra* note 351.

354. *White Industries v. India*.

355. New Indian Model BIT, *supra* note 149.

pend on the role it played. The behavior of the state as the respondent in an ISDS case will be different than when the state has a vested interest in a broad interpretation of an MFN provision. In this context, a restrictive interpretation generally favors capital-importing countries, and an expansive interpretation generally favors capital-exporting countries.³⁵⁶ Thus, statements supporting the conventional use of MFN provisions made by capital-exporting countries—like Austria,³⁵⁷ Australia,³⁵⁸ Italy,³⁵⁹ as well as a few developing countries in the General Assembly—should not be taken as an endorsement of borrowing MFN provisions by all countries.³⁶⁰

Scholarly literature shows that capital-exporting countries do not hesitate to adopt the restrictive approach for MFN interpretation when they become the respondents in ISDS cases.³⁶¹ It is difficult, therefore, to ascertain the intended use of MFN provisions by capital-exporting countries because they change their stance on MFN provisions in BITs based on convenience. Developing countries have suffered due to such expansive interpretations of MFN provisions; for example, India (*White Industries*³⁶²), Pakistan (*Bayindir*³⁶³), Argentina (*Siemens*,³⁶⁴ *Gas Natural*,³⁶⁵ *Camuzzi*,³⁶⁶ *Suez*,³⁶⁷ and *National Grid*³⁶⁸), Turkmenistan (*Garanti Koza*³⁶⁹), Chile (*MTD*³⁷⁰), and more. In this

356. Vesel, *supra* note 7, at 132.

357. U.N. GAOR, 67th Sess., 20th mtg. ¶ 117, UN Doc. A/C.6/67/SR.20 (Nov. 2, 2012).

358. U.N. GAOR, 68th Sess., 24th mtg. ¶ 54, UN Doc. A/C.6/68/SR.24 (Nov. 4, 2013).

359. U.N. GAOR, 70th Sess., 17th mtg. ¶ 56, UN Doc. A/C.6/70/SR.17, (Nov. 2, 2015).

360. *See, contra*, Paparinskis, *supra* note 5.

361. Vesel, *supra* note 7, at 132.

362. *White Industries v. India*.

363. *Bayindir v. Pakistan*.

364. *Siemens v. Argentina*.

365. *Gas Natural v. Argentina*.

366. *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objection to Jurisdiction (May 11, 2005), <https://www.italaw.com/sites/default/files/case-documents/ita0108.pdf>.

367. *Suez v. Argentina*.

368. *National Grid v. Argentina*.

369. *Garanti Koza v. Turkmenistan*, Decision on the Objection to Jurisdiction for Lack of Consent.

370. *MTD v. Chile*.

respect, Venezuela,³⁷¹ Cuba,³⁷² and India³⁷³ have already expressed their concerns about borrowing MFN provisions.³⁷⁴ It is also surprising that despite contesting the borrowing of MFN provisions from third-party BITs in ISDS cases,³⁷⁵ many states have not challenged this practice in any other international forum. At the same time, there are also examples of states that have reacted very strongly to this practice.³⁷⁶ The following section undertakes an assessment of a few ways that states have reacted in recent years.

A. The Indian Model BIT

The year 2015 brought an important change to India's BIT approach, as it came up with its new, very detailed model BIT.³⁷⁷ Certainly, since it was drafted in the aftermath of *White Industries*,³⁷⁸ it had to be unique in form and substance.³⁷⁹ The MFN provision was not included in the new Indian model BIT. As such, it drew the attention of scholars from all over the world.³⁸⁰ With regard to the MFN provision, India had expressed its concern at the World Investment Forum of 2014

371. U.N. GAOR, 70th Sess., 19th mtg. ¶ 49, UN Doc. A/C.6/70/SR.19 (Nov. 4, 2015).

372. U.N. GAOR, 68th Sess., 25th mtg. ¶ 74, UN Doc. A/C.6/68/SR.25 (Nov. 5, 2013).

373. Sixth Committee, Summary Record of the 18th Meeting, UN Doc. A/C.6/70/SR.18, ¶ 27 (Nov. 3, 2015); U.N. GAOR, 70th Sess., 18th mtg. ¶ 27, UN Doc. A/C.6/70/SR.18 (Nov. 3, 2015).

374. Paparinskis, *supra* note 5, at 50–1.

375. For example, Spain in *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction.

376. For example, India through its New Indian Model BIT, *supra* note 149.

377. *Id.*

378. *White Industries v. India*.

379. Some examples of its unique features include the absence of provisions related to MFN and indirect expropriation.

380. Prabhash Ranjan & Pushkar Anand, *The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction*, 38 NW. J. INT'L L. & BUS. 1, 1–54 (2017); Grant Hanessian & Kabir Duggal, *The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See*, 32 ICSID REV. FOREIGN INV. L. J. 216, 216–26 (2017); Aniruddha Rajput, *India's Shifting Treaty Practice: A Comparative Analysis of the 2003 and 2015 Model BITs*, 7 JINDAL GLOB. L. REV. 201, 201–26 (2016); Amokura Kawharu & Luke R Nottage, *Models for Investment Treaties in the Asian Region: An Underview*, 34 ARIZ. J. INT'L & COMP. L. 461 (2017); Ajay K. Sharma, *A Good Offence Is Not Always the Best Defence: Critiquing the Standards of Protection under the 2015 Indian Model BIT*, 36 BUS. L. REV. 203 (2015).

that MFN provisions have been interpreted in a manner to include rights beyond what is granted by the treaty.³⁸¹ India's abovementioned approach to MFN provisions can be attributed to the interpretation of the MFN clause in *White Industries*.³⁸²

Scholars have criticized the approach of removing the MFN provision in the new model BIT by stating that this practice may lead to discriminatory treatment and that it tilts the balance of BITs in favor of the host state.³⁸³ It is correct that the MFN clause protects investors against discriminatory treatment by the host states;³⁸⁴ however, scholars who lamented that the Indian government removed the MFN provision from the new model BIT³⁸⁵ have failed to inquire as to whether the state's behavior has any legitimacy, or what the underlying reasons were behind such strong reactions. States, as the primary lawmakers in international law, are expected to react strongly when treaty provisions are interpreted in a manner that was not originally intended by the states.³⁸⁶

B. The Draft Netherlands Model BIT and Australia-Indonesia CEPA

The analysis below will show that states have started to draft their new investment agreements with caution. In particular, the language of the MFN clause has been drafted to ensure that its application is restricted to internal measures only. These carefully drafted MFN provisions are examples of the inclination of states towards a restricted interpretation of MFN provisions. For example, Article 8 (2) of Netherlands Draft Model BIT provides that

381. Ranjan & Anand, *supra* note 380, at 17.

382. *Id.*

383. *Id.* at 24–25.

384. Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses*, *supra* note 7, at 521.

385. Sharma, *supra* note 381; Ranjan & Anand, *supra* note 381; Hanessian & Duggal, *supra* note 381.

386. There is a tendency among investment tribunals to ignore the rules of general international law while interpreting provisions in BITs. For more about this, see SURYA SUBEDI, *INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE* 2–3 (2016); Nicolette Butler & Surya Subedi, *The Future of International Investment Regulation: Towards a World Investment Organisation?*, 65 NETH. INT'L. L. REV. 43, 47 (2017).

Each Contracting Party shall accord to an investor of the other Contracting Party and/or to an investment of an investor of the other Contracting Party, treatment no less favorable than the treatment it accords *in like situations*, to investors of a third country and to their investments with respect to the conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in *its territory*.³⁸⁷

Similarly, Article 14.5 of Australia-Indonesia Comprehensive Economic Partnership Agreement (CEPA) provides:

1. Each Party shall accord to investors of the other Party treatment no less favourable than it accords, *in like circumstances*, to investors and their investments of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments *in its territory*.
2. Each Party shall accord to covered investments treatment no less favourable than it accords, *in like circumstances*, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.
3. For greater certainty, the treatment referred to in this Article shall not encompass international dispute resolution procedures or mechanisms, such as those included in Section B (Investor-State Dispute Settlement).³⁸⁸

The relevance of these provisions lies in two factors: first, the use of “in like situations” and “in its territory” are phrases that point toward the use of MFN provisions for internal measures only, and second, Article 14.5(3) of the Australia-Indonesia CEPA clearly provides that MFN clauses shall not be used to borrow dispute settlement provisions.³⁸⁹ Thus, this recent state behavior emphasizes the fact that an MFN provision should not be interpreted the way that it is currently being interpreted

387. Netherlands Draft Model BIT, *supra* note 149 (emphasis added).

388. Australia-Indonesia Comprehensive Economic Partnership Agreement, Aust.-Indon., <https://dfat.gov.au/trade/agreements/not-yet-in-force/iacepa/iacepa-text/Pages/iacepa-chapter-14-investment.aspx> (emphasis added).

389. *Id.* art. 14.5(3).

by tribunals and scholars; for example, to borrow provisions from third-party BITs.

VI. IS MFN INTERPRETATION PATH DEPENDENT?

This article argues that MFN interpretations that allow for the importation of favorable provisions are path dependent. Joost Pauwelyn³⁹⁰ and Wolfgang Alschner,³⁹¹ in their separate works on “path dependency,” have greatly influenced the development of this argument. The concept of path dependency posits that past decisions limit subsequent choices and shape the development of an institution in the future.³⁹²

Pauwelyn gives an excellent example, which he calls a “winding road,”³⁹³ to explain path dependency:

Centuries ago, a fur trader cut a path through dense woods. To avoid a wolves’ den, he took a winding, indirect route. Later, travellers dragged wagons along the same winding path the fur trader chose, deepening the grooves and clearing away some trees. Industry came and settled in the road’s bends, even though the wolves’ den was long gone. Housing developments were constructed that fit the road and industry. The path got widened and paved to allow for today’s trucks. The winding road we now have, dependent on the path taken centuries ago by the fur trader, is not the one that the authorities would build if they were choosing their road today. However, society, having invested in the path itself and in the resources alongside the path, is better off keeping the winding road than razing the factories and houses along the bends and paying to build a new, straight path. If the road winds too much, new technologies will develop that will allow vehicles to take the bend without giving up too much speed. If this increases the noise too much, sound walls may be built along the road. Drivers may have to be better trained,

390. Joost Pauwelyn, *At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed*, 29 ICSID REV. 372, 411 (2014).

391. Wolfgang Alschner, *Locked-In Language: Historical Sociology and The Path Dependency of Investment Treaty Design*, in RESEARCH HANDBOOK ON THE SOCIOLOGY OF INTERNATIONAL LAW 352 (Moshe Hirsch et al. eds., 2018).

392. James Mahoney, *Path dependence in historical sociology*, 29 THEORY SOC. 507, 507–48 (2000).

393. Pauwelyn, *supra* note 390, at 411.

and speed limits may be stricter than if the road were a simple, straight one. The result will not be ideal, but the transportation system will adapt.³⁹⁴

This passage asserts that, despite the possibility of more efficient pathways, the road chosen by the fur trader was later followed by other travelers, even when the reasons for which the fur trader chose that path did not exist. It is because society has invested so much in the road that it is difficult to move away from such investment.

Mahoney gives the example of the QWERTY computer keyboard design, stating that it has become so entrenched through self-reinforcing processes that it is difficult to move away from QWERTY, despite the existence of better models (like the Dvorak Model) that allow for faster typing.³⁹⁵ Alschner gives three reasons to explain the forces that create path dependency: efficiency, socialization, and cognitive biases.³⁹⁶ Efficiency is based on the law of increasing returns, which articulates that the cost of entrenched initial choices grows over time and this makes switching to more efficient models difficult, even to the most rational actors.³⁹⁷ Socialization revolves around the internalization of a social community's practices.³⁹⁸ For example, a law student builds their understanding based on the principles developed in past cases.³⁹⁹ Cognitive biases explain the behavior of people who tend to lean more towards the status quo rather than making new choices.⁴⁰⁰

When path dependency theory is applied to MFN interpretation, it is difficult to accept that MFN interpretations are developed from scratch. Once the tribunal in *AAPL v. Sri Lanka*⁴⁰¹ made an interpretation that the MFN provision could be used to borrow third-party provisions,⁴⁰² many tribunals and scholars built upon this interpretation rather than looking into whether there was any alternative interpretation. In fact, there are various tribunals that have completely abandoned the task

394. *Id.*

395. Mahoney, *supra* note 392.

396. Alschner, *supra* note 391, at 352–53.

397. *Id.* at 353.

398. *Id.*

399. *Id.*

400. *Id.*

401. *AAPL v. Sri Lanka*.

402. *Id.* at 246.

of justifying broad MFN interpretation in international law, assuming that earlier interpretations made by previous tribunals were completely correct.⁴⁰³ This tendency toward the status quo, when challenged, starts a cerebation in academia.⁴⁰⁴ It is argued, therefore, that the current interpretation of the MFN clause, which allows for the importing of favorable provisions from third-party BITs, is path dependent and certainly not the most efficient model for interpreting MFN provisions.

CONCLUSION

It is difficult to understand and accept the basis of the “conventional wisdom” of using MFN provisions to borrow provisions from third-party BITs. In fact, it appears that before *AAPL v. Sri Lanka*,⁴⁰⁵ such a practice did not even exist in the BIT regime. This judicial adventurism, started by *AAPL v. Sri Lanka*,⁴⁰⁶ was later followed by various tribunals.⁴⁰⁷ The path dependency by these tribunals to such interpretation of MFN provisions, supported by various scholars,⁴⁰⁸ created this notion of “conventional wisdom.”

Despite having a questionable basis in international law, this practice is sometimes cherished as creating “multilateral rules of investment protection.”⁴⁰⁹ Such an assertion, as this article explains, is problematic. The interpretation of treaty provisions in a manner that was never intended by the states is bound to create problems. In the absence of clear and unambiguous substantiation for the conventional use of an MFN provision, it is

403. *White Industries v. India*.

404. Schill, *MFN Clauses as Bilateral Commitments to Multilateralism*, *supra* note 7; Batifort & Heath, *supra* note 4; Andrea K. Bjorklund, *The Enduring But Unwelcome Role of Party Intent in Treaty Interpretation*, 112 AM. J. INT’L L. UNBOUND 44 (2018); Paparinskis, *supra* note 5; Perez-Aznar, *supra* note 195; Michael Waibel, *Putting the MFN Genie Back in the Bottle*, 112 AM. J. INT’L L. UNBOUND 60 (2018); McRae, *supra* note 194.

405. *AAPL v. Sri Lanka*, at 246.

406. *Id.*

407. *EDFI v. Argentina*; *Arif v. Moldova*; *Al Warraq v. Indonesia*; *Ansung Housing v. China*; *Garanti Koza v. Turkmenistan*, Decision on the Objection to Jurisdiction for Lack of Consent; *Teinver v. Argentina*, Decision on Jurisdiction; *AAPL v. Sri Lanka*.

408. See, e.g., Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses* (2009), *supra* note 7; Schill, *MFN Clauses as Bilateral Commitments to Multilateralism*, *supra* note 7.

409. *Id.*

argued that such practice amounts to fraud on the sovereignty of states. Further, the interpretative methodologies followed by tribunals do not seem to have conformed to the interpretative steps provided under the VCLT. Nor is there any justification to follow other interpretative methodologies.

It is submitted, therefore, that using an MFN provision to borrow provisions from third-party BITs is not a sound practice for the following reasons: (1) there is no inquiry about the relevant comparator and, in the absence of such an inquiry, it becomes difficult to establish discriminatory practices; (2) its rationale and basis in general international law is questionable; (3) the economic and non-rationale of using an MFN provision to borrow clauses from third-party BITs are not well founded nor entirely correct; (4) the relevant rules of international law should be used to interpret MFN provisions, as provided under Article 31 of the VCLT, to determine the scope of the provisions; (5) the complications created by such use of an MFN provision are highly problematic for the investment regime because they give rise to problems like treaty-shopping, free-ridership, and jurisdictional issues; (6) recent state behavior shows a trend against the conventional use of MFN provisions; and (7) there is a requirement for an objective test to determine the actual discrimination due to the favorable language of a BIT. In the absence of such a test, the interpretation of MFN provisions remains highly subjective and malleable. For the aforementioned reasons, it is submitted that use of MFN provisions to borrow clauses from third-party BITs is a problematic practice, having a dubious basis in general international law, and should therefore be put to rest.

The ‘Necessary’ Nexus Requirement Link in General Exception Provisions of South Asian Bilateral Investment Treaties and Some Insight on Its Interpretative Approach in the Context of South Asia

Amit Kumar Sinha*

Abstract

Nexus requirement links (NRLs) in general exception provisions of bilateral investment treaties (BITs) are an important connecting factor between measures taken by States and objectives pursued by States. This article attempts to make a first-ever detailed study of NRLs as necessary features of general exception provisions in all BITs in force that are signed by South Asian countries. The objective of this study is to map and ascertain a suitable interpretative approach of ‘necessary’ NRLs against the background of various interpretative methodologies adopted by different investment tribunals. For this purpose, the article delves into the meaning of NRLs in general, the relevance of studying ‘necessary’ NRLs in South Asia, and the mapping of ‘necessary’ NRLs, and it concludes by offering a suitable interpretative approach in the South Asian context.

Keywords: *bilateral investment treaty; foreign direct investment; investor–State dispute settlement; Nexus requirement link; general exceptions; South Asian countries*

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Introduction

Nexus requirement links (NRLs) in general exception provisions of bilateral investment treaties (BITs) are an important connecting factor between measures taken by States and the objectives behind those measures. This article studies 'necessary' NRLs that are found in the BITs of South Asian countries. The reason for studying NRLs in the BITs of South Asian countries has assumed importance as there is a plethora of investor–State dispute settlement cases (ISDS) pending against South Asian countries. The purpose of this study is to fill the gaps in academia where the study of 'necessary' NRLs has never found attention, especially in the context of South Asian countries. For this purpose, the article studies 190 BITs of South Asian countries and maps the 'necessary' NRLs found in them.¹ It then proceeds to explore the meaning of 'necessary' in international law, followed by an approach to determine its meaning in specific investment treaty regimes based on the decisions of various tribunals and academic debate. After that, it inquires into the relationship between 'necessary' in investment treaty regimes and 'necessity' in international law, followed by suggestions and a conclusion.

However, before we move directly to a discussion of NRLs, it would be better to first understand the meaning of general exception clauses. General exception clauses work as an instrument embedded in the BIT itself that, when invoked by the host States, makes the other provisions of the same BIT redundant. As the text suggests, the actions of the host States that are inconsistent with the BIT obligations are generally allowed by virtue of general exception provisions.² Therefore, those actions by States that violate BIT provisions are usually accepted as being consistent with a BIT if the State has invoked the general exception clause. Here, the host State dismisses its liability of harm done to an investment in exceptional circumstances using a general exception clause.³ Thus, general exception provisions permit States to regulate the investments in exceptional circumstances in their territories.⁴ Hence, in order to pursue their non-investment policy objectives, the general exception provision is an effective device to ensure regulatory latitude for States.⁵

¹ Here, the expression 'bilateral investment treaty' (BIT) includes all stand-alone BITs (that are in force), investment chapters in various free trade agreements (FTAs) and any other investment agreements signed by South Asian countries. This expression shall be used throughout this article and should be understood to have incorporated all standalone BITs, FTAs, and investment agreements signed by South Asian countries.

² William W Burke-White and Andreas Von Staden, 'Investment Protection in Extraordinary Times: The Interpretation of Non-Precluded Measure Provisions in Bilateral Investment Treaties' (2008) 48 *Virginia JIL* 307, 314.

³ *Ibid* 401.

⁴ Kenneth J Vandevelde, 'Of Politics and Markets: The Shifting Ideology of the BITs' (1993) 11 *Berkeley J Intl L* 159, 170.

⁵ Jürgen Kurtz, 'Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis' (2010) 59 *ICLQ* 325, 343.

Unlike the General Agreement on Tariffs and Trade (GATT), which distinguishes between general exceptions⁶ and security exceptions,⁷ general exception provisions in BITs do not provide any such demarcation. These provisions usually use an expression known as 'essential security interests' (ESIs) that deal with both security and non-security issues.⁸ ESIs in general the exception provisions of BITs are used in a general sense, as they cover more issues than just conventional security-related issues.⁹ Here, however, general exceptions provisions must be distinguished from security exception provisions found in different free trade agreements (FTAs) and BITs that contain the list of security-related areas.¹⁰ The security exception provisions containing ESIs can be of two types: first, those that have a self-judging clause, which means BITs that provide discretion to the State to assess the security-related situations and thereby allows the State to deviate from BIT obligations,¹¹ and, second, having non-self-judging clauses, where the tribunal determines what deference is to be given to the assessment made by the State.¹²

⁶ General Agreement on Tariffs and Trade, 30 October 1947, 58 UNTS 187, art XX (GATT).

⁷ Ibid art XXI.

⁸ Prabhash Ranjan, 'Protecting Security Interests in International Investment Law' in Mary Footer, Julia Schmidt, and Nigel D White (eds), *Security and International Law* (Hart Publishing 2016). However, whether ESIs should be interpreted narrowly or broadly has received divided opinion from various scholars. For more on essential security interests (ESIs), see A Reinisch, 'Necessity in International Investment Arbitration: An Unnecessary Split of Opinions in Recent ICSID Cases?' (2007) 7 J World Investment & Trade 191, 209; JE Alvarez and K Khamsi, 'The Argentine Crisis and Foreign Investors' in Karl P Sauvant (ed), *The Yearbook on International Investment Law and Policy 2008/2009* (OUP 2009) 379.

⁹ Amit Kumar Sinha, 'Non-Precluded Measures Provisions in Bilateral Investment Treaties of South Asian Countries' Asian JIL (28 April 2016) on CJO 2016 DOI <<http://dx.doi.org/10.1017/S2044251316000023>> assessed 12 March 2017.

¹⁰ Comprehensive Economic Partnership Agreement between Republic of India and Korea (7 August 2009) <<http://commerce.nic.in/trade/INDIA%20KOREA%20CEPA%202009.pdf>> accessed 19 March 2017 (India–Korea CEPA); Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the Association of South East Asian Nations and the People's Republic of China (15 August 2009) <<http://fta.mofcom.gov.cn/inforimages/200908/20090817113007764.pdf>> accessed 19 March 2017; Free Trade Agreement between the Government of New Zealand and the Government of the People's Republic of China (2008) <<http://www.chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/0-downloads/NZ-ChinaFTA-Agreement-text.pdf>> accessed 19 March 2017; Agreement between Japan and the Republic of Singapore for a New Age Economic Partnership (13 January 2002) <<http://www.mofa.go.jp/region/asia-paci/singapore/jsepa-1.pdf>> accessed 19 March 2017; Agreement between Canada and the Republic of Peru for the Promotion and Protection of Investment (14 November 2006) <<http://www.treaty-accord.gc.ca/text-texte.aspx?id=105078>> accessed 19 March 2017; Singapore–Australia Free Trade Agreement (28 July 2003) <<http://www.fta.gov.sg/fta.safta.asp?hl=4>> accessed 19 March 2017; United States–Chile Free Trade Agreement (1 January 2004) <<http://www.ustr.gov/tradeagreements/free-trade-agreements/chile-fta/final-text>> accessed 19 March 2017.

¹¹ SW Schill and R Brieze, '“If the State Considers”: Self-Judging Clauses in International Dispute Settlement' in A von Bogdandy and R Wolfrum (eds), *Max Planck Yearbook of UN Law*, vol 13 (Brill 2009) 61.

¹² Ibid.

In South Asia, of the 103 BITs having general exceptions provisions, 81 contain an ESI as one of the permissible objectives.¹³ Among these South Asian BITs, only four BITs have self-judging clauses in their general exception provisions or security exception provisions;¹⁴ the other BITs having general exception provisions are non-self-judging.

The formulation and textual composition of these types of provisions may vary from one BIT to another. The examples of textual variation of these provisions can be easily seen in South Asian BITs.¹⁵ However, only a handful of general exception provisions having similarity with Article XX of the GATT¹⁶ can be found in South Asian BITs.¹⁷ The Agreement for the Promotion and Protection

¹³ Sinha (n 9).

¹⁴ Agreement for the Promotion and Protection of Investments between the Republic of Colombia and the Republic of India (10 November 2009), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/796>>. art 13(4) (India–Colombia BIT); Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore (2005) art 6.12, <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2707>> accessed 25 February 2017 (India–Singapore CECA); India–Malaysia FTA, Comprehensive Economic Cooperation Agreement between the Government of Malaysia and the Government of the Republic of India (18 February 2011), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2629>> art 12.2 (India–Malaysia FTA); India–Japan EPA, Comprehensive Economic Partnership Agreement between Japan and the Republic of India (16 February 2011), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2627>>. art 115; India–Korea CEPA (n 10) art 2.9.

¹⁵ Eg, Agreement between the Government of the United Mexican States and the Government of the Republic of India on the Promotion and Protection of Investments (25 July 2005), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1578>> art 31 (Mexico–India BIT) provides for:

‘Security Exceptions:

Nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a nondiscriminatory basis.’

Mauritius–Pakistan BIT, Investments Promotion and Protection Agreement (IPPA) between the Republic of Mauritius and the Islamic Republic of Pakistan (03 April 1997), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1987>>. art 12 (Mauritius–Pakistan BIT) provides for:

‘Prohibitions And Restrictions:

The provisions of this Agreement shall not in any way limit the right of either, Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases and pests in animals or plants.’

¹⁶ GATT (n 6).

¹⁷ Framework Agreement on the Promotion, Protection and Liberalization of Investment between Asia-Pacific Trade Agreement Participating States (2009) art 5 <<http://investmentpolicyhub.unctad.org/IIA/treaty/3269>> accessed 25 February 2017 (APTA Agreement); Agreement on South Asian Free Trade Area (2004) art 14 <<http://commerce.nic.in/trade/safta.pdf>> accessed 25 February 2017 (SAFTA); Final Framework Agreement on the BIMSTEC Free Trade Area (15 January 2004) art 8 <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/3099>> accessed 25 February 2017 (BIMSTEC Agreement); Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India (2014) art 21 <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/3337>> accessed 25 February 2017 (ASEAN–India Investment Agreement); Comprehensive Economic Cooperation Agreement between the Government of

of Investments between the Republic of Colombia and the Republic of India (India-Colombia BIT), the Association of Southeast Asian Nations–India Investment Agreement, the India–Malaysia FTA, the India–Singapore Comprehensive Economic Cooperation Agreement, the South Asian Free Trade Area, the Asia-Pacific Trade Agreement, and the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation are a few of the BITs in South Asia that contain a general exception clause resembling Article XX of the GATT.¹⁸ These differences in textual variation provide us with the opportunity to assess these provisions on two levels: first, on the number of permissible objectives provided and their nature and, second, on the basis of NRLs and their gravity. In this context, NRLs in general exception provisions assume an important role, which is discussed in the sections to follow.

Before moving to ‘necessary’ NRLs in the context of South Asia, it would be pertinent to understand the meaning of NRLs. They are textual formulations that are found in general exception clauses¹⁹ establishing the links between measures adopted by host States and the objective sought by such States through those measures.²⁰ The importance of NRLs lies in the fact that they determine the gravity in the relationship between the measures engaged by States and objectives sought to be achieved by the State.²¹ This degree of connection actually decides the threshold for how smoothly or intricately a State can take regulatory measures affecting foreign investments. Various types of NRLs are used in general exception provisions of different BITs, and all of these different NRLs have diverse connotations. South Asian BITs also use different types of NRLs.²² For example, the NRL in the India–Bangladesh BIT²³ is ‘for’,²⁴

Malaysia and the Government of the Republic of India (2011) art 12 <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2629>> accessed 25 February 2017; India–Singapore CECA (n 14) art 6.11.

¹⁸ India–Colombia BIT (n 14) art 13(5); ASEAN–India Investment Agreement (n 17) art 21; India–Malaysia BIT Agreement between the Government of the Republic of India and the Government of Malaysia for the Promotion and Protection of Investments (03 August 1995), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1576>>, art 12 (India–Malaysia BIT); India–Singapore CECA (n 14) art 6.11; SAFTA (n 17) art 14; APTA Agreement (n 17) art 5; BIMSTEC Agreement (n 17) art 8.

¹⁹ For more on general exception clauses in South Asian countries, see Prabhash Ranjan, ‘Non-Precluded Measures in Indian International Investment Agreements and India’s Regulatory Power as a Host Nation’ (2012) 2 Asian JIL 21; Sinha (n 9).

²⁰ Sinha (n 9).

²¹ Ranjan (n 19).

²² See Table 1.

²³ Agreement between the Government of the Republic of India and the Government of the People’s Republic of Bangladesh for the Promotion and Protection of Investments (7 July 2011) <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/265>>. (India–Bangladesh BIT).

²⁴ India–Bangladesh BIT (n 23) art 12(2); ‘[N]othing in this Agreement precludes the host Contracting Party from taking action for the protection of its’ (emphasis added).

whereas the NRL in the Turkey–Bangladesh BIT²⁵ is ‘necessary’.²⁶ Here, it is evident that NRLs can be formulated differently—some examples are: ‘for’,²⁷ ‘directed to’,²⁸ ‘necessary’,²⁹ and ‘relating to’.³⁰ It can also be seen by studying the different formulations of NRLs that some NRLs are more robust than others—for example, a ‘necessary’ NRL is stricter than a ‘for’ NRL.³¹ The stricter the NRL, the more difficult it would be for a State to take, or to adopt, any regulatory measures.

Studying NRLs in the context of South Asia

In South Asia, where circumstances like terrorist threats, environment-related problems, and public health emergencies are too common, less strict NRL formulations in general exception provisions in BITs could provide more regulatory latitude to host States. There is no dearth of examples where States have argued the application of general exceptions provisions before numerous international tribunals.³² Decisions given by tribunals on matters relating to general exceptions are conflicting and non-consistent; some have interpreted it as being equivalent to a necessity defence in customary international law;³³

²⁵ Agreement between the Republic of Turkey and the People’s Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investments (12 November 1987), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/275>>. (Bangladesh–Turkey BIT).

²⁶ Bangladesh–Turkey BIT (n 25) art X: ‘This agreement shall not preclude the application by either Party of measures *necessary* for the maintenance of public order...’ (emphasis added).

²⁷ Agreement between the Government of the Republic of India and the Government of the Republic of Armenia for the Promotion and Protection of Investments (23 May 2015) <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/138>>. (India–Armenia BIT).

²⁸ Agreement between the Government of the Republic of Mauritius and the Government of the Republic of India for the Promotion and Protection of Investments (4 September 1998) <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1577>>. (Mauritius–India BIT).

²⁹ Belgium–Luxembourg Economic Union–India (BLEU) BIT, Agreement between the Belgium–Luxembourg Economic Union and the Government of the Republic of India Concerning the Encouragement and Protection of Investments (31 October 1997), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/369>>. (India–BLEU BIT).

³⁰ India–Colombia BIT (n 14).

³¹ Ranjan (n 19) 47; eg, ‘necessary’ is stricter than ‘related to’. *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, Appellate Body (29 April 1996) 17–18, 21–2.

³² *CMS Gas Transmission Co v Argentina*, ICISD Case no ARB/01/8, Annulment Proceedings (25 September 2007) (*CMS Gas*, Annulment); *CMS Gas Transmission Co v Argentina*, ICISD Case no ARB/01/8 (12 May 2005) (*CMS Gas*); *Enron Creditors Recovery Corp v Argentina*, ICSID Case no ARB/01/3, Annulment Proceedings (30 July 2010) (*Enron*, Annulment); *Enron Corporation v Argentina*, ICSID Case no ARB/01/3 (22 May 2007) (*Enron*); *Sempra Energy International v Argentina*, ICSID Case no ARB/02/16, Annulment Proceedings (29 June 2010) (*Sempra*, Annulment); *Sempra Energy International v Argentina*, ICSID Case No ARB/02/16, 28 September 2007) (*Sempra*); *LG&E Energy Corporation v Argentina*, ICISD Case no ARB/02/1 (3 October 2006) (*LG&E*); *Continental Casualty Company v Argentina*, ICSID Case no ARB/03/9 (5 September 2008) (*Continental*).

³³ *CMS Gas* (n 32); *Enron* (n 32); *Sempra* (n 32).

others have adopted different approaches, which shall be discussed below.³⁴ The examination of flaws and virtues of different approaches adopted by these tribunals reveals the importance of NRL formulations. Therefore, the need to study NRLs assumes importance.

The study of 'necessary' clauses in South Asia also assumes importance for three main reasons: first, South Asian countries have signed BITs at an exceptional rate since 1990;³⁵ second, there is increasing foreign direct investment (FDI) inflow in these countries;³⁶ and, third, there are a rising number of BIT cases against these countries.³⁷ We need to delve into these issues separately.³⁸ In regard to the first issue, acceptance of a large number of BITs by South Asian countries reflects the willingness to undertake obligations under all of these BITs to protect investment within their territories. These obligations make South Asian countries vulnerable in international law for any measure taken by them that jeopardizes foreign investments. The total number of BITs signed by South Asian countries before 1990 was 33; however, the current number of total BITs signed by South Asian countries is 230.³⁹ This shows how fast these countries have signed BITs after 1990 and, thereby, have become subjected to international obligations more than ever before. In regard to the issue of FDI inflow in South Asian countries, notwithstanding the fact that FDI is considered a sound economic factor for host States, a host State's vulnerability to BIT claims increases with the increase in FDI inflows, given that the home States of the foreign investors have BITs with the host State. FDI inflow in these countries before 1990 was US \$567 in total; however, this inflow had reached US \$48,434 by 2015.⁴⁰ This puts obligations upon South Asian countries to protect this huge inflow of FDIs into their territories. In this respect, it can be seen that the vulnerability of these countries to investor-State dispute settlement (ISDS) cases is certainly higher than before. With respect to the third issue, South Asian countries are already facing a large number of ISDS cases. To date, there are eight cases filed against Pakistan,⁴¹ Sri Lanka has faced four ISDS

³⁴ LG&E (n 32); *Continental* (n 32); Christina Binder, 'Necessity Exceptions, the Argentine Crisis and Legitimacy Concerns' in Tulio Treves, Francesco Seatzu and Seline Trevisanut (eds), *Foreign Investment, International Law and Common Concerns* (Routledge 2014) 71, 76.

³⁵ Sinha (n 9) at 5.

³⁶ Ibid.

³⁷ Ibid.

³⁸ For the purposes of a comparative study, the year 1990 is taken as a base year in this section because most of the South Asian countries started moving towards liberalization after 1990.

³⁹ International Investment Agreements <<http://investmentpolicyhub.unctad.org/IIA>> accessed 19 January 2017.

⁴⁰ South Asian Association for Regional Cooperation FDI <<http://unctadstat.unctad.org/wds/ReportFolders/reportFolders.aspx>>. accessed 19 January 2017.

⁴¹ *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case no ARB/01/13 (23 May 2004); *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case no ARB/03/29 (27 August 2009); *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case no ARB/03/3 (II) (26 September 2005); *Agility for Public Warehousing Company KSC v Islamic Republic of Pakistan*, ICSID Case no ARB/11/8 (01 August 2016); *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case no ARB/12/1 (04 July 2017) (Pending); *Mr Ali Allawi v Pakistan*,

cases;⁴² Bangladesh has been subjected to one ISDS case;⁴³ and India is facing 22 cases against it.⁴⁴ In many of these cases, investors have emerged as successful parties.⁴⁵

The combination of these three factors indicates that the chances of South Asian countries facing ISDS claims are certainly higher than ever before. In this scenario, in order to ascertain how much leverage these countries can have during emergency situations, one must make a proper study of 'necessary' formulations in general exception provisions.

Of all the NRL formulations that exist in general exception provisions in the BITs of South Asian countries, the 'necessary' NRL has assumed the utmost importance for two reasons: first, it is, so far, the strictest NRL found not only in BITs of South Asian countries but also in almost all the BITs signed globally. Second, the divergent interpretations made by various investment tribunals have brought it into the centre of various scholarly and academic discussions. Therefore, without undermining the importance of other NRLs, this article deals only with the issues relating to 'necessary' NRLs.

UNCITRAL (12 January 2015) <<http://www.italaw.com/cases/2032>> accessed 15 January 2017; *Progas Energy Ltd v Pakistan* UNCITRAL (12 January 2015) <<http://www.italaw.com/cases/2044>> accessed 15 January 2017; *Karkey Karadeniz Elektrik Uretim AS v Islamic Republic of Pakistan*, ICSID Case no ARB/13/1 (8 June 2016) (Pending).

⁴² *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, ICSID Case no ARB/87/3 (27 June 1990); *Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka*, ICSID Case no ARB/00/2 (15 March 2002); *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case no ARB/09/2 (09 June 2016).

⁴³ *Saipem SpA v People's Republic of Bangladesh*, ICSID Case no ARB/05/7 (30 June 2009).

⁴⁴ *Bechtel Enterprises Holdings, Inc and GE Structured Finance (GESF) v Government of India*, Tribunal Rules for Bechtel and GE in Dabhol Power Project Arbitration (9 September 2003) <<http://www.bechtel.com/newsroom/releases/2003/09/tribunal-rules-dabhol-power-project-arbitration/>> accessed 15 January 2017; *ABN Amro NV v Republic of India*, (12 April 2015) <<http://rdaujotas.com/lt/publikacijos/0/42/-icsid-foreign-investment-requirement-in-case-of-borrowed-funds>> accessed 15 January 2017; *ANZEF Ltd v Republic of India*, *BNP Paribas v Republic of India*, *Credit Lyonnais SA (now Calyon SA) v Republic of India*, *Credit Suisse First Boston v Republic of India*, *Erste Bank Der Oesterreichischen Sparkassen AG v Republic of India*, *Offshore Power Production CV, Travamark Two BV, EFS India-Energy BV, Enron BV, and Indian Power Investments BV v Republic of India*, *Standard Chartered Bank v Republic of India Bycell (Maxim Naumchenko, Andrey Polouektov and Tenoch Holdings Ltd) v India* (28 November 2014) <<http://www.italaw.com/cases/1933>> accessed 15 January 2017; *Deutsche Telekom v India*, ICSID Additional Facility (28 November 2014) <<http://www.italaw.com/cases/2275>> accessed 15 January 2017; *Khaitan Holdings Mauritius v India*, UNCITRAL (28 November 2014) <<http://www.italaw.com/cases/2262>> accessed 15 January 2017; *Louis Dreyfus Armateurs SAS (France) v Republic of India*, PCA Case no 2014-26 (28 November 2014) <<http://www.pccases.com/web/view/113>> accessed 15 January 2017; *Vodafone International Holdings BV v India*, UNCITRAL (28 November 2014) <<http://www.italaw.com/cases/2544>> accessed 15 January 2017; *White Industries Australia Limited v India*, UNCITRAL (30 November 2011) <<http://www.italaw.com/cases/1169>> accessed 15 January 2017.

⁴⁵ *AAPL* (n 42); *Deutsche Bank AG* (n 42); *Saipem SpA* (n 43); *White Industries* (n 44).

The importance of NRLs in South Asia can also be ascertained by the fact that, in a recent ISDS case filed against India,⁴⁶ India questioned the appointment of two arbitrators on the basis of the interpretation of the term 'necessary' in general exception clauses made by them in previous ISDS cases where they sat as arbitrators.⁴⁷ While the decision on merit is still pending before the tribunal, India had partial success since its request to remove one of the arbitrators from the panel was accepted.

'Necessary' in South Asian BITs

In South Asia, there are 32 BITs that contain 'necessary' as a NRL⁴⁸ in their general exception provisions; of these, India and Bangladesh have 'necessary' as a NRL in 25 and four BITs respectively. Pakistan, Nepal, and Sri Lanka have 'necessary' in one, three, and four BITs respectively. Bhutan and Maldives have 'necessary' in two BITs and one BIT respectively. The 'necessary' formulation functions in at least two capacities; it not only balances the investor's right *vis-à-vis* the State's interest but also separates justified regulatory actions from the protectionist measure taken under the pretext of necessity.⁴⁹ The significance of this NRL can be ascertained by the diverse interpretations made by tribunals in ISDS cases filed against Argentina for its default of foreign investments.⁵⁰ Based on these interpretations, many scholars have devised

⁴⁶ *CC/Devas (Mauritius) Ltd, Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v Republic of India*, PCA Case no 2013-09 (2013) <<https://www.italaw.com/cases/documents/1963>> accessed 10 April 2017.

⁴⁷ *Ibid* paras 51–9.

⁴⁸ These 32 BITs include many regional investment agreements in which all or some South Asian countries are parties. Therefore, counting of necessary in BITs of individual countries may seem to be more than 32 BITs.

⁴⁹ Burke-White and Staden (n 2) 307; Benn McGrady, 'Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures' (2008) 12 J Intl Economic Law 153, 154.

⁵⁰ Jim Saxton, 'Argentina's Economic Crisis: Causes and Cures' (Joint Economic Committee United States Congress, June 2003); Alvarez and Khamsi (n 8) 379; William W Burke-White, 'The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System' (2008) 3 Asian J WTO & Intl Health L & Policy 199; Burke-White and von Staden (n 2); Michael Waibel, 'Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E' (2007) 20 Leiden JIL 637; Sarah Hill, 'The Necessity Defense and the Emerging Arbitral Conflict in its Application to the U.S.–Argentina Bilateral Investment Treaty' (2007) 13 Law & Bus Rev Am 547; Stephen W Schill, 'International Investment Law and Host State's Power to Handle Economic Crises: Comment on the ICSID Decision in *LG&E v Argentina*' (2007) 24(3) J Intl Arbitration 265; David Foster, 'Necessity Knows No Law!: *LG&E v Argentina*' (2006) 9 (6) Intl Arb L Rev 149. See also, Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (14 November 1991), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/127>>. (US–Argentina BIT) art 11: This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.'

Table 1. Various NRLs in general exception provisions in BITs of South Asian countries

State	NRLs (number of times used in BITs)
Bangladesh	'necessary' (four) ⁵² 'for' (one) ⁵³ 3. 'to' (one) ⁵⁴
India	'necessary' (25) ⁵⁵ 'directing to' (one) ⁵⁶ 'for' (49) ⁵⁷ 'to' (two) ⁵⁸ 'in pursuance of' (one) ⁵⁹ 'relating to' (two) ⁶⁰
Nepal	'necessary' (three) ⁶¹
Pakistan	'directed to' (two) ⁶² 'necessary' (one) ⁶³
Sri Lanka	'directed to' (one) ⁶⁴ 'necessary' (four) ⁶⁵ 'for' (one) ⁶⁶
Bhutan	'necessary' (two) ⁶⁷
Maldives	'necessary' (one) ⁶⁸

several interpretative guidelines of their own that will be discussed in another section.⁵¹

Table 1 shows the different NRLs found in different general exception provisions of South Asian BITs.

Therefore, the study of 'necessary' in South Asian BITs is desired in order to ascertain the proper interpretation of the term. Before an independent inquiry can be made in this regard, it would be pertinent to understand the meaning of 'necessary'. Thus, this article will make an inquiry into the following areas: (i) 'necessary' under customary international law (CIL); (ii) 'necessary' as an independent treaty standard; and (iii) an inquiry as to their relationship with each other.

⁵¹ Kurtz (n 5) 325; Burke-White and Staden (n 2) 307; Diane A Desierto, 'Necessity and Supplementary Means of Interpretation for Non-Precluded Measures in Bilateral Investment Treaties' (2009) 31 U Pa J Intl L 827; Tarcisio Gazzini, 'Necessity in International Investment Law: Some Critical Remarks on CMS v Argentina' (2008) 26 J Energy & Natural Resources L 450; August Reinisch, 'Necessity in International Investment Arbitration: An Unnecessary Split of Opinions in Recent ICSID Cases?' (2007) 7 J World Investment & Trade 191, 209; Schill (n 51) 50; Matthew Parish, 'On Necessity' (2010) 11 J World Investment & Trade 169.

⁵² Treaty between The United States of America and The People's Republic of Bangladesh Concerning The Reciprocal Encouragement and Protection of Investment (12 March 1986), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/278>>; Turkey-Bangladesh BIT, Agreement between the Republic of Turkey and the People's Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investments (12/11/1987), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/275>> APTA Agreement (n 17); SAFTA (n 17).

⁵³ India-Bangladesh BIT (n 23).

⁵⁴ Agreement between the Government of People's Republic of Bangladesh and the Government of the Republic of Uzbekistan on Reciprocal Protection and Promotion of Investment (18 July

'Necessity' in CIL

Before any inquiry can be made as to the relation of 'necessary' as a treaty standard with 'necessity' in CIL, it would be pertinent to inquire into the meaning of 'necessity' in CIL. The normative authority of 'necessity' in international law as CIL can be reflected in the International Law Commission's (ILC)

2000), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/279>> (Uzbekistan–Bangladesh BIT).

- ⁵⁵ Agreement between The Government of Australia and The Government of The Republic of India on the Promotion and Protection of Investments (26 February 1999), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/154>> (Australia–India BIT); Austria–India BIT, Agreement between the Government of the Republic of Austria and the Government of the Republic of India for the Promotion and Protection of Investments (31 January 2001), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/192>> (Austria–India BIT); BLEU–India BIT (n 29); Bosnia and Herzegovina–India BIT, Agreement between Bosnia and Herzegovina and The Republic of India for The Promotion and Protection of Investments (12 September 2006), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/475>>; India–Colombia BIT (n 14); Czech–India BIT, Agreement between the Czech Republic and the Republic of India for the Promotion and Protection of Investments (11 October 1996), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/939>> Denmark–India BIT, Agreement concerning the promotion and reciprocal protection of investments (06 Septemebr 1995), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1009>>; Finland–India BIT, Agreement between The Government of The Republic of India and The Government of The Republic of Finland on The Promotion and Protection of Investments (07 November 2002), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1185>>; (Finland–India BIT); France–India BIT, Agreement between The Government of The French Republic and The Government of The Republic of India on Reciprocal Encouragement and Protection Investments (02 September 1997), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1231>>; Germany–India BIT, Agreement between the Federal Republic of Germany and the Republic of India for the Promotion and Protection of Investments (10 July 1995), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1340>>; Korea–India BIT, Agreement between The Government of The Republic of India and The Government of The Republic of Korea on The Promotion and Protection of Investments (26 February 1996), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1568>>; Kuwait–India BIT, Agreement between The State of Kuwait and The Republic of India for The Encouragement and Reciprocal Protection of Investment (27 November 2001), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1569>>; India–Malaysia BIT (n 18); Morocco–India BIT, The Government of the Kingdom of Morocco and the Government of the Republic of India for the Promotion and Protection of Investments (13 February 1999), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1580>>; Netherlands–India BIT, Agreement between the Republic of India and the Kingdom of the Netherlands for the promotion and protection of investments (06 November 1995), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1584>>; Saudi Arabia–India BIT, Agreement between The Government of The Republic of India and Government of The Kindgom of Saudi Arabia Concerning The Encouragement and Reciprocal Protection of Investments (25 January 2006), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1594>>; Sweden–India BIT, Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of India for the Promotion and Reciprocal Protection of Investments (04 July 2000), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1602>>; Spain–India BIT, Agreement for the Reciprocal Promotion and protection of investment between the Kingdom of Spain and the Republic of India (30 September 1997), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1599>>. The Nexus requirement link (NRL) 'necessary' has been used three times in the India–Colombia BIT (n 14) in its different sub-clauses.

⁵⁶ Mauritius–India BIT (n 28).

⁵⁷ Armenia–India BIT (n 27); Bahrain–India BIT, Agreement between the Government of the Republic of India and the Government of the Kingdom of Bahrain for the Promotion and Protection of Investments (13 January 2004), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/252>>; India–Bangladesh BIT (n 23); Belarus–India BIT, Agreement between the Government of the Republic of India and the Government of the Republic of Belarus for the Promotion and Protection of Investments (27 November 2002), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/301>>; Brunei–India BIT, Agreement between the Government of the Republic of India and the Government of His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam on the Reciprocal Promotion and Protection of Investments (22 May 2008), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/517>>; Bulgaria–India BIT, Agreement between the Government of the Republic of India and the Government of the Republic of Bulgaria for the Promotion and Protection of Investments (19/10/1998), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/533>>; China–India BIT, Agreement between the Government of the Republic of India and the Government of the People's Republic of China for the Promotion and Protection of Investments (21 November 2006), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/742>>; Croatia–India BIT, Agreement between the Government of the Republic of Croatia and the Government of the Republic of India on the Promotion and Reciprocal Protection of Investments (04 May 2001), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/861>>; Cyprus–India BIT, Agreement between the Government of the Republic Of India and the Government of Republic of Cyprus for the Mutual Promotion and Protection of Investments (09 April 2002), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/923>>; Egypt–India BIT, Agreement between the Government of the Arab Republic of Egypt and the Government of the Republic of India for the Promotion and Reciprocal Protection of Investments (04 April 1997), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1078>>; Greece–India BIT, Agreement between Government of Hellenic Republic and the Government of the Republic of the India on the Promotion and Reciprocal Protection of the Investments (26 April 2007), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1463>>; Hungary–India BIT, Agreement between the Republic of Hungary and the Republic of India for the Promotion and Protection of Investments (03 November 2003), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1523>>; Iceland–India BIT, Agreement between the Government of the Republic of India and the Government of the Republic of Iceland for the Promotion and Protection of Investments (29 June 2007), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1560>>; Portugal–India BIT, Agreement between the Portuguese Republic and the Republic of India on the Mutual Promotion and Protection of Investments (28 June 2006), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1588>>; Indonesia–India BIT, Agreement between the Government of the Republic of Indonesia and the Government of the Republic of India for the Promotion and Protection of Investments (10 February 1999), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1563>>; Israel–India BIT, Agreement between the Government of the Republic of India and the Government of the State of Israel for the Promotion and Protection of Investments (29 January 1996), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1564>>; Jordon–India BIT, Agreement between the Government of the Republic of India and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments (30 November 2006), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1566>>; Kazakhstan–India BIT, Agreement between the Government of the Republic of Kazakhstan and Government of the Republic of India for the Promotion and Reciprocal Protection of Investments (9 December 1996), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1567>>; Kyrgyzstan–India BIT, Agreement between the Government of the Republic of India and the Government of Kyrgyz Republic for The Promotion and Protection of Investments (16 May 1997), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1570>>; Lao–India BIT, An Agreement between the Government of the Republic of India and The Government of the Lao People s Democratic Republic for the Promotion and Protection of

Investments (09 November 2000), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1571>>; Latvia–India BIT, Agreement between the Government of the Republic of India and the Government of the Republic of Latvia for the Promotion and Protection of Investments (18 February 2010), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1572>>; Libya–India BIT, Agreement between the Republic of India and the Great Socialist People's Libyan Arab Jamahiriya for the Promotion and Protection of Investments (26 May 2007), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1573>>; Lithuania–India BIT, Agreement between the Government of the Republic of India and the Government of the Republic of Lithuania for the Promotion and Protection of Investments (31 March 2011), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1574>>; Macedonia–India BIT, Agreement between the Government of the Republic of India and the Government of the Republic of Macedonia for the Promotion and Reciprocal Protection of Investments (17 March 2008), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1575>>; Mexico–India BIT (n 15); Mongolia–India BIT, Agreement between the Government of the Republic of India and the Government of Mongolia for the Promotion and Protection of Investments (03 January 2001), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1579>>; Mozambique–India BIT, Agreement between the Government of the Republic of Mozambique and the Government of the Republic of India for the Reciprocal Promotion and Protection of Investments (19 February 2009), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1581>>; Myanmar–India BIT, Agreement between the Government of the Republic of India and the Government of the Union of Myanmar for The Reciprocal Promotion and Protection of Investments (24 June 2008), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1582>>; Oman–India BIT, Agreement between the Government of the Sultanate of Oman and the Government of the Republic of India for the Promotion and Protection of Investments (02 April 1997), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1585>>; Philippines–India BIT, Agreement between the Government of the Republic of India and the Government of the Republic of the Philippines for the Promotion and Protection of Investments (28 January 2000), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1586>>; Poland–India BIT, Agreement between the Government of the Republic of India and the Government of the Republic of Poland for the Promotion and Protection of Investment (07 October 1996), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1587>>; Qatar–India BIT, Agreement between the Government of the Republic of India and the Government of the State of Qatar for the Reciprocal Promotion and Protection of Investments (07 April 1999), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1590>>; Romania–India BIT, Agreement between the Government of the Republic of India and the Government of Romania for the Promotion and Reciprocal Protection of Investments (17 November 1997), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1591>>; Serbia–India BIT, Agreement between the Government of the Republic of India and the Federal Government of the Federal Republic of Yugoslavia for the Reciprocal Promotion and Protection of Investments (31 January 2003), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1596>>; Slovakia–India BIT, Agreement between the Republic of India and the Slovak Republic for the Promotion and Reciprocal Protection of Investments (25 September 2006), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1597>>; Sri Lanka–India BIT, Agreement between the Government of the Democratic Socialist Republic of Sri Lanka and the Government of the Republic of India for the Promotion and Protection of Investment (22 January 1997), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1600>>; Sudan–India BIT, Agreement between the Government of the Republic of India and the Government of the Republic of the Sudan for the Promotion and Protection of Investments (22 October 2003), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1601>>; Syria–India BIT, Agreement between the Government of the Republic of India and the Government of the Syrian Arab Republic on the Mutual Promotion and Protection of Investments (18 June 2008), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1605>>; Taiwan–India BIT,

Agreement between the India Taipei Association in Taipei and the Taipei Economic and Cultural Center in New Delhi on the Promotion and Protection of Investments (17 October 2002), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1606>>; Tajikistan–India BIT, Agreement between the Government of the Republic of India and the Government of the Republic of Tajikistan for the Promotion and Protection of Investments (13 December 1995), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1607>>; Thailand–India BIT, Agreement between the Government of the Kingdom of Thailand and the Government of the Republic of India for the Promotion and Protection of Investments (10 July 2000), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1608>>; Trinidad and Tobago–India BIT, Agreement between the Government of the Republic of India and the Government of the Republic of Trinidad and Tobago for the Promotion and Protection of Investments (12 March 2007), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1609>>; Turkey–India BIT (n 25); Turkmenistan–India BIT, Agreement between the Government of the Republic of India and the Government of Turkmenistan for the Promotion and Protection of Investments (20 September 1995), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1611>>; Ukraine–India BIT, Agreement Government of the Republic of India and the Government of Ukraine for the Promotion and Protection of Investments (01 December 2001), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1612>>; United Kingdom–India BIT, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Promotion and Protection of Investments (14 March 1994), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1613>>; Vietnam–India BIT, Agreement between the Government of the Republic of India and the Government of the Socialist Republic of Vietnam for the Promotion and Protection of Investments (08 March 1997), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1616>>; Yemen–India BIT, Agreement between the Government of the Republic of India and the Government of the Republic of Yemen for the Promotion and Protection of Investments (01 October 2002), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1617>>; Switzerland–India BIT, Agreement between the Swiss Confederation and the Republic of India for the Promotion and Protection of Investments (04 April 1997), <<http://investmentpolicyhub.unctad.org/Download>>⁵⁸ Italy–India BIT, Agreement between the Government of the Italian Republic and the Government of the Republic of India on the Promotion and Protection of Investments (23 November 1995), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/5457>>; Uzbekistan–India BIT (n 54).

⁵⁹ India–Colombia BIT (n 14).

⁶⁰ Ibid. The NRL ‘relating to’ has been used twice in India–Colombia BIT (n 14) in its different sub-clauses.

⁶¹ Finland–Nepal BIT (n 55); BIMSTEC Agreement (n 17); SAFTA (n 17).

⁶² Mauritius–Pakistan BIT (n 15); Singapore–Pakistan BIT, Agreement between the Government of the Republic of Singapore and the Government of the Islamic Republic of Pakistan on the Promotion and Protection of Investments (08 March 1995), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2126>>.

⁶³ SAFTA (n 17).

⁶⁴ China–Sri Lanka BIT, Agreement between the Government of the Democratic Socialist Republic of Sri Lanka and the Government of the People’s Republic of China on the Reciprocal Protection and Promotion of the Investments (13 March 1986), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/781>>.

⁶⁵ US–Sri Lanka BIT, Treaty between the United States of America and the Democratic Socialist Republic of Sri Lanka Concerning the Encouragement and Reciprocal Protection of Investment (20 September 1991), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2295>>; APTA Agreement (n 17); BIMSTEC (n 17); SAFTA (n 17).

⁶⁶ Sri Lanka–India BIT (n 57).

⁶⁷ BIMSTEC (n 17); SAFTA (n 17).

⁶⁸ SAFTA (n 17).

Articles on State Responsibility.⁶⁹ The International Court of Justice (ICJ), in various cases, has reiterated and acknowledged that ‘necessity’ is part of CIL.⁷⁰ ‘Necessity’, as mentioned in the ILC’s articles, provides for when the defence of necessity can be invoked.⁷¹

The state of necessity simply dictates that any action taken by a State that in normal circumstances would have been unlawful can be justified in exceptional circumstances, if that action was its only option to protect its interests.⁷² The ‘defence of necessity’ can only be taken when the primary rules of a particular regime have been breached and where the defence for such a breach works as a secondary rule.⁷³ In this respect, the plea of ‘necessity’ acts as a safeguard for those States that are alleged to have breached their international legal obligations.⁷⁴ It encompasses in itself all those actions, in the traditional sense, of a State that are not in consonance with international obligations.⁷⁵ However, ‘necessity’ in its modern sense does not comprise itself of all actions of States constituting a wrongful act.⁷⁶ The instances cited by the ILC⁷⁷ include only judicial decisions involving issues like monetary obligations,⁷⁸ the use of force,⁷⁹ and commercial activities.⁸⁰ Therefore, the defence of necessity is available to States only in narrow or exceptional circumstances that are also very

⁶⁹ International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001) art 25 (ILC Articles on State Responsibility).

⁷⁰ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, para 51; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, para 140.

⁷¹ ILC Articles on State Responsibility (n 69) art 25(1):

‘1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) is the only means for the State to safeguard an essential interest against a grave and imminent peril; and

(b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) the international obligation in question excludes the possibility of invoking necessity, or

(b) the State has contributed to the situation of necessity.’

⁷² *Ibid.*

⁷³ August Reinisch, ‘Necessity in Investment Arbitration’ (2010) 41 *Netherlands YB Intl L* 137 at 148; Roman Boed, ‘State of Necessity as a Justification for International Wrongful Conduct’ (2000) 3 *Yale Human Rights & Development LJ* 1, 4.

⁷⁴ ILC Report on State Responsibility (n 69).

⁷⁵ Tarcisio Gazzini and others, ‘Necessity across International Law: An Introduction’ (2010) 41 *Netherlands YB Intl L* 3; Robert D Sloane, ‘On the Use and Abuse of Necessity in the Law of State Responsibility’ (2012) 6 *AJIL* 447.

⁷⁶ Ian Brownlie, *Principles of Public International Law* (6th edn, OUP 2003) 448.

⁷⁷ ILC Report on State Responsibility (n 69).

⁷⁸ Beate Rudolf and Nina Hüfken, ‘Argentinean State Bonds-Defense of Necessity in Relationship between State and Private Debtors-Customary International Law and General Principles of Law’ (2007) 101 *AJIL* 857.

⁷⁹ James Crawford, *The International Law Commission’s Articles on State Responsibility*, art. 25(1), (2002) 81.

⁸⁰ *Ibid.*

evident from negative language (for example, the use of the word ‘unless’) in which Article 25 is concluded. The codification of the defence of necessity was purposely done by the ILC in order to limit the loose contours of ‘necessity knows no law’ like situations.⁸¹ Also, for a State to make a plea of ‘necessity’, there has to be the presence of a wrongful act on the part of that State.⁸² It works as an affirmative defence for a state that has committed a wrongful act.⁸³ In the *Gabčíkovo-Nagymaros Project* case, the ICJ accepted that necessity is ‘deeply rooted in general legal thinking.’⁸⁴

‘Necessary’ as an independent treaty standard

A ‘necessary’ NRL in general exception provisions, having textual similarity to the ‘necessity’ clause of Article 25 of the ILC Articles on State Responsibility, is not usually found in investment treaties.⁸⁵ However, BITs do contain some provisions to deal with emergency situations. In order to tackle problems arising during extraordinary situations, some countries tend to keep regulatory space for them while making investment commitments with other countries.⁸⁶ ‘Necessity’ serves different meanings and functions in different treaty-based regimes.⁸⁷ It works as a tool to determine whether the regulatory actions taken by the State are justifiable.⁸⁸ In this way, it limits the actions taken by the State that adversely affect the interest protected by that specific treaty regime rather than just working as an excuse by a State for non-fulfilment of its international obligations.⁸⁹ However, ‘necessity’ does not provide any scale or measurement that can determine whether an action by the State is justified. Practically, it is also not possible that ‘necessity’ can determine what types of actions or omissions by the State are justified or not justified.⁹⁰ Situations and circumstances behind every State action are different, and whether or not it is justified is governed and determined by that particular treaty regime.

⁸¹ Sarah F Hill, ‘The “Necessity Defense” and the Emerging Arbitral Conflict in its Application to the US-Argentina Bilateral Investment Treaty’ (2007) 13 L & Bus Rev Am 547, 550–57.

⁸² Ibid.

⁸³ Desierto (n 51) 827.

⁸⁴ See *Gabčíkovo-Nagymaros Case* (n 70) 37.

⁸⁵ Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law* (British Institute of International and Comparative Law 2008) 340.

⁸⁶ SR Subramanian, ‘Too Similar or Too Different: State of Necessity as a Defence under Customary International Law and the Bilateral Investment Treaty and Their Relationship’ (2012) 9 Manchester J Intl Economic L 68.

⁸⁷ Andrew D Mitchell and Caroline Henckels, ‘Variations on a Theme: Comparing the Concept of “Necessity” in International Investment Law and WTO Law’ (2013) 14 Chicago J Intl L 93, 97.

⁸⁸ Ibid.

⁸⁹ Kurtz (n 5).

⁹⁰ One such example of a necessary clause in a BIT could be India–Australia BIT (n 55) art 15: ‘Prohibitions and Restrictions: Nothing in this Agreement precludes the host Contracting Party from taking, in accordance with its laws applied reasonably and on a non-discriminatory basis, measures necessary for the protection of its own essential security interests or for the prevention of diseases or pests.’

Therefore, courts and tribunals have developed their own criteria to determine whether a measure is necessary.⁹¹

An inquiry as to their relationship with each other

There can be two broad reasons for the use of Article 25 of the ILC Articles on State Responsibility—that is, the ‘necessity’ clause in cases of the violation of BIT provisions.⁹² First, BITs usually do not contain ‘necessity’ clauses that also provide for the requirement to invoke them, and, because of this, tribunals or courts resort to requirements as set out in the ‘necessity’ clause in the ILC Articles on State Responsibility.⁹³ Also, though the recourse to CIL is not contingent upon being provided under the text of the BIT, the possibility to resort to CIL still may not be negated by the tribunal in absence of express text in the BIT. Thus, second, sometimes the text of the Investment Treaty Arbitration clause in BITs allows tribunals to use customary international law.⁹⁴ Also, Article 42(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States provides for the application of rules of international law to be applied by tribunals as may be applicable to the disputes pending before them, thereby allowing tribunals to resort to CIL as well when faced with problems of interpretation such as in the case of necessity.⁹⁵

When tribunals use norms established by Article 25 of the ILC Articles on State Responsibility to interpret the ‘necessary’ clauses in BITs, despite having separate ‘necessary’ clauses in BITs, it becomes a problem of harmonization of the two sources. In contrast to Article 25, the text of general exception provisions in BITs merely specifies the classes of measures contemplated under permissible objectives without providing those classes of action that will inevitably result in a breach of treaty obligations or in their termination. Since necessity clauses in BITs through specified permissible objectives provide very limited classes of cases, the State can justify its action only under those permissible objectives provided under necessity clauses in BITs. However, the same is not the case with the Article 25 defence. The Article 25 defence includes a plethora of issues and interests.⁹⁶ If parties to the BITs had desired to have the necessity provision textually similar to Article 25, such as

⁹¹ Kurtz (n 5).

⁹² Alberto Alvarez-Jiménez, ‘New Approaches to the State of Necessity in Customary International Law: Insights from WTO Law and Foreign Investment Law’ (2010) 19 Am Rev Intl Arb 463.

⁹³ Ibid.

⁹⁴ One such example of this could be India–Austria BIT (n 55) art 9(3)(iii):

‘The arbitral award shall be made in accordance with the provisions of this Agreement and the general principles of International Law.’

⁹⁵ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965, 575 UNTS 159); Alvarez-Jiménez (n 92).

⁹⁶ Dissertio (n 51).

formulation, they would have had necessity clauses in BITs more analogous to Article 25.⁹⁷ The absence of an Article 25-type formulation in general exception provisions simply goes against the approach of interpreting a necessity clause in BITs along the lines of necessity clauses in the ILC Articles on State Responsibility.⁹⁸

Analysis by tribunals on the interconnection between necessity clauses in CIL and necessary NRLs in general exception provisions

The *Enron*, *CMS*, and *Sempra* tribunals,⁹⁹ after establishing *prima facie* that Argentina had breached certain provisions of the BIT, examined and rejected the necessity plea first under CIL and then under Article XI of the US–Argentina BIT. Confusion on the part of these tribunals to treat necessity under CIL on the same level with necessary NRLs in general exception provisions, without providing any interpretative justification, led to severe criticism by annulment committees, as one annulment committee¹⁰⁰ held that such an approach by tribunals was a manifest error of law.¹⁰¹

However, necessity was also interpreted by other tribunals with different methodologies. One such approach was followed by the *LG&E* tribunal,¹⁰² which tried to justify Argentina's measures under the general exception clause by drawing support from the necessity clause under CIL. Its effort to maintain the distinction between the specific treaty norm and the norm of CIL was correct. However, its failure to provide the content of the general exception clause and rationale to support the general exception clause with norms in CIL was lacking in its decision. The *Continental* tribunal,¹⁰³ while rejecting the conflation of the general exception clause under the BIT and the necessity clause in CIL,¹⁰⁴ suggested that the interpretation of 'necessary' should be based on the World Trade Organization's (WTO) jurisprudence.¹⁰⁵ The tribunal resorted to the 'least restrictive alternative' test as developed by WTO case law by distancing itself from the 'no other means available' test.¹⁰⁶ The *El Paso* tribunal,¹⁰⁷ while interpreting the term 'necessary' in Article XI of the US–Argentina BIT, relied on the CIL meaning of 'necessity' and concluded

⁹⁷ Ranjan (n 19).

⁹⁸ Dissertio (n 51).

⁹⁹ See note 32 for all three cases.

¹⁰⁰ *CMS Gas*, Annulment (n 32) para 131.

¹⁰¹ Sinha (n 9).

¹⁰² *LG&E* (n 32).

¹⁰³ *Continental* (n 32).

¹⁰⁴ *Ibid* para 168.

¹⁰⁵ *Ibid* para 85.

¹⁰⁶ William W Burke-White and Andreas von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations' (2010) 35 *Yale J Intl L* 283, 325.

¹⁰⁷ *El Paso Energy International Company v Argentine Republic*, ICSID Case no ARB/03/15 <date?>.

that since Argentina has contributed to the situation of necessity, therefore, it cannot take the defence under Article XI of the US–Argentina BIT. The *El Paso* tribunal, like the *CMS*, *Enron*, and *Sempra* tribunals, also tried to interpret the term ‘necessary’ in line with CIL’s meaning of necessity as provided under Article 25 of the ILC Articles on State Responsibility.¹⁰⁸

The approach of conflating two concepts attracted criticism not only from the annulment committees of these tribunals but also from scholars around the globe. Christina Binder says elements of Article 25 of the ILC Articles on State Responsibility are not simple and create a problem when applied to economic emergencies since economic emergencies are always affected by both internal and external factors.¹⁰⁹ William Burke-White and Andreas Von Staden, while talking about the types of possible interpretative methods that can be undertaken,¹¹⁰ refer to the equation of the term ‘necessary’ with the requirement of necessity under CIL as unsound. They reject this approach by asserting that if the necessity defense in CIL was intended, then there would not have been arguments in favour of general exception clauses in BITs in the first place. Jürgen Kurtz rejects this approach on both textual and historical grounds.¹¹¹ Prabhash Ranjan also seems to have rejected this approach when he says that ‘[i]f ... treaty makers intended to use the ILC Article 25 defense to achieve the permissible objectives given in NPM provisions, there was no need to have an NPM provision because the customary defense is anyway available.’¹¹²

One resonant difference between Article 25 of the Vienna Convention on the Law of Treaties (VCLT) and treaty exceptions lies in the language of these provisions.¹¹³ Article 25 of the VCLT uses the phrase ‘ground for precluding the wrongfulness’, which means it assumes in itself that a wrongful act has already been committed, whereas, in treaty exceptions, wrongfulness is not assumed; it is contested whether the act was wrongful or not. Also, before continuing, it would be wise to understand the rationale of WTO case law in relation to the interpretation of the necessity clause, as provided under Article XX of the GATT.

Interpretation of “ under WTO jurisprudence vis-à-vis Article XX of the GATT

Necessity appears numerous times throughout the WTO Agreements.¹¹⁴ However, the general exception provisions, as provided under Article XX and

¹⁰⁸ Ibid paras 551–630.

¹⁰⁹ Binder (n 34) 77–8.

¹¹⁰ William Burke-White and von Staden (n 2) 343.

¹¹¹ Kurtz (n 5).

¹¹² Ranjan (n 19) 48.

¹¹³ Vienna Convention on the Law of Treaties (1969, 1155 UNTS 331).

¹¹⁴ Eg, General Agreement on Tariffs and Trade (1994, 55 UNTS 194) arts III:3, VII:3, XI:2(b) and (c), XII:2(a), XVIII:9, XIX, XX(a), (b), (d), (i), XXI(b); Agreement on the Application of Sanitary and Phytosanitary Measures (1994, 1867 UNTS 493) arts 2.1, 2.2, 5.6; Agreement on Technical

Article XIV of the GATT and the General Agreement on Trade in Services (GATS), respectively, containing necessary provisions, have received the most attention from WTO tribunals. WTO tribunals, through various case laws, have devised a detailed test to determine the meaning of ‘necessary’ under these provisions.¹¹⁵ This two-tier test, as adopted by WTO tribunals, includes a weighing and balancing process, followed by the determination of less trade-restrictive measures. This approach was adopted by the appellate body in *Brazil – Retreaded Tyres*.¹¹⁶ According to this approach, as held by the Appellate Body in *Brazil – Retreaded Tyre*:

a panel must assess all the relevant factors, particularly the extent of the contribution to the achievement of a measure’s objective and its trade restrictiveness, in the light of the importance of the interests or values at stake ... this result must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective.¹¹⁷

In a similar manner, WTO tribunals refer to three-step analysis as adopted by the Appellate Body in *Korea – Beef*.¹¹⁸ In this approach, the importance of measures adopted by the State,¹¹⁹ how such measures will contribute to achieving the intended goals set out by the State,¹²⁰ and the effects of such measures on trade and commerce are usually taken into consideration.¹²¹ After analysing these three factors, the WTO tribunals try to find out whether any alternative measure was available to the State. If so, the tribunals then determine if the alternative measure was realistic in achieving the intended goals set by the State.¹²² The importance of looking at alternative measures is so that the State is not allowed to take the defence of necessity if the alternative measure is found to be less restrictive on international commerce than the measure originally taken by the State.¹²³

The similarity between general exception provisions of BITs and the defence provided by Articles XX and XXI of the GATT are conspicuous, as these two

Barriers to Trade (1994, 1868 UNTS 120) arts 2.2, 12.3, 12.7; Agreement on Safeguards (1994, 1869 UNTS 154) art 5.1; Agreement on Government Procurement (1994, 1869 UNTS 508) art XXIII; General Agreement on Trade in Services (1994, 1869 UNTS 183) arts XII:2(d), XIV(a), (b) (c), XIV bis:1(b); Agreement on Trade-Related Aspects of Intellectual Property Rights (1994, 1869 UNTS 299) arts 8.1, 27.2, 39.3, 73(b).

¹¹⁵ Michael Ming Du, ‘The Rise of National Regulatory Autonomy in the GATT/ WTO Regime’ (2011) 14 *J Intl Economic L* 639, 672.

¹¹⁶ *Brazil – Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/AB/R, Appellate Body (2007) [*Brazil – Retreaded Tyres*].

¹¹⁷ *Ibid* para 178.

¹¹⁸ *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc WT/DS161/AB/R, Appellate Body (11 December 2000) para 161 [*Korea – Beef*].

¹¹⁹ *Ibid* para 162.

¹²⁰ *Ibid* para 163.

¹²¹ *Ibid*.

¹²² *Ibid*.

¹²³ *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R, Appellate Body (7 April 2005) paras 309–11 (*US – Gambling*).

articles provide for both general exceptions and security exceptions that are also usually covered under general exception provisions in BITs.¹²⁴ The approach of WTO tribunals has been consistent in applying the least restrictive alternative test involving exceptions as provided under Articles XX and XXI of the GATT.¹²⁵ Recent scholarly works have pointed out that the least restrictive alternative test is a more balanced approach since it harmonizes the conflicting interests of the disputing parties compared to the only means available test, which was adopted by the International Centre for Settlement of Investment Disputes against Argentina.¹²⁶ The GATT panel, in *US – Section 337*¹²⁷, explained the importance of the least restrictive alternative test in the following words:

A contracting party cannot justify a measure inconsistent with another GATT provision as 'necessary' in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.¹²⁸

The only investment arbitration case related to the Argentine crisis that has followed the approach of the WTO panels and Appellate Body while interpreting 'necessary' is the *Continental* case. As pointed out by scholars, the tribunal in the *Continental* case distanced itself from the no other alternative test and tilted in favour of the least restrictive alternative test.¹²⁹ By relying on WTO case law, the tribunal in this case justified measures taken by Argentina under the general exception clause in the US–Argentina BIT.¹³⁰ Working on the jurisprudence of the WTO tribunals, it framed the two-step approach to ascertain the meaning of necessary. First, it had to identify the contribution of the measure in achieving the intended goals, and, second, it had to determine whether there was any alternative measure available to the State, which, in turn, was more suitable to achieve the intended goals than the measure originally taken by the State.¹³¹

¹²⁴ Burke-White and von Staden (n 105).

¹²⁵ Alan O Sykes, 'The Least Restrictive Means' (2003) 70 U Chicago LR 403, 416.

¹²⁶ Mads Andenas and Stefan Zleptnig, 'Proportionality and Balancing in WTO Law: A Comparative Perspective' (2007) 20 Cambridge Rev Intl Affairs 71; Andrew D Mitchell, 'Proportionality and Remedies in WTO Disputes' (2006) 17 EJIL 985; Thomas Sebastian, 'World Trade Organization Remedies and the Assessment of Proportionality: Equivalence and Appropriateness' (2007) 48 Harvard ILJ 337.

¹²⁷ United States - Section 337 of the Tariff Act of 1930, Report by the Panel adopted on 7 November 1989, (L/6439 - 36S/345), available on <<https://www.wto.org/english/tratop/e-dispu/e/87tar337.pdf>> accessed on 12 July 2017.

¹²⁸ Andrew D Mitchell (n 126).

¹²⁹ Burke-White and Staden (n 105) 325.

¹³⁰ *Korea – Beef* (n 118); *Brazil – Retreaded Tyres* (n 116); *US Gambling* (n 123).

¹³¹ *Continental* (n 32) para 156.

It is argued here that the least restrictive alternative test should be applied to interpret necessary in general exception provisions; however, such reliance should be preceded by a weighing and balancing approach as adopted by various WTO tribunals. These two approaches, while maintaining their separate periphery, complement each other in the interpretation of necessary. Where the weighing and balancing approach provides us with the preliminary determination of the measure taken by the State, the least restrictive alternative test provides the confirmation of such a determination. Thus, this article argues that the least restrictive alternative test should be used to interpret necessary; however, this test must be preceded by the weighing and balancing test in order to ascertain a balanced outcome while interpreting necessary in general exception provisions.

Example from South Asia: new Indian Model BIT

In January 2016, India came up with its new Model BIT to review its current BIT regime and ISDS mechanism.¹³² The reasons that augmented the framing of this new Model BIT, as India already had a 2003 Model BIT, were the backlash from the *White Industries* case¹³³ and the growing number of ISDS cases against India after 2011.¹³⁴ The new Model BIT can certainly be said to be tilted in favour of the host State. This shift in approach by India can be easily understood with its confrontation with numerous ISDS cases after 2010. Some of the salient features of the new Model BIT are the inclusion of an enterprise-based definition of investment; the exclusion of a most-favoured-nation and fair-and-equitable-treatment provisions; the incorporation of the police power doctrine, among other tests, like sole effect and proportionality, to

¹³² Model Text for the Indian Bilateral Investment Treaty, Ministry of Finance, Government of India, <<http://pib.nic.in/newsite/PrintRelease.aspx?relid=133412>> accessed 16 February 2017.

¹³³ *White Industries Australia Limited v India*, UNCITRAL (30 November 2011) <<http://www.italaw.com/cases/1169>> accessed 13 February 2017 (*White Industries*). White Industries obtained an arbitral award in its favour in a contractual dispute with Coal India, an Indian public sector company, and sought enforcement of the award before the Delhi High Court. Simultaneously, Coal India approached the Calcutta High Court to have the award set aside, and the request was granted. White Industries appealed to the Supreme Court in 2004 and the final decision is still pending. In 2010, White Industries took the matter to arbitration on the grounds that the inordinate delay in Indian courts to enforce the arbitration award violates the India–Australia BIT (n 55). White Industries argued that the delay violated the provisions on fair and equitable treatment (FET), expropriation, MFN treatment, and free transfer of funds. The tribunal dismissed White Industries' allegations related to violation of the FET, expropriation and free transfer of funds. However, the tribunal ruled that India violated the MFN provision of the India–Australia BIT and awarded White Industries AUS \$4 million <<https://www.iisd.org/itn/2012/04/13/the-white-industriesarbitration-implications-for-indias-investment-treaty-program/>> accessed 15 January 2017.

¹³⁴ Prabhash Ranjan and Pushkar Anand, 'The 2016 Indian Model Bilateral Investment Treaty: A Critical Deconstruction' (2018) 38 NW J Intl L & Business (forthcoming) <<https://papers.ssrn.com/sol3/papers.cfm?abstractid=2946041>> accessed 15 May 2017.

determine indirect expropriation; full protection and security only for the physical protection of an investment and investors and not for any other obligations; the inclusion of both general and security exceptions in general exception provisions; the compulsory exhaustion of local remedies and some jurisdictional qualifications¹³⁵ in the ISDS clause; and so on.¹³⁶

Article 32 of this new Model BIT deals with the general exception clause.¹³⁷ This is a very detailed and exhaustive provision as it provides for a long list of permissible objectives that includes, *inter alia*, public morals, public order, human health and life, environment, and compliance with domestic laws.¹³⁸ An important feature of this provision is that it only uses 'necessary' as the NRL in the provision.¹³⁹ Another important feature of this clause is that it lays down the meaning of 'necessary'. It provides that 'necessary' means adopting a less restrictive measure in the footnote of the clause.¹⁴⁰ This shows the inclination of the Indian government towards the least restrictive alternative approach in determining whether a measure was 'necessary' or not. This may be a template as to how all South Asian countries should draft their BITs.

Before this new Model BIT came out in 2016, many Indian scholars had already argued that 'necessary' should be interpreted on the least restrictive alternative approach rather than on any other test.¹⁴¹ Ranjan argues that the least restrictive alternative approach is the right approach for interpreting 'necessary' in international investment agreements even before the new Model BIT came into the picture.¹⁴² This approach, however, is still missing from almost all South Asian BITs.

However, this adherence to only the least restrictive alternative approach without having reference to the weighing and balancing approach will lead to more complications as tribunals will only be concerned with the existence of alternative measures rather than looking into the intention behind the measure taken by the host State. In *US – Gambling*,¹⁴³ the Appellate Body, while

¹³⁵ The investor is allowed to bring a case against India only when the matter falls under chapter II of the Model BIT, which includes provisions such as full protection and security, national treatment, expropriation, monetary transfers, and compensation for losses. The investor cannot bring a case against India for the breach of any other provision in the BIT.

¹³⁶ Ibid.

¹³⁷ Model Text for the Indian Bilateral Investment <<http://indiainbusiness.nic.in/newdesign/upload/ModelBIT.pdf>> accessed 15 May 2017 (Indian Model BIT).

¹³⁸ Ibid art 32.

¹³⁹ Ranjan and Anand (n 133).

¹⁴⁰ Ibid n 6, in Indian Model BIT (n 136) art 32:

'In considering whether a measure is "necessary", the Tribunal shall take into account whether there was no less restrictive alternative measure reasonably available to a Party.'

¹⁴¹ Prabhash Ranjan, 'India's International Investment Agreements and India's Regulatory Power as a Host Nation' (PhD dissertation, King's College London, 2012); Amit Kumar Sinha, 'Non-Precluded Measures in Bilateral Investment Treaties of South Asian Countries: A Legal Study' (LLM thesis, South Asian Universities, 2015).

¹⁴² Ranjan (n 19); Ranjan (n 140).

¹⁴³ *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R, Panel Report (10 November 2004).

interpreting ‘necessary’ in Article XIV of the GATS, held that the weighing and balancing approach is inherent in the necessity analysis.¹⁴⁴ In this scenario, the State making default of the foreign investment will just have to prove that there was no alternative measure available to justify its default. This approach is inherently problematic. The term ‘necessary’ in itself requires the State to provide reasons for taking those measures that are in breach of international obligations. When we leave out the weighing and balancing approach, we inadvertently dilute the gravity of the term ‘necessary’ as NRL, and we also fail to distinguish justified regulatory measures from protectionist measures taken by States. Therefore, it is argued here that reliance on the least restrictive alternative approach should occur with the weighing and balancing approach.

Conclusion

This article concludes that by resorting to the least restrictive alternative approach, WTO dispute settlement bodies and tribunals, in the interpretation of ‘necessary’ clauses in BITs, have followed the right approach. One such possible methodology is discussed below. Dian Disertio’s argument is theoretically sound when she argues that the WTO and BITs represent two different regimes, and her suspicion that any attempt to conflate these two regimes might create problems is equally acknowledgeable.¹⁴⁵ However, in the case of a lack of explicit meaning of ‘necessary’ in the general exception provision of a treaty, Article 31(3)(c) of the VCLT—that is, ‘any relevant rules of international law applicable in the relations between the parties’—provides the right approach for tribunals to interpret ‘necessary’ in the treaty provision. If, in this approach, tribunals use the help of the WTO’s jurisprudence, it does not make the approach of the tribunals, *ipso facto*, unsound. It is surprising that Disertio, while rejecting Article 25 of the ILC’s Articles on State Responsibility as a proper interpretative tool, accepts that it can be considered as any relevant rule of international law. However, her analysis in regard to the WTO regime does not undertake any such evaluation of Article 31(3)(c).¹⁴⁶ Therefore, it is submitted that GATT/WTO jurisprudence can be used as an interpretative tool while interpreting ‘necessary’ in treaty exceptions under the authority of Article 31(3)(c) of the VCLT, provided that the correct methodology is followed.

It is suggested here that tribunals, while dealing with the question of interpretation of necessary, should look into whether there was a less restrictive measure available to the State in place of trying to find out the equilibrium between benefits of the measure and its effect on investment.¹⁴⁷ The availability of less restrictive measures means the original measure was not necessary, and, thus, the State cannot take the defence of necessity under general

¹⁴⁴ *US – Gambling* (n 123) para 306.

¹⁴⁵ Disertio (n 51).

¹⁴⁶ *Ibid.*

¹⁴⁷ *Burke-White and Staden* (n 2) 325.

exception provisions. Also, the absence of the explicit meaning of necessary in general exception provisions in BITs will certainly drive the tribunal to look for the meaning of necessary in related regimes like the WTO. Thus, in BITs signed by South Asian countries, necessary should be interpreted along the lines of jurisprudence developed by WTO case law for interpreting necessary. It is emphasized here that this approach is suitable for South Asian countries as it harmonizes the interests of the State with the interests of the investor by providing a balance between the State's right to regulate and excessive restriction on investments. With this approach, tribunals will focus more on the availability of less restrictive measure with States rather focusing on the intent of the State behind the regulatory measure.¹⁴⁸ This approach would be more objective in nature in comparison to ascertaining the intent of the State behind the regulatory measure, which is highly subjective. In this scenario, this approach is beneficial for South Asian countries as a question of the impact of any measure on investment will be zeroed in on the availability of less restrictive measures than the subjective intent behind the regulatory measures of these countries.¹⁴⁹

South Asian countries contain a necessary NRL in 32 BITs. This NRL inflicts high standards for States to vindicate their right to regulate in cases of default of foreign investments. It is clear that of the 190 BITs, only 32 BITs contain this NRL. The absence of necessary NRLs from South Asian BITs would mean that these countries will not have to justify the conditions of necessary during emergency situations. Thus, it is suggested here that South Asian countries may avoid the inclusion of necessary in the general exception provisions of BITs, which will, in turn, give them more regulatory sphere. However, at the same time, it is very important to maintain the balance between the interests of States and the interests of investors. These countries should ensure this balance while avoiding necessary in their BITs.

¹⁴⁸ Ranjan (n 19) 50.

¹⁴⁹ Sinha (n 9).

Trade, Law and Development

Amit Kumar Sinha, *Locating Women in
Indian Investment Agreements*
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LOCATING WOMEN IN INDIAN INVESTMENT AGREEMENTS

AMIT KUMAR SINHA*

The cognisance of gender concerns is vital when contemplating policies to improve the socio-economic climate and stimulate growth. The primary purpose of this study is to locate women in structural and normative frameworks of the Indian Investment Agreements (IIA). It enables us to identify gender issues persisting in IIA due to the lack of any study and propose relevant reforms. The position of women in IIA due to the lack of extensive study and a considerable gap in the literature has been mostly unknown. Women are an important driver of socio-economic development. Creating greater socio-economic opportunities for women has compelling reasons, and inequalities impose development costs on societies. Hence, this study shall be significant as it will be the first detailed study to map women and examine Indian laws and policies from a gender neutrality perspective. This inquiry will pave the roadmap for a more gender-inclusive and responsive IIA.

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I. INTRODUCTION

This article studies Indian Investment Agreements (IIAs) and how women are positioned in the structural and normative frameworks of such agreements. The scope of IIAs in this article is limited to studying the Indian Parliament, Bureaucracy, and Judiciary for an inquiry into the structural framework of IIAs. The article studies the normative content of IIAs concerning their gender neutrality (language), gender blindness, etc. This study will enable us to evaluate the tenets of IIA concerning gender issues and, if required, pave the roadmap for a more gender-inclusive Indian legal system. As Brooks writes “[w]e need to map the silences and fill them”.¹ To borrow the words of Charlesworth and Chinkin, an “archaeological digging” shall be done into different layers of IIA.² In the absence of any study, the question of whether IIA requires gender reforms and to what degree cannot be answered. The general trend is that international law side-lines women;³ it would be hard to believe that IIA acts any differently. Investigation of the structural and normative content of IIA on gender issues will enable us to identify problems and provide possible venues for gender reforms. In this regard, the employment of feminist analysis and methods like asking women questions, raising consciousness etc., shall help present the experiences of women as participants and stakeholders in IIA. This, in turn, shall be another step towards greater gender inclusiveness. Women as decision-makers and policymakers and the representation of women in IIAs are different matters but profoundly intertwined. Women in decision-making positions at the IIA law-making level can bring more gender-inclusive law and policy frameworks which, in turn, would help the women who are subject to these laws and policies.

Before any inquiry into IIA is made, let us take the privilege to provide the reader with a glimpse of the international legal sphere. Despite being addressed as quite progressive and women’s rights-oriented⁴, the situation at the international level is no better.

¹ Rosa Ehrenreich Brooks, *Feminism and International Law: An Opportunity for Transformation*, 14 YALE J.L. & FEMINISM 345, 352 (2002).

² HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 349 (2000).

³ *Id.* at 173.

⁴ Some instances of progressive attitudes could be found in global commitments made by states, like World Conference on Human Rights, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/24 (Part I), chap. III (1995); Report of the Fourth World Conference on Women, *Beijing Declaration and Program in Action*, U.N. Doc. A/CONF.177/20/Rev.1, chap. I, Res. I, annexes I and II; U.N. Conference on Sustainable Development Rio 20; Millennium Development Goals, etc.

Women's first interaction with international law is generally associated with the meeting of the International Congress of Women in 1915 in The Hague and its call for the peaceful settlement of disputes.⁵ Since then, much has been said and written about the role and status of women and why their active participation in all spheres of the international legal system is relevant and important. However, the study of women as participants in international law-making offers a completely different picture. As of December 2015, women's representation at the high management level (D-2 and above)⁶ in the United Nations (UN) system ranges from a dismal ~27% to ~30%.⁷ From its establishment in 1945 to date, there has not been a woman Secretary-General of the UN.⁸ This pattern of underrepresentation of women at the senior management level can be observed across all UN agencies barring a few.⁹

Even in International Tribunals and Courts, women are underrepresented. For example, as of May 2020, the International Court of Justice (ICJ) has three women judges making their overall percentage on the bench to 20%.¹⁰ International Law Commission (ILC) had its first woman member in 2001 after almost more than fifty years of its establishment.¹¹ As of September 2019, ILC has four female members in the body of a total of thirty-four members which is around 12% of the total strength. In the ILC's history of seventy years, only seven female members have ever been part of the ILC.¹² This quick analysis of international bodies reveals a highly skewed

⁵ B. S. CHIMNI, *Feminist Approaches to International Law: The Work of Hilary Charlesworth and Christine Chinkin*, in INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES 358 (2d ed. 2017).

⁶ D-2 refers to senior level professionals. There are senior appointments like Secretary General, Director General, etc. which constitute some of the top positions at UN.

⁷ For date of contract of one year or more, see U.N. Women, Status of Women in the United Nations System, (2016), <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2016/Status-of-women-in-the-United-Nations-system-2016-en.pdf>.

⁸ Department of Economic and Social Affairs, The World's Women 2015 Trends and Statistics, 130 (2015), https://unstats.un.org/unsd/gender/downloads/WorldsWomen2015_report.pdf.

⁹ *Id.*

¹⁰ *Current Members*, INTERNATIONAL COURT OF JUSTICE, <https://www.icj-cij.org/en/current-members>.

¹¹ U.N. Office of Legal Affairs, Opening Remarks by Mr. Miguel de Serpa Soares (May 24, 2018), https://legal.un.org/ola/media/info_from_lc/mss/speeches/MSS_ILC70_gender_side_event-24-May-2018.pdf.

¹² Christiane Ahlborn & Bart Smit Duijzentkunst, *70 Years of the International Law Commission: Drawing a Balance for the Future*, OPINIO JURIS (May 3, 2018), <http://opiniojuris.org/2018/05/03/70-years-of-the-international-law-commission-drawing-a-balance-for-the-future/>.

gender ratio in favour of men. This leads to perpetuation of an androcentric worldview and decision-making. This bias does not only manifest itself in terms of relegating female issues to a lesser degree of importance but also side-lining the normative female experiences.¹³ The paternalistic attitude adopted in gender-focused policies is a form of benevolent sexism, which is found to be harmful to the cause of women's empowerment.¹⁴ Therefore, there is a need to have more women at the decision-making table.¹⁵ Despite its apparently progressive nature, international legal structures and norms have failed women. The normative content of international law is no less worrisome vis-à-vis the status and position of women. Despite having a rich body of international human rights instruments which aim to protect the rights of women, discrimination against women persists in all spheres of their lives. Against this background, due to inadequate studies, the status and position of women under the structural and normative content of IIAs is unknown.

Therefore, the examination of the position of women in the structural and normative framework of IIAs and how IIAs may render gender-blind, if not gender-biased, norms, and policies in the absence of participation of women is necessary.

For this article, the study of IIAs shall be divided into structural and normative parts. The structural part shall include mapping of women in law-making bodies like the Parliament of India, the executive branch, the Judiciary, and Academia. The normative part shall include an analysis of IIAs followed by suggestions for reforms which cater to the concerns of women through IIAs.

II. ANALYSIS OF STRUCTURAL CONTENT OF IIA

Women's movement and their struggle for equal rights and status are centuries old. According to Fraser, it is a struggle for gender equality and inclusion in social, political, and economic spheres mostly dominated by men.¹⁶ According to Deborah Rhode, it challenges existing ideological and institutional structures and distributions

¹³ The conformity bias often leads to the minority, primarily consisting of women, agreeing with the majority, dominated by men. Therefore, to enable women to voice their concerns, their representation in the aforesaid bodies matters.

¹⁴ Peter Glick & Susan T. Fiske, *An Ambivalent Alliance: Hostile and Benevolent Sexism as Complementary Justifications for Gender Inequality*, 56(2) AM. PSYCHOLOGIST 109, 112 (2001).

¹⁵ Tam O'Neil & Pilar Domingo, *The Power to Decide: Women, Decision-Making and Gender Equality*, <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9848.pdf>. Decision making here refers to ability to influence decisions in all spheres of public and private activities; for example, law making, policy making, or judicial activities etc. It includes formal access to positions of authority and to decision making processes. It is a combination of capabilities, access and actions that influence law and policy making.

¹⁶ Arvonne S. Fraser, *Becoming Human: The Origins and Development of Women's Human Rights*, 21(4) HUM. RTS. Q. 853, 859 (1999).

of power.¹⁷ A more responsive legal system for bringing social change to gender-related power issues is one of the important goals of the women's movement.¹⁸

In India, equal opportunities for women still look like a far-flung dream. The invisibility of women from law/policy-making bodies, unequal pay, poor literacy rate and struggle to have property rights are some examples of these struggles.¹⁹ As explained above, feminism demands such opportunities through its various schools; however, there is another very convincing argument that calls for equal opportunities for women. This results from the demand for diversity. But, why is diversity important? Some of the arguments entail that it helps in avoiding cognitive biases and decision-making fairer.²⁰ Diversity brings sociological legitimacy to decision-making which, in the absence of diversity, may be seen as a biased decision.²¹ Although, most of these arguments are made in the context of adjudicatory processes, they are also true in any other field of decision-making. The article shall discuss this aspect while studying various public structures.

A. Parliament

The Parliament of India passes laws which apply to every subject of the Indian Republic. Debates and discussions on such laws take place in the two houses of the Parliament, the Upper House and the Lower House, apart from a few external consultations if desired or necessary. This means even the laws which directly affect the interest of women in India are made by the Parliament. The question that arises here is whether women are sufficiently represented in the Parliament, enabling them to participate in discussions and play an active role in lawmaking or, whether the majority consists of men who end up making laws for women in India.

A study on the gender-wise representation in both houses of the Parliament shows that the 17th Lower House (Lok Sabha) consisting of 539 seats has only eighty-one

¹⁷ Deborah L. Rhode, *Feminist Critical Theories*, 42(3) STAN. L. REV. 617, 619 (1990).

¹⁸ Dianne Otto, *Feminist Approaches to International Law*, in THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 8 (Anne Orford & Florian Hoffman eds., 2016).

¹⁹ Kishor Parashramji Brahmapurkar, *Gender Inequality in India Hit by Illiteracy, Child Marriages and Violence, A Hurdle for Sustainable Development*, 28 PAN AFR. MED. J. 178 (2017); Nilanjana Chakraborty, *What Is Gender Pay Gap and Why Is It So Wide in India?*, MINT (Dec. 3, 2019), <https://www.livemint.com/money/personal-finance/what-is-gender-pay-gap-and-why-is-it-so-wide-in-india-11575356633900.html>; *Win for Daughters: But More Needed to Ensure Women's Property Rights*, TIMES OF INDIA (Jan. 21, 2022), <https://timesofindia.indiatimes.com/blogs/toi-editorials/win-for-daughters-but-more-needed-to-ensure-womens-property-rights/>.

²⁰ WON KIDANE, THE CULTURE OF INTERNATIONAL ARBITRATION 145 (2017).

²¹ Andrea K. Bjorklund et al., *The Diversity Deficit in International Investment Arbitration*, J. WORLD INVEST. TRADE 410, 413 (2020) [hereinafter Bjorklund et al.].

seats represented by women which translates into around 15% of the total strength of the House.²² The Upper House (Rajya Sabha), until August 2020, had twenty-five women representatives out of 245 total seats making it around 10% of the total strength.²³ This situation reflects that women-related laws are mainly made by men in India, and women do not have the number to overturn the decisions made by men. Efforts have been made to introduce the Women's Reservation Bill which ensures a certain number of seats for women in the Parliament. However, it has been pending for the last twenty-seven years.

This analysis presents a grave picture of inequalities persisting in the law-making processes. The absence of women, who constitute around half of the population in India, perpetuates and nurtures prejudices and creates an unequal distribution of sources prompting social injustices and more. Not only in terms of women-related laws but in also cases of international importance including participation in debates on international matters, a meagre number of women in debates and discussions may render their small presence invisible or lost to the overwhelming number of their male counterparts. In such situations, male biases and prejudices can hardly be balanced. Various studies have shown that the political inclusion of women is good for democracy.²⁴ Participation of all in a democracy is desired to question unfair and unequal power dynamics.²⁵ UN Commission on Women has argued that the "[a]bsence of women from leadership positions undermines democracy and decision making".²⁶

It is suggested that more and more women should be encouraged to participate in political processes. It is incumbent upon the state machinery to ensure that the aforementioned barriers are removed or diluted considerably allowing women to be a part of political processes.

B. Bureaucracy

The uppermost law-making body in India, as explained above, presents a disappointing picture of women's equality. The Parliament makes the law and the

²² GENDER-WISE REPRESENTATION OF MEMBERS, <https://sansad.in/lm/members>.

²³ Tara Krishnaswamy, *Female Parliamentarians at a Historic High, but Parties Must Do More*, THE WIRE (Aug. 11, 2020), <https://thewire.in/women/women-parliament-lok-sabha-rajya-sabha-political-parties>.

²⁴ Elizabeth Asiedu et al., *The Effect of Women's Representation in Parliament and the Passing of Gender Sensitive Policies*, 2 (2018), <https://www.aeaweb.org/conference/2018/preliminary/paper/an5yEb5h>.

²⁵ *Id.*

²⁶ Press Release, Economic and Social Council, Absence of Women from Leadership Positions Undermines Democracy, Commission on Status of Women Told, U.N. Press Release WOM/1541 (Feb. 28, 2006).

bureaucracy implements it. In India, government services are divided into three main services namely, All India services, central group services and state (provincial) services.²⁷ All India services include the Indian Administrative Service (IAS), Indian Forest Service (IFoS) and Indian Police Service (IPS).²⁸ The struggle for women to be a part of these coveted services was not easy. Married women were not allowed to join the IAS in the initial years of Indian independence and in the event of their marriage during service, they were to resign from the office.²⁹ Married women were only allowed to join the services after 1971 with the rule of maternity leave.³⁰ Women, whether married or not, were barred from recruitment in IPS till 1971.³¹ It was only in 1972 that a woman entered the IPS service. Entry of women into IFoS was also very late; it was in 1980 that the first woman entered this service.³² Although the rule relating to married women not allowed being IAS officers was removed, the mindset of the organisation remained the same that certain jobs are not for women.³³

Till 2019, out of 5205 IAS officers, only 935 were women IAS officers.³⁴ This makes the total strength of women officers just around eighteen per cent of the total IAS cadre. Till January 2022, out of ninety-two Secretaries, only thirteen have been women.³⁵ As of December 2021, counting all the states and UTs, there were only two women chief secretaries. As of January 01, 2020, there were only four women officers in the Legal and Treaty Division of the Ministry of External Affairs.³⁶ As per the analysis done by Surabhi Bhatia and Akshi Chawla, out of 11569 IAS officers only 1527 have been women between 1951 and 2020.³⁷

At present, there is no reservation for women in All India Services.³⁸ The entry is only based on merit, despite all the challenges and social obstructions for women in Indian society. Implementation of policies and laws which affect women's interests

²⁷ Jayasheela George, *Women in Administration in India*, 12(1) J. WOMEN'S STUD. 151–156 (2011).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Surbhi Bhatia & Akshi Chawla, *Why There Have Been So Few Women in India's Administrative Services*, INDIA SPEND (Jan. 5, 2022), <https://www.indiaspend.com/gendercheck/why-there-have-been-so-few-women-in-indias-administrative-services-795991> [hereinafter Bhatia & Chawla].

³⁴ On file with the author.

³⁵ Bhatia & Chawla, *supra* note 33.

³⁶ On file with author received through RTI.

³⁷ Bhatia & Chawla, *supra* note 33.

³⁸ Santosh Goyal, *Social Background of Officers in the Indian Administrative Service* (1989), <http://103.82.220.134/pdf/santosh1.PDF>.

and under-representation of women in decision-making are intertwined. The Beijing Declaration³⁹ and Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁴⁰, both called for equal participation of women in public life, administration and decision-making.⁴¹

Notably, in the context of IIAs, where most of the negotiating teams from India mainly consist of men due to their sheer number, it is less likely that women will be able to negotiate terms of IIAs which are women-friendly and resonates with them well in terms of gender parity.

C. Judiciary

The Parliament makes the law; the bureaucracy implements it, and the judiciary enforces it. Most of the women-related matters in courts are heard by men. It is simply because women do not occupy such positions in equal numbers. A study has concluded that gender stereotyping is the reason for the lower representation of women in the judiciary.⁴² Equal representation of women in the judiciary has many benefits. The legitimacy of adjudication and inspiration for the next generation of female judges are some of the benefits to mention.

As of April 2022, the Supreme Court of India had thirty-two judges out of which only four were women judges. There are 25 High Courts in India each having complete jurisdiction over a province or more. Data portrays a sad state of affairs in terms of gender diversity in our constitutional courts. Of the total seats occupied in the Supreme Court and various High Courts, both known as constitutional courts, only around 12% is occupied by women.

The overall analysis of the Indian judicial system presents how it has dealt with the issue of gender diversity immaturely, and this utterly problematic picture must be rectified as soon as possible. Andrea Bjorklund writes that diversity is important because it ensures that at least one adjudicator can understand the dispute's cultural

³⁹ *Report of the Fourth World Conference on Women, Beijing*, ¶¶ 165(k)-343, UN Doc. A/CONF.177/20/Rev. 1, Annex II (1996).

⁴⁰ See Convention on the Elimination of All Forms of Discrimination against Women, Preamble, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981.

⁴¹ U.N. Development Programme, *Global Report on Gender Equality in Public Administration* (Jul. 8, 2021).

⁴² INT'L COMM'N OF JURISTS, WOMEN AND THE JUDICIARY 3 (2013), <https://www.icj.org/wp-content/uploads/2014/10/Universal-Women-and-Judiciary-Gva-For-1-Publications-Conference-Report-2014-ENG.pdf>.

or social context.⁴³ As mentioned earlier, diversity ensures avoiding cognitive biases and group thinking at the bench.⁴⁴ Diversity may also improve the quality of decision-making and increase the normative legitimacy of the decisions.⁴⁵ Also, feminist scholars have argued that female judges interpret laws from a different perspective and may seek a different outcome from their male counterparts.⁴⁶ They argue that women, due to their experience, contextualise matters in a legal dispute, unlike their male judges, who decide cases on abstract reasoning.⁴⁷

Any dispute relating to foreign investment in India, where matters relating to human rights or women's rights are involved, will fare better if female judges, who can contextualise the experiences of women, preside to decide the case. Unfortunately, the few women judges lack training in such matters. This makes the case harder for the local population. They suffer due to the negative impact of foreign investments in India like deprivation of land rights, displacement from ancestral lands or exploitation of various forms etc.

The overall analysis of this chapter disillusiones the author and readers alike. Public legal institutions in India are a mockery in the face of gender equality. Women are mostly invisible from the structural framework of IIA. This absence would mean most of the positions at senior or decision-making levels are occupied by men. The men at the highest levels of decision-making act in self-interest; therefore, more men would mean lesser women-related or gender-sensitive policies or norms, etc. shall be formulated.⁴⁸ Therefore, the absence of women from the structural framework of IIA is probably the main reason for the gender-biased decision-making processes or lack of gender-sensitive policies or norms in IIAs. This analysis calls for a strong case of gender parity in structural frameworks of IIA, particularly at senior management or decision-making levels.

⁴³ Andrea Kay Bjorklund, *The Diversity Deficit in Investment Arbitration*, EUR. J. INT. L. (April 4, 2019), <https://www.ejiltalk.org/the-diversity-deficit-in-investment-arbitration/> [hereinafter Bjorklund 2].

⁴⁴ *Id.*

⁴⁵ Bjorklund et al., *supra* note 21, at 413.

⁴⁶ Coontz P., *Gender and Judicial Decisions: Do Female Judges Decide Cases Differently Than Male Judges?*, 18 GENDER ISSUES 59, 71 (2000).

⁴⁷ *Id.*

⁴⁸ James M. Buchanan, *Public Choice: Politics without Romance*, (2013), <https://www.cis.org.au/app/uploads/2015/04/images/stories/policy-magazine/2003-spring/2003-19-3-james-m-buchanan.pdf>; William N. Eskridge, Jr, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VIRGINIA L. REV. 275 (1988). The inspiration has been taken to analysis how people at decision-making work in self-interest.

III. GENDER NEUTRALITY UNDER NORMATIVE CONTENT OF IIA

This study argues, in the subpart above, that number matters. It concludes that equality in terms of number will be hopeful for gender justice. However, as of today, when numbers are nowhere near the halfway mark, analysis of gender neutrality and gender blindness of investment agreements in India will enable us to understand gender awareness and the sensitivity of IIAs. It must be reminded to the readers that this is in no way a critique of the content of IIAs but only an analysis of gender neutrality or blindness of laws. Gender neutrality here refers to “not being associated with men or women . . . in the style of language”.⁴⁹ The term gender-blind has been used to identify the laws that are silent on issues concerning women. Most of the IIAs do not utilise gender-non-neutral language. However, it is important to remember that these bilateral investment treaties (BITs) are from an earlier age.⁵⁰ The BITs and free trade agreements (FTAs) that India has signed since 2015 are gender-neutral and include some significant provisions for women.⁵¹ This is a step in the right direction toward developing more gender-sensitive and balanced BITs.

India-Brazil BIT (2020) in its Article 4.1 provides for the following provision:

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 . . .⁵² (emphasis supplied)

A similar provision has been provided under Articles 3 of India-Belarus BIT and India-Kyrgyzstan BIT. In the global context, the BITs between Brazil and UAE,⁵³

⁴⁹ Department of Economic and Social Affairs, Integrating a Gender Perspective into Statistics 192 (2016), <https://unstats.un.org/unsd/genderstatmanual/Glossary.ashx>.

⁵⁰ E.g., India-UK BIT.

⁵¹ See, e.g., Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, Braz.-India, Jan. 25, 2020 [hereinafter India – Brazil BIT]; Bilateral Investment Treaty between the Government of Kyrgyz Republic and the Government of Republic of, Kyrg.-India, June 14, 2019; Treaty between the Republic of Belarus and the Republic of India on Investments, Belr.-India, Sep. 24, 2018.

⁵² India – Brazil BIT, *supra* note 53, art. 4.1.

⁵³ Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and the United Arab Emirates, Braz.-U.A.E., art. 4.2 (iii), Nov. 12, 2018.

Brazil and Guyana⁵⁴, and Serbia and Turkey⁵⁵ also contain similar provisions for investor protection on the ground of gender discrimination.

According to a UNCTAD report, the increased representation of women at senior policy-making levels, advocacy campaigns about the benefits of gender equality, increased gender awareness research carried out by international organisations and academia, and the widely held belief that inclusive development that equally distributes its benefits will last for a long time are the reasons for these positive developments.⁵⁶

The addition of safeguards against discrimination other than based on nationality is another crucial consideration, as is seen in the current generation of BITs. For instance, the BIT between India and Brazil prohibits discrimination based on gender, ethnicity or religion.⁵⁷ Investors will be safeguarded in this way not just against nationality-based discrimination but also against other types of prejudice such as gender, religion, etc.

Nonetheless, in contrast to some new-generation trade agreements,⁵⁸ with a few notable exceptions, new-generation Indian BITs or investment agreements do not include extensive sections addressing gender or women's problems. The author was unable to locate any BITs that provided for the protection of gender in IIAs or the appointment of a diverse group of arbitrators in Investor State Dispute Settlement (ISDS) procedures.

However, there have recently been a few encouraging developments. India's future BITs can be written using a better model such as the one provided by the 2019

⁵⁴ Cooperation and Investment Facilitation Agreement between the Federative Republic of Brazil and the Co-operative Republic of Guyana, Braz.-Guy., art. 4.1 (iii), Dec. 13, 2018.

⁵⁵ Agreement between the Government of Republic of Serbia and the Government of the Republic of Turkey on Mutual Promotion and Investment Protection, Serb.-Turk., art. 3.3 (g), Jan. 30, 2018.

⁵⁶ U.N. Conference on Trade and Development, *The New Way of Addressing Gender Equality Issues in Trade Agreements: Is it a True Revolution?*, Policy Brief No. 53 (Oct. 2017), https://unctad.org/en/PublicationsLibrary/presspb2017d2_en.pdf.

⁵⁷ Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, India-Braz., art. 4.1, Jan. 25, 2020.

⁵⁸ Chile-Uruguay Free Trade Agreement, ch. 14, arts. 14.1, 14.2, Oct. 4, 2016; African, Caribbean and Pacific Group of States-European Union Partnership Agreement, Preamble and arts. 1, 9, 11, 20, 25, 31 and 31a, June 23, 2000; Caribbean Forum States-European Union Economic Partnership Agreement, ch. 5, art. 191, Oct. 2008.

Netherland Model BIT (NMB).⁵⁹ The NMB's Article 6 addresses sustainable development.⁶⁰ The contracting parties are required by Clause 3 of this Article to recognise the contribution of women to economic growth as well as the inclusion of a gender perspective for inclusive economic growth.⁶¹ Additionally, it states that parties to contracts must take down obstacles to women's economic involvement and the crucial part that gender-responsive policies may play in achieving sustainable development.⁶² To ensure women's involvement in the economy, it also stipulates that contractual parties must work together and support one another.⁶³ Any discrimination against an investor based on their gender is prohibited by the BIT's fair and equitable treatment (FET) clause, according to Article 9(2).⁶⁴ According to Article 20(2), the appointing authority must take gender and regional diversity into account when choosing arbitrators for the tribunal.⁶⁵

There is a need to have more gender-inclusive investment agreements. Most of these agreements often ignore the concerns of half the population while framing issues and policies. Even when some token provisions are made part of these agreements, women are mostly kept out of the decision-making processes. The overall gender analysis of the structural and normative framework of the IIA regime is disappointing. Women are mostly underrepresented in the structural framework of the IIA and issues concerning women in investment agreements are barely addressed.

IV. SUGGESTIONS AND REFORMS

A. Performance Requirement and Procurement Policy

Even though foreign direct investment (FDI) has advantages for host countries, it may not necessarily support such countries' developmental objectives.⁶⁶ In these circumstances, performance requirements (PR) may be able to assist the state in balancing some of its interests with those of foreign investment. PRs are instruments

⁵⁹ U.N. Conference on Trade and Development, *Netherlands Model Investment Agreement* (March 22, 2019), <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download>.

⁶⁰ *Id.*, art. 6.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*, art. 9(2).

⁶⁵ *Id.*, art. 20(2).

⁶⁶ Suzy H. Nikiéma, *Performance Requirements in Investment Treaties*, INT'L INSTITUTE FOR SUSTAINABLE DEV. (2014), <https://www.iisd.org/system/files/publications/best-practices-performance-requirements-investment-treaties-en.pdf>. [hereinafter Nikiéma].

in the form of demands placed on foreign investors to fulfil certain objectives while conducting business in the host nation.⁶⁷ However, using PRs might occasionally be considered ineffective.⁶⁸ The Washington Consensus concluded that the employment of PRs was harmful to investment and commerce.⁶⁹ Consequently, several of the agreements that the United States and Canada have signed forbid PRs.⁷⁰ The predominant strategy is for states to employ PRs to promote their legitimate non-economic interests, despite such a restrictive practice. The WTO's Agreement on Trade-Related Investment Measures (TRIMs), which forbids some PRs under its provisions 2.1, also adopts this strategy.⁷¹

Resultantly, governments may make good use of PRs to achieve gender parity and safeguard the legitimate interests of women. For instance, nations can impose PRs on foreign investors that include preferences for hiring women, local content requirements up to a particular percentage from women-owned businesses, training programs for women, and technology transfer to women-owned industries, among other things. However, it is equally essential that governments employ such a tool sensibly and without undermining the goal of their IIA duties.

B. *Dispute Settlement*

Despite the fact that investments and investors are protected by investment agreements (IAs), investors are nevertheless obligated to uphold human rights duties under the relevant host state legislation.⁷² Consequently, the ISDS tribunal may need to consider claims that the investor violated the relevant laws of the host nations with regard to human rights notwithstanding its restricted authority.⁷³ The tribunal may only grant the host state's counterclaim over human rights if the IA's dispute

⁶⁷ *Id.*

⁶⁸ See World Bank Guidelines on the Treatment of Foreign Direct Investment, Guideline II (3), 31 ILM 1363, (1992); UNCTAD, World Investment Report, 112 (2014), https://unctad.org/system/files/official-document/wir2014_en.pdf; C. Fontheim & M. Gadbaw, *Trade Related Performance Requirements Under the GATT-MTN System and US Law*, 14 L. & POL'Y INT'L BUS. 129, 139 (1982); M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 114 (2017).

⁶⁹ Nikièma, *supra* note 66, at 1.

⁷⁰ See Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, Can.-China, art. 9, Sep. 9, 2012; U.S.-Ukraine BIT, art. 2.6, March 4, 1994; North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289, art. 1106 (1993).

⁷¹ Nikièma, *supra* note 66, at 7.

⁷² Eric De Brabandere, *Human Rights and International Investment Law*, in RESEARCH HANDBOOK ON FOREIGN DIRECT INVESTMENT 619 (Markus Krajewski et al. eds., 2019) [hereinafter Brabandere].

⁷³ *Id.* at 620.

resolution provision is sufficiently inclusive to include all investment-related problems without restriction.⁷⁴ However, the tribunal may not permit the transformation of investment issues into human rights problems.⁷⁵ Additionally, the balancing requirements may be met by including particular clauses in IIAs that correspond to the responsibility of investors with regard to human rights on the territory of the host state. Such wording is present in a number of model investment agreements and free trade agreements, and it also puts human rights duties on investors.⁷⁶ The problem of regulatory chill is another crucial element that cannot be disregarded.⁷⁷ Due to a lack of regulatory space offered by IAs or concern over foreign investors bringing ISDS suits in circumstances of state involvement, it is a situation where states choose not to take action against the investor while being aware of the investor's violation of human rights. Therefore, it is crucial that states have sufficient room for regulation through general exception provisions or any other IIA rules.⁷⁸

In order to balance economic and non-economic interests, Petersmann has passionately campaigned for the adoption of "balancing principles" by regional tribunals like the European Court of Human Rights (ECHR).⁷⁹ The goal of the

⁷⁴ Patrick Dumberry & Gabrielle Dumas-Aubin, *When and How Allegations of Human Rights Violations Can Be Raised in Investor-State Arbitration*, 13(3) J. WORLD INVEST. & TRADE 349, 360 (2012).

⁷⁵ Brabandere, *supra* note 72, at 629.

⁷⁶ See Trade and Gender in Free Trade Agreements: The Canadian Approach, GOV. OF CANADA, https://www.international.gc.ca/trade-commerce/gender_equality-egalite_genres/trade_gender_fta-ale-commerce_genre.aspx?lang=eng; Netherlands model Investment Agreement, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download>.

⁷⁷ For more literature on regulatory chill, see Kyla Tienhaara, *Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement*, 7 TRANSNAT'L ENVIRON. L. 229 (2018); K. Tienhaara, *Regulatory Chill and the Threat of Arbitration: A View from Political Science*, in EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 606, 615 (C. Brown et al. eds., 2011); K. Cooper et al., *Seeking a Regulatory Chill in Canada: The Dow Agrosciences NAFTA Chapter 11 Challenge to the Quebec Pesticides Management Code*, 7(1) GOLDEN GATE UNIV. ENVIRON. L. J. 5 (2014); L. Gruszczynski, *Australian Plain Packaging Law, International Litigations and Regulatory Chilling Effect*, 5(2) EURO. J. RISK REGULATION 242, 244 (2014); C. Côté, *A Chilling Effect? The Impact of International Investment Agreements on National Regulatory Autonomy in the Areas of Health, Safety and the Environment*, LONDON SCHOOL OF ECON. (2014).

⁷⁸ Amit Kumar Sinha, *Non-Precluded Measures Provisions in Bilateral Investment Treaties of South Asian Countries*, 7(2) ASIAN J. INT'L L. 227, 228 (2017).

⁷⁹ Ernst-Ulrich Petersmann, *Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society*, 19(3) LEIDEN J. INT'L L. 633 (2006).

balancing principle is to balance out the competing norms by weighing one against the other.⁸⁰ As a result, it is necessary to investigate the balancing principle and the extent to which the ECHR-developed version of the concept can be useful. How the ECHR applies human rights principles to its interpretation of European Economic Community Law (EEC law) may be instructive in the context of the current study.⁸¹ The assertion that fundamental rights are part of EEC law appeared first in the *Stauder* case.⁸² In this case, by resorting to the middle path, the court decided that the recipient of subsidised butter did not need to disclose their name without questioning EEC law's validity.⁸³ This balancing approach, although, was criticised by Habermas as reducing relationships between rights to policy arguments;⁸⁴ nonetheless, it may be proved to help decide cases involving trade-gender linkages. It is essential to note that human rights concerns, including gender issues, are understood to be embedded in economic regulation rather than being considered an external factor.⁸⁵ This subtlety resonates with Ruggie's "embedded liberalism", which proposes that the ultimate goal of international economic order is the welfare of people.⁸⁶ While weighing economic rights against non-economic rights, like gender, the ISDS courts must pay close attention to the preservation of individual rights. Therefore, a host state must be permitted to vary from its responsibilities under International Economic Law (IEL), and such deviation must be weighed against the economic measure in issue by the international courts. This is because if a host state has a reasonable concern that an economic measure may harm women in its country in any way, it must be allowed to do so.

In addition, gender diversity on the bench is another important issue that must be addressed. In ISDS disputes, the adjudicators on tribunals are often men.⁸⁷ Diversity

⁸⁰ Bart Van der Sloot, *The Practical and Theoretical Problems with Balancing: Delfi, Coty and the Redundancy of the Human Rights Framework*, 23(3) MAASTRICHT J. EURO. & COMP. L. 439 (2016).

⁸¹ Bruno De Witte, *Balancing of Economic Law and Human Rights by the European Court of Justice*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 198 (Pierre-Marie Dupuy et al. eds., 2009).

⁸² Case 29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419.

⁸³ *Id.*

⁸⁴ Steven Greer, "Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate, 63, 414 CAMBRIDGE L. J. (2004).

⁸⁵ Bruno De Witte, *Balancing of Economic Law and Human Rights by the European Court of Justice*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 202 (Pierre-Marie Dupuy et al. eds., 2009).

⁸⁶ John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36(2) INT'L ORG'N 379 (1982).

⁸⁷ Cosette D Creamer et al., *Diversity and Legitimacy of the World Trade Organization's Bench*, in IDENTITY AND DIVERSITY ON THE INTERNATIONAL BENCH: WHO IS THE JUDGE? 427 (Freya Baetens ed., 2020); Bjorklund et al., *supra* note 21, at 410; Taylor St. John et al., *Glass Ceilings and Arbitral Dealings: Gender and Investment Arbitration* 6 (PluriCourts, Working Paper,

on the bench is necessary for gender-responsive decision-making as well as for reasons of legitimacy.⁸⁸ Unfortunately, the nomination of women in ISDS tribunals mostly rests on the preferences of the parties to the dispute.⁸⁹ While WTO dispute adjudication processes have some influence over the appointment of adjudicators, which may be utilised to make the panel or appellate body benches gender diverse, the selection of women as adjudicators in ISDS cases is made much more challenging and almost impossible by the limited percentage of women who can meet the experience criteria, as required by most parties.⁹⁰ In this regard, the role of the organisations, like ICSID or ICC, that allow such conflict settlement becomes increasingly crucial as they may play an important role in encouraging parties to get a diverse bench.⁹¹

V. CONCLUSION

As per World Bank, until 2019, women constituted around 48% of the total population of India.⁹² This means that around half of the population in India belongs to a different gender. However, the question remains the same. Does this number reflect in law/policy-making bodies or enforcing bodies? After analysing the structural and normative framework of IIA, it can be concluded that the answer is no. The public institutions in India present an abysmal picture of gender equality. The obstacle women face in India is exclusion. They have been excluded from all spheres of public life as they are dominated by men.

The analysis of structural content suggests that women are absent from decision-making positions in all the important sectors related to foreign investments. The analysis of normative content which deals specifically with IIAs is also quite disappointing. The existing international investment law regime is androcentric and

2018); *Intersectionality Must Be a Part of the Conversation*, 19(1) MELBOURNE J. INT'L L. 259 (2018); Mariama Williams, *Gender Issues, and the Reform of Investment Liberalization, ILAs and BITs*, in INVESTMENT TREATIES-VIEWS AND EXPERIENCES FROM DEVELOPING COUNTRIES 8 (Kinda Mohamadieh et al. eds., 2015); Constance A. Anastopoulou & Daniel J. Crooks III, *Race and Gender on the Bench: How Best to Achieve Diversity in Judicial Selection*, 8 NW. J. L. & SOC. POL'Y. 174 (2013).

⁸⁸ Amit Kumar Sinha & Pushkar Anand, *Feminist Overview of International Investment Law: A Preliminary Inquiry*, 24(1) J. INT'L ECON. L. 99, 118 (2021).

⁸⁹ Bjorklund et al., *supra* note 21, at 410; *see also*, Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT'L L. 387 (2014).

⁹⁰ Bjorklund 2, *supra* note 43, at 413.

⁹¹ Meg Kinnear, *Advancing Diversity in International Dispute Settlement*, WORLD BANK (Mar. 2019), <https://blogs.worldbank.org/voices/advancing-diversity-international-dispute-settlement>.

⁹² The World Bank, *Population, female (% of total population) – India*, (Rev. 2022), <https://data.worldbank.org/indicator/SP.POP.TOTL.FE.ZS?locations=IN>.

silent on issues affecting women, as discussed in the introduction to this article. Women are notably underrepresented in the highest levels of IIAs' organisational structure. Issues about women hardly have a place in the IIA standards or policy. No positive or negative requirements are placed on governments by international legal instruments to guarantee gender parity in any area of IIAs. Overall, the IIA regime is gender-neutral. International law, according to Bianchi, is not only created by men but also for men.⁹³ We discover that IIAs are not any different.

Positive steps have been achieved through recent model IIAs, inclusive new-generation IIAs, and reform measures at select international organisations. These adjustments, like new model IIAs or ISDS reforms, are rare and only at the proposal stage, which implies that they are still up for discussion and implementation. It is recommended, in this regard, to take into account gender diversity when selecting arbitrators for ISDS proceedings, and focus on obligations on states to ensure gender parity at municipal levels, equal representation of women at senior management levels of the structural framework of IIA, the inclusion of gender-related provisions into treaty norms and policies, increased participation of women in economic activities in host states, and more.

Indeed, the present scenario is not encouraging. Nonetheless, effective measures may be put in place to ameliorate the situation. What is encouraging is that more and more feminists and women academicians are working to fill the void created by the absence of women in public institutions. Let us hope our institutions and treaty-making take more gender-sensitive and appropriate steps in the coming years.

⁹³ ANDREA BIANCHI, *INTERNATIONAL LAW THEORIES: AN INQUIRY INTO DIFFERENT WAYS OF THINKING* 186 (2016).

Feminist Overview of International Investment Law—A Preliminary Inquiry

Amit Kumar Sinha  and Pushkar Anand *

ABSTRACT

There have not been many studies to evaluate the tenets of international investment law from a feminist perspective. Thus, a study from a feminist perspective is not only desirable but also necessary to understand the position of women in this regime. To fill this gap, the article presents an analysis of the normative and structural frameworks of international investment law from a feminist standpoint. This article finds that women are under-represented in the structural framework of international investment law, and the normative framework barely touches upon the issues of women. The article suggests measures to gender-mainstream the investment law regime. It concludes that gender inclusiveness of the international investment regime can only be achieved when international investment policymaking is complemented by a flexible but robust municipal structure that supports gender equality and women's participation in economic activities.

I. INTRODUCTION

There exists abundant literature on the feminist analysis of international law,¹ human

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1 Hilary Charlesworth, Christine Chinkin, and Shelley Wright, 'Feminist Approaches to International Law', 85 *American Journal of International Law* 613 (1991); Hilary Charlesworth, 'Feminist Ambivalence about International Law', 11 *International Legal Theory* 1 (2005); Rosa Ehrenreich Brooks, 'Feminism and International Law: An Opportunity for Transformation', 14 *Yale Journal of Law & Feminism* 345 (2002); Hilary Charlesworth, 'Feminist Methods in International Law', 36 *Studies in Transnational Legal Policy* 159 (2004); Fernando Tesón, 'Feminism and International Law: A Reply', 33 *Virginia Journal of International Law* 647 (1994); Aaron Xavier Fellmeth, 'Feminism and International Law: Theory, Methodology, and Substantive Reform', 22 *Human Rights Quarterly* 658 (2000); Hilary Charlesworth, 'Feminist Critiques of International Law and Their Critiques', 13 *Third World Legal Studies* 1 (1994); Hilary Charlesworth and Christine Chinkin, 'The Gender of Jus Cogens', 15 *Human Rights Quarterly* 63 (1993); Sari Kuovo and Zoe Pearson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (Oxford: Hart Publishing, 2011); Bhupinder Singh Chimni, *International Law and World Order: A Critique of Contemporary Approaches*, 2nd ed. (Cambridge: Cambridge University Press, 2017) 358; Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (New York: Oxford University Press, 2016) 183.

rights law,² international criminal law,³ and to some extent international economic law.⁴ Somehow, the analysis of International Investment Law (IIL) from a feminist/gender perspective has escaped the attention of scholars, barring a few exceptions.⁵ IIL stands out as a distinct field of study in the realm of international law.⁶ IIL is also an important factor in economic globalization.⁷ As global economic movements and international law have been questioned by scholars as being ‘thoroughly (male) gendered’⁸ and inhospitable toward women,⁹ and in a fragmented international legal framework, different regimes present different levels of responses to gender issues,¹⁰ it becomes necessary to examine how IIL responds to gender issues. This article is an attempt at presenting an overview of IIL from a feminist perspective. This preliminary inquiry will enable us to evaluate the tenets of IIL concerning gender issues and pave the roadmap for a more gender-inclusive IIL. In the words of Brooks, this article is an attempt at ‘mapping the silences’ so that such gaps can be filled.¹¹ This paper, at the outset, does not claim that women are at the periphery of the IIL regime. However, it hypothesizes that IIL is androcentric and silent on issues concerning women. The

- 2 Charlotte Bunch, ‘Women’s Rights as Human Rights: Toward a Re-Vision of Human Rights’, 12 *Human Rights Quarterly* 486 (1990); Shelley Wright, ‘Economic Rights and Social Justice: A Feminist Analysis of Some International Human Rights Conventions’, 12 *Australian Yearbook of International Law* 241 (1992); Gayle Binion, ‘Human Rights: A Feminist Perspective’, 17 *Human Rights Quarterly* 509 (1995).
- 3 Rhonda Copelon, ‘Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law’, 46 *McGill Law Journal* 217 (2000); Christine Chinkin, ‘Rape and Sexual Abuse of Women in International Law’, 3 *European Journal of International Law* 1 (1994); Kelly Dawn Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (The Hague, London, Boston: Martinus Nijhoff, 1997); Janet Halley, ‘Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law’, 30 *Michigan Journal of International Law* 1 (2008–2009).
- 4 Helen Ruiz Fabri, ‘Understanding International Economic Law in Unsettling Times: A Feminist Approach’, 20 *The Journal of World Investment and Trade* 3 (2019); Fiona Beveridge, ‘Feminist Perspective in International Economic Law’, in Doris E. Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Oxford: Hart Publishing, 2005).
- 5 Andrea K. Bjorklund et al., ‘The Diversity Deficit in International Investment Arbitration’, 21 (2–3) *Journal of World Investment and Trade* 410 (2020); Taylor St. John et al., ‘Glass Ceilings and Arbitral Dealings: Gender and Investment Arbitration’ (2018) PluriCourts Working Paper; Ksenia Polonskaya, ‘Diversity in The Investor–State Arbitration: Intersectionality Must Be A Part of The Conversation’, 19 (1) *Melbourne Journal of International Law* 259 (2018); Mariama Williams, ‘Gender Issues, and the Reform of Investment Liberalization, IIAs and BITs’, in Kinda Mohamadieh, Anna Bernardo and Lean Ka-Min (eds.), *Investment Treaties—Views and Experiences from Developing Countries* (Geneva: South Centre, 2015); Sangwani Patrick Ng’ambi and Kangwa-Musole George Chisanga, *International Investment Law and Gender Equality: Stabilization Clauses and Foreign Investment* (London: Routledge, 2020), 99.
- 6 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, 2nd ed. (Oxford: Oxford University Press, 2012), 19.
- 7 Stephen W. Schill, *The Multilateralization of International Investment Law* (New York: Cambridge University Press, 2009), 1.
- 8 Charlesworth et al., above n 1, at 615.
- 9 Ajit Singh and Ann Zammit, ‘International Capital Flows: Identifying the Gender Dimension’, 28 (7) *World Development* 1249 (2000); Saskia Sassen, ‘Towards a Feminist Analytics of the Global Economy’, 41 *Indiana Journal of Global Legal Studies* 7 (1996); Ozlem Ingun Karkis, ‘An Analysis of Economic in International Law Using the Feminist Theory’, 4 *International Journal of Social Science Studies* 150 (2016); Shelley Wright, ‘Women and the Global Economic Order: A Feminist Perspective’, 10 *American University Journal of International Law & Policy* 861 (1995).
- 10 Catherine O’Rourke, ‘Feminist Strategy in International Law: Understanding Its Legal, Normative and Political Dimensions’, 28 (4) *European Journal of International Law* 1019 (2018) at 1028.
- 11 Brooks, above n 1, at 352.

specific questions that this article seeks to answer are as follows: Is the structural framework of IIL gender-inclusive? Is the normative framework of IIL gender-blind? Is the language of International Investment Agreements (IIAs) gender-neutral?¹² What are the ways to gender-mainstream IIL?

The relationship between the word 'gender' and the relatively associated term 'sex' has been a subject of extensive contestation and debate.¹³ Gender and sex are often associated with the understanding of nurture and nature, respectively.¹⁴ But, this distinction has also been questioned by scholars.¹⁵ The objective here is not to disregard any debate or different understanding on these two words but to primarily emphasize that the word 'gender', being inclusive, has been used in the context of women in this paper.

The article begins by presenting the rationale for this study (section II) followed by an inquiry into the structural framework (section III) and normative framework (section IV) of IIL from a gender perspective. Section V shall then deal with the issue of gender mainstreaming (GM) of IIL. Section VI will conclude.

II. INTERNATIONAL INVESTMENT LAW AND WOMEN

The United Nations has recognized gender equality and empowerment of women and girls as a sustainable development goal (SDG),¹⁶ and foreign investment has been recognized as an important way to achieve these SDGs.¹⁷ The United Nations Commission on Trade and Development (UNCTAD) published a report in 2014 studying the impact of foreign investment by the transnational corporations (TNCs) on women and gender issues in the host state.¹⁸ The UNCTAD report found that investments by TNCs may have two different kinds of effects in the host state. On the one hand, such foreign investments tend to create new employment opportunities for women, thus leading to empowerment. They may also contribute to the emergence of norms in the host state in cases where there is a transference of higher standards from the home state to the host state.¹⁹ However, the effect on women may be adverse if the foreign investments operate and exploit the disadvantageous condition of women in the labour market of the host state, to remain competitive.²⁰ According to a World Bank report, men and women are affected differently due to enhanced foreign direct investments

12 IIA here includes Bilateral Investment Treaties and investment chapters in Free Trade Agreements.

13 Joanne Conaghan, *Law and Gender* (New York: Oxford University Press, 2013), 16.

14 *Ibid.*, at 17.

15 Moira Gatens, *Imaginary Bodies: Ethics, Power and Corporeality* (London: Routledge, 1996), 16.

16 UN Sustainable Development Goals, Gender equality and women's empowerment, <https://sustainabledevelopment.un.org/topics/genderequalityandwomens empowerment> (visited 8 July 2020).

17 UNCTAD, 'Investment by TNCs and Gender: Preliminary Assessment and Way Forward', 2014, https://unctad.org/en/PublicationsLibrary/webdiaeia2014d4_en.pdf (visited 28 August 2020), at 1 (hereinafter, 'UNCTAD Report').

18 *Ibid.*

19 *Ibid.*, at 32.

20 *Ibid.*, at 7–8.

(FDIs).²¹ According to the report, women are particularly vulnerable to the negative effects of enhanced FDIs.²² The report provides the example of logging operations by foreign investors in the Solomon Islands and how it negatively affected local women resulting in loss of women's land rights, loss of jobs, exclusion of women in the payment of royalties, and sexual exploitation of women by foreign loggers, *inter alia*.²³ Nonetheless, these reports have also identified several avenues for further research for a holistic understanding of the impact of foreign investments on gender issues in the host states.²⁴

While a review of the legal and regulatory framework at the municipal level is indispensable for regulating FDI to make it gender-responsive, IIL reform may also play an important role in limiting the negative effects of FDI on women in host states. Since IIL forms an integral part of the legal regime regulating foreign investments, one of the policy considerations for the host states identified by the UNCTAD report was—'does the country's strategy for engaging in international investment agreements consider gender-related issues?'.²⁵ The interaction between IIL and gender issues has to be inquired, first, from the perspective of women as stakeholders in the outcome of the application of the rules of IIL and, second, from the perspective of women as actors within the IIL regime.

In 2018, a report submitted to the 'Working Group on Right to Development' of the Human Rights Council—'International Investment Agreements and Industrialization: Realizing the Right to Development and the Sustainable Development Goals' (RTDR)²⁶—is probably the first document to dwell in some detail on how IIAs impact women and gender issue, from a 'women as stakeholders' perspective. The RTDR identifies the possible adverse impact of IIAs mainly in two contexts. First, the report underlines the adverse impact of IIAs containing prohibitions of performance requirements and national treatment obligations on small and medium-sized enterprises (SMEs) and their indirect but substantial impact on women. Around 31–38% of formal SMEs are either fully or partially owned by women in middle-income developing countries, and as such 'supporting [the] domestic SME sector is crucial for advancing gender equality and women's rights'.²⁷ Lack of support from the state triggered by IIA obligations and tough competition from foreign investments might leave SMEs in developing countries

21 Sevi Simavi, Clare Manuel, and Mark Blackden, 'Gender Dimensions of Investment Climate Reform: A Guide for Policy Makers and Practitioners', The World Bank, 2010, <http://documents1.worldbank.org/curated/en/260721468321276647/pdf/528610PUB0gnd101Official0Use0Only1.pdf> (visited 20 August 2020), at 205.

22 Ibid.

23 Ibid.

24 A more recent study conducted by Ouedraogo and Marlet tracing the relationship between FDI and women empowerment in developing countries found that FDI improves women's welfare and decreases gender inequality. However, they also found that impact is lower in countries where women have low access to resources and face a heavier burden to open a business.

25 UNCTAD Report, above n 17, at 34.

26 Bhumika Muchhala, 'International Investment Agreements and Industrialization: Realizing the Right to Development and the Sustainable Development Goals', Human Rights Council, Working Group on Right to Development, 19th Session, Geneva (23–27 April 2018) A/HRC/WG.2/19/CRP.5, https://www.ohchr.org/Documents/Issues/Development/Session19/A_HRC_WG.2_19_CRP.5.pdf (visited 28 August 2020), (hereafter 'RTDR').

27 Ibid.

disenfranchised, eventually proving detrimental to women.²⁸ Second, the RTDR highlights the adverse impact of investor–state dispute settlement (ISDS) provisions on vulnerable sections of society in host states, which include women and children. The problem is particularly exacerbated in the disputes arising out of investments in the resource extraction industries. For instance, in the case of *South American Silver Limited v Bolivia*, one of the major allegations by the host state against the investor was related to the sexual abuse and rape of women from the indigenous community.²⁹ Irrespective of their outcomes, the context in which the ISDS cases such as *Burlington v Ecuador*,³⁰ *Renco v Peru*,³¹ *Chevron v Ecuador*³² and *Pac Rim v El Salvador*³³ arise reveals the adverse impact of foreign investments in the natural resources extraction sector on vulnerable groups such as indigenous communities, including women and children. Very recently, Ng’ambi and Chisanga argue that the new gender equality laws introduced by Zambia could increase the operational cost of foreign investors in the mining sector and be challenged in ISDS proceedings due to the stabilization clauses in the development agreements that Zambia has entered into with foreign investors.³⁴

The interaction of IIL and gender issues from a ‘women as actors in IIL’ perspective would require an inquiry into its institutional and structural framework, to trace the presence of women in this field. The issue of ‘under-representation of women in international arbitration tribunals’ has prompted members of the international arbitration community in 2015 to draw up a pledge that ‘seeks to increase, on an equal opportunity basis, the number of women appointed as arbitrators to achieve a fair representation as soon as practically possible, with the ultimate goal of full parity’.³⁵ Further, it is also necessary to look at the presence of women in international institutions which play an important role in IIL and policymaking.

A brief overview of how IIL impacts gender issues provides a solid justification for undertaking this preliminary research into the structural and normative framework of IIL from the perspective of women.

III. INQUIRY INTO THE STRUCTURAL FRAMEWORK OF INTERNATIONAL INVESTMENT LAW

Scholars have argued that the invisibility of women in international organizations (IOs) affects not only gender issues but also the way international issues are

28 Ibid.

29 *South American Silver Limited v Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018.

30 *Burlington Resources, Inc. v Republic of Ecuador*, ICSID Case No. ARB/08/5.

31 *The Renco Group v Peru*, ICSID Case No. UNCT/13/1.

32 *Chevron Corporation and Texaco Petroleum Corporation v Ecuador*, PCA Case No. 2009-23.

33 *Pac Rim Cayman LLC v El Salvador*, ICSID Case No. ARB/09/13.

34 Ng’ambi and Chisanga, above n 5.

35 Equal Representation in Arbitration, <http://www.arbitrationpledge.com/> (visited 2 July 2020); also see Mirèze Philippe, ‘Redressing the Balance: The Path Ahead for Gender and Generational Diversity on Arbitral Tribunals’, *Kluwer Arbitration Blog*, 31 October 2016, http://arbitrationblog.kluwerarbitration.com/2016/10/31/redressing-the-balance-the-path-ahead-for-gender-and-generational-diversity-on-arbitral-tribunals/?doing_wp_cron=1592477927.7179028987884521484375 (visited 2 July 2020).

understood.³⁶ A glance at the number of women in IOs will enable us to understand the nature of decision-making in general. Thus, it is necessary to present the existing gender trend in some of the specialized IOs dealing with investment policymaking and dispute settlement bodies relating to the IIL regime. For this study, we have identified UNC-TAD and the International Centre for Settlement of Investment Disputes (ICSID). We shall also explore the gender diversity of arbitrators in ISDS as well as the number of women claimants in ISDS.

A. United Nations Conference on Trade and Development

In over 50 years of UNCTAD's existence never has a woman been appointed as the secretary-general of UNCTAD. Also, during the period 2005–15, no woman was appointed to an ungraded position at UNCTAD.³⁷ In 2017, however, Ms Isabelle Durant was appointed as the Deputy Secretary-General of UNCTAD. The projections for reaching gender parity at an average annual increment (2005–15) point out that gender parity for most of the senior management and professional levels in UNCTAD shall never be achieved.³⁸ As per the aforementioned data, the situation at UNCTAD looks grim for achieving gender parity at senior management levels.

B. International Centre for Settlement of Investment Disputes

ICSID was established in 1966 under the Convention on the Settlement of Investment Disputes between states and nationals of other states (the ICSID Convention).³⁹ It works under the aegis of the World Bank, and it is an independent dispute settlement institution.⁴⁰ The ICSID Administrative Council is its governing body, and the ICSID Secretariat deals with the daily operations of ICSID. Out of the top five positions at the ICSID Secretariat, four are occupied by women.⁴¹ Women also occupy around 74% of staff positions at the ICSID Secretariat.⁴² The ICSID Administrative Council consists of one representative from each member state.⁴³ ICSID also maintains panels of arbitrators and conciliators.⁴⁴ Each member state can designate up to four members to each

36 Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000) 171.

37 UN Women, 'UNCTAD: Representation of Women (P-1 to UG) 2005 to 2015, on Contracts of a Year or More, at All Locations', <https://www.unwomen.org/-/media/headquarters/attachments/sections/how%20we%20work/unsystemcoordination/data/secretariat/trends/unctad.pdf?la=en&vs=928> (visited 2 July 2020).

38 UN Women, 'Trends and Projections for Gender Parity: UNCTAD', <https://www.unwomen.org/-/media/headquarters/attachments/sections/how%20we%20work/unsystemcoordination/data/secretariat/projections/unctad.pdf?la=en&vs=654> (visited 2 July 2020).

39 About ICSID, <https://icsid.worldbank.org/en/Pages/about/default.aspx> (visited 8 February 2020).

40 Ibid.

41 Secretariat Staff, ICSID, <https://icsid.worldbank.org/en/Pages/about/ICSID-Secretariat-Staff.aspx> (visited 8 February 2021).

42 Meg Kinnear and Otylia Babiak, 'International Investment Arbitration Needs Equal Representation', 9 April 2018, <https://www.cigionline.org/articles/international-investment-arbitration-needs-equal-representation> (visited 8 February 2021).

43 Convention for the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) ('ICSID Convention'), Article 4(1).

44 Ibid, Article 12.

of these panels.⁴⁵ The ICSID Convention does not impose either negative or positive obligations on member states to ensure gender parity while appointing a representative to its different bodies. In fact, it appears that the language of the ICSID Convention envisions only men serving in distinct capacities.⁴⁶ The absence of any obligation upon states can be related to the smaller number of women not only in the ICSID Administrative Council but also in the panel consisting of arbitrators who are designated by the member states of ICSID.

As per our study, out of 276 arbitrators in the panel of arbitrators at ICSID, only 50 are women, which is around 18%. As per the available data of 154 representatives in the ICSID Administrative Council, there are only 19 female members in the council, which is around 12%.⁴⁷ A survey of all the appointments made in ICSID Convention and ICSID additional facility arbitral proceedings till February 2014 found that 93% of arbitrator appointments were male.⁴⁸ Moreover, as a very small group of women receives most of these female appointments, in the group of all arbitrators that have ever been appointed in the past, only 5% are women.⁴⁹ Likewise, as there has never been any full-time woman president of the World Bank,⁵⁰ the ICSID Administrative Council also never had any woman chairperson. The President of the World Bank is the *ex officio* chairperson of the ICSID Administrative Council as per Article 5 of ICSID Convention. While the ICSID Secretariat fares well concerning gender parity and in terms of the number of women at the decision-making level, ICSID Administrative Council and panel of Arbitrators present a completely different and problematic picture.

C. Gender Diversity in Investor-State Dispute Settlement

There is an ample body of literature underlining the lack of gender diversity as one of the most conspicuous features of investment arbitration.⁵¹ As per a study done by PluriCourts researchers, until 2017, of all the ICSID and non-ICSID arbitrators in investment arbitration, only 11% have been women.⁵²

Data suggest that there exists a trend to prefer male over female while appointing the arbitrators at ISDS proceedings, and there is a considerable gender gap when it comes to the appointment of women as arbitrators (Table 1).

45 Ibid, Article 13.

46 For example, reference can be made to Article 5, ICSID Convention for use of word 'his', <https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf> (visited 2 July 2020).

47 ICSID, Representative and Alternate Representative, <http://pubdocs.worldbank.org/en/459711541108834436/ICSIDAdminCouncil.pdf> (visited 2 July 2020).

48 Sergio Puig, 'Social Capital in the Arbitration Market', 25 (2) European Journal of International Law 387 (2014), at 404–05.

49 Ibid.

50 The World Bank, Past Presidents, <https://www.worldbank.org/en/about/archives/history/past-presidents> (visited 2 July 2020).

51 Bjorklund et al., above n 5; Malcolm Langford, Daniel Behn, and Runer Hilleren Lie, 'The Revolving Door in International Investment Arbitration', 20 Journal of International Economic Law 301 (2017); Daniel Behn, Malcolm Langford, and Laura Létourneau-Tremblay, 'Empirical Perspectives on Investment Arbitration: What do We Know? Does it Matter?' 21 (2–3) Journal of World Investment and Trade 188 (2020); Polonskaya, above n 5.

52 St. John et al., above n 5.

Table 1. Women as arbitrators⁵³

	Number of times— women arbitrators	Number of times— all arbitrators	Percentage of women of the total strength
Appointment by claimants	36	1002	~4
Appointment by respondents	187	995	~18
Women president of a panel	99	973	~10
Annulment	45	352	~13

Source: Bjorklund et al., above n 5

According to the study done by PluriCourts researchers, contrary to the popular opinion that there are not enough qualified women, women make up 30% of around 4000 active individuals in the field of investment arbitration.⁵⁴ This study also suggests that this number is substantially higher when compared to the number of women arbitrators.⁵⁵ Scholars point out that one of the reasons for this gap is the existence of a ‘prior experience norm.’⁵⁶ This means new entrants to the field are rarely trusted by disputing parties to be appointed as arbitrators. Those having experience as arbitrators are generally given preference. Since in the past, few women were working in investment arbitration, there are only a few women arbitrators with experience. Those few experienced women are preferred over new female entrants. Therefore, the number of women arbitrators has not improved over time.⁵⁷ As per the current trend, gender parity in the appointment of arbitrators to new ISDS cases will be achieved in the year 2250.⁵⁸

D. Women claimants in investment arbitration

Female investors are important participants in global economic movements. Therefore, it is necessary to understand their position in investment arbitration as claimants. From 1987 to 2019, as per the UNCTAD Investment Policy Hub (IPH), 1023 investment arbitrations have been initiated. As per our study from the data collected from IPH, only 27 of these arbitrations involve women claimants, out of which 20 of these cases have been initiated after 2010. Table 2 provides a year-wise assessment.

⁵³ Bjorklund et al., above n 5, at 15.

⁵⁴ St. John et al., above n 5.

⁵⁵ Ibid.

⁵⁶ Daniel Behn, Malcolm Langford, and Maksim Usynin, ‘Does Nationality Matter? Arbitrator Background and Arbitral Outcomes’, in Daniel Behn, Ole Kristian Fauchald, and Malcolm Langford (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (Cambridge University Press, forthcoming, 2021).

⁵⁷ Ibid, at 12.

⁵⁸ Bjorklund et al., above n 5, at 17.

Table 2. Women claimants over the years⁵⁹

Year	Cases involving women claimants	Decision/Result	Total number of cases initiated that year	Year-wise percentage
2019	1 ⁶⁰	Pending	55	~1.8
2018	5 ⁶¹	Pending—4 In favour of state—1 (<i>Jin Hae Seo v Korea</i>)	84	~6
2017	2 ⁶²	Pending	79	~2
2016	0	Not applicable (NA)	76	0
2015	2 ⁶³	Pending—1 In favour of state—1 (<i>Garcia Armas v Venezuela</i>)	86	~2
2014	1 ⁶⁴	In favour of state	59	~1.7
2013	2 ⁶⁵	Pending—1 In favour of state—1 (<i>Van Riet v Croatia</i>)	69	~2.9
2012	2 ⁶⁶	In favour of investor—1 (<i>Garcia Armas & Garcia Gruber v Venezuela</i>) In favour of state—1 (<i>Bogdano v Moldova (IV)</i>)	55	~3.6
2011	2 ⁶⁷	In favour of state—1 (<i>Levy & Gremcitel v Peru</i>) Discontinued—1	54	~3.7

(continued)

- 59 We have undertaken the task of analysing the data very diligently. However, the possibility of human error cannot be entirely ruled out.
- 60 Alaa Nizar Raja Sumrain, Ayat Nizar Raja Sumrain, Eshakra Nizar Raja Sumrain and Mohamed Nizar Raja Sumrain *v* State of Kuwait, ICSID Case No. ARB/19/20.
- 61 Astrida Benita Carrizosa *v* Republic of Colombia (II), ICSID Case No. ARB/18/5; Alicia Grace and others *v* Mexico, ICSID Case No. UNCT/18/4; Maria Lazareva *v* The State of Kuwait, UNCITRAL; Jin Hae Seo *v* Republic of Korea, HKIAC Case No. 18117; Rogelio Barrenechea Cuenca, Antonio Cosío Ariño, Luis de Garay Russ and others *v* Kingdom of Spain, PCA Case No. 2019-17.
- 62 Gokul Das Binani and Madhu Binani *v* Republic of North Macedonia, PCA Case No. 2018-38; Victor Pey Casado, Coral Pey Grebe and President Allende Foundation *v* Republic of Chile, PCA Case No. 2017-30.
- 63 Theodoros Adamakopoulos, Elektra Adamantidou, Vasileios Adamopoulos and others *v* Republic of Cyprus, ICSID Case No. ARB/15/49; García Armas and others *v* Venezuela, PCA Case No. 2016-08.
- 64 Michael Ballantine and Lisa Ballantine *v* The Dominican Republic, PCA Case No. 2016-17.
- 65 Chantal C. van Riet, Christopher van Riet and Lieven J. van Riet *v* Republic of Croatia, ICSID Case No. ARB/13/12; Vladislav Kim and others *v* Republic of Uzbekistan, ICSID Case No. ARB/13/6.
- 66 Serafin García Armas and Karina García Gruber *v* The Bolivarian Republic of Venezuela, PCA Case No. 2013-3; Yuri Bogdanov and Yulia Bogdanova *v* Republic of Moldova (IV), SCC Case No. 091/2012.
- 67 Hortensia Margarita Shortt *v* Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/30; Renée Rose Levy and Gremcitel S.A. *v* Republic of Peru, ICSID Case No. ARB/11/17.

Table 2. (Continued)

Year	Cases involving women claimants	Decision/Result	Total number of cases initiated that year	Year-wise percentage
2010	2 ⁶⁸	In favour of state—1 (<i>Renée Rose Levy de Levi v Peru</i>) In favour of investor—1 (<i>Bernhard von Pezold v Zimbabwe</i>)	36	~5.55
2009	0	NA	41	0
2008	1 ⁶⁹	In favour of investor	39	~2.5
2007	1 ⁷⁰	In favour of state	45	~2.2
2006	1 ⁷¹	In favour of state	27	~3.7
2005	1 ⁷²	In favour of investor	40	~2.5
2004	0	NA	42	0
2003	0	NA	38	0
2002	1 ⁷³	In favour of state	25	~4
2001	1 ⁷⁴	In favour of investor	16	~6.25
2000	0	NA	13	0
1999	0	NA	14	0
1998	0	NA	11	0
1997	1 ⁷⁵	In favour of state	7	~14.3
1996	0	NA	6	0
1995	1 ⁷⁶	Settled	2	50
1994	0	NA	2	0
1993	0	NA	1	0
1987	0	NA	1	0
Total	27	In favour of state—11 In favour of investor—5 Other—11	1023	~2.6

68 *Renée Rose Levy de Levi v Republic of Peru*, ICSID Case No. ARB/10/17; *Bernhard von Pezold and others v Republic of Zimbabwe*, ICSID Case No. ARB/10/15.

69 *Marion Unglaube v Republic of Costa Rica*, ICSID CASE No. ARB/08/1.

70 *Alasdair Ross Anderson and others v Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3.

71 *Jan Oostergetel and Theodora Laurentius v The Slovak Republic*, UNCITRAL, 23 April 2012.

72 *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe*, ICSID Case No. ARB/05/6.

73 *Ahmonseto, Inc. and others v Arab Republic of Egypt*, ICSID Case No. ARB/02/15.

74 *Antoine Goetz and others v Republic of Burundi (II)*, ICSID Case No. ARB/01/2.

75 *Robert Azinian, Kenneth Davitian, & Ellen Baca v The United Mexican States*, ICSID Case No. ARB (AF)/97/2.

76 *Antoine Goetz and others v Republic of Burundi (I)*, ICSID Case No. ARB/95/3.

Table 2 shows that there are only a handful of female claimants involved in investment arbitration. Among these female claimants, some are part of the family or an organization that has initiated the arbitration. We came across only a few sole female claimants.⁷⁷

Apart from this, out of 16 decided cases, 11 have gone in favour of states, which is around 69% of the decided cases.⁷⁸ This percentage is little higher when compared to the percentage of overall investment arbitrations decided (excluding settled and discontinued cases) in favour of the state, which is around 55%.⁷⁹ It can be concluded that women are mostly invisible or exceptionally under-represented from the structural framework of institutions we have studied in this section.

IV. INQUIRY INTO NORMATIVE FRAMEWORK OF INTERNATIONAL INVESTMENT LAW

In this section, we analyse the gender neutrality of the language used in IIAs and inquire if these IIAs provide for any substantive rules or provisions from a gender standpoint. For this purpose, we have used the ‘stratified random sampling’ technique for the sample selection. The rationale for using this sampling technique is to make the sample selection representative and to minimize any bias arising in choosing the subjects of analysis. We have created strata of four different classes of economies based on their income as designated by the World Bank for the fiscal year 2021. These income economies are high-income economies, high- to middle-income economies, low- to middle-income economies, and low-income economies. To get more accurate results, we have divided each stratum into five sub-strata based on geographical regions—Africa, America, Asia, Europe, and Oceania. We have selected one random country from each of these geographical regions to study their IIAs. We have studied only those IIAs that are signed during 2000–20. The reason for this demarcation is based on our understanding that most older IIAs do not have gendered language-related or gender-related issues due to lack of debate and discussion on IIAs and gender before 2000.

We analyse these IIAs on two counts. First, whether the IIAs use gender-neutral language; second, whether the IIAs contain substantive rules addressing the issue of gender equality, inclusivity, and development. For this analysis, the IIAs are divided into four categories; gender-neutral, gender-non-neutral, gender-blind, and IIAs with gender-specific provisions. According to the gender statistics manual of the United Nations, gender neutrality refers to ‘not being associated with men or women in the style of language etc.’⁸⁰ In this work, gender neutrality of IIAs shall refer to a lan-

⁷⁷ For example, *Maria Lazareva v The State of Kuwait*; *Jin Hae Seo v Republic of Korea*, HKIAC Case No. 18117.

⁷⁸ These data of 16 cases do not include settled or discontinued cases.

⁷⁹ UNCTAD, ‘Investment Dispute Settlement Navigator’, <https://investmentpolicy.unctad.org/investment-dispute-settlement?status=2> (visited 3 February 2021).

⁸⁰ Gender Statistics Manual, ‘Glossary of Terms’, <https://unstats.un.org/unsd/genderstatmanual/Glossary.ashx> (visited 2 October 2020).

guage that does not refer to any specific gender, i.e. use of ‘it’, ‘their’, as well as a language that takes into account both genders, such as ‘his or her’ while referring to investors or arbitrators. Further, gender blindness refers to a failure to take into account the diverse roles and needs of different genders. Therefore, the term ‘gender-blind’ shall be used to specify the IIAs that are completely silent on issues relating to women/gender. Similarly, the ‘IIAs with specific gender provisions (SGPs)’ are those IIAs that contain any specific provisions for addressing the gender issues such as gender equality, inclusiveness, and development. Table 3 shall explain this dynamic.

An analysis of around 300 IIAs reveals that there are only a few IIAs with SGPs. Most of the IIAs signed by these countries are gender-non-neutral in terms of the language they use and gender-blind in terms of substantive provisions addressing gender issues. The SGPs in the few IIAs are either in the form of the provision on corporate social responsibilities or in the form of non-discrimination provision protecting investors from targeted discrimination based on gender.

Importantly, all of the eight IIAs with SGPs out of the 300 studied in this work have been signed after 2015. For instance, the investment chapter of the USMCA contains an SGP as a part of the CSR provision:

Article 14.17

The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction *to voluntarily incorporate* into their internal policies those internationally recognized standards, guidelines, and principles of corporate social responsibility that have been endorsed or are supported by that Party, which may include the OECD Guidelines for Multinational Enterprises. These standards, guidelines, and principles may address areas such as labor, environment, *gender equality*, human rights, indigenous and aboriginal peoples’ rights, and corruption.

This provision does not create a binding obligation either for the host states or for the foreign investors. As such this provision can neither become the basis of a claim by the investor nor can it support a counterclaim by the state. However, it still can be considered as having a nudging effect for the host states to ensure that the foreign investors do adopt policies that ensure gender equality and inclusiveness. While couched in a soft law language, this provision certainly can be seen as having GM potential.

Similarly, the IIAs signed by India after 2015 are not only gender-neutral in language, but they also contain a substantive provision ensuring gender equality concerning the treatment of foreign investors by the host state. For instance, the India–Kyrgyzstan IIA in its clause dealing with the ‘Treatment of Investors’ provides

Table 3. Gender analysis of IIAs

Economies (World Bank (Fiscal Year 2021)) ⁸¹	Geographical region	Country	IIAs signed during 2000–20	Gender- neutral IIAs (Language basis)	Gender- non-neutral IIAs (Language basis)	Gender- blind IIAs (Content/ substance basis)	IIAs with specific gender provisions
High-income economies	America	United States	13	11 ⁸²	2 ⁸³	12	1 ⁸⁴
	Asia	Japan	40	39	1 ⁸⁵	40	0
	Europe	Germany	19	0	19	19	0
	Oceania	Australia	18	15	3 ⁸⁶	18	0
	Africa	Seychelles	4	1 ⁸⁷	3 ⁸⁸	4	0

(continued)

- 81 The World Bank, 'The World by Income', <https://datatopics.worldbank.org/world-development-indicators/the-world-by-income-and-region.html> (visited 2 October 2020).
- 82 US–Rwanda IIA; Chapter 14, Investment, Agreement between the United States of America, the United Mexican States, and Canada (USMCA) 2018; Chapter 9, Trans-Pacific Partnership (TPP) 2016; Chapter 11, Korea–US FTA; Chapter 11, Panama–US FTA; Chapter 10, Colombia–United States TPA; Chapter 10, Oman–US FTA; Chapter 10, Morocco–United States FTA; Chapter 11, Australia–United States FTA; Chapter 10, Chile–US FTA; Chapter 15, Singapore–US FTA; Chapter 4, US–Viet Nam Trade Relations Agreement.
- 83 US–Uruguay IIA; Chapter 10, Investment, Peru–United States FTA.
- 84 Chapter 14, Investment, Agreement between the United States of America, the United Mexican States, and Canada (USMCA) 2018.
- 85 Japan–Kuwait IIA.
- 86 Australia–Sri Lanka IIA, Australia–Uruguay IIA and Australia–Egypt IIA.
- 87 COMESA Investment Agreement.
- 88 Seychelles–China IIA, Seychelles–Egypt IIA, SADC Investment Protocol.

Table 3. (Continued)

Economies (World Bank)	Geographical region	Country	IIAs signed during 2000–20	Gender- neutral IIAs (Language basis)	Gender- non-neutral IIAs (Language basis)	Gender- blind IIAs (Content/ substance basis)	IIAs with specific gender provisions
Upper middle- income economies	America	Brazil	6	6	0	3	3 ⁸⁹
	Asia	China	45	9	36	45	0
	Europe	Serbia	38 ⁹⁰	3 ⁹¹	24	25	1 ⁹²
	Oceania	Fiji	1	1 ⁹³	–	1	0
	Africa	South Africa	23 ⁹⁴	3 ⁹⁵	17	20	0

(continued)

89 Brazil–India IIA, Brazil–UAE IIA, and Brazil–Guyana IIA.
90 Serbia’s IIAs with Italy, Ukraine, Slovenia, Nigeria, Kuwait, Iran, Libya, Denmark, Montenegro, and Indonesia could not be translated into English.
91 Serbia–Canada IIA, Chapter 4, Free Trade Agreement Between the EFTA States and the Republic of Serbia, Chapter VI, Non-Trade Issues, Section B, Investment, Agreement on Amendment of and Accession to the Central European Free Trade Agreement.
92 Serbia–Turkey IIA.
93 Part 4, Chapter 7, Cotonou Agreement.
94 South Africa’s IIAs with Sudan, Kuwait, and Yemen are not available in public domain.
95 South Africa–Libya IIA, South Africa–Madagascar IIA, Part 4, Chapter 7, Cotonou Agreement.

Table 3. (Continued)

Economies (World Bank (Fiscal Year 2021)) ⁸¹	Geographical region	Country	IIAs signed during 2000–20	Gender- neutral IIAs (Language basis)	Gender- non-neutral IIAs (Language basis)	Gender- blind IIAs (Content/ substance basis)	IIAs with specific gender provisions
Lower middle- income economies	America	Bolivia	3	2 ⁹⁶	1	3	0
	Asia	India	56	9 ⁹⁷	47	53	3 ⁹⁸
	Europe	Ukraine	30 ⁹⁹	5 ¹⁰⁰	13	18	0
	Oceania	Papua New Guinea	2	2 ¹⁰¹	0	2	0
	Africa	Nigeria	25 ¹⁰²	5 ¹⁰³	16	21	0

(continued)

- ⁹⁶ Bolivia–Paraguay IIA and Bolivia–Costa Rica IIA.
- ⁹⁷ India–Brazil IIA, India–Kyrgyzstan IIA, India–Belarus IIA, India–Uruguay IIA, ASEAN–India Investment Agreement, Chapter 10—Investment, India–Malaysia FTA, Chapter 8—Investment, India–Japan EPA, Chapter 10—Investment, India–Republic of Korea CEPA, Chapter 6—Investment, India–Singapore CECA.
- ⁹⁸ India–Brazil IIA, India–Kyrgyzstan IIA, and India–Belarus IIA.
- ⁹⁹ Ukraine’s IIAs with Qatar, Turkey, San Marino, Equatorial Guinea, Brunei Darussalam, Syrian Arab Republic, Kuwait, Tajikistan, Democratic Republic of Congo, Libya, and Yemen are not available in public domain. Also, translation of Jordan–Ukraine IIA, which is available in Arabic, could not be done.
- ¹⁰⁰ Portugal–Ukraine IIA, Morocco–Ukraine IIA, Japan–Ukraine IIA, Chapter 4, Investment EFTA–Ukraine FTA, Ukraine–US TIFA.
- ¹⁰¹ Papua New Guinea–Japan IIA, Part 4, Chapter 7, Cotonou Agreement.
- ¹⁰² Nigeria’s IIAs with Kuwait, Jamaica, Uganda, and Ethiopia are not available in the public domain.
- ¹⁰³ Nigeria–Russian Federation IIA, Canada–Nigeria IIA, Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and The Modalities for Their Implementation With ECOWAS, Chapter III, Investment Protection and Promotion, ECOWAS Energy Protocol A/P4/1/03, Part 4 Chapter 7, Cotonou Agreement.

Table 3. (Continued)

Economies (World Bank) (Fiscal Year 2021) ⁸¹	Geographical region	Country	IIAs signed during 2000–20	Gender- neutral IIAs (Language basis)	Gender- non-neutral IIAs (Language basis)	Gender- blind IIAs (Content/ substance basis)	IIAs with specific gender provisions
Low-income economies	America	–	–	–	–	–	–
	Asia	Afghanistan	4 ¹⁰⁴	–	2	2	0
	Europe	–	–	–	–	–	–
	Oceania	–	–	–	–	–	–
	Africa	Ethiopia	30 ¹⁰⁵	2 ¹⁰⁶	24	26	0

104 Afghanistan–Iran IIA and Afghanistan–Azerbaijan IIA are not available in public domain.
105 Ethiopia’s IIAs with BLEU (Belgium–Luxembourg Economic Union), Nigeria, Equatorial Guinea, and Morocco are not available in public domain.
106 Brazil–Ethiopia IIA, Part 4, Chapter 7, Cotonou Agreement.

Article 3.1.

No Party shall subject investments made by investors of the other Party to measures which constitute a violation of customary international law through:

.....

iii) targeted discrimination, *such as gender, race or religious belief*¹⁰⁷

.....

Similar provisions are also present in the India–Belarus IIA,¹⁰⁸ the India–Taiwan IIA,¹⁰⁹ and the India–Brazil IIA, all of them signed after 2016 and based on the 2016 Model Indian IIA.¹¹⁰ The Brazil–UAE IIA,¹¹¹ the Brazil–Guyana IIA,¹¹² and the Serbia–Turkey IIA¹¹³ also contain similar provisions for the protection of investors from gender discrimination.

Although the European Union (EU) is not studied in the Table 3 above, the EU–Viet Nam IIA also contains a clause similar to the ones found in the recent Indian IIAs discussed above. However, there is one major difference. The EU–Viet Nam IIA provides that ‘targeted discrimination on manifestly wrongful grounds, such as *gender, race.....*’ would amount to a breach of FET.¹¹⁴ The Indian IIAs as discussed above do not make any reference whatsoever to FET. Instead, the Indian IIAs provide that the targeted gender-based discrimination would be considered as constituting a violation of customary international law (CIL). The reference to CIL in the Indian IIAs concerning the treatment of investment can be considered as referring to the international minimum standard (IMS) and can be seen as an attempt to provide normative content to the IMS without making any reference to FET.¹¹⁵ In any event, the EU–Viet Nam IIA and the Indian IIAs can be seen as limiting the scope of the otherwise flexible concept of FET as well as the IMS owing to the discretion of arbitral tribunals. Provisions like these ensure that investors will not only be protected against discrimination based on nationality, but also from other forms of discrimination such as gender or religion.

In contrast to some new-generation trade agreements,¹¹⁶ new-generation IIAs studied above do not contain any comprehensive provisions specifically addressing the issues of gender or women. We could not find any IIA that specifically addressed the concerns and interests of women in the host state or ensured gender diversity when appointing arbitrators in ISDS proceedings.

107 India–Brazil IIA, Article 4.1(c).

108 India–Belarus IIA, Article 3.1(iii).

109 India–Taiwan IIA, Article 3.1(c).

110 2016 Model Indian IIA, Article 3.1(iii).

111 Brazil–UAE IIA, Article 4.2(iii).

112 Brazil–Guyana IIA, Article 4.1(iii).

113 Serbia–Turkey IIA, Article 3.3(g).

114 EU–Viet Nam IIA, Article 2.5(2)(d).

115 Prabhaskar Ranjan and Pushkar Anand, ‘The 2016 Model Bilateral Investment Treaty: A Critical Deconstruction’, 38 (1) *Northwestern Journal of International Law and Business* 1 (2017).

116 Chile–Uruguay Free Trade Agreement 2016 (Chapter 14, Articles 14.1 and 14.2); African, Caribbean and Pacific Group of States–European Union Partnership Agreement (preamble and Articles 1, 9, 11, 20, 25, 31 and 31a); Caribbean Forum States–European Union Economic Partnership Agreement (Chapter 5, Article 191).

Furthermore, there are some IIAs containing provisions that do not directly address women or gender issues. Nevertheless, they may provide regulatory space to the host state for taking measures to ensure gender equality, development, and so on. For instance, Article 3(2) and Article 3(3) of the South Africa–Ethiopia IIA provide for Most Favoured Nation (MFN) and National Treatment (NT) to be accorded to the foreign investors. However, Article 3.4, which is an exception to the MFN and NT obligations contained in Article 3(2) and Article 3(3), provides

Article 3.4

The provisions of sub-Articles (2) and (3) shall not be construed so as to oblige one Party to extend to the investors of the other Party the benefit of any treatment, preference or privilege resulting from-

.....

(c) any law or other measure the purpose of which is to promote the achievement of *equality* in its territory or designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination in its territory.

Many South African IIAs¹¹⁷ and some Nigerian IIAs¹¹⁸ contain similar provisions. Interestingly, such provisions are only incorporated in the intra-African IIAs. For example, the South Africa–Angola IIA and the South Africa–Democratic Republic of Congo IIA contain a similar provision. However, the South Africa–Israel IIA, which was signed just 2 months after the signing of the South Africa–Democratic Republic of Congo IIA and 4 months before signing of the South Africa–Angola IIA, does not contain such provision.¹¹⁹

Similarly, there are several IIAs signed by Japan containing exceptions to the MFN and NT obligations, which may be used by the host state to take measures ensuring gender equality, development, etc. An example of such provision is Clause 10 of the Schedule of Japan and Clause 4 of the Schedule of the Argentine Republic to the Japan–Argentina IIA.

Clause 10 of the Schedule of Japan to the Japan–Argentina IIA

Japan reserves the right to adopt or maintain any measure relating to investment in public law enforcement and correctional services, and in social services such as income security or insurance, social security or insurance, *social welfare*, primary and secondary education, public training, health, child care and public housing.

117 Nigeria–South Africa IIA, South Africa–Zimbabwe IIA, South Africa–Guinea IIA, South Africa–Congo IIA, South Africa–Tanzania IIA, South Africa–Gabon IIA, South Africa–Angola IIA, Democratic Republic of the Congo–South Africa IIA, Equatorial Guinea–South Africa IIA, Libya–South Africa IIA, South Africa–Tunisia IIA, South Africa–Rwanda IIA, South Africa–Uganda IIA, and South Africa–Nigeria IIA.

118 Algeria–Nigeria IIA and South Africa–Nigeria IIA.

119 It is possible that these provisions were written with ‘race’ in mind. However, in the absence of the *travaux préparatoires* of these BITs in public domain, it is difficult to reach any conclusion. Nonetheless, the general nature of these provisions can be used to extend protection to women from the negative effects of investments.

Clause 4 of the Schedule of Argentine Republic to the Japan—Argentine IIA

Argentina reserves the right to adopt or maintain any measure to *grant rights or preference* to indigenous peoples, minorities, *vulnerable groups* or *groups at a social or economic disadvantage*.

Although negotiations vary country-wise, provisions like these provide regulatory latitude to countries that host diverse communities.

A. The policy shift towards more gender-inclusive IIAs

There are some positive developments that have taken place recently. Many recent model IIAs provide for achieving the SDGs and specific gender-related provisions. For example, the Morocco Model IIA (2019) provides for the protection of investors from targeted discrimination based on gender.¹²⁰ Similarly, the Belgium–Luxembourg Economic Union Model IIA (2019) is replete with the reference to ‘sustainable development goals’ as a legitimate policy objective and provides that nothing in the agreement shall limit the rights of the host state to pursue the same.¹²¹ However, compared to other Model IIAs, the Netherlands Model IIA 2019 (NMI)¹²² goes substantially ahead in incorporating gender perspectives in the text of the IIA. Arguably, the NMI is the first Model IIA to recognize in its preamble the ‘importance of equality between men and women when formulating, implementing and reviewing measures within the field of international trade and investment’. In spirit with the preamble, the text of the NMI takes into account the gender issues under IIL in three different contexts. First, as a part of the provision on sustainable development, Article 6.3 of the NMI provides

The Contracting Parties emphasize the important contribution by women to economic growth through their participation in economic activity, including in international investment. They acknowledge the *importance of incorporating a gender perspective* into the promotion of inclusive economic growth. This includes *removing barriers to women’s participation* in the economy and the *key role that gender-responsive policies play in achieving sustainable development*. The Contracting Parties commit to *promote equal opportunities and participation for women and men* in the economy. Where beneficial, the Contracting Parties shall carry out cooperation activities to *improve the participation of women* in the economy, including in international investment.

Although the text of Article 6.3 of the NMI falls short of creating any binding obligation, the detailed recognition of the importance of participation of women in the economy and the need to promote equality of opportunities are unprecedented. Further, Article 9(2) of the NMI provides that any gender-based discrimination to an investor or his or her investment shall be considered a breach of FET. Another, unprecedented provision in the NMI is Article 20 (2), which provides that while appointing

120 Morocco Model IIA (2019), Article 6.

121 BLEU Model IIA, Article 1(2), Article 3(3), Article 14, Article 15(1).

122 ‘New Model Text Investment Agreements’, <https://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden> (visited 2 July 2020).

arbitrators to the tribunal, the appointing authority shall take gender and geographical diversity into consideration.

There are also positive initiatives taken by working groups in institutions like UNCITRAL. UNCITRAL Working Group III in its report on its 38th session has expressed that it is desirable to bring gender and geographical diversity into the appointments of arbitrators and that there is a need to achieve adequate gender diversity.¹²³ Despite these positive developments, these proposed reforms are still at the negotiation level, and it would require a great deal of political will on the part of states to accept and implement these reforms.

V. GM OF INTERNATIONAL INVESTMENT LAW

The Fourth World Conference on Women (Beijing Conference) endorsed GM as sustainable and indispensable to achieve gender equality commitments in all spheres of society.¹²⁴ The 1997 Agreed Conclusion of the United Nations Economic and Social Council defined GM as follows:

Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.¹²⁵

Since the Beijing Conference, GM has been on the agenda of action for both international and regional institutions. For instance, UNCTAD is mandated by the 2016 Nairobi Maafikiano to 'continue its efforts in all its work to mainstream cross-cutting issues of gender equality and the empowerment of women,'¹²⁶ in recognition of the fact that 'gender equality and women's empowerment are essential to all countries to attain sustainable and equitable growth and development.'¹²⁷ While the GM initiatives, specifically in the field of IIL, still seem to be in a nascent stage, such initiatives seem to have taken off well in the field of international trade. A possible reason why new FTAs are bolder to include trade and gender issues, compared to IIAs, is because there are more women involved in trade policymaking, the increased number of women traders, increased awareness about the gender dimension of trade, and advocacy campaigns about the importance of gender equality from a trade and development

123 Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session, United Nations Commission on International Trade Law, January 2020, A/CN.9/1004/Add.1, <https://undocs.org/en/A/CN.9/1004/add.1>, at 16 (visited 12 July 2020).

124 Report of the Fourth World Conference on Women, Beijing, 4–15 September 1995, A/CONF.177/20/Rev.1, <https://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20E.pdf> at 11 (visited 12 July 2020).

125 Gender Mainstreaming, Extract from Report of the Economic and Social Council for 1997, (A/52/3), 18 September 1997 <https://www.un.org/womenwatch/daw/csw/GMS.PDF> (visited 21 July 2020).

126 UNCTAD, Nairobi Maafikiano, https://unctad.org/meetings/en/SessionalDocuments/td519add2_en.pdf (visited 2 July 2020).

127 Ibid.

perspective.¹²⁸ Hence, it would be worthwhile to look at how new-generations FTAs are mainstreaming gender issues in trade.

A. 'Trade and gender' chapters in new-generation FTAs

There are several instances of recent trade agreements becoming increasingly gender-responsive.¹²⁹ For instance, the recently amended Canada–Chile FTA and Canada–Israel FTA include an entire chapter on trade and gender. Even though the Comprehensive Economic Trade Agreement between Canada and the European Union (CETA) signed in 2016 did not originally contain a chapter on trade and gender, the CETA Joint Committee in 2018 adopted a detailed recommendation aimed at making CETA more gender-responsive.¹³⁰ These chapters on trade and gender in Canadian FTAs have four main functions—(i) reaffirming the importance of incorporating a gender perspective in economic and trade issues; (ii) reaffirming the commitment to international agreements on gender equality and women's rights including CEDAW; (iii) providing a framework of cooperation between the parties to work on gender and trade issues; and (iv) establishment of a trade and gender committee and other institutional provisions.¹³¹

These chapters in Canadian FTAs as of now are like framework agreements, and the delineating substantive content is still a work in progress. So far as the investment obligations contained in the FTAs are concerned, they will have to be consistent and read in coherence with the obligations in the chapter on trade and gender. Since there is no such provision concerning inconsistency between the 'trade and gender' chapter and that on investment, it is presumed the contents of this chapter shall inform the entire FTA including the investment provisions.

Moving ahead, in the following section, we discuss a few tools that can be used for GM of stand-alone IIAs.

B. Gender impact assessment of IIAs

One of the most important tools for making gender-responsive policies is a gender-impact assessment (GIA).¹³² IIAs can be made more gender-sensitive by using

- 128 UNCTAD, 'The New Way of Addressing Gender Equality Issues in Trade Agreements: Is It A True Revolution?', 2017, https://unctad.org/system/files/official-document/presspb2017d2_en.pdf (visited 5 February 2020). For more literature on the subject, see, José-Antonio Monteiro, 'Gender-Related Provisions in Regional Trade Agreements', WTO Staff Working Paper ERS2018-15, https://www.wto.org/english/res_e/reser_e/ersd201815_e.pdf (visited 5 February 2020); Amrita Bahri, 'Women at the Frontline of COVID-19: Can Gender Mainstreaming in Free Trade Agreements Help?' 23 *Journal of International Economic Law* 563 (2020).
- 129 This development is in line with the call to make trade and development policies more gender responsive by the Buenos Aires Joint Declaration on Trade and Women's Economic Empowerment, https://www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf (visited 8 February 2021).
- 130 Recommendation 002/2018 of 26 September 2018 of the CETA Joint Committee on Trade and Gender, <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/rec-002.aspx?lang=eng> (visited 30 August 2020).
- 131 Trade and Gender in Free Trade Agreements: The Canadian Approach, https://www.international.gc.ca/trade-commerce/gender_equality-egalite_genres/trade_gender_fta-ale-commerce_genre.aspx?lang=eng (visited 30 August 2020).
- 132 Gender Impact Assessment: Gender Mainstreaming Toolkit, <https://eige.europa.eu/sites/default/files/mh0416171enn.pdf> (visited 30 August 2020).

GIA. A GIA involves two aspects—first examining the existing gender-related position and second determining the projected impact on women and men of any measures, law, or policy.¹³³

However, GIAs can take place in two different forms and stages. The *first* form of GIA may take place as a part or component of larger human rights impact assessment (HRIA) to be conducted by states prior to entering into any IIA. In this regard, it is important to recall the UN Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements.¹³⁴ Even as these principles accord a fair amount of discretion to states to devise their methods for the conducting of HRIAs, they recommend making explicit reference to the normative content of human rights obligations; incorporating human rights indicators into the assessment; and ensuring that decisions on trade-offs are subject to adequate consultation (through a participatory, inclusive, and transparent process), in accordance with the principles of equality and non-discrimination.¹³⁵

The commentary to these guidelines also calls for specific attention to ‘*the impact of trade and investment agreements on gender equality*, as required under the [CEDAW].’¹³⁶ The commentary also emphasizes breaking down the information by gender, by disability, by age group, by region, and by ethnicity or on other grounds, based on a contextual, country-level appreciation of the most vulnerable groups, so that due attention is paid to the situation of such groups, particularly women.¹³⁷ Further, the principles also call for adopting measures by states either at the domestic level or measures such as flexibilities or exceptions within IIAs themselves, if they conclude based on an HRIA that there is an incompatibility between the human rights obligations of the state and those under the IIA, to ensure an adequate level of protection of vulnerable groups including women.¹³⁸ The sustainability impact assessments conducted by the EU in respect of its FTA negotiations provide a good example of using impact assessments prior to inking a trade or investment agreement in order to mainstream the vulnerable stakeholders including women.¹³⁹

The second form of GIA may take place once the IIA has been signed, and an investor seeks to establish its investment in the host state while seeking protection of the IIA. While no IIA at present provides specifically for GIA, a template can be found in the Morocco–Nigeria IIA, which has a specific provision dedicated to impact assessment, requiring both environmental impact assessment and social impact assessment

133 Ibid, at 8.

134 Human Rights Council, ‘Report of the Special Rapporteur on the right to food, Olivier De Schutter’, Addendum ‘Guiding principles on human rights impact assessments of trade and investment agreements’, A/HRC/19/59/Add.5, 19 December 2011, <https://undocs.org/A/HRC/19/59/Add.5> (visited 30 August 2020).

135 Ibid, para 5.

136 Ibid, para 5.1.

137 Ibid, para 5.3.

138 Ibid.

139 European Commission, ‘Sustainability Impact Assessment’, https://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/sustainability-impact-assessments/index_en.htm#_Sias (visited 30 August 2020).

(SIA).¹⁴⁰ It can be argued that a SIA would, and must, involve an assessment from a gender perspective. We argue that, much like an environmental impact assessment, a foreign investor before investing in the host state may be required to perform a GIA independently, or as a specific component of an SIA, either under the laws of the host or home state whichever is more stringent. Even in the absence of any such law in the host state or the home state, the GIA may be performed in accordance with any internationally recognized standard.¹⁴¹

C. Using exceptions and flexibilities in IIAs

While the substantive obligations contained in the IIAs constrain regulatory powers, host states can use exceptions in IIAs to promote gender-related concerns. Some of the exceptions already seen, and which should be resorted to by states, appear in the context of the national treatment and MFN obligations as seen in the Japan–Argentina IIA or the South Africa–Ethiopia IIA. These exceptions allow the host state to adopt investment-related measures for social welfare and achieving equality *inter alia*. The RTDR¹⁴² also underlines the adverse impact of NT obligations, especially for the SME sector. According to an International Finance Corporation report, around 9.34 million, one-third of all formal SMEs in over 140 countries are owned by women.¹⁴³ Yet the report recognizes several financial and non-financial barriers that women-owned SMEs face. The role of the state becomes essential in removing these barriers. The RTDR argues that pitted against foreign investors, these SMEs will be ‘unable to compete with foreign firms that have far greater capacity, finances, technology and innovation, markets and production scale ...’¹⁴⁴ Therefore, the exceptions to the NT provisions in IIAs as discussed above may play an important role in securing economic rights for women in the host state. Another tool that is somewhat controversial and debated is ‘performance requirements (PRs).’ Even as the Washington Consensus views PRs as a tool that should not be used by states, a view that informs the basis for including PR prohibitions in IIAs, it has been argued that PRs, if implemented in the right manner, tailored to the specific circumstances of the country and accompanied by sector-specific conditions may well be a tool to achieve and maximize the economic, social, and environmental benefits of FDI.¹⁴⁵ On the same lines, the independent expert in the RTDR also

140 Morocco–Nigeria IIA, Article 14.

141 Ibid.

142 Muchhala, above n 26.

143 International Finance Corporation, ‘Women-Owned SMEs: A Business Opportunity for Financial Institutions’, 2014, <https://www.ifc.org/wps/wcm/connect/44b004b2-ed46-48fc-8ade-aa0f485069a1/WomenOwnedSMEs+Report-Final.pdf?MOD=AJPERES&CVID=kiiZZDZ> (visited 3 February 2021).

144 RTDR, above n 26.

145 Aaron Cosbey and Howard Mann, ‘Bilateral Investment Treaties, Mining and National Champions: Making It Work’, https://www.iisd.org/sites/default/files/publications/bilateral_investment_treaties_mining_national_uneca.pdf (visited 25 August 2020); Suzy H. Nikiema, ‘Performance Requirements in Investment Treaties Best Practices Series’, International Institute for Sustainable Development, Winnipeg, Manitoba, Canada, December 2014, <https://www.iisd.org/sites/default/files/publications/best-practices-performance-requirements-investment-treaties-en.pdf> (visited 25 August 2020).

suggests PRs as an important policy tool to achieve the goal of securing economic rights for women, a key component of sustainable development.¹⁴⁶

Another important way of realizing GM is the tool of ‘government procurement’. The gender-responsive investment regime suggested by the Canadian government advocates for ‘government procurement provisions that allow procuring entities to consider opportunities for small and minority-owned businesses or under-represented groups, including women, when procuring goods or services.’¹⁴⁷ Such policies at the domestic level must be complemented by provisions in IIAs that create an exception that allows for this type of government procurement. For instance, the recent Brazil–India IIA, based on the 2016 Indian Model IIA, has kept ‘government procurement by a Party’ and ‘subsidies or grants provided by a Party to vulnerable groups in accordance with its law’¹⁴⁸ completely outside the scope of the protection afforded to foreign investors in the IIA. Similarly, the Japan–Morocco IIA exempts government procurement from the MFN and NT obligations.

Apart from these tools discussed above, the insertion of the word ‘gender equality’ or ‘rights or interests of women’ in the illustrative list of areas where parties reaffirm their right to regulate in the public interest would go a long way in securing policy space for host states to take gender-responsive measures.

D. Strengthening investor obligations

Several measures and policy recommendations have been made by UNCTAD as well as the RTDR on how foreign investors can contribute to a more gender-responsive investment regime. This includes issues areas such as ensuring non-discrimination and equality in treatment between men and women, incorporating gender concerns into TNCs’ investment projects and their business models, reporting on gender participation by TNCs, respect for the equal right in collective bargaining, etc.¹⁴⁹ At the same time, the impact on women of the activities of TNCs in the host state, particularly in the natural resources sector as well as in conflict areas, is also a matter of concern. While these issues can be addressed through municipal or domestic laws in the host state, it is equally important for states to incorporate these issues as concrete investor obligations in IIAs. As a matter of investment policymaking, the incorporation of investor obligations in IIAs is in sync with the business and human rights movement for fixing corporate responsibility, currently taking shape at the international level.¹⁵⁰ Choudhury observes that the corporate responsibility to respect human rights has evolved into, at best, a global norm and, at least, a global expectation as put by the UN Office of the High Commissioner for Human Rights.¹⁵¹

New-generation IIAs increasingly contain provisions on Corporate Social Responsibility (CSR) for instance as discussed above in the case of the USMCA. However,

146 RTDR, above n 26; Also see ECOWAS Supplementary Act 2008, Article 25.

147 See, above n 131.

148 India–Brazil IIA, Article 3.6 (d), (e).

149 UNCTAD Report, above n 17.

150 Barnali Chaudhary, ‘Investor Obligations for Human Rights’, *ICSID Review—Foreign Investment Law Journal* (2020) doi:10.1093/icsidreview/siaa002.

151 *Ibid.*, at 4.

most of these CSR provisions are couched in ‘soft law’ language and exist in the form of non-binding ‘best endeavour’ clauses.¹⁵² Nevertheless, these provisions certainly contribute to shifting the context and perspective in which IIAs are interpreted, i.e. from a pure investment protection perspective to a human rights-oriented perspective. It would be beneficial to have ‘gender equality’ and the ‘mitigation of adverse impact on vulnerable groups including women’ as goals to be pursued by investors as part of their CSR mandate.

A better approach, as found in the Morocco–Nigeria IIA is to have a provision on post-investment obligations, which states that investors *shall* uphold human rights in the host state; *shall* act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998; and *shall* not manage or operate the investments in a manner that circumvents international environmental, labour, and human rights obligations to which the host state and/or home state are parties.¹⁵³ It is submitted that the states should consider including specific text addressing issues such as ‘gender equality’ and ‘gender-based violence’, as a part of investor obligation provisions. In addition, states should strive to adopt treaty text that may support counterclaims against an erring investor in an ISDS dispute.

In addition, IIL can be made more gender-responsive by making ISDS arbitral tribunals gender-diverse. Disputing parties can play a major role in ensuring gender parity in arbitral tribunals. One way is to bring requirements of gender diversity into the framework of IIAs themselves. Another way, as suggested by scholars, is to increase the size and breadth of the pool of arbitrators and making this known to appointing authorities.¹⁵⁴ This would facilitate a more gendered selection process.¹⁵⁵

As the analysis undertaken in the previous section indicates, historically IIL has been oblivious to gender issues. The inclusion of substantive gender-related provisions may allow states to reconcile their gender-related goals with investment protection and promotion. Such reconciliation, it is submitted, has two aspects—first is the immediate consequence for the host state in terms of enhanced regulatory space to take measures ensuring gender equality, development, etc. The second aspect concerns the larger debate about the legitimacy of IIL. Gender-responsive substantive provisions in IIAs, obliging the host state to play an active role in ensuring gender equality *inter alia*, will go a long way in debunking claims that IIL does not have an effect on domestic governance and policymaking in the host state. At this juncture, it is pertinent to note that the lack of transparency in respect of ISDS-related documents is also a roadblock in accessing the information related to challenges by foreign investors to government measures that affect women, or which may have gendered implications.¹⁵⁶ Therefore, it is

152 Ibid.

153 Morocco–Nigeria IIA, Article 18.

154 Bjorklund et al., above n 5, at 18.

155 Ibid.

156 Mona Pinchis-Paulsen, ‘Transparency as a First Step for Tomorrow’s Investment Treaties’, 9 April 2018, <https://www.cigionline.org/articles/transparency-first-step-tomorrows-investment-treaties> (visited 25 August 2020).

not only important to recondition the content of IIAs, but also effectively enhance the transparency of the ISDS system.¹⁵⁷

The potential of IIL to effect changes to the domestic governance of the host state is debatable. Some empirical studies suggest that IIAs do not affect domestic governance.¹⁵⁸ Can any bilateral treaty bring change to the municipal legal framework for the reasons other than for which that treaty was signed? Since most IIAs are bilateral, it is highly unlikely that states would bring costly changes to their domestic laws for a commitment (such as protection of human rights) to another state that is distant from the actual purpose (i.e. promotion and protection of investments) of the bilateral treaty.¹⁵⁹ It is conceded that the non-investment commitments may give host states regulatory space, but those commitments in no way are a force to effect change at the municipal level. Therefore, the question should be: Can such provisions be incorporated in IIAs that oblige host states to ensure gender equality norms in the domestic sphere? The answer is yes! This assessment is corroborated by the recent practice of states that include gender-related norms in IIAs, signalling a policy shift from past practice. This policy shift also refers to the willingness of states to acknowledge women as stakeholders in economic activities and ensure their greater participation in economic activities.

E. Is GM enough?

Having outlined some ways to achieve GM of IIL, it is submitted that changes to IIL can only be fully realized when they are complemented by a flexible but robust municipal structure that supports gender equality and women's participation in economic activities. Scholars have pointed out that translation of commitments into action has been a major problem of GM.¹⁶⁰ A mere gender-neutral legal or regulatory environment may not be sufficient. Studies show that even a gender-neutral framework may have gender-differentiated outcomes, which may impede women more than men in participating in economic activities.¹⁶¹ It has been rightly argued by scholars that GM

157 United Nations Convention on Transparency in Treaty-Based Investor–State Arbitration, done at New York, 10 December 2014.

158 Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Oxford: Hart Publishing, 2018), 20; Jonathan Bonnitcha, 'The Impact of Investment Treaties on Governance in Myanmar', 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3644056 (visited 20 August 2020); Tom Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance', 25 *International Review of Law and Economics* 107 (2005).

159 We concede that some modern IIAs no longer have protection and promotion of investments as their sole purpose. These IIAs have diverse objectives including sustainable development. However, the empirical study done by us in Table 3 shows that the IIAs having such diverse objectives are few. In absence of generality on the nature of IIAs having various purposes, we have relied on old-generation IIAs to point the actual purpose of the IIAs.

160 Charlesworth and Chinkin, above n 36, at 195–96; Bahri, above n 128, at 577–78.

161 Simavi et al., above n 21, at 8.

is a process and not the end itself.¹⁶² It is a process through which equality and gender justice can be achieved.¹⁶³ Only GM at the structural or normative level of IIL might not be enough. Political will to incorporate and implement the gendered policies/budgeting is crucial for achieving any good. Therefore, we need to have increased access for women to investment supply chains, increased capacity of women to contribute in the opportunities of foreign investment, detailed gender analysis of targeted sectors of foreign investments, participation of women in investment policymaking, regular interventions to help women garner the benefits of foreign investments, female-friendly foreign investment promotions, mitigating risks from foreign investment faced by women, and collective efforts to promote economic empowerment of women.¹⁶⁴ In the absence of these measures from states, merely placing women in a highly gendered system will only be a formality.

VI. CONCLUSION

In the introductory part of this paper, we hypothesized that the current regime of IIL is androcentric and silent on issues concerning women. After carefully examining and delving upon all the research questions we had in the beginning, we found our hypothesis to be true. Women are considerably under-represented in the top echelons of the structural framework of IIL. Women-related issues barely find their place in the norms or policies relating to IIL. International legal instruments do not put any positive or negative obligations upon states to ensure gender parity in any field of IIL. Overall, the entire regime of IIL is gender-blind. As Bianchi writes, international law is not only made of men, it is also made for men.¹⁶⁵ We find IIL not to be different.

Positive steps have been taken through inclusive new-generation IIAs, recent model IIAs, and reforms initiatives at some IOs. However, these changes are not only exceedingly scarce but are also at the proposal level, like new model IIAs or ISDS reforms, which means they are the subject of negotiations and yet to be implemented. Equal representation of women at the senior management levels of the structural framework of IIL, the inclusion of gender-related provisions into treaty norms and policies, increased participation of women in economic activities in host states, gender diversity while appointing arbitrators at ISDS proceedings, and, most importantly, obligations on states to ensure gender parity at municipal levels are some of our recommendations in this regard.

This study was only a preliminary inquiry. The effort was to highlight one of the important areas of IIL, which is mostly untouched by scholars. We hope that more work will be done on this front to fill this gap.

162 Mariama Williams, 'Mainstreaming Gender Perspectives into All Policies and Programs in the UN System', https://www.awid.org/sites/default/files/atoms/files/spotlight_-_gender_mainstreaming_-_can_it_work_for_womens_rights.pdf (visited 30 December 2020).

163 Ibid.

164 Inspiration for some of these measures have been taken from 'Women and Trade: The Role of Trade in Promoting Gender Equality', a joint report by the World Bank and the World Trade Organization (WTO), https://www.wto.org/english/res_e/booksp_e/women_trade_pub2807_e.pdf (visited 8 February 2021); and Simavi et al., above n 21.

165 Bianchi, above n 1, at 186.

Mob-Lynching

—New Threat to Rule of Law

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Kavita**

Introduction

Presently, while the whole world is under the threat and impact of COVID-19, we could not ignore recent heinous act of Palgarh in Maharashtra. Repeatedly incidences of murder by aggravated mob supported by rumours of vehicle carrying cow meat or individual is belonging to child kidnapping gang are noticed and reported¹. Act is done under the shield of mob as our criminal law is silent somehow as to it. Rumours like child kidnapping, smuggling of human organs or beef spread as Wildfire via various online messaging platform and results into distinct acts of crime at various places².

We may access the gravity of act as Chairman of UP State Law Commission, Justice Adityanath Mittal, former judge of Allahabad High Court submitted 7th Law commission report on 10 July 2019 where in committee expressed serious concern over increasing instances of mob lynching via quoting instances of 28 September 2015 in Dadri, Gautam Buddha Nagar and in Bulandshahar on 3rd December 2018 where mob tried to burn the cops live.³

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¹ L. Correspondent, *Lynchings: Supreme Court seeks response from Centre, NHRC, States*, The Hindu (New Delhi, 26th June, 2019).

² N. Desk, *Tracking Mob Lynching*, The Hindu (New Delhi, 3rd July, 2018).

³ State Law Commission, *Mob Lynching*, Law Com No. 7(2019) pp 1-128.

Self-Attested
Kavita

On 26 June 2019 Hon'ble Prime Minister, Shri Narendra Modi slammed on 'GauRakshak' that 'killing of human beings, injury to public or private property in the name of *Gau Raksha* is not allowed and would not be tolerated by the government in any way'.

Justice Dr. A.K. Sikri, in *Cardamom Marketing Corporation v. State of Kerala*⁴, observed that: 'When we talk of sound and stable system of administration of justice, all the stakeholders in the said legal system need to be taken care of. The Rule of Law reflects a man's sense of order and justice. There can be no Government without order; there can be no order without law...'. Here the question arose whether criminal justice system has sufficient penal laws to curb it.

Mob Violence in India

According to the Oxford English dictionary, lynching refers to 'the act of killing/s done by a mob without any legal authority or process involved. Earlier, these acts of lynching used to involve hanging a person to death. The mob usually killed someone accused of a wrongdoing based on their suspicion and without looking into available evidence. Lynching is considered as a major crime like murder or rape. The mob serving as 'judge, jury and executioner' would carry out their spontaneous or pre-planned act of killing with absolute impunity and without any fear of law⁵.'

Therefore, it is homicide, i.e., killing human being by specified office without exception. Gradually it has emerged as hate crime to target minorities or specified communities⁶. It is pre-mediated violence in the name of public outrage. Our criminal justice system consists of various institutions at different level from police to prison⁷.

⁴ (2017) 5 SCC. 255.

⁵ *Supra* n.3.

⁶ M.K. Pathak & S. Rai, *Mob Lynching: A New Form of Hate Crime*, 20 Medico-legal Update, 127 (July-September, 2020).

⁷ Shoaib Daniyal, *The Modi Years: What has fuelled rising mob violence in India*, Scroll.in (Feb 23, 2019) available at <https://scroll.in/article/912533/the-modi-years-what-has-fuelled-rising-mob-violence-in-india> (last visited December 3, 2020).

It is apathy that our system provides haven to the conspirators of such a heinous mobocracy⁸.

- Restricted and conditional police power, critical mass and bureaucracy to support.
- Political interference helps offenders to go scot free
- Negligent or irresponsible police attitude gives various names like cow slaughtering, smuggling, road rage or rest driving etc.
- Even insult add to injury when case is registered against the victim himself
- Unmatched timings of offence and police arrival aggravate the situation.⁹

Since 2012, the incidents of mob-lynching have only increased.

The author does not have data of 2020, except few instances as on 31 July 2020, 25 years aged Lukman Khan was beaten brutally by self-assumed 'cow protector' group in presence of cop and forced to chant 'Jai Shri Ram' in Gurugram, Haryana. The whole episode was captured in videos, but only 1 accused was arrested. In another instance 52 years aged Gapphar Ahmad, an auto rickshaw driver was assaulted Sikar district of Rajasthan by mob¹⁰.

Curbing the Menace

On July1, 2017, then President Hon'ble Mr. Pranab Mukherjee commented that 'mob frenzy becomes so high and irrational, uncontrollable', people 'have to pause and reflect' and be proactively 'vigilant' to 'save the basic tenets of our country'. Mobocracy falls under the preview of following legal provisions-

In all below given provisions mobocracy or mob lynching is neither defined nor punished. It is by virtue of legal interpretation that cases are registered under above mentioned provisions.

⁸ A. Singh, *Mob Lynchings in India*, Jurist (May 9, 2020) available at <https://www.jurist.org/commentary/2020/05/ashutosh-singh-palghar-lynchings> (last visited December 3, 2020).

⁹ *Supra* n. 2, p.1.

¹⁰ See, <https://thewire.in/rights/two-years-since-sc-judgment-the-spectre-of-mob-violence-continues-to-loom-large> (last visited December 3, 2020).

Constitution of India	Article 21	Protection of life and personal liberty
Indian Penal Code	Sec 141	Unlawful assembly
	Sec 147	Punishment for rioting
	Sec 148	Rioting, armed with deadly weapon
	Sec 149	Every member of unlawful assembly guilty of offence committed in prosecution of common object
	Sec 323	Punishment for voluntary causing hurt
	Sec 324	Voluntary causing hurt by dangerous weapon
	Sec 325	Punishment for voluntarily causing grievous hurt.
	Sec 326	Voluntary causing grievous hurt by dangerous weapon or means.
	Sec 302	Punishment for murder
	Sec 307	Attempt to murder
	Sec 436	Mischief by fire or explosive substance with intent to destroy house, etc
Criminal Procedure Code	Sec 223	What persons may be charged jointly

In the case of *Tehseen S. Poonawalla v. Union of India and others*¹¹ on dated 17.07.2018 Hon'ble S.C held that 'lynching and mob violence are creeping threats that may gradually take the shape of a typhoon like monster. It is a colourable way to commit the crime in the name of mob. It is really threat to democracy that people are losing faith and tolerance to sustain a diverse culture.

There is no dispute that the act of lynching is unlawful, and this sweeping phenomenon has far-reaching impact. It is our constitutional duty to protect lives and human rights. No right is above the right to life with dignity and to be treated with humanness. what the law provides may be taken away by lawful means that was the fundamental concept of law. No one is entitled to shake the said

¹¹ (2018) 9 SCC 501.

foundation. No citizen could assault the human dignity of another, for such an action would comatose the majesty of law. In a civilised society, it was the fear of law that prevents crime. Commencing from legal space of democratic Athens till the legal system of modern societies today, the lawmakers try to prevent crimes and make the people aware of same but some people who develop masterly skill to transgress the law jostle in the streets that eventually leads to an atmosphere which witnesses bloodshed and tears. Steps to be taken at every stage for implementation of law are extremely important. Hence, the guidelines are necessary to be prescribed.'

Looking into the gravity of offence, the Hon'ble apex Court gave 11 guidelines to control the menace. These guidelines are based on preventive, remedial and punitive theory of crime. 'Police' and 'public order' is state subject as per 7th schedule. Therefore, maintenance of law and order, Protection of life and property of its residents and controlled crime rate is the responsibility of concern state. State has power to enact, adopt and enforce legislative provisions to curb crime in its territory. On August 9, 2016 advisory guidelines were issued to control the pre-planned crime in the name of protection of cows¹².

These guidelines are comprehensive covering major areas in which the menace could be overthrown. Since appointment of senior police officer as nodal officer and assistance staff to identify suspected areas in a time bound duration along with frequent patrolling and awareness programmes are major administrative steps to trap the offenders.

Another set of guidelines are remedial measures wherein immediate registration of FIR, reporting to nodal officer along with protection of family members of victim and provisions of speedy trial are there. Both deterrent and preventive steps are taken wherein personal responsibility of cops is imposed including charge of negligence and penal consequences.

¹² A. Bagriya, *To End Mob Lynching, Supreme Court gives an 11-Point Prescription*, Hindustan Times (New Delhi, 17th July, 2018).

Guidelines Given by Apex Court

1. In each district, States are directed to appoint/ dispute nodal officer who shall be senior police officer and must not be below rank of Superintendent of Police.
2. Nodal Officer shall be assisted by task force including DSP rank officer. Their prime responsibility is to take timely and effective measures to avoid mob lynching, collect intelligence report on the possibility of occurrence and check over leaking of hate speeches or provoking fake news.
3. Based on previous records identification of suspected areas in districts or villages within three weeks.
4. Monthly meeting of nodal Officer with local intelligence units in each district to evaluate and check tendencies and frequency of the offence.
5. Regular review meeting of DGP with nodal Officer and heads of the state police intelligence.
6. Dispersal of mob is prime responsibility of each police officer.
7. In order to prevent caste or community lynching, Each State and Union Government will work together in coordination to identify measures to be taken to prevent repetition.
8. Frequent police patrolling by SP team (as per circular of DGP) in sensitive areas.
9. Appropriate Government shall ensure awareness or threat warning via means of mass communication like Radio, T.V and official website of home department and police along with the other social media platforms that involving in mob violence would lead to serious consequences.
10. It is the primary responsibility of Centre and the State machinery to stop or dissemination of hate messages, videos, photos or other content via any social media app or site.
11. FIR should be lodged under section 153A IPC, i.e promoting enmity among people or other relevant provision.
12. Centre being guardian of state may issue guidelines to the States in grave situations to manage or control the gravity.¹³

¹³ L. Correspondent, *SC lays down Guidelines to Curb Lynching*, The Telegraph online (E paper, 17th December, 2020).

Remedial Measures suggested in *Tehseen S. Poonawalla v. Union of India*¹⁴

1. Respite all preventive steps, if any incidence is reported then PS within whose local jurisdiction the matter arose would take immediate steps after lodging of FIR.
2. SHO would report immediately to the district nodal officer on one side and give protection to the family of victim further harassment.
3. Nodal officer shall himself supervise the whole matter and is personally bound to ensure lawful investigation in effective manner. Charge-sheet shall be filed within the limitation time period.
4. In order to compensate victims state government shall issue various schemes. Due consideration as to the nature of psychological and physical injury, impairment of Sight or hearing and involved legal as well as medical expenses should be kept in mind.
5. Matter should be tried in special designated court in each district on daily basis and judgment should be pronounced within six months of occurrence of offence.

CJI Sh. Dipak Mishra commented that 'we may hasten to add that these directions shall apply to even pending cases'.¹⁵

Deterrent Punishment

Maximum sentence by trial court must be awarded ordinarily.

1. In order to conceal the whereabouts of witnesses, on written request of PP or such witness, effective steps can be taken.
2. Proper notice as per rules of CPC should be served to victim or a deceased.
3. Free legal aid to the victim as the fundamental right (if claims) be ensured.¹⁶

¹⁴ *Supra* n. 11.

¹⁵ *Id.*, p. 10.

¹⁶ *Supra* n. 13.

Preventive Measures

In house departmental inquiry against the defaulting police or district officer should be done under deliberate grave negligence or misconduct provisions. Moreover, it should be completed within six months with appropriate action.

In the case of *Kodungallur Film Society and Ors. v. Union of India*¹⁷ (UOI) and Ors (1.10.2018 SC) the writ petition was allowed to entertain due to damage to the public and private property by the act of mob violence, protest and demonstrations based on directive guidelines of apex court in the case of **Destruction of public and private property versus Government of Andhra Pradesh**¹⁸, where in the court directed that 'there might be different reasons of self-resume protector of public morality but common idea was to exercise unlawful power without sanction of state and create fear in the mind of viewers.'

In the case of *Sulfikar Nasir v. State of Uttar Pradesh*¹⁹ (31.10.2018) Delhi H.C observed that all the matters of mob lynching prior meeting of mind along with the planning to commit murder is there. Therefore, all accused are liable under section 120 B IPC, 364 IPC, 302 IPC r/w 201 IPC without reasonable doubt. In this matter the court took strict view to set an example against repeated instances of murder colourable with mob lynching.

Reasons why Mob Lynching Continues Unabated

Common cause, an NGO and CSDS²⁰ researched into the reasons why in spite of the Supreme Court guidelines, the issue of mob lynching has not resolved. The report claims that '35% of interviewed police officers think that it is natural for a mob to punish the 'culprit' in

¹⁷ (2018)10 SCC 713.

¹⁸ (2006) 8 SCC 161.

¹⁹ MANU/DE/3960/2018.

²⁰ The Centre for the Study of Developing Societies (CSDS) is an Indian research institute for the social sciences and humanities. It was founded in 1963 by Rajni Kothari and is largely funded by the Indian Council of Social Science Research Govt of India. It is in New Delhi.

cases of cow slaughter, and 43% think it is natural for a mob to punish someone accused of rape.²¹

Our society always demands instant justice. People take law and order in their hands even without looking into the gravity of the issue. Lynching usually happens by gathering of a mob and illusive self-presumed responsibility of people towards the society, coupled with lost faith over administration of Justice.

Major contributory factor is the notion of 'Justice delayed is Justice denied'. One must accept that the nature of instant justice leads to another heinous offence and one offence can never be punished by committing another.

Way Forward

In the case of *National Human Rights Commission v. State of Gujrat and others*²², the Hon'ble Apex Court observed, 'communal harmony is the hallmark of a democracy. No religion teaches hatred. If in the name of religion, people are killed, that is essentially a slur and blot on the society governed by the rule of law. The Constitution of India, in its Preamble refers to secularism. Religious fanatics really do not belong to any religion; they are 'no better than terrorists who kill innocent people for no rhyme or reason in a society which as noted above is governed by the rule of law.'

In order to ensure administration of justice and rule of law, there is a need to strict comply with SC guidelines in *Prakash Singh case*²³ as to functional autonomy of police and direct accountability towards public.

A separate police board should be constituted to ensure internal transparency and accountability.

Report of Malimath committee²⁴ as to criminal justice system in India should be followed.

²¹ Mahtab Alam, *Why Do Mob Lynchings Still Continue Unabated*, The Wire (Sep. 7, 2019).

²² (2009) 6 SCC 342.

²³ *Prakash Singh v. Union of India*, 2006(8) SCC 1.

²⁴ Malimath Committee headed by Justice V.S. Malimath, former CJ Karnataka and Kerala HC was constituted by the Home Ministry, GOI.

Police and administration should have access to latest means of monitoring devices like Drones in sensitive areas.

In order to meet emergent situations, the police personnel should be given power to take immediate punitive action against accused.

Political interference and bureaucracy should be minimised to zero tolerance.

Finally, there is a need to redefine the role and interference of media.

Sri K.T.S. Tulsi, Senior Advocate and Member of Rajya Sabha, had introduced 'Protection from Lynching Bill, 2017²⁵' in the Rajya Sabha on 29th December, 2017 but the Bill has not yet been passed. 7th Schedule of the Constitution of India imposes competence on the State Governments to frame law on the point of mob lynching. Therefore, it is submitted that the State Governments should take immediate steps to develop a law to combat mob lynching. It is pertinent to mention here that Manipur is the first state and Rajasthan comes second in the list of states to have framed its own Anti Mob lynching Bills. It is submitted that there is a dire need for other states follow suit.

²⁵ Bill No. 44 of 2017.

कला एवं धर्म शोध संस्थान, वाराणसी द्वारा संचालित



कला सरोवर (त्रैमासिक)

(Peer Reviewed Journal Approved by UGC Care List)

भारतीय कला एवं संस्कृति की विशिष्ट शोध पत्रिका

प्रिय महोदय/महोदया,

रचना के लिए धन्यवाद! सुविधानुसार शीघ्र ही अंक वर्ष 24 संख्या-4-2021 में प्रकाशित करने की व्यवस्था करूँगा। इसे इस विश्वास पर स्वीकृत किया गया है कि यह आपकी अपनी मौलिक रचना है और कहीं अन्यत्र प्रकाशित नहीं हुई है।

आपकी रचना **Mediation in Consumer complaints: Analysis in the perspective of the Consumer Protection Act, 2019** की स्वीकृति संख्या कला

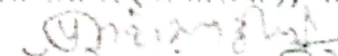
Dr. Kavita

सरोवर वर्ष 24/263 है। पत्र व्यवहार करते समय इसका उल्लेख अवश्य करें।

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Mediation in Consumer complaints: Analysis in the Perspective of the Consumer Protection Act, 2019

¹⁵ ★ Dr. Kavita

Abstract:

The Consumer Protection Act, 1986 was passed to strengthen consumer protection and allow for the creation of consumer protection councils and other authorities to resolve consumer disputes. However, in light of the continued evolution of consumer economies and the digitization of commerce, Parliament enacted the Consumer Protection Act, 2019 to better shield customers against the dangers of misleading advertising, telemarketing, "multi-level marketing, and e-commerce. Additionally, the Act provided for the establishment of a Central Consumer Protection Authority to encourage, defend, and uphold customers' interests and allow appropriate interventions to discourage unfair trade practices and bring class-action lawsuits, including imposing recall compensation and return of goods. Therefore, the President of India gave his sanction to the long-awaited Consumer Protection Act, 2019, on Aug 9, 2019, and it went into effect on July 20, 2020. Importantly, the law has undergone several changes while still managing to maintain certain old clauses while incorporating new ones. Chapter V of the Act emphasizes the value of mediation in consumer-related issues and allows the parties to participate in mediation after the case has been accepted or at some later time.

Keywords: Mediation, Consumer Complaints, Mediator, Procedure of Mediation, Consumer Mediation Cell

Introduction

The Act requires the parties to a dispute to unanimously negotiate on the appointment of a mediator that is the sole mediator. If the parties are unlikely to agree on who will serve "as the sole mediator, the respective commission will nominate/appoint the mediator at its own discretion." Mediation is critical for the timely and effective resolution of consumer's litigations, and it's praiseworthy that the state has a scheme in place to hire mediators who can resolve conflicts, reducing the pressure on the courts. The President of India gave his sanction to the long-awaited Consumer Protection Act, 2019, on Aug 9, 2019, and it went into effect on July 20, 2020. Importantly, the law has undergone several changes while still managing to maintain certain old clauses while incorporating new ones. Chapter V of the Act emphasizes the value of mediation in consumer-related issues and allows the parties to participate in mediation after the case has been accepted or at some later time. If the representatives of the Central Authority believe there is a reasonable chance of resolving the conflict, they will send it to mediation, and if mediation fails, the case may be pursued further.

Appointment of Mediator

There was a pressing need to develop additional standards under the Law of 2019, to improve the effectiveness of consumer dispute mediation. "The National Consumer Disputes Redressal Commission has established specific qualifications, training, and procedures for selecting and appointing of mediators under these regulations. The training protocol instills in the mediator a sense of integrity, trust, and conviction. However, there is still a need to provide an ombudsman so that the parties concerned can voice their questions about the mediator's malfeasance. In order to obtain the required certificate of accreditation, qualified mediators would be required to complete at least of 40 hours of training.(GOVINDARAJAN, 2020)

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Mediation offers an additional source of money for people who may still use it as an alternative source of income and is, therefore, a welcome addition to the list of employment available in these difficult economic times. The new Consumer Protection Act of 2019 allows consumers to submit lawsuits online and in consumer commissions with authority over their (i.e., complainant's) residence, thereby eliminating the former procedure under the previous Act. However, the Act specifies 30 days for the conclusion of mediation.

Procedure for Starting Mediation Proceedings

At the beginning, a written request must be submitted to the appropriate authority (i.e. District/State/National Commission). The following headings should be included in the request:

- a) Following a brief description of the nature of the conflict, the approximate value of the disputed sum and any relief or claim pursued by the requesting party must be specified.
- b) Mention both parties' names and contact information (or a subset of the names and numbers for each) involved in the conflict, including all their representatives and any legal or other interested parties.
- c) There must also be a recommendation for selecting a mediator, with recommended credentials such as language abilities, mediation experience of the subject matter, and other relevant qualifications being included.
- d) It is important to note that the party or parties that initiate the proceedings or file the request are required to provide a copy of the request to every other party at the same time, unless and until the application is submitted collectively by all of the parties involved. A charge of Rs must accompany this request. 500/-, which is non-refundable.

Role of a Mediator

When considering the numerous tangents of how effective the new Act of 2019 is, it is essential to assess and address the position of mediator. The mediator must attempt to encourage a voluntary settlement of the conflict between the parties, convey each party's point of view to the other, support them in tackling problems, reducing disputes, elevating priorities, articulating on areas of agreement, Finally, generating alternatives in an effort to resolve the issues, and consistently emphasizing that it is the parties' duty/responsibility to resolving the issues. (Shekhar, 2019)

Mediation Rules

On July 15, 2020, the union government published the Consumer Protection (Mediation) Rules, 2020, which marked a new improvement in consumer mediation under the novel Law. The guidelines include a set of issues that under which complaints should never be forwarded or submitted to mediation. Below is a summary of the items on the list:-

1. Cases of medical negligence that result in serious injuries or death.
2. Offenses pertaining to defaults committed, for which one or more parties have submitted applications for compounding of offences. ("National Consumer Protection Act 2019 | Penalties, punishments, Mediation| Online complaints, E-commerce complaint", n.d.)
3. Strong accusations of fraud, paper manipulation, forgery, impersonation, and coercion.
4. Cases of felony charges and non-compoundable offences.
5. Lawsuits concerning public concern.
6. The Commission to which the suit is *lis pendens* may prefer not to refer the dispute to mediation in every case other than those mentioned above if it seems to "the Commission that there is no scope for a settlement that may be acceptable to both parties, or if mediation would be an ineffective or inadequate option given the circumstances in each case."

Mediation as a new redressal mechanism

The Consumer Protection Act of 2019 established mediation as a redressal process for consumer conflicts. Parties in customer court now have the privilege of using mediation as a conflict resolution tool for some point since the case has been admitted. Section 74 of the Act empowers the state government to create a customer mediation cell attached to each district and state commission. ("Consumer Protection Act, 2019 - Salient Features & Summary", n.d.) According to Section 37 (2) of the Act, if the parties wish to negotiate by mediation and offer their consent in writing, the District Commission would refer the matter for mediation within 5 days of obtaining permission, and in that case, the mediation clauses of Chapter V will extend.

Expenditures and Fees

The relevant States/UTs are responsible for any costs associated with the mediation procedure, including the mediator's fee, operating costs, and any other costs that might occur. The mediator's fee shall not surpass Rs. 2000/- per event in certain conditions, although each side may be responsible for any costs incurred in the creation of witnesses, including consultants, or in the production of records. "According to the most recent Consumer Dispute Redressal Commission Rules, there will be no charge for filing complaints under the Consumer Protection Act, 2019, up to a maximum of Rs. 5 lakhs." As a society, we work hard against all odds to separate the poisonous dealings and present a healthier competitive climate by reducing market and customer tension by securing and ensuring fair rights for them. The Act aims to protect the best of consumer rights by creating and hiring the relevant authority regularly in an appropriate regulatory mechanism to resolve consumer conflicts at a significantly lower amount, rendering it more flexible for the aggrieved parties. Furthermore, it is completely reliant on how effectively individuals use the safeguards provided by the Act. That has not only improved the dispute resolution process, but also eased pressure on consumer commissioners, which nevertheless have a backlog of cases awaiting judgment. (Bagga&Paliwal, 2020)

Conclusion

The Consumer Protection Act, 1986 was passed to strengthen consumer protection and allow for the creation of consumer protection councils and other authorities to resolve consumer disputes. However, in light of the continued evolution of consumer economies and the digitization of commerce, Parliament enacted the Consumer Protection Act, 2019 to better shield customers against the dangers of misleading advertising, telemarketing, "multi-level marketing, and e-commerce. Additionally, the Act provided for the establishment of a Central Consumer Protection Authority to encourage, defend, and uphold customers' interests and allow appropriate interventions to discourage unfair trade practices and bring class-action lawsuits, including imposing recall compensation and return of goods. The Act further provides for simplifying the adjudication" phase of customer grievance redressal services and arrangements for dispute mediation by Alternate Dispute Resolution processes. The mediation cells are tasked with developing a council of mediators, which is kept up to date daily. In Section 77 of the Act, the mediator's roles and obligations in the mediation phase are outlined, especially the responsibility to report necessary details to any party. The Act further specifies the protocol for negotiations and how a resolution should be reached. It, therefore, necessitates the documentation of the above settlements by the relevant commission. (Singh & Sharma, n.d.)

A civil action in India takes approximately six years to resolve, excluding the time necessary for appeals. Therefore, the same time for a consumer dispute would be absurd. The earlier redressal system was insufficient in and of itself. A survey commissioned by the Centre

for Market Studies at the Indian Institute of Planning revealed consumers' true perceptions of current redressal processes. According to the findings of this study, 71.9 percent of those polled were unhappy with the operation of the redressal mechanism at different stages, although just 28.1 percent were pleased. The number of customer reports to the redressal process has steadily risen, but data has not been kept up to date. The biggest accusation leveled at the redressal scheme was the time it took to resolve disputes. This is a widespread problem in the Indian legal framework. According to Motilal C Setalvad, "A burning problem which the citizens, lawyers, and judges face alike is that of the congestion of courts of law and the consequent inordinate delays in the administration of justice." The Old Act specifies the time intervals in which the application may be made and the time frame in which the complaint must be handled. Despite this, the period required to resolve customer complaints was lengthy. To fix this problem, the 2019 Act included a desperately required solution of Mediation in the Indian framework.

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Lacunas of the RTE Act, 2009

Dr. Ravindra Kumar¹

More than 3300 years back a poet² had said, "Mother and that father are enemies, who do not give education to their children." In the recent past Nelson Mandela³ had proclaimed, "Education is the most powerful weapon which you can use to change the world."

"What must be think then, of that barbarous education which sacrifices the present to an uncertain future, which loads a child with chains of every sort and begins by making him miserable in order to prepare for him long in advance, some pretended happiness, which it is probable, he will never enjoy." --- (Jean Jacques Rousseau)

Introduction

The right to free and compulsory education became a fundamental right in India after six decades of independence. The right of children to free and compulsory education (RTE) Act, 2009 came into force April 1, 2010 after a century long serious of struggle, beginning with a demand for legislation for universal education initiated by Gopal Krishna Gokhale in the British era, culminating in a time bound promise under Article 45 of the Indian constitution. The RTE Act presents a unique opportunity to ensure that all Indian children enjoy their right to a quality, child-friendly and child-centred education. The RTE is anchored the belief that values of equality, social justice and democracy and the creation of a just and human society can be achieve only through the provision of inclusive elementary education to all. Thus, RTE Act promises a hope for children between 6 to 14 years to receive quality education.

The Act makes for a host of provisions that can potentially mark a turning point in the status of delivery of education in the country. While a historic step, the Act does have various lacunas, some of them are very serious. For instance, it does not include children below 6 years and above 14 years of age. The law is derived from the 86th Constitutional Amendment Act, 2002 and is, with its imperfections, a product of a hundred years of struggle.

The Act introduces remarkable changes in the education system through the school system in India. Numerous of the changes are quite revolutionary and if implemented properly, will greatly mend the system of delivering education in the country. Though the provisions of the Act have been included with noble intentions, some of them may lead to certain unintended

¹ Assistant Professor, Faculty of Law, University of Delhi, Delhi.

² Baddena, Neeti Saara or Neeti Sastra, (Wikipedia the Free Encyclopedia). Baddena a Telugu poet (1220-1280 AD) was the composer of the most famous "Sumathi Satakam" as well as "Neeti Sastra," during the thirteenth century. available at: https://en.wikipedia.org/wiki/Neeti_Sastra

³ Nelson Mandela quotes, South African Statesman First Democratically Elected State President of South Africa (1994), 1993 Nobel Prize for Peace, (b.1918) available at: https://en.wikiquote.org/wiki/Talk:Nelson_Mandela (Visited on Dec. 05, 2015). See also, Ann Kannings, "Nelson Mandela His Words," Lulu Press, Inc., (22-Jan-2014).

consequences. Thus, analysis of various provisions of the RTE Act, would pin point that this Act is not complete or sufficient in terms of accomplishing its declared and most desirable goals. Further, several lacunas of the RTE Act, 2009 are examined critically, these are as follows:

Definition

The definition clause Section 2 of the RTE Act, 2009 address the child belonging to disadvantaged group⁴ and child belonging to weaker section.⁵ Thus RTE Act does not adequately address the issue of child labour. The Act ignores the reality that a majority of poor children who are employed in agriculture and who bear the burden of housework and sibling care. The need to categorically state that all forms of employment and engagement, which hinders the development of the child, should be banned and made a cognizable offence. The historic judgement of the Supreme Court's in *Bandhua Mukti Morcha v. Union of India and Ors.*,⁶ already declared that, the 'right to live' with 'human dignity' must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, unities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity.

Meaning of Child

Section 2(c) of the RTE Act, 2009 defined the 'child' – means a male or female child of the age of 6 to 14 years. India accedes the United Nations Convention on the Rights of the Child (CRC), 1989 which mandates, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. Article 21-A of the Constitution mandates, "The State shall provide free and compulsory education to all children of the age of 6-14 years in such a manner as the State may, by law, determine."⁷ Article 45 inter alia provides the provision for early childhood care and education to children below the age of six years.⁸ The objects and reasons of the RTE, Act 2009, which enacted by parliament and came into force April 1, 2010, mandates that, every child has a right to be provided full time elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards.

Thus, United Nations Convention on Rights of the Child, 1989 use the term a child means "every human being" and Article 21-A of the Indian Constitution use the term "all children" and Article 45 inter alia use the similar term "all children" further objects and reasons of the RTE Act, 2009 use the term "every child", section 3(1) inter alia uses the term "every child". Thus Section 2(c) defined the 'child' – means a male or female child of the age of 6 to 14 years. So, we find a contradiction between objects and reasons of RTE Act and definition clause 2(c)

⁴ The Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009), s. 2(d).

⁵ The Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009), s. 2(e).

⁶ AIR 1984 802, (1984)2 SCR 67 (Supreme Court on Dec.-16-1983).

⁷ Ins. By the Constitution (Eighty-six Amendment) Act, 2002, s. 2

⁸ Subs. By the Constitution (Eighty-six Amendment) Act, 2002, s. 3

of the said Act. Therefore, RTE Act, 2009 does not cover every child like Hijras/Kinnar/Transgender Community (TGs).⁹

Right Of Child to Free and Compulsory Education

Sec. 3 of the Act is limited to elementary education of children between 6-14 years only.¹⁰ This means prohibiting of children in the age of 14-18 years from the ambit of Act.¹¹ Hence, deprive poor children from the opportunity and eligibility for technical education and higher education.

There is ambiguity in the Act as far as understanding for the term 'child' is concerned. The International document CRC, 1989 use the term "below" 18 years of age as a child, and all above National Education Policies use the term "up to" 14 years of the age of child, and also judgement of Unnikrishnan, J.P. declared the term "up to" 14 years age of the child. Whenever, the RTE Act, 2009 covers only children in the age group between 6 to 14, clearly excluding and ignoring the child of the 0-6 and 14- to 18-year-old and narrows down the definition to child between 6 to 14 years. Though the provision in the Act expresses interest in taking necessary steps in providing free pre-school education for children above three years of age but leaving out such a critical segment of the child population from the definition is perturbing.¹²

Duties Of Appropriate Government and Duties of Local Authorities

It is worth praising that section 8(c)¹³ and 9(c)¹⁴ prohibited discrimination against the children belonging to weaker section and disadvantage group from pursuing and completing elementary education on any grounds. But according to Report, 2014 of Human Right Watch (HRW) children belonging to these groups are harassing in class room continually. Such children have to compel to sit back in the classroom, this type of incidence is increasing day by day.¹⁵

Good Quality Elementary Education

⁹ Ravindra Kumar, "Right to Education: Comprehensive Equal Educational Opportunity to Every Child" *FIR" a Multidisciplinary Biannual Refereed Online Research Journal* (Paper has presented in 11th National Seminar on the Child Rights and Child Protection: A Socio-Legal Perspective, held on 11th November 2016, Organized by All Indian Rights Organization (AIRO), and Baba Saheb Bhim Rao Ambedkar Law College, Lucknow).

¹⁰ RTE Act, 2009, Section 3(1) 'Every child of the age of six to fourteen years, including a child referred to in clause (d) or clause (e) of Section 2 shall have a right to free and compulsory education in a neighbourhood school till completion of his or her elementary education'. This Section replaced by the Act No. 30 of 2012. [old provision was 'Every child of the age of six to fourteen years shall have a right to free and compulsory education in a neighbourhood school till completion of elementary education', following Act of received the assent of the President on the 19th June, 2012 and Act published in the gazette of India (Extr.) Part II Sec. 1 dated 20-06-2012, 1-3pp.

¹¹ Ravindra Kumar and Dr. Preeti Misra, "Right to Education as a Fundamental Right: A Critical Evaluation" Vol. V, Issue 1, *Shodh Prerak*, 193 (January 2015).

¹² Ravindra Kumar and Dr. Preeti Misra, "Constitutional Delineation of Right to Education: A Critical Appraisal" Vol. 3, Issue 1, *Journal of Legal Studies*, 122(January, 2015).

¹³ The Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009), Ss. 8(c) and 9(c) ensure that the child belonging to weaker section and the child belonging to disadvantaged group are not discriminated against and prevented from pursuing and completing elementary education on any grounds;

¹⁴ *Ibid*

¹⁵ New Delhi, Agencies, "Garib Bacchon Ke Sath Hota Hai Bhed Bhaw" *Dainik Jagran*, Apr. 23, 2014, p.15

The RTE Act envisages the appropriate government shall ensure 'good quality' elementary education conforming to the standards and norms specified in the Scheduled,¹⁶ and inter alia provides local authority shall ensure 'good quality' of elementary education conforming to the standards and norms specified in the Scheduled.¹⁷ The RTE Act uses the word 'good quality' in Sections 8(g) and 9(h), and as one of its objectives of the RTE Act. The word making 'good quality education' available use in National Policy on Education, 1986 as modified 1992 and inter alia the word accessible 'quality education' use in National Policy for Children, 2013. Whenever, the word 'good quality' not defines in the definition clause, and Act is silent about 'good quality' and does not declare the meaning of 'good quality'. Therefore, the Act fails to achieve its goals and objective properly.

Duty of Parents and Guardian

Sec. 10 of the RTE Act provides that it shall be the duty of every parent or guardian to admit or cause to be admitted his or her child or ward, as the case may be, to an elementary education in neighbourhood school.¹⁸ Thus, this provision generally perceived in this Act, and not the intention of this provision to compel parent or guardian and children or wards, who do not wish to avail of free and compulsory education, to inevitably admit their children or wards in neighborhood school. In other word, if parent or guardians have not performed their duty, there is no provision in RTE Act, 2009 to compel them to perform their duty.

Pre-School Education

Sec., 11 of the RTE Act, refers that '.... appropriate Government may make necessary arrangement for providing pre-school education to prepare children' above the age of three years for elementary education and provide early childhood care.¹⁹ Whereas, it should be mandatory for all concerned Governments and for this purpose 'may' should be replaced by 'shall', because the word 'may' make this provision of the Act maim. This provision is not mandatory in this Act, without a mandatory provision, there can be no accountability and clarity that how the appropriate government can make arrangements for this provision.

Extent of School's Responsibility for free and Compulsory Education

Section 12 of the Act provides the extent of school's responsibility for free and compulsory education, for the purposes of this Act, a school specified in sub-clauses (iii) and (iv) of clause (n) of Section 2 shall admit in class I, to the extent of at least 25%, of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion²⁰. The Act provides education only weaker section and disadvantage group of children admit in class I, to the extent of at least 25%, of the strength of that class, those children whom belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion. Whereas, the word 'disability' already has mentioned in the

¹⁶ The Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009), s. 8(g).

¹⁷ The Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009), s. 9(h).

¹⁸ The Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009), s. 10

¹⁹ The Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009), s. 11

²⁰ The Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009), s. 12(1)(c)

definition clause²¹, but missing from Section 12 of the Act. The effect of that is disabled children do not clearly get to avail 25% quota in private schools. Thus, the Act fails to provide free and compulsory education to every child.

Proof of Age

Sec. 14(2) of the RTE Act mandates that, no child shall be denied admission in a school for lack of age proof,²² it is the duties of appropriate Government and local authorities. Migrant's children may not be able to procure birth certificate etc. sometimes, and they are protected under this Section, but it should be constructed to support orphans as well as children belonging to disadvantageous circumstances.

No Denial of Admission

Section 15 mandates that a child shall be admitted in a school at the commencement of the academic year or within the prescribed extended period,²³ but this provision of the Act does not cover private un-aided schools. Because, Private unaided schools need not be concerned about this provision, especially with respect to the 75% admission, because if they have filled all seats at the beginning of the academic year the question of any-time admission would not arise.

Prohibition of Holding Back and Expulsion

Sec. 16 of the RTE Act, 2009 mandates that No child admitted in a school shall be held back in any class or expelled from school till the completion of elementary education.²⁴ There is no examination and evaluation process for children in primary classes, they do not get any motivation to improve their skills and complete their elementary education. If a child does not hold back in any class and promoted to next class continuously without any test or examination, does not have enough knowledge and skill to understand the syllabus of higher class, in which he promoted.

Examination and Completion Certificate

Sec. 30 of the RTE Act, 2009 mandates that, no child shall be required to pass any Board examination till completion of elementary education,²⁵ inter alia provides that every child completing his elementary education shall be awarded a certificate, in such form and in such manner, as may be prescribed.²⁶ According to the RTE Act, 2009 if a child secure zero marks in all subjects and does not go to school even a single day should be promoted to the next class, this provision of the Act affected those children who really want to read and acquire knowledge. If a child promotes to the next class it takes away all types of motivation for those children to learn or for the teachers to teach. It is the subject of concern that due to no detention policy the child does not learn the mother-tongue, essay calculation and other fundamentals of primary

²¹ Section 2 (ee), Ins. by Act No. 30 of 2012

²² The Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009), s. 14(2)

²³ The Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009), s. 15

²⁴ The Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009), s. 16

²⁵ The Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009), s. 30(1)

²⁶ The Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009), s. 30(2)

classes, because it is very important for the proper development of child's mind. Therefore, the Act is working on paper work only in fact it is not working on grass-root level.

Suggestions

If we want to overcome the challenges relating to children education, it would be necessary to overhaul the entire education system and the following can be suggested for bringing qualitative improvement with respect to RTE Act 2009. So, there are some suggestions as follows:

- Right to education should ensure satisfactory and qualitative education for all children in all government aided and un-aided private schools.
- Article 21-A of the Constitution should be amended and ambit up to age of 18 years as international definition of a child in the CRC, 1989.
- Article 51-A(k) of the Constitution should be amended and ambit up to age of 18 years as international definition of a child in the CRC, 1989.
- The optimum age for the right to free and compulsory education should be same as the age of right to vote, age of maturity, right to work and right to marriage, etc.
- Section 3 provides only 8 years elementary education of children between 6-14 years. It should be amended and Act ambit to the age up to 18 years to deprive poor children in technical education and higher education.
- It is clear in Sec. 11 of the RTE Act that the word 'may' is not mandatory in this Act, it should be amended immediately to word 'may' replaced by 'shall'.
- Section 11 should be amended and provide education above the age of 3 years of children and until they complete the age of 6 years because this age is very important for mental as well as physical growth of all children.
- Awareness should be spread among the rural masses about the importance of education, so that they really feel the need to send their children to school.
- Those parents/guardians, who fail to admit their child to a neighbourhood school for obtaining elementary education, should be debarred from availing total government facilities like ration card, water, electricity, LPG and job card facility, etc. and should be liable to fine for each day during which such contravention continues.
- The primary schools need to be made aware of the provisions made for 25% seats for the economically, socially weaker sections and disadvantaged groups of children of the society and the role of school managing committees in this regard.



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Judicial Approach for Justice: Redefining 'Aggrieved Person' Under Domestic Violence Act, 2005

Alok Sharma*

Introduction

The hierarchical structure of family permits the sexual division of labour resulting in subordination of females and domestic violence is one of the tools to maintain this configuration and its continuance. In Indian context, it has an atypical dimension that it is inflicted by husband and other members of his family especially his mother. Shockingly now-a-days it is also inflicted by daughter-in-law or sister-in-law to the mother and sister of her husband respectively. However, generally people do not recognize its existence in the family and take it as a routine affair having social and cultural approval resulting in non-reporting of such cases.

Domestic violence has been known by many names like domestic abuse, intimate partner violence, and wife battering etc. and its definition varies according to the time, place and context in which it is used. According to Black's Law Dictionary, domestic violence means "*violence between members of the households, usually spouses, an assault or other violent act committed by one member of a household against other.*"¹ However, presently it has been defined very generally to include physical, sexual, psychological, emotional and economic abuses. Laws of many countries

* Dr. Alok Sharma is a Senior Assistant Professor at LC-I, Faculty of Law, University of Delhi and can be reached at: alokasharma001@yahoo.com.

¹ BLACK'S LAW DICTIONARY, (7th Ed., 1999), p. 1564. See also, "According to the Merriam Webster dictionary, it is the inflicting of physical injury by one family or household member on another; also, a repeated/habitual pattern of such behaviour".

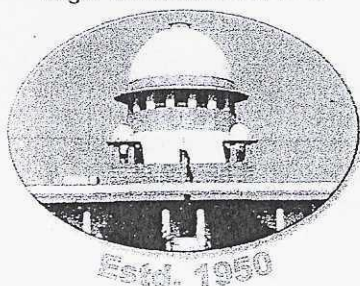
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* Due to non-availability of many persons involved, no useful purpose would be served in continuing with the judicial commission of inquiry. 331

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JUDICIAL POWER TO ALTER THE DICTA OF THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005

By

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Abstract

The Protection of Women from Domestic Violence Act, 2005 was enacted by Parliament to protect women from all kinds of domestic violence. It has very elaborately defined the various terms including the 'respondent'. However, since the inception of the Act, the definition of respondent has become the bone of contention among various High Courts about inclusion of females as respondents. Finally, the Apex Court has settled the controversy, at least in *Sau Sandhya's* case by including females as respondent if the aggrieved person is wife/female partner. But this interpretation falls when aggrieved person is male. Therefore, the Supreme Court by exercising its power of judicial review has deleted the word 'adult male' from it to make it operative in the present scenario in *Hiral Poonji*. The present article discusses the scope of judicial review to protect women from domestic violence.

Keywords: Judicial Review, Domestic Violence Act, Respondent, Legislative Interpretation, Judicial Interpretation
1. Introduction

The family with its hierarchal structure and sexual division of labour emerges as a unit where subordination of female pervades, and domestic violence is

used as a tool to maintain this composition and its continuance. In Indian context, it has a peculiar dimension that it is not only inflicted by husband alone but also by other members of his family especially the mother-in-law. A depressing facet of this problem is the reluctance of people to recognize its existence in the family. Moreover, the societal emphasis in such cases has normally been on family reconciliation therefore, social and cultural approval of domestic violence led to non-reporting of such cases.

It is important to note that over the last three decades, domestic violence has increasingly been recognized nationally as well as internationally as a serious problem. At the international level, many initiatives have been taken by the UN regarding Violence against Women in general and domestic violence in particular according to which the State parties had to take immediate steps to end gender-based violence in family, in community and by State. They called on

1. "Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted by the UNGA in December, 1979, effective from September, 1981; The Committee on the Elimination of Discrimination against Women was established under Article 17, Part V of CEDAW; In 1989, the Committee adopted a celebrated General Recommendation (GR) No. XII (12); In 1990, the Economic and Social Council accepted a resolution recommended by the Commission on the Status of Women; Recommendation 19 issued by the Committee on Convention on the Elimination of Discrimination against Women (CEDAW) and the UN Declaration on Elimination of Violence against Women (DEVAW) (20th December, 1993)".

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The Concept of Shared Household: Essentiality for Relief under Domestic Violence Act, 2005

*Alok Sharma**

Introduction

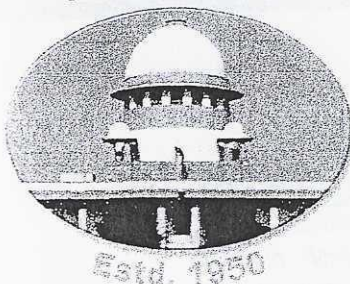
What is the position of women in Indian society? Are they equal? Whether they feel safe and secure in public places and even in homes? These are the million-dollar questions even in 21st century. The irony of Indian society is that women are still subjected to various kinds of violence even in their homes which are temples where they are believed to be the deities. Unfortunately, till now Indian society has an influence of patriarchy where women must suffer on various counts resulting in domestic violence, yet there was no such law relating to prevention of domestic violence against women before 2005. Many women organisations in India have raised their voice in order to have such a law. It became a great movement and there was such great pressure even on the political parties that one of the parties have included a promise to enact such law in their election manifesto. In addition to this, there was pressure from the International community to enact such a law. In the backdrop of these developments, India has enacted a special law for prevention of domestic violence, *viz.*, the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'the Act').

The Act has been enacted by Parliament by virtue of Article 15(3) of the Constitution which empowers Parliament to enact laws in favour of women and children. The Act is very comprehensive which provides for various reliefs¹ in addition to the already existing ones for women who are subjected to domestic violence by their family members, *viz.*,

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¹ The Domestic Violence Act, 2005, s. 18-23 provide many avenues for an aggrieved person to get relief from the court by applying under s. 12(1).

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ADMISSION IN EVIDENCE – Mere admission in evidence and making (marking) exhibit of a document does not prove it automatically unless the same has been proved in accordance with law. 652

ADVERSE POSSESSION – In order to establish adverse possession an inquiry is required to be made into the starting point of such adverse possession. 657

ENFORCEMENT OF A FOREIGN AWARD – Errors of judgment are not sufficient grounds for refusing enforcement of a foreign award. 672

FALSE DOCUMENT OR ELECTRONIC RECORD – Unless a person is said to make a false document or electronic record, Section 463 IPC does not get attracted at all. 727

FATAL INJURY – When the fatal injury was inflicted by the appellant on the head of the deceased by only one blow given in the manner alleged by the prosecution it could as well be that the act by which death was caused was not done with the intention of causing death or of causing such bodily injury as is likely to cause death. 649

FINALITY OF THE JUDGMENT IS ABSOLUTELY IMPERATIVE – In a country governed by the rule of law, finality of the judgment is absolutely imperative and great sanctity is attached to the finality of the judgment. 668

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DOMESTIC RELATIONSHIP UNDER THE DOMESTIC VIOLENCE ACT: NEED FOR A HUMANITARIAN APPROACH

By

Dr. (Mrs.) Alok Sharma, Assistant Professor

Abstract

The Protection of Women from Domestic Violence Act, 2005 was enacted by Parliament to protect women from all kinds of domestic violence. It has very elaborately defined the relevant terms including the 'domestic relationship'. However, since the inception of the Act, the definition of domestic relationship has become very controversial regarding the category of relationship or the nature of marriage vis-a-vis live-in-relationship. Of course, the Apex Court has settled the controversy at rest in Indra Sarma's case by differentiating between relationship in the nature of marriage and live-in-relationship and stating that protection under the Act would be granted only to those females who are in relationship in the nature of marriage and no protection is granted to those females who are having live-in-relationship. But this interpretation fails to protect many women because they do not know the technicalities of law and think that they are having the relationship in the nature of marriage but actually they fall short of it and become victim of technicalities of legislative and judicial approach. The present article highlights the need for a humanitarian approach on the part of legislation as well as judiciary to provide justice to all affected women under this category by proper enactment and judicial interpretations.

Keywords: Domestic Violence Act, Domestic Relationship, Relationship in the Nature of Marriage, Live-in-Relationship, Humanitarian Approach, Judicial Interpretation.

1. Introduction

The family which is one of the most cherished institutions promotes discrimination among male and female members to make

females subordinate with the tool of domestic violence used against them in various forms depending upon the status of the victim. Fortunately, over the last few decades, domestic violence has been recognized all over the world as a matter of concern. Internationally, many steps have been taken by the international organizations like UN in this respect.¹ The State parties were directed to take instant steps to end any gender-based violence not only in family but also in community and by State. They directed the States parties to enact national laws in this regard or to modify the existing laws if they have any on this issue.

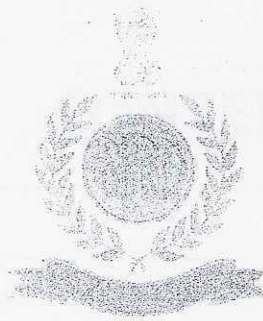
In the country, as per the directions, the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'the Act') was enacted by the Parliament to protect women exclusively in the private sphere from all kinds of domestic violence. It has very elaborately defined the relevant terms including the 'domestic relationship'. However, since the inception of the Act, the definition of domestic relationship has become very controversial regarding the category of relationship in the nature of marriage vis-a-vis live-in-relationship.

Of course, the Apex Court has settled the controversy at rest in many cases by

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Insights into the Role of Police for Implementation of Domestic Violence Act in India

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ABSTRACT

Domestic violence against women is an omnipresent fact to maintain and reinforce women's subordination. For the last few decades, many women's groups started movement throughout the world resulting in many initiatives by the international community especially the United Nations resulting in directions to all State parties to the Conventions to take immediate steps to control and eradicate this evil by modifying the existing laws comprehensively or by enacting new laws in this regard. The Protection of Women from Domestic Violence Act, 2005 is a resultant Indian law to address the issue of domestic violence to impart justice and relief to its victims. It has reduced the procedural formalities by providing for an inbuilt mechanism to facilitate the entire system of access to justice. It identifies specific functionaries like protection officers and service providers whose primary duty is to assist women in accessing the reliefs provided under the Act. The Act confers similar responsibilities on Police by specifying their duties and powers in these cases. The present paper deals with the role of Police in implementation of the Act, their approach and difficulties, and suggestions for improvement. Some data, collected by the author for her Ph.D. research, have been used to highlight the issues.

Keywords: Police, Domestic Violence Act, Implementation, Functionaries, Aggrieved Person

Introduction

Violence against women is an apparent and irrefutable fact in all the countries irrespective of development. It operates as a means to maintain and reinforce women's subordination. There are various actors and factors which play crucial roles in infliction

of domestic violence. A number of theories have been propounded to explain the causes of domestic violence which has adverse consequences on health, family and economic etc. For the last few decades, there has been a large increase in the number of domestic violence cases. Therefore, many women

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