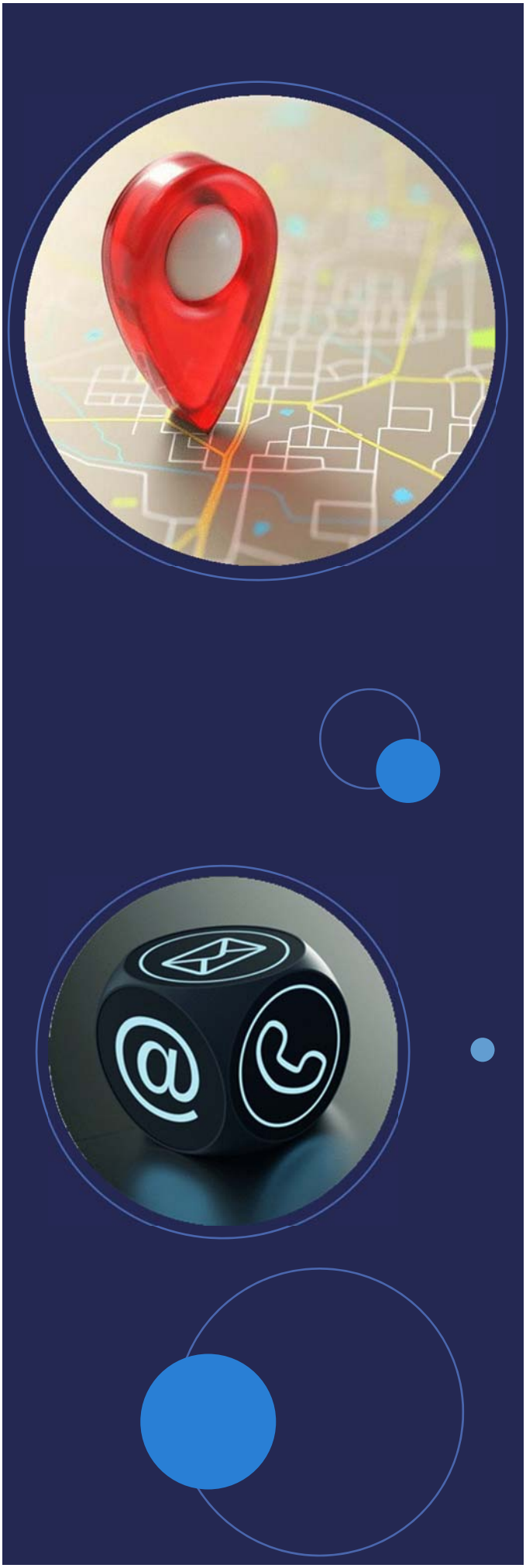
ISSN : 2581-3692

CORPORATE LAW JOURNAL

TO EXPLORE CORPORATE LITERACY

VOLUME 2 ISSUE 1
JANUARY 2019
ISSN : 2581-3692



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FROM THE DESK OF THE PUBLISHER

Corporate Law Journal proudly announces the publication of its Volume II Issue I. After the successful run of our first volume, we are eager to implement the feedback we have received from our readers and make the journal even better. The past year has taught us many lessons and we have met excellent people along the way who have contributed to our journal drawing from their varied expertise.

The Journal demonstrates our commitment to excellence in scholarship and student development. The legal industry is really about people, which ties in with one of our core beliefs that people make a difference. Our goal is always to produce a reputable legal journal.

The Journal primarily covers the latest topics of discussion and debate in corporate law around the world and also the emerging trends in the field of corporate law.

Like any reader, we rate publications that are readable, indeed fun! We hope you enjoy Corporate Law Journal and we welcome your feedback. We are confident that this edition will be valued by judges, lawyers, students, researchers and scholars. As you read the topics addressed in this Journal, we are sure that you will agree that this is an impressive work produced by the authors and editors. It is a pleasure to work with such fine individuals and students on a daily basis.

MESSAGE FROM OUR MEMBERS

DR. CS MAMTA BINANI

Former President of ICSI

Corporate Law Journal after successful publication of two issues releasing its Volume II Issue I. The Journal primarily covers the latest topics of discussion and debate in corporate law around the world and also the emerging trends in the field of corporate law. I am happy to know the young minds are bringing a learning initiative in the legal sphere. Through this initiative they are filling their role in the corporate world and discharging the range and scope of corporate society as an emerging corporate professionals. This platform is very much relevant in these days as during the last few years Corporate Laws are burgeoning with fast pace. So at times even for professionals it is difficult to keep pace with changes. For this purpose, there is an urgent need of a good journal which covers significant aspects of corporate laws and changes therein, in a simple but effective manner.

I extend my warm wishes for grand success of Volume II Issue I of Corporate Law Journal.

MESSAGE FROM OUR MEMBERS

KARAN S. THUKRAL

Founder at Thukral Law Associates

It is a dynamic time for the legal profession since after the advent of globalization and liberalization, the horizon of legal field has expanded greatly. Especially, when we talk in the context of India, which is an emerging economy, we cannot remain oblivious to the importance of corporate law.

This online biannual Corporate Law Journal with fine tune and pioneering method engage author, legal scholarship, researcher, professionals, students with exemplary articles/papers, research notes and comments, recent growths, judgments and advisory opinions on corporate as well as other faces of law.

It is one stop journal as it covers every aspect of law. Law is one gigantic field and a journal is a linking path. The contents, articles, research papers would give an insight to the readers into realm of law.

With all gratitude I wish the journal and its readers a great journey of Volume II, Issue I.

MESSAGE FROM OUR MEMBERS

MANISHA CHAUDHARY

Advocate, Managing Partner, UKCA and Partners Advocates & Solicitors

It had been a while since I had wished for a journal which is entirely dedicated to corporate laws. When I was introduced to the Corporate Law Journal, I took a keen interest to help it develop into a reliable and cited source on corporate laws and commercial laws in the near future. Though it is still in its nascent stage, CLJ is a great platform for research skill development and advancing knowledge in the field corporate laws. It is really important for a lawyer to be updated with recent judgments, amendments and changes in the law and CLJ is playing a principal role to not only helps lawyers like me to be updated but also provides students with necessary legal education. I yearn that CLJ should soon be recognized as a journal which can be used in courts and research as there are not many journals made especially for corporate laws.

MESSAGE FROM OUR MEMBERS

MANOJ AGARWAL

Senior Manager, Finance, Dabur International Ltd.

Please accept my heartiest congratulations and compliments for the splendid efforts of your team for second volume of journal.

I admire and appreciate the efforts of young team of CLJ for their efforts in bringing this journal with current developments and judgments. I am confident that the journal will be an intellectual learning spree for the readers.

Sincerely hope that the Corporate Law Journal shall meet the expectations of all and shall be make a great contribution in understanding the laws and consequent effective implementation thereof.

Warm wishes to all team members of Corporate Law Journal.

MESSAGE FROM OUR MEMBERS

JYOTI SHEKHAR

Legal Consultant & Founder Editor, EYRA

Corporate Law Journal is releasing its third issue. The first two issues were very successful and well received because the Journal not only covers the latest topics of interest in corporate law around the world, but also its emerging trends. The current issue brings an exciting variety of relevant topics, with detailed analysis of law and pertinent issues. I am pleased to see the young minds bringing such a learning initiative in the legal sphere.

I extend my warm wishes for the grand success of Volume II Issue I of the Corporate Law Journal.

MESSAGE FROM OUR MEMBERS

AJAR RAB

Partner, Rab & Rab Associates LLP

Corporate Law Journal is an excellent endeavor to collate views and develop corporate jurisprudence in this country which has been sustaining on patchy adoption from England and borrowed principles of other common law jurisdictions. A journal with a focus on corporate matters, especially in times of the changing commercial landscape was desperately required for members of the industry, academia, practitioners to collaborate and improve the ailing legal regime of corporate law.

CONTENTS

Economic Scenario of New Economic Policy and its Impact on Central Public Sector Enterprises

Dr. D. Nagarathinam

Principal, Theni Kammavar Sangam College of Technology

Abstract:

For five decades after the Second World War, most economies around the world witnessed historically unparallel progress. During the two hundred years of the British rule in India, Britain had eroded India's copious reserves and had exploited wealth and surplus revenue was carried away from India in various forms and had completely crushed the Indian industry to their advantage. At the time of Independence India was basically an Agrarian economy with a weak industrial base. Public Sector Enterprises profits are utilized towards financing the economic development of the country. In India, there had been only **five central public sector** enterprises with an **investment of mere Rs 29 crores** were there at the time of independence in 1947. The aim of establishing Public Sector Enterprises is for economic development which is the backbone of industrial development of the country in Independent India. The public sector enterprise was started primarily for the welfare of both the workers and the society. This paper presents the Economic Scenario of New Economic Policy and its impact on public sector enterprises in India.

Introduction:

India got freedom on 15th August 1947 and Pandit Jawaharlal Nehru had been the Prime Minister of India from 1947 to 1964. During this period, it was decided to reserve right of control with the state over coal, steel, aviation, petroleum industries, etc. **Nehru as an architect** of modern India and the nation builder left deep imprints of his personality(12). In addition to democracy, secularism, socialism, national integration, non-alignment, science and technology and modernization of our traditional society, Nehru wanted to introduce planning into the economic activities of the nation. He was inspired by the example of Soviet Union which had been using economic planning for its development and felt that there was no other way to deal with the economic backwardness of his own country and take it to a stage where

production would become adequate for the conquest of poverty. He set up a Planning Commission of which he himself became Chairman and went all out to popularize the planning concept and get it in operational trim for dealing with the problem of India's economic development in India's first three Five Year Plans.

After independent, Nehru wants to achieve ultimate goal of a **"Socialist pattern of Society"** in the country to ameliorate the socio-economic condition of the Nation. When the Indian Constitution was being drafted, the **"Laissez Faire"** philosophy had become a thing of the past in every democratic country **(1)**. The Indian Constitution makers were naturally influenced by contemporary philosophy. For economic reforms in India, The Industries (Development and Regulation) Act was passed in 1951 to implement the Industrial Policy Resolution, 1948.

When India secured independence from the British Empire in 1947, the economy which had just taken a beating from the Second World War had to withstand the repercussions of the Indo-Pak partition. India woke to freedom with large scale refugee camps, illiteracy, and malnutrition, lack of a political and administrative support as their major challenges. The most persistent problem was widespread poverty and chronic lack of resources and to address this dual developmental challenge the policymakers had two ideological pathways to choose from. During the first period of hundred years, i.e., from 1757 to 1857, cottage industries in India were totally destroyed due to the colonial strategy followed by the British rulers. During early part of twentieth century about 10 per cent of the total national income of India was remitted to England. Nehru was democratic and socialistic. He contributed a strong base of public sector to the economy of the country. He also provided government patronage to large scale industries and adopted a systematic method of development like the former USSR.

After making an incisive and close study of the above factors, we can safely conclude that Nehru's notion of socialism still has a relevance in the contemporary scenario but there is a need for modification and reinterpretation in the light of the changed domestic and inter-national scenarios that have come to the surface after the adoption of the New Economic Policy by India on the one side and the emergence of the hegemony of the USA after the downfall of the USSR and collapse of the Communist regimes on the other. In 1956 Nehru was considered the most arresting figure in the world political stage since the end of the Churchill, Stalin and Roosevelt era.**(2)** Although he played an important role in the independence struggle, yet his contributions are related to solving many deep-rooted issues, political challenges and socio-economic

problems which India confronted during the years after independence. Anti-national destructive forces were bent upon dividing the country after independence but Nehru helped ensure the political stability of India by enhancing the process of national and State integration.[(3)]

The present social welfare policies which our government has adopted are based on the social policies adopted and favoured during the Nehru era. The latest focus on the concept of *aam aadmi* and other central themes like Right to Work in the form of the Mahatma Gandhi National Rural Employment Guarantee Scheme and National Rural Livelihood Mission, Right to Education, Right to Shelter, Right to Health and Right to Food and several others have their origin in Nehru's rhetoric of socialism.[(7)]. It is pertinent here to note that the Indian Space Research Organization has successfully launched the Mars Mission on September 24, 2014. A nuclear agreement was also arrived at between India and the USA in 2008 which recognized India as a state having nuclear technology [(6)]

Initially the Public sector Units role was to help create the much-needed industrial base and infrastructure apart from bringing about price stabilization and socio-economic development. CPSEs contributed greatly to job creation by adopting labor-intensive techniques in the early part of independence, nationalization of sick textile units and setting up ancillary industries around major units subsequently.

Five Year Plan:

Industrial policy is a statement which defines the role of government in industrial development. The place of the public and private sectors in industrialization of the country. The relative role of large and small industries or in other words industrial policy is a government plan that is designed to encourage the development of industry. One of his key economic reforms was the introduction of the **Five-Year Plan in 1951**. The policies initiated by him have been considered to be socialistic in nature. Nehru always advocated a kind of mixed economy. The Government revised its **First Industrial Policy** (i.e., the policy of 1948) in 1956, and announced the Industrial Policy of 1956. The 1956 Policy emphasizes, inter alia, the need to expand the public sector, to build up a large and growing cooperative sector. More number of **Public Sector Units or Companies or Enterprises (PSU/PSC/PSE)** was started for the economic development of India and also for the younger generation employment opportunities.

Central Public Sector Enterprises [10]:

Nehru favoured public sector industries and he wanted them to play a vital role in making a modern and strong India to enable it to face the challenges of the modern era. Nehru also favoured the policies that would help the weaker and deprived sections of our society. The present social welfare policies which our government has adopted are based on the social policies adopted and favoured during the Nehru era.

A *Public Sector Undertaking* **(PSU)** is a Government-owned corporation or company. Public Sector Undertakings are the companies in which the government, either the federal Union Government or the many state or territorial governments, or both own a majority, i.e., 51 percent or more of the company equity. Public Sector Undertakings are registered under **Companies Act 1956** and are governed by all those rules and regulations as may be applicable to any other registered company. The capital to them may be wholly or partially provided by the government. These Government Companies are formed by following the procedure as laid down by the Companies Act. Public Sector Undertakings are created by the Government of India to undertake commercial activities on behalf of Government of India. Several Public Sector Undertakings under the aegis of Government of India regularly provide tremendous employment opportunities in various technical and management areas.

The government company can be run on business principles and it provides a healthy competition to private sector. In spite of all these advantages, these companies suffer from the limitations like lack of initiative in taking right decisions at the right time, lack of expertise in business management, frequent change of policies and management due to change in Government, etc.

Growth of Public Sector in India [10]:

After 1956, there has been an impressive growth of the public sector enterprises in India. The Central and State Governments have set up industrial enterprises for production of both goods and services for economic growth. The growth of public enterprises started by the Central Government can be observed from Table.1. **Table 1 shows the Growth of Central Public Sector Enterprises.** From this table it could be understood that there were 5 industrial public sector units of Central Government with a capital investment of Rs. 29 crores in 1951. The total number of Public Sector Enterprises went up to 244 in 1990 with investment of Rs. 99,330

crores. The number of Central Government Public Enterprises stood at 242 with a total cumulative investment of Rs. 4,55,409 crores at the end of March 2008. The total number of public sector units fell to 217 at the end of March 2010 but cumulative investment in them rose to Rs. 5,79,920 crores.

S.No	As at End of March	No. of Total Units	Cumulative Investment (₹ Crore)
1.	1951	5	29
2.	1961	47	950
3.	1980	179	18,150
4.	1990	244*	99,330
5.	2000	240*	252,745
6.	2001	242*	274,114
7.	2005	237	357,849
8.	2007	244	421,089
9.	2008	242	455,409
10.	2010	217	579,920
11.	2012	200+	---

Table 1: GROWTH OF CENTRAL PUBLIC SECTOR ENTERPRISES

Industrial Policy Resolution 1948:

The Government of India announced its first Industrial Policy Statement on 6th April, 1948 whereby both public and private sectors were involved towards industrial development. The main historical importance of this policy is of Mixed Economy. The main thrust of IPR, 1948 was to lay down the foundation of mixed economy whereby the private and public sector was accepted as important components in the development of industrial economy of India. The 1948 policy put industries under Central and State List. The coal, power, railways were in Central List and paper, medicines, cycles were in State List. Further The policy divided the industries into four broad categories:

(i) Industries with Exclusive State Monopoly**:** Atomic energy, railways, arms and ammunition are included in this category.

(ii) Industries with Government Control**:** Fertilizers, heavy chemical, heavy machinery and 18 such industries were included under this category

(iii) Industries in the Mixed Sector: Public sector and private sector industries were included in this mixed sector and allowed to operate.

(iv) Industries under Private Sector: Industries not covered by above categories fell in this category.

On 8th May 1952, The Industries (Development and Regulation) Act, (IDRA), came into force under a notification of the Central Government published in the Gazette of India. This Act extends to whole of India including the state of Jammu & Kashmir with a view to being under Central and regulation of a number of important industries, the activities of which affect the country as a whole and the development of which must be governed by economic factors of all India importance particularly the power of controlling prices.

Industrial Policy Resolution, 1956 [30] :

IPR, 1956 is the next important policy statement which was adopted by the Parliament in April 1956. It provided more powers to the governmental machinery. The Industrial Policy Resolution, 1956 expanded the scope of Public sector. The Public sector was viewed as an instrument for implementing the state policy for the socio-economic revolution in the country. The Industrial Policy Resolution - 1956 classified industries into three categories such as Schedule A, Schedule B and Schedule C.

Schedule A had industries with center's monopoly and later they became Public Sector Undertakings or PSUs. The main objectives for setting up the public sector enterprises as stated in the Industrial Policy Resolution of 1956 were :

1. To help in the rapid economic growth and industrialization of the country and create the necessary infrastructure for economic development;
2. To earn return on investment and thus generate resources for development;
3. To promote redistribution of income and wealth;

4. To create employment opportunities;
5. To promote balanced regional development;
6. To assist in the development of small-scale and ancillary industries; and
7. To promote import substitutions, save and earn foreign exchange for the economy.

Industrial policy of 1969 (MRTP - Act):

In 1969, the Monopolies and Restrictive Trade Practices (MRTP) Act was introduced on the basis of recommendation of **Dutt Committee** to enable the Government for effectively control concentration of economic power. MRTP Act was enacted in 1969 to prohibit monopolistic and restrictive trade practices and to ensure that concentration of economic power in hands of few rich This MRTP Act extends to whole of India excluding the state of Jammu & Kashmir. The aims and objectives of this act were:

1. To ensure that the operation of the economic system does not result in the concentration of economic power in hands of few rich.
2. To provide for the control of monopolies, and
3. To prohibit monopolistic and restrictive trade practices.

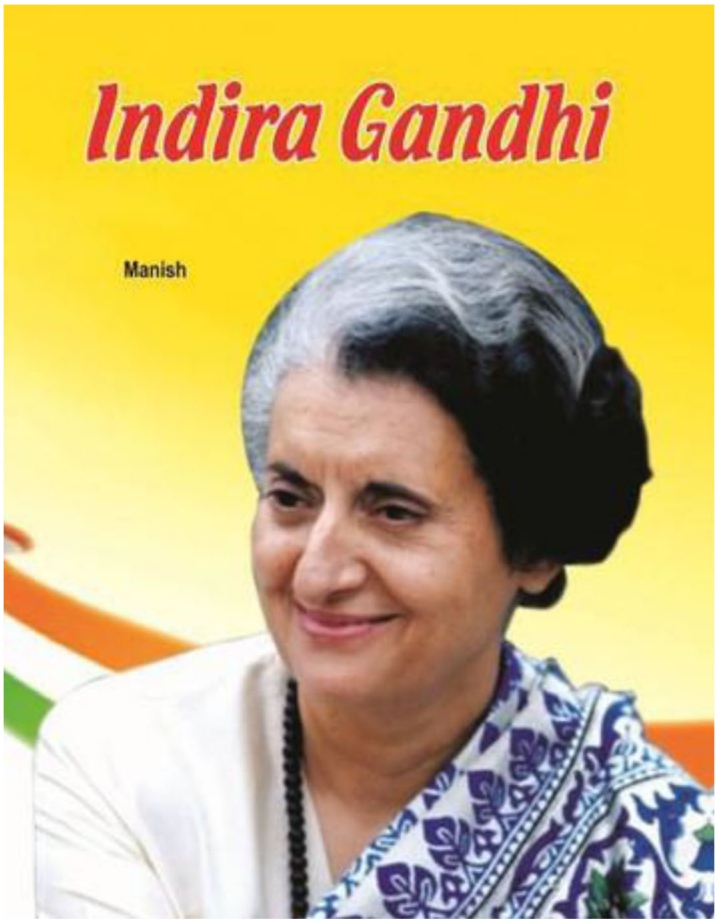
Non-applicability of MRTP Act :

This MRTP act is not applicable to :

- Government Company and undertaking owned by Government.
- Company established by the Central or State Act.
- Trade Unions
- Companies which have been taken over by the central Government.
- Companies owned by registered Cooperative Societies.
- Any financial institution.

During **Indira Gandhi** period, India was achieving tangible success through advancements of the **Green Revolution**. Prime Minister Indira Gandhi issued an ordinance and **nationalized the 14 largest commercial banks** with effect from the midnight of 19th July, 1969 which is considered as an **economic milestone** of India. Indira Gandhi nationalized Insurance companies, mineral resources, Heavy industries including, coal, steel, copper and refining industries, to

safeguard the interests of common people of India. The main aim of nationalization was to protect employment and secure the interest of the organized labor. She also nationalized oil companies. She implemented three **Five-year plans** - two of which were successful in meeting the targeted economic development growth. More number of Public Sector Companies (PSU) were started for the economic development of India and also for the younger generation employment opportunities. Her campaign slogan, Remove Poverty (Garibi Hatao), had become the iconic motto of the Indian National Congress.



Indira's Campaign Slogan - Remove Poverty:

Industrial policy of 1973 [30] : The Policy Statement of 1973 drew up Large industries were permitted to start operations in rural and backward areas with a view to developing those areas and enabling the growth of small industries around. The entry of competent small and medium entrepreneurs was encouraged in all industries. Large industries were permitted to start operations in rural and backward areas with a view to developing those areas and enabling the

growth of small industries around. One of the most important policies, it introduced the concepts of Core Industry industries for development of other industries. Joint Sector concept was introduced i.e. partnership between Centre, State and the private sector.

Industrial policy of 1977 : It advocated the growth on rural economy to solve the problem of unemployment and regional inequalities in industrial development. It was influenced by the Gandhian and Socialistic views (new government came to power in 1977 with Morarji Desai as Prime Minister; it was more socialistic in nature). District Industries Centre (DIC) to be set up at each district headquarters to provide, under a single roof, all the services and support required by the cottage and small-scale industries. It put emphasis on village industries and decentralized industrialization. The main elements of the new policy were:

1. Development of Small-Scale and cottage industries.

2. Restrictive Approach towards Large Business Houses.

3. Expanding Role of Large-scale industries and public sector.

Industrial policy of 1980 -

Congress (I) came back to power in 1980 and it thrust in Industrial Policy of 1956 and the new Industrial Policy was announced on July 1980. The government believes that the industrial policy 1956 emphasized that the public sector is the pillar of economic development, because of its high reliability, the large investment is required for Industrial Policy 1980 for its infrastructure and the longer gestation periods of the projects crucial for economic development. The important features of the policy were:

1. Effective Management of Public Sector.

2. Liberalization of Industrial licensing.

3. Redefining Small-Scale Industries.

Industrial policy, 1980 focused attention on the need for promoting competition in the domestic market, technological up gradation and modernization. The policy laid the foundation for an increasingly competitive export-based industries and for encouraging foreign investment in high-

technology areas. It was a result of change of government at the Centre. Congress came back to power and re-introduced its old policies and improved a few others.

Industrial policy of 1985-86 – This industrial policy was given importance on the lines of liberalization. The world was moving towards liberalization, globalization and preratification and there was discussion all over the world to reduce tax barriers to facilitate the movement of goods and services.

Era of Liberalization after 80's:

After 1980, an era of liberalization started, and the trend was gradually to dilute the strict licensing system and allow more freedom to the private entrepreneurs. Re-endorsement of licenses for private sector taken place and also license and location restriction were removed.

Major Features of Pre-1991 Industrial Policy:

1. Protection to Indian Industries:
2. Import-Substitution Policy:
3. Financial Infrastructure:
4. Control over Indian Industries:
5. Regulations on Foreign Capital under the Foreign Exchange and Regulation Act (FERA):
6. Encouragement to Small Industries:
7. Emphasis on Public Sector:

Top Ten Profit and Loss Making CPSEs [31,32] :

Table - 2 : provides the list of the top ten profit making CPSEs. Oil & Natural Gas Corporation Ltd., NTPC Ltd., and Indian Oil Corporation Ltd., have ranked first, second and third, respectively, amongst the top ten profit making CPSEs. All the top ten profit making companies are, more or less same in 2010-11 as in 2009-10 (with ranking slightly changed) except for Power Grid Corporation that has replaced the Power Finance Corporation. **Table.2. shows Top**

Ten Profit Making CPSEs 2010-11 (in Rs. Crores). There are many loss making CPSEs are in the list. Amongst the loss-making companies, Air India Ltd., BSNL and MTNL, were the top three loss making enterprises during 2010-11. The top ten loss making Companies covered nearly 92.55%. The top three CPSEs namely Air India Ltd., BSNL and MTNL alone have incurred a loss equal to 74% of the total loss of all CPSEs in 2010-11. Intense price war and cut-throat competition from new entrants, increase in salary & wages and increase in operating cost as well as increase in interest cost contributed to greater losses during the year. While the loss of Air India and MTNL have gone up by 24% and 54% respectively, the loss of BSNL increased by 145% in 2010-11 over 2009-10. **Table-3: Top Ten Loss Making CPSES (2010-11)**. Table 3: provides the list of top ten loss making CPSEs (exclusive of extra ordinary items and prior period adjustment).

New Industrial Policy, 1991:

India's economy during mid- 1980's showed a sign of warning of future crisis by having a trade imbalance and started to run with the trade deficit and need for major economic reforms was felt in the country. During this time India didn't allow any of foreign direct investments (FDI) into the country so the flow of foreign currency into the country were almost null. There was an urgently need to bring U-turn in the economy. It was mainly due to Excessive fiscal deficit , Balance of payment deficit, Poor performance of public sector, Rise in prices and Reduction in foreign exchange reserves. *The* country at that time has faced the dilemma of excessive balance of payment crisis following the Gulf War. Economic liberalisation of New Economic Policy in India was initiated on 24 July 1991 by Prime Minister P. V. **Narasimha Rao** and his Finance Minister Dr. Manmohan Singh. **Rao** was often referred to as Chanakya for his ability to steer tough **economic** and political legislation through the parliament at a time when he headed a minority government.

The New Industrial Policy has scrapped the asset limit for MRTP companies and abolished industrial licensing of all projects, except for 18 (now 5) specific groups. It has raised the limit for foreign participation of foreign capital in the country's industrial landscape. The new policy has dismantled all needless irksome bureaucratic controls on industrial growth. The new policy has re-defined the role of the public sector and has asked the private sector to operate even in those areas which were hitherto reserved for the public sector.

Distinctive Objectives of New Industrial Policy (NIP), 1991: The Industrial Policy reforms have reduced the industrial licensing requirements, removed restrictions on investment and expansion, and facilitated easy access to foreign technology and foreign direct investment. The liberalized Industrial Policy aims at rapid and substantial economic growth, and integration with the global economy in a harmonized manner. There are three major components or elements of new economic policy- Liberalization, Privatization, Globalization (LGP).

The Features of New Industrial Policy are as follows:

1. Delicensing.
2. Entry to private sector.
3. Disinvestment to PSEs
4. Amendments of Monopolies and Restrictive Trade Practices (MRTP) Act, 1969;
5. Liberalized Foreign Direct Investment Policy (FDI)
6. Foreign Technology Agreements (FTA);
7. Dilution of protection to SSI and emphasis on competitiveness enhancement.

The main elements of Government policy towards Public Sector Enterprises (PSU) are:
Disinvestment of Government equity of public enterprises was mainly through sale of Government equity to strategic private partners in all non-strategic Public Sector Undertakings (PSU) to 26 per cent or lower if necessary. Those public sector enterprises which are potentially viable have to be restructured and revived. Those Public Sector Undertakings (PSU) which cannot be revived would be closed down. The Government has evolved a fair, transparent and equitable procedure for disinvestment in selected public sector enterprises. The achievement made with regard to disinvestment of Public Sector Undertakings which started in 1991-92 with the sale of minority stakes in some public sector undertakings.

Revival of Sick CPSEs [31,32]:

The condition of sick CPSEs has to show improvement over the years. (i.e. CPSEs whose accumulated losses have exceeded their net worth). The number of sick CPSEs, which were 105 in March, 2003 came down to 64 in March 2011. The CPSEs were brought under the purview of Sick Industrial Companies (Special Provision) Act, 1985, which was subsequently amended in 1991 and made effective from 1992. Out of the 64 CPSEs registered with Board for Industrial and Financial Reconstruction (BIFR) till 30.6.2011, the BIFR has already disposed of 48 cases of CPSEs either through sanctioning revival schemes (15 cases), or declaring 'no longer sick' (2 cases) or dropping due to net worth becoming positive (5 cases) or dismissing the cases as non-maintainable (4 cases) or deregistered with the cases as non-maintainable (4 cases) or deregistered with BIFR/ others (2 cases) or recommending winding up (19 cases) or winding up notice issued (one case). The BIFR is yet to take further view on 16 cases of CPSEs.

The Government of India subsequently set up the Board for Reconstruction of Public Sector Enterprises (BRPSE) for taking measures was established in December 2004 as an advisory body to advise the Government on the strategies, measures and schemes related to strengthening, modernizing, reviving and restructuring both industrial and non-industrial CPSEs in 2004. Out of the 43 CPSEs, 13 have been declared as turnaround companies as they have been in profits (profit before tax) continuously for three years and more. Up to October 2011, cases of 68 sick CPSEs have been referred to BRPSE, out of which the Board has made recommendation in respect of 62 cases. Remaining 5 cases were remitted to the concerned administrative Ministers. Out of these 62 cases, as on 31.10.2011, the Government of India has approved revival proposals in respect of 43 cases of CPSEs (Department of Public Enterprises, 2012).

S. No.	Name of the CPSEs	Net profit	% share of total Net Profit
1.	Oil & Natural Gas Corporation	18924.03	16.63

	Ltd.		
2.	NTPC Ltd.	9102.59	8.00
3.	Indian Oil Corporation Ltd.	7445.48	6.54
4.	NMDC Ltd.	6499.22	5.71
5.	Bharat Heavy Electricals Ltd.	6011.20	5.28
6.	Steel Authority of India Ltd.	4904.74	4.32
7.	Coal India Ltd.	4696.10	4.13
8.	GAIL (India) Ltd.	3561.13	3.13
9.	Oil India Ltd.	2887.73	2.54
10.	Power Grid Corporation of India Ltd.	2696.89	2.37
Total Profit		**66729.11**	**58.65**
Net Profit of profit making CPSEs		**113769.88**	**-**

Source: Government of India, Public Enterprises Survey, (2010-11).

TABLE 2: TOP TEN PROFIT MAKING CPSES 2010-11 (in Rs. Crores)

S. No.	Name of the CPSEs	Net Loss	% share of total Net Loss
1.	Air India Ltd.	(-) 6865.17	31.65
2.	Bharat Sanchar Nigam Ltd.	(-) 6384.26	29.43
3.	Mahanagar Telephone Nigam Ltd.	(-) 2801.91	12.92
4.	Hindustan Photo Films Manufacturing Co. Ltd.	(-) 1156.65	5.33
5.	Indian Drugs & Pharmaceuticals Ltd.	(-) 621.83	2.87
6.	Hindustan Cables Ltd.	(-) 607.39	2.80
7.	Fertilizer Corporation of India Ltd.	(-) 508.51	2.34
8.	Air India Charters Ltd.	(-) 391.22	1.80
9.	Hindustan Fertilizer Corporation Ltd.	(-) 382.28	1.76
10.	ITI Ltd	(-) 357.75	1.65
Total Loss		**(-) 20076.97**	**92.55**
Net Loss of loss making CPSEs		**(-) 21693.31**	**---**

Source: Government of India, Public Enterprises Survey, (2010-11).

TABLE 3: TOP TEN LOSS MAKING CPSES (2010-11)

Conclusion:

Public Sector Units have become an integral part of the process of planned economic development in India. They have played an important role in accelerating the rate of growth of the economy, creating employment opportunities, balanced regional growth etc. Public and Private sectors have contributed much in the development of India. Public sector units play a vital role in *steering the national economy* and without public sector enterprises India could lose its economic development. It is necessary to realign the policies of public sector enterprises, then only *efficient, effective and profit performance* could be attained on the role of public sector enterprises in Indian economy. But both have got short comings as well. The need of hour is that both sectors should work compatibility with each other rather than contrast then only there will an accelerate the economic development and India will be a developed country.

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Inadequacy of Indian Laws in Curbing Bitcoin-Money Laundering

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Abstract:

This article explains how money laundering through bitcoins can take place in India and how certain Indian laws and policies of the government is insufficient and inadequate to curb the problem of money laundering through bitcoins. The first section of the article defines and explains certain basic concepts necessary to understand the research problem. The second section involves analysis of certain Indian laws such as the Indian contract Act, the R.B.I notification dates 6th April 2018 and the Prevention of Money Laundering Act to show the inadequacy of these laws in curbing 'bitcoin-money laundering'. The last section of the article shows how the effectiveness of the Indian laws are at zero percent if the launderer resorts to 'double laundering'. For the practical understanding of this inadequacy of the laws, an illustration of how a person can use Apple Company owned 'iTunes' for 'bitcoin-money laundering' is also provided in the article.

Introduction

Technology-revolution has taken a leap in the 21st century. It has made the impossible, possible and never fails to surprise us by introducing new technologies making our lives easier (and at times difficult) day by day. Long gone are the days where you have to go to the bank, stand in the queue for depositing or withdrawing money. Right now, this long, tiring and definitely the most monotonous task of going to the bank for the above purpose can be done in just one click in your mobile banking app while watching your favourite T.V. show at your home. That is when the 'tech minds' of this century thought – "Why do we need to use the banking system at all? Let's make people's lives easier!" This thought which almost took the world by storm led to the invention of cryptocurrency when Satoshi Nakamoto, an anonymous person developed the first crypto currency also known as digital currency called '**Bitcoin'**.

Cryptocurrency is digital currency which has no physical form and is created and stored electronically in a database called 'Block Chain', which is essentially a public ledger of the

transactions related to cryptocurrencies. It uses certain encryption techniques for creating units and also for the purpose of verification of transactions involving cryptocurrencies which makes it a very safe process. The highlight of crypto currency technology is that it is decentralized and does not have a centralized authority controlling the supply. While these features open up a new world full of opportunities in the financial market, it is not free from its abuse by the 'evil tech minds' of the 21st century. Cryptocurrencies have become extremely popular among the criminals due to its unique features. The use of cryptocurrencies, especially bitcoin, for the purpose of money laundering, financing terrorism, drug trade, illegal arms, tax evasion etc. has given rise to ingenious ways to commit heinous crimes against humanity while making it relatively easy process to be carried out, however, tracking and tracing such crimes prove to be an arduous, if not impossible process.

In the case of any paid crime, the most difficult part than committing the crime itself is what do you do with the money you received as remuneration? If they keep with themselves or spend for themselves such unaccounted illicit remuneration received for the crime, in no time the enforcement agencies are going to be chasing them and sooner or later they are going to put be behind the bars. This is where the process of '**money laundering'** comes into picture. Money laundering, in simple terms, is the process of transforming illegally obtained money into a legit, commercially recognized currency. In order to conceal themselves from the watchful eyes of the enforcement authorities from illegal activities, criminals and other anti-national elements use the 'money laundering' process to make their 'dirty' money 'clean'.

As noted above, since the consideration for a crime has taken a shift from fiat currency (paper notes) to cryptocurrency, criminals have found a new way to launder their proceeds of the crimes – **'Bitcoin money laundering'**. This development is a huge boon for the criminals and a huge bane for the agencies as it is extremely difficult for the enforcement agencies to track and trace money laundering through cryptocurrency since the usual laundering channels through which the agencies could track the laundering process is absent from the picture with the use of cryptocurrencies such as bitcoin.

In a country such as India where the anti-money laundering laws are not keeping pace with the technological development in the world, money laundering through cryptocurrencies is literally an untraceable act and hence a very attractive and fool-proof crime that could be carried out. The fundamental question which I intend to deal with in this article is **whether**

the present laws and policies of the government are sufficient to control the 'bitcoin-money laundering' scenario in India? To answer this question in the negative, I intend to use an illustration on how certain criminals can use the Apple company owned **'iTunes'** to portray how the recent **Reserve Bank of India notification on cryptocurrency as well as the Indian Contract Act of 1872**, **Prevention of Money Laundering Act of 2002,** are **not sufficient** enough to curb the problem of bitcoin- money laundering transactions in India.

What Is Bitcoin?

Before understanding what bitcoin is, it is important understand what exactly cryptocurrency is. Cryptocurrency is –

> "*A digital currency in which encryption techniques are used to regulate the generation of units of currency and verify the transfer of funds, operating independently of a central bank."*[1]

Bitcoin is a cryptocurrency, a form of payment that uses cryptography to control its creation and management, rather than relying on central authorities.[2] These are a subset of digital currencies. One of the most striking features of cryptocurrency is that it weeds out the need for a trusted third party such as a governmental agency, bank etc.[3]

According to Satoshi Nakamoto, Bitcoin is a software-based online payment system and introduced as open-source software in 2009.[4] Unlike paper notes, it is not issued under the order and supervision of any centralized authority but is created using a process called 'mining' where complex mathematical algorithms are used by the 'miners' to create new bitcoins and approve and add bitcoin transactions to the blockchain. Another important feature associated with bitcoins is that it is created and stored digitally in a software called 'blockchain'. Blockchain is essentially a public ledger which records all transactions involving bitcoins. The technicalities of blockchain will be discussed in the subsequent sections of the article.

What Is Bitcoin-Money Laundering?

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[1] bitcoin | Definition of bitcoin in English by Oxford Dictionaries, , available at https://en.oxforddictionaries.com/definition/bitcoin, last seen on 20/10/2018.
[2]Bitcoin: A Primer for Policymakers | Mercatus Center, available at https://www.mercatus.org/publication/bitcoin-primer-policymakers, last seen on 16/10/2018.
[3] Andy Greenberg, CRYPTO CURRENCY FORBES, forbes/2011/0509/technology-psilocybin-bitcoins-gavin-andresen-crypto-currency.
[4] Satoshi Nakamoto, Bitcoin: A Peer-to-Peer Electronic Cash System, 9.

Money laundering is a process whereby large amounts of money obtained from criminal activity, such as drug trafficking, terrorist activity or other illicit means, is made to appear as if it originated from a legitimate commercial source. Money laundering is the process of making illegally-gained proceeds (i.e., "dirty money") appear legal (i.e., "clean").[5]

Money laundering has three recognisable stages – placement, layering and integration.[6] :

1) **Placement:** At this stage, "dirty" cash or proceeds of crime makes their initial entry into the legitimate financial system. This is usually done through currency exchanges, currency smuggling, gambling etc.
2) **Layering:** This is the second stage where the 'dirty' money is layered in the financial system so as to separate and de-link its trail from its criminal source. This is done through sending the money to offshore accounts, creating multiple complex transactions, etc.
3) **Integration:** This is the final stage where the money which was placed and layered in the financial system finally comes back to the criminal from source which looks legitimate. This is usually done through property dealings, fake loans and invoices etc.

The traditional methods of money laundering essentially involved getting assistance from certain intermediaries like the banks in various tax havens of the world. For example, the Swiss banking system follows the tradition of secrecy/confidentiality as regards their customer details and deposit details. But certain incidents in the past, such as the multibillion-dollar tax evasion probe by the F.B.I in 2008[7] on the Swiss bank UBS has created scepticism in the minds of the launderers as to the safety of their illicitly obtained funds.

As the noose tightened around their neck, launderers looked for a better way to launder their money and it was at this perfect timing when the world witnessed the birth of Bitcoins. This gave the launderers huge advantages over the traditional methods of money laundering because they did not have to rely upon any intermediaries anymore. The whole point of

[5]History of Anti-Money Laundering Laws | FinCEN.gov, available at https://www.fincen.gov/history-anti-money-laundering-laws , last seen on 16/10/2018.
[6] Nicholas Ryder, The Financial Services Authority and Money Laundering a Game of Cat and Mouse, 67 THE CAMBRIDGE LAW JOURNAL 635–653 (2008).
[7] How does Bitcoin Money Laundering work? - Blockchain Council | Blockchain-council.org, available at https://www.blockchain-council.org/blockchain/how-bitcoin-money-laundering-works/, last seen on 16/10/2018.

bitcoins is that you do not need to trust a third party to hold your crypto assets.[8] As long as you control your private keys, you are the only one able to initiate transactions and you do not face any counterparty risk, you are effectively your own bank.[9] Money launderers could, therefore, bypass the entire banking system as transactions involving bitcoins do not need any centralized authority to control and regulate the same.

The study conducted by researchers from the University of Sydney and the University of Technology Sydney April 2017, suggests that around 24 million bitcoin market participants use the cryptocurrency "primarily for illegal purposes" and that these bitcoin users are estimated to conduct around 36 million transactions per year, with a total value of around $72 billion, and collectively hold around $8 billion worth of bitcoin, the researchers say.[10]

Bitcoin has a reputation for being used by criminals, particularly people selling drugs on the dark web.[11] On marketplaces such as the now-defunct Silk Road and its more modern imitators, cryptocurrencies such as bitcoin have been the only method of payment, largely because they are theoretically untraceable.[12]

Therefore, Bitcoin has earned the reputation as "**currency of thieves**" because made it much easier for the criminals because they have to trust each other even less and even complete strangers can cooperate.[13]

The 'iTunes' Illustration

As I noted above, I intend to use an illustration using the Apple owned 'iTunes' to show how a person can still launder money through bitcoins in India and how the relevant laws will fail in curbing the same. This method of money laundering is not limited to just iTunes but can also be used in a variety of platforms such as amazon music, spotify, certain gaming and gambling and other similar applications.

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[8] The Financialization of the Crypto Ecosystem Is Accelerating, Expert Take, available at https://cointelegraph.com/news/the-financialization-of-the-crypto-ecosystem-is-accelerating-expert-take, last seen on 16/10/2018.
[9] Ibid.
[10] Bitcoin price is so high because criminals are using it for illegal trades, research suggests | The Independent, available at https://www.independent.co.uk/life-style/gadgets-and-tech/news/bitcoin-price-fall-criminals-blockchain-anonymous-cryptocurrency-zcash-monero-dash-a8174716.html, last seen on 16/10/2018.
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[12] Ibid.
[13] Mind your wallet: why the underworld loves bitcoin | Reuters, available at https://www.reuters.com/article/us-bitcoin-criminals-insight/mind-your-wallet-why-the-underworld-loves-bitcoin-idUSBREA2D09820140314, last seen on 16/10/2018.

This is how it works – Once the launderer obtains illicitly gained bitcoins, in order to launder such bitcoins, he creates/hires artists to create music to get it published on iTunes store with the help of a publishing company. Once published, the songs are available for sale to the public at large, which in turn will be bought by the launderer himself using bitcoins or with gift cards purchased using bitcoins with the help of smurfs[14], for which he, in the capacity of the music creator will be paid a royalty fee from iTunes, periodically. Therefore, the launder purchases his own music and get paid by Apple. Thus, the 'dirty' money (illicitly gained bitcoins) is converted to 'clean' white money (fiat currency).

The questions regarding how iTunes can receive bitcoins for selling their songs and how they will encash the same shall be addressed in the subsequent sections of this article.

Enforceability of Contracts Involving Bitcoins

Section 23 of the Indian contract Act of 1872 (hereinafter referred to as 'Contract Act') lays down what constitutes unlawful consideration and object. According to this section, any consideration which is not opposed to public policy, not forbidden by law, which does not defeat the provisions of law etc., are considered to be lawful consideration.

As of now, there is no law in India which states that bitcoin is opposed to public policy. Further, there is also no reason to as to why the usage of bitcoins would defeat any provisions of law. Therefore, a contract relating to bitcoin is not per se illegal under the Indian Contract Act of 1872.[15]

Moreover, the Contract Act does not lay down the manner in which the consideration should be made by the parties. It may be in cash or a valuable consideration that is 'value for money'. Since bitcoin is not a currency or legal tender under the Indian laws (explained in the subsequent section), it can be considered as 'value for money' and therefore assumes the identity of valid consideration under the Indian Contract Act of 1872.[16]

[14]This process is commonly referred to as smurfing where criminals/smurfs will deposit money in financial institution in amounts that are lower than the level at which the financial institution must complete a suspicious activity report. See Sarah N. Welling, *Smurfs, Money Laundering, and the Federal Criminal Law: The Crime of Structuring Transactions*, 41 Fla. L. Rev. 287, 344 (1989).

[15] Nishid Desai Associates, Bitcoins – A Global Perspective (April, 2015), available at http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Bitcoins_A_Global_Perspective.PDF, last seen on 16/10/2018.

[16] Ibid.

The RBI Notification on Cryptocurrency

The Reserve Bank of India on 6th of April 2018, after issuing repeated notifications cautioning users, holders and traders of cryptocurrencies regarding various risks associated with the same, issued a notification on '**Prohibition on dealing in Virtual Currencies (VCs)**'[17] (hereinafter referred to as Notification') prohibiting certain entities regulated by the R.B.I from dealing in Virtual Currencies or Cryptocurrencies.

The Notification was addressed only to certain entities regulated by the R.B.I, namely, all Commercial and Co-operative Banks, Payments Banks, Small Finance Banks, NBFCs and Payment System Providers. It provided that these entities shall not, with immediate effect, deal in virtual currencies or provide services such as maintaining accounts, registering, trading, settling, clearing etc. for facilitating any person or entity in dealing with or settling virtual currencies.

Now, let us analyse the notification and its effect:

- The Notification has not provided anything as to the illegality of the cryptocurrencies.
- The Notification has provided that only those entities regulated by R.B.I as named in the notification are prohibited from dealing in cryptocurrencies.
- Therefore, the usage of such currencies by any person[18] or in **'Peer to Peer**' (P2P) transactions where the transaction is done between two persons without the involvement of any specified entities is not illegal or unlawful but legal and valid, provided such usage does not violate any terms of the said Notification.
- The intention of the Notification was to discourage persons from dealing with cryptocurrencies.

Therefore, P2P transactions involving cryptocurrency are not illegal, which means that 'A', a person, can enter into transactions involving bitcoins with 'B', for a certain consideration (as bitcoins is a valid form of consideration as noted above) and this is legally justified since, in this transaction, the R.B.I notification is not being violated in any manner.

Now let us see how a person and iTunes can enter into a valid contract where a person is purchasing songs from iTunes for which iTunes is getting paid in bitcoins:

[17] Reserve Bank of India - Notifications, available at https://rbi.org.in/Scripts/NotificationUser.aspx?Id=11243, last seen on 16/10/2018.
[18] Person shall mean and include any company or association or body of individuals whether incorporated or not.

- iTunes and the person purchasing the songs are not entities regulated by R.B.I.
- iTunes does not have to partner with the 'payment system providers', who have been prohibited under the notification, for facilitating the payment in this transaction since the transaction does not involve payment in fiat currencies.
- iTunes can encash the bitcoins without using any intermediaries in India, who are prohibited under the notification, and therefore can encash it anywhere outside India.

If all these above factors are complied with, the Notification cannot prohibit iTunes, or such other platforms not hit by the said Notification from entering into a contract involving bitcoins. Therefore, the launderer can very well use his smurfs to purchase songs from iTunes in India using his 'dirty' bitcoins for the purpose of laundering the same into completely 'white' money.

The Prevention of Money Laundering Act, 2002

The PMLA was enacted by the NDA government on 2002 and came into force on July1, 2005. The object of PMLA, as seen from its preamble, is to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto.

Section 3 of PMLA defines money laundering as:

> *"Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering."*[19]

Let us look upon how the prevention of money laundering mechanism works and how it fails to curb bitcoin-money laundering

I. <u>OBLIGATION OF REPORTING AUTHORITIES – SECTION 12</u>

[19] Section 3, The Prevention of Money Laundering Act, 2002

Section 2(wa) of PMLA defines "reporting entity" as a banking company, financial institution, intermediary or a person carrying on a designated business or profession.

In the traditional method of money laundering, the money which is being laundered usually takes it course through any of these above reporting entities. This is the reason why under section 12 of PMLA, these reporting entities have mandatory obligations to maintain records of all transactions, identities of its clients, their beneficial owner if any, and of all documents relating to them and also report the same to the authority under PMLA.

Now let us look upon how the bitcoin-money laundering takes place and why the mechanism under PMLA fails w.r.t to the same.

- First, in the world of bitcoin-money laundering, the entire process of laundering is done digitally/electronically just like the 'iTunes' illustration. Therefore, unlike the traditional method, there is no physical movement of cash which vastly reduces the risk of coming under the radar of enforcement authorities.
- Second, in case of bitcoin transactions, you are effectively your own bank. The launderer does not need to use the above reporting authorities for laundering the money and therefore can bypass the entire banking system, since encashing bitcoins is completely legal through P2P transactions as noted above.
- Third, the R.B.I notification prohibits all the entities which includes banks and financial institutions regulated by it in dealing with virtual currencies. Whereas, the major reporting entities under the PMLA are the banks and the financial institutions since any transaction involving money has to pass through them or ultimately reach them. These major reporting entities under PMLA are also regulated by R.B.I and are clearly prohibited by the same notification in dealing with bitcoins. When they are prohibited by law in dealing with virtual currencies, there is no way that these reporting entities come across suspicious transactions involving bitcoin-money laundering. When they do not come across such transaction, how can they maintain records of the same and report it to the concerned authorities?

Consider the 'iTunes' illustration. Here the 'dirty' bitcoins are laundered into white fiat currency through song purchases using iTunes. **Section 2(sa) of the PMLA** provides a list of **'designated business and profession'** and further says that the central

government may, from time to time, by notification designate other business and profession under the ambit of the section. Business similar in nature of iTunes does not find any place in the any notification issued under this section. Therefore, **iTunes and other business which is not specified in the section is not a 'designated business or profession'** under the PMLA**.**

Further, under **Rule 3** of the Prevention of Money-laundering (Maintenance of Records) Rules, 2005 are obliged to report suspicious transactions to the concerned authorities only if such transactions are above the value of 10 lakhs rupees. **Assuming**, iTunes was an entity obliged to report under the PMLA, the song purchase cost will only be a minimal amount purchased by a large number of people and hence a song purchase transaction would never cross the 10 Lakhs limit prescribed by Rule 3 of the Prevention of Money-laundering (Maintenance of Records) Rules, 2005. Thereby absolving the legal obligation of iTunes from reporting transactions.

So, neither the purchaser nor iTunes are entities regulated by R.B.I. iTunes does not use assistance of any payment system providers for the purpose of this transaction. iTunes can encash bitcoins using an intermediary outside India. The only time where a reporting authority may come into picture is when iTunes pays the launderer/music composer. But this transaction involves fiat currency and even otherwise there is no form of any illegality attached to this transaction.

The **case would have been different** if R.B.I notification did not prohibit those entities from dealing in bitcoins. If such prohibition on the entities did not exist, reporting entities under PMLA would have been part of the above transaction and the chances of them coming across such transaction and reporting suspicious ones would have been higher. But now the chances are literally nil. Therefore, the most important mechanism under the act for preventing money laundering which is reporting of suspicious transactions by the obliged authorities to the concerned authorities together with the R.B.I notification utterly fails in curbing the problem. Or should I say it actually makes the work of the launderer easier?

II. THE ISSUE WITH INVESTIGATION:

In the traditional method of money laundering, the investigation is usually carried out with the assistance of the reporting authorities as well as other authorities[20]. The investigating authority travels back through the trail of laundering process from integration to layering to placement and finally traces it back to the original crime/predicate offence for which the launderer received the proceeds of crime which he has laundered/is laundering.

In the case of bitcoin-money laundering, prima facie, it appears that it is very easy to trace the launderer back to the predicate offence for which he received bitcoins because of the '**blockchain'** technology associated with bitcoins.[21] Blockchain is a public database/ledger wherein all the transactions that ever took place are recorded through blocks and is publicly available to anyone who wish to see the same. These recorded transactions cannot be changed or reversed and cannot be manipulated by anyone[22].

I will explain as to how, in reality, it is not at all easy for the enforcement authorities to identify and trace the same regardless of the presence of blockchain technology:

I. INTERNET PROTOCOL (I.P) ADDRESS

What is recorded in the blockchain is the transaction alone. The name of the transacting parties and other details are not recorded in the blockchain but the address of your bitcoin wallet[23]. How the authorities trace back is using the Internet Protocol or I.P address of the person transacting in bitcoins. Once the I.P address is obtained, the whole history of the bitcoins will be revealed to the authorities. But, the I.P address can be very easily manipulated by any person. For example, if you are an Indian resident transacting in bitcoin and you do not want the authorities to know of the same, you can change your I.P address in a matter of minutes from India and make it look like you are in Singapore. Further, the use of the 'The Onion Router' (TOR) software which gives complete anonymity to its users makes it very difficult for the authorities to trace it back to the person who was actually transacting in bitcoins.

II. BITCOIN MIXERS

[20] Section 54, The Prevention of Money Laundering Act, 2002
[21] All you need to know about blockchain, explained simply | World Economic Forum, available at https://www.weforum.org/agenda/2016/06/blockchain-explained-simply/, last seen on 16/10/2018.
[22] Danton Bryans, Bitcoin and Money Laundering: Mining for an Effective Solution, 89 Ind. L.J. 441, 472 (2014)
[23] Protect your privacy - Bitcoin, available at https://bitcoin.org/en/protect-your-privacy, last seen on 16/10/2018.

Secondly, suppose the authorities have somehow figured out a way to trace the bitcoin-money launderer. The launderer will have no excuse as to why he is holding so much of unaccountable and dirty bitcoins and he can be easily put behind the bars for the same. This is where the **Bitcoin mixers** will come into picture.

Bitcoin mixing services offers the work of delinking or dissociating the bitcoins from any criminal source. Bitcoin Mixers helps to cut the transactional link between two transactions in the blockchain.[24] How the bitcoin mixing services essentially work is-

The launderer sends his 'dirty' bitcoins to the mixing services. The mixing service mixes these 'dirty' bitcoins with 'clean' bitcoins in their reserve. Then the 'clean' bitcoins are sent to the launderer in a new bitcoin account provided by the launderer. To provide more anonymity, the mixing service pay out the 'clean' bitcoins over a period of time and in different amounts each time the pay-out is made.[25] An operational bitcoin mixer makes it virtually impossible to trace back mixed bitcoin to their tainted source[26]. The working model is further illustrated in Figure 1 below for a better understanding of how the bitcoin mixing services work.

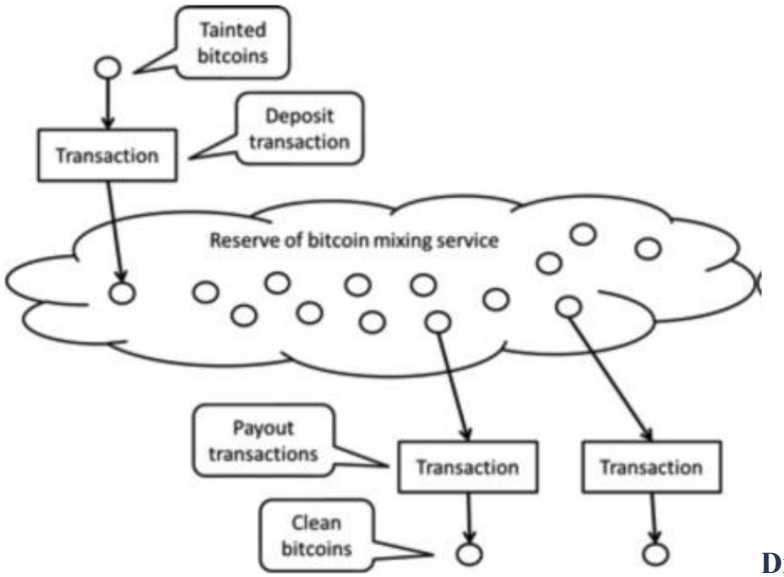

Diagram1.[27]

[24] Rolf van Wegberg, Jan-Jaap Oerlemans & Oskar van Deventer, Bitcoin money laundering: mixed results? An explorative study on money laundering of cybercrime proceeds using bitcoin, JOURNAL OF FINANCIAL CRIME 00–00 (2018).
[25] Ibid.
[26] Supra at 24
[27] Supra at 24

III. 'DOUBLE LAUNDERING' OF BITCOINS

Once the 'dirty' bitcoins are laundered to 'clean' bitcoins using the mixers, the question arises as to why do you have to launder the bitcoins if it is already clean? The reason behind this is the fact that even though, after the bitcoin mixing process, the acquisition of the bitcoin cannot be traced back to the launderer, the source of the money represented by the bitcoin is still not accounted for after the bitcoin mixing process. This is the reason why, in order to account for that money, the launderer still has to find a mode of income which is where the iTunes example comes into picture. **I like to name this process as 'Double Laundering'**.

Post the mixing process, if the double laundering of the bitcoin money is not done, the launderer will have bitcoins in his account which he still cannot use because it might give rise to suspicion. In the event of a tip off from an informant, an investigation can still be initiated against the launderer and there is a possibility that during this investigation, although the criminal source has been delinked from the bitcoins using the mixers, the authorities might pick at the discrepancy between the huge number of bitcoins and the income of the launderer. This is the reason behind the whole process of double laundering where, if you launder the 'clean bitcoins' (obtained using the mixers) using platforms such as iTunes, it provides a fool-proof mechanism for bitcoin-money laundering, starting from mixing services to when you receive payment from iTunes. In addition, this mechanism lays down a clear-cut manner to encash the bitcoins as the alternative mode of doing the same i.e. through banks and financial institutions, is prohibited by the above stated RBI notification.

Therefore, when the Indian laws and policies are unable to curb the bitcoin- money laundering problem even when the launderer uses a single laundering channel like iTunes, we can only imagine how it becomes impossible for the government to curb this same problem if the launderer resorts to this process of 'double laundering'

Conclusion

The world has been confused about the socio-legal-economic impact of cryptocurrencies especially bitcoins since its inception in 2009. Some have extensively supported the legalisation of cryptocurrencies and the others for its complete ban. The world is still

exploring the unending possible uses and misuses of bitcoins. As noted above, one of the major misuse of cryptocurrencies have been for illegal purposes such as drug trafficking, terrorism and money laundering activities. Because of the extensive use of bitcoin for illegal purposes, it has earned the reputation of currency of thieves. Having this consideration in mind, the RBI issued the notification on cryptocurrency with the sole intention to discourage the Indian citizens from dealing in bitcoins. However, as discussed above, this intention of the central bank does not contribute considerably towards curbing the illegal usage as it leaves out of its ambit most entities and persons which are not regulated by the central bank.

The ineffectiveness of the RBI notification left us with only the PMLA 2002 being responsible to curb the bitcoin money laundering issue. However, due to the limitations in the reporting requirements and the other loopholes in the provisions of PMLA 2002, provide gaps for money launderers to escape from the radar of the enforcement authorities under the PMLA. The iTunes illustration and the elaborate nexus through which the bitcoin money laundering is taking place at the virtual stage is further evidence of the fact that the Indian laws at this point are absolutely infirm to curb the illegal fraudulent activity.

The only possible way out of this situation is to understand the gravity of the peculiar circumstances revolving situations where money laundering is taking place through bitcoins and thereby, come up with a legal framework properly addressing the issue by targeting the bitcoin related frauds in particular money laundering.

Finding Predictability: The Basis for the application of precedents under the ICSID and WTO framework

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Abstract

One of the most significant objectives of law has been to treat alike and unlike differently. For the purpose of justice, the Courts of law need to be equitable in their practices. However, every case which is presented before the court of law has a unique set of facts which often entails novel question of facts. The primary objective of relying upon the precedents is that it brings certainty and consistency to a particular law. It gives an assurance to the parties that they would be treated equally and there shall not exist any sort of arbitrariness in deciding of the matter. However, such is not the case in International arena because international law is an evolving law which is primarily based upon consent. Further under the ICSID and WTO framework the parties decide the laws that they wish to be bound with. Article 59 of the statute of the International Court of Justice (ICJ) provides that decisions are binding between the parties in respect of a particular case. Accordingly, the court is not bound by its previous decisions. Hence in this context, it would be interesting to analyze the basis of application of precedents under the ICSID and WTO framework.

This paper explores the judicial history of precedents in matters of ICSID and WTO, the opinions of various authors upon this very doctrine of precedents. The paper also brings to forefront how the ICSID tribunal and WTO have relied upon precedents while deciding certain matters and what lies ahead for the international community.

Doctrine of Precedent And ICSID

There is no outright law that declares '*stare decisis'* to be a formal part of law thus making it *de jure* in either ICSID or WTO. However, a deeper study of the contemporary practices reveals a

strong predisposition towards relying upon the points of law settled in cases. As a result, '*stare decisis'* becomes a *de facto* part of law. To understand the relevance of precedence in ICSID convention, we need to understand why ICSID was established. ICSID was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States in order to ensure investment protection by providing a depoliticized, independent and effective dispute resolution mechanism. The objective of the World Bank was primarily to encourage inter-state investment by reassuring the investors and states of an amicable and quick way to resolve disputes via arbitration. The intention was not creation of a substantive law; rather it was to ensure quick dispute resolution. Therefore, arbitration under the ICSID convention primarily depends upon the investment treaties signed between the parties, though the secondary sources of law mentioned under Article 38 of the ICJ Statute also hold relevance. Therefore ideally, each case is decided in isolation, in accordance with the facts and the laws in that separate legal environment, without letting the general currents of law affect decision making. It is because of this understanding of ICSID, that certain jurists reject the application of precedents to ICSID. The legal backing for the same line is derived from Article 53 of the ICSID convention which states that the award shall be 'binding on the parties'. This is construed to as binding only between the parties and therefore, a separate case with similar set of facts cannot be held to be bound by the principal of law evolved. The arbitration awards are not meant to contribute to the body corpus of law, but in the present paradigm, considering the multiplicity of investment disputes, a comprehensive investment dispute law has started evolving. In this, several arbitrators have started referring to other cases to ensure consistency, continuity and equality of law.

Several authors opine that- "The absence of a doctrine of precedent is linked to Article 53 of the ICSID Convention, according to which 'the award shall be binding on the parties'.[1] This does not appear to be an extremely convincing basis to deny the existence of any form of precedent in this field. Granted, nothing in the Convention's 'travaux préparatoires' suggests that the doctrine of stare decisis should be applied, though nothing in the 'travaux préparatoires' suggests that it should not be applied. In lieu of many others, a quotation from the recent award *in El Paso v. Argentina* (which is reiterated in Pan American v. Argentina and BP v. Argentina) will suffice to

[1] Christoph Schreuer and Loretta Malintoppi, *The ICSID Convention: A Commentary* (1st ed., Cambridge University Press, 2001).

illustrate the general consensus: 'ICSID arbitral tribunals are established ad hoc ... and the present Tribunal knows of no provision, establishing an obligation of stare decisis. It is nonetheless a reasonable assumption that international arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by other arbitration organs, especially those set by other international tribunals."[2]

In an analysis of ICSID awards issued between 1990 and 2006, Jeffery Commission found that tribunals cited to awards rendered by other ICSID panels nearly 80 percent of the time. Commission also found that, over that time period, ICSID panels grew increasingly likely to cite prior awards and that the number of such citations per award increased. Through this engagement with past awards, ICSID tribunals have gradually fashioned what has been called an investment treaty "case law or jurisprudence".[3]

In the *Shrimp Turtle case*, the arbitrators had held that it could consider amicus curiae briefs attached to a party's submission, since the attachment of a brief or other material to either party's submission, renders that material at least prima facie an integral part of that party's submission. Based on the same rationale, the Appellate Body reversed the Panel and ruled that a panel has the "discretion either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not" under DSU Arts.12 and 13. This was significant as a previously decided case was considered as amicus curiae and used to arrive at the judgment. *SGS v. Philipines*[4] on the other hand, laid emphasis on uniqueness of law and claimed that each investment treaty had to be applied in its own terms and therefore precedents could not be applied in investment law. It raised valuable questions regarding application of precedents- whether the value of a judgment with a dissenting opinion had considerably less value, are recent precedents stronger than ones made earlier or based on first principals etc.

[2] Gabrielle Kauffman Koehler, 'Arbitral Precedent: Dream, Necessity or Future', [2014] Arbitration International, Volume 23, Issue III, 357-378. The Article is adapted from The Freshfields Arbitration Lecture, given on 14 November 2006

[3] W. Mark C.Weidemaier, 'Toward a Theory of Precedent in Arbitration', [2010] William and Mary Law Review, volume 51, page 1908.

[4] '*Société Générale de Surveillance S.A. v. Republic of the Philippines',* (ICSID Case No. ARB/02/6), Decision on Objections to Jurisdiction dated 29 January 2004, www.worldbank.org/icsid/cases .

This represents a conflict in opinion and gives rise to the question of whether arbitrators be allowed to pick and choose which decision suits their need. To this, an answer is, - "Flexibility does not amount to a license for tribunals to "pick and choose" among their favorite arbitral pronouncements to justify a decision they believe embodies the correct outcome of the case. Labeling even via the use of precedents, should be no substitute for analysis".[5] In investment arbitration, there is a progressive emergence of rules through lines of consistent cases on certain issues, though there are still contradictory outcomes on others. With evolution of laws, consistency and continuity is paid greater emphasis and arbitrators have increased the amount of attention paid to precedents.

There is an important potential role for the ICSID Secretariat regarding the awareness of ICSID decisions that might be relevant for future cases. Under the proposed amendments to the Rule 48 of the ICSID Arbitration Rules, ICSID shall publish excerpts of the legal conclusions of awards, even without the consent of the parties. This could allow parties and tribunals to enrich their dialogue and, indirectly, contribute to the informed development of international investment law. The fork in the road provisions, which historically provided opportunity to the investors to pick between local, national courts and ICSID, are repeatedly being rejected. This was rejected in the Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic[6]. This has contributed significantly to the importance attached to ICSID and creating a uniform body of law.

In *El Paso International Co. v. Argentine Republic*[7], the arbitrators upheld that ICSID arbitral tribunals are established ad hoc, from case to case, in the framework of the Washington Convention, and [they] know of no provision, either in that Convention or in the BIT, establishing an obligation of stare decisis. However, the Tribunal recognized that international

[5] Alejandro A. Escobar, Latham & Watkins, 'The use of ICSID precedents by ICSID and ICSID tribunals', (*BIICL*) <https://www.biicl.org/files/917_alejandro_escobar_-_precdent.pdf> accessed 6 June, 2018.

[6] '*Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic',* (ICSID Case No. ARB/01/3), Decision on 14 January 2004, Paragraphs 95-98, www.ita.law.uvic.ca/alphabetical_list.htm .

[7] '*El Paso International Co. v. Argentine Republic'*, (ICSID Case No. ARB /03/15), Decision on Jurisdiction, April 27, 2006, Para. 39.

arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by other arbitration organs, especially those set by other international tribunals. In *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*[8] and *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*[9], arbitrators held that the ICSID Tribunal was not bound by earlier decisions, but will certainly carefully consider such decisions whenever appropriate. More recently, in AES Corp. v. Argentine Republic[10], the ICSID tribunal stated clearly that there is so far no rule of precedent in general international law; nor is there any within the specific ICSID system for the settlement of disputes between one State party to the Convention and the National of another State Party.

Doctrine of Precedent And WTO

An important consideration with regard to the doctrine of Precedent and WTO is that, for the doctrine to be successfully applied there need to be a proper hierarchization of courts. Since both ICSID arbitrators and WTO Dispute settlement mechanisms are independent courts and in international law, no set hierarchy of courts is identified, it is difficult to apply the doctrine of precedents in its traditional sense. The WTO Understanding on rules and procedures concerning the settlement of disputes (DSU) are more reliable, predictable and incorporate a single, integrated, and exclusive dispute settlement system. The appellate body set up within the framework, provides a scope for de facto stare decisis.

Interestingly no doctrine of *stare decisis* exists in international law." For example, Article 59 of the statute of the International Court of Justice (ICJ) provides that decisions are binding between the parties in respect of a particular case."' Accordingly, the court is not bound by previous decisions. International courts generally strive for legitimacy, and one way of building credibility is to follow previous decisions in cases which involve similar facts. Despite this the general rule

[8] '*Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan'*, (ICSID Case No. ARB/03/29) (Turkey/Pakistan BIT) Decision on Jurisdiction, 14 November 2005, Para. 76.

[9] '*Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt'*, (ICSID Case No. ARB/04/13) (Belgo-Luxembourg/Egypt BIT), Para. 62-63.

[10] '*AES Corp. v. Argentine Republic'*, (ICSID Case No. ARB/02/06), Decision on Jurisdiction, April 26, 2005 para. 17-18.

is, under international law, dispute settlement procedures and tribunal opinions or decisions do not create obligations upon which future bodies must rely.[11]

Although precedents are not codified under the DSU, they are used when facts are similar. "For example, in the Japan Alcoholic Beverages case, a product similarity test was given. These definitions and tests were subsequently followed in *Canada -Periodicals* and *Korea - Alcoholic Beverages.* In both cases the Appellate Body used it's like product analysis, which it had developed in *Japan - Alcoholic Beverages.* In the former, Canada specifically cited *Japan - Alcoholic Beverages* where it believed the panel had erred in its judgment. Procedurally, the citation of previous decisions by parties to a dispute is a clear indication of the existence of a *de facto* doctrine of precedent. The Appellate Body approved most of the panel's decision, which was a replica of that in *Japan - Alcoholic Beverages,* but criticized the panel for not applying the test as accurately as it should have.12 In *Korea - Alcoholic Beverages* the Appellate Body cited large chunks of the test and refused to alter it.33 Thus, the Appellate Body appears keen to enforce strict compliance with the reasoning handed down in previous decisions."[12]

The appellate panel of the DSU had held that the laws create legitimate expectations among WTO members and, therefore, should be taken into account where they are relevant to any dispute.[13] If the WTO Agreement is interpreted in an ad hoc way, without regard to previous decisions, uncertainty will arise as to whether government policies are inconsistent with the WTO Agreement. Such uncertainty will deprive panel reports of the practical value desired by contracting parties, and impair the achievement of GATT/WTO objectives. On the other hand, a general recognition of the persuasive force of previously adopted panel reports will result in "the development of a comprehensive body of law which can be used as direct evidence as well as embodiment of the spirit of the law.[14] If judicial decisions are inconsistent, legal credibility can hardly be achieved.

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[11] Eoin Gubbins, 'Precedent in the WTO: Advantages Of De Jure Stare Decesis',[2006] Trinity Law Journal, Volume 9, page 70

[12] Ibid.

[13] Appellate Body Report, *Japan- Taxes on Alcoholic Beverages,* (WT/DS8/AB/R,WT/DSO/AB/R, WT/DS1 1/AB/R), (4 October 1996) at 14.

[14] Hersch Lauterpacht, '*The Development of International Law by The International Court'*, (1st ed., Cambridge University Press 1958).

The judiciaries around the world are known to state the law or to find the law and to apply the law as found. But it is this process of interpretation which at times demands judicial creativity and judicial activism. It is this judicial activism which the Members of the WTO did not foresee. Therefore, judicial activism is not recognized in the DSU. However, time and again, WTO DSU has indulged in judicial activism to flesh out judgments it thinks are just and equitable. This was apparent in the Asbestos case.[15] It bought new sets of obligations into picture which is not desirable for the investors as they do not want to follow regulations they never consented to in the first place. The WTO DSU bought a judicial structure replicating those found in the Common Law countries. While this adds to the certainty and predictability much needed in a trading system it also raises concerns of judicial activism. This is not healthy for a globalizing economy because it raises concerns especially in less developed countries that they are being subjected to obligations which they never bargained for.[16]

One practical difficulty that comes in the development of WTO investment jurisprudence has been explained by Dolores Bentolila. "It could be argued that the lack of permanence of arbitral tribunals, as their existence and power result from a particular agreement to settle a particular dispute in respect of a particular bilateral investment treaty (BIT), are obstacles to the existence of any type of jurisprudence. Arbitral tribunals are independent amongst themselves and each BIT is a different treaty.[17] However, Bentolila further identifies certain practical reasons for setting the decisions as precedents- arbitrators usually belong to a particular profession. One cannot ignore the fact that arbitration is monopolized by a homogeneous group of arbitrators. These are in majority specialized practitioners and academics belonging to a small elite of western origin. As Jeffery Commission's study demonstrates, most investment cases are decided by a reduced group of arbitrators of the ICSID list, many of which have been appointed more than once.[18] Finally, independent arbitral tribunals could only share their experience if they have

[15] EC-Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R adopted 12 March 2001.

[16]Sheela Rai, 'Doctrine of Precedent in WTO', (*WBWTO*) <http://wbwto.iift.ac.in/Downloads/WSII/WTO_Precedent.pdf> accessed on 8 June, 2018.

[17] Dolores Bentolila, 'Towards A Doctrine Of Jurisprudence In Treaty-Based Investment Arbitration', (*Universidade de São Paulo*) <https://edisciplinas.usp.br/mod/resource/view.php?id=193429> accessed on 8 June, 2018.

[18] Ibid.

access to this experience, if they can know what others have decided. The appellate body in *Stainless Steel Mexico*[19] had opined that: 'It is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the ratio decidendi contained in previous Appellate Body reports that have been adopted by the DSB.'

Role Played by The Precedents in The Adjudication System of WTO and ICSID

If by precedent what is meant is the rule of the binding effect of a single decision, then there is no doctrine of precedent in international law. There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals. Binding precedents and law are two methods of making binding norms that provide legal certainty.[20] The idea of following precedent is complex and creates conceptual and practical difficulties. In common law jurisdictions the doctrine of precedent is a fundamental source of law. It is a doctrine which provides certainty but is also able to adapt and depart from decisions when it appears right to do so.[21] In a civil law jurisdiction the law is not based on case-law. For example, a judge in the French legal system is not obliged to consider case-law, la jurisprudence,[22] when reaching a decision. In fact, it is expressly prohibited by the French civil code. In Switzerland, judges are permitted to engage in free scientific research when both rule and custom are lacking.[23] Thus the civil code allows a judge to act "as if he were himself acting as a legislator. From a practical point of view the main difference between common law, e.g. England, and civil law, e.g. France, is the civil law judge does not regard himself as bound by the decision of any court in a single previous instance.

[19] '*United States – Final Anti-Dumping Measures on Stainless Steel from Mexico'*, WT/DS344/AB/R, decided on 30 April 2008.

[20] Dolores Bentolila, 'Towards A Doctrine Of Jurisprudence In Treaty-Based Investment Arbitration', (*Universidade de São Paulo*) <https://edisciplinas.usp.br/mod/resource/view.php?id=193429> accessed on 8 June, 2018.

[21] Ibid

[22] Dadomo and Farran, *The French Legal System* (2nd ed., Butterworths 1996).

[23] Dessemontet & Ansay (eds)., *Introduction to Swiss Law* (2nd ed. Kluwer law and taxation publ.1995).

Under international law, dispute settlement procedures and tribunal opinions or decisions do not create obligations upon which future bodies must rely.[24] Quite like the ICJ, ICSID tribunals are not bound by the rule of *stare decisis.*[25] No doctrine of *stare decisis* exists in international law.[26] For example, Article 59 of the statute of the International Court of Justice (ICJ) provides that decisions are binding between the parties in respect of a particular case.[27]

Nevertheless, arbitral precedents have acquired an important role in investment arbitration becoming an essential legal language in the settlement of legal disputes.[28] It can be argued that as the existence and power of arbitral tribunals result from a particular agreement to settle a particular dispute in respect of a particular bilateral investment treaty (BIT), there is lack of permanence of such arbitral tribunals, which is an obstacle to the existence of the jurisprudence of *stare decisis.*[29]

But these tribunals operate in an environment, which favors their harmonization and the development of arbitration as a professional unit and a specialized field. Thus, legalization and standardization of contemporary arbitration set out the conditions for the homogeneity of these tribunals allowing that the experience of one tribunal is useful to others.[30] Homogeneity also exists in relation to the claims and the applicable BITs, as these treaties generally share the same structure and have identical clauses[31] since they are often drafted on the basis of model treaties.[32] Despite this homogeneity, it is difficult to expect that arbitrators will imitate each other as they

[24] Brownlie*, Principles of Public International Law* (4th ed., Oxford University Press, 1990); Article 59 of the Statute of the ICJ, signed 26 June 1945. 23 Calabresi, A Common Law for the Age of Statutes, Harvard University Press.
[25] Alain Pellet, 'The Case Law of the ICJ in Investment Arbitration', [2013] ICSID Review, Vol. 28, No. 2, pp. 223–240.
[26] Raj Bhala, 'The Myth about Stare Decisis and International Trade Law' (Part 1 of a trilogy), American University International Law Review 14, no. 4 (1999): 845-956.
[27] International Court of Justice (2005) Statute of the International Court of Justice. signed 26 June 1945, 59 Stat. 1055; TS 993,-Chapter 111.

[28] Jeffery P. Commission, 'Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence', [2007] 24 (2) Journal of International Arbitration 129.
[29] Dolores Bentolila, 'Towards A Doctrine Of Jurisprudence In Treaty-Based Investment Arbitration', (*Universidade de São Paulo*) <https://edisciplinas.usp.br/mod/resource/view.php?id=193429> accessed on 8 June, 2018.
[30] Ibid.
[31] James Crawford, *Similarity of Issues in Disputes Arising under the Same or Similarly Drafted Investment Treaties*(1st edition, Huntington, N.Y. : Juris Publishing, Inc., 2008).

[32] Ibid

belong to different nationalities, different professions and different traditions.[33] In a permanent tribunal, judges are the same for long periods of time and it is logical to expect that a judge will be consistent with himself.[34]

On the other hand, if we think of investment arbitration, given its plural and atomized nature we might tend to think that there wouldn't be that same consistency. But pluralism produces cultural neutrality and arbitration becomes a hybrid with elements of different legal traditions.[35] Thus, arbitration becomes plural but specific. In the case of *AES v. Argentina*[36] and *SGS v. Philippines*[37] it was declared that the limited mission of the arbitrator does not stop him to follow earlier decisions and those annulment committees may develop an arbitral *jurisprudence constante*. Imitation amongst arbitral tribunals would not generate a relevant set of general norms given that tribunals are independent and that there are no institutional hierarchies. However, certain mechanisms of control of the award under the ICSID Convention, may, in the future, generate arbitral jurisprudence.

The argument raised against such a theory is that control mechanisms of arbitral awards are not sufficient to produce arbitral jurisprudence. Unlike domestic courts of appeal, ICSID annulment committees may not review whether the application of the law to the case is correct.[38] It is difficult to see how annulment committees could ever play role similar to domestic courts as the committees themselves, such as MCI and Enron, have rejected such a role.[39] This does not implies that annulment committees are prevented from following precedents of other committees and generating a consistent jurisprudence on annulment proceedings.[40]

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[33] Dolores Bentolila, 'Towards A Doctrine Of Jurisprudence In Treaty-Based Investment Arbitration', (*Universidade de São Paulo*) <https://edisciplinas.usp.br/mod/resource/view.php?id=193429> accessed on 8 June, 2018.

[34] Gerhardt, 'The Limited Path Dependency of Precedent', 7 U Pa J Const L (2004-2005) 903, 952.
[35] Gaillard (ed), 'Towards a uniform international arbitration law?' : YAP Seminars, Paris - March 28, 2003; Geneva- March 26, 2004 iai series (2004), at 1 ff
[36] *AES Corp. v. Argentine Republic*. (ICSID Case No. ARB/02/17).
[37] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, (ICSID Case No. ARB/02/6).
[38] MCI Annulment, at § 24. Enron Annulment, at 66-63.; ver también: Bjorklund, 'Investment Treaty Arbitral Decisions as Jurisprudence Constante', at 271.
[39] Enron Annulment, at 63-66.; Bjorklund, 'Investment Treaty Arbitral Decisions as Jurisprudence Constante', at 271.
[40] MCI Annulment, at 24-25

Another position that appears in number of cases like such as *Austrian Airlines, Bayindir, Saipemand Burlington Resources*[41] is that the arbitrator has the duty to follow arbitral precedents, in particular, the solutions established in a series of consistent cases (jurisprudence) in order to develop investment law and promote legal certainty. This works similar to the doctrine of *decisis* binding jurisprudence, because the arbitrator has a moral and not legal duty[42] to follow the earlier solutions unless there are compelling reasons on contrary. From the point of view of the objectives of arbitral jurisprudence (predictability and security) these are the objectives of binding precedent and law. As in civil law countries this task was entrusted to legislators through codes, in Anglo-Saxon countries it was entrusted to judges through the system of binding precedent.[43]

The ones, who claim that the use of arbitral precedent would constitute a violation of the obligations of the arbitrator and an abuse of power, take the position that arbitral jurisprudence is prohibited because it involves the creation of unauthorized international law. Under the arbitration clause of the agreements it is the duty of the arbitrator to settle a dispute in an independent and autonomous way. As BITs are so specific, if the interpretation of one treaty is applied to another, the arbitrator would be exceeding its power and create a multilateralization of various BITs in violation to the principle of State consent,[44] given the unique nature of each treaty as *lex specialis.*[45]

But arbitral tribunals are not multilateralizing or modifying a conventional rule, but are imitating others in its application and interpretation. Arbitral jurisprudence is, thus, developed through imitation of precedents. With the imitation and repetition of a particular decision the specific becomes a general principle applicable to a generality of cases.

[41] Burlington Resources, at § 100. Austrian Airlines v. Slovakia, at § 84; Bayindir v. Pakistan. Saipem SpA v. Bangladesh, ICSID Case No ARB/05/07; IIC 280 (2007), Decision on jurisdiction and recommendation on provisional measures, signed 21 March 2007, 2007, at 67.
[42] The president of these arbitrations explains it in an article: Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' at 374.
[43] R.L. Henry,' Jurisprudence constante and stare decisis contrasted', 15 ABAJ (1929) 11.
[44] Schill, The multilateralization of international investment law.
[45] '*AES Corporation v. Argentina'*, (ICSID Case No. ARB/02/17) at § 22-23.

International tribunals do interact with one another, even if not at the robust level found in domestic legal systems, the tribunals have referred to the jurisprudence of another.[46] The critique of this theory and practice say that too much emphasis on an emerging jurisprudence constant may have the effect of undermining coherency in the development of international investment law for the sake of consistency between decisions.[47] It is also argued that not even the evolutionary provisions of the VCLT open a door to judicial precedent, particularly since tribunals are not 'parties' in the meaning of Article 31(3).[48] Given the intrinsic value and established role of precedent in international adjudication that might be an excessively formulaic approach, particularly since the VCLT was designed precisely to foreclose a mechanistically doctrinalist and clause-bound approach to interpretation.[49] Thus we should not read the VCLT as prohibiting due regard for judicial precedent, as at a minimum, precedent is plausibly a 'supplementary means of interpretation' under Article 32 of VCLT.

Given the seriousness with which the Appellate Body of the WTO makes its decisions, it is unlikely that it would often diverge from its own jurisprudence.[50] Thus the reality is that previous dispute settlement reports are followed on a regular basis by the Appellate Body and the panel.

As illustrated in the *SGS v Philippines*,[51] the ICSID tribunals do refer to precedents as elucidating tools. The tribunals discuss the jurisprudence, constante or not, and use it extensively in order to justify their decisions in a manner similar to that of other international courts or tribunals that they refer to precedents, sometimes abundantly. International tribunals thus tend to

[46] Nathan Miller, 'An International Jurisprudence? The Operation of "Precedent Across International Tribunals', [2002]15 Leiden Journal of International Law 483–526.
[47] Zachary Douglas , 'Can a Doctrine of Precedent Be Justified in Investment Treaty Arbitration?', [March, 2010] ICSID Review - Foreign Investment Law Journal, Volume 25, Issue 1, Pages 104–110
[48]Julian Davis Mortenson, 'Quiborax SA et al v Plurinational State of Bolivia: The Uneasy Role of Precedent in Defining Investment Julian Davis Mortenson', [2013] ICSID Review, Vol. 28, No. 2 , pp. 254–261
[49] Julian Davis Mortenson, 'The_Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History? '(forthcoming 2013) (*ASIL*) <https://www.asil.org/sites/default/files/AJIL.107.4.780.Mortenson.pdf> accessed on 12 June, 2018.
[50]Natalie McNelis, 'What Obligations are Created by World Trade Organization Dispute Settlement Reports', (2003) 37 (3) J World Trade 647 at 656.
[51] 'SGS Société Générale de Surveillance S.A. v. Republic of the Philippines', (ICSID Case No. ARB/02/6).

rely on earlier decisions in the 'interests of judicial consistency'[52], although the doctrine of *stare decisis* is inapplicable in international law.[53]

The emergence of the practice of following previously adopted reports can be traced back to the early decisions of GATT panels.[54] Despite the general rule in international law, which prohibits the use of previous decisions as a source of law, precedent had a heavy bearing on the participants in the GATT system. Previous decisions were often mentioned in some detail in GATT deliberations and the formal dispute settlement findings.[55] While the doctrine was never formally recognized as being an element of the legal infrastructure of the GATT, it continued to be used until the GATT ceased to exist and the WTO came into force.

.Although precedent is not supposed to exist in the WTO its presence can be clearly seen in many cases. *Japan -Alcoholic Beverages*[56] is one of the most significant cases on the issue of precedent. This case put forward a test for "like" product determination under Article III of the GATT. The Appellate Body approved the panel's definition of "likeness", agreeing that the definition is narrower than a "directly competitive or substitutable product.[57] The Appellate Body grounded this interpretation in previous GATT practice. It also invoked an "accordion of likeness" test.

These definitions and tests were subsequently followed in *Canada -Periodicals*[58] and *Korea - Alcoholic Beverages*.[59] In both cases the Appellate Body used its like product analysis, which it had developed in *Japan - Alcoholic Beverages*. In the former, Canada specifically cited *Japan - Alcoholic Beverages* where it believed the panel had erred in its judgment. Procedurally, the citation of previous decisions by parties to a dispute is a clear indication of the existence of a de facto doctrine of precedent. The Appellate Body approved most of the panel's decision, which

[52] Robert Jennings & Arthur Watts (eds), *Oppenheim's International Law* (9th edn. Oxford University Press 1992).
[53] Aniruddha Rajput , 'Problems with the Jurisprudence of the Iran–US Claims Tribunal on Indirect Expropriation' [2015] ICSID Review, Vol. 30, No. 3, pp. 589–615
[54] The Australian Subsidy on Annonium Sulphate, adopted 3 April 1950, GATT, B.I.S.D. (vol. II) at 188, and 193 para. 12 (1952)
[55] John H. Jackson & John Jackson, *The World Trading System: Law and Policy of International Economic Relations*, (2nd ed., MIT Press 1997).
[56] WTO Appellate Body Report, *Japan - Taxes on Alcoholic Beverages*, (WT/DSS/AB/R,) (21 June 1995), WT/DSlO/AB/R, (7 July 1995), WT/DSl/AB/R (7 July 1995).
[57] Ibid 27.
[58] WTO Appellate Body Report, *Canada - Certain Measures Concerning Periodicals*, (WT/DS31/AB/R), (30 June 1997).
[59] WTO Appellate Body Report, *Korea - Taxes on Alcoholic Beverages*, (WT/DS75/AB/R)(4June1999).

was a replica of that in *Japan - Alcoholic Beverages*, but criticized the panel for not applying the test as accurately as it should have.[60] In Korea - Alcoholic Beverages the Appellate Body cited large chunks of the test and refused to alter it.[61] Thus, the Appellate Body appears keen to enforce strict compliance with the reasoning handed down in previous decisions.

Ultimately, the Appellate Body held that panel reports constitute subsequent practice within the meaning of Article 31 (3) (b) of the 1969 Vienna Convention on the Law of Treaties.[62] However, Article 31(3)(b) applies only when there are a number of consensually adopted panel reports so as to constitute aconcordant, common and consistent" sequence of acts sufficient to establish the agreement of the parties to that reasoning.[63] Thus it cannot be doubted that the importance of previous reports has increased quite substantially since the holding in *Japan Alcoholic Beverages.* Given the seriousness with which the Appellate Body makes its decisions, it is unlikely that it would often diverge from its own jurisprudence.[64] It also seems clear that the panel is obliged to follow previous Appellate Body decisions. With this evolution of the WTO jurisprudence, some observers have even said that a system of *de facto stare decisis* now exists in the Dispute Settlement Board.[65]

Conclusion

Doctrine of precedent is not supposed to exist and be practiced in the WTO, but its presence is evident in many cases some of which have been discussed above. Japan -Alcoholic Beverages is one of the most significant cases on this very issue of precedent. Even in the SGS v Philippines, the ICSID tribunal relied upon the precedents. Hence, it's now crystal clear that Doctrine of Precedents exists in International Arena especially in ICSID and WTO.

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[60] WTO Appellate Body Report, *Canada - Certain Measures Concerning Periodicals*, (WT/DS3 I/AB/R),(30 June 1997).at 35, section VIII.
[61] WTO Appellate Body Report, *Korea - Taxes on Alcoholic Beverages*, (WT/DS75/AB/R.)(June 4, 1999)at 16, 29, 30, 34, 35, 39
[62] 'Uruguay Round Agreement: Understanding on Rules and Procedures Governing the Settlement of Disputes', (*WTO*, 2005) < http://www.wto.org/english/docs-e/legal e/28-dsu e.htm > accessed on 10 June,, 2018.
Hereafter DSU, Article 6.2
[63] WTO Appellate Body Report, '*India - Patent Protection for Pharmaceutical and Agricultural Chemical Products',* (WT/DS50/AB/R) (19 December 1997).
[64] Natalie McNelis, 'What Obligations are Created by World Trade Organization Dispute Settlement Reports', (2003) 37 (3) J World Trade 647 at 656.
[65] Raj Bhala, 'The Myth about Stare Decisis and International Trade Law' (Part 1 of a trilogy), (1999) American University International Law Review 14, no. 4: 845-956; R.H. Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints', (2004) 98 Am JIntl L, 247.

This paper discussed the opinion of various authors and relied upon various cases indicating that even though under the ICSID and WTO framework the parties are bound to decide the laws that they wish to be bound with under and under Article 59 of the International Court of Justice Statute the decision of the court is binding only upon the parties of the particular case, but still the Doctrine of Precedents has been followed by ICJ, ICSID and WTO.

As stated earlier, the importance of previous reports has increased quite substantially since the holding in Japan Alcoholic Beverages. Thus, it's time for the international community to come forward and propose a Multilateral Treaty on the Doctrine of Precedents. The courts and tribunals have relied upon the precedents for over a long period of time. Hence, if we give this practice a legal recognition through a multi-lateral treaty, it would be a step in a right direction as it will help in reducing arbitrariness and ambiguity and would only strengthen the principles of International Law.

FDI And Competition in India – A Study with Respect to The Walmart – Flipkart Deal

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Abstract:

It is very important for every company to change with transit of time. Corporate Restructuring is one of the well-known concept used to strengthen and increase its value in the global market. Merger, amalgamation, acquisition & takeover have become an integral part of the corporate regime. These companies when resulting to form a new entity after the restructuring process, it affects the various factors of the market. Some of them are Foreign Direct Investment and competition in the market. It is the primary duty of Competition Commission of India (CCI), an antitrust regulatory authority, gained power from Competition Act, 2002 to scrutinize that whether any sort of companies' expansion or reorganization is affecting the healthy competition mechanism in India.

Walmart- Flipkart deal is also one of those merger, which has become a major topic of debate and discussion as this deal is widely expected to shake the e-commerce market of the world all over. This merger is one of the world's largest e-commerce deal. Thus, this research paper aims to discuss the well-known Merger that took place between Walmart Incorporation, an American multinational retail corporation, and Flipkart Private Limited, an Indian electronic commerce company.

Introduction

Foreign Direct Investment ["**FDI**"] is, most simplistically speaking, the inflow of capital into the Economy of a country by way of investment from a foreign player. In other words, FDI takes place when an investor from another country invests in a business in a manner wherein, he gains control over the company purchased. The Organization of Economic Cooperation and Development (OECD) defines Control to mean the owning of 10% (Ten percent) or more of the

business.[1] Foreign investments into India are governed by the Foreign Direct Investment Policy ("FDI Policy") of India, which is issued by the Ministry of Commerce and Industry through the Department of Industrial Policy and Promotion [DIPP].

The deal of Walmart and Flipkart will have a positive impact in India's foreign investment flows and has been done as per FDI norms. This is one of the world largest e-commerce deal. This paper will discuss firstly, about the deal and later will move on to state that whether it entrance in Indian market have any appreciable adverse effect.

An Overview

FDI brings with it, a long list of advantages to the growth of a host country's economy. When an investor is looking to invest in a foreign company, innumerable factors play a decisive role such as the human resource availability for labor, government policies, taxation schemes, openness of market, enforcement of competition laws, etc. Thus, when such an investor enters the Indian market, he brings along with him sizeable employment opportunities and capital into the country. The investor also brings along a vast skills set, technology and expertise from his home country, thus bringing in enormous scope for development.

The primary purpose of The Competition Act, 2002 ["**The Act**"] and the Indian competition policies therein is to ensure that no entity in any industry indulge in any practice that negatively impacts the health of the competition in that industry. The other main objectives of the Act are, establishment of Competition Commission of India ["**CCI**"] , protect the interest of consumers, to ensure freedom of trade, promote fair means of competition and prohibit the unfair means of competition which is having an appreciable adverse effect on the market. Therefore, FDI flowing in from any country into India must not contradict the competition policies or catalyze anti competitiveness in any manner.

1. IMPACT OF THE FDI POLICY ON INDIAN ECONOMY

1.1. THE POLICY

[1] OECD

India is an emerging economy and is investment starved. Every dollar of capital has a multiplier effect on the GDP and in turn, economic growth of the country.

The inception of the FDI Policy ["**Policy**"] can be traced back to the early 1990s to the era of liberalization in India. The Policy has undergone numerous revisions and changes and today, we operate on the latest Policy, The FDI Policy, 2017 and has brought about some major changes and introductions to the FDI practices in India. For instance, earlier, the Foreign Investment Promotion Board was set up as the inter-ministerial body that granted government approval for FDI in sectors where such prior approval was necessary. However, in 2017 the Foreign Investment Promotion Board (FIPB) was abolished and instead, a Standard Operating Procedure was put in place wherein for sectors mandating prior Government approval, the entities would have to approach the respective administrative ministries.

FDI can be brought about by 2 (two) routes, namely, the automatic route and the government route. For sectors falling under automatic route, no governmental approval is required as opposed to the self-explanatory government route.

Among many other changes, it further provided for 100% FDI under automatic route for various industries which earlier required government approval, such as the manufacturing industry, existing projects in civil aviation industry, financial sector activities governed by financial sector regulators, e-commerce, etc.

1.2. THE IMPACT

India has emerged as one of the most attractive destinations for foreign investment from around the globe. With the new Policy in place, various opportunities have opened up. Entities such as IKEA, Apple, etc. have hinted their interest at entering/expanding the Indian market. Further, the International Finance Corporation, the investment arm of World Bank is planning to invest 6 Billion USD in India to bring about several sustainable and renewable energy programs in India by 2022, tentatively.

With FDI having risen to approximately to a whopping USD 62 Billion for the year 2017-18, the Indian GDP is likely to move upwards more rapidly, placing it on the charts with some of the world's largest markets.

2. THE WALMART- FLIPKART DEAL

2.1. BACKGROUND OF COMPANIES

Walmart is a mega retailer with headquarters in Arkansas, U.S.A., was established in 1962. This is not the first time that Walmart had entered Indian Market. Previously to this deal with Flipkart, it had a retail joint venture agreement[2] with Sunil Mittal's Bharti Airtel Enterprises, India's biggest mobile phone carrier. In November 27, 2006 this agreement was entered to establish a 50-50 joint venture to do wholesale business there. This partnership called Bharti Walmart Private Ltd, would operate stores called Best Price Modern Wholesale. It entered the Indian market to make a direct entry into India's retailing sector. The purpose of this deal was to build and operate cash and carry superstores in India. But this deal did not work for Walmart and it failed. In 2013, they announced that they are going to independently own and operate separate business, and are no longer going to continue this agreement in the retail business. Later in May 2018, US based retail chain Walmart announced its intent to acquire Flipkart, subject to regulatory approval. This time it tried to enter the Indian market through a wholesale company which can fulfill its objectives of entering into Indian market. It had become successful in doing this, When CCI finally approved this deal.

Flipkart was launched in October, 2007 by Sachin Bansal and Binny Bansal. It was started by a team of 2 and now it had become a large company with 100 million registered user and 100 thousand sellers. It is India's leading e-commerce marketplace with over 80 million products across 80 plus categories.[3] During this long journey of 11 years, it made several acquisitions and joint venture agreement with different retailers including, Mime360, Letsbuy, Myntra, Jabong.com, Motorola, etc. In 2018, following the announcement of Walmart deal, it has become the owner by having stake of 77% . Prior to this acquisition Flipkart was most heavily funded private company in the Indian start up system.

2.2. DEAL WITH FLIPKART

[2] Available at: https://www.thehindu.com/todays-paper/tp-business/wal-mart-enters-india-with-bharti-tie-up/article18500924.ece (Last Accessed on: 6th October, 2018)
[3] Refer the Official Website of Flipkart (www.flipkart.com)

The Policy provides for 100% FDI by automatic route in the marketplace model of e-commerce in India. Flipkart used to run on the inventory-based model but later switched to the marketplace model and is therefore eligible to avail 100% FDI.

- On 9th May, 2018, Walmart Inc. announced that it will acquire 77% holding in Flipkart, leading to bringing about one of the largest ever acquisition deal in e-commerce. The deal is valued at 16 Billion USD. Flipkart has the largest market share in e-commerce, so with this acquisition Walmart can achieve next leg of growth in India with Flipkart's 175 million registered user base.
- Soft Bank which had earlier pumped in $2.5 billion into Flipkart, exits the company by selling its 20 per cent stake for $4 billion. The other major investors of Flipkart are Sachin Bansal, Nasper, Tiger Global, Tencent etc. Under the deal Walmart will subscribe to ordinary shares for the purchase price of $2 billion in cash. Walmart had also purchased preference and ordinary shares. Further, the preference shares shall be converted to ordinary shares which will lead to 77 per cent of the shares holding belonging to Flipkart.
- Walmart intends to extend its market position in India by way of Business to Business (B2B) marketing. Walmart has said that it will use newly issued debt & cash to finance the investment. The global giant is also pumping in $2 billion of fresh equity funding to grow Flipkart's business in the country.[4]
- Walmart and Flipkart are also in discussions with additional potential investors who may join the round, which could result in Walmart's investment stake moving lower after the transaction is complete. Even so, the company would retain clear majority ownership.[5]

This deal has shown effects on each and every stakeholder related to the Company[6]. This greatest rivalry in the market firstly, could be advantageous to the customers as new and increase in innovation and ideas, will lead to better goods and services. Moreover, on the other hand Walmart whose strength lies in it world-class direct sourcing will help to reduce costs and consequently bring down prices of products.

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[4] Sanchita Dash, Walmart-Flipkart Seal the Deal: What You Need to Know, available at https://www.entrepreneur.com/article/313168 , Accessed at 04:04 PM, 1st September, 2018

[5] Available at: https://news.walmart.com/2018/05/09/walmart-to-invest-in-flipkart-group-indias-innovative-ecommerce-company , Accessed at 5:02 PM , 1st September, 2018

[6] Available at: https://www.indiatoday.in/india/story/walmart-flipkart-merger-all-you-need-to-know-1229461-2018-05-09 , last accessed at: 6:02 PM, 28th October, 2018

On 8th August, 2018 evening, CCI posted a tweet from its official Twitter handle, confirming it had approved the Walmart Flipkart deal.[7] The CCI while approving this combination held that Flipkart and Walmart are neither close competitors under the B2B model nor they have combined market share that raises competition concern. Therefore, on an evaluation of factors mentioned under section 20(4) of the Act, there is no appreciable adverse adverse effect on competition and this particular transaction adds to the healthy competition for Indian retail. The deal has become official now, Walmart will pay $16 billion for the initial stake of 77 per cent in Flipkart and the remainder business will be held by some of the Flipkart's existing shareholders.[8]

Impact of FDI On Competition

FDI has important implications for the sustainability of national policies. The trade-off between higher FDI, which is considered to be beneficial for the recipient nation, against the ability of the government to maintain its control over certain sectors of the domestic economy, and the benefit of doing so, remains a largely debatable policy question.

As the world's largest retail giant pours funds, it will lead to more such investments in e-commerce. The Indian e-commerce market space was drying up as funding ebbed following liquidity issues due to Demonetization and Goods and Services Tax (GST) bottlenecks. Walmart's entry will usher fresh funds and rejuvenate e-commerce ecosystem as more foreign firms and venture capitalists enter India.

With the new Policy in place and India being the attractive hub for investment as it is, the Walmart Flipkart deal has sparked several debates across the country. While the deal is being celebrated on one end, the retail traders are enraged at the entry of Walmart claiming that it is cancerous to their growth. They fear that Walmart will put them out of competition and affect their trade adversely.

[7] Available at: https://www.livemint.com/Companies/h63fBTnFc7HE8WBaufifAN/FlipkartWalmart-deal-gets-CCI-approval.html , Accessed at 4:48 PM, 1st September, 2018

[8] Available at: https://www.businesstoday.in/current/corporate/mega-walmart-flipkart-deal-is-official-now-here-are-top-10-takeaways/story/276557.html, Accessed at 07:16 PM, 1st September, 2018

Local traders have suffered huge losses owing to the voluminous discounts, cash back offers and reduced prices offered by e-commerce giants. Foreign investment that enables such giants to present such offers to customers, have a very adverse effect on the local traders, since they cannot afford to sell their products at such prices or offer consumers such benefits due to lack of capital. The CCI has confirmed this deal currently and clearly stated that this deal is not creating a position of abuse of dominance under Section 4 of The Act. The giant players of the e-commerce industry constantly leverage their investments to provide better and better pricing for their products, competing against each other for the same. With the USD 16 Billion investment, it opens up the gates to heavier battle for lower prices between Flipkart, Amazon and all other big players, thus setting a price range unachievable by the smaller players, putting them out of business.

The Confederation of All India Traders ("**CAIT**"), demanded that a national policy for e-commerce be framed at the earliest and a regulatory authority be constituted to regulate the online retail business in India. This is a very necessary regulatory measure, considering the rapid growth of the e-commerce industry in India. The CAIT had filed a petition in National Company Law Appellate Tribunal (NCLAT) against the CCI's decision to approve Walmart-Flipkart deal.[9] The body further stated that it had filed objection against this deal before the CCI on the grounds that "The proposed combination would lead to a huge degree of vertical integration in the market since Walmart is a global retail giant with its own range of multi-brand products and where the B2B market is concerned, there is a high likelihood of Flipkart and Walmart would affect other wholesalers on the platform".

However, if we really stop to consider, it is quite logical that the small players of the retail (non-e-commerce) industry will take a hit with the sprinting growth of the e-commerce industry as well as with the participation of the big players such as Reliance, More, Nilgiris, etc. and the growth of these players and the e-commerce industry is inevitable. The real question is, will Walmart's entry into the Indian market give rise to any unfair competition (anti competition) or adversely affect any group that is not otherwise affected? As long as the answer to this question

[9]Available at: https://economictimes.indiatimes.com/articleshow/65580684.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst, Accessed at: 6:00 PM, 2nd September, 2018

is negative, the deal cannot be said to be anti-competitive as per the eyes of the Indian legal system. The primary issue is that the small players are not on level playing field to be able to compete with global players. Thus, entry of international players into the market is a threat to their livelihood. The only balance that could be brought in would be with the introduction of a regulatory statute for such industries (ex: E-commerce) and set up such bodies to implement the same.

Conclusion

India is still learning from other countries in the matter of doing business. The present regulation that we have for competition that is Competition Act, 2002 which itself has been taken from US. Previous to this we had Monopolies and Restrictive Trade Practices Act, 1969, which repealed in the year 2009. The present act had gone several amendments in the year 2007 and 2009. But still it seems that some way or other we are still lacking from other foreign countries. Let's take an illustration that, whenever an Indian company goes to a point of highest level, we see that some foreign country acquiring it. Therefore, it is a matter of question that Why most Indian companies are acquired by a foreign companies rather than acquiring them in return? There can be several reasons to it, one of those can be that we are developing and learning from other foreign companies. But, it's not that Indian company do not acquire foreign companies, there are some examples to it also.

In India, FDI is a crucial aspect for the growth of the economy. As long as such foreign investment is in synchronization with the Indian laws, FDI is a welcome catalyst to economic development. Insofar as the small traders are affected, they are affected by the growth of the e-commerce industry itself and not by the entry of Walmart. Therefore, regulation of the e-commerce industry is the solution rather than restriction of FDI in the sector. Moreover, All India Vendor Association should come up with some regulation so that the interest of small traders can be looked in such case of merger.

Flipkart, Amazon, Snapdeal, Paytm Mall and other players of the e-commerce industry compete intensely amongst themselves, thus resulting in lower prices and better discounts, which shall benefit Indian customers. Walmart's entry will only strengthen such competition. By providing

capital to Flipkart, it gives Amazon and other players more incentive to compete harder without causing any further damage to the industry than Status quo. As we know that Walmart has physical presence in the market but, some way or the other lacks its existence in e-commerce. So, this deal will not only help Walmart to appear in Indian e-commerce market but also to extend their Business to Business (B2B) sales across India through this merger/ acquisition. Moreover, Walmart have an experience in retailing, logistics, inventory and supply chain management which can help Indian agriculturalist and farmers. Therefore, it is a win win to the e-commerce sector in India and any adverse effect to any other sector is only a result of successful growth of the e-commerce sector. The deal of Flipkart and Walmart is going to be remembered always as this is the first world's largest acquisition in e-commerce sector.

Legal Position of Director

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Abstract

It is very difficult to pinpoint the exact legal position of directors of a company only because till today, legislature has not taken any serious efforts to define it moreover stance of judiciary is also not clear which led the confusion. They are called by various names, sometimes as agents, sometimes as trustees, and sometimes as managing partners of a company. Thus, it is incumbent to clarify by the legislature regarding their legal position especially whether they are the employee or not, and whether they can hold two different positions in a company or not?

In this article author critically analyses the provisions of companies Act 2013 and finds the shortcomings of the existing provisions, the author also suggests modification of those provisions regarding legal position of director by legislature through amendment in the companies Act 2013 and also to take all feasible steps to liquidate this adversity and clarify the confusion in this regard.

Introduction

It is very difficult to pinpoint the exact legal position of directors of a company only because still Companies Act 2013, makes no effort to define their position. No doubts director of any company occupies an important position in a company as they have to play a key role in management of the company's business. It is considered that they are neither the servants of the company[1] nor its employee[2] However there is no restriction under the Act that a director can't be an employee to the company[3]. Now the concept of legal position of director evolved after the judgement of ***Lee v Lee's air farming Ltd***[4]**.** In this case, Director of air farming company was also working as pilot for the company further he was killed in a plane crash now his widow demands compensation under worker compensation Act and court allow it. Further Privy Council observed that the directors of the company may work as an employee in different capacity which create more confusion regarding the legal position of Director. The true position

[1] Burland V. Earle, (1902) AC 83 (100).
[2] Normandy V. Ind. Coope & Co. (1998) 1 Ch 84.
[3] R.R. Kothandaraman v. CIT (1957).
[4] (1962) 3 All ER 420 (Privy Council in an appeal from New Zealand); 1961 AC 12: (1960) 3 WLR 758: (1960) 3 All ER 420 (PC).

is that they are really commercial men managing a trading concern for the benefit of themselves and of all other shareholders in it[5].

Judicial efforts to define the legal position of director

No doubt that, the Companies Act 2013 is inspired from the companies Act-2006 of England rather than copied but one can't deny that the lawmaker of India has not taken the serious efforts to describe the legal position of director in the annals of corporate legislation. Legal position of directors has meticulously described by judges sometimes as agents, trustees and organs of corporate body etc.

Directors as an agent

It is well settled principle that directors are agents of the company after the judgement of ***Ferguson v Wilson***[6] Where the Plaintiff supplied certain goods to a company through its chairman, who promised to issue him a debenture for the price but never did so and company went in to liquidation. Court observed that when the directors contract in the name and on behalf of the company it is the company which is liable and not the directors.

Once again in the case of ***T.R Pratt (Bombay) Ltd v M.J Ltd***[7] Privy Council held that, the notice to a director will amount to a notice to the company in the same as a notice to an agent is the notice to the principle.

Further The concept of legal position of Directors as agents become imperative after the Liberalization Privatization and Globalization in India when Hon'ble Apex Court in case of ***Vineet Kumar Mathur v Union of India***[8] held that "Directors as agents make the company liable even for contempt of court". However, directors Incur a personal liabilities in the following circumstances.

- Where they contract in their own names.
- Where they use the company's name incorrectly, e.g. By omitting the word "Limited".
- Where they exceed their authority e.g. Where they borrow in excess of the limits imposed upon them[9].
- Where the contract is signed in such a way that it is not clear Whether it is the principal (the company) or the agent who is signing.

Directors as a Trustee

[5] Coal Mining Co., Re (1878) 10 Ch. D 450.
[6] (1866) 2 Ch A PP 77.
[7] AIR 1938 PC 159.
[8] (1996) 20 CLA 213 (SC)
[9] Weeks v Propert (1873) LR 8 CP427.

Meaning of Trustee :- A trustee is a person in whom is vested the legal ownership of assets which he administers for the benefit of another or others. Directors are regarded as trustees of the company's asset and of the powers that vest in them because they administer those assets and perform duties in the interest of the company and not for their own personal advantage.

Why the directors have been described as trustee:- Directors are those persons selected to manage the affairs of the company for the benefit of shareholders. It is an office of trust, which if they undertake, it is their duty to perform fully and entirely. This peculiar nature of their office is one of the reasons why the directors have been described as trustees.

It has been acknowledged in the case of ***Ramaswami Iyer v Brahmayya & Co***[10]**.** where the Madras High Court held that " the directors of a company are trustees for the company and with reference to their power of applying funds of the company and for misuse of the power they could be rendered liable as trustees and on their death the cause of action survives against their legal representative.

It may be noted that directors can be made liable for any criminal breach of trust by them under section 409 of Indian penal code[11]

To whom the directors are trustee? Whether to the company or to the Individual Shareholder:- The Principal was laid down in 1902, in ***Percival v Wright***[12] and still holds ground as a basic Proposition. In this case the Court held that, directors have no duty towards Individual shareholder. From this it is clear that directors are trustee to the company and not of Individual shareholders.

In this case, there were negotiations for the sale of the company's business (undertaking) at a very high price, which in turn would have considerably increased the value of the shares of the company. The directors of the company did not disclose this fact to a shareholder and purchased his shares at a low price thereby making a substantial profit. However, the negotiations proved to be useless. Nevertheless, the plaintiffs (shareholders) claimed that the non-disclosure was a breach of the fiduciary duty entitling them to repudiate the sale (i.e. purchase of shares). The sale was, however, held to be valid.

However, in the case of ***Allen v Hyat***[13] It was held that the directors are trustees of the profit for the benefit of the shareholders. They always cannot act under the impression that they owe no duty to the individual shareholders but, there is no doubt that the primary duty of the director is to the company.

Criticism of the position of director as Trustee

[10] (1996) 1 Comp 107 (Mad)
[11] R.K. Dalmia v Delhi Admn. (1962) 32 Comp Cas 699 SC.
[12] (1902) 2 Ch. 421.
[13] (1914) 30 TLR 444.

Though the directors of a company are loosely called trustees, but they are not trustees in the strict sense of the term. Directors are not trustees in the real sense because Trustee is the legal owner of the trust property and contracts in his own name on the other hand A director is a paid agent or officer of the company and contracts for the company[14].

Critical analysis of the legal position of director

After analyzing the existing provisions of companies act 2013 and practices of the court, what I found that the modern directors are more than mere agents or trustees. As it is clear after the judgement of ***Lee v Lee's air farming Ltd*** where the widow of director gets compensation under worker compensation Act. Furthermore, the organic theory of the corporate life treats certain officials so called directors as organs of the company for whose action the company is held liable just as a natural person for the action of his limbs. Therefore, it is necessary to define the position of director by legislature in the interest of public at large because Directors and managers represent the directing mind or will of the company and control what it does.

Conclusion

Keeping in mind, the judgement of Lee v Lee's air farming Ltd., Ferguson v Wilson, T.R Pratt (Bombay) Ltd v M.J Ltd., Ramaswami Iyer v Brahmayya & Co One cannot deny the meticulous approach of the court to describe the legal position of directors but in my view, it is still obscure thus it requisites to define the legal position of directors by legislature. However as per the verdicts of the Court it is clear that Directors are the brain or will of the company therefore they are not only agent and trustee but also the primary organs of the company.

The director is regarded as the alter ego of the company, and it would be responsible for his personal negligence. His fault is the fault of somebody who is not merely a servant or agent for whose action the company is liable upon the footing respondent superior, but somebody for whom the company is liable because his action is the very action of the company itself.

In the era of globalization, it is incumbent to define the exact legal position of director to maintain the transparency in the corporate world for the interest of public at large as in India Precedent shows that directors are more than mere agents and trustees.

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[14] Smith v Anderson (1880) 15 Ch D 247 at page 275.

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