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SHOULD ENVIRONMENT CLAIMS BE GRANTED THE STATUS OF SECURED CREDITORS IN THE INSOLVENCY AND BANKRUPTCY CODE, 2016?

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ABSTRACT

Arresting climate change requires recalibration of the global financial and insolvency systems. The dichotomy between insolvency law and environmental law arises when a debtor enters insolvency and has not fulfilled its part of the bargain on the environmental regulations and the environmental claims are treated as unsecured. This incompatibility will cease to exist if environmental claims are given the same status as that of secured creditors. Evolution of insolvency laws, both, globally as well as in India, are a testament that the insolvency laws had been malleable. The insolvency literature is amenable to grant environmental claims a secured status if clarity exists in the law and the participants in the ecosystem are aware of the same. Jurisprudence across the globe is pivoting towards treating environmental claims favourably and vis-à-vis one aspect, the contamination of land and its abandonment the judgements are analogous. India has a plethora of laws on environment including for contamination of land; a charge on assets is created, effectively granting a "secured-equivalent" status, for recovery of expenses incurred by the pollution board. However, the question has not yet been tested in the Indian courts. Furthermore, based on evolving judicial precedents, it is probable that, in future, insolvency professionals and lenders to the corporate debtor may be held liable for environmental liabilities on the grounds of "capacity of influence"; probability of systemic risk exists due to climate emergency. Thus, granting a secured status to environmental claims will obviate such professional liabilities as it would be in the interest of all stakeholders to give primacy to environmental laws.

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I. INTRODUCTION

Human influence is the primary driver that has warmed the atmosphere, ocean, and land. Global warming of 1.5°C and 2°C[1] will be exceeded during the 21st century unless deep reductions in carbon dioxide (CO_2) and other greenhouse gas emissions (primarily methane) occur in the coming decades. Changes in the climate system have become larger in direct relation to increasing global warming. Global warming has resulted in an increase in the frequency and intensity of hot extremes, marine heatwaves, agricultural and ecological droughts, intense tropical cyclones, variability of the water cycle, severe wet (heavy precipitation) and dry events, unprecedented sea-level rise, receding glaciers, and reductions in Arctic Sea ice, snow cover, and permafrost.[2]

The aforesaid climate emergency calls for an appropriate response from the legislature, the judiciary, and the executive; insolvency and bankruptcy laws[3] being part of the broader legislative framework, thus have a moral obligation to adapt accordingly. Neither does such a moral obligation to adapt impinge on individual liberty. John Stuart Mill, in his essay, said, "that the individual is not accountable to society for his actions, in so far as this concern the interests of no person but himself"[4]. He added, that "actions that are prejudicial to the interests of others, the individual is accountable and may be subjected either to societal or to legal punishments, if society is of the opinion that the one or the other is requisite for its protection"[5]. Today, action on climate change is a prerequisite for societal protection.

Also, economics and associated laws evolved out of moral philosophy. Adam Smith, who is regarded as the father of economics, was a professor of moral philosophy and not economics. Smith had opposed slavery on moral grounds. Thomas Kuhn, the philosopher, and intellectual historian, argued, that early in the development of a new field, "social needs and values" are a

[1] Such temperature rise will have severe climatic consequences, that is, frequent agricultural and ecological droughts, storms, dust storms, tropical cyclones, heavy snowfall & landslides, and flooding, etc.
[2] Masson-Delmotte, V., P. Zhai, A. Pirani, S. L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L.Goldfarb, M. I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T. K. Maycock, T. Waterfield, O. Yelekçi, R. Yu and B. Zhou (eds.), *2021: Summary for Policymakers. In: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, IPCC, CAMBRIDGE UNIVERSITY PRESS (2021) https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM_final.pdf.
[3] Insolvency is the financial state where a person is unable to pay their debt on time. Bankruptcy is the legal process that is undertaken when a person formally declares the inability to pay their debt to creditors. However, throughout the paper, the words insolvency laws and bankruptcy laws have been used interchangeably.
[4] JOHN STUART MILL, ON LIBERTY 1859 86 (Enhanced Media Publishing, Los Angeles, CA 2001).
[5] *Id.*

major force determining what problems its practitioners take up[6]. The climate emergency today equates to the social needs and values of our time.

The Preamble[7] of the Insolvency and Bankruptcy Code, 2016 (IBC) also has an inherent morality built into it, further expounded by the Hon'ble Supreme Court in *Swiss Ribbons Pvt. Ltd. & Anr vs. Union of India*[8]. The court stated that "It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus beneficial legislation which puts the corporate debtor back on its feet". The court further added that "repayment of financial debt infuses capital into the economy in as much as banks and financial institutions are able, with the money that has been paid back, further to lend such money to other entrepreneurs for their businesses." Thus, the social good of saving the corporate along with its personnel and judicious deployment of capital is at the core of IBC.

Currently, insolvency laws restructure or liquidate the debtor, whereas environment law seeks to safeguard the environment. A disagreement arises between the two laws when the debtor enters insolvency, has not fulfilled its part of the bargain on the environmental regulations, and the insolvency law intends to treat claims arising out of such negligence, pertaining to a period prior to the insolvency commencement date[9], as any other unsecured debt. Developing jurisprudence in different jurisdictions on the treatment of such environmental claims ensues. This paper argues that environmental claims should be granted the same status as that of 'traditional' secured creditors. This would address not only the climate emergency but also, in a roundabout manner, serve the interest of 'traditional' secured creditors, a segment that *prima-facie* will be affected by the grant of such a priority.

Some of the enlightened jurisdictions have already embarked on granting environment obligations/claims their rightful priority, albeit in limited scenarios. The broader ecosystem amidst which insolvency laws operate is in the midst of a change and may have a direct or an indirect

[6] BENJAMIN M FRIEDMAN, RELIGION AND THE RISE OF CAPITALISM (Knopf 2021).
[7] An act to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms, and individuals in a time-bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interest of all the stakeholders including alteration in the order of priority of payment of Government dues.
[8] Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors., AIR (2019) 4 SCC 17.
[9] All claims arising on account of environmental violations, post the insolvency commencement date, will be treated as insolvency resolution costs / administrative costs, necessary to preserve the assets of the debtor. In some jurisdictions, this may not be applicable for renounced assets.

effect on the functioning of insolvency laws. Though several adjacencies of insolvency law are undergoing a metamorphosis, two aspects are elaborated below: one from the realm of accounting and another from the domain of lending, to bring to fore the probable consequences of such a transformation.

The first aspect is from the accounting arena. IFRS Trustees at the United Nations Climate Change Conference (COP26) decided to establish the International Sustainability Standard Board (ISSB). ISSB's purpose is to develop, in the public interest, a comprehensive global baseline of sustainability disclosures for the financial markets.[10] The intersection of financial standards and sustainable standards may result in a situation of balance sheet insolvency, i.e., liabilities exceeding assets. Most companies do not recognize liabilities arising from carbon emissions produced by their operations, products, and services. This is because these emissions are priced at zero today, and thus, it is assumed that they will be priced at zero in the future too.[11] Any change in the assumptions requiring quantification of the aforesaid emissions may drive companies to balance sheet insolvency and will have a concomitant effect on a director's responsibility and liability. Director's liabilities may arise, especially in cases, where the companies use internal or shadow pricing of carbon for scenario planning. Though, not in the context of balance sheet insolvency, activists have embarked on suing boards for inaction on climate change.[12]

The second aspect is the developments in the debt market. Primarily, there are two sources of debt funds i.e., banks and bond markets. Central banks across the globe have recognized the climate

[10] MEETING REPORT, IFRS ADVISORY COUNCIL MEETING, https://www.ifrs.org/news-and-events/calendar/2021/november/ifrs-advisory-council/ (last visited Nov. 8, 2022).

[11] Robert G Eccles and John Mulliken, *Carbon Might Be Your Company's Biggest Financial Liability*, HARVARD BUSINESS REVIEW, (Oct. 7, 2021) https://hbr.org/2021/10/carbon-might-be-your-companys-biggest-financial-liability .
"Through some combination of government intervention and the development of carbon trading markets, it seems inevitable that a price will eventually be put on carbon around the world. Underscoring this, a carbon price has been proposed as part of several bills before Congress, but other mechanisms like a cap on emissions in a sector or geography would achieve the same effect. Economic models and the experience of the EU Emissions Trading System suggests that a price could likely be between $50 and $100 per ton of CO_2 in the near term and rise from there. At $100 per ton that would represent five percent of the global economy. Five percent of the global economy is a huge number. But where does this liability sit? With the world's corporations.
A sad joke for corporate climate activists is that acting on climate plans is always "the next CEO's job." But every company has an uncovered "Carbon Short" position based on their emissions, and it needs to recognize this hidden liability today. This short position arises from the carbon emissions produced by their own operations (Scope 1 and 2, in the argot of climate accounting), and their products and services (Scope 3). Most companies don't recognize this liability because these emissions are priced at zero today, were priced at zero last year, and so it seems natural to assume that they will be priced at zero in the future. One could say that companies are engaging in the carbon futures market, assuming that this fundamental "input cost" will never change. Anyone who works in commodity markets knows that uncovered positions can turn from profit to significant loss in the blink of an eye".

[12] Gareth Vipers, *Shell Directors are sued over Action on Climate*, WALL STREET JOURNAL, (Feb. 9, 2023) https://www.wsj.com/articles/shell-directors-are-sued-over-action-on-climate-11675938744 .

emergency and heightened the supervision of banks. Network for Greening the Financial System, a conclave of central banks and supervisors, with over 100 members, in their first report, had recommended engaging with financial firms to ensure that climate-related risks are understood, discussed at the board level, and considered in risk management, investment decisions and are embedded into firms' strategy[13]. Thirty-eight central banks have committed to climate-related stress tests to review the resilience of large financial firms, and thirty-three central banks have committed to issue guidance on managing climate-related financial risks[14]. The Bank of England ("**BOE**") has reported on the progress banks, and insurers have made against its climate-related supervisory expectations, set out initial views between climate change and regulatory capital requirements, and has designated climate change as one of its seven strategic priorities.[15] The Reserve Bank of India ("**RBI**"), in its 2015-16 annual report, has mentioned about findings of the G20 Green Finance Study Group[16], in its 2018-19 Report on Trend and Progress of Banking in India, RBI noted the risk of a climate change on financial assets and the need to accelerate the green finance for environment-friendly sustainable development[17] and in the July 2022 discussion paper articulated broad contours of its strategy for regulated entities which included stress testing for climate-related scenarios and climate-related financial disclosures[18]. Recently, in January 2023, RBI published a discussion paper on expected credit loss[19] ("ECL") based provisioning for banks. Once implemented, this may require banks to factor in physical risks and transition risks[20] of climate change in their loss models and provide for the same in their books.[21] Under the existing

[13] *A Call for Action - Climate Change as a Source of Financial Risk, Network for Greening the Financial System,* NETWORK FOR GREENING THE FINANCIAL SYSTEM- FIRST COMPREHENSIVE REPORT, (Apr. 2019) https://www.ngfs.net/sites/default/files/medias/documents/ngfs_first_comprehensive_report_-_17042019_0.pdf.

[14] *Amount of finance committed to achieving 1.5C now at scale needed to deliver the transition,* GLASGOW FINANCIAL ALLIANCE FOR NET ZERO, (Nov. 3, 2021) https://www.gfanzero.com/press/amount-of-finance-committed-to-achieving-1-5c-now-at-scale-needed-to-deliver-the-transition/.

[15] *Our response to climate change*, BANK OF ENGLAND (Jul. 6, 2023) https://www.bankofengland.co.uk/climate-change

[16] Reserve Bank of India, *Governance, Part II: The Working and Operations of the Reserve Bank of India, Chapter X: Human Resources and Organisational Management, Box X.3, Green Finance: An Analysis,* Page 117, RESERVE BANK OF INDIA ANNUAL REPORT 2015-16.

[17] Reserve Bank of India, *Chapter II: Global Banking Developments, Box II.1: Opportunities and challenges of Green Finance Report on Trend and Progress of Banking in India 2018-19*, Page 17.

[18] Reserve Bank of India, , *Discussion Paper on Climate Risk and Sustainable Finance*, July 27, 2022.

[19] Reserve Bank of India, *Discussion Paper on Introduction of Expected Credit Loss Framework for Provisioning by Banks*, RBI DEPARTMENT OF REGULATION (Jan. 16, 2023) https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/CLIMATERISK46CEE62999A4424BB731066765009961.PDF.

[20] Physical risks are physical risks to assets due to extreme climate events. Transition risks are risks of obsolescence to existing industries due to changes in regulation, policy, or technology due to climate change.

[21] IFRS 9 Financial Instruments requires entities to use reasonable and supportable information in measuring expected credit loss. Climate-induced adverse future scenarios may potentially have an impact on the probability of default as well as loss given default.

accounting framework banks, barring exceptional cases, recognize provisions for losses on an event of default whereas ECL will require banks to consider the past, present and the probable future events. Thus, physical risks that may arise due to climate change in the future, such as a coastal factory being inundated due to a rise in seawater or destruction of infrastructure due to hurricanes etc., may influence ECL. Similarly, transition risks too will have an effect; the long-term viability of thermal plants due to rise in renewables, effect on the combustion engine industry due to electric vehicles etc. The probability of default for such events will have to be considered as well as the total loss that a lender may suffer. Furthermore, as mentioned above, putting a price to carbon may result in re-casted company financials that may have a bearing on credit risk.

Vis-à-vis bonds, US$66 trillion[22] in assets, or more than half of the asset management sector globally[23] in terms of total funds managed, are committed to a net zero emissions target. A total of 291 investors are part of this initiative. A significant constituent of the asset management sector involves investing in bonds. Another set of bond holders, namely, the asset owners too, have committed to transitioning their investment portfolios to net-zero GHG emissions by 2050[24]. Additionally, green bonds are slowly creeping in vogue; European Commission has proposed a European Green Bond Standard,[25] the Securities and Exchange Board of India (SEBI) has issued guidelines on disclosure of green bond issuance in 2017 and has made Business Responsibility and Sustainability Reporting mandatory from 2022-23 for India's top 1000 listed firms. Indian companies have been issuing green bonds since 2015. The framework for Indian sovereign green bonds[26] (SGrB) was released in November 2022, wherein the Government of India will use the proceeds raised from SGrBs to finance and/or refinance expenditure (in parts or whole) for eligible green projects in nine categories.

[22] THE NET ZERO ASSET MANAGERS, https://www.netzeroassetmanagers.org/ (last visited Nov. 8, 2022).
[23] STATISTA, https://www.statista.com/statistics/323928/global-assets-under-management/ (last visited Nov. 9, 2022).
[24] UN ENVIRONMENT PROGRAM, https://www.unepfi.org/net-zero-alliance/ (last visited Nov. 9, 2022).
[25] EUR-Lex, *Proposal for a Regulation of the European Parliament and of the Council on European green bonds*, STRASBOURG, (Jul. 6, 2021) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0391.
[26] *Framework for Sovereign Green Bonds Government of India*, https://dea.gov.in/sites/default/files/Framework%20for%20Sovereign%20Green%20Bonds.pdf (last visited Nov. 10, 2022).

Admittedly, in the initial years, "greenwashing"[27] will be rampant, but eventually, debt markets will move towards financing greener projects. As a corollary, there may be a liquidity crunch for projects that do not meet the green criterion. This is because secured creditors are assured the first piece of the pie in case a debtor files for insolvency, safeguarding their interests. However, granting a "secured-equivalent" status to environment claims reverses this equation; perversely, it forces secured creditors to engage with the debtor and adopt means that will make the business sustainable based on the current climate criterion, an aspect elaborated later in the paper.

The question is whether insolvency laws across the globe have the flexibility to grant a secured status to environmental claims. We seek an answer to the same by studying the evolution of insolvency law.

II. INSOLVENCY LAWS HAVE KEPT PACE WITH THE TIMES

"All bankruptcy law, however, no matter when or where devised and enacted, has at least two general objects in view. It aims, first, to secure an equitable division of the insolvent debtor's property among all his creditors, and, in second place, to prevent on the part of the insolvent debtor conduct detrimental to the interest of the creditors. In other words, bankruptcy law seeks to protect the creditors, first, from, one another and secondly from their debtor."[28]

[27] Adam Hayes, *What Is Greenwashing? How It Works, Examples, and Statistics*, INVESTOPEDIA (Mar . 31, 2023), https://www.investopedia.com/terms/g/greenwashing.asp.
Greenwashing is the process of conveying a false impression or providing misleading information about how a company's products are more environmentally sound. Greenwashing is considered an unsubstantiated claim to deceive consumers into believing that a company's products are environmentally friendly.

[28] LOUIS EDWARD LEVINTHAL, THE EARLY HISTORY OF BANKRUPTCY LAW 3 (Kessinger Publishing 1918).

However, it was different for much of bankruptcy history. Preferences were allowed in English bankruptcies till mid-1500s[29]. It was in 1589, in The Case of Bankrupts,[30] that the principle of

[29] Louis Edward Levinthal, *The Early History of English Bankruptcy*, 67 UNI. OF PENSYL. LAW SCH. 1, (Jan. 1919) https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=7675&context=penn_law_review .
"Many of the Lombards, who nearly monopolized the trade of Britain in 1300's were found to have left- the kingdom, leaving their creditors without a possibility of redress. By a Statute in 1351 it was ordained that if any merchant of the company of Lombard-merchants acknowledged himself bound in a debt, the company should answer for it. This apparently was due to the fact that the Lombard merchants made a practice of escaping from the country without satisfying their creditors. The regulation is based upon a principle quite familiar to our law-the principle that where many are interested to prevent an offense, that offense will probably be less frequently committed.
Evasions by debtors who for one reason or another had gained the favor of the King constituted a peril that had to be fought by Parliament constantly. Royal aid was given to the evading debtors by means of a letter of safe conduct issued by virtue of the Royal prerogative. This corrupt practice was frequently restrained by action of Parliament, but since the fifteenth century the kings do not appear to have abused their authority in this way.
Asylums constituted the most dangerous means of evasion by debtor. Officials who followed the debtor into the asylums were excommunicated by the Church and otherwise punished. As the number of asylums increased through the influence of the Abbots, the abuse became more and more intolerable.
In the reign of Richard II, the King decreed that Westminster Abbey should be an asylum for only such debtors as were impoverished through adversity and not for those who became insolvent through their own fault and who simply sought to protect themselves from imprisonment. Fraudulent debtors, on the other hand, could be compelled to appear before Court even if they had fled to asylums.
The Statute of 2 Richard II, St. 2, c. 3 (1379), which provided that "in case of debt where the debtors make feigned gifts and feoffments of their goods and lands to their friends and others, and often withdraw themselves and flee into places of Holy Church privileged, and there hold them a long time, and take the profit of their said lands and goods so given by fraud and collusion, whereby their creditors have been long and yet be delayed of their-debts and recovery, wrongfully and against good faith and reason: It is ordained "and established, that after that the said creditors have thereof brought -their writs of debt, and thereupon a capias awarded, and the Sheriff shall make his return that he hath not taken the said persons, because of such place.
By the Statute of 3 Henry VII, c. 4 (1487), all gifts were made void, where a debtor made a fraudulent transfer to friends and lived in an asylum on the rents and income. There -had been no remedy for this abuse prior to the reign of Henry VII. The Statute of 1487 gave a fairly adequate remedy where the fraudulent transfer was intended for the benefit of the debtor himself.
These statutes, it is to be noted, avoided fraudulent alienations of property for the use of the debtor himself, but not such alienations for the benefit of others, particularly favored creditors
The fundamental principle of the Act of 34 and 35 Henry VIII was an effort to remedy this situation. It aimed to establish a summary proceeding, by which the property of the fraudulent debtor should be at once seized and secured for the benefit of all the creditors, and by which all unfair alienations, even to favored creditors, should be avoided. In the case of fraudulent debtors, there should be a compulsory administration and distribution, on the basis of a statutable equity or equality among all the creditors. This, of course, involved a compulsory and summary collection of the assets. Hence the two great features of all bankruptcy law, as we know it today, have their origin in the Act of 1542: a summary collection or realization of the assets, and then an administration or distribution for the benefit of all creditors. A number of penal provisions are also' included in the statute to prevent fraud on the part of the debtor's friends or false claimants."

[30] Steve Sheppard, *The selected writings and speeches of Sir Edward Coke-,* 1 LIBT. FUND 45, (2003) http://files.libertyfund.org/files/911/0462-01_LFeBk.pdf .
"John Cook, a merchant, went bankrupt, owing Robert Tibnam £64 and another group of creditors £273, 12d. The second group of creditors got a commission in bankruptcy against Cook. Cook gave part of his goods to Tibnam in partial payment of his debt, and Tibnam sold them. But the bankruptcy commissioners sold the same goods to the group of creditors in partial satisfaction of their debts. In an important case construing the then-two-decade-old bankruptcy statute, Chief Justice Wray of the King's Bench held that the sale by the commissioners was good, that the purpose of the statute was to protect all of the creditors of a bankrupt, and that a bankrupt debtor cannot give preferential settlements to one creditor, but both debtor and creditors must accept an equal settlement for all of the creditors".

voiding preferences was upheld conclusively. On the other side of Atlantic, preferential transactions became voidable only in 1898.[31]

In the Indian context, IBC has been constantly evolving to address the concerns of various stakeholders. Section 29A, a unique concept, which specifies persons who are ineligible to be resolution applicants, was introduced in early 2018,[32] a year after the enactment of IBC. The statement of objects and reasons, which was attached to the bill when it was presented, stated that "Concerns have been raised that persons who, with their misconduct, contributed to defaults of companies or are otherwise undesirable, may misuse this situation due to lack of prohibition or restrictions to participate in the resolution or liquidation process, and gain or regain control of the corporate debtor. This may undermine the processes laid down in the Code as the unscrupulous person would be seen to be rewarded at the expense of creditors."

"In our case, there ought to be an equal distribution *secundum quantitatem debitorum suorum*; (according to amount of debts) but if, after the debtor becomes a bankrupt, he may prefer one (who peradventure hath least need), and defeat and defraud many other poor men of their true debts, it would be unequal and unconscionable, and a great defect in the law, if, after that he hath utterly discredited himself by becoming a bankrupt, the law should credit him to make distribution of his goods to whom he pleased, being a bankrupt man, and of no credit; but the law, as hath been said before, hath appointed certain commissioners, of indifferency and credit, to make the distribution of his goods to every one of his creditors, rate and rate alike, a portion, according to the quantity of their debts, as the statute *speaketh*. Also, the case is stronger, because this gift is an assignment of the bankrupt after the commission awarded under the Great Seal, which commission is matter of record, whereof every one may take *conusance*".

[31] David A. Skeel Jr., *The Empty Idea of "Equality of Creditors"*, FACULTY SCHOLARSHIP AT PENN LAW, (2018) https://scholarship.law.upenn.edu/faculty_scholarship/1724.

"Bankruptcy advocates, many of whom lived in the commercial states of the Northeast, viewed bankruptcy as essential to the development of commerce in America, and equality of creditors as a key feature of a properly functioning bankruptcy law.

Thomas Jefferson and other bankruptcy critics in the South and West, by contrast, questioned the need for a federal bankruptcy law; many critics insisted that it was perfectly appropriate for debtors to pay some of their general creditors rather than others. Critics refused to concede that preferential payments are inherently problematic.

Congressman Bailey of Texas, who had proposed an alternative to the bill that became the 1898 Act, criticized the assumption that "all debts shall stand upon exactly the same footing." "As for my part," he countered, "I do not believe that it is true in morals, and I do not believe that it ought be made true in law, that all debts are of equal obligation." Congressman Bailey then gave two illustrations: "If I owed $5000 to a man who possessed nothing else and I owed $25,000 to a man who was many times a millionaire," he said, but he could not pay both, he would not hesitate to pay the $5000 debt but not the $25,000. As finally enacted, the 1898 Act included a preference provision that took roughly the same form as the provisions in the 1841 and 1867 Acts. The trustee could retrieve any payments or other transfers made within four months of the bankruptcy, so long as the debtor was insolvent at the time of the transfer and the creditor "had reasonable cause to believe that [the transfer] was intended thereby to give a preference." The provision was important both because it was a victory for advocates of creditor equality, and because the 1898 Act would prove to be the nation's first permanent bankruptcy law, escaping the early demise of its three predecessors. Within a few years, defenders of intentionally preferential payments would wane, and the equality norm would be embraced by nearly everyone".

[32] The Insolvency and Bankruptcy Code (Amendment) Act, 2017, § 29A, No. 8, Acts of Parliament, 2018 (India).

Another example from IBC will reinforce the argument. Homebuyers were given the status of financial creditors in mid-2018.[33] The validity of such inclusion was challenged in the Supreme Court. Nevertheless, Supreme Court upheld the amendment.[34]

Thus, insolvency and bankruptcy laws have been malleable and have changed according to the circumstances of the day, which buttresses the argument that environmental claims can be granted a secured status in today's world. A secured status will be akin to the evolution of law to the next level of fairness. Nevertheless, before we embark on our journey of environmental claims in conjunction with jurisdictions, let's peruse the literature on the subject.

III.

INSOLVENCY LITERATURE ON GRANTING OF SECURED STATUS TO ENVIRONMENTAL CLAIMS

For the sake of brevity but at the same time completeness, two documents were consulted[35], i.e., UNCITRAL Legislative Guide on Secured Transactions[36] (ULGST) and UNCITRAL Legislative Guide on Insolvency Law[37] (ULGIL).

The primary objective of ULGST is to promote credit at a reasonable cost. According to ULGST, an efficient secured transactions regime seeks to establish streamlined procedures for obtaining security rights.[38] In order for a secured transactions regime to function efficiently, it is important that all parties be able to determine with a reasonable degree of certainty the extent of the rights of a grantor and third parties in assets to be encumbered. A prospective creditor must not only be able to ascertain the rights of the grantor and third parties in the assets to be encumbered but also be able to determine with certainty, at the time it agrees to extend credit, the priority that its security right in encumbered assets would enjoy relative to the rights of other creditors including an insolvency representative in the grantor's insolvency.[39] One may argue that it is difficult to

[33] The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018, No. 6, 2018, Gazette Notification dated June 6, 2018 (India).
[34] Pioneer Urban Land and Infrastructure Limited & Anr v. Union of India & Ors, Writ Petition (Civil) No. 43 of 2019.
[35] Applies to movable assets.
[36] United Nations, *UNCITRAL Legislative Guide on Secured Transactions* (2007) https://uncitral.un.org/en/texts/securityinterests/legislativeguides/secured_transactions.
[37] United Nations Commission on International Trade Law, UNCITRAL Legislative Guide on Insolvency Law.
[38] United Nations, *UNCITRAL Legislative Guide on Secured Transactions*, UN COMM. ON INT. TRD. LAW 20, (2010) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/09-82670_ebook-guide_09-04-10english.pdf.
[39] *Id.* at 21.

determine environment claims with certainty; such claims are inherently contingent, as clean-up costs may not have been incurred, the extent of damage cannot be ascertained, or the remedy to cure is not apparent. The timing can create further uncertainty; claims can arise either when the environment is polluted, pollution is discovered, or when pollution is cleaned. However, most jurisdictions, including India, are in the process of mandating Environment, Social & Governance ("ESG") reporting. Thus, request for mandatory ESG data, at the time of disbursal of loan, as well as incorporating such data in the periodic submissions, along with other financial data, by the borrower, will obviate uncertainty and facilitate lenders to factor the risk in their decisions.

Achieving an effective and efficient secured transactions regime requires States to consider carefully policies and principles that have traditionally underpinned this branch of law as well as the relationship between secured transactions law and the general law of obligations, property law, civil procedure law, and insolvency law. Many of the key objectives of a modern secured transactions regime can only be achieved if these traditional policies are revisited.[40]

Thus, granting security right to environmental claims per-se are not frowned upon as long as enough clarity exists beforehand. Further, ULGST states that a modern secured transactions regime should incorporate a set of detailed and precise rules, i.e., (a) rest on clearly expressed and well-understood general principles; (b) are comprehensive in scope; (c) cover a broad range of existing and future secured obligations; (d) apply to all types of encumbered asset, including future assets and proceeds; (e) provide ways for resolving priority conflicts among a wide variety of competing claimants.[41] Furthermore, the enactment must be accompanied by a relatively thorough legislative commentary that explains the origins and purposes of the law[42].

ULGST elaborates that in several jurisdictions claims for taxes and contributions to social welfare programmes and employee wages are given a priority solely based on the nature of the claim.[43] Also, in many States as a means of achieving general social goals, certain unsecured claims are re-characterized as preferential claims and given priority within or even outside insolvency proceedings over other unsecured claims.[44]

[40] *Id.* at 26.
[41] *Id.* at 191.
[42] *Id.* at 29.
[43] *Id.* at 194.
[44] *Id.* at 208-209.

Thus, basis the ULGST, environmental claims can potentially be clubbed under the umbrella of "general social goals", as elucidated above, may be granted a secured status and revisiting of existing laws is encouraged. Furthermore, if few exceptions have already been carved out; there is no reason why these cannot be expanded to encompass environmental claims.

Additionally, though in a slightly different context of assets, ULGST does state that it does not cover assets covered by national or international agreements[45]; it is highly likely that in future, we will have a defined international consensus vis-à-vis the environment.

According to ULGIL most insolvency laws grant a stay/moratorium on any proceedings/enforcements on the filing of bankruptcy. The act of stay itself modifies the security rights though only for a brief period. Furthermore, granting administrative expenses the priority too upends the established matrix.

ULGIL states that despite stay laws, action may continue to protect vital and urgent public interests and restrain activities causing environmental damage, with a caveat that to ensure transparency and predictability, it is highly desirable that an insolvency law clearly identifies the actions that are to be included within and specifically excepted from the scope of the stay.[46] Additionally, ULGIL allows to relinquish the estate's interest provided relinquishment does not violate public interest, for example, where the asset is environmentally dangerous or hazardous to public health and safety.[47]

Moreover, according to ULGIL, some insolvency laws do not afford secured creditors a first priority. Payment of secured creditors may be ranked, for example, after costs of administration and other claims, such as unpaid wage claims, tax claims, environmental claims, and personal injury claims, which are afforded the protection of priority under the insolvency law.[48]

Finally, some of the factors that may be relevant in determining whether compelling reasons exist to grant privileged status to any particular type of debt may include the need to give effect to international treaty obligations;[49] the likelihood of such a treaty in the future is high.

[45] *Id.* at 39.
[46] United Nations, *UNCITRAL Legislative Guide on Insolvency Law,* UN COMM. ON INT. TRD. LAW 86, (2010) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/09-82670_ebook-guide_09-04-10english.pdf.
[47] *Id.* at 109.
[48] *Id.* at 269.
[49] *Id.* at 271.

Thus, ULGIL, in its current form, raises the issues of environmental claims at a number of places in the text, though relevant importance has not been granted, as yet, to such claims by the legislature.

Summarising the aforesaid discussion, there is a climate emergency, ecosystem in which insolvency law operates is taking steps to tackle the climate emergency, historically insolvency law has evolved with the needs of the time, and insolvency literature allows for granting of higher rights to environmental claims in comparison to other unsecured claims. Given these facts, let's focus our attention on how various jurisdictions are treating environmental claims.

IV. CANADA – TOWARDS ENVIRONMENTAL NIRVANA

Canada has seen enlightened jurisprudence evolve vis-à-vis environmental claims. The question "whether the regulator's use of powers under provincial legislation to enforce a bankrupt company's compliance with end-of-life obligations ("environmental obligations") conflicts with trustee's powers under federal bankruptcy legislation, or with the order of priorities under such legislation" was answered in 2019, in the landmark Supreme Court case of *Orphan Well Association v. Grant Thornton Ltd*[50] (Redwater). A 5:2 majority proclaimed that a trustee cannot renounce assets that are subject to remediation by the environmental regulator, in the process of granting priority rights to environmental claims. The majority held that not all environmental obligations enforced by the regulator would be provable claims in bankruptcy; abandonment costs were not provable claims or debts requiring payments – they were duties.[51]

[50] Orphan Well Association v. Grant Thornton Limited, 2019 SCC 5.

[51] In brief, the facts of case: Redwater, a publicly traded oil and gas company, was first granted licences by the Regulator in 2009. Its principal assets are 127 oil and gas assets: wells, pipelines and facilities and their corresponding licences. A few of its licensed wells are still producing and profitable, but the majority are spent and burdened with abandonment and reclamation liabilities that exceed their value. In 2013, ATB Financial, which had full knowledge of the end-of-life obligations associated with Redwater's assets, advanced funds to Redwater and, in return, was granted a security interest in Redwater's present and after-acquired property. In mid-2014, Redwater began to experience financial difficulties. Grant Thornton Limited ("GTL") was appointed as its receiver in 2015. At that time, Redwater owed ATB approximately $5.1 million and of the 127 gas and oil assets, 72 were inactive or spent i.e., only 55 working assets.

On Redwater's receivership, the Regulator notified GTL that it was legally obligated to fulfil abandonment obligations for all licensed assets prior to distributing any funds or finalizing any proposal to creditors. The Regulator warned that it would not approve the transfer of any licenses.

GTL surmised that it could not meet the Regulator's requirements because the cost of the end-of-life obligations for the spent wells would exceed the sale proceeds for the productive wells. Therefore, GTL informed the Regulator that it was taking possession and control only of productive wells and renouncing others. GTL's position was that it had no obligation to fulfil any regulatory requirements associated with the renounced assets.

V. UNITED STATES – A HALF-BAKED RENAISSANCE

An environmental claim, akin to most other unsecured claims, is treated as a general unsecured claim unless it is entitled to priority treatment as an administrative expense. However, a narrow exception was created in *Midlantic National Bank v. New Jersey Department of Environmental Protection*,[52] wherein the Supreme Court considered a trustee's power to abandon property containing toxic waste.[53] The Court held that a trustee may not abandon property in contravention of a state statute or regulation that is designed to protect the public health or safety from identified hazards.

The Regulator filed an application for declaration of renounced assets as void and required GTL to comply with orders to fulfil the end-of-life obligations. GTL brought a cross-application seeking approval to pursue a sales process excluding the renounced assets and an order directing that the Regulator could not prevent the transfer of the licenses associated with the retained assets. Meanwhile, a bankruptcy order was issued for Redwater, and GTL was appointed as trustee. GTL invoked Bankruptcy and Insolvency Act (BIA) in relation to renounced assets.

The Chambers Judge and Court of Appeal agreed with GTL and held that the Regulator's proposed use of its statutory powers to enforce Redwater's compliance with abandonment and reclamation obligations during bankruptcy conflicted with the BIA: (1) it imposed on GTL the obligations of a licensee in relation to the Redwater assets disclaimed by GTL, contrary to BIA; and (2) it upended the priority scheme for the distribution of a bankrupt's assets established by the BIA by requiring that an unsecured creditor be paid ahead of the claims secured creditors.

Majority in Supreme Court opined, "Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy. They must, for example, comply with non-monetary obligations that are binding on the bankrupt estate, that cannot be reduced to provable claims, and the effects of which do not conflict with the BIA notwithstanding the consequences this may have for the bankrupt's secured creditors".

Therefore, the trustee couldn't walk away from the disowned sites. The BIA was meant to protect trustees from having to pay for a bankrupt estate's environmental claims with their own money. It didn't mean estate could avoid its environmental obligations. Also, the abandonment costs were not provable claims or debts requiring payments—they were **duties** (to the public and nearby landowners). Therefore, these costs were outside the BIA's payment order scheme.

[52] Midlantic Nat. Bank v. New Jersey Department of Environmental Protection , 474 U.S. 494 (1986).

4th Draft, Supreme Court of the United States, Midlantic National Bank, Petitioner versus New Jersey Department of Environmental Protection, Thomas J. O'Neill, trustee in bankruptcy of Quanta Resources Corporation, Debtor, Petitioner vs. City of New York et al., on writs of certiorari to the United States Court of Appeals for the Third Circuit

[53] In brief the facts of the case: Quanta Resources Corp. (Quanta) processed waste oil at facilities located in New York and New Jersey. The New Jersey Department of Environmental Protection (NJDEP) discovered that Quanta had violated a provision by accepting oil contaminated with a toxic carcinogen. Amidst negotiations for the cleanup, Quanta filed a petition under Chapter 11 and after NJDEP had issued an order, converted the action to a liquidation under Chapter 7. An investigation of the New York facility too revealed similarly contaminated oil at that site. The trustee notified the creditors and the Bankruptcy Court that he intended to abandon the property, which authorizes a trustee to "abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate." The city and the State of New York objected, contending that abandonment would threaten the public's health and safety, and would violate state and federal environmental law.

The Bankruptcy Court approved the abandonment, and, after the District Court affirmed, an appeal was taken to the Court of Appeals. Meanwhile, the Bankruptcy Court also approved the trustee's proposed abandonment of the New Jersey facility, and NJDEP took a direct appeal to the Court of Appeals.

A divided Court of Appeals for the Third Circuit reversed the bankruptcy court's decisions. The Supreme Court in a 5-4 verdict, affirmed the court of appeals' decisions and refused to allow the trustee to abandon the contaminated properties. Although a trustee can abandon property which is burdensome or of inconsequential value, the Supreme Court created a narrow exception and refused to allow abandonment.

The Supreme Court concluded, "without reaching the question whether certain state laws imposing conditions on abandonment may be so onerous as to interfere with the bankruptcy adjudication itself, the Court holds that a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the

The judgment did not categorically comment on granting priority to clean-up expenses i.e., the question of law before the court was not to determine whether priority should be granted to clean-up expenses in the insolvency waterfall. ("New York is claiming expenditure as an administrative expense; that question is not before us"). Furthermore, it does not directly discuss environmental claims in bankruptcy (the focus of the question before the court was "on imminent and identifiable harm").

Additionally, there may have been external factors too that may have had an impact on the divided judgment; new bankruptcy law had been adopted in 1978, environmental disasters on the three-mile island happened in 1979, and Russel Mahler, who operated Quanta, was at the center of several notorious high-profile dumping scandals.[54]

Finally, the process that the Justices used to arrive at the judgement[55] resulted in varied interpretations of the judgement.[56] Some courts interpreted it narrowly whereas others took a broad interpretation.[57] Those ascribing to narrow view said that a trustee may abandon contaminated property if the trustee takes adequate precautions to ensure that there is no imminent danger to the public and the abandonment will not aggravate the existing situation. On the other hand, those taking a broad view said that a trustee is barred from abandoning any property if the act of abandonment would violate a state or federal law designed to protect the public health and safety. The condition for abandonment is full compliance with laws. As a trustee cannot abandon property without satisfying certain conditions, in the same vein, he can neither maintain nor possess that property without satisfying those same conditions. Thus, the cost incurred in satisfying those conditions is entitled to priority as an administrative expense.

Irrespective of the broad or the narrow interpretation, it seems that the case only addressed one sliver of the environmental issues i.e., abandonment.

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public health or safety from identified hazards. Accordingly, we affirm the judgements of Court of Appeals for the Third Circuit"

The Court further stated: "This exception to the abandonment power vested in the trustee is a narrow one. It does not encompass a speculative or indeterminate future violation of such laws that may stem from abandonment. The abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm."

[54] Ronald Mann, *Balancing Bankruptcy and Environment Law: Midlanic National Bank vs. New Jersey Department of Environmental Protection*, J. OF SC HIST. 102-103, http://www.columbia.edu/~mr2651/Mann-2017-Journal_of_Supreme_Court_History.pdf.

[55] *Id.*

[56] Deborah E Parker, *Environmental Claims in Bankruptcy: It's a question of priorities*, 32:221 SDLR 221-284, (1995), https://digital.sandiego.edu/cgi/viewcontent.cgi?article=2639&context=sdlr.

[57] *Id.*

In context of abandonment another relevant case to consider would be *United States vs. Apex Oil Company Inc.*[58]; a reorganized debtor's liability to pay for environmental clean-up. The question before the court was whether government's claim to injunction was discharged in bankruptcy or it can be renewed in subsequent lawsuit[59]?

The court concluded that Resource Conservation Recovery Act (RCRA) requires the defendant to clean up the contaminated site and does not allow to sue for money. Thus, the clean-up order was not a claim as it does not give rise to right to payment even though Apex had to spend money for the clean-up. Thus, the claim was not dischargeable in bankruptcy.

Though, abandonment claims for contaminated lands, especially brought under RCRA, will grant primacy to environmental obligations, this isn't yet true for other environmental violations. One example should suffice to buttress the point.

In *La Paloma Generating Company LLC*[60] (La Paloma) the question before the court was whether debtor can transfer an asset with a free and clear title, under section 363 of the Bankruptcy Code, without the purchaser assuming, any obligation under the California Cap-and-Trade Program for emissions generated by the debtor during the period before the transfer of the assets.[61] The court

[58] Oil Company, Inc. v. United States, 208 F. Supp. 2d 642 (E.D. La. 2002).

[59] In brief facts of the case: Apex Oil's Corporate predecessor operated Hartford refinery from 1967 to 1988. The leaks and spills from refinery had contaminated the ground water and the fumes created odour problems for the residents. In 1987 Apex's predecessor entered Chapter 11 and in 1990 the bankruptcy court entered confirmation discharging corporate debtor from liens and suits. Apex had discontinued refining facility and did not have contamination cleaning capability. In 2005 The Administrator of the EPA filed a suit for injunctive relief claiming that this was not discharged by the 1990 order. The district court agreed; "section 6973(a) does not allow the government to seek pecuniary relief here, the injunction the government seeks could not have been discharged in earlier bankruptcy proceedings."
The court of appeals affirmed. The court held that the government's entitlement to a RCRA injunction is not a "claim" within the meaning of the Bankruptcy Code; the Code defines the term "claim" to include a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment. The court concluded that the RCRA provision "entitles the government only to require the defendant to clean up the contaminated site at defendant's expense," but "does not authorize any form of monetary relief." The court rejected petitioner's contention that, because compliance with any clean-up order would require the expenditure of money, such an injunction would entail a "right to payment". Supreme Court denied a writ of certiorari.

[60] In re La Paloma Generating Company et. al Debtors, 588 B.R. 695 (Bankr. D. Del. 2018) (Jointly Administered). California Air Resources Board v. La Paloma Generating Company, No 1:17-CV-1698.

[61] Brief facts of the case: La Paloma owned a natural gas fired facility in California which had GHG emissions. Under the California Air Resources Boards' (CARB), cap-and-trade programme, La Paloma was supposed to submit GHG equivalent compliance instruments to CARB. The cost of compliance instruments to fulfil GHG obligations in open market would be US$ 63 million. LNV Corporation ("LNV"), La Paloma's secured creditor who was owed US$300M agreed to purchase all its assets by a credit bid for US$150M. La Paloma submitted a plan to bankruptcy court for transferring all La Paloma's assets free and clear of all claims and interests to LNV.
The court held that under section 363(f), "the trustee may sell property ... free and clear of any interest in such property of an entity other than the estate, only if (1) applicable non bankruptcy law permits sale of such property free and clear of such interest". In the instant case neither did the court find that the Regulation provides for successor liability nor is environmental liability excepted by Section 363(f) of bankruptcy code.

held that the purchaser did not assume successor liability for the debtor's obligations under cap-and-trade programme which arose prior to acquisition of debtor's assets.

Thus, in United States only a few types of environmental claims are granted a special status when such claims are being dealt in bankruptcy.

VI. UNITED KINGDOM – THE SCOTTISH ENLIGHTENMENT

The *Celtic Extraction* judgement held primacy for about two decades in which the court said that it is unacceptable that the costs of compliance with a waste management licence imposed by environmental authorities would have priority over provable debts, clearly establishing primacy of the insolvency law over the environmental laws.

However, a shift was seen in the Scottish Courts, in *Doonin Plant Limited* (2018).[62] The company carried waste management business and went into liquidation. The company had not fulfilled its remediation obligations for which a notice had been issued, both pre and post, liquidation filing. The cost of remediation exceeded funds with the company and thus liquidators sought directions from the court. The court held that remediation expenses are liquidation costs to be paid before any other debt.[63]

[62] Sellar QC, Addleshaw Goddard LLP v. Lake QC, Brodies LLP, [2018] CSOH 89.

[63] Brief facts of the case: The company carried waste management business and is registered in Scotland. In July 2015 the Court ordered that the company be wound up and appointed liquidators. Scottish Environment Protection Agency (SEPA) maintains that between 2010 and the liquidation date the company deposited waste at the site which it was not licensed to deposit. In December 2012 SEPA issued a notice requiring the company to remove waste which was not acted on. In December 2015, SEPA issued a further notice to remove controlled waste. Liquidators had realised all the company's assets other than the site. They estimate that the cost of remediation work exceeded the funds with the company. Therefore, the Liquidators sought directions from the court as the need for removal and remediation is attributable to the activities of the company prior to the liquidation date. The questions were:

1. Whether remediation costs be expenses of liquidation or contingent debt i.e., unsecured debt? Whether Liquidators are obliged to apply companies' funds to the extent available for remediation?
2. Whether liquidators' remediation will be paid in priority to remediation costs?

The court opined that remediation costs are indeed liquidation expense and thus must be paid before secured creditors. "Viewing the nature of the liability imposed by a section 59(1) notice through the prism of the directive which Part II of the EPA was intended to implement, I conclude that it must reasonably have been intended by the legislature that expenditure by a liquidator complying with a section 59(1) notice should be a liquidation expense".
The court can order for liquidator's remuneration be paid in priority to section 59(1) expenditure if that is necessary.

In another Scottish case *Dawson International Plc* (2018),[64] the court held that the environment regulators' ability to serve a notice created a contingent liability. Furthermore, the remediation work for past liabilities that had been going on prior to filing of liquidation cannot be stopped even though it may result in reduced distribution to creditors.

Finally, in *Paperback Collection and Recycling Limited*[65], which was placed under creditors voluntary liquidation in June 2018, the court did not stay criminal proceedings on the company stating that it did not have the jurisdiction to do so. However, the court added that even if it had the powers serious environmental offenses need not be stayed even at the cost of creditors.

VII. AUSTRALIA – SUPREME COURT OF VICTORIA TAKE UP THE CUDGELS

A discussion on the status of environmental claims has started in the courts but is yet to reach its fruition. In *Linc Energy*[66] liquidators had disclaimed land whereas the Queensland environmental authority wanted them to comply with environmental obligations. The liquidators sought directions of the court requesting permission not to comply with environment directives as well

[64] Howie QC, Shepherd & Wedderburn LLP v. Thomson QC, Roxburgh, Dodd; Lay Representative, Delibegovic-Broome QC; Burness Paull LLP, [2018] CSOH 52.

[65] Cooper v. Natural Resource Body for Wales, [2019] EWHC 2904 (Ch).

[66] Brief facts of the case: Linc Energy operated a pilot underground coal gasification project at Chinchilla in Queensland. The company owned land, a Mineral Development Licence granted under Mineral Resources Act 1989, Petroleum Facility Licence granted under Petroleum and Gas (Production and Safety) Act 2004, and Environmental Authority ("EA") issued under Environmental Protection Act 1994 ("EPA"). In Queensland, one needs to apply for an environmental authority (EA) to undertake an environmentally relevant activity (ERA). ERAs are industrial, resource or intensive agricultural activities with the potential to release contaminants into the environment.
In May 2016, the Department of Environment & Heritage Protection, issued an Environmental Protection Order ("EPO") pursuant to EPA to Linc Energy. The EPO was made whilst the company was under administration. Subsequently Linc Energy went into liquidation. The EPO required liquidators to comply with their general environment duty which included sampling gas and water, maintain infrastructure to comply with EPO and site rehabilitation.
In June 2016, the liquidators issued a notice disclaiming the land, licenses, and site infrastructure. The liquidators sought directions from the court. The court had to decide on following three questions a) whether the liquidators were justified in not complying with EPO? b) whether liquidators were justified in complying with any future EPO's and c) whether liquidators were executive directors of the company and thus would be personally liable?
The court concluded that the liquidators are not justified in causing the company not to comply with the EPO but did not decide whether the EAs are disclaimer property. Furthermore, the court said that it would be unwarranted to limit the definition of "executive officer" to exclude a liquidator.
On an appeal the Court of Appeals turned down the trial court's judgement. The court held that obligations imposed by EPO were in respect of disclaimed property; disclaimer of the land and MDL is effectively an acceptance that the disclaimer terminated the liabilities under the EPO and an inconsistency in the law of the state should be resolved in favour of insolvency provisions under the Corporation Act.

as not be classified as executive directors. The Trial Court[67] disagreed with the liquidators. However, the Court of Appeal[68] held that disclaimer was in accordance with the Corporation Act and will override the State Act.

However, the High Court's decision to not grant special leave to Queensland State Government to appeal the decision left the issue inconclusive[69].

A recent case, *EPA vs The Australian Sawmilling Company*[70] (TASCO) went a step further. The Supreme Court of Victoria set-aside the notice of liquidators disclaiming the property. The court said that disclaimer would cause prejudice to EPA and the State that is grossly out of proportion to the prejudice that setting aside the disclaimer would have on TASCO's creditors. Additionally, though the estate *per-se* did not have any property, the indemnity provided by the parent company for TASCO to the liquidator, is a property that liquidators can fall back upon for remediation costs. Also, as a matter of public policy it is inappropriate that liabilities for which liquidators have an indemnity to be passed on to the state.

Finally, liquidators were held to be the occupiers of the site and though not personally liable, they were liable to the extent of indemnity. The costs and remuneration of the liquidators was protected.

VIII. INDIA: JURISPRUDENCE NOT TESTED; RECENT JUDGEMENTS HARBINGER OF CHANGE

Environment claims have been treated like any other unsecured claim under IBC. However, interpretation of two recent judgements may create a situation wherein environmental claims may reside on the same plane as that of secured creditors.

[67] Linc Energy Ltd (in Liq): Longley & Ors v Chief Executive Dept of Environment & Heritage Protection [2017] QSC 53.
[68] Longley & Ors v Chief Executive, Department of Environment and Heritage Protection & Anor; Longley & Ors v Chief Executive, Department of Environment and Heritage Protection [2018] QCA 32
[69] Douglas Ross (Partner), David Proudman (Consultant), *Linc Energy – High Court refuses special leave to Qld State Government,* JOHNSON WINTER SLATTERY, (Sep 2018), https://jws.com.au/insights/articles/2018-articles/linc-energy-%E2%80%93-high-court-refuses-special-leave-to.
[70] EPA & Anor v. Australian Sawmilling Company Pty Ltd (in liq) & Ors [2020] VSC 550.

The Hon'ble Supreme Court, in *State Tax Officer vs. Rainbow Papers Limited*[71] (RPL) held that IBC defines secured creditor to mean a creditor in favour of whom security interest is credited. Such security interest could be created by operation of law. The definition of secured creditor in the IBC does not exclude any Government or Governmental Authority which in this case was the state government under the Gujarat Value Added Tax.

A number of environmental claims arise under the Environment (Protection) Act 1986, the Air (Prevention and Control of Pollution) Act 1981, and the Water (Prevention and Control of Pollution) Act, 1974; the expenses incurred by the pollution board are recoverable as arrears of land, in effect creating a charge on assets.

Thus, a probability exists that, in the future, claims under all the acts mentioned above may be treated as secured claims.

In another judgment, National Company Law Appellate Tribunal (NCLAT) in *Jet Aircraft Maintenance Engineers Welfare Association vs Ashish Chhawchharia Resolution Professional of Jet Airways*[72]

[71] State Tax Officer v. Rainbow Papers Limited; Supreme Court of India, Civil Appeal No. 1661 of 2020 and Civil Appeal No. 2568 of 2020.
The appeal was filed against the order of NCLAT that the Government cannot claim first charge over the property of the Corporate Debtor, as Section 48 of the Gujarat Value Added Tax, 2003, (GVAT), which provides for first charge on the property of a dealer in respect of any amount payable by the dealer on account of tax cannot prevail over Section 53 of the IBC. The court held that financial creditors cannot secure their own dues at the cost of statutory ones owed to a government whilst approving a resolution plan.
"If a Resolution Plan is ex facie not in conformity with law and/or the provisions of IBC and/or the Rules and Regulations framed thereunder, the Resolution would have to be rejected. If the Resolution Plan ignores the statutory demands payable to any State Government or a legal authority, altogether, the Adjudicating Authority is bound to reject the Resolution Plan. In other words, if a company is unable to pay its debts, which should include its statutory dues to the Government and/or other authorities and there is no plan which contemplates dissipation of those debts in a phased manner, uniform proportional reduction, the company would necessarily have to be liquidated and its assets sold and distributed in the manner stipulated in Section 53 of the IBC." The bench set aside the resolution plan approved by the CoC and directed that the Resolution Professional (RP) may consider a fresh plan in the light of its observations.

[72] Jet Aircraft Maintenance Engineers Welfare Association v. Ashish Chhawchharia Resolution Professional of Jet Airways (India) Ltd. & Ors, 2022 SCC OnLine NCLAT 418; Aggrieved Workmen of Jet Airways (India) Ltd. vs Jet Airways (India) Ltd. & Ors, (2022) ibclaw.in 66 NCLAT; Bhartiya Kamgar Sena & Anr. v. Ashish Chhawchharia Resolution Professional of Jet Airways (India) Ltd. &Ors, Company Appeal (AT) (Insolvency) No. 801 of 2021; Rohit Sharma & Ors. v. Monitoring Committee Through Ashish Chhawchharia & Ors, Company Appeal (AT) (Insolvency) No. 915 of 20; All India Jet Airways Officers and Staff Association v. Ashish Chhawchharia Resolution Professional & Ors, Company Appeal (AT) (Insolvency) No. 771 of 2022; Regional P.F. Commissioner v. Ashish Chhawchharia Resolution Professional for Jet Airways (India) Ltd. & Anr., Company Appeal (AT) (Insolvency) No. 987 of 2022.
The pertinent questions for this paper before the court can be broadly clubbed in two buckets.

1. Whether the workmen and employees are entitled to receive the payment of provident fund, gratuity and other retirement benefits in full since they are not part of the liquidation estate under Section 36(4)(b)(iii) of the IBC?
2. Whether the Resolution Plan approved by the Adjudicating Authority violates the provisions of Section 30(2)(b) and 30(2)(e) of the Code since it does not provide the minimum amount to the workmen/ employees, contravenes the provisions of Industrial Disputes Act, 1947 as retrenchment compensation to the workmen/employees was

("Jet"), held that the resolution professional should confirm that the resolution plan does not contravene any of the provisions of law for the time being in force. It was held that non-compliance with provisions of the Employees Provident Funds & Miscellaneous Provisions Act 1952, the Payment of Gratuity Act 1972, and the Industrial Disputes Act 1947 were in contravention of the law in force. This was subsequently upheld by the Supreme Court[73].

Consequently, a resolution plan which does not adequately compensate for the environmental liabilities described above that create a charge by operation of law may be deemed to be in contravention of the law.

IX. TRADITIONAL SECURED CREDITORS WILL BE AMENABLE TO GRANT A SECURED STATUS TO ENVIRONMENTAL CLAIMS

Financial creditors are well informed about the business of borrowers according to the judgment of Hon'ble Supreme Court in *Swiss Ribbons Pvt. Ltd & Anr. vs. Union of India*[74]. While deliberating on differences between financial creditors and operational creditors, Hon'ble court stated, "Most importantly, financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do, engage in restructuring of the loan as well as reorganization of the corporate debtor's business when there is financial stress…."

not provided and demerger of entire workforce was illegal and contrary to the provision of Section 25-FF of Industrial Disputes Act?

The court held that the workmen and employees are entitled for payment of full amount of provident fund and gratuity till the date of commencement of the insolvency which amount is to be paid by the Successful Resolution Applicant consequent to approval of the Resolution Plan in addition to the 24 months workmen dues as the workmen is entitled to under Section 53(1)(b) of the Code. Also, the workmen and employees are entitled to receive the amount of provident fund and gratuity in full since they are not part of the liquidation estate under Section 36(4)(b)(iii). Moreover, the workmen are entitled to receive their dues from the Corporate Debtor for period of 24 months as per provision of Section 53(1)(b) at least to minimum liquidation value envisaged under Section 32(2)(b) read with Section 53(1).

The court further added that non-payment of full provident fund and gratuity shall lead to violation of Section 30(2)(e), hence, to save the plan the above payments have to be made. The deficiencies in the plan need to be remedied by issuing appropriate direction to the Successful Resolution Applicant to make requisite plan so that plan may become compliant of Section 30(2)(e).

Citing the judgement of Hon'ble Supreme Court in "Maharashtra State Cooperative Bank Limited vs. Assistant Provident Fund Commissioner & Others", the court said that claim of Appellant was to be satisfied in full, otherwise breach of provision of Section 30(2)(e) would have occurred. Thus, the court issued direction to the Successful Resolution Applicant to make payment of the admitted claim of the Appellant towards provident fund dues to save the plan from invalidity.

[73] Jalan Fritsch Consortium v. Regional Provident Fund Commissioner & Anr, Civil appeal no 407 of 2023 with Civil appeal no 465-469 of 2023.

[74] Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors, Writ Petition (Civil) No. 99 of 2018,

Hon'ble Court added, "Since the financial creditors are in the business of money lending, banks and financial institutions are best equipped to assess viability and feasibility of the business of the corporate debtor. Even at the time of granting loans, these banks and financial institutions undertake a detailed market study which includes a techno-economic valuation report, evaluation of the business, financial projection, etc. Since this detailed study has already been undertaken before sanctioning a loan, and since financial creditors have trained employees to assess viability and feasibility, they are in a good position to evaluate the contents of a resolution plan."

Thus, Hon'ble Court has cast a greater responsibility on secured financial lenders. Moreover, jurisprudence in some countries is evolving on the subject and its adjacencies. It is highly likely that in the not-so-distant future, public interest litigation may hold insolvency practitioners and secured creditors responsible for environmental damage. The Australian case of TASCO described above is just one step away from holding administrators personally responsible. This may also have consequences for the professional liability insurance of insolvency professionals.

Moreover, in the United States, in the case of *United States v Fleet Factors Corporation,*[75] the court held that creditors would subject themselves to CERCLA liability when they participate in the management of a debtor to a degree indicating a "capacity to influence" the debtor's decision for hazardous waste disposal.[76]

In 1996, Congress passed the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act, which amended CERCLA's liability provisions arising out of *Fleet Factors*. Though the amendment falls short of a carte-blanche immunity to lenders, the amended provision states that participation in management requires actual participation in the management and does not

[75] Brief facts of the case: Fleet Factors Corporation (Fleet) loaned Swainsboro Print Works (SPW), a textile manufacturer, working capital from 1976 to 1981. Fleet took a security interest in SPW's accounts receivable, equipment, and the land on which SPW's manufacturing facility was located. SPW filed for bankruptcy and was adjudged bankrupt, and a trustee assumed title and control over assets. Fleet foreclosed on everything except plant.
Later, the EPA discovered hazardous waste on the property and in some of the plant buildings. The EPA disposed of the waste at a cost of $400,000. The EPA sued Fleet under CERCLA for the cost of its clean-up and argued that Fleet was liable as both the current owner and operator of the SPW plant and as the owner and operator at the time of the illegal disposal of the hazardous substances. The district court held that Fleet was not the current owner and operator of the plant. The court, however, denied Fleet's motion to dismiss the action on the second basis of Fleet's liability as the "owner and operator" at the time the hazardous substances were illegally disposed. Both Fleet and the EPA appealed.
Eleventh Circuit held that secured creditor may incur liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes.

[76] Geoffrey Kres Beach, *Secured Creditor CERCLA Liability after United States v. Fleet Secured Creditor CERCLA Liability after United States v. Fleet Factors Corp. – Vindication of CERCLA's Private Enforcement Mechanism*, 1 CULR 41(1991) https://scholarship.law.edu/cgi/viewcontent.cgi?article=1753&context=lawreview.

include merely having the capacity to influence or the unexercised right to control facility. Thus, the presence of clauses in a financing agreement giving a lender the right to take action for violations of law or discharge of hazardous waste will not expose the lender to liability.[77]

Twenty-five years have passed since the aforesaid amendment, and priorities for governments may have changed during this period. Thus, it is in the interest of secured creditors if an equivalent status is granted to environmental claims. This will help to convert the "known-unknowns" to "known-knowns."

Secured creditors can grant the borrowers a time frame of 3 to 5 years wherein the borrowers upgrade to comply with the current environmental norms. In the interim, the lenders can follow a two-pronged approach; the first, to introduce stricter periodic ESG reporting requirements, and the second, to incorporate an additional covenant in existing loan documents. This additional covenant may consider the fruition of any environmental claim as an event of default. This may enable lenders to undertake appropriate and timely action. Alternatively, a grandfathering clause can be introduced, provided the shortfalls are remedied within a period of three to five years.

Simultaneously, the secured creditors can vet the projects through the lens of "The Equator Principles",[78] a financial industry benchmark existing since 2010 to assess and manage the future environment-related risks.

Furthermore, the global trend in the post-Covid world is to move towards some form of preventative restructuring i.e., filing and solving for insolvency before a company turns insolvent. In most parts of the world, sooner or later, this will bring into existence a monitoring framework to ensure that what is promised is implemented *in-toto*. Such a development will make it easy for a third party to establish that the lenders and/or the insolvency professionals too are liable for

[77] Larry Schnapf, *Congress amends CERCLA to expand lender liability protection*, 4 Nat. Res. and Env. 11, https://www.environmental-law.net.

[78] The Equator Principles (Eps) is a risk management framework, adopted by financial institutions, for determining, assessing and managing environmental and social risk in projects and is primarily intended to provide a minimum standard for due diligence and monitoring to support responsible risk decision-making.
The Eps apply globally to all industry sectors and to five financial products: 1) Project Finance Advisory Services, 2) Project Finance, 3) Project-Related Corporate Loans, and 4) Bridge Loans and 5) Project-Related Refinance, and Project-Related Acquisition Finance.
Financial Institutions commit to implementing the Eps in their internal environmental and social policies, procedures and standards for financing projects and will not provide Project Finance or Project-Related Corporate Loans to projects where the client will not, or is unable to, comply with the Eps.
Eps are not intended to be applied retroactively. However, Eps apply to the expansion or upgrade of an existing project where changes in scale or scope may create significant environmental and social risks and impacts.

environmental claims as they were in a situation which was broader than mere "capacity to influence".

Thus, to obviate such allegations which can be foreseen today, it is in the interest of all the players in the insolvency ecosystem, including 'traditional' secured lenders to embark on a path which grants environmental claims the same status as that of secured claims.

Also, a fear may be expressed in some quarters, that if the value of security held by 'traditional' secured creditors, is diluted by the introduction of secured-equivalent creditors in the mix, this would lead to secured creditors increasing interest rates, to safeguard themselves and increase their returns when the company is solvent. However, these fears are unfounded. Once a cost-benefit analysis of the dilution of security versus the losses arising of out of physical and transition risks, described above, is undertaken, the 'traditional' secured creditors will not hesitate to concede equal rights to environmental claims.

X. MODUS-OPERANDI OF INCORPORATING ENVIRONMENTAL CLAIMS IN IBC

IBC treats the costs of maintaining a going concern as insolvency resolution process costs, under section 5(13)(c), 5(23C)(c) and in Insolvency and Bankruptcy Board of India Liquidation Process Regulations 2(1)(ea). The going concern costs should include environmental compliance costs. IBC also casts a duty on insolvency professionals to comply with all the laws in force under section 17(2)(e). The combined reading of the aforesaid will entail compliance with environmental laws not only whilst keeping a going concern but also may extend to remediation of past pollution.

Environment pollution from a location perspective can take two forms. Inside the premises that the successful resolution applicant (SRA) takes over and outside such premises i.e., generally in the wider environment. The responsibility of clean-up costs for assets taken over by the SRA vests with him. However, all other remediation costs are to be borne by the Government. Section 5(13)(d) of IBC, define insolvency resolution process costs as "any cost incurred at the expense of the Government to facilitate the insolvency resolution process".

Subjecting environmental claims to section 5(13) will upend the priority and make environmental claims senior to 'traditional' secured claims. Thus, the legislature can caveat, if the cost pertains to environmental claims of past years, they will be deemed to be on the same pedestal as 'traditional' secured creditors.

Once the status of environmental claims in the waterfall is established, the next step will be to ascertain the value of these claims, especially the ones where clean-up has not yet been carried out, the methodology for clean-up is not apparent, and the extent of damage is not discernible. It is inevitable that in such scenarios, an approximation must be arrived at with the help of valuers or engineers, or a combination of the two. Necessary, amendments should be carried out to regulations to enable appropriately qualified valuers/professionals to be inducted to value such claims. ULGIL provides for such scenarios, "The insolvency law should allow unliquidated claims to be admitted provisionally, pending determination of the amount of claim by the insolvency representative." Regulation 14[79] of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons), 2016 too, provides for the same.

[79] Where the amount claimed by creditor is not precise due to any contingency or other reason, the interim resolution professional or the resolution professional, as the case may be, shall make the best estimate of the amount of claim based on the information available with him.

It is possible that uncertainty of valuation may result in outcomes where the value of environmental claims is disproportionate to the value of claims of secured lenders, especially during the interim period / grandfathering phase, as described above. Judgments[80] emanating from the US provide us with an innovative framework to circumvent this obstacle. In the case of *Wellman Dynamics Corporation*[81] (Wellman), a settlement was reached between the buyer and the environmental agencies. The buyer acceded that it had certain obligations under RCRA, which included financial assistance and implementing corrective measures at Wellman facility. Thus, the buyer agreed to complete excavation of material from the landfill, close the Industrial Monofill Sanitary Landfill, perform post-closure monitoring at the Wellman facility, remove the radioactive material stored above-ground and decommission the burial site. Trusts were created for fulfilling the financial obligations, wherein the total monthly transfer amounts are to be calculated based on total net sales in the trailing twelve-month period times the defined percentages, annual meetings were to be held to review progress and adjust amounts if required.

A trust mechanism for payments like the Wellman, in the interim, till the time vetting projects through a mechanism like Equator Principles becomes an established practice, will be fair to both i.e., claims of 'traditional' secured creditors as well as the claims of environmental authorities. This would turn out to be the "*loss and damage*" equivalent of insolvency laws.

XI. CONCLUSION

In none of the jurisdictions discussed above, the insolvency law provides special treatment to environmental claims or liabilities. It is the judiciary, keeping in mind the public interest, that has overextended its reach to grant special status to environmental claims, even priority in some of the cases. However, extra-judicial-legislations will result in different yardsticks in different jurisdictions and will create conflicting precedents, which will be detrimental to the cause of insolvency. Governments across the world need to wake up to climate emergency, weigh the competing options between environment and secured creditors and legislate accordingly, if required, with the help of international insolvency organizations like INSOL.

[80] Thomas D Goslin, Weil Gotshal & Manges LLP, *Recent Developments at the intersection of Bankruptcy and Environmental Law,* LEXOLOGY (Aug. 8 , 2022) https://restructuring.weil.com/environmental/recent-developments-at-the-intersection-of-bankruptcy-and-environmental-law/#page=1.

[81] In re Wellman Dynamics Corporation, United States. Bankruptcy Court, Case No. 16-01825-als11.

The probable reason environmental claims have not been treated differently is that such a need never arose. ULGIL gives the example of labour contracts and cites the reasons for their priority status, i.e., protection of labour, social concerns, and restricting a debtor from terminating onerous contracts. Section 53(1)(b)(i) and Section 53(1)(c) of IBC are drafted with a similar intention. Today, the environment is an equally pressing social concern.

ULGIL also deals with systemic risk and allows netting or closing of financial contracts, else that would be a threat to the stability of the financial system. The aforesaid logic is incorporated in IBC, too; Section 5(8)(g) defines that a derivative transaction is to be taken at market value (in-effect a net-off), and Section 36(4)(b) of IBC states that netting off amounts are not part of liquidation estate. Thus, if the laws encapsulate systemic risk, a question will arise in not so distant a time, whether systemic risk is more important than survival risk? In fact, climate change could lead to Green Swan[82] events and be the cause of the next systemic financial crisis. "The traditional backward-looking models that merely extrapolate historical trends prevent full appreciation of systemic risk posed by climate change".[83]

Insurance companies are deeply entrenched in today's financial system and are exposed to effects of climate change on both sides of their balance sheet; investments assets are impacted by hurricanes and floods whereas liabilities are impacted by increase in claims. In case we do not grant a higher status to environment claims, the world in its business-as-usual ways, will soon encounter a huge catastrophe in coastal cities, near riverbanks and in the arctic region. The insurance liabilities arising from such a devastation will lead to a systemic risk. Recently, Florida in the United States

[82] Patrick Bolton, Morgan Despres, Luiz Awazu Pereira Da Silva, Frederic Samama, and Romain Svartzman, The Green Swan, *Central banking and financial stability in the age of climate change*, BANQUE DE FRANCE, (Jan. 2020) https://www.bis.org/publ/othp31.pdf.
"Green swans present many features of a black swan. Climate related risks typically fit fat-tailed distributions: both physical and transition risks are characterised by deep uncertainty and nonlinearity, their chances of occurrence are not reflected in past data, and the possibility of extreme values cannot be ruled out. In this context, traditional approaches to risk management consisting in extrapolating historical data and on assumptions of normal distributions are largely irrelevant to assess future climate-related risks. That is, assessing climate-related risks requires an "epistemological break" with regard to risk management. However, green swans are different from black swans in three regards. First, although the impacts of climate change are highly uncertain, "there is a high degree of certainty that some combination of physical and transition risks will materialize in the future". That is, there is certainty about the need for ambitious actions despite prevailing uncertainty regarding the timing and nature of impacts of climate change. Second, climate catastrophes are even more serious than most systemic financial crises: they could pose an existential threat to humanity, as increasingly emphasized by climate scientists. Third, the complexity related to climate change is of a higher order than for black swans: the complex chain reactions and cascade effects associated with both physical and transition risks could generate fundamentally unpredictable environmental, geopolitical, social and economic dynamics."
[83] *Id.*

has passed a law, to establish a USD 1Bn state backed fund for insurers, as insurers ran out of reserves due to massive natural disaster related claims.[84]

The jurisdictions discussed in this paper are moving in a similar direction in treatment of abandonment of hazardous sites. IBC too provides for disclaimer of onerous property under its regulations[85] though the clause has not yet been tested in the courts.

India should modify its insolvency law to grant environmental claims a secured status else the judiciary will have to intervene if such a question comes before the court. Hon'ble Supreme Court in the case of *Gujarat Urja Vikas Nigam* v. *Mr. Amit Gupta & Ors.*[86] aptly described this dilemma in words. "The Court is at its heart, an institution which responds to concrete cases brought before it. It is not within its province to engraft into law its views as to what constitutes good policy. This is a matter falling within the legislature's remit. Equally, when presented with a novel question on which the legislature has not yet made up its mind, we do not think this Court can sit with folded hands and simply pass the buck onto the Legislature. In such an event, the Court can adopt an interpretation – a workable formula – that furthers the broad goals of the concerned legislation, while leaving it up to the legislature to formulate a comprehensive and well-considered solution to the underlying problem. To aid the legislature in this exercise, this Court can put forth its best thinking as to the relevant considerations at play, the position of law obtaining in other relevant jurisdictions and the possible pitfalls that may have to be avoided. It is through the instrumentality of an inter-institutional dialogue that the doctrine of separation of powers can be operationalized in a nuanced fashion. It is in this way that the Court can tread the middle path between abdication and usurpation".

[84] Daphne Zang, *Storm-Driven Insurance Insolvencies Stir State Action: Explained,* BLOOMBERG LAW (Dec. 29, 2022, 3:30 PM) https://news.bloomberglaw.com/insurance/storm-driven-insurer-insolvencies-stir-state-actions-explained.

[85] Regulation 10, Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 - Disclaimer of onerous property. (1) Where any part of the property of a corporate debtor consists of - (a) land of any tenure, burdened with onerous covenants; (b) shares or stocks in companies; (c) any other property which is not saleable or is not readily saleable by reason of the possessor thereof being bound either to the performance of any onerous act or to the payment of any sum of money; or (d) unprofitable contracts; the liquidator may, notwithstanding that he has endeavored to sell or has taken possession of the property or exercised any act of ownership in relation thereto or done anything in pursuance of the contract, make an application to the Adjudicating Authority within six months from the liquidation commencement date, or such extended period as may be allowed by the Adjudicating Authority, to disclaim the property or contract.

[86] Gujarat Urja Vikas Nigam Limited v. Mr. Amit Gupta & Ors. Civil Appeal No. 9241 of 2019.

ARTICLE

APPSTORE PAYMENT POLICIES: A VEILED ABUSE OF DOMINANCE THROUGH THE LENS OF COMPETITION REGULATION

Alok Antony[*]

ABSTRACT

At the heart of the legal battle between Epic Games and Apple is a set of restrictions Apple imposes on app developers. For instance, Apple prohibits the distribution of iOS apps outside of the App Store, which Apple fully controls. Apple similarly requires developers to exclusively use its own in-app payment system for app purchases and in-app purchases for digital content. Through this system, Apple automatically collects a 30% commission on all such transactions. Dissatisfied with these policies, Epic Games tried to use its flagship game Fortnite as leverage to convince Apple to open up its closed platform. After Apple refused, Epic Games violated the App Store rules by enabling its own payment method in the Fortnite iOS app on August 13, 2020. That same day, Apple removed Fortnite from the App Store and Epic Games filed an antitrust suit in a federal district court in California. Apple soon thereafter countersued for breach of contract. A yearlong trial ensued, the result of which is a 185-page decision, which was handed down by Judge Yvonne Gonzalez Rogers on September 10, 2021. The case of Epic Games v. Apple raises a broader discussion, whether Apple, as the "gatekeeper" of Apps can restrict distribution and access to the apps in the iOS operating system, and whether that kind of activity can be deemed as a monopolist and restrictive competition in the App distribution market. This paper will analyse and critically evaluate the lawsuit that was brought up against Apple by Epic Games and the decision that was handed down by Judge Rogers. The main aspect of this analysis is whether a company can legally restrict the developer's ability to distribute the applications through their App Store and if it does not restrict the competition. Further this article indulges into the jurisdictional comparison on how other regulators have dealt with the same issue.

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I. INTRODUCTION

When smartphones first came out, many consumers had trouble finding and installing applications. That issue was resolved by online app shops, which completely changed the software industry. App stores act as marketplaces to assist users in locating software from various developers that can be used in conjunction with the operating systems and programmes that come preinstalled on their smartphones and desktop computers. By developing a set of regulations governing platform access, user interfaces, compatibility, costs, payment methods, reliability, security, and intellectual property rights, they function. In comparison, Apple's App Store for the iPhone and iPad has over 2.2 million apps as of 2021, while the Google Play Store for Android-powered smartphones and tablets had about 3.5 million.

Additionally, app shops have evolved into independent two-sided platform businesses. Even though most applications were free, Apple alone made $20 billion from its App Store in 2020, with mobile games making up over 70% of iPhone app revenues.[1] According to one estimate, Apple's App Store profits can reach 78%.[2] When sellers of video game software licences, updates, subscription, or virtual goods use the 2008-launched Apple App Store, they must pay a 30% levy. Regarding these fees and Apple's conditions of usage, some developers have expressed their displeasure.

The app stores continue to be the main method for smartphone users to get software and for developers to reach consumers due to their simplicity and power of distribution. Nevertheless, Epic Games, a privately owned software company with an estimated $29 billion market value that develops Fortnite and other video games, has lately criticised Apple's App Store, brought a legal

[1] Jack Nicas & Kellen Browning, *Judge orders Apple to ease restrictions on app developers,* THE NEW YORK TIMES (Sept. 10, 2021), available at https://www.nytimes.com/2021/09/10/technology/epic-apple-app-developers.html.
[2] Kim Lyons, *Epic-backed expert says Apple's App Store profit is as high as 78 percent,* THE VERGE (May 1, 2021) https://www.theverge.com/2021/5/1/22414402/epic-expert-apple-app-store-fortnite-court-profit.

challenge, and the fallout from its ruling can be seen around the world with different competition regulators actively pursuing Apple against its abusive behaviour in the market.[3]

It began when Fortnite users on iPhones from Epic Games were abruptly presented with a decision screen while purchasing in-app cash (V-Bucks). These in-game sales, which in 2019 reached a monthly average of $300 million, are reportedly made by 70% of gamers. Users were given the option to purchase 1,000 V-Bucks either directly from Epic for $7.99 or through the Apple App Store for $9.99.

Thus, Epic unveiled their competing payment method alongside Apple's. When Apple charged a 30% fee for in-app purchases, Epic only charged 10%, sharing 20% of the cost savings to the users. After that, Apple swiftly pulled Fortnite from its own App Store for breaking its Developer Guidelines by skipping the 30% charge.[4]

In order to avoid paying the 30% charge, Epic itself had already tried removing their app from the Google Play Store and had users "side load" (i.e., download it straight from the web) it. In a study on app stores, the Dutch Regulator analysed this project and came to the dismal conclusions that approximately 41% less people downloaded Fortnite, with Epic potentially losing players to rival game PUBG.[5] However, side loading is technically not feasible with Apple's iOS. Thus, the implications of having the programme withdrawn from the Software Store are much worse such as new players cannot use the app, and existing users cannot upgrade it.

II. THE APPLE PREMIA FOR DEVELOPERS

The downloading of native apps from private entities was once restricted by Apple, but in late 2007, the company began issuing licences to these developers so that they could use their interfaces and technologies to create native apps. Basic development tools are provided by Apple without charge, although subscription in its developer programme costs $99 USD per year (which is essential to

[3] Ben Thompson, *The Apple v. Epic Decision,* THE STRATECHERY (Sept. 13, 2021) available at https://stratechery.com/2021/the-apple-v-epic-decision/.

[4] Nick Statt, *Apple just kicked Fortnite off the App Store*, THE VERGE (Aug. 14, 2020), https://www.theverge.com/2020/8/13/21366438/apple-fortnite-ios-app-store-violations-epic-payments.

[5] The Netherlands Authority for Consumers & Markets, Report on Market study into mobile app stores, Case no.: ACM/18/032693, https://www.acm.nl/sites/default/files/documents/market-study-into-mobile-app-stores.pdf.

distribute apps).[6] The App Guidelines which were introduced in 2010, go farther and address problems of safety, privacy, performance, and reliability. The Developer Product Licensing Agreement (DPLA) covers a wide range of factors. Some elements have drawn criticism, such as the Anti-steering rule for in-app purchases (Section 3.1.1 App Guidelines), which states that applications and associated metadata may not contain buttons, external links, or other calls to action that point users to other payment mechanisms.[7] The licences were issued with the following regarding pricing, where developers decide the price for their applications—including free—and retain 70% of all sales earnings, which implies that Apple levies a 30% commission fee.[8]

The policy was somewhat altered throughout time. Today, Apple's in-app purchase system (IAP) covers both in-app and subscription transactions in addition to app purchases. There are a few exceptions though:

- IAP is optional for in-app transactions of physical items and services; it is only required for purchase of/subscriptions to digital material.[9] This implies that although Uber trips and Airbnb stays do not incur any fees, purchases of Spotify or Fortnite cash do.
- Though "reader" applications, such as those for newspapers, books, radio, music, and videos, may let users access media they've already paid for or subscribed to elsewhere. Due to this, one can use the Netflix or Spotify app, log in, and then subscribe via your web browser.
- The "anti-circumvention policy" prohibits software developers from informing consumers of these other options.[10] The commission cost for memberships lasting for more than a year has been reduced to 15%.[11]

As other app stores imitated Apple, its approach became the norm for the sector.[12] The number of developers that are displeased with Apple's commission cost structure and their inability to accept

[6] Choosing a Membership, APPLE INC., https://developer.apple.com/support/compare-memberships/.
[7] Juli Clover, *Apple Removes Fortnite From App Store*, MACRUMOURS (Aug. 13, 2020), https://www.macrumors.com/2020/08/13/apple-removes-fortnite-from-app-store/.
[8] Ian Carlos Campbell & Julia Alexander, *A Guide to Platform Fees*, THE VERGE (Aug. 24, 2021), https://www.theverge.com/21445923/platform-fees-apps-games-business-marketplace-apple-google.
9 App Store Review Guidelines, Section '3.1 Payments, https://developer.apple.com/app-store/review/guidelines/.
[10] Emily Feely, *Can David Really Beat Goliath? A Look into the Anti-Competitive Restrictions of Apple Inc. and Google, LLC*, 5 U. CIN. INTELL. PROP. & COMPUTER L.J. (2020), https://scholarship.law.uc.edu/ipclj/vol5/iss1/5.
[11] App Store Review Guidelines, Section '3.1 Payments, APPLE INC., https://developer.apple.com/app-store/review/guidelines/.

alternative payment methods is significant. A rising number of applications have simply stopped IAP, preventing users from making purchases or subscribing inside the app. Examples include Netflix, Amazon's Kindle, and Google's YouTube TV.[13] Facebook further claims that it is forbidden from even informing customers about AppStore charges.[14]

III. THE LAWSUIT

Following Apple's actions, Epic Games filed a case with the United States District Court for the Northern District of California seeking injunctive relief. After Epic's claim, Apple filed a counterclaim. The Court issued a judgement partially granting and rejecting an application for a preliminary injunction on October 9th, 2020, indicating that Epic Games is responsible for requesting such exceptional relief. Additionally, according to the court order, Apple is prohibited from restraining, suspending, or revoking the Epic Affiliates' participation in Apple's Developer Program.[15]

This temporary restraining order will stay in place throughout the proceedings under the condition that Epic's Subsidiaries do not violate any of their regulating contracts with Apple or the current App Store policies.[16] It is crucial to note that this lawsuit involves Apple's activities in two key markets: first, the distribution of applications (referred to as "apps"), and second, the processing of payments from customers for digital material used within iOS apps (referred to as "in-app content").

According to Epic, these markets should be seen as a single market wherein Apple exercises a monopoly. Apple contends that these marketplaces are distinct and that the functioning of the App

[12] Natasha Lomas, *Telegram hits out at Apple's App Store "tax" in latest EU antitrust complaint*, TECHCRUNCH (July 30 2020), https://techcrunch.com/2020/07/30/telegram-hits-out-at-apples-app-store-tax-in-latest-eu-antitrust-complaint/.
[13] Brian Fung, *The app-store war between Netflix and Apple is heating up,* THE WASHINGTON POST, (Jan. 4, 2019), https://www.washingtonpost.com/technology/2019/01/04/app-store-war-between-netflix-apple-is-heating-up/
[14] Katie Paul and Stephen Nellis, *Facebook says Apple rejected its attempt to tell users about App Store fees*, REUTERS, (Aug. 28 2020), https://www.REUTERS.com/article/us-facebook-apple-exclusive/exclusive-facebook-says-apple-rejected-its-attempt-to-tell-users-about-app-store-fees-idUSKBN25O042
[15] Lara Jackson, *Apple Cannot Remove Unreal Engine Games From App Store, Rules Judge*, GAMEBYTE (Aug. 26, 2020), https://www.gamebyte.com/apple-cannot-remove-unreal-engine-games-from-app-store-rules-judge/.
[16] James Batchelor, *Epic wins restraining order against Apple but Fortnite remains blocked*, GAMES INDUSTRY.BIZ (Aug. 25, 2020), https://www.gamesindustry.biz/epic-wins-restraining-order-against-apple-but-fortnite-remains-blocked.

Store is tied to the processing of consumers' payments rather than being intrinsically linked with apps.[17]

The level of commission Apple charges is one of the factors that led Epic to decide to sue Apple. Apple Pay, an Apple-controlled payment processor, handles every transaction in the App Store. In order to completely monopolise both markets, according to Epic, Apple imposes unreasonable and illegal restrictions. These restrictions, according to Epic, prevent app developers from trying to reach the over a billion users of Apple's mobile devices unless they use the App Store, which Apple controls and charges an oppressive 30% tax on the purchase of every app.

As Epic has indicated, Apple mandates that software developers use in-app purchases, a single payment processing method provided by Apple, in order to sell digital in-app items to those customers, which includes a 30% tax.[18] However, platforms that take a portion of developer income are not limited to the Apple iOS. Apple allocates developer fees based on their earnings. The same "oppressive 30%" income cuts are taken from all developers by Google Play, another Android App Store, and PlayStation. So, platforms other than Apple also charge a commission.[19] Given that Apple has different requirements for app developers than other platforms do, it makes sense that the Apple ecosystem should be seen as more cost-effective for app developers. Therefore, it may appear that Epic's claim on the "oppressive 30%" tax is not completely accurate.

Nevertheless, this circumstance raises a much more significant issue: Is the controversy really about the profit cuts Apple makes? As Epic noted in the claim, they are not looking for monetary compensation but rather are worried about what they perceive to be Apple's monopolistic behaviour, particularly its control over a vital facility and its unwillingness to grant access to it. This implies that Epic should concentrate on demonstrating the foreclosure and lack of choices. As was already stated, the court declared that Epic's demand for preliminary injunctive relief is an unusual step that is seldom granted. Millions of users are impacted by Epic's lawsuit, which contests the fundamental operation of digital platforms.

[17] F. Bostoen, *(2020) Epic v Apple (1): introducing antitrust latest Big Tech battle royal*, LEXXION (Sept. 4, 2020) available at: https://www.lexxion.eu/en/coreblogpost/epic-v-apple-1/.
[18] *Supra* note 4.
[19] Paulina Ambrasaitė & Agnė Smagurauskaitė, *Epic Games v. Apple: Fortnite Battle That Can Change The Industry*, VILNIUS UNIVERSITY OPEN SERIES 6–25 (2021).

IV. EPIC'S DEFINITION OF RELEVANT MARKET

A relevant market is described by Epic in three ways, which underlines that Apple has a monopoly in the relevant market, which is the App Store; secondly Apple's business practises are monopolistic because they contractually prohibit developers from distributing iOS-compatible versions of their apps elsewhere; and thirdly Apple has a monopoly in the market for payment processing services because it contractually binds developers to use Apple's built-in processing service.

The size and competitive ability of the defendant, its rivals, supra-competitive revenue levels, barriers to competition in the sector that would prevent new entrants or the growth of existing rivals, and historical trends within the industry are all good parameters of market power dominance or the absence of such power.[20]

Epic maintains that the Apple platform is a two-sided market, where two groups of consumers depend on one another to create value, and the value to each group grows as more people join on either side. The platform is a key factor in the development of these indirect network effects. A fee, which is a portion of the transaction, is charged to the developer by App Stores to facilitate their connection. The developer then directly incorporates this fee in the price that customers pay. Because of this "tax," Apple frequently makes more money from a developer's consumer than from the developer themselves.[21] Apple employs every available strategy to safeguard this source of income, starting with not disclosing it to users. Facebook might be used as an example to prove this point. Because Facebook's display of "irrelevant" information to users violates the terms of the App Store, Apple forced Facebook to remove the indication that Apple receives 30% of the App Store fee.[22] Apple's payment processor would lose market share if direct payment methods were made available in games like Fortnite.

[20] *Benefits of competition and indicators of market power - whitehouse.gov*. Available at: https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160502_competition_issue_brief_updated_cea.pdf.
[21] Serkan Ada, Two-sided markets: Apples Digital Application Platform, 1 JOURNAL OF SOCIAL SCIENCE RESEARCH 14–20 (2013).
[22] *Supra* note 14.

Epic claims that Apple owns a key entry point into the current digital economy, which is the only place where iOS users may legally download software. Apple has developed a consumer-tailored ecosystem utilising user data, making it hard for iPhone customers to convert to a competitor because the costs would be more than 50 times more than a 5% rise in app pricing.[23] This is due to Apple's strategic product portfolio design and ecosystem construction efforts to make switching more expensive and inconvenient. Most iOS users are not likely to migrate to another operating system. Additionally, direct network effects are present on digital platforms like the App Store, which draw users and app creators together and vice versa.

Developers that seek to alter the status quo face huge difficulties as a result of this effect. They need a sufficient number of other developers and users to bring about change, and they are likely reluctant to leave the App Store due to the added expense and discomfort. If developers were able to build a different platform to take advantage of the network effect, they would need to draw a certain number of users and other developers to assure the platform's usefulness. The market's efficiency is maximised with only a few firms actively vying for market control as a result of this particular worry for two-sided platforms, at least in digital markets.[24]

This perspective argues that all Apple Store customers in the relevant market are the ones that suffer from a lack of competition. They must first deal with Apple commissions on each transaction that are passed by the developers and go through platform innovation with regard to in-app payments. Unless they opt to switch from their iPhone to a phone with a different operating system, iOS users cannot get apps from sources other than the App Store. Additionally, the fact that in-app transactions are only possible through an Apple-controlled payment processor eliminates the option for customers to choose an in-app supplier.[25] As per Epic, Apple has complete control over the way payments are made as well as how apps are distributed. There are only two options available to app developers: put up with Apple's monopolistic actions or completely withdraw their apps from the App Store.

[23] *Apple Business Strategy: A Detailed Company Analysis*, GREYB (Sept. 27, 2021), available at www.greyb.com/apple-business-strategy.
[24] *Supra* note 21.
[25] Friso Bostoen, and Daniel Mandrescu. (2020). *Assessing Abuse of Dominance in the Platform Economy: A Case Study of App Stores,* SSRN http://dx.doi.org/10.2139/ssrn.3629118.

On the other hand, in this situation, should consumers be regarded as a relevant market? The legality and validity of Epic's restrictive interpretation of the relevant market, which excludes all other app distribution platforms in favour of just iOS users and the Apple App Store, are in question. Despite the fact that the Supreme Court recognised a single-brand market in *Eastman Kodak Co. v. Image Technical Services*[26] in 1992, the decision was widely regarded as an exception in light of later case law in *Spahr v. Leegin Creative Leather Products*,[27] where the Federal District Court ruled that courts have consistently declined to consider one brand to be a relevant market of its own when the brand competes with other potential substitutes.

This could apply to the Apple Store. From a different angle than what was previously said, both existing and new Fortnite players can continue to play the game on a variety of platforms and devices other than the iPhone, including PCs (including Macs (macOS)), laptops, gaming systems, and non-iOS mobile devices. In relation to the game's newly added direct payment feature, it is important to note that Google too has taken down Fortnite from the Google Play store.[28] However, since this is not clearly linked to the Apple Play store, it should not be taken into account when determining the relevant market in this situation. Therefore, Epic Games can reach clients through different alternate distribution channels.

V. APPLICABILITY OF ESSENTIAL FACILITY DOCTRINE

The basis of Epic's allegation is that access to a supposedly necessary facility was denied. Since iOS is an exclusive ecosystem that Apple completely controls, entry to the Apple Store is under Apple's control and cannot be obtained without Apple's consent. It raises the question of whether Apple controls access to a necessary facility given its consistent reluctance to grant it. The monopoly power will be protected from most forms of competition, at least temporarily, if the facility is actually necessary in this circumstance.

[26] Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 45.1.
[27] Spahr v. Leegin Creative Leather Products, Inc., NO. 2:07-CV-187 (E.D. Tenn. Aug. 20, 2008).
[28] Dieter Bohn, Fortnite for Android has also been kicked off the Google Play Store, THE VERGE (Aug. 14, 2020), https://www.theverge.com/2020/8/13/21368079/fortnite-epic-android-banned-google-play-app-store-rule-violation.

The "refusal to deal" precedents, which establish restrictions on a monopolist's capacity to reject real or prospective competitors from competing with it, are generally considered to be a subset of the essential facility doctrine.[29] The essential facilities doctrine holds a company accountable when it refuses a second company fair access to a good or service that the second company needs in order to compete with the first and that company controls an essential facility.[30] Those in control of facilities must provide for fair sharing when they cannot be practically copied by potential rivals. Closing the restricted facility is an illegal trade restraint.

Courts have established broadly accepted standards that parties must achieve before a court may order a monopolist to provide its rivals access to an essential component because the theory deviates from the general norm that even a monopoly may pick with whom to trade. According to the essential facilities doctrine, a party must specifically show four things in order to establish antitrust liability:

(1) monopolist control of the essential facility;
(2) a competitor's incapability to essentially or fairly recreate the essential facility;
(3) the refusal of the utilisation of the facility to a rival; and
(4) the viability of providing the service to competitors.[31]

The application must be compliant with Apple's iOS in order for a consumer to download it onto an iOS device. The Apple Developer Agreement must be signed by an app developer if they want to use iOS. The Developer Agreement mandates that developers only make their iOS-compatible programmes available through the App Store. As a result, the only way for a third-party developer to distribute applications to iOS devices is through the App Store. Without using the Apple App Store and according to Apple's policies, developers are unable to reach the more than one billion iOS consumers.[32]

[29] Robert Pitofsky, Donna Patterson, & Johnathan Hooks, The *Essential Facilities Doctrine Under U.S. Antitrust Law,* (2002) ANTITRUST L. J., *70*(2), 443–462. http://www.jstor.org/stable/40843561.
[30] *Id.*
[31] Christopher M. Seelen, *The Essential Facilities Doctrine: What Does It Mean to Be Essential?* 80 MARQ. L. REV. 1117 (1997), http://scholarship.law.marquette.edu/mulr/vol80/iss4/6.
[32] Dieter Bohn, *Apple's App Store policies are bad, but its interpretation and enforcement are worse*, THE VERGE (June 17, 2020), available at https://www.theverge.com/2020/6/17/21293813/apple-app-store-policies-hey-30-percent-developers-the-trial-by-franz-kafka

Additionally, the Courts should determine whether a wider or narrower definition of the relevant market should be used in this instance to determine whether Apple controls the essential facility.[33] If a broader perspective is used, it is questionable if the Apple Store should be seen as a necessary resource given that developers, such as Epic Games, can reach a large audience through other channels. If it is determined that iOS users are the important market (a limited understanding), then the Apple Store may be regarded as an essential facility.

Apple places a number of technological limitations on the iOS App Distribution Market, including, iOS users are prohibited by Apple from installing apps or App Stores from websites. Apple created technical limitations. As a result, iOS users must download all apps from Apple's App Store to their devices, and iOS app developers must distribute their apps through Apple's App Store. Further Apple pre-installs its App Store on the home screen of each and every iOS device it sells. No competing App Stores are pre-installed or permitted anywhere on iOS devices by Apple.[34] Apple also makes it impossible for iOS users to delete the App Store off their phones.

Epic argued that by levying a 30% tax, Apple compelled creators to undergo lower profits and that because Apple deprived them of the option to choose how they distribute their apps, they were forced to spend a greater percentage of their income on premium features than they would have if the company had faced competition.

Apple presents a different viewpoint, claiming that collecting a charge for others to utilise one's service is not anticompetitive. This implies that Apple receives zero commission for over 80% of apps that are freely available to users on the App Store.[35] That is what Epic wants to do, and the repercussions would be disastrous again for the App Store ecosystem. As a result, there is a great deal of debate on the percentage of developer revenues that Apple takes.

[33] Nikolas Guggenberger, *Essential Platform Monopolies: Open Up, Then Undo,* PROMARKET (Dec. 7, 2020), Available at http://promarket.org/2020/12/07/essential-facilities-regulation-platform-monopolies-google-apple-facebook/
[34] Geoffrey A. Fowler*, iTrapped: All the things Apple won't let you do with your iPhone*, THE WASHINGTON POST (May 27, 2021), available at https://www.washingtonpost.com/technology/2021/05/27/apple-iphone-monopoly/
[35] Supra note 19.

VI. THE JUDGEMENT

Yvonne Gonzalez Rogers, the judge in the *Epic Games v. Apple* lawsuit, rendered a decision that generally supports Apple. The "mobile gaming market," with annual revenues of almost $100 billion and a share of 59% of all gaming revenue worldwide, was the subject of the judge's decision.[36] The Judge came to the conclusion that Apple's 55% market share was insufficient to constitute a monopoly. As a result, the judge approved Apple's decision to keep charging the 30% commission and forbidding in-app purchases and third-party iPhone software stores.

Meanwhile, Apple has announced a legal settlement for smaller developers in August 2021 who have earnings below $1 million (about 99% of American iOS developers). They have access to a $100 million assistance fund and can only pay a 15% tariff.[37] Additionally, Apple will permit small developers to inform their clients about different payment options via emails or other messaging services.[38] They are still unable to alert customers of alternate payment options from inside their apps due to Apple's restrictions. However, these developments raise the possibility that upcoming court rulings and legislative changes would make operations for app store owners more challenging.[39]

First, the judge stated that her decision solely applies to mobile games and that Apple may continue its stringent App Store policies. As a result, how future legal or legislative acts handle app store sales of other software items and digital services may vary.

Second, Apple only achieved limited victory in the trial. The judge decided that Apple has the power to withdraw Epic's development licence for the App Store and to establish the App Store's terms of usage. But the judge also determined that by forbidding developers from advising customers they

[36] Epic Games, Inc., v. Apple Inc., Case No. 4:20-cv-05640-YGR.
[37] Jay Peters, Sean Hollister and Richard Lawler, *Apple's $100 million settlement agreement 'clarifies' App Store rules for developers, but doesn't change much,* THE VERGE (Aug. 27, 2021), available at https://www.theverge.com/2021/8/26/22643807/apple-developer-class-action-lawsuit-collect-information-ios-apps-anti-steering
[38] Kif Leswing, *In major policy change, Apple will allow developers to email customers about alternatives to App Store billing*, CNBC (Aug. 26, 2021), available at https://www.cnbc.com/2021/08/26/apple-will-allow-developers-to-email-customers-to-bypass-app-store-billing.html
[39] Malcolm Owen, *Epic Games vs Apple trial, verdict, and aftermath - all you need to know*, APPLE INSIDER (Mar. 26, 2022) available at https://appleinsider.com/articles/20/08/23/apple-versus-epic-games-fortnite-app-store-saga----the-story-so-far

could buy programs or upgrades outside the app, Apple broke California's Unfair Competition Law. The Judge gave Apple 90 days to discontinue using that method. As a result, Apple will no longer be able to forbid application developers from informing customers of alternate payment options via channels like email messages.[40]

Third, the judge found that Apple's customer base of 55% was insufficient to qualify as a monopoly. As we observed in the Microsoft antitrust suit,[41] simply possessing a high market share—even more than 90%—does not constitute illegal conduct.[42] Abusing a dominant market position, such as by combining products from many marketplaces or stifling competition, is prohibited. However, Apple would have a 100% market share for its iPhone if a future court decides that app stores are one market, and this may well result in severe regulation.

Fourth, due to the greater openness of the Android market, Apple might be more vulnerable to regulation than Google. For instance, there are numerous Android app stores in China. For Galaxy phones, Samsung also provides an Android app store. The Android operating system's ability to "side-load" applications, or to install "unknown apps," outside of Google Play, makes these alternatives viable.[43] On the other hand, while it is possible to download apps on an iPhone without utilising Apple's App Store, doing so necessitates "jailbreaking" the security lock that Apple pre-installed and is against the terms of the warranty for the device.[44]

The 30% levy, according to Epic, would be an abuse of Apple's dominant position in the market. Judge argued against it. But given that software and other digital items have a marginal cost that is almost zero, what should they be priced at? Apple and Google regard their app stores to be crucial to their platform strategies and revenue models and have spent a lot of intellectual property in them.

[40] T. Higgins, *Apple judge's warning suggests App Store fight is far from over,* THE WALL STREET JOURNAL (Sept. 12, 2021), available at https://www.wsj.com/articles/apple-judges-warning-suggests-app-store-fight-is-far-from-over-11631363400.
[41] United States v. Microsoft Corporation, 253 F.3d 34 (D.C. Cir. 2001).
[42] Prasid Banerjee, *Judge bars Apple from forcing App Store payments on apps in Epic Games case*, MINT (Sept. 11, 2021), https://www.livemint.com/technology/tech-news/us-judge-tells-apple-allow-apps-to-use-third-party-payments-in-app-store-11631358753974.html.
[43] Sami Fathi, *Tim Cook: Users Who Want to Side load Apps Can Use Android, While the iPhone Experience Maximizes 'Security and Privacy',* MACRUMOURS (Nov. 9, 2021), available at https://www.macrumors.com/2021/11/09/tim-cook-users-sideloading-use-an-android/
[44] *Id.*

In-app purchases can be tracked and handled securely by app stores.[45] Of course businesses have the right to charge for the use of their capital and technology. How much, though, is too much? That is still a mystery.

VII. JURISDICTIONAL COMPARISON

A. EUROPEAN UNION AND SPOTIFY'S CLAIMS

At the EU level, Spotify's case against Apple is now being "examined in detail" by the European Commission (EC). Due to excessive commission costs, sluggish approvals, constrained marketing, and limited interaction with Apple's larger ecosystem, the music streaming service Spotify claims that it is treated unjustly in comparison to Apple's music app. The objections from Spotify were successful. The European Commission announced in a press statement on June 16, 2020, that it has begun an investigation into Apple's App Store policies.[46] It focuses on the same legal arguments as the Epic case, firstly the requirement to use Apple's in-app purchase model; and the limitations on developers' ability to notify consumers to other purchasing options outside of applications.

Abuse of a dominant position is barred as per Article 102 of the Treaty on the Functioning of the European Union.[47] According to different precedents, it is lawful for an enterprise to hold a dominating position and such an enterprise is allowed to compete on the merits. However, the concerned enterprise has a specific obligation to ensure that its actions do not obstruct real, unaltered competitiveness in the market.

The framework of the market, in especially the following elements, will be taken into account for determining dominance:

1. restrictions imposed by the bargaining power of the undertaking's customers;

[45] Oscar Borgogno; Giuseppe Colangelo, *Platform and device neutrality regime: The new competition rulebook for app stores?*, 67(3) The Antitrust Bulletin 451–494 (2022).
[46] Tom Warren, *EU accuses Apple of App Store antitrust violations after Spotify complaint*, *THE VERGE* (Apr. 30, 2021), available at https://www.theverge.com/2021/4/30/22407376/apple-european-union-antitrust-charges-app-store-music-competition-commission-margrethe-vestager. (Press Release from the EU Commission can be found here: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061); Mikey Campbell, *Spotify supports Epic Games' private antitrust action against Apple*, APPLE INSIDER (Aug. 13, 2020) available at https://appleinsider.com/articles/20/08/13/spotify-supports-epic-games-private-antitrust-action-against-apple
[47] Article 102, Consolidated Version of the Treaty on European Union [2008] OJ C115/089

2. limitations imposed by current supplies from and the position of actual competitors on the market;
3. limitations placed by the credible prospect of future expansion by actual rivals or entrance of potential competitors (countervailing buyer power).[48]

The market share of the Play Store approaches 90% as noted in the Google Android decision, which is more than enough to establish a presumption of dominance. The market structure is considerably more obvious in the case of Apple.[49] Given that each ecosystem is viewed as a distinct market and that the iOS platform is more closed than the Android ecosystem (as it does not permit the downloading of alternative App Stores or side loading apps), the iOS App Store market is almost entirely controlled by Apple, giving it a 100% market share if a more strict definition of the relevant market is adopted.

High market share alone does not, however, guarantee dominance, especially for digital platforms that compete in extremely dynamic marketplaces. The capacity of prospective rivals to enter the market, which is increasingly the focus of market power evaluations in the case of digital platforms, determines whether Apple is dominant regarding its App Store.

Countervailing buying power is the last competitive barrier to be taken into account in a market power analysis, although it hasn't been well addressed in relation to digital platforms yet.[50] There must be evidence of a strong buyer power which can prevent price rises by the Apple App Store across the board for countervailing force to exist. This would necessitate a reasonable alternative to the App Stores that a key customer could transfer to, or else a new player that would be supported by a customer of that importance. This is hard to envisage in the situation of the Apple App Store given the above discussed obstacles to entrance.

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[48] Article 82 Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02), available a

[49] Kenney, M., Pon, B. *Structuring the Smartphone Industry: Is the Mobile Internet OS Platform the Key?*. J IND COMPET TRADE 11, 239–261 (2011). https://doi.org/10.1007/s10842-011-0105-6

[50] OECD (2022), The Evolving Concept of Market Power in the Digital Economy, OECD Competition Policy Roundtable Background Note, www.oecd.org/daf/competition/the-evolving-concept-ofmarket-power-in-the-digital-economy-2022.pdf.

One of the key points of Spotify's claim against Apple is the 30% commission (15% after one year) assessed based on the cost of the Spotify Premium monthly membership, at least when iOS customers subscribe using Spotify's application (rather than its website).[51] According to the lawsuit, this transaction cost is excessive, which makes it challenging for Spotify to provide users with competitive rates, especially when compared to Apple Music, the company's music streaming service.[52] Thus, one can wonder if Apple's commission fees violate Article 102(a) TFEU from the standpoint of competition law.

B. NETHERLANDS' AUTHORITY FOR CONSUMERS AND MARKETS

Apple has been compelled to make reforms after the Dutch antitrust regulator, Netherlands' Authority for Consumers and Markets (ACM) determined that its policies mandating software developers to adopt its in-app payment mechanism are anti-competitive. This made the Dutch Competition Regulator the first antitrust authority to conclude that the technology giant has abused market dominance in the app store.[53] The Dutch inquiry into whether Apple's actions constituted an abuse of its dominant market position was first announced in 2019, but its purview was later narrowed to concentrate primarily on dating app markets.

C. JAPAN AND SOUTH KOREA'S NON-TOLERANCE

Apple reached a settlement with JFTC after the agency's investigation lasted five years. Following that, Apple permitted "reader application" app developers to redirect their in-app purchase to a link other than Apple's payment method, allowing them to avoid the 30% commission.[54] To ensure a safe and convenient user experience, the App Store's rules encourage developers to sell digital services and memberships through Apple's in-app payment system. Apple and the JFTC decided to

[51] Mafalda Maia Braga, *Spotify vs. Apple: A Battle of Titans*, available at https://repositorio.ucp.pt/bitstream/10400.14/35185/1/202750620.pdf

[52] ibid

[53] Daniel Mandrescu, *The Apple App Store case in the Netherlands – a potential game changer*, LEXXION (Jan. 18, 2022), available at https://www.lexxion.eu/en/coreblogpost/the-apple-app-store-case-in-the-netherlands-a-potential-game-changer/

[54] Press Release dated September 2, 2021 by the Japan Fair Trade Commission on Closing the Investigation on the Suspected Violation of the Antimonopoly Act by Apple Inc. available at https://www.jftc.go.jp/en/pressreleases/yearly-2021/Sept.ember/210902.html

let reader app developers display a link to their website so users may register and manage their accounts as they do not offer digital products and services in-app.[55]

Thereafter, around the same time that Fortnite was battling Apple and Google, a team of developers petitioned the Korea Communications Commission (the "KCC"). This caused South Korea to alter its Telecommunication Business Act, which was passed almost a year later.[56] The new regulation made an effort to stop big tech corporations from abusing their supremacy by charging high app or in-app purchase fees. As a result, South Korea was the first nation to establish restrictions on the payment policy practices of major tech firms.[57]

The KCC states that the law expressly forbids pushing a certain payment option on a mobile content provider by taking use of the status of the app store operator unjustly.[58] App market operators are not allowed to unreasonably postpone the assessment of mobile content or to refuse, postpone, limit, remove, or forbid the registrations, renewals, or inspections of mobile content that uses third-party payment methods. A penalty of up to 2% of the average yearly revenue from linked business practices will be assessed in the event of a violation.[59]

D. INDIA'S EARLY INTERVENTION

Early in 2022, Apple's business operations in India were the subject of an investigation by India's competition watchdog, the Competition Commission of India (CCI), which stated that it had a preliminary belief that the tech giant had broken some of the Competition Act's rules.[60]

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[55] Press Release dated September 2, 2021 by Apple Inc. Japan Fair Trade Commission closes App Store investigation available at https://www.apple.com/in/newsroom/2021/09/japan-fair-trade-commission-closes-app-store-investigation/

[56] Charles McConnell, *Korea finalises rules forcing Google and Apple to open up app stores*, GLOBAL COMPETITION REVIEW (Mar. 10, 2022), available at https://globalcompetitionreview.com/article/korea-finalises-rules-forcing-google-and-apple-open-app-stores.

[57] TELECOMMUNICATIONS BUSINESS ACT, 1996 (Republic of Korea)

[58] Tim Cowen, *South Korea: First Country To Pass A Bill Limiting Apple And Google's Control Over App Store Payments*, MONDAQ (Sept. 02, 2021), available at https://www.mondaq.com/consumer-law/1108060/first-country-to-pass-a-bill-limiting-apple-and-google39s-control-over-app-store-payments

[59] ibid

[60] Reuters, *CCI orders investigation into Apple's business practices in India*, MINT (Jan. 01, 2022), available at https://www.livemint.com/industry/infrastructure/india-antitrust-body-orders-investigation-into-apple-s-business-practices-in-india-11640955821370.html.

According to CCI, the requirement that paid apps and in-app purchases be made using Apple's in-app payment solution "restricts the possible choice to the application developers to choose a payment processing system of their choice, especially considering that it fees a charge of up to 30% for app purchases and in-app purchases," in its order.[61]

The regulator stated in a 20-page order that iOS users can only download applications through Apple's App Store, which comes pre-installed on each and every Apple device. According to the watchdog, both app users and app developers seem to rely on Apple's App Store to reach their intended audiences and distribute their products.[62] The regulator noted, among other things, that Apple requires the app developer to agree to supplemental duties that, by their very essence or in accordance with commercial usage, have nothing to do with the distribution services that are the basis of the contract.

The recent case of Google in India has revealed very comparable exploitation of the Android environment as the competition watchdog for the European Union did in 2018.[63] This year, the European Court upheld the majority of the anti-competitive behaviour discovered during the investigation along with the over $4 billion punishment levied on Google by the EU authority.[64]

Alphabet-owned Google has been penalised with a provisional fine of Rupees 1,337.76 crore by the Competition Commission of India (CCI) for "abusing its dominant position" in markets pertaining to the ecosystem for Android mobile devices.[65]

Much recently, the CCI ordered a penalty of Rupees 936.44 crore for abusing its dominant position with regard to the payment policies for using their operating systems.[66] The commission noted that Google's control over Play Store, the vital gateway connecting app developers and users, gives it the power to impose terms on app developers and compel them to use its own payment system. The

[61] Together We Fight Society v. Apple Inc. & Another, Case No. 24/2021
[62] ibid
[63] Mr. Umar Javeed and Others v. Google LLC and Another, Case No.
[64] Id at 293.
[65] XYZ (Confidential) v. Alphabet Inc. and Others, Match Group, Inc. v. Alphabet Inc. and Others, Alliance of Digital India Foundation v. Alphabet Inc. and Others, Case No. 07 of 2020 with 14 of 2021 with 35 of 2021
[66] Id at 197.

Commission further held that the PlayStore is without a doubt the biggest app marketplace connecting app makers with users on the Android ecosystem.[67]

E. RUSSIA

The Russian Federal Antimonopoly Service (FAS) decided in August 2020 that Apple's App Store provides it an unfair edge in the market for digital apps. It is to be noted that the regulator would fine Apple $12 million. FAS claimed in its fine filed in response to the decision that Apple's iOS app distribution hurt the competitiveness of its own products.

Russia's Federal Antimonopoly Service filed an antitrust complaint against Apple's Software Store in October 2021 after the tech giant disregarded earlier requests to permit app makers to advise users of alternate payment methods.[68] The competition regulator in Russia has fined Apple, citing that it abused its dominant position by requiring developers to utilise the App Store's payment system. The regulatory body declared that it had come to the conclusion that Apple "prohibits iOS app developers from telling consumers within the app about the chance of paying for transactions outside the App Store or using alternate payment methods" and has fined Apple $17.4 million as a result.[69]

F. AMERICAN WAY FORWARD

The "Open App Markets Act," a bipartisan antitrust measure, was introduced by Senators Amy Klobuchar, Marsha Blackburn and Richard Blumenthal in August 2021 and specifically targets Apple and Google's app stores.[70] The two leading operating systems for smartphones and their respective app stores, they claimed, are under the gatekeepers control of the two firms, allowing them to unilaterally set the parameters of app markets, stifling competition and constraining consumer choice.

[67] Id at 186.
[68] REUTERS, Russia says it will fine Apple for violating antitrust laws, *REUTERS* (July 20, 2022) available at https://www.REUTERS.com/technology/russia-says-apple-violates-antitrust-laws-2022-07-19/.
[69] REUTERS, Russian anti-monopoly agency fines Apple $17 million – TASS, *REUTERS* (Jan 18, 2023) available at https://www.reuters.com/technology/russian-anti-monopoly-agency-fines-apple-17-million-tass-2023-01-17/
[70] Open App Markets Act, S.2710 — 117th Congress (2021-2022).

VIII. CONCLUSION

Success is not illegal.[71] This is how Judge Yvonne Gonzalez Rogers concludes the Epic v. Apple case. In many ways, the Judgement of the Northern District of California makes sense in the matter that although having a considerable amount of market power does not necessarily imply that they are abusing their market power, Apple's business strategy has gradually changed away from focusing primarily on the production and sale of hardware and toward a greater reliance on the services provided by iPhone users. Apple appears to have developed an ecosystem where it has enormous control over iOS, distributed software applications (apps), and handles user payments for digital material used in iOS mobile apps.

The judgement left room for upcoming antitrust complaints. With its significant market share, Gonzalez Rogers argues, "*the evidence does imply that Apple is reaching the precipice of major market power, or monopolistic practices*." Apple is only kept alive by the fact that its market share isn't larger, the fact that rivals from similar submarkets are gaining ground in the video game submarket, and probably the fact that Epic didn't concentrate on this subject.[72]

The answer might turn out to be technical rather than legal. Microsoft opted to make its service available to iOS users as a web app because Apple refused to let cloud gaming services like Microsoft's xCloud in the App Store.[73] Even Fortnite is making a comeback on iOS with a web app.[74] While such development is to be appreciated, it is still unclear whether web applications can actually compete with native applications.

[71] Supra 36, *Apple Inc.,*
[72] Rebekah Valentine, *Epic v. Apple: Court Says Apple's 30% Sales Cut Is Unjustified*, IGN (Sept. 11, 2021), available at https://in.ign.com/fortnite/166467/news/epic-v-apple-court-says-apples-30-sales-cut-is-unjustified.
[73] Tom Warren, *Microsoft is bringing xCloud to iOS via the web*, THE VERGE, (Oct. 08 2020), available at https://www.theverge.com/2020/10/8/21508706/.
[74] Nick Statt, *Nvidia is bringing Fortnite back to iOS with new cloud gaming web app*, THE VERGE (Nov. 19, 2020), available at https://www.theverge.com/2020/11/19/21573311/.

ARTICLE

STANDARD ESSENTIAL PATENTS & COMPETITION LAW: ANALYSING UNFAIR PRICING & PATENT BUNDLING ISSUES

*Nityesh Dadhich**

ABSTRACT

Standards promote compatibility, interoperability, and wide adoption of new technologies in the marketplace. An 'A4 Size' paper or a 'Type-C' charger, are some well-known examples of universally adopted standards. The entity developing such a standard would seek its protection under Patent Law to gain from its innovation. Patent Law stands in harmony with such standard-setting processes as both of these encourage or support innovation. At times, commercial implementation of a standard would necessarily require the use of technology protected by one or more patents. Such standards are also known as 'Standard Essential Patents' (SEP), as these standards are 'essential' to meet the prescribed industry standard. Thus, Patent Law itself grants SEP holders a dominant position within the patent's relevant market. Often SEP holders abuse this dominant position by imposing unreasonable conditions on patent licensing or refusing to grant a license for the 'essential' patent to a competing firm, or by concealing its existing patent applications that qualify as SEP so that once such protection is declared as SEP, the patentholder would get exclusive rights over the same. Thereby, patent law's aim to promote innovation through the grant of exclusive rights over such innovation is misused. The biggest challenge to the abuse of SEP patents arises from Competition Law. India enacted the Competition Act (2002) to promote fair competition within the market. If the competition within the market is distorted by the abuse of dominance by SEP-holders, it would violate Section 4 of the Competition Act. Thus, both patent law and competition law aim to promote the growth of the market, incentivize innovation and ensure consumer welfare, but the manner in which they attempt to achieve these goals seems as if they are holding contrasting positions. This paper argues on two major competition law concerns that arise from the misuse of SEP Patents. First, 'unfair pricing' issues, where SEP patents are offered at artificially

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high or low royalty rates aimed to distort the market. Secondly, 'patent-bundling' issues, where SEP patents are offered only on conditional purchase of other 'non-SEP patents'. These practices, when performed by a dominant entity, are prohibited by the Competition Act.

I. INTRODUCTION

Standards are adopted by the manufacturers to increase interoperability, compatibility and to increase user access to various products. For instance, '***A4 size paper***' or '***Type-C Mobile Phone Charging Cable***' or '***3.5mm Plug & Jack for Earphones***' are some of the standards which are adopted by various manufacturers to increase interoperability of the products. Standards offer economies of scale by reducing the variations across the products. Consumers get a better set of choices, as they can choose among various products based on similar standards. Standards system and Patent Law have similar aims to promote innovation and diffuse technology. Under Patent Law, the patent holder is granted ***exclusive rights over the patented product*** (which promotes innovation), and the information regarding the patented technology is ***mandatorily disclosed*** (which promotes the diffusion of technology). The standardization process promotes the mutual exchange of information and enables the development of compatible products within the market.[1] However, standards must not be misused to hinder competition or to discourage innovation, or create a monopoly within the market.

The implementation of a standard might necessarily require access to patented technology. Such patents are 'Standard Essential Patents' or SEPs.[2] The access and use of such patents are necessarily required to meet the industry-defined standard. ***For instance***, assume that the A4 paper sheet standard is adopted across the market. However, the technology to cut paper sheets in A4 Size is patented, then such a patent would be a Standard Essential Patent. SEP Patents raise Competition Law concerns as the patent law grants 'exclusive rights' over a 'Standard Essential' patent. To minimize these concerns, SEP patent holders are required to license their patents on ***Fair, Reasonable, and Non-***

[1] WIPO's Standing Committee on the Law of Patents, '*Standards and Patents*', 10 (2009) https://www.wipo.int/edocs/mdocs/scp/en/scp_13/scp_13_2.pdf.
[2] RK Chopra, *Issues and Challenges in Standard Essential Patents: Indian Perspective,* 26 J. INTELLECT. PROP. RIGHTS 131-145 (2021)

Discriminatory (FRAND) terms.[3] The idea is that SEP Patents should be granted after balancing the interests of technology providers and technology users and the patent license fees should be reasonable.[4] Thus, the *exclusive rights granted under the patent law must be exercised reasonably*.

This article is divided into three chapters, and it shall discuss the implications of the European Union, and US legal framework towards the development of India's existing legal understanding. The ***first*** chapter shall give a broad overview of India's patent law framework and its interaction with the Competition Act, 2002. Patent Law promotes innovation by granting exclusive rights over the patents, whereas, the Competition Act aims to prevent the abuse of dominance by a firm. The ***second*** chapter discusses the 'unfair pricing' of SEP patents and its interaction with the Competition Act. The ***third*** chapter analyses the anti-competitive concerns arising from patent bundling such as bundling of SEP with non-SEP patents. The article discusses the Indian and foreign position regarding 'unfair pricing' and 'bundling'. This is followed by the conclusion and recommendation.

[3] **Caner K. Çeşit and Ulya Zeynep Tan**, *New Footprints in the Framework of SEPs and FRAND Terms*, LEXOLOGY (May, 2022), https://www.lexology.com/library/detail.aspx?g=9ee80432-20d3-4628-9a1d-868c9910c2ce.

[4] Geeta, *Standard Essential Patents (SEPs) and FRAND Licensing,* MONDAQ (May 11, 2020), https://www.mondaq.com/india/patent/930032/standard-essential-patents-seps-and-frand-licensing.

II. PATENT PROTECTION & COMPETITION LAW- FRIENDS OR FOES?

A. Patents Law & Anti-Competitive Agreements

Under Patent Law, exclusive rights over the patented product are granted to the patentholder. ***Section 48*** of the Patents Act provides that the patentholder gets exclusive right over the patented product/process, and can prevent third parties from dealing with such patented product without his/her consent.[5] ***Section 53*** provides that these exclusive rights are granted for twenty years. The aim of granting exclusive rights over the patented product is to promote innovation, as exclusive rights enable the patentee to economically or otherwise exploit the patent. The patent granting process involves mandatory disclosure of information regarding such a patented product/process. ***Section 47*** provides that any patented product or process or its information can be utilized by 'any person' for 'research or experiment' or for 'imparting of instructions'.[6] Nevertheless, 'Exclusive rights' over patented product/process are often considered as in conflict with the Competition Law regime, where the latter aims to further competition within the market.[7]

The preamble of the Competition Act, 2002 describes that the statute aims to 'promote competition' within the market, and to prevent such practices that have 'adverse effect on competition'. In *Competition Commission of India v. SAIL,*[8] the Hon'ble Supreme Court said that promoting economic efficiency, directing the market towards consumer preferences and perfect competition are the guiding principles of Competition Law. Section 3 of the Competition Act prohibits any firm(s) or association of persons from entering into any agreement with regards to production, distribution, storage, etc. of goods and services '*which causes or is likely to cause an appreciable adverse effect on competition within India*'.[9] 'Appreciable adverse effect on Competition' is determined through factors mentioned under Section 19(3), such as creation of barriers for new entrants, consumer benefits, elimination of existing competitors, or

[5] Patents Act, 1970, § 48, No. 39, Acts of Parliament, 1970 (India).
[6] Patents Act, 1970, § 47, No. 39, Acts of Parliament, 1970 (India).
[7] Yogesh Pai & Nitesh Daryanani, *Patents and Competition Law in India: CCI's reductionist approach in evaluating competitive harm*, 5 J. ANTITRUST ENFORC., 299-327 (2017).
[8] Competition Commission of India v. SAIL, (2010) 10 SCC 744.
[9] Competition Act, 2002, § 3, No. 12, Acts of Parliament, 2002 (India).

promotion of technical or scientific standards, etc. Section 3(2) provides that any agreement that contravenes Section 3 shall be void.[10] However, Section 3(5) provides that Section 3 of the Competition Act shall not restrain any firm or person from imposing 'reasonable conditions' that are necessary to protect such rights granted to him under various mentioned statutes, including the Patents Act, 1970.[11] Thus, a patent holder can impose 'reasonable conditions' to protect his rights under the Patents Act. In *FICCI Multiplex Association v. United Producers/Distributors Forum,* the Court held that intellectual property statutes do not have an 'absolute overriding effect' on competition law. [12] The *non-obstante* clause in Section 3(5) is not absolute, and it only permits the IP rights holder to impose reasonable conditions to protect such rights. Thus, the Competition Commission of India ("CCI") clarified that Competition Law concerns shall not arise only when '*reasonable conditions*' are imposed by the IP rightsholder.[13]

In *Shamsher Kataria v. Honda Siel,* the car manufacturers restricted the Original Equipment Manufacturers (OEMs) from selling their proprietary car parts without their permission. Car manufacturers claimed that this was a reasonable restriction to prevent IP infringement of their proprietary car parts. The Court laid down two factors to determine whether the protection under Section 3(5) is available or not –

a) Whether this right in its true sense aim to protect intellectual property rights?

b) Whether the requirement of the Patents Act has been satisfied?[14]

The Court held that the exemption under Section 3(5) of the Competition Act could not be invoked *firstly*, on particular facts of the case.[15] Secondly, it was held that the restriction was not a reasonable condition under Section 3(5). Therefore, competitive law concerns under Section 3 of the Competition Act shall not arise when the patentholder has imposed 'reasonable conditions' for protection of rights associated with such patent.

B. Patents Law & Dominant Firms under Competition Law

[10] Competition Act, 2002, § 3(4), No. 12, Acts of Parliament, 2002 (India).
[11] Competition Act, 2002, § 3(5), No. 12, Acts of Parliament, 2002 (India).
[12] FICCI v. United Producers, 2011 SCC OnLine CCI 33.
[13] *Id.* at para 23.30.
[14] Shamsher Kataria v. Honda Siel, Case No. 03/2011.
[15] OEM had failed to submit documentary proofs establishing the grant of Patent Protection.

Section 4 of the Competition Act prohibits any firm from abusing its dominant position. Explanation to Section 4(2) defines 'dominant position' as a position of strength within the 'relevant market' that enables the firm to operate independently within the market, and to affect its competitors in its favor.[16] Section 19(5) provides that the relevant market is determined after considering the 'relevant geographic market' and 'relevant product market', which are given under Sections 19(6) and 19(7) of the Act. Section 4 of the Competition Act shall be violated if a firm abuses its dominant position. Unlike Section 3, there is no requirement to show '*appreciable adverse effect of the competition*'. Thus, if any of the acts mentioned under Section 4(2) are performed by a dominant enterprise then it shall be presumed as an 'abuse of dominant position' and hence, anti-competitive.[17]

However, such distinctions between Section 3 and Section 4 are often blurred by the Courts. In the *Department of Agriculture (MoA&FW) v. Mahyco Monsanto Biotech Ltd (MMBL),* competition law concerns arose from the license of BT Cotton technology by MMBL.[18] The Court found that MMBL was dominant in the relevant market area and its actions were found contravening Section 4 of the Act.[19] The MMBL's licensing clause was also analyzed under Section 3 to evaluate whether it falls as an "anti-competitive agreement". Section 2(d) of the Act defines an Agreement as an arrangement or understanding or an action 'in concert'.[20] Since MMBL is a dominant entity, it solely determined the licensing terms and conditions. This unilateral determination of terms and conditions by MMBL cannot be called as an act 'in concert', and hence it should not be considered under Section 3 of the Act. Nonetheless, the CCI analysed Monsanto's licensing actions under Section 3 and found it in violation by holding that it has caused an appreciable adverse effect on competition. Additionally, the contract termination conditions were found excessively harsh and unreasonable. The court held that this anticompetitive agreement which imposed excessive and unreasonable conditions would not enjoy the protection granted to the patentholder under Section 3(5) of the Competition Act.[21]

The ratio in MMBL contradicts the position adopted across several common law jurisdictions. Section 3(1) of the Competition Act is based on Article 101(1) of the Treaty on Functioning of the European

[16] Explanation to Section 4(2), Competition Act.
[17] Pai & Daryanani, *supra* note 7.
[18] Department of Agriculture (MoA&FW) v. Mahyco Monsanto Biotech Ltd*,* Case 02/2015.
[19] *Id.* at para 40.
[20] Competition Act, 2002, § 2(b), No. 12, Acts of Parliament, 2002 (India).
[21] *supra* note 18, at para 45.

Union (TFEU).[22] Under TFEU, 'agreement' has been defined as any understanding or arrangement or action in concert. This was interpreted in *Bayer AG/Adalat*[23] where Bayer reduced its supplies to its wholesalers in other countries, intending to reduce price competition within the UK. The Court held that an 'agreement' with regards to Article 101 (earlier Article 85) would not arise if the contractual decision is unilaterally taken by one party and it has been acknowledged by the other party.[24] This position has been accepted by the US Supreme Court in *Monsanto v. SprayRite Services,* where the Court held that concerted action requires a 'conscious commitment towards a common scheme'.[25] Thus, relying upon this reasoning, an action through indifference or unwilling compliance should not raise competition law concerns under Section 3 of India's Competition Act. However, CCI has often blurred such distinctions between Sections 3 and 4, and this distinction is not limited to Section 3(5). For instance, in *Builders Association of India v. Cement Manufacturers' Assn.,*[26] the Court said that Section 3 considers the effect of anti-competitive agreements on 'markets' in India, and 'market' for Section 3 is different from the 'relevant market' determination under Section 4.[27] However, in *Sonam Sharma v. Apple,* the CCI relied upon a lack of 'market power' and dominance of Apple Inc. within the 'relevant market' to claim that no appreciable adverse effect on competition resulted from Apple Inc.'s actions.[28]

Interestingly, Section 4 of the Competition Act lacks a provision parallel to Section 3(5) for creating exceptions under Section 4 for protection of rights under the Patents Act. In *Shamsher Kataria v. Honda Siel,*[29] the Court concluded that the protection of IP rights under Section 3(5) cannot be sought when a claim has been made under Section 4 regarding abuse of dominance. The Court held that when a company has abused its dominant position to deny market access to the consumers in the relevant market, then it cannot be claimed that such abuse of dominance is a lawful exercise of rights granted

[22] C326/88, Consolidated Version, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF

[23] *Bayer AG/Adalat,* [1996] OJ L201/1 <https://curia.europa.eu/juris/document/document.jsf?docid=48819&doclang=en>.

[24] *Bayer AG/Adalat,* [1996] OJ L201/1 <https://curia.europa.eu/juris/document/document.jsf?docid=48819&doclang=en>.

[25] Monsanto v. SprayRite Services, 465 U.S. 752 (1984).

[26] Builders Association of India v. Cement Manufacturers' Assn., Case 20/2010.

[27] Divyansh Prasad, *The Quandary of Market Delineation under Section 3 of the Competition Act,* INDIACORPLAW (Sept. 27, 2018) https://indiacorplaw.in/2018/09/quandary-market-delineation-section-3-competition-act.html.

[28] Sonam Sharma v. Apple, Vodafone Essar and Bharti Airtel, Case 24/2011.

[29] Shamsher Kataria v. Honda Siel, Case No. 03/2011.

under the intellectual property law.[30] Subsequently, this position was approved by the Appellate Tribunal in *Toyota Kirloskar v. CCI.*[31] However, such literal interpretation leads to absurd conclusions as the impact of IP Rights should remain the same irrespective of the nature of the anti-competitive action performed (i.e. whether such claim is raised under Section 3 or 4 or under both).[32] This means that even reasonable conditions imposed in the lawful exercise of patent rights by a dominant firm, if covered under any of the definitions mentioned under Section 4(2), would be an anti-competitive action.

The Delhi High Court in *Ericsson v. Competition Commission of India* held that '*Competition Act and Patent Act are special acts operating in their respective field*'.[33] Section 62 of the Competition Act provides that the statute is in addition to, and not in derogation to the provisions of any other law for time being in force.[34] Thus, courts have clearly denied any conflict between the Patent Act (which grants certain rights) and the Competition Act (which prevents abuse of rights).[35] However, in reality, the existing position opens a floodgate of claims where Section 4 of the Competition Act can be misused to deny the rights under the Patent Act or vice versa. SEPs grant 'exclusive rights' with regards to licensing of such SEP patents. This interaction of these statutes becomes crucial as a license from SEP holder is mandatorily required to comply with the SEP Standards.

Moving on, in the past few years, SEP holders have misused their patent rights through various ways such as the threat of injunctions (abuse of injunctive relief by patentholder to license patent at unreasonable terms), patent ambush (when the relevant patent is not disclosed during the standard-setting process), royalty stacking or bundling (when SEPs are offered only through the license of various other patents), misappropriation of information or discriminatory pricing through non-disclosure agreements, etc.[36] In the next section, the Article shall discuss 'Unfair Pricing' as a strategy used by SEP holders to misuse their patent rights, and its analysis with regards to Section 4 of the Competition Act.

[30] *Id.* at 157.
[31] Toyota Kirloskar v. CCI, Competition Appellate Tribunal (Appeal 60/2014).
[32] Pai & Daryanani, *supra* note 7.
[33] Telefonaktiebolaget LM Ericsson (PUBL) v. Competition Commission of India, 2016 SCC OnLine Del 1951.
[34] *Id.* at 152.
[35] *Id.* at 180.
[36] Neha Goyal, *Anti-Competitive Repercussions of the Standard Setting Process*, 3(I) J. INTELLECT. PROP. RIGHTS 67-77.

III. MISUSE OF SEPS- SEPS, UNFAIR PRICING & COMPETITION ACT

Section 4(1) of the Competition Act prohibits any dominant firm from abusing its dominant position. Section 4(2)(a) provides that abuse of dominance would arise if a firm imposes 'discriminatory or unfair condition' or 'unfair price' on the sale/purchase of goods or services. Article 102(2)(a) of the TFEU imposes a similar prohibition on the imposition of unfair purchase or selling prices. The CCI in *HT Media Ltd. v. Super Cassettes Industries Ltd.*[37] agreed that determining a reasonable price for a product is an 'uncertain and difficult task'. The Court illustrated this as a song recording might be expensive but its music might fail to attract listeners. Nevertheless, the Courts have attempted to determine when a price would be unreasonable. In *United Brands v. Commission of the European Communities*[38] the Court held that a price would be excessive if it has no reasonable nexus with the 'economic value' of the product or service supplied. This reasoning was subsequently adopted by the CCI in *Dept. of Agriculture (MoA&FW) v. Mahyco Monsanto Biotech Ltd (MMBL)*[39] where MMBL was found dominant in the relevant market. The amount recovered by MMBL was much higher than the expenses it had incurred on developing and offering the technology. Therefore, CCI held that MMBL abused its dominant position by charging unfair prices as royalty charges.

In *Verizon Communications v. Law Offices of Curtis Trinko,*[40] the Court held that charging high/ monopoly prices for a short period requires 'business acumen', and such risk-taking promotes economic growth and innovation. However, in *Hilti AG v. Commission of European Communities,* the Court held that when patentholder charges unreasonable royalty with the intention to unreasonably delay or refuse the grant of a license, then such action would be an abuse of dominance.[41] In *Broadcom Corporation v. Qualcomm Incorporated*[42] Qualcomm's actions were challenged as anti-competitive. Broadcom alleged that Qualcomm failed to adhere to the FRAND licensing terms and abused its SEP patents. The Court held that when patented technology is recognized as a SEP then it eliminates alternatives to the patented

[37] HT Media Ltd. v. Super Cassettes Industries Ltd., Case 40/2011.
[38] *United Brands Company and United Brands Continental BV v Commission of the European Communities*, Case 27/76, European Court Reports 1978 -00207.
[39] Department of Agriculture (MoA&FW) v. Mahyco Monsanto Biotech Ltd, Case 02/2015.
[40] Verizon Communications v. Law Offices of Curtis Trinko, 540 U.S. 398.
[41] Hilti AG v. Commission of European Communities, [1991] ECR II-1439.
[42] Broadcom Corporation v. Qualcomm Incorporated, 501 F.3d 297 (3rd. Cir. 2007).

technology. The Court recognized that even if patent law does not necessarily confer market power to the patentholder, if a patent is recognized as SEP, then the value of such patent increases significantly. In such a situation, if the SEP holder is allowed to exercise unrestricted 'exclusive rights' over the patented product, then such power can be misused to charge 'supra-competitive prices. Thus, the obligations upon SEP holder are higher than any other patentholder, as denial of licensing by SEP holder can cause appreciable adverse effects on competition.

In *Telefonaktiebolaget LM Ericsson (PUBL) v. Competition Commission of India*[43] mobile manufacturers argued that Ericsson demanded exorbitant royalty rates for licensing of its SEPs. Moreover, royalty rates were decided on the value of the final product sold instead of the value of the component involved. Mobile manufacturers claimed it as unfair as the final price of the product depends upon various other features, which have no relation with the patented technology offered by Ericsson. They claimed that Ericsson abused its 'dominant position' as SEP Holder, and violated FRAND Terms. The Court held that '*it is indisputable that as an SEP Holder, Ericsson is in a position of dominance*', and retains greater bargaining power in relation to its licensees, who have no option but to adopt the standard by licensing technology from Ericsson.[44] SEP holder can misuse his power to prevent market participants from implementing such technology. To prevent such misuse, SEP holders are required to adhere to FRAND licensing terms under which the patent must be licensed on '*fair, reasonable and non-discriminatory terms.'* Rule 6 of ETSI (a European Standard Setting Organization, of which Ericsson is a member) imposes a similar obligation upon SEP holder to issue licenses on FRAND terms.[45] Refusal to license by a SEP holder may have an adverse effect on competition. The Court found Ericsson dominant in the determined relevant market of GSM technologies and held that it had charged unfair prices and its conduct violated FRAND terms. Thus, CCI certainly adopted a more objective test by requiring compliance with the FRAND Licensing terms.

In the *Ericsson SEP case,* the mobile manufacturers claimed that royalty should be based upon profit margin of the sale price of the patented chipset.[46] Ericsson argued that its royalty rate on the patent was calculated from factors such as 'a percentage of sale priced earned is demanded as royalty', where the

[43] Telefonaktiebolaget LM Ericsson (PUBL) v. Competition Commission of India, 2016 SCC OnLine Del 1951.
[44] *Id.* at 191.
[45] Rule 6, Annex 6: ETSI Intellectual property Rights Policy (14 April 2021) < https://www.etsi.org/images/files/IPR/etsi-ipr-policy.pdf>.
[46] Telefonaktiebolaget LM Ericsson (PUBL) v. Intex Technologies, 2015 SCC OnLine Del 8229, 73.

percentage of royalty depends upon the contribution of the patented technology in the product, and such royalty rate is revised as per the ongoing market conditions.[47] However, disregarding these factors, the CCI concluded that the royalty rate charged by Ericsson had 'no linkage to the patented product', and found Ericsson acting contrary to FRAND terms by imposing royalties linked with the final price paid by the user.[48] The Court held that charging two different prices for the same patented technology was discriminatory.

In such cases, CCI has diluted the 'exclusive rights' of the patentholder to prevent third parties from using, making, selling, etc. of patented products or technology as granted under Section 48 of the Patent Act. Determining the price for the patent is an inherent right involved in making, selling, using, etc. of the patented product/process. If this right is misused, then compulsory license under Section 84(7) can be sought, such as on '*refusal by the patentee to grant license on reasonable terms*', etc.[49] A plain reading would indicate that the remedy of compulsory licensing can be sought against SEP holders on misuse of patent rights. However, Delhi High Court earlier held that remedies against abuse of dominance under Section 27 of the Competition Act are materially different from remedies available under Section 84 of the Patents Act.[50] Moreover, the Court would often err in determining 'reasonable price' for patents, as each patent fee aims to cover the cost incurred along with the risk involved in the patenting process.[51]

As the concept developed, in *CSIRO v. CISCO Systems*[52] the District Court of Texas laid down two relevant considerations for determining applicable royalty rates. *Firstly*, patented technology should be separated from the rest of the unpatented features. *Secondly*, royalty must be calculated on the value of the patented feature (and not by the value addition through such technology becoming a SEP). In *LaserDynamics v. Quanta Computer Inc.,*[53] the Court held that royalty calculation should be made on Smallest Saleable Patent Pricing Unit (SSPPU), and not on the value of the entire product. The Court further said that it is an 'important evidentiary principle' that 'care must be taken to avoid misleading

[47] Telefonaktiebolaget LM Ericsson (PUBL) v. Intex Technologies, 2015 SCC OnLine Del 8229, 81.
[48] Micromax v. Ericsson, Case 50/2013, 17.
[49] Patents Act, 1970, § 84(7)(a), No. 39, Acts of Parliament, 1970 (India).
[50] Telefonaktiebolaget LM Ericsson (PUBL) v. Competition Commission of India, 2016 SCC OnLine Del 1951, 168.
[51] Jorge Padila & David Evans, *Excessive Prices: Using Economics to Define Administrative Legal Rules* , 1 J. COMPET. LAW ECON. (2005).
[52] Fed. Cir. Dec. 3, 2015.
[53] LaserDynamics v. Quanta Computer Inc., 694 F.3d 51 (Fed. Cir. 2012), 66.

the jury by placing undue emphasis on the value of the entire product'.[54] Thus, royalty value should be based on the value addition in the product by the patented technology. Moreover, the royalty rates should not be hiked merely because such technology is adopted as SEP.[55]

A narrow exception to the SSPPU rule is the 'entire market value' rule, under which the patent's royalty rate can be calculated on the product's entire market value if it is proved that the patented technology derives demand for the end product. The Courts have also relaxed the SSPPU rule for patents based on comparable licenses, where royalty rate is determined taking into account the formal/informal negotiations between the parties. Under this model, the rates of comparable licenses are adjusted along with the 'differences in the technologies and economic circumstances of the contracting parties, as the royalty rates are determined relying upon the market valuation of the patent.[56] Merely because the royalty is expressed in terms of percentage of total revenue rather than in terms of SSPPU, it is not sufficient ground for invalidation.[57] This legal position was adopted by the Delhi High Court in *Koninklijke Philips Electronics v. Rajesh Bansal,*[58] while dealing with a SEP patent violation dispute. In this case, the defendant failed to convince the Court that the royalty charged by the defendant violated FRAND terms. The Court accepted the 'informal negotiations between the parties with regards to the end product', and recognized it as a generally accepted principle for ascertaining royalty.[59] The royalty rate, as informally negotiated by the parties, adhered with the FRAND licensing terms and hence, it was accepted by the Court. Thus, the existing Indian legal position for determining 'unfair pricing' for patents is laid down under the *Ericsson* and *Koninklijke Philips Electronics* judgment, which stands in line with the adopted international legal position. In the next section, the article focuses on the misuse of SEPs through Patent Bundling.

IV. MISUSE OF SEPS- SEPS, BUNDLING & COMPETITION ACT

[54] *Id.* at 67.
[55] Commonwealth Scientific and Industrial Research Organization (CSIRO) v. CISCO Systems, Inc., Fed. Cir. Dec.3 (2015).
[56] Finjan, Inc. v. Secure Computing Corp., 626 F.3d 1197, 1211-12
[57] *CSIRO v. CISCO*, Fed. Cir. Dec.3 (2015).
[58] Koninklijke Philips Electronics v. Rajesh Bansal, 2018 SCC OnLine Del 9793.
[59] *Id.* at 56.

Section 3(4)(a) of the Competition Act prohibits 'tie-in arrangements' under which the purchaser is mandatorily required to purchase other goods as a condition for such initial purchase. If such a vertical 'tie-in arrangement' causes appreciable adverse effects on competition, then it shall be anti-competitive. Section 4 of the Competition Act prohibits a dominant firm from abusing its position to impose such supplementary obligations which have 'no connection with the subject matter of such contract'. In *Ericsson v. Intex*[60] Ericsson claimed that Intex had violated 8 SEP patents held by Ericsson. Intex agreed to pay royalty rate as per FRAND terms with regards to those specific 8 SEP patents. However, Ericsson refused to provide specific royalty rates with regards to 8 SEP and instead, offered its entire bouquet of approx. 33,000 patents. Mobile manufacturers claimed that Ericsson was compelling them to acquire an entire bundle of patents held by Ericsson, which they claimed amounted to 'bundling and tying' prohibited under the Competition Act.

European Committee for Standardization's Principle 4 of '*Core Principles and Approaches for Licensing of Standard Essential Patents'* provides that within the Patent Portfolio offered by SEP holder, the parties can identify the specific patents which they intend to get licensed.[61] If the licensee is unwilling to obtain a license for certain patents, the burden of proof shall be upon the SEP holder to show that such violation would result in SEP patent infringement, for which royalty must be paid on FRAND terms.[62] The CCI has acknowledged patent bundling by SEP holder *prima-facie* amounts to abuse of dominance and contravenes Section 4 of the Competition Act. In *Best IT World (iBall) v. Ericsson*[63] iBall claimed that Ericsson refused to identify the specific 8 SEP patents which it claimed were violated. Instead, Ericsson abused its dominance to make iBall enter into a 'Global Patent Licensing Agreement' under which all the patents held by Ericsson were bundled along with the SEP patents. The CCI held that Ericsson violated FRAND licensing terms, and its acts *prima-facie* amounted to an abuse of dominance.

Patents have been seen as individual products. Instances of patent bundling where the patent license is not granted unless a license for another patent is also obtained is viewed with skepticism by

[60] Ericsson v. Competition Commission of India, 2016 SCC OnLine Del 1951, 19.09.
[61] CEN Workshop Agreement, Core Principles and Approaches for Licensing of Standard Essential Patents, CWA 9500:2019(E) (June 2019) <https://2020.standict.eu/sites/default/files/CWA95000.pdf>.
[62] Niharika Sanadhya, *Paving the 'FRAND' way ahead for SEP Licensing*, MONDAQ (Feb. 20, 2019) https://www.mondaq.com/india/patent/782480/paving-the-frand39-way-ahead-for-sep-licensing#_ftnref3.
[63] Best IT World (iBall) v. Ericsson, CCI Case No. 04/2015, 4.

courts.[64] Moving ahead from the reasoning adopted in *Best IT World (iBall) case,* the Courts have applied even stricter standards while dealing with patent bundling of SEP patents. In *Motorola – Enforcement of GPRS Standard Essential Patent,*[65] Motorola sought royalty payment for certain SEPs used by iPhone 4S which Apple may not be infringing. Further, Apple was prohibited from challenging such infringement. The European Commission relied upon *Der Grune Punkt (DSD) case,*[66] and held that if a dominant entity seeks royalty payment for such patent which is not used by the licensee, then it shall be an abuse of dominance. The Court held that Motorola was claiming potentially undue royalties from Apple,[67] and such a situation would result in abuse of dominance.

With regards to patent bundling, another branch of scholars promotes bundling as it can prove effective when multiple licenses are required to use a product.[68] The US Supreme Court in *Jefferson Parish Hosp. v. Hyde.* Held that merely because the purchaser is 'forced' to buy a product in bundle (which he would not have brought otherwise), does not necessarily cause an adverse effect on competition.[69] By combining SEP patents with non-SEP patents, licensees would avoid the cost of identifying the potentially infringing patents and shall be protected from any possible infringement in case they overlooked any patent during individual purchasing.[70] To determine whether tying or bundling of SEP with Non-SEP is anti-competitive, three factors are considered. *Firstly*, the market power of the SEP holder. Courts do not assume market power merely because the patent held by such entity is declared as a SEP. *Secondly,* whether bundling of SEP with non-SEP patents has caused (or would likely cause) foreclosure in the tied market.[71] *Thirdly,* to determine whether tying and bundling have resulted in procompetitive effects. If SEP holder has market power, and bundling has caused foreclosure in the

[64] CEN Workshop Agreement, *Core Principles and Approaches for Licensing of Standard Essential Patents*, CWA 9500:2019(E) p.36 Heading 5.4 (June 2019) https://2020.standict.eu/sites/default/files/CWA95000.pdf.
[65] Case At. 39985 - *Motorola – Enforcement of GPRS Standard Essential Patent,* C.R. (EC) 1/2003 European Commission https://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf .
[66] Case T-151/01Der Grüne Punkt - Duales System Deutschland v Commission [2007] ECR II-1607, 119-164.
[67] Para 386, Case At. 39985 - *Motorola – Enforcement of GPRS Standard Essential Patent,* C.R. (EC) 1/2003 European Commission https://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf .
[68] Alden F. Abott & Joshua Wright, *Antitrust Analysis of Tying Arrangement and Exclusive Dealing* 7 George Mason University Law and Economics Research Paper Series Paper No. 08/37 (2008).
[69] Jefferson Parish Hosp. v. Hyde*.,* 466 U.S. 2 (1984).
[70] Koren Wong, Evan Hicks & Ariel Slonim, *Tying and Bundling involving Standard-Essential Patents,* George Mason Law Review 2018, p. 1107 .
[71] *Id.* at 1111.

tied patent market, competition law concerns shall not arise if they are overpowered by the pro-competitive effects of tying and bundling.

The need to develop a comprehensive test for the determination of unfair 'patent bundling' through SEP becomes crucial, as *prima facie* the SEP status of a patent with regards to a standard is often unilaterally determined by the patentholder. The European Commission has acknowledged that out of all patents identified as SEPs, only between 10 to 50 percent of patents are actually 'essential' (and the rest are not SEPs).[72] SEP holder cannot be allowed to force the licensee to necessarily accept a patent bundle. Moreover, the SEP holder cannot be permitted to shift the burden of proof upon the licensee to show that such patent is not applicable.[73] An SEP holder's decision to offer his patents in the bundle would be anti-competitive if this is an attempt to exploit market power conferred by the inclusion of his patents into the standard. SEP holders may abuse their market power to include non-essential, or poor-quality patents in the patent bundle to increase bundle size to increase the licensing cost. The U.S. Supreme Court has said that patent challenges should be made in 'public interest' to save the public from paying royalties for such ideas which are not patentable, or for which no justification exists.[74] Thus, the underlying idea is that patent licensing is not mandatorily required merely because the patentholder claims such patent to be a SEP.[75] In *Google/Motorola Mobility,* the European Commission held SEP holder cannot require the licensee to grant the license to non-SEP patents as a condition for grant of SEP patents.[76] The Court held that such conditions would have 'direct negative effect on consumers' and would raise several anti-competitive concerns.[77]

In 2017, UK High Court gave its landmark decision on bundling of SEP patents with non-SEP patents in *Unwired Planet v. Huawei.*[78] Huawei claimed that a dominant entity cannot tie or bundle its products with some other products or services (that do not fall in the same market). Huawei claimed

[72] European Commission, *Setting out the EU approach to the Standard Essential Patents*, COM(2017) 712 final, Citation 19 (29 November 2017).
[73] CEN Workshop Agreement, *Core Principles and Approaches for Licensing of Standard Essential Patents*, CWA 9500:2019(E) p.36 Heading 5.4 (June 2019) https://2020.standict.eu/sites/default/files/CWA95000.pdf.
[74] Lear Inc. v. Adkins*,* 395 U.S. 653, 670 (1969). Also see, Blonder-Tongue Labs v. Unvt. Of Illinois Foundation*,* 402 U.S. 313, 349-50 (1971).
[75] *supra* note 73.
[76] European Commission, *Google/Motorola Mobility,* Case No. COMP/M.6381 < http://ec.europa.eu/competition/mergers/cases/decisions/m6381_20120213_20310_2277480_EN.pdf>.
[77] *Id.* at 107.
[78] Unwired Planet v. Huawei [2017] EWHC 711 (Pat).

that Unwired Planet was only offering no choice but to accept its worldwide license. Huawei relied upon the four-factor test on tying and bundling laid down in *Microsoft Corp v. Commission of the European Communities.*[79] These four factors are –

- "*the tying and tied products should be two separate products;*
- *the firm should be a dominant entity in the market for 'tying product';*
- *the firm does not allow its consumers to obtain a tying product without obtaining the tied product;*
- *tying and bundling should have foreclosed competition*."

Huawei claimed that Unwired Planet failed to show that bundling of SEP with non-SEP patents resulted in market distortion.[80] Huawei argued that on a claim regarding SEP violation, the alleged violator must be informed about the specific SEP violation, and to determine whether the patent is valid and infringed or not.[81]

The Court recognized that bundling of SEP with non-SEP patents can be misused to eliminate competition. In the specific facts of the case, the Court assumed that Unwired Planet was a dominant entity. The Court held that anti-competitive concerns arise if the SEP holder insists on licensing its SEPs only through a bundle of patents.[82] The mere fact that the SEP holder has offered a bundle of SEP and non-SEP patents does not raise anti-competitive concerns. The Court said that the determination of anti-competitive conduct would depend upon the particular facts and circumstances. In that case, Unwired Planet was willing to separate SEPs from non-SEP patents, which was subsequently separated when such demand was raised by Huawei.[83] This does not indicate abuse of market power to perform anti-competitive conduct.[84] The series of SEP abuse cases involving Ericsson shows that India's nascent jurisprudence on tying and bundling of SEPs is moving towards the reasoning adopted in *Unwired Planet judgment.*[85] It can be argued that CCI had adopted a similar reasoning

[79] Microsoft Corp v. Commission of the European Communities, [2007] ECR II-3619 para 842-861.
[80] Unwired Planet v. Huawei, [2017] EWHC 711 (Pat) 527.
[81] *Id.* at 556.
[82] *Id.* at 787.
[83] Bharadhwaj, Devaiah & Gupta, *Multi-dimensional approaches towards new technology,* Springer Open (2018) p. 119.
[84] *Id.* at 790.
[85] The reasoning regarding tying and bundling of SEP and non-SEP patents was settled in the High Court decision, and it was not raised before the UK's Supreme Court on the same issue. Unwired Planet v. Huawei [2020] UKSC 37.

and had held that patent bundling of SEP patents by Ericsson was anti-competitive and in violation of Section 4 of the Competition Act, 2002.[86]

[86] Para 14, *Best IT World (iBall) v. Ericsson,* CCI Case No. 04/2015 (12 May 2015) https://www.cci.gov.in/sites/default/files/042015_0.pdf.

V. CONCLUSION- INDIA'S RESPONSIVE APPROACH, STILL CLARITY REQUIRED

The series of cases alleging abuse of dominance and violation of FRAND terms by Ericsson has clarified India's legal position regarding Standard Essential Patents. In 2013, CCI held that Ericsson's royalty based upon the final sale price of mobile phones (which permitted Ericsson to charge different royalty depending upon the price of mobile phones) was outrightly anti-competitive. Subsequently, Delhi High Court in *Ericsson v. CCI* broadened its approach and relied upon the antitrust framework adopted across various other jurisdictions (such as the United States, United Kingdom, and China).[87] Thus, Delhi High Court's approach towards FRAND and SEP licensing indicates that the Indian judiciary had adopted a responsive approach towards emerging trends across various jurisdictions.

This article analyzed how the Indian Courts have often blurred the distinction between Section 3 and 4 of the Competition Act. Section 4 of the Competition Act imposes an additional burden upon the 'dominant entity' to not indulge in the acts mentioned under Section 4(2), which would otherwise be presumed as an abuse of dominance. Similarly, while Section 3(5) of the Competition Act permits patentholder to impose reasonable conditions in the exercise of rights granted under the Patent Act, such provision is missing under Section 4's framework. A patent's value increases significantly if it is identified as an SEP, and often SEP holders indulge in anti-competitive practices to misuse their market power.

The Indian Courts have laid down two factors to determine the 'reasonable royalty rate' for SEP patent. ***Firstly***, the patented technology should be valued independently, disregarding other features. In *LaserDynamics v. Quanta Computer Inc,* the US Court said that patent value should be calculated based on Smallest Saleable Patent Pricing Unit (SSPPU), and not on the value of the entire product.[88] However, the Courts have developed certain exceptions to SSPPU principle. ***Secondly,*** patent royalty should be calculated based on the value-added by the patented technology. The value of the patent should not be artificially hiked merely because such technology is accepted as a SEP. In 2018, Delhi High Court in

[87] J. Gregory Sidak, *FRAND in India: The Delhi High Court's emerging jurisprudence on royalties for Standard-Essential Patents*, 10(8) J. INTELLECT. PROP. RIGHTS 618 (2015).
[88] LaserDynamics v. Quanta Computer Inc., 694 F.3d 51 (Fed. Cir. 2012) 66.

Koninklijke Philips Electronics v. Rajesh Bansal relied upon these factors to determine FRAND royalty for DVD Video Player Patents, and this puts the standard adopted by the Indian jurisdiction at par with the developed jurisdictions such as UK and USA.[89] This is a welcome introduction that furthers the Indian law towards the international standards and maintains a positive check on the unfair pricing in SEP patents.

However, the Indian Courts have still not encountered a full-fledged dispute on patent bundling. These concerns were raised before CCI by mobile manufacturers and were discussed in passing by the Delhi High Court.[90] Mobile manufacturers asked Ericsson to provide details regarding the 8 infringed SEPs, however, Ericsson insisted on offering its bundle of 33,000 patents. CCI found this as anti-competitive. In 2018, the UK High Court settled the legal position regarding SEP patents bundling in the *Unwired Planet judgment.* The Court recognized that bundling of SEP and non-SEP patents can be misused to eliminate competition, especially when the dominant entity insists on only offering SEP patents only as a bundle. The Court recognized anti-competitive repercussions when SEP patent is denied by abusing unreasonable conditions, including when non-SEP patents are imposed upon an unwilling licensee as a necessary condition for the license to SEP patent. This is another positive standard that must be incorporated in the Indian context either through legislative intervention or appropriate caselaw.

The interaction of the Competition Act and the Patent Act in the context of patent bundling issues raise certain legal issues that require urgent attention. Section 3(4)(a) of the Competition Act prohibits such 'tie-in arrangements' that cause 'appreciable adverse effect on competition'. Similarly, Section 4 prohibits abuse of dominance by forcing the other party to accept supplementary obligations that have 'no connection with the subject matter of such contract'. These provisions sufficiently deal with the patent bundling issues. Moreover, Section 61 disempowers the civil courts from entertaining any matter arising under the abovementioned provisions. However, patent bundling is also prohibited under Section 140 of the Patents Act, under which a suit can be filed before civil courts. Section 140 provides that it shall be unlawful to license a patent on a condition that the licensee shall acquire 'any article other than patented article', regarding which a suit can be filed before a civil court as per the

[89] Koninklijke Philips Electronics v. Rajesh Bansal, 2018 SCC OnLine Del 9793.
[90] Ericsson v. Intex Technologies (India) Ltd., 2015 SCC OnLine Del 8229 para 132.

provisions of the Patent Act.[91] This apparent conflict is marginally settled by Section 62 of the Competition Act, which provides that provisions of the Competition Act are 'in addition to, and not in derogation of' any other law in force for the time being. However, needless to say, such conflicts must be settled by court to give additional clarity on the issue.

The interplay between Sections 3(4)(a) and 4(2)(a) of the Competition Act serves as a critical safeguard against anti-competitive practices related to patent bundling, especially concerning Standard Essential Patents (SEPs).

To ensure a competitive marketplace and prevent unfair patent bundling, a comprehensive test must be applied, considering the legitimacy of SEP licensing arrangements. Regulatory authorities and courts need to exercise stricter scrutiny to prevent SEP holders from misusing their market power to stifle competition and innovation.

Recent cases, such as *Unwired Planet v. Huawei* and *Ericsson v. Intex*, demonstrate how courts assess the anti-competitive nature of patent bundling practices based on these sections. As jurisprudence evolves, regulatory authorities and courts should continue applying these sections effectively to uphold fair competition and protect consumer interests in the dynamic technology and intellectual property landscape.

In conclusion, a balanced approach to SEP licensing, guided by the interplay of Sections 3(4)(a) and 4(2)(a) of the Competition Act, is vital to foster fair competition and safeguard consumer welfare.

[91] Aayush Sharma, *Prevention is Better than Cure – Avoidance of Section 140 of the Patents Act*, MONDAQ (Nov. 30, 2015) https://www.mondaq.com/india/patent/447644/prevention-is-better-than-cure-avoidance-of-s140-of-the-patents-act.

ARTICLE

ECOCIDE IN INTERNATIONAL ARMED CONFLICTS: ASSESSING INDIA'S POSITION AND PROCEDURAL CHALLENGES IN ADDRESSING OIL SPILLS

*Shivesh Saini & Bhawna Mangla**

ABSTRACT

The 2006 oil spill incident originating from the Jiyyeh plant in Lebanon had a severe impact on the species of fish and loggerhead turtles inhabiting the Mediterranean Sea. Approximately 35,000 tons of oil were released into the sea, leading to significant environmental devastation and detrimental effects on regional economies. What sets this incident apart from the notorious Mexican oil spill and the Exxon Valdez accident is its origin in an International Armed Conflict. International Environmental Law extensively addresses civil liability concerning oil spills through numerous treaties and conventions. However, there exists a relative scarcity of provisions dealing with the imposition of criminal liability for such spills. This article aims to evaluate these actions within the framework of International Humanitarian and Criminal Law, taking into account the regulations established in UNCLOS, the Stockholm Declaration, and the Rio Declaration of 1992. Emphasizing the distinctiveness of the Maritime laws in armed conflict situations, as opposed to the emerging field of Ecocide, the article focuses primarily on procedural aspects. It explores how the establishment of effective mens rea (intent) is crucial in establishing liability under the Rome Statute. Due to the absence of pre-war environmental regulations, the imposition of liability during armed conflicts becomes challenging. Therefore, the article suggests the need for other specialized branches of law to collaborate with environmental regulations in addressing acts of oil spills and related activities during armed conflicts. The article examines the approach of developing countries like India, assessing their reservations in adhering to international law and their current policies regarding the crime of ecocide. By delving into India's stance, it aims to shed light on the reasons behind these reservations and provide insights into the broader implications of the crime of ecocide. It underscores the necessity of incorporating multiple legal frameworks to effectively address the liability associated with such incidents while addressing the perspectives of developing countries like India.

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I. INTRODUCTION

In July 2006, as a result of military action by Israel on the Jiyyeh power utility in Lebanon, the oil spill from the Jiyyeh plant spread along about 150 kilometres of Lebanon's coastline and up to Syria. The destruction on Lebanon's Mediterranean Coastline took place in between continuing hostilities, and the clean-up was delayed by several weeks until Israel gave permission for a crew to begin, as the conditions were not safe to work. Unfortunately, given the nature of the spill, delays in clean-ups resulted in irreparable damage. Therefore, the paper is particularly concerned with deconstructing the length and breadth of this dynamic relationship between oil, water, environment, and armed conflict. What makes this incident distinct from any other case of oil spill is the fact that this was the result of a military action of Israel, that was well directed at the oil tankers. Various eminent scholars argued that this particular incident goes unpunished in the absence of any well-concrete legal remedy. However, it shall be remembered that there exists a well elaborative procedural and substantive legal provision that could act upon the issue effectively. Judicial bodies such as the International Criminal Court and other treaty bodies are the relevant legal forums in which the states could address wartime ocean destruction. The need of the hour is not just to impose civil liability over the concerned acts, but to constitute the well elaborative criminal obligation under International criminal and Humanitarian law, particularly when these acts are the results of armed conflict.

Explaining the presence of a well elaborative criminal obligation of the acts that are the results of an armed conflict, a policy paper on case selection and prioritization was presented by the prosecutor of the ICC back in 2016. This policy paper addressed the long-standing issue of environmental protection under the regime of International law.[1] The policy paper gave rise to a new enthusiasm, prompting the outlets to declare that the wilful environmental attacks would not go scot-free. However, such enthusiasm was not long-lasting, considering the limited and confined jurisdiction of the ICC. The only reference to the environment appears in Article 8 (2)(iv) of the Rome statute, which criminalizes the wilful attack directed at the environment.[2] Yet, these

[1] Kai Ambos, *Office of the Prosecutor: Policy Paper on Case Selection and Prioritisation (Int'l Crim. Ct.)*, 57 International Legal Materials 1131–1145 (2018).
[2] Rome Statute of the International Criminal Court, art. 8(2)(iv) July 17, 1998, 2187 U.N.T.S. 90; 37 I.L.M. 1002 (1998).

provisions could still collaborate and provide an effective mechanism to the provisions laid down in the Rio Declaration of 1993[3] and the Stockholm Declaration of 1972.[4]

The first step in the said direction was taken in the unofficial events that were running parallel to the Stockholm Conference, particularly in the Folkets Forum. In the concerned event, a working group of experts was constituted that supported the convention on Ecocidal warfare that was held in Stockholm, Sweden.[5] Unfortunately, to date, the crime of Ecocide and oil Spill has not been legally defined and drafted. However, there exists a plethora of precedents and article in International Criminal and Humanitarian law, that has the potential to constitute criminal liability for environmental destruction. To constitute such liability effectively, it is essential to ensure that there exists a complementarity between these branches of International Law. This parallelism and co-existence have been acknowledged by ICJ in its verdict of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* wherein the court identified this complementarity as a 'duality of responsibility'.[6] The same principle was recognized in the Rome Statute, where it is explicitly stated that no provision of the statute shall affect the liability of states in International law. This understanding of International law would assist the experts in understanding the intrinsic value of the environmental heritage and will ultimately offer a way out of the linear and anthropocentric approach.

This paper further delves into the Indian perspective on Ecocide, exploring the mechanisms governing it. This discussion holds significance considering the presence of diverse indigenous communities and the historical impact of discriminatory legislation rooted in colonial ideologies. These laws favoured the exploitation of natural resources, which had a detrimental effect on communities like the forest communities that relied on them. In the modern era, Judicial Activism plays a crucial role in establishing and comprehending precedents in environmental jurisprudence, a trend also observed in India. Recognizing the need to reform the exploitative colonial rules, India has developed laws, policies, and precedents over time, with contributions from policymakers, legislators, and armed officers. The paper investigates the proactive role of the military in addressing various forms of armed conflicts, both domestic and international, as well as natural

[3] Rio Declaration on Environment and Development, June 13, 1992, 31 ILM 874 (1992).
[4] Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, 2256 U.N.T.S. 119; 40 I.L.M. 532 (2001).
[5] Björk, Tord, *The emergence of popular participation in world politics: United Nations Conference on Human Environment*, DEPARTMENT OF POLITICAL SCIENCE, UNIVERSITY OF STOCKHOLM, http://www.folkrorelser.org/johannesburg/stockholm72.pdf
[6] Application of the Convention on Prevention and Punishment of Crime of Genocide Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 173 (Feb. 26).

disasters through operations and it seeks to emphasize how approaches in these sensitive and ecologically vulnerable areas can align more closely with international law.

II. ACTS OF OIL SPILL AND INTERNATIONAL LAW

These oil leaks put at danger several listed or endangered species, including marine turtles, migratory birds, and seals. It was estimated that a significant portion of the oil seeps into the underlying porous rock. The spill generally contains a carcinogenic substance of the kind which causes the fish population to collapse. These incidents also result in air pollution due to the oil which evaporates, thereby creating a hazardous spray with long-term repercussions thereby, destroying the environment.

As aforementioned, the policy papers that were issued in 2013 and 2016 were directed toward the notions of environmental damage and its illegal and wilful destruction.[7] The policy was being formulated as there exist several authorities within the International law regime that forbids the destruction caused by oil tumble in oceans whether wilfully or negligently. Several Maritime laws address these damages such as The Convention on the Prohibition of Military or Other Hostile Use of Environmental Modification Techniques.[8] In addition, the UNCLOS regulations impose liability on flag states in case the loss or damage is extended to the territories of another state due to non-compliance with International law.[9] Explicit provisions of UNCLOS, such as Article 194,[10] mandate the high contracting parties to avoid discarding their radioactive waste in oceans, whereas Article 145 necessitates that the state parties shall take appropriate measures for the protection of the Maritime environment from pollutants.[11] It could be justifiably argued that this *Sui utere* principle shall be part of customary International Law too, as it fulfils the required threshold that was laid down in Article 38 (1) of the ICJ charter. The generation of Customary law mainly rests on two fundamentals which are State practice and *Opinio Juris*.[12] For constituting state practise as a source of international law, recourse could be made to the multilateral treaties that were ratified

[7] *Supra* note 1.
[8] Convention on the prohibition of military or any other hostile use of environmental modification techniques, 18th May, 1977, 1108 U.N.T.S. 151 (Hereinafter, ENMOD Convention).
[9] UN Convention on the Law of the Sea, Part XII, Art. 236, Dec. 10, 1982, 1833 U.N.T.S. 3. Art 31.
[10] *Id.* Art 194.
[11] Convention on the Law of the Sea, Art. 145.
[12] Charter of the United Nations and Statute of the International Court of Justice, art. 38, ¶ 1, June 26, 1945.

by a substantial number of states. One such treaty is the Stockholm Declaration of 1972 which emphasizes in its Principle 21 that the activities controlled by the states shall not cause the destruction of an environment or resources of another state.[13] Here, much emphasis shall be placed on the fact that it was ratified by nearly 113 state parties. Therefore, because of the declaratory status of UNCLOS and the Stockholm Declaration, the legally binding obligations could be imposed on the states, as the treaty concluded between parties can lead to the extension of its principles beyond the signatory states. This may lead to the formulation of a new rule as was done in many instances before.

In addition to state practice, several other judicial precedents or *stare decisis* also exist on which the scholars have put their reliance, to establish and codify the principle as Customary International Law. Prominent Jurists such as Mr. John Bassets Moore were once noted down in *SS. Lotus* case of 1927 that it shall be the duty of the state to offer due diligence or to refrain from committing criminal acts within its domain to protect the interest of other states and its netizens.[14] The verdict was later re-affirmed by ICJ in the *Corfu Channel* where the court imposed the liability on Albania for violating the 'well-recognized principles' including the 'responsibility to not allow the use of its territory in contradiction with rights of others'.[15] Having these standards applied set forth in the cases of oil spills would mean that the deliberate attacks on the oil reserves of the state or even of its own shall amount to a violation of Customary International Law.

(A) Constituting the Criminal Liability

The emergence of International Criminal Law in environmental law is a modern-day innovation, owning to the novel emerging forms of armed conflicts over the period. However, it is important to acknowledge that the aspect of International Criminal Law pertaining to the environment lacks a thorough clarification of what is presently considered punishable under environmental law.

It shall be accompanied and interpreted in light of International Humanitarian and Criminal law. The majority of the humanitarian law clauses made negligible or no reference to the environment. However, it is argued that these provisions, which primarily focus on private property or the civilian population, are considered to offer an equivalent level of protection for environmental resources. For instance, Art. 23 of the Hague Convention, 1929 illustrates that it is forbidden to

[13] Stockholm Declaration of the United Nations Conference on the Human Environment, adopted 16 June 1972, U.N. Doc.A/Conf.48/14.
[14] SS 'Lotus' (France v. Turkey) (Judgment) 1927 PCIJ (ser A) No 10, 44 (Sept 7) pp. 28,60,96-97.
[15] Corfu Channel Case (United Kingdom v. Albania) 15 XII 49, International Court of Justice (ICJ), (Dec 15).

destroy the enemy's property unless it is demanded by the necessity of war.[16] However, Article 35 of Additional Protocol I explicitly deals with the environment while stating that it is prohibited to employ those means of warfare that could cause long-term and widespread damage to the natural environment.[17] Article 55 of the protocol also prohibits such attacks but the obligation here is more concerned with the protection of the civilian population.[18] The additional principles of Humanitarian Law that constitute humanity and distinction will continue to apply in selecting the target of attack in armed conflict. Therefore, it has been argued that these provisions are effective in limiting the destruction, provided, they should be effectively implemented. However, the implementation alone is ineffective unless it is assisted by the well-laid procedural rules and redressal body. It is paramount to ensure the combination of all these elements to prevent insuperable damage to environmental resources.

To provide the administrative and procedural backing to these provisions with more efficiency, International Law Commission considered the inclusion of similar provisions within the draft Code of Crimes against Peace and Mankind.[19] Eventually, the concerned document became the Rome Statute of today which has been ratified by nearly 121 high contracting parties. The statute primarily contains only four core crimes which are Genocide, Crime against humanity, Acts of Aggression, and War crimes under which the liability can be constituted subjected to the satisfaction of required elements.

The initial stage for the proceedings is the confirmation of Charges, in a pre-trial chamber under the relevant articles. The gravity threshold has to be satisfied in which it has to be determined at hand whether the subject matter constitutes sufficient gravity. Given that the attack on oil spills directly affects the environment, the liability would be constituted under Article 8.2 (b) (iv).[20] The article delivers the criminalization of deliberate attacks on the environment. This article is the only recourse in the whole Rome statute that provides the ecocentrism or biocentric approach. It means that accountability could be imposed regardless of its impact on human civilization, as the

[16] Geneva Convention Relative to the Treatment of Prisoners of War, art. 23, Aug. 12, 1949 6 U.S.T. 3316; 75 U.N.T.S. 135.
[17] Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 35, June 8, 1977, 1125 U.N.T.S. 3.
[18] Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 55, June 8, 1977, 1125 U.N.T.S. 3.
[19] Draft Code of Offences Against the Peace and Security of Mankind until 1987; see: General Assembly resolution 42/151 of 7 December 1987.
[20] Rome Statute of the International Criminal Court, art. 8(2)(iv), July 17, 1998, 2187 U.N.T.S. 90; 37 I.L.M. 1002 (1998).

environment is considered for its intrinsic value in particular. However, the article mandates that the attack shall be widespread, long-term, and severe. The most authoritative interpretation of these elements could be found in the ILC commentary on draft codes of Crimes against Peace and Mankind. The ILC specified that the term 'long-term' shall be interpreted in the light of its aftereffects on the environment rather than on its existence.[21] The committee on Disarmament on the contrary interpreted the term in the terms of a time period, to mean the period of months or years. The other expression of 'Widespread attack' has been interpreted by the ICTR in the *Akayesu* case. The attack to be widespread has to be large, and massive and shall follow a continuous pattern with a definite plan.[22] The effect shall be spread over the major or different geographical areas. Applying these interpretations to the deliberate attacks on oil spills would render us favourable results. The armed forces of Iraq and Israel are accredited with nearly the spills of 4,000,000 US barrels and 35,000 tons respectively. It was estimated that the Iraqi oil spill covered nearly 604 Kms of offshore[23] whereas the Israeli oil tumble affected nearly 150 km of the coastline of Lebanon and Syria.[24] The UNEP declared that the time for clean-up was 'pretty unprecedented' given its size and volume. Thus, it could be concluded that both of these attacks satisfy the elements of crimes against aggression enshrined in Article 8.2(b) (iv)[25].

The supplementary method to confer the liability is Article 6 of the Rome Statute illustrates in detail the required elements of Genocide.[26] The age-old connection between the concept of Genocide and Ecocide as a crime is evident as the elements of ecocide were being prepared on the grounds of Genocide only. The term 'Ecocide' became recognized from Stockholm Declaration itself when the Swedish Prime Minister expressed her views regarding the Vietnam war and referred to it as an Ecocide.[27] Therefore, all these discussions regarding the criminalization of these acts of destruction are imperative to realise and fulfil the resolutions of the Stockholm Declaration. The ILC also considered the inclusion of Ecocide in the Code of Crimes Against the Peace and

[21] Int'l Law Comm'n, Rep. on the Work of Its Forty-Third Session, U.N. Doc. A/46/10, at 97 (1991).
[22] The Prosecutor v. Jean-Paul Akayesu (Appeal Judgment), ICTR-96-4-A, International Criminal Tribunal for Rwanda (ICTR), (June 1).
[23] William Booth, *War's oil spill still sullies gulf shore*, THE WASHINGTON POST, https://www.washingtonpost.com/archive/politics/1991/04/08/wars-oil-spill-still-sullies-gulf-shore/baf87829-69fa-48dd-a5ab-73e28fadc92a/
[24] United Nations Environment *Programme, The Crisis in Lebanon: Environmental Impact*, http://www.unep.org/lebanon/.
[25] *Supra* note 19.
[26] Rome Statute of the International Criminal Court, art. 6, July 17, 1998, 2187 U.N.T.S. 90; 37 I.L.M. 1002 (1998).
[27] *Supra* note 5.

Security of Mankind (present- Rome statute).[28] However, the efforts were not enough to codify the principles into well-organized law. Regardless the liability still could be conferred in the same manner under article 6 as it would be. Article 6 sought to criminalise those intentional acts in question which inversely affect the normal 'condition of life for the purpose of 'physical destruction of a group'.[29] These acts could include the worsening of health conditions caused due to the degradation of the environment. The reference here can be best made to those indigenous communities who often are most browbeaten by these acts. The prosecutor of the ICC even charged President Mr. Bashir for deliberately attacking the various ethnic groups to bring their physical destruction in part.[30] Similarly, the Nuremberg trial of 1945 saw the trial of individuals that were for directing the environmental damage. Mr. Alfred Jodl was held liable by the court provided he implemented the scorched earth policy to escape the Russian army as the environment was severely impacted.[31] In furtherance, The United Nations War Crime Commission in *Polish forestry case no.7150* convicted ten German administrators for cutting down Polish timber.[32] The threshold that has been set in this landmark precedent by competent tribunals is comparatively much below the destruction caused by these spills. These provisions are not yet exploited by any competent tribunal still, they can act as the best authority for environmental protection. The Israeli attacks led to a shortage of Regular supply of water in 60% of towns in South Lebanon.[33] The aggression destroyed the maritime economy of the region causing most of them to flee. Those who were dependent on the tourism industry were forced to quit the sector as major destinations are on the coastline. Therefore, the acts in question are well competent in ultimately affecting the 'normal life conditions' of the people living in coastal areas causing nearly 30,000-50,000 to displace. Regardless of these provisions, the threshold of the elements of these provisions is comparatively higher due to the principles of 'Military Necessity' and 'Proportionality'. Additionally, these two provisions in specific require proving the genocidal intent causing the scholars to favour the liability under Crimes Against Humanity (Article 7).[34] However, all these

[28] Draft Code of Offences Against the Peace and Security of Mankind until 1987; see: General Assembly resolution 42/151 of 7 December 1987.
[29] *Supra* Note 26.
[30] Situation in Darfur, The Sudan, Summary of Prosecution's Application under Article 58, (ICC-02/05- 152, 14 July 2008), para. 1.
[31] Trial of Alfred Jodl (1948) Trial of the Major War Criminals before The International Military Tribunal "Blue Series" Vol XXII , 570-57.
[32] Tara Weinstein, *Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?*, 17 GEORGET. ENVIRON. LAW REV. 704, (2005).
[33] (United States Agency for International Development) (2006) Lebanon Humanitarian Emergency Situation Report. 30. 29 August. USAID, Beirut.
[34] Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187 U.N.T.S. 90; 37 I.L.M. 1002 (1998).

provisions are subjected to the satisfaction of *mens rea's* requirement that has to be rewarded irrespective of provisions. The whole structure of the Rome statute is centred around the subjective and procedural element of 'intent'. It is the most disputed and uncertain part of the statute considering its scope has not been defined yet. This default provision becomes problematic in deciding the required scope of crime which has not been codified yet including an attack on oil reservoirs or ecocide as a whole.

(B) Fulfilling the *mens rea* Requirement

Article 30 of the Rome Statute acts as a default and general rule for all the wrongs that would be committed. Regardless of its implication, the provision has not yet been adequately defined in a phased manner. Vivid discussions are going on within ICC itself regarding its definite scope. However, scholars generally advocated for the broader *mens rea* threshold for the new incipient forms of crime.

The present status of Article 30 provides a comprehensive definition of 'intent' and 'Knowledge' as *mens rea* elements.[35] Presently, it incorporates 3 elements of *mens rea* – (a) *Dolus Directus* of 1st Degree (b) *Dolus Directus* of 2nd Degree, and (c) *Dolus Eventualis*. However, the scholars are pretty uncertain regarding the inclusion of *Dolus Eventualis* within the domain of Article 30.[36] This implied that the perpetrator could be held accountable provided he committed the act of destruction of oil tankers with the required intention or knowledge given. The word 'intent' here denotes two distinct connotations altogether depending on whether he wanted to be involved in mere conduct or consequences of the act. As per Article 30(2), the person has an intent relative to consequences if (a) he wants that consequence to occur or (b) is aware that the said consequence will occur in the ordinary course.[37] Therefore, the two distinct degrees have been assigned by the statute, that is, *Dolus Directus* of 1st degree and *Dolus Directus* of 2nd degree. These categories are further divided by the level of existence of volitional (desire) and cognitive (awareness) elements.[38] The volition element denotes that the accused must know that he will accomplish the desired consequence and has the desired intention whereas, the cognitive element merely denotes the awareness that the desired consequence might be achieved. The *Dolus Directus* (1st degree) denotes a higher gradation

[35] Rome Statute of the International Criminal Court, art. 30, July 17, 1998, 2187 U.N.T.S. 90; 37 I.L.M. 1002 (1998).
[36] S. Finnin, '*Mental Elements under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis*', 61 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY (2012) 2, 325, 349.
[37] Rome Statute of the International Criminal Court, art. 30(2), July 17, 1998, 2187 U.N.T.S. 90; 37 I.L.M. 1002 (1998).
[38] William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute,* (OUP 2010) 475.

of intent or volition element where the wilfulness of a higher level is required on the part of the perpetrator and mere foreseeability will not constitute the liability.[39] The *Dolus Directus* (2nd Degree) represents the second level of intent where the perpetrator has an oblique determination to bring the consequences of an act.[40] It has been held by the PTC in the case of *Prosecutor vs. Lubanga* that the accused might not have the actual intent but was hitherto aware that such would be the consequences of his action.[41] This interpretation denotes that the volition element is comparatively lower in *Dolus Directus* of 2nd Degree. Thus, it was held in the *Bemba case* that to constitute liability in the 2nd degree, the prosecution would be required to prove that the accused without having the actual intent, was aware that this would be the consequences of his actions.[42]

When applied to the armed attacks aimed at destroying basins, the crime would be said to be constituted under *Dolus Directus* (1st Degree) when the perpetrator is well - aware that his bombing would cause large-scale and widespread damage to the ocean for long period. In regards to the second degree, the liability would occur if the perpetrator destroys the reservoir, while not wanting to damage the ocean in fact destroys the reservoir leaving its adverse effects. Hence, even the mere presence of 'knowledge' here is sufficient as opposed to the *Dolus Directus* of 1st Degrees. Therefore, the best alternative for imposing the liability for Ecocide Acts would be under the 2nd Degree of Dolus Directus as usually, environmental destruction is not the aggressor's primary determination. These acts would of course include the low Volitional element as compared and hence is suitable to be held legally responsible under 2nd degree of Intention.

The additional mode of proving the 'knowledge' more effectively is under the third gradation of Article 30 that is, *Dolus Eventualis* or Recklessness. As aforesaid mentioned, there exists uncertainty regarding its existence in Article 30. Reckless or *Dolus Eventualis* was part of the early negotiation process in the preparatory committee report. Though, it did not find its place in subsequent Rome statutes without any formal declaration of its elimination leaving behind speculations.[43] Recklessness has a low volitional component required by the continuative use of 'intention' and 'knowledge'. For this reason, it has been held by PTC-I in both *Lubanga*[44] and *Bemba cases* that it

[39] Badar, *M.E. The Mental Element In The Rome Statute Of The International Criminal Court: A Commentary From A Comparative Criminal Law Perspective. Crim Law Forum* 19, 473–518 (2008).
[40] *Id.*
[41] Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v. Thomas Lubanga Dyilo , ICC-01/04-01/06, International Criminal Court (ICC), (Mar 14). P 351.
[42] Prosecutor v. Bemba Gombo (Confirmation Decision) ICC-01/05-01/08, PT Ch II (15 June 2009) para 359 (Bemba Confirmation).
[43] D. K. Pigaroff & D. Robinson, in Triffterer & Ambos (eds), Art 30, P.3.
[44] *Supra* note 41 Lubanga Confirmation Case. Fn 438.

does form part of Article 30.[45] However, there were instances where even the Dolus Eventualis or Recklessness managed to be included within the wording of 'will occur in ordinary series of events. This interpretation was implicitly approved by ICTY in later cases of *Delalic*[46] and *Blaskic*[47]. The third gradation denotes the presence of 'knowledge' rather than intent which implies that the person has 'knowledge' that certain consequences will occur 'in the ordinary course' of events.[48] The finest possible explanation of *Dolus Eventualis* as the third category has been given by ICTY in the *Blaskic case* where the perpetrator was held liable for planning and committing war crimes. The appeal chamber held that the mere awareness or likelihood of the consequence is sufficient to hold the perpetrator accountable.[49] This particular precedent is appropriate to hold the preparator liable under the third gradation given that the threshold of intention has been reduced to much extent. Since Article 30 has to be broadened considering the strict standards of intent, the inclusion of fewer standards would only lead to the prosecution of crimes that earlier would go unpunished. The inclusion of Recklessness would mean that the liability could be conferred on the armed attacks by considering the consequences of the act i.e., oil spill without going into the question of intention.

Applying the standards in Ecocide as other associated attacks, the accused would be liable even if the exact minutiae of the target is not known to the preparator. It is sufficient that the accused is aware of the consequence of his act or omission. This threshold of *mens rea* with less stern requirements would assist the prosecution in proving the existence of the outcome. These laws and customs, if relaxed, could allow the court to enumerate acts on the basis of these laws, customs, and precedents. In simpler terms, even if the provisions go beyond the scope or interpretation of the Rome statute could still presumably be part in accordance with Article 21 of the statute.[50] Article 21(2) illustrates that the reference could be made to customary International Law and Multilateral treaties. This relevant provision should be used to execute the environmental protection regulations applicable in armed conflict. The article even used the term 'armed conflict'

[45] *Supra* note 42 Bemba case. P. 360.
[46] Prosecutor v. Zdravko (Trial Judgement), IT-96-21-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 16 November 1998.
[47] Prosecutor v. Tihomir Blaskic (Trial Judgement), IT-95-14-T, International Criminal Tribunal for the former Yugoslavia (ICTY), (3 March 2000).
[48] *Supra* note 39.
[49] Prosecutor v. Blaskic, Case No. IT-95-14-A, Appeals Judgment, ¶ 42 (Int'l Crim. Trib. for the Former Yugoslavia (July 29, 2004).
[50] Rome Statute of the International Criminal Court, art. 21, July 17, 1998, 2187 U.N.T.S. 90; 37 I.L.M. 1002.

signifying its explicit domain over the battlefield, particularly with respect to environmental protection.[51]

Currently, under the framework of international criminal law, apart from the environmental war crime specified in Article 8(2)(b)(iv) of the Rome Statute, environmental damage is not pursued as a crime in itself. Instead, it is considered a means of committing other crimes such as genocide, crimes against humanity, or war crimes. To address this gap, there have been calls for the establishment of ecocide as a separate international crime within the jurisdiction of the International Criminal Court (ICC).

(C) Internationalisation of Crime of Ecocide

The core idea of ecocide would involve criminalizing serious environmental damage caused intentionally, recklessly, or negligently. The goal would be to hold those primarily responsible for such damage criminally accountable, with the aim of deterring similar behaviour in the future. The concept of criminalizing environmental damage is not new, but within the realm of international criminal law, the appropriateness of responding to pure environmental damage (without direct or immediate adverse impacts on the human population) through criminal sanctions is questionable. The International Law Commission has recognized the need for heavy penalties for severe environmental damage. However, criminal law may not provide the most suitable means for addressing harm caused to the environment, as its sanctions mainly focus on punishing the individual perpetrator through imprisonment. In the case of a damaged environment, the priority should arguably be on repairing the damage, which cannot be achieved solely through international criminal law.

When it comes to defining ecocide as a crime, the International Law Commission, in its Draft Code on State Responsibility, equates "serious acts of environmental degradation" with crimes such as aggression, slavery, genocide, and apartheid.[52] However, due to competing interests and varying standards of environmental integrity worldwide, it has been challenging to determine the precise limits of ecocide. Some definitions heavily rely on the right to a healthy environment, a concept that is still evolving in international human rights law.[53] Alternatively, a more useful definition could be based on the existing limitations of environmental harm in the war crimes

[51] Rome Statute of the International Criminal Court, art. 21(2), July 17, 1998, 2187 U.N.T.S. 90; 37 I.L.M. 1002.
[52] L. Berat, *'Defending the Right to a Healthy Environment: Toward a Crime of Geocide in International Law'*, 11 B.U. Int'l L.J. 334 (1993).
[53] *Id.*

provisions of international criminal law. While the requirements of "long-term, widespread, and severe" harm may be too high of a threshold to effectively prevent environmental damage during wartime, they may be a suitable standard for judging the magnitude of environmental damage that constitutes ecocide. Widespread, long-term, and severe damage caused recklessly could potentially be recognized as an international crime by the international community.

The value of establishing a single crime specifically addressing environmental damage is evident. International criminal law could provide a means to hold individuals criminally liable for extensive environmental damage,[54] potentially overcoming the political or corporate shields that have hindered accountability in the past. However, it is not immediately clear whether the crime of ecocide would be successful. At its core, it may be argued that international criminal law lacks the appropriate mechanisms for providing the types of remedies required to address environmental damage. This is an important consideration for future discussions on the subject. At present the remedy in Rome statute could be taken through other provisions such as Article 75 of the Rome Statute that can be used by the prosecution to claim the appropriate reparations with respect to the victims of the armed conflict. Similarly, restitution and compensation can also be made through the court's Trust for Victims.[55] The TVF is a non-judicial institution that seeks to compensate the victims by collecting and attaching the resources from the accused. If the landmark precedents concerning environmental degradation have been favourably decided, this might open new opportunities for the assistance of victims. Such measures are in conformation with the ICC's reparation principles and procedures that would allow these sorts of compensatory measures to victims.

The prospect of universal jurisdiction for environmental crimes is foreseeable, with a focus on international or supranational legal authority. The criteria for universal jurisdiction would resemble those that render certain actions internationally criminal: their impact on the global community that could necessitate each state's involvement in their repression, regardless of where or by whom they are committed. Suggestions have been made to treat certain environmental offenses on the High Seas as a contemporary form of piracy. In this context, universal jurisdiction could encompass offenses committed within state jurisdictions, as the concept of territory becomes increasingly dismantled by the global environment. Presently, litigation in the realm of international

[54] Berat Lynn, *Defending the Right to a Healthy Environment: Toward a Crime of Geocide in International Law*, 11 B.U. INT'L L. J. 327 (1993).
[55] Rome Statute of the International Criminal Court, art. 75, July 17, 1998, 2187 U.N.T.S. 90; 37 I.L.M. 1002 (1998).

human rights argues that victims located far away from polluters can legitimately sue states across borders for global environmental harm.[56] The case for universal jurisdiction is particularly compelling for environmental crimes compared to other traditionally justifiable crimes. While a single act of torture committed in one location may have limited impact on a state and population thousands of miles away, the consequences of severe environmental damage in one country can significantly and tangibly affect other nations. Therefore, exercising universal jurisdiction in such instances would combine protective jurisdiction and a functional division of responsibilities among states.

Despite the transformation of the Code of Crimes Against the Peace and Security of Mankind into the less morphed Rome Statute, some nations have incorporated draft Crimes Against Peace, including ecocide, into their own national penal codes thereby advancing the internationalization of environmental crime. Vietnam, influenced by the repercussions of the lengthy Vietnam War, became the first country[57] to criminalize ecocide in its domestic legislation, followed by Russia in 1996 after the dissolution of the USSR in 1991.[58] While ecocide was no longer under consideration at the United Nations, certain states chose to adopt the crime by including all the draft Crimes Against Peace in their national penal codes, indicating a growing global trend against ecocide. However, the Indian approach to ecocide remains uncertain and inconsistent. Despite having various environmental laws, India, as a major global power, is not a member of the International Criminal Court (ICC), making it challenging to effectively and sustainably enforce a prohibition on ecocide at the global level. Therefore, it would not be wrong to point out that India in some sense opposing the idea that domestic criminalization leads to a "general principle of law recognized by civilized nations" that could bind the international community to recognise it as a custom that act as a source of Law.

III. INDIAN PERSPECTIVE ON ECOCIDE

[56] J.T. Roberts, *Globalizing Environmental Justice*, in ENVIRONMENTAL JUSTICE AND ENVIRONMENTALISM: THE SOCIAL JUSTICE CHALLENGE TO THE ENVIRONMENTAL MOVEMENT 285-307 (Ronald D. Sandler & Phaedra C. Pezzullo eds., 2007).

[57] Giovanni Chiarini, *Ecocide: From the Vietnam War to International Criminal Jurisdiction? Procedural Issues In-Between Environmental Science, Climate Change, and Law*, CORK ONLINE LAW REVIEW, SSRN, https://ssrn.com/abstract=4072727.

[58] G.E. Okwezuzu, Revivification of Legal Efforts to Criminalize Ecocide in International Law: Emerging Trend, (2015-2016) NATIONAL LAW SCHOOL JOURNAL, Vol. 13, National Law School of India University (NLSIU), Bangalore.

As discussed, Ecocide consists of a wide array of crimes in the International Domain. However, it's still an under-utilized subject that is capable of evolving its jurisprudence. Scholars have argued that this narrower definition of the UN does a great disserve to the indigenous population who were not necessarily killed or persecuted but were forced in such a way to alter or adjust to the modern living of today.[59] The fact that the focus of humanitarian efforts becomes almost entirely on the well-being of individual humans rather than with concern for the natural world that sustains them is one of the main drawbacks of the human rights approach to responding to genocidal violence. This certainly becomes more important in the Indian context considering the wide array of indigenous communities and its colonial history of discriminating forest legislations which was backed by the then-modern ideology which disregarded the forest as a sacred order. Colonist legislations such as the Forest Act of 1878 and 1927 were precisely passed to cater for the demands of timber (earlier for ships and later for railway construction).[60] These regulations were tools to expand the idea of western imperialism and industrial capitalism by making the forest an object of exploitation, commodity and merchandise. The various agricultural techniques were used to familiarize the masses with the form of crops and animal husbandry which irretrievably alter the living style of those communities.[61] The Madras Forest Act of 1882 that followed the forest Act of 1878 was another effort to suppress the community-based ownership of forests at the cost of the imperialistic interest of the colonial regime.[62]

Now, the question arose that whether the situation has changed in independent and sovereign India after a history of constant alterations and colonial oppression. The Answer to this question is quite intricate and complex. Judicial activism has shown its intent and there exist various precedents of ecological conservation. Though, no legislation has been passed by the legislation that expressly identifies the crime of 'ecocide'. India in aftermath of certain cases introduced well-descriptive legislation (such as Air Act, Water Act and Environmental Protection Act) along with criminal provisions for offenders. However, the situation again taking its turn under the current

[59] Jacques Pouchepadass, *Colonialism and Environment in India : Comparative perspective*, 30, ECW. 2059, 2061 (1995).
[60] Ramachandra Guha, *An Early Environmental Debate: The Making of the 1878 Forest Act*, Vol 27 INDIAN ECONOMIC AND SOCIAL HISTORY REVIEW, (1990).
[61] *Supra* note 59, at 2061.
[62] *Supra* note 60.

Modi regime that plans to decriminalize environmental violations with mere higher penalties.[63] India in COP 27 pushed for the demand of climate funds along with holding its fossil fuel reserves at the same time when the main theme of the event was climate financing and green bonds.[64] These policy changes are implicit signals of changing priorities of New Delhi to prioritise the needs of cooperates and other business Interests on the cost of ecological imbalance.

The same fragmented approach has been continued by India in its approach to dealing with the crimes of ecocide in Armed conflict and internal disturbances. The whole of the south Asian conflict-prone area has led to a contrary effect on its natural resources. Indian conflict with Pakistan and China and sporadic aggressions results in adverse repercussions for the whole of the region. The planning and execution of military operations also encompass the natural ecosystem that either affects them positively or negatively. The decades-long conflict has not spared the fragile environment of both Indian-administrated Kashmir and Pakistan-occupied Kashmir for a considerable span.[65] Nearly 120-150 glaciers of the region were affected which further affected the streamflow patterns of the valley.[66] Scholars argued that the forest land in Kashmir has over time suffered large-scale deforestation and soil degradation.[67] The reason was timber smuggling that was allegedly operated by the ground militia named '*lkhwanis'* that were purportedly supported by the forces to counter local insurgency.[68] Similarly, the military excavations and global warming together led to the swift melting of 70 KM long Siachen glacier which ultimately results in the cataphoric effects of floods and food shortages. Unfortunately, the joint doctrine policy paper of 2017 by the armed forces only interprets this situation within the context of food shortage and endangering water supply for the armed forces.[69]

Apart from Kashmir, certain areas are witnessing political violence through local insurgent groups. There are constant and growing linkages between the rebellious groups and political violence that

[63] Ministry of Environment, *Environment (Protection) Amendment Rules, 2022*, INDIA ENVIRONMENT PORTAL, http://www.indiaenvironmentportal.org.in/content/472602/environment-protection-amendment-rules-2022/ (last visited Oct 30, 2022).
[64] *Oil and Gas Industry Report*, OIL & GAS INDUSTRY IN INDIA BRAND EQUITY FOUNDATION, https://www.ibef.org/industry/oil-gas-india (last visited Oct 30, 2022).
[65] Nusrat Sidiq, *Environment paying price of conflict in Kashmir,* AA, https://www.aa.com.tr/en/asia-pacific/environment-paying-price-of-conflict-in-kashmir/2413469
[66] *Id.*
[67] Alexander Dulap & Andrea Brook, *Enforcing Ecocide : Power, Policing & Planetary Militarisation* 199 (Palgrave macmillan 2022).
[68] *Id.* At 211.
[69] Dhanasree *Jayaram, Indian Military Recognizes Environment as "Critical" Security Issue, But Response Is Still Fragmented*, NEW SECURITY BEAT, https://www.newsecuritybeat.org/2018/01/indian-military-recognizes-environment-critical-security-issue-response-fragmented/

led to conservative militarisation in the region. The Naxal area of Chhattisgarh has been heavily militarized and the forest area has been cut down for military vehicles.[70] The militarization has a detrimental effect on the Adivasi culture of the concerned region. The Adivasi Man who sought to participate in the local hunting festival '*sarhul*' was shot down by the armed forces merely on suspicion because he carried a gun.[71] These security forces are positioned in some of the most compactly packed forests where even land mapping through satellites is not possible. Therefore, these counterinsurgency operations often led to the clearing down of trees on a large scale and illegal hunting. There are several instances of hunting and during one such drill in 2015, Indian security personnel hunted down the Indian peafowl, a bird of national importance.[72] A similar instance occurred back in 2019 when a leopard was killed.[73] These factors together led to the blockades or dispossession of animal corridors which further adversely affected the lives of indigenous groups.

The role of Indian armed forces has mainly been revered too for their efforts and rescue operations at the time of natural calamities. The government and policymakers have realised the role of environmental damage in the physical alteration of boundaries. Concerning this, the army has taken up certain reformative steps to ensure sustainability and efficiency even in war preparations. The Navy launched its first warship on biofuel to achieve the net zero carbon print.[74] Similarly, the Navy has built its naval base named Karwar to the east of the Suez Canal with efficient water and waste management system.[75] The Ecological task force of Indian armed forces has effectively undertaken the responsibility of environmental-based activities in the insurgency-sensitive area. The ecological restoration of Shivalik hills that were affected by limestone mining was another such instance.[76] The curation of Ganga through the Ganga task force formed from within the ETF led to the spreading of awareness. The security forces involved in the projects of social development gave them a glorified position all around the nation. However, these prominent

[70] *Supra* note 67 at 211.
[71] Vishal Sharma, *Man, out to hunt, shot dead by security forces in Latehar*, THE HINDUSTAN TIMES, https://www.hindustantimes.com/cities/others/man-out-to-hunt-shot-dead-by-security-forces-in-latehar-101623515371168.html
[72] Express News Service, *Three Army jawans hunt down, skin two peacocks for 'feast', probe on*, THE INDIAN EXPRESS, https://indianexpress.com/article/cities/kolkata/three-army-jawans-hunt-down-skin-two-peacocks-for-feast-probe-on/
[73] *Supra* note at 69.
[74] *Id.*
[75] Dhanasree *Jayaram, Indian Military Recognizes Environment as "Critical" Security Issue, But Response Is Still Fragmented*, NEW SECURITY BEAT, https://www.newsecuritybeat.org/2018/01/indian-military-recognizes-environment-critical-security-issue-response-fragmented/
[76] *Id.*

contributions to some extent absorb the undesirable consequences of their actions in politically disturbed areas which are yet to be documented and demand a unified approach.

The approach in these cases, especially in the difficult habitat of politically troubled areas has to be dealt with sensitivity and at the same time, in accordance with international law. The destruction caused due to the development of imperative and basic military infrastructure can be addressed by open communication. The idea was first propagated by the ILC's first rapporteur on International liability for injurious consequences arising out of acts not prohibited by international law.[77] The rapporteur Quentin Baxter believes that the use of soft measures including negotiation and other preventive measures shall be carried out to prevent the potential damage in the most sustainable alternative available.[78] However, the crime of ecocide certainly needs some hard measures too which can be provided by the substantive criminal provisions. These provisions could be backed by the relative theory of punishment wherein there lies the provision of successful punishment of the guilty for setting up effective deterrence. The Intention and knowledge in the context of Indian law and international law could impose the required and compulsory standards of due care for armed forces. The threshold for ascertaining intention and knowledge can be taken from the ICTR precedent in the case of *Prosecutor v. Akayesu* wherein the emphasis was laid on contextual elements.[79] This meant that only the establishment of knowledge is sufficient as opposed to the intention. The last ingredient that has to be satisfied here is proximity. The criteria focus on the elements of duration, time, relationship and frequency of the concerned act.[80] Additionally, the liability could be made even on the awareness of the significant destruction that might be caused and this test of foresightedness is called conditional intent.

The Indian military is advancing towards the advancement to improve its efficiency in a counter-attack. Its efforts for achieving sustainability and its contribution in life menacing natural calamities are often praised. However, it is equally imperative to address the frequent hunting practices by security forces and their adverse consequences on the local population. This contribution becomes further important that could help the forces to align its efforts with the country's environmental commitments. Furthermore, comprehensive legislation shall be incorporated by the parliament for ecocide to fulfil its obligations towards international law. This could be an opportunity for New

[77] Quentin-Baxter, *Third Report on International Liability for Injurious Consequences Arising Out. of Acts Not Prohibited by International Law*, 11 Y.B. Int'l L. Comm'n, pt. 1, para. 20, at 56 (1982).
[78] *Id.*
[79] *Supra* note 22 at 523.
[80] Vanessa S., *The Disposable Nature : The case of ecocide and corporate liability,* 9 Amsterdam Law Forum 71, 90, (2007).

Delhi to incorporate international law as a means to advance its national interest while at the same time fulfilling its commitments towards the global community.

IV. CONCLUSION

The benefits of adding ecocide as a new war crime are obvious given the rising incidents of destruction of the environment in contemporary times. However, it has been demonstrated that current international criminal law under the Rome Statute, Customary International law to an extent and International Humanitarian Law are accomplished enough for the deployment of novel strategies to combat the new emerging forms of Warfare, i.e., oil Spill. However, during NIACs, anthropocentric clauses like those relating to crimes against humanity, genocide, and other war crimes may be applicable. This indirect approach also has the useful advantage of relying on tried and true rules that have served as the foundation for successful trials in international courts in the past. Strict accountability for transnational offshore oil disasters is supported by a number of "customary" international legal sources; nonetheless, the best course of action would be to establish "conventional" international law in this domain. A treaty would formally bind the party States and would make it explicit how culpability, compensation, and enforcement would be determined. In comparison to the current customary international law, a multilateral treaty would be a more effective statement of international law.[81]

Nevertheless, Article 8(2)(b)(iv) establishes stringent conditions that are difficult to meet, the other Rome Statute war and peacetime provisions have a *mens rea* element that is impractical for the commission of environmental crimes, or they are too anthropocentric and hence ignore the complex interrelationships between humans and their surrounding ecosystems. Although Article 8(2)(b)(iv) stipulates that the damage must have all three of the aforementioned qualities (severe, extensive, and long-term) cumulatively, this high bar has been criticised as being overly restrictive and may render the new offence practically irrelevant. While it is vital to restrict prosecution by introducing precise and restricting standards of damage, they should be chosen by carefully weighing various circumstances and effects involving various degrees of injury, geographical scopes, and time impacts.

[81] Gamble, The Treaty/Custom Dichotomy: An Overview, 16 TEx. INT'L L.J. 305, 306 (1981).

Article 30 of the Rome Statute provides a comprehensive definition of 'intent' and 'Knowledge' as *mens rea* elements. There are constant demands to lower the *mens rea* threshold for more effective implementation of current regulations. The paper suggests that *Dolus eventualis* shall be included within the domain of Article 30 at least for ecocide-associated crimes. An observation here suggests that the requirement of recklessness and negligence within *dolus eventualis* would focus on the consequences of an act or omission in addition to measuring the intention of the perpetrator through its action. The close reading of the judgements concerning *dolus eventualis* would lead us to the conclusion that the volitional element here is strong enough to prosecute the perpetrator for its transgressions. The paper concludes that this will be in accordance with the subjective elements enshrined within Article 30 of the Rome Statute and will succeed in balancing the objective criteria and volitional elements together. Further assistance can be taken by the court officials to demonstrate the intent behind the act in question. The witness statement here could help the court to conclude that senior officials were at least aware of the potential risks of their acts. Therefore, the proof of the fact that concerned officials were attentive to the long-term and widespread destruction could be deduced from the fact that the intentional attacks were taken out on the reservoirs despite knowing its potential consequences.

In addition to the *mens rea* requirement of the Rome Statute and the elements of genocide, it is imperative to trace down the nation's approach to the law of ecocide. The Indian approach in terms of its hard power has not been satisfactory yet. No attempt has been made to codify the ecocide legal regulations. Moreover, the reluctance of the Indian administration to ratify the Rome Statute further raises doubt on the Indian approach to international law. The reason for this reluctant policy might be that India is still anxious about the fact that ICC might use its jurisdiction to try the cases pertaining to its internal insurgency. India also opposed the low threshold for the crime against humanity and often argued for the higher threshold, including the addition of armed conflict for crime against humanity fulfilling both the elements of Widespread and systematic instead of widespread or systematic.[82] Correspondingly, India opposed any efforts of the ICC to prosecute the peacekeeping forces of states that are not part of the statute.[83] It stipulates that it will not sustain any outside interference or authority. It even hosted Sudan's President al-Bashir in

[82] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998. Official Records. Vol. 2, Summary Records of the Plenary Meetings and of the Meetings of the Committee of Whole, p. 148.

[83] Security Council Resolution 1422 (2002) [on United Nations peacekeeping], UN SECURITY COUNCIL, 12 July 2002, S/RES/1422 (2002).

2015, discounting any request of the ICC for his arrest.[84] These stances show us India's probable stand on the inclusion of ecocide in the Rome statute and even in its domestic legal regulations.

This stand is not much different from the other Asian countries and other nations from the global south. The stand cannot be said to be entirely wrong since there always exist apprehensions regarding the northern hegemony over international institutions. However, it's still ambiguous as to why these countries are reluctant to include the ecocide laws in their domestic jurisdiction on the lines of other global south republics. The current Indian policy that is diverging from International environmental law shall be met with adequate criticism, and efforts shall be made to at least reconcile its laws in accordance with International law while maintaining its sovereignty.

It is hereby suggested that all conceivable safeguards must be taken, including the addition of an ecocide crime to the Rome Statute, to recognise this shifting cultural climate and, more crucially, to protect the environment. After all, "grave crimes [that] threaten the peace, security, and well-being of the world are what the Rome Statute seeks to punish.[85]

[84] Situation In Darfur, Sudan, Pre-Trial Chamber, Request for the Arrest and Surrender of Omar Hassan Ahmad Al Bashir to the Republic of India, INTERNATIONAL CRIMINAL COURT, ICC-02/05-01/09-252, 26 October 2015.
[85] UN General Assembly, Preamble, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6.

ARTICLE

DOES THE PENDULUM SWING? BEHAVIOURAL ANALYSIS OF FINAL TERM OFFER AND ITS APPLICABILITY IN INDIA

Nehal Tapadia[*]

ABSTRACT

With the increasing number of pending cases within the Indian judicial system, there is a need for a mechanism of dispute resolution that takes away a substantial burden of the court. Against this backdrop, Alternate Dispute Resolution mechanisms came into play, focusing predominantly on Arbitration. It was meant to be a speedy, unbiased, cost-friendly, balanced forum. However, in recent times, it has started to prove otherwise. With the high costs, arbitral proceedings have started to become unproductive as the parties met with a deadlock in their demands; the arbitrators went into a hurry to give an award and the costs as fees of the arbitration began to rise exponentially. The legislature, through the Arbitration & Conciliation (Amendment) Act, 2015, sought to speed up the process and make it more efficient. However, this did not bring much change to the regime and further increased the need for significant policy reforms such as Pendulum Arbitration or Final Offer Arbitration (FOA) in India. This assists the parties to bring forth their entire offer reasonably and practically and for the Arbitrators to choose the best one. Though cost-friendly and speedy, this model works entirely on the behavioural approach. The author analyses FOA as a policy reform and its scope and applicability within the Indian legal system. It further applies a behavioural analysis to study the India-specific benefits of FOA by taking reference to parties dealing with taxation and employment disputes. Finally, it strongly suggests for incorporating Final Offer Arbitration by presenting the most optimal strategy.

Keywords: Final Offer Arbitration, Pendulum Arbitration, Policy Reform, Taxation Disputes, Optimal, Arbitration and Conciliation Act, 1996.

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I. INTRODUCTION

'Pendulum Arbitration,' otherwise known as Final Offer Arbitration (**"FOA"**) or 'Baseball Arbitration' due to its American origins, is a kind of Arbitration where the parties aim at resolving the disputes in minimal time by reaching a reasonable decision and hence, upholding the purpose of Arbitration as an effective ADR Mechanism. In a Pendulum Arbitration, there is no reliance on the arbitrator's decision-making but relies on the submission of final offers by the parties and the choice of the best offer by the Arbitrator.[1] Based on 'Applied Reasons' and 'Rational Behavior,' the parties find an equitable and practical solution for the disputes rather than depending on the Arbitrator to weigh their respective demands. Various FOA models exist, such as 'Package FOA and Issue-by-issue FOA.' While in Package FOA, the offer that the parties present concerns all the issues Issue-by-issue FOA motivates the parties to resolve one dispute at a time and present offers for a specific issue. Irrespective of this, the goals of Pendulum Arbitration, in general, are multi-fold: swiftness, fairness, and contribution to the procedural economy, the same as those of a Reformative Arbitral Institution.[2]

In India, the introduction of Arbitration was to offer a speedy resolution of disputes, but with growing cases and procedural limitations, this is no longer the case. It has not been entirely 'speedy' and 'effective', especially in cases where there is a deadlock of demands or intentional delays caused by either of the parties.[3] This is also evident through the amendments to the legislation, such as the introduction of sections 29A[4] and 29B,[5] to curb the delayed dispute resolution process. In these

[1] Danilo Ruggero Di Bella (Bottega Di Bella), *Final-Offer Arbitration": A Procedure to Save Time and Money?*, KLUWER ARBITRATION BLOG (25 Oct. 2022,) http://arbitrationblog.kluwerarbitration.com/2019/01/25/final-offer-arbitration-a-procedure-to-save-time-and-money/

[2] *Id.*

[3] Gaurav Kumar, *Home Run of Baseball Arbitration,* RMLNLU ARBITRATION LAW BLOG (26 Oct. , 2022) https://rmlnluseal.home.blog/2019/11/05/home-run-of-baseball-arbitration/

[4] Arbitration and Conciliation Act 1996, § 29(A), Act No. 26 OF 1996 (India).

[5] *Id.,* at §29(B).

instances, Pendulum Arbitration would be pertinent in motivating the parties to make a more practical, balanced, and reasoned proposal on the pretext that Arbitrators are usually reluctant to choose an extreme draft offer. This would ideally steer the parties to being more considerate and realistic to the other party's needs to get the decision in their favour and preserve a long-term business relationship. The need for Pendulum Arbitration is most evident in disputes relating to Employment and Taxation. This is because, in both the abovementioned disputes, there is a sense of uncertainty in the outcome and fear of potential costs due to an adverse Pendulum Arbitration ruling. Further, both require a growing long-term relationship, whether during employment or to create trade and investment atmosphere patterns, to decrease compliances and administrative expenses. However, while the former follows a model relating to the Law of Submission as there is a degree of Authority involved, the latter relates to the law of Dominance due to equal standing and the long-term need for a healthy relationship and hence the behavioural applicability of the Final Term Offer shall differ in both.

Through this paper, the author will first review the applicability of FOA following the Arbitration and Conciliation Act 1996 (**"the Act"**) and various international enactments. The author will then derive the necessity of this kind of settlement in the Labour and Taxation dispute. Lastly, the author will apply a behavioural analysis of the parties when making an offer to unearth the most optimal strategy. The methodology adopted in this paper would be doctrinal and shall entail a theoretical and descriptive approach.

II. SCOPE OF PENDULUM ARBITRATION IN INDIA

As discussed above, the scope of Pendulum Arbitration derives its substance from the parties putting their respective offers on the table and a reasonable conclusion being navigated by the Arbitrators. In doing so, there is a minimal investment of time, leading to a speedier outcome that is final, binding and presumably rational. On record and as evidenced through various instances in the USA, a country where the kind of arbitration originated, Pendulum Arbitration is deemed efficient.[6] However, the

[6] Guilherme Rizzo Amaral, *A Model Clause for a New Kind of Final Offer Arbitration in International Commercial Arbitration: the "Final Draft Award" Arbitration,* KLUWER ARBITRATION BLOG (26 Oct. 2022)

problem arises when the specifics of the nature of disputes are considered. Pendulum Arbitration holds success when the issues relate to determining the quantum but are not so when the issues relate to determining liabilities. Irrespective of this, it is considered to eradicate a monopolistic approach by a party of dominance as it would not be able to mould the decision or use corrupt practices to have an award in its favour.

This kind of Arbitration has not been well explored within the Indian context and its arbitration practice. However, by determining its relevance within the International Scenario, an analysis could be made of its inclusivity and potential effect on the Indian Practice of Arbitration, especially within Employment and Taxation Disputes.

III. INTERNATIONAL ANALYSIS

Pendulum Arbitration is also known as Baseball Arbitration due to its origin. Pendulum Arbitration came into existence to determine baseball players' salaries in the USA. However, with time, it saw an evolution in resolving disputes on FRAND Agreements' royalty rate settlements and various tax-related disputes on the international front and by the OECD Multilateral Tax Convention of 2016.[7]

Though with all the positives, there also exist negatives in this kind of arbitration. These include curtailing the powers of the Tribunal by bringing forth impractical, controlled and not rational offers. This leaves the Tribunal with no choice but to give a decision favouring a party. Hence, another negative aspect exists relating to the system of appeal when an award is enforced. As stated by Farber,[8] parties sometimes tend to determine the behaviour and preferences of the Arbitrator and formulate their proposals accordingly.

However, the flexibility of this kind of arbitration gives the legislators of various countries and jurisdictions the power to regulate their systems. For instance, the clause of Pendulum Arbitration in

http://arbitrationblog.kluwerarbitration.com/2019/02/23/a-model-clause-for-a-new-kind-of-final-offer-arbitration-in-international-commercial-arbitration-the-final-draft-award-arbitration/.

[7] Ajay and Shreya Nair, *Homerun in India: Baseball Arbitration,* THE ARBITRATION WORKSHOP (28 Oct. 2022) https://www.thearbitrationworkshop.com/post/homerun-in-india-baseball-arbitration.

[8] Henry Farber, *An Analysis of Final-Offer Arbitration,* THE JOURNAL OF CONFLICT RESOLUTION, 683-705 (1980).

the Japanese Legislation does not limit the choices to those of the offers presented by the parties, and the arbitrators have a substantial hand in decision-making.[9] As rightly stated by Crawford and Stevens, the best kind of incentives concerning a dispute resolution mechanism is provided through Final Offer Arbitration.[10] This is because to get the maximum benefit, parties must propose a practical and balanced offer, or else they might have to face the brunt of an unfavourable decision by the arbitrator.

In today's global market, any dispute relating to pricing, salaries or rent can be resolved through Pendulum Arbitration. In India, though its prevalence can be seen through a few sections, an example could be set through its utility on International Platforms to get momentum.

IV. INDIAN SCENARIO

A. Fast-Track Arbitration

Arbitration as a dispute resolution mechanism has seen substantive changes with time and its evolution. A method which was supposed to be cost-effective and speedy did not serve its true purpose, as is evident from its delayed functioning in recent times. Consequently, came the changes through Amendments such as the 2015 Amendment,[11] which inserted Sections 29A[12] and 29B[13]. These sections brought forth an improved fast-track arbitration process. Accordingly, post-completion of the proceedings, Section 29A mandates the tribunal to present an award within 12 months, with Section 29B (4) speeding up the process by setting up a time limit of 6 months. Though these are practical sections in meeting the lacunas concerning a speedy resolution mechanism with penalties being imposed under Section 15[14] of the Act, the problem arises when there is a reasonable delay on the part of the tribunal due to either a deadlock of demands or a policy of strict time.

[9] David L. Snyder, *Automatic Outs: Salary Arbitration in Nippon Professional Baseball,* SPRT. L. REV. 79 (2009).
[10] P. Vincet Crawford, *On Compulsory Arbitration Schemes,* 87 THE JOURNAL OF POLITICAL ECONOMY 131-59 (1979).
[11] The Arbitration and Conciliation (Amendment) Act 2015, No. 3 of 2016.
[12] *Id.*, at § 29A.
[13] *Id.*, at § 29B.
[14] *Supra* note4, § 15.

In the latter, the time for deciding can be too short or too long. As the proceedings commence, various other factors and discoveries can be essential to determine the issues and provide a rational and comprehensive award. In such a situation, the Arbitrator might be biased to comply with Section 29B. The need for Pendulum Arbitration during this time will prove to be timesaving and provide the Arbitrator to understand the needs and situation as a whole. It will also incentivise the parties should be more balanced and nuanced with their offers as they want a favourable outcome.

B. Autonomy of the Act

However, the inclusivity of Pendulum Arbitration in the current regime would depend upon its compliance with the Arbitration and Conciliation Act of 1996. Relevance can be attached to Chapters V[15] and VI[16] of the Acts. Though there are legislative rules relating to the conduct of arbitration proceedings and how an award is to be passed, the importance given to party autonomy is provided throughout the Act. One relevant example of Pendulum Arbitration can be seen through Section 19(2)[17], where the conduct of arbitration proceedings can be on the parties' needs as they are responsible for determining the rules of these proceedings. Secondly, though ordinarily, the Arbitration Act allowed oral pleadings, with an amendment to Section 24, the parties can avoid giving pleadings in front of the Tribunal, creating a way for introducing Pendulum Arbitration as a practical step.

C. Reasoned Award

One crucial criterion for an Arbitral Award to succeed is its reasonability, which is supposed to be a 'Reasoned Award.' As per the legislative enactment, general reasons are provided under Section 31(3)[18] when an arbitral award is passed; these reasons are waived off through the exception mentioned under sub-clause(a). Accordingly, on a mutual consensus, if there is an agreement between the parties to pass an award with no reasons attached, it can be allowed. However, in such an instance, following an issue-by-issue model would be the ideal way to bring forth Pendulum Arbitration. In this, the parties

[15] *Id.,* at CH. V.
[16] *Id.,* at CH. VI.
[17] *Id.*, at § 19(2).
[18] *Id.,* at § 31(3).

would choose specific issues to be dealt with under Pendulum Arbitration rather than wavering on the right to give a reasoned award concerning the entire subject matter of the dispute. Hence, the Arbitrator would have to accept the parties' proposals concerning specific issues in hand, but he would still be able to provide an award that is well-reasoned and follows the provisions of the Act.

However, clarity must be given in defining an 'unreasonable award.' It does not include an award that lacks substance or is without intelligence or merit but merely an award that exists on a threshold that determines whether there is a need or requirement to mention a reason. A silent award can exist when determining a claim or a reasoned award backed by sufficient evidence. It would not be considered an award without merits in both situations. In support of this, the Supreme Court has leapt to distinguishing an 'unintelligible award' that lacks merits from an 'unreasonable award' in the case of Dyna Technologies v. M/s Crompton Greaves.[19] The need of the hour is sufficient enforcement of the Pendulum Arbitration mechanism by the Indian Courts, which would be possible only when legislative enactments appropriately recognise it. Suppose such a condition is added where the parties have the right to make the last best offer about a specific issue while the arbitrator has the authority to pass an award that is well-reasoned while accepting the specific figures mentioned by the parties. In that case, it will serve a two-fold purpose:

1. The problem concerning appeal, when an award is enforced, would be solved as the parties would retain their right to challenge a substantive part of the award.
2. The wavering exception would be considered a deemed consent of both parties under Section 31(3)(a) of the Act.

D. Challenges within Section 34 of the Act

The procedural working of the Act as a choice of the Parties is well-recognised within the legislation. However, the problem arises when a specific award is challenged under Section 34 of the Act. Though the award that the Arbitrator provides is supposed to be reasonable within the purview of Section 34(2)(b)(iii), there are two grounds of justice and morality provided to set aside an award. The

[19] Dyna Technologies v. M/s Crompton Greave, 2019 SCC Online SC 1656 (India).

definition of both these grounds differs from case to case. The terms of the offer are determined by the parties suiting their interest, which is to be accepted by the arbitrator while passing an award; such an award can be questioned on morality and justice

V. BEHAVIOURAL PATTERNS DURING PENDULUM ARBITRATION THROUGH TAX AND EMPLOYMENT DISPUTES

The Pendulum either swings or misses!

When Pendulum Arbitration is being considered, the Arbitrator's or the Tribunal's job is strictly limited to choosing an offer presented by either of the parties. Though this puts a substantial burden on the adjudicators, unbiased and neutral third parties, to make the right choice, the states are also liable to bring forth positive solutions.[20] If the regime of FOA is brought forth in a manner that advocates reasoned and well-balanced proposals, it can lead to:

1. *Accuracy:* The Arbitrators choose a reasonable offer rather than those that lead to extreme demands and splitting of differences.
2. *Efficiency*: Reduction in costs, speedy dispute resolution and simplicity.

The idealistic regime would be when the Pendulum Arbitration can create a long-term relationship and cooperation between the parties yet provide an adequate settlement rather than creating a 'chilling effect'. Though there is a shift from reasoned arbitration, Pendulum Arbitration should not focus merely on a swing or a miss but a middle ground where the optimal strategy would include Pendulum Arbitration based on numbers and reasoned arbitration when the issues at the threshold are being considered. The objective to trace the behavioural pattern of both the states and parties while creating final offers is important in containing various attributes. These include:

[20] Joost Pauwelyn, *Baseball Arbitration to Resolve International Law Disputes: Hit or Miss*, 22 FLA. TAX REV. 40 (2018).

A. Reduction in the Costs to Sovereign

When international disputes between the states are being considered, there often needs to be more clarity to refer the parties for third-party adjudication. This is because as the issues increase in their gravity, there is a rise in the sovereignty costs. There is also a widespread fear amongst them of not losing a sense of familiarity with the tribunals, or else they may be subjected to an unfamiliar jurisdiction. The most relevant dispute that has been subjected to Pendulum Arbitration is Tax Disputes on an international level. This is because Tax Disputes often arise out of a mutually consented agreement. An existing Mutual Agreement Procedure (MAP) is an efficient and effective method for resolving tax disputes. This is significantly important in introducing the intent to interact and resolve international tax disputes between the designated representatives of the contracting states. The subject matter of disputes shall vary from the interpretation and application of a taxation convention to cases of double taxation. [21]

The sovereignty costs in a regime of Pendulum Arbitration are being reduced because the arbitrator must mandatorily pick one of the offers, and there cannot be pursuance of advice or development of solutions. It does not hold a precedential value to the award that is being passed. This is also evidenced through the OECD Multilateral Tax Convention, to which India is a signatory that provides provisions for Pendulum Arbitration. It states that after completion of the determination by the arbitration panel, the competent authorities shall *"resolve all the unresolved issues by framing a mutually agreed resolution,"* [22] and shall be different from the former, leading to the decision of the Tribunal being non-binding. As a result, it is very pertinent for the authorities to deal with the issues in a balanced and nuanced way.

B. Preference is given to settlements that are well-negotiated

It is often an ill-perceived notion that Pendulum Arbitration leads to extreme proposals that do not promote bargaining in any form. However, this is not true. The primary objective of Pendulum Arbitration is the stimulation of negotiation and following the principles of bargaining to push parties

[21] Dr Adil NAS, *Tax Resolution of Treaty Disputes and Arbitration,* 18 LJR REV. 1-5 (2019).
[22] OECD Multilateral Tax Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Sharing, 2016, Art. 24.2.

to formulate an agreement based on mutual consensus.[23] This can be well-enumerated through Employment disputes about wages, denial of working rights and provisions about temporary termination. If made compulsory, Pendulum Arbitration would increase costs when disagreement exists, motivating the parties to settle and simultaneously make concessions.

Employment Disputes work on the Law of Submission, where one party can control another party. Hence, during conventional arbitration, the tribunal usually lays down an award that points towards the Splitting of differences, i.e., a compromise.[24] The party with a dominant hand was given the liberty to exaggerate their claims; this led to agreements having a chilling effect. However, in a Pendulum Arbitration, there exists a scope of doubt for the claims raised by the party that is demanding. This is because both parties are incentivised to put forth their proposals, and one of these is picked by the Arbitrator.[25] The parties are interested in making reasonable proposals to get their choice accepted. The parties here seek security rather than drastic outcomes to resolve disputes and maintain long-term relationships.

C. Liberty in Rulemaking by No Chill Effect[26]

In Conventional Arbitration, the decision-making power lies entirely in the hands of the Arbitrator post-presentation of claims. However, in Pendulum Arbitration, the parties take a step by bringing forth extreme and technical arguments to get an outcome in their favour. They are not ready to engage in the rulemaking process because they constantly fear that if they negotiate to make rules, the outcomes will not be in their favour. However, Pendulum Arbitration focuses more on settling a dispute than engaging in a tug-of-war. This is because substantial liberty is being provided to the parties for maintaining their relationships by advocating proposals that engage in rule-making to settle and put forth mutually agreeable solutions. In employment disputes, an Employee shall constantly be under a value analysis by his co-employees while being subjected to the arbitration proceedings, and

[23] *Ibid.*
[24] Carl Stevens, *Is Compulsory Arbitration Compatible with Bargaining?*, 5(2) INDUS. REL. 38-44 (1996).
[25] *Ibid.*
[26] JP Montero, *A Model of Final Offer Arbitration in Regulation,* 28 JOURNAL OF REGULATORY ECONOMICS, 23-46 (2005).

he ultimately would remain part of the organisation. Similarly, in tax disputes, prices and payment criteria shall be favourable for the party with a neutral stance in contrast to a party with an extreme position. Hence, Pendulum Arbitration broadens the understanding of relationship management by incentivising both parties' proposals. As a result, the settlement does not have a chilling effect.

D. Reduction in Costs, Speedy Dispute Resolution and Simplicity[27]

The most prevalent and known advantage of Pendulum Arbitration includes reduced costs, speedy resolution of disputes and a simple yet efficient process. There is avoidance of precedents, and there need to be continuous hearings, visits, and lengthy submission rounds. Engaging in a Pendulum Arbitration involves negotiating settlements or presenting a final and reasoned offer.

VI. WHAT IS THE MOST OPTIMAL STRATEGY?

A dispute has threshold issues and numerical issues. While the latter is being considered, it focuses on determining a specific price. The threat of an extreme decision and uncertain demand by its counterpart motivates the party to make a negotiated choice and draw concessions. Hence, rather than focusing on a compromise between two extremes, it becomes more of a choice between two reasonable strategies. However, the problem arises when a threshold issue has a definite answer and reasoning. For instance, whether there ought to be a disclosure of documents or whether there should be an Interim Relief to be provided. In such situations, the Pendulum Arbitration will not be able to stimulate a settlement to reach a rational outcome. Hence, the liberty ought to be given to the arbitrator to make a reasoned decision or choose a final offer.

VII. CONCLUSION

In Pendulum Arbitration or FOA, the primary duty first lies with the state to introduce it through legislation that supports reasoned and negotiated settlements rather than extreme and drastic

[27] Max H. Bazerman, *Arbitrator Decision Making: When are Final Offers Important?* 39(1) ILR REVIEW 76-89 (1995).

outcomes. If it is implemented in the right way, it can bring long-standing disputes to an end in a time-bound manner. Both parties intend to maximise the benefits yet preserve a relationship, especially concerning taxation or employment disputes. Hence, they shall engage in determining reasonable calculations and providing equitable solutions.

The regime of Alternative Dispute Resolution emerged due to pending litigation cases, so shifting from the traditional judiciary was needed. Over time, the attributes of Arbitration as a resolution process became like the conventional judicial system concerning costs and time, leading to more pending cases. Hence, the need of the hour was to have reforms in the ADR regime of our country. The 2015 Amendment though tried to fill the lacunas, had its limitations. Pendulum Arbitration is a giant leap in this direction. It has relevance and applicability within the Indian Context. If implemented and enforced accurately, it can lead to more efficient resolution of disputes through its attributes of being cost-saving, time-binding and not too complicated. Further, the parties would be motivated to be more cooperative rather than competitive.

Pendulum Arbitration is optimal in both disputes; those relating to the law of submission, such as employment disputes, and those relating to the law of dominance, such as taxation disputes. While the former increases costs with disagreements, the latter is essential in reducing sovereignty costs. Hence, this would lead to effective tax administration and promote a reasoned employment dispute settlement. Further, this form of dispute resolution is most appropriate when dealing with numerical issues where there exists a possibility of putting forth varying offers for the specific issue as threshold issues require a reasoned award by a tribunal. Hence, for Pendulum Arbitration to be swinging at its most optimal level, the right behavioural approach would be to decide a dispute issue-by-issue.