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FROM THE DEAN'S DESK

This publication serves as a significant milestone in our mission to institutionalise research and lays out the foundation for promoting open and objective quality legal discourse. I say with utmost pride that when review articles were solicited, we were surprised with the huge response from across the country. After a rigorous peer-review process, we have meticulously curated a distinguished compilation of original research articles. I am certain that these contributions will elicit profound appreciation and foster constructive dialogue amongst our readers. This year, our journal embarks on an insightful exploration of various contemporary debacles, thereby offering a meticulous legal analysis of these pressing issues. Encompassing a wide spectrum of current topics, our publication not only presents diverse perspectives on noteworthy subjects but also serves as a catalyst for raising awareness, creating an intellectual delight for our readership.

Kirit P. Mehta School of Law has garnered commendable endorsements from esteemed entities across the industry, academia, judiciary, bar, law firms, MNCs and regulatory bodies like SEBI. On behalf of the institution, I extend my warm welcome and heartfelt gratitude to our esteemed Board of Advisors and Peers, whose invaluable guidance has played an instrumental role in shaping this edition into a vital platform that generates and challenges existing paradigms of legal jurisprudence.

I congratulate the Editorial Board for their unwavering dedication and significant contribution to the growth of NMIMS Student Law Review. I earnestly encourage our readers to embrace and elevate the thoughts presented by our contributors, allowing them to soar and inspire fresh perspectives in the realm of legal scholarship.

- **Dr. Durgambini Patel**

MENTOR'S MESSAGE

It is with immense pleasure and a profound sense of accomplishment that I present to you this special edition of the Student Law Review. The inception of this journal was fueled by our institution's unwavering commitment to foster a platform for the exploration of legal discourse and the cultivation of academic excellence. With the guidance of our esteemed peers, we have embarked on a rigorous journey to curate a publication that would showcase the finest scholarly contributions from our student community.

Within these pages, you will find a rich tapestry of legal scholarship, meticulously crafted by our talented contributors. Each article represents countless hours of research, critical analysis, and meticulous attention to detail. These contributions have not only enriched the pages of this publication but have also elevated the discourse within our academic community. The tireless efforts of our reviewers and peers, who provided invaluable feedback and engaged in thoughtful deliberations, have contributed to the exceptional quality of the articles presented herein. I extend my deepest gratitude to them for their dedication to maintaining the highest standards of academic rigor.

To those who missed out, I want to emphasize upon the incredible value of your efforts and the enduring impact of your dedication to the pursuit of legal scholarship. Each submission showcased immense potential and demonstrated your unwavering commitment to the highest standards of academic excellence. I encourage you to persevere, for your contributions hold immense promise and will undoubtedly find their rightful place in future endeavors.

It is important to acknowledge the countless hours of meticulous review, rigorous editing, and collaborative teamwork that have shaped this edition. I extend my deepest appreciation to the dedicated members of the Editorial Board who have meticulously assessed each submission, ensuring that only the most exceptional works grace the pages of this publication. I hope each one of you found the experience enlightening and will go on to play a role in developing the research culture in the field of law.

- **Mr. Harshal Shah**

ACKNOWLEDGMENT

This Special Issue of NMIMS Student Law Review has been a collective effort right from the moment we conceptualised its theme. We are filled with anticipation as we envision this issue to establish an unprecedented benchmark, surpassing all prior boundaries in terms of its comprehensive scope and profound depth. The chosen theme, explored with utmost precision and intellectual rigor, promises to deliver an unparalleled examination of contemporary issues.

We extend our gratitude to our Hon'ble Vice Chancellor, NMIMS University for his constant support and unwavering encouragement throughout the process. Furthermore, we are immensely thankful to Dr. Durgambini Patel, the Dean of NMIMS Kirit P. Mehta School of Law, for entrusting us with this responsibility of overseeing the curation of this edition of the NMIMS Student Law Review. Her support has been instrumental in the realization of this endeavour.

We thank the Registrar of NMIMS University for her continued support. We would also thank the administrative department; our Board of peer reviewers for their time and close reading of the articles; our faculty colleagues who have always provided the intellectual space and friendship that help sustain projects like these and make them a happy affair. We must also thank our contributors who so encouragingly responded to our call for papers, were very cooperative with keeping deadlines, and thought of us as a worthy venue for publishing their scholarship. It is your work that makes this edition special.

Our team also deserves a very special mention: Our Student Head, Ms. Aashirwa Baburaj; Student Co-head, Ms. Prerna Hegde; Student Editor-In-Chief, Ms. Anushka Bhardwaj, Student Co-Editor-in-Chiefs, Mr. Abhay and Ms. Bhargavi G Iyer; Student Blogs-Head, Ms. Riya Karkera; along with the entire team of Content Editors. Their unwavering dedication and professionalism have been instrumental in bringing this issue to fruition. Lastly, we extend our sincere gratitude to our Mentor, Mr. Harshal Shah, whose intellectual engagement and thought-provoking guidance have played a vital role in upholding the theoretical rigor of our publication.

- **Prof. Richa Kashyap**

Editor-in-Chief

FOREWORD

It gives us immense pleasure in publishing this special edition of the NMIMS Student Law Review. With the inclusion of this edition in our scholarly repertoire, we remain steadfast in our unwavering commitment to elevate legal discourse on pertinent issues. Our fervent ambition is for this volume to serve as a dynamic catalyst stimulating profound intellectual exploration, fostering consequential dialogues, and leaving an indelible imprint on the trajectory of legal scholarship for the years that lie ahead. This edition sets a remarkable precedent, as the authors have demonstrated exceptional depth of insight and critical analysis while addressing a wide spectrum of legal inquiries.

Sayan Dasgupta, in his paper titled *"The Labyrinth Of General Anti-Avoidance Rules And Double Taxation Avoidance Agreements: Responsibility And Justification Of Non-Performance And Breach Of Treaty"*, embarks on an insightful analysis of the impact of General Anti-Avoidance Rules under the scheme of the Income-Tax Act, 1961 on Double Taxation Avoidance Agreements that proposes a conflicting obligation of avoiding double taxation of the same income. The paper contemplates whether GAAR and DTAA can coexist. Thereafter, this paper analyses whether derogation or non-performance of a DTAA is justified or emanates state responsibility.

In his paper titled "*The Impact Of DAOS On Traditional Corporate Governance And Arising Legal Issues"*, Mukund Arora investigates the promise of a DAO to bring transparency, efficiency, and accountability, and explores how it can effectively fulfil the regulatory needs of existing corporate structures. The paper examines the progress made by DAOs in establishing themselves as normative corporate entities and addresses pressing legal questions regarding legal form, jurisdiction, and liabilities. The paper argues for a unified international framework to address these legal challenges. Lastly, the paper presents limitations of this model, and seeks to evaluate their viability for implementation, along with the potential road ahead.

In "*Unpacking The Competition (Amendment) Act: An In-Depth Examination Of Its Provisions And Consequences*", Saachi Kale critically examines the key amendments undertaken, with a focus on highlighting their impact on the economy to thoroughly understand the implications of the Amendment Act. The paper also provides few recommendations that could possibly provide some clarity post amendment of the Competition Act, 2002.

In her article titled *"The Competition Amendment Act 2003: A Game Changer For Mergers And Acquisitions"*, Pavitra Dubey analyses the key amendments in the Competition Act and additionally compares the amended act with the Principal Act. The paper further delves into the loopholes that still exist in the legislative framework, like the issue arising in determining the power of DG, the compulsory deposit of money, and intellectual property rights as a defense.

Lastly, it would be remiss not to mention that the collective endeavor of the entire team involved in this edition warrants utmost admiration for their unwavering commitment, tireless perseverance, and unwavering dedication to fostering the dissemination of exemplary legal scholarship. Their ceaseless efforts have played an instrumental role in ensuring the publication of profound and exceptional legal literature of the highest calibre.

Board of Editors

Short Articles

THE LABYRINTH OF GENERAL ANTI-AVOIDANCE RULES AND DOUBLE TAXATION AVOIDANCE AGREEMENTS: RESPONSIBILITY AND JUSTIFICATION OF NON-PERFORMANCE AND BREACH OF TREATY

- Sayan Dasgupta

ABSTRACT

Today, the system of international law has transformed from the exclusive presence of states performing as the sole actors to a system governing plurilateral concerns between states, individuals, and corporations. Various actors have rights and parallel responsibilities with accountability mechanisms for breaches of performance.

*While such rights and responsibilities have variegated sources, international treaties are the most discernible and manifest. This article considers the impact of General Anti-Avoidance Rules ("**GAAR**") under the scheme of the Income-Tax Act, 1961 on Double Taxation Avoidance Agreements ("**DTAAs**") that proposes a conflicting obligation of avoiding double taxation of the same income.*

The paper contemplates whether GAAR and DTAA can coexist. Further, in any event, whether there are instances of treaty override. Thereafter, this paper analyses whether such derogation or non-performance of a DTAA is justified or emanates state responsibility. Finally, in case of a derogation from treaty law, whether the difference encompasses potential remedies and legal consequences.

KEYWORDS: GAAR, DTAA, international taxation, transaction, treaties, non-performance, breach

I. INTRODUCTION

International treaties often provide for remedies or rights in the event of treaty derogation[1] and circumstances where exit or withdrawal from the treaty may be justified.[2] International treaty law[3] as well as customary international law[4] provide for, *inter alia*, rules of termination, suspension, and violation.

Such anticipation arises in the wake of the introduction of the GAAR in the Income-Tax Act, 1961 ("**ITA**").[5] GAAR provisions have been introduced in the ITA pursuant to the goal of combating tax avoidance by way of treaty shopping. Tax avoidance is legal; it exists in the grey zone between tax evasion and tax planning. Companies often utilise, or rather, mis-utilise DTAA and avoid taxes causing losses to the state. revenue.[6] GAAR was introduced as a cornerstone of a tax system to circumvent tax avoidance and distringuish between tax panning and illegitimate and improper avoidance.[7]

DTAAs are negotiated, comprehensive and bilateral instruments entered into between states for the purposes of avoiding double taxation of the same amounts of income earned in one state.[8] Often, DTAAs provide for, *inter alia*, (i) preventing tax evasion, (ii) limitation of benefits, (iii) where the income would be taxed, and (iv) measures for the exchange of information for taxation purposes.[9] The regime of tax treaties, while being an offshoot of instruments, has evolved into different species.

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[1] Denys P. Myers, *Treaty Violation and Defective Drafting*, 11 AM. J. INT'L L. 538 (1917); *see also* Veijo Heiskanen, *Forbidding Depecage: Law Governing Investment Treaty Arbitration*, 32 SUFFOLK TRANSNAT'L L. REV. 367 (2009).

[2] LR Helfer, *Exiting Treaties*, 91 VIRGINIA L. REV. 1579, 1582 (2005).

[3] Vienna Convention on the Law of Treaties, May 29, 1969, 1155 U.N.T.S. 331, ("**VCLT**").

[4] Gabcikovo Nagymaros (Hungary v. Slovakia), Judgment, 1997 I.C.J. Rep, ¶7 at 78-79 (May 22).

[5] Income Tax Act, 1961, No. 43, Acts of Parliament, 1961 (India), Chapter XA.

[6] Union of India v. Azadi Bachao Andolan, (2004) 10 SCC 1; Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613.

[7] CIR v. BNZ Investments, [2002] 1 NZLR 45.

[8] Ashrita Prasad Kotha, *Place of Effective Management Test in the Income Tax Act, 1961: Is It the Right Way Forward?*, 8 NUJS L. REV. 13 (2015).

[9] Hanishi T. Ali, Ajay Verma, H. Jayesh, James Parkinson, Priyanka Sharma, Amer Raja, Dipak Rao, Sandeep Mohanty, Fernan Rodriguez, Timothy D. Richards, & Alonso Sanchez, *India*, 46 INT'L LAW 553, 556 (2012).

DTAAs are largely bilateral instruments. Multilateral tax regimes, as envisaged by the World Trade Organisation ("**WTO**") have failed to fructify.[10]

Further, DTAAs govern the domestic system by replacing the existing taxation regime.[11] Therefore, once ratified, a DTAA effectively replaces the domestic system of taxation and enables corporate entities to claim tax exemptions and bilateral reliefs in case the same item of income is being taxed twice in two sovereign states. Such exemptions and reliefs are designed and structured to minimise tax liabilities artificially. Ambiguities are utilized to minimise liabilities.[12] Though legal *per se*, tax avoidance is contrary to the spirit of the law. Significant losses of revenue are faced by the exchequer due to tax avoidance.[13]

The Indian GAAR, introduced in 2012, envisages preventing tax avoidance by means of calculating 'substance over form' of transactions.[14] It empowers taxation authorities to sieve through transactions and arrangements that appear to be intended for tax avoidance and thereby withhold treaty benefit.[15] The powers of scrutiny under GAAR provisions are discretionary and wide. It has been suggested that GAAR provisions hang like a Damocles' sword on investors and international taxpayers.[16] Consequently, such power accorded to the tax authorities overrides any DTAA unilaterally.

II. THE INTERPLAY OF GAAR AND DTAA: OPERATION AND IMPACTS

Often, corporate entities establish subsidiary companies in low-tax jurisdictions with favourable DTAAs in force. This common way of tax avoidance may be

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[10] NIGAM NUGGEHALLI, INTERNATIONAL TAXATION, THE INDIAN PERSPECTIVE, 95, 96 (Springer, 2020). *See* also, OECD, ACTION PLAN ON BASE EROSION AND PROFIT SHIFTING, 9, 10 (OECD Publishing, 2013).

[11] Income Tax Act, 1961, No. 43, Acts of Parliament, 1961 (India), §§ 90, 90-A.

[12] McDowell & Co. Ltd. v. CTO, (1985) 3 SCC 230 (India).

[13] Dhruva Gandhi & Gaurav Bhawani, *GAAR to Override DTAAs: Can the Constitution or Limitation of Benefits Clause Prevent This Menace*, 10 NUJS L. REV.141, 142 (2017).

[14] Duke of Westminster v. Commissioners of Inland Revenue (1936) AC 1 (HL) (England).

[15] Shefali Anand, *Explainer: India's GAAR or General Anti-Avoidance Rules*, WALL STREET JOURNAL (Nov. 27, 2022, 04:50 PM), http://blogs.wsj.com/indiarealtime/2014/07/15/explainer-indias-gaar-or-general-anti-avoidance-rules/.

[16] Dr. N. Nuggehalli, *GAAR and Tax Treaties*, INDIACORPLAW (Nov. 27, 2022, 5:09 PM), http://indiacorplaw.blogspot.in/2016/07/gaar-and-tax-treaties.html.

termed as "treaty shopping".[17] Often, artificial investment vehicles are created to take advantage of DTAAs.[18] Investment Tribunals do not consider treaty shopping to be *per se* illegitimate unless done to gain access to certain dispute resolution mechanisms.[19] States, in an attempt to prevent such abuse, have introduced legal devices such as limitation of benefit.[20] Investors, in this case, are able to overcome limitation of benefit by way of additional compliance.[21]

GAAR had been introduced to deter such sophisticated tax avoidance. The Standing Committee on Finance in the Parliament, while reviewing the Direct Taxes Code Bill, 2010 identified arbitrariness, uncertainty, and ambiguity therewith. It was suggested that inbuilt safeguards be introduced to avoid excessive litigation.[22] In spite of objections presented by tax practitioners, policy experts[23] and parliamentary reports, the Government went ahead to introduce unamended GAAR provisions in the ITA.

GAAR provides tax authorities with access to examine and scrutinize arrangements to identify tax avoidance. If an arrangement is deemed as an

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[17]Andrew Mitchel, *Treaty Shopping & Anti-Treaty Shopping*, INT. TAX BLOG, (Nov. 27, 2022, 3:40 PM) https://intltax.typepad.com/intltax_blog/2008/05/treaty-shopping.html; *see also* Mrsc Zuzana Vysudilova, *Treaty Shopping*, JUS MUNDI, (Nov. 27, 2022, 12:45 PM),https://jusmundi.com/en/document/publication/en-treaty-shopping.

[18] Kenneth A. Grady, *Income Tax Treaty Shopping: An Overview of Prevention Techniques*, 5 NW. J. OF INT'L. L. & BUS., 626 (1983). *See also* Department of Industrial Policy and Promotion, Fact Sheet on Foreign Direct Investment (FDI), (Nov. 27, 2022, 2:10 PM), http://dipp.nic.in/English/Publications/FDI_Statistics/2016/FDI_ FactSheet_April_Sep_2016.pdf.

[19]*Id*.*; see* also Autopista Concesionada de Venezuela CA v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5, Decision on jurisdiction,¶129 (Sept. 27, 2001), ICSID Rep. 419 (2004).

[20] Gayatri Sridharan, *Limitation of Benefits clause in the India Singapore DTAA – An analysis of recent decisions*, LAKSHMIKUMARAN & SRIDHARAN ATTORNEYS, (Nov. 27, 2022, 11:26 AM), https://www.lakshmisri.com/insights/articles/limitation-of-benefits-clause-in-the-india-singapore-dtaa-an-analysis-of-recent-decisions/; *see also* Toto Jose, *What is Limitation of Benefit Clause under DTAAs?*, INDIANECONOMY, (Nov. 24 2022, 12:47 PM), https://www.indianeconomy.net/splclassroom/what-is-limitation-of-benefit-clause-under-dtaas/

[21] *See* Central Board of Direct Taxes, Circular No. 789/2000 (Issued on Apr. 13, 2000); Union of India v. Azadi Bachao Andolan, (2004) 10 SCC 1 (India).; Citicorp Investment Bank (Singapore) Ltd. v. CIT, 2017 SCC OnLine ITAT 7431 (India).

[22] Press Information Bureau, Government of India, Scope of the Terms of Reference of the Expert Committee Headed by Dr Parthasarathi Shome on GAAR Expanded to Include all Non-Resident Tax Payers Instead of Only FIIS, DEA (Nov. 27, 2022, 12:42 PM), https://dea.gov.in/sites/default/files/scope_ToRef_ExpComm_PShome.pdf.

[23] *Bad Move on GAAR*, THE HINDU, (Nov. 27, 2022, 3:50 PM), https://www.thehindu.com/opinion/editorial/bad-move-on-gaar/article3855349.ece.

"*impermissible avoidance arrangement*"[24], the relevant DTAA may be overridden and benefits thereunder may be withheld. Effectively, Section 90(1)[25] of ITA[26] conferring power to the state to enter into DTAAs[27] is overridden by a *non-obstante* clause: "*Notwithstanding anything contained in sub-section (2), the provisions of Chapter X-A of the Act shall apply to the assessee even if such provisions are not beneficial to him*."[28]

Further, the trigger of the GAAR provisions is uncertain. Section 96 of the ITA[29] lays down a four-factor test for invocation of the GAAR provisions.

First. If the arrangement creates rights and obligations that did not ordinarily exist at arm's length;
Second. If the arrangement results in direct or indirect abuse of the law;
Third. If it lacks or is deemed to lack commercial substance;[30]
Fourth. If it is not *bona fide*.

The form versus substance on implementation affords discretion to the tax authority. The provision, therefore, creates an overriding effect upon DTAAs causing a unilateral treaty derogation.[31] The wide discretion to withhold treaty benefits nomenclated as an "*impermissible avoidance arrangement*" may inadvertently preclude legitimate transactions. Dictates of customary practices, including the *Calvo* doctrine, which establishes principles of protection of investors from arbitrary state actions and treatment on par with standards of treatment of nationals.[32]

[24] Income Tax Act, 1961, No. 43, Acts of Parliament, 1961 (India), §95.
[25] Income Tax Act, 1961, No. 43, Acts of Parliament, 1961 (India), §90, cl. 1.
[26] Income Tax Act, 1961, Section 90(1).
[27] IND. CONST. art. 253.
[28] Income Tax Act, 1961, No. 43, Acts of Parliament, 1961 (India), §90, cl. 2A.
[29] Income Tax Act, 1961, No. 43, Acts of Parliament, 1961 (India), §96.
[30] Income Tax Act, 1961, No. 43, Acts of Parliament, 1961 (India), §97.
[31] Myers, *Supra* note 1.
[32] Irene Cholvi Ferrer, *Calvo Clause,* JUS MUNDI**,** (Nov. 13, 2022, 08:06 AM) https://jusmundi.com/en/document/publication/en-calvo-clause**;** *see* also, Certain German Interests in Polish Upper Silesia case (Germany v. Poland), Judgment, 1926 P.C.I.J. (ser. A) No.7 (May 25).

III. NON-PERFORMANCE OF TREATY OBLIGATION: WITHDRAWALS, BREACH, AND STATE RESPONSIBILITY

International law is built around two principles *viz*. (i) consent and (ii) reciprocity. This yields to *pacta sunt servanda.*[33] Any interpretation of international law must cause the application of the object and purpose of the treaty.[34] The Charter of the United Nations expressly mandates its member states to fulfil "*obligations arising from treaties and other sources of international law*".[35] The same principle governs the execution and performance of contracts.[36] *Pacta sunt servanda* applies to customary international law.[37]

Treaty-making is the sole prerogative of the executive. In India, the Central Government is empowered to "*enter into an agreement with the Government of any other country*",[38] *inter alia*, to afford relief from double taxation. The benefits of a DTAA may be claimed under Section 90 or Section 90A of the ITA. *Sans* legislation, Indian courts have developed idiosyncratic jurisprudence to implement DTAAs by way of comparative constitutional analysis and the general obligation of the court to harmonise and construe domestic legislation to give effect to the

[33] VCLT, *supra* note 3, at 339.

[34] SGS Societe Generale de Surveillance SA v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decisions on Objection to Jurisdiction, (Aug.6, 2003), 18 ICSID Rep. 301(2003); *see* also Application of Convention of 1902 Governing Guardianship of Infants (Netherland v. Sweden), Judgment,1958 I.C.J. Rep. 55, at 67 (November 28).

[35] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI,

[36] *See generally* JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE (OXFORD: CLAREDON PRESS 1991).

[37] I. I. Lukashuk, *The Principle Pacta Sunt Servanda and the Nature of Obligation under International Law,* 83 THE AMERICAN J. OF INT. L., 513 (1989).

[38]Income Tax Act, 1961, No. 43, Acts of Parliament, 1961 (India), § 90, cl. 1.

international instruments.[39] Courts frequent customary international law and the VLCT to interpret and give effect to DTAAs.[40]

The court however considers its duty to give effect to the legislative intent as a primary obligation. Whereupon, contextual construction may be pursued, the court cannot artificially graft meaning and make law. The decision of the Supreme Court in *Poppatlal Shah v. State of Madras*[41] is exemplary of this rule of interpretation. The Court held that:

> It is a settled rule of construction that to ascertain the legislative intent, all the constituent parts of a statute are to be taken together and each word, phrase or sentence is to be considered in the light of the general purpose and object of the Act itself […] The title and preamble, whatever their value might be as aids to the construction of a statute, undoubtedly throw light on the intent and design of the legislature and indicate the scope and purpose of the legislation itself.[42]

Therefore, the court must effectuate the treaty or rule of international law limited to the portion that is not contrary to municipal law.[43] GAAR lays down law contrary to the most DTAAS thereby leaving no conciliation by constructive

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[39] Union of India v. Naveen Jindal, (2004) 2 SCC 510; Kesavananda Bharati Sripadagalvaru v. State of Kerala, (1973) 4 SCC 225; *Kubic Dariusz v. Union of India*, *AIR* 1990 *SC* 605 (where the Court held that "*it is generally a well-recognized principle in national legal system that in event of doubt the national rule is to be interpreted in accordance with the state's international obligations. There is need for harmonization whenever possible bearing in mind the spirit of the covenants*.") *See Jolly* George *Varghese v. Bank of Cochin,* (1980) 2 *SCC* 360 (where the court adopted a purposive interpretation approach and held that "*India is now a signatory to this Covenant and Art. 51(c) of the Constitution obligates the States to "foster respect for international law and treaty obligations in the dealings of organized peoples with one another*").

[40] Vik Kanwar, *Treaty Interpretation in Indian Courts: Adherence, Coherence, and Convergence*, DOMESTIC COURTS AND THE INTERPRETATION OF INTERNATIONAL LAW: CONVERGING APPROACHES? 239, 240 (Helmut Philipp Aust And Georg Nolte Ed., Oxford University Press, 2015).

[41] Poppatlal Shah v. State of Madras, 1953 SCR 677.

[42] *Id*.at ¶7. *See also*, ICC v. Baird, 194 U.S 25, 28 (1904) where the United States Supreme Court found the fruition of legislative intent to be the cornerstone of obligations of the Court. The Court held "*The object of construction, as has been often said by the courts and writers of authority, is to ascertain the legislative intent, and, if possible, to effectuate the purposes of the lawmakers*."

[43] Re Berubari Union, AIR 1960 SC 845; Ali Akbar Kashami Mirza v. United Arab Republic, AIR 1966 SC 230 p.30; State of West Bengal v. Jugal Kishore More, AIR 1969 SC 1171 p. 6; Githa Hariharan v. Reserve Bank of India, (1999) 2 SCC 228 p. 4; Shayara Bano v. Union of India, (2017) 6 MLJ 378 p. 189.

interpretation. This initiates the rigours of the foundation stone of international law – state responsibility.[44]

A. Breach of Treaty and State Responsibility

The International Law Commission ("**ILC**") codified state responsibility *vide* the Advisory Opinion where it was definitively affirmed that intergovernmental actions would be 'responsible' under international law.[45] The primary actor of international law remains the state and therefore, the consequent onus of compliance and principal obligations rest on the shoulders of the state.[46] The ILC *vide* Articles on the Responsibility of States for Internationally Wrongful Acts ("**ARSIWA**") codified rules of state responsibility. However, while the ILC ARSIWA authoritatively address the law of international responsibility, the delicate issue of national interests and measures taken pursuant to community interest remain the preserve of interpretation and application.

The adage of state responsibility entails that a breach of international obligation must be followed by a duty of reparation.[47] There are three limbs to append responsibility to a state:

First. There must exist an international obligation notwithstanding its nature in force between the states;[48]

Second. There must be an act or omission on part of a state causing a violation of such obligation and the breach must be imputable to that state;

Third. The violation of the obligation must occasion a loss or damage.

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[44]Jean D'Aspremont, *State Responsibility: The General Part*, 64 INT'L.& COMP. L.Q. 982 (2015).

[45] Reparations for Injuries Suffered in the Services of the United Nations, Advisory Opinion, Apr. 11, 1949, ICJ Reports (1949), 174.

[46] James Crawford, *The System of International Responsibility*, THE LAW OF INTERNATIONAL RESPONSIBILITY, 18 (James Crawford, Alain Pellet & Simon Olleson eds., Oxford University, 2010).

[47] Article 1, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.; *See* JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY (Cambridge, 2002). *See* also Rainbow Warrior Case (New Zealand v. France), (1990) 82 I.L.R. 500; Gabcikovo Nagymaros Case at *supra* note 4.

[48]ARSIWA, supra note 57, at 46.

If the preceding submissions are accounted for, there is a visible override of treaty obligations by way of GAAR imputable to the legislative and the revenue authorities for such breach.[49] To test the breach, interpretation of the domestic law is not necessarily seized upon however, non-derogation or the breach, whether direct or not may assume a central position A litmus of whether a violation has occurred is not subject to interpretation of domestic statute causing the violation, but rather, whether there is a direct or indirect breach. The Permanent Court of International Justice in *Certain German Interests in Polish Upper Silesia*[50] held that:

> From the standpoint of International Law and of the Court which is its organ, national laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.

From the above, it is clear that it is immaterial whether the impetus of the breach or non-performance of the obligation is due to legislative or executive acts.[51] The justification of non-performance or breach due to municipal law espouses no defence or justification.[52] The Permanent Court of International Justice held that:

> It should however be observed that, while on the one hand, according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted, on the other hand and conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.[53]

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[49] ARSIWA, supra note 57, at 44.

[50] Certain German Interests in Polish Upper Silesia case (Germany v. Poland), Judgment, 1926 P.C.I.J. (ser. A) No.7 (May 25).

[51] F. A. Mann, *State Contracts and State Responsibility*, 54 AM. J. INT'L. L. 572 (1960).

[52] VCLT, *supra* note 3, at 339.

[53] Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig Territory, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 44 (Feb. 4).

B. Material Breach

Article 60(3)(b) of the VCLT provides *inter alia* "*A material breach of the treaty…consists…violation of a provision essential to the accomplishment of the object or purpose of the treaty*".[54] The ILC's commentary on the provision holds material breaches to be those in relation to the central purpose of the treaty but extends to "*[o]ther provisions considered by a party to be essential to the effective execution of the treaty may have been very material in inducing it to enter into the treaty at all, even [though] these provisions may be of an ancillary character*".[55]

It is a *fortiori* suggestion that withholding treaty benefits that are central to the purpose and object of the DTAA are indeed a material breach. The purpose of DTAA is vitiated by invoking GAAR on transactions. Incidental provisions for limitation of relief and anti-abuse provisions are also overridden by GAAR.[56]

GAAR, being a unilateral breach of the DTAA, gives rise to the right of the non-defaulting state to "*invoke the breach as a ground*"[57] for termination or suspension of the DTAA in whole or part. The breach, however, does not *ipso facto* cause termination of the treaty. It is open to the non-defaulting state to suspend operation insofar as there remains a scope to fulfil obligations by the defaulting state at a later date. There may not be a fundamental breach if the DTAA provides a sanction to repudiation in certain circumstances.

C. Exceptions and Justification to Non-Performance and Breach

Determination of state responsibility may not be conclusive if a breach falls within the ambit of exceptions precluding wrongfulness. ARSIWA exonerates the non-performing state from liability when the impediment to perform the obligation was unanticipated and beyond the control of the state making the obligation

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[54] VCLT, *supra* note 3, at 346.

[55] Report of the International Law Commission on the Work of Its Eighteenth Session, U.N. Doc. A/6309/Rev.1 (1966), reprinted in [1966] 2 Y.B. INT'L L. COMM'N 172, 255, U.N. Doc. A/CN.4/SER.A/1966/Add.1

[56] *See* generally, Frederic L. Kirgis Jr. *Some Lingering Questions about Article 60 of the Vienna Convention on the Law of Treaties,* 22 CORNELL INT'L L. J. 549, 552 (1989).

[57] VCLT, supra note 3, at 346.

materially impossible to perform.[58] The significant caveat is that the wrongfulness is precluded only on failure to perform the obligation i.e., it is involuntary.[59]

GAAR is an active step to avoid or exit the treaty obligation. *Arguendo*, the defaulting state invokes the justification of loss of revenue due to treaty abuse as failure to fulfil treaty obligation, the justification may not withstand the test of proof. The Permanent Court of International Justice. in the *Serbian Loans Case*[60]rejected the claim of non-repayment of a loan by Serbia on account of the First World War.[61]

The factor of volition may lead to substantially diverse answers. The defaulting state may invoke the rule of necessity or distress.[62] The non-performance due to necessity results from an active or passive decision in response to a methodically evaluated imminent peril to safeguard the essential interest of the state. The interpretation of what constitutes "necessity" is based on a subjective analysis of the facts.[63] Further, it must be established that the measure taken was the only means to safeguard the state's interest and the state itself did not contribute to the situation of necessity. The aforementioned prerequisites are additive and cumulative, thus failing to establish any of the abovementioned would result in failure to establish the state of necessity. In addition, the International Court of Justice along similar lines in *Gabˇcíkovo-Nagymaros Project* held:

> [T]hat the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation…it must have been occasioned by an 'essential interest' of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a 'grave and imminent peril'; the act

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[58] ARSIWA, supra note 57, at 48. *See* also VCLT, supra note 3, at 347.
[59] John Gill (Great Britain) v. United Mexican States, Decision of 19 May 1931, RIAA, Vol. V, p. 23.
[60] Payment of Various Serbian Loans Issued in France, France v. Kingdom of the Serbs, Croats, and Slovenes, Judgment, 1929 P.C.I.J. (Ser. A) No. 20, (July 12).
[61] Rainbow Warrior Case (New Zealand v. France), (1990) 82 I.L.R. 500; *See* Dr Andrew Willcoks and Mr Romain Pieri, *Force majeure,* JUS MUNDI (Nov. 29, 2022, 10:54 PM), https://jusmundi.com/en/document/publication/en-force-majeure (where is it noted that the invocation of force majeure is justified mostly in cases of natural calamities or man-made constraints such as wars.)
[62] ARSIWA, supra note 57, at 49.
[63] Rainbow Warrior Case (New Zealand v. France), (1990) 82 I.L.R. 500, 499.

> being challenged must have been the 'only means' of safeguarding that interest; that act must not have 'seriously impair[ed] an essential interest' of the State towards which the obligation existed; and the State which is the author of that act must not have 'contributed to the occurrence of the state of necessity.[64]

To comprehend the justification, the dissection of reasons for compliance must be performed. The international anarchy and the lack of a central enforcement authority cannot go unnoticed. The disciplines of international relations emphasize this apparent factor in the realist and the neo-realist school of thought.[65] Instead of presuming compliance with international law, the theory functions on presumptions of the character of the state. The central presumptions are that the state is the unitary and principal subject in international relations and that the state always acts rationally towards national interests. The affairs of the state are directed and conducted to survive in the competitive anarchic domain and for self-interest. Therefore, compliance with international norms would only exist when impacting the interest of the state.[66] This consequentially reflects the shortcomings and extents of international law.

The Permanent Court of Arbitration in *Saluka v. Czech Republic*[67] found itself in a quandary when considering measures taken by Czech Republic in response to financial distress due to accumulation of bad debt in the late 1990s. The claimant owned one of the 'big four' Czech banks - Investiční a Poštovní Banka (**"IPB"**). Consequent to the debt crisis, the respondent State took measures providing financial assistance to three banks comparable to IPB in nature and circumstances. The lack of state assistance to IPB made it impossible for the claimant to continue business and caused several losses. The respondent State claimed exemption from fulfilment of the 'fair and equitable treatment' (**"FET"**) under BIT due to its

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[64] Gabcikovo Nagymaros Case at *supra* note 4, at 40– 41, 51–52.

[65] Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AMER. J. INT'L. L. 260 (1940).

[66] *See* Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42, INTERNATIONAL ORGANIZATION, 485 (1988); F.A. Boyle, *The Irrelevance of International Law*, CALIF. WEST. INT'L L. J. 10 (1980); R.H. Bork, *The Limits of 'International Law'*, 18 NATIONAL INTEREST 3 (1989-90).

[67] Saluka Investments B.V. v The Czech Republic, PCA Case No. 2001-04.

financial distress. However, the Tribunal held that IPB should have been included in the bailout plan and distress due to bad debt was no ground of exemption.

However, contrary to *Saluka*[68], the ICSID Tribunal in *Hesham Talaat M. Al-Warraq v. Republic Indonesia*[69] and *Rafat Ali Rizvi v. Republic of Indonesia*[70] decided that State's fiscal stimulus of about USD 700 million provided due to financial crisis, though an FET violation,[71] no compensation would be awarded since acts of claimants were detrimental to national interest. Further, the bailout in exclusion of the claimants was found to be a reasonable measure taken in response to the global credit crisis in 2008.[72]

Financial distress and inability has been the background of several other measures and following claims. The Argentinian financial crisis of 2001[73] which spawned restorative measures taken by the State to put a stopper on the debilitating economy such as prohibitions over transfer of currency, non-payment of debt obligations and bank freezes, all of which are central to IAAs and BITs led to several claims.

Continental Casualty Company[74] among many other entities[75] was at the receiving end of such decrees. Continental Casualty, an American financial service provider, occasioned a substantial loss of over 45 million U.S Dollars. Argentina claimed the defence of infirm economy for its non-performance. The ICSID Tribunal held that Argentina is not liable for its measures issued for "maintenance of public order…or

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[68] Saluka, supra note 78.

[69] Hesham Talaat M. Al-Warraq v. The Republic of Indonesia, Ad Hoc Arbitration, Final Award December 15, 2014.

[70] Rafat Ali Rizvi v. Republic of Indonesia, ICSID Case No. ARB/11/13.

[71] Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference, Bagdad, 5 June 1981, into force 23 September 1986, Article 10(1).

[72] Lorenzo Cotula, Human Rights and Investor Obligations in Investor-State Arbitration, 17, THE J. OF WORLD INVESTMENT & TRADE, 148 (2016).

[73] *See* IMF Independent Evaluation Office, *The IMF and Argentina 1991-2001* (Washington D.C.: IMF, 2004).

[74] Continental Casualty v. Argentine Republic, ICSID Case no. ARB/03/9, Award (Sept. 5, 2008).

[75] CMS Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005); LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006); Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, (United States/Argentina BIT) Award (May 22, 2007); CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005); Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007)

the protection of its own essential security interest."[76] The Tribunal in *CMS Gas* along similar lines resolved that measures taken in response to economic exigencies is not prohibited under customary international law.[77]

Since DTAAs are wide obligations, performance thereof would be subject to exit-valves i.e., measures of necessity. Ergo, if the State is able to establish that the measure of GAAR was taken to preserve the infirm economy and combat the leaking revenue, obligations would ordinarily not be attracted.[78]

With the extrapolation of commercial activities, stagnant treaty obligation become onerous encumbrance. However great the onus may be, the anarchic international polity[79] has now become an extension of State's national interests intersection in webs and thus forms a close-knit superstructure.[80] Waltz, based on such onuses presupposes theory of survival:

"*Internationally, the environment of states' actions, or the structure of their system, is set by the fact that some states prefer survival over other ends obtainable in the short run and act with relative efficiency to achieve that end*"[81].

This reservation of self-help based on relative capabilities to perform obligations has now distilled into 'self-judging clauses'. Such clauses essentially permit contracting parties to reserve rights of unilateral non-compliance under certain circumstances wherein performance of obligations would compromise with its sovereignty, public policy or other essential interests.[82] Self-judging provisions in the treaty generally bear the language like "if the state considers" or in the state's

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[76] Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. XI, Nov. 14, 1991, S. TREATY Doc. No. 103-2 (1993). *See* also, Continental Casualty, supra note 85, at 75.

[77] CMS Gas, supra note 86, at 359.

[78] Chris Brummer, *Origins of the Financial Crisis and International/National Responses: An Overview*, 104 AM. SOC'Y INT'L. L. PROC. 435 (2010).

[79] Helen Milner, *The Assumption of Anarchy in International Relations Theory: A Critique*, 17, REV. OF INT'L STUDIES, 67 (1991).

[80] Sayan Dasgupta, *Collisions in Outer Space: Assessment of Liability*, 12 INDIAN J. ASL, 164 (2021).

[81] KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS, 45 (Addison-Wesley Publishing Company 1979).

[82] See Susan Rose-Ackerman and Benjamin Billa, *Treaties and National Security*, 40, NEW YORK U. J. OF INT'L. L. AND POL., 437 (2008).

opinion" or "if the state determines"[83] thereby vesting autonomy with the State to derogate from treaty obligations on fulfilment of requisite factors.[84] Article 2(c) of the *Convention concerning Judicial Assistance in Criminal Matters*[85] serves as a good instance of representation of a self-judging clause. It reads as follows:

"may be refused […] if the requested State considers that the execution of the request is likely to prejudice its sovereignty, its security, its order public or other of its essential interests."

The exit-valve provides States to participate in the international order while also balancing its competing domestic priorities.[86] In spirit, it would provide a mechanism to the contracting State to control and exercise its residuary powers. Sans a global international tax regime to avoid double taxation and innovative and dynamic models of improper tax avoidance arrangements, it would be advisable to incorporate self-judging clauses in DTAA. The clause incorporated may have the flesh and feel as provided hereunder:

"Nothing in this Treaty shall prevent the State from taking any action or adopting any measure which it considers to be necessary or appropriate for the protection of its own national interest."

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[83] Stephen Schill, Robyn Briese, *"If the State Considers": Self-Judging Clauses in International Dispute Settlement*, 13, MAX PLANCK UNYB, 61 (2009).

[84] See, eg, Convention on Cybercrime, opened for signature 23 November 2001, 2296 UNTS 167 (entered into force 1 July 2004); Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, opened for signature 20 December 1988, 1582 UNTS 164 (entered into force 11 November 1990); United Nations Convention against Transnational Organized Crime, opened for signature 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003); United Nations Convention against Corruption, opened for signature 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005); International Convention for the Suppression of the Financing of Terrorism, opened for signature 9 December 1999, 2178 UNTS 197 (entered into force 10 April 2002); International Convention for the Suppression of Terrorist Bombings, opened for signature 15 December 1997, 2149 UNTS 256 (entered into force 23 May 2001).

[85] Convention concerning Judicial Assiatcne in Criminal Matters, Signed 27 September 1986, 1695 UNTS 297 (entered into force 1 August 1992)

[86] Arthur Larson, *The Facts, the Law, and the Connally Amendment*, 74, DUKE L. J. (1961); Hubert Humphrey, *The United States, the World Court and the Connally Amendment*, 11, VIRGINIA J. OF INT'L. L., 310 (1971). (Self-judging optional declarations were first introduced by the United States in 1946 by the Connally Amendment.)

The phrase "it considers to be" has been found in several American treaties since 1992[87] and have been accepted by the International Court of Justice in the *Nicaragua case*.[88] However, it would be considered good practice to enlist the circumstances and delineate particular criteria for derogation rather than a wide phraseology. It would also inspire confidence in negotiation of DTAA to explicitly declare the ambit of "it considers." [89] The United States (**"U.S"**) Model DTAA also lays down a similar exit valve from which no compromise is generally visible.[90] The U.S Model provides a "saving clause" that preserves the right of U.S to tax its citizens notwithstanding the treaty obligations.

IV. CONCLUSION

GAAR, first introduced as a calculated step to combat DTAA abuse has become a fertile ground for uncertainty in state responsibility. GAAR, which envisages the prevention of tax avoidance, conflicts with DTAAs. The invocation of GAAR over dubious transactions causes a direct and material breach of the treaty obligation under DTAAs. Moreover, the Constitution of India leaves no scope for the judiciary to conciliate the unequivocal conflict.

State responsibility in case of breach of DTAA would however be subject to a volition-based exoneration on grounds of necessity. Necessity is an act of the state to justify non-performance due to a threat to the national interest. Loss of revenue may be construed as an imminent threat to the economy of the country. The states primarily comply with the international norm out of self-interest. Compliance with international law is limited to where there is an accrual of benefit to the national interest and would cease to exist when contrary to the state interest. Similarly, where the DTAA causes a loss of revenue, it may be argued that the same is incompatible with the initial circumstances present when the treaty obligations

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[87] LG&E Capital Corp, LG&E International Inc v. Argentine Republic (2006) ICSID Case No ARB/02/1 (United States/Argentina BIT). Decision on Jurisdiction, 30 April 2004, Paragraph 213.

[88] *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. US*) [1984] ICJ Rep 392, para 222.

[89] Burke-White, William W. & von Staden, Andreas, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 379 (2008).

[90] Doron Narotzki, *Tax Treaty Models - Past, Present, and a Suggested Future*, 50 AKRON L. REV., 384, 394 (2017).

were undertaken. The changed circumstances therefore may provide a ground for non-performance and breach.

THE IMPACT OF DAOS ON TRADITIONAL CORPORATE GOVERNANCE AND ARISING LEGAL ISSUES

- Mukund Arora

ABSTRACT

*Decentralized Autonomous Organizations ("**DAOs**") embody peer-to-peer ("**P2P**") networks of participants within the blockchain ecosystem established to accomplish common objectives within an organized structure. They present a challenge to traditional corporate governance structures by enabling automated operations, compliances, and dispute resolution, thereby representing a progressive approach. This paper investigates the promise of a DAO to bring transparency, efficiency, and accountability, and explores how it can effectively fulfil the regulatory needs of existing corporate structures. This research examines the progress made by DAOs in establishing themselves as normative corporate entities and addresses pressing legal questions regarding legal form, jurisdiction, and liabilities. To this end, this research analyses existing laws, theoretical models, and structures of prominent DAOs as case studies to provide insights into their functioning. This paper argues for a unified international framework to address these legal challenges. Lastly, this paper presents limitations of this model, and seeks to evaluate their viability for implementation, along with the potential road ahead.*

KEYWORDS: Decentralized Autonomous Organisations, Corporate Governance, Blockchain, Jurisdiction, Liability

I. INTRODUCTION

Corporate governance is characterized by the presence of agency constructs. In traditional finance and corporate governance, the agency relationship is distinguished by attempts to optimize incentives between principals and agents, control costs, minimize information asymmetries, manage adverse selection and moral hazard, optimize risk preferences between principals and agents, and engage in monitoring activities. Despite the unresolved and significant issues pertaining to the separation of ownership (shareholders) and control (agents) or "agency problems", and the imperfect regulations that address these conflicts, the corporate structure remains the most widely adopted mechanism for governance.[1]

During the 17th century, the corporate structure emerged as a mechanism for advancing trade interests, primarily through the East India Company and the Dutch East India Company. Monarchies offered shares to investors, who funded their charters, resulting in risk pooling and downside limitation.[2] The corporate form has undergone minimal modification since its inception as early joint-stock companies. Corporations continue to rely on centralized frameworks with an emphasis on top-down control. However, the contemporary notion of decentralizing governance represents a notable departure from this conventional approach, presenting both considerable prospects and potential difficulties.

The integration of technology in modern business operations has brought about a significant transformation in corporate governance, ushering in various opportunities for progress. The utilization of technological advancements has presented the potential to enhance transparency, mitigate the abuse of information asymmetry by management, and offer direct benefits to organizations.[3] Recent developments in the form of Decentralized Autonomous Organizations represent a departure from this conventional approach, with their emphasis on decentralized governance. This shift to decentralized governance presents both significant opportunities and potential challenges for corporations.

DAOs challenge the traditional roles of board members, executives, and shareholders in decision-making processes, potentially leading to more democratic and participatory decision-making. However, this also challenges the inherent

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[1] DAN FISCHEL & FRANK EASTERBROOK, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991).

[2] Rayne Steinberg, *Enhancing Traditional Corporate Governance with DAOs*, FORBES FINANCE COUNCIL 89-99 (2022).

[3] Van der Elst C, Lafarre *A. Bringing the AGM to the 21st century: Blockchain and smart contracting tech for shareholder involvement*, SSRN ELECTRONIC J. (2017).

concepts of accountability, transparency, and decision-making in a decentralized environment.[4]

Blockchain-based technology has presented an array of potential alternatives to extant corporate governance solutions. Through the use of code, peer-to-peer connectivity, crowdsourcing, and collaboration, blockchain technology may facilitate the elimination of agents as intermediaries in corporate governance. This is achieved via the incorporation of blockchain-based guarantees into the code, which serve to ensure that participants in business transactions and agency relationships are unable to circumvent established governance rules. These guarantees operate by requiring that contracts between principals and agents are executed only when all contract terms have been met by both parties and have been verified via a consensus algorithm. As such, blockchain technology may lead to a reduction in the level of oversight and monitoring required of agents, thereby altering the cost structure of the principal-agent relationship. For example, firms may use blockchain to provide better clarity in their organization's ownership structure, hence reducing undesired practices such as "empty voting."[5]

A DAO is an entity that is collectively owned by its members and governed by smart contracts – simple rules programmed into a blockchain. Smart contracts are logical elements that perform actions automatically based on pre-specified conditions. In contrast to conventional corporate structures that depend on bylaws, voting arrangements, and board deliberations, DAOs function primarily through automated processes without significant human intervention in decision-making. The governance of DAOs can be distributed among a large number of participants, potentially numbering in the hundreds or thousands. The transparency of DAOs is ensured through publicly visible transactional activity on the blockchain, effectively replacing the legal power of corporate bylaws with a zero-trust system that ensures accountability and deters rule-breaking.[6]

A DAO comprises a group of shareholders or members who are authorized to manage the entity's finances and modify its code, subject to a predetermined majority quorum, or have another set of such rules. The allocation of funds within the organization is determined through a collective decision-making process.

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[4] Shahrani, P.S., Hassan, R. and Adaikalam, L. *The Evolution of Corporate Governance and Its Impact on Contemporary Management*, 12(10) TURKISH ONLINE J. OF QUALITATIVE INQUIRY (2021).

[5] Yermack D. *Corporate governance and blockchains*, 21(2) REV. OF FINANCE, 7-31 (2017).

[6] Feng and Wen, *An Empirical Study on Relationship between Corporate Governance and Technical Innovation of Chinese Listed Companies*, 7 CHINA INDUSTRIAL ECONOMICS, 91-101 (2018).

Members of the DAO acquire governance tokens, which are cryptocurrencies linked to the specific project of the DAO, and the revenue generated is directed towards the DAO's treasury account.[7] DAOs are flat organizations where power is not formally delegated to specific individuals, and no one participant is regarded as superior to others. All participants are considered equals who contribute equally or similarly to the community.

II. ANALYSIS

A. Impact on Corporate Structures

DAOs are challenging traditional corporate governance structures in several ways.

First. DAOs eliminate the need for traditional intermediaries such as boards of directors and executives, who are replaced by a decentralized group of token-holders. This eliminates the potential for conflicts of interest and ensures that decision-making is democratic and transparent.

Second. DAOs enable the creation of decentralized autonomous applications that operate independently of any central authority, which can result in greater efficiency, lower transaction costs, and improved service delivery.[8]

Third. DAOs are more resistant to external interference and regulatory capture, which reduces the risk of corruption and abuse of power.

The implications of these challenges for companies are significant. Traditional corporations may find it difficult to compete with DAOs in terms of transparency, efficiency, and accountability. DAOs offer a level of transparency that traditional corporations cannot match, which makes them more attractive to investors and customers.[9] DAOs also offer a greater level of decentralization as opposed to traditional corporations, which reduces the risk of regulatory capture and abuse of power.

The role of board members, executives, and shareholders in decision-making processes is changing due to the rise of DAOs. As discussed above, decision-making power is distributed among token-holders, which eliminates the need for

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[7] Ying-Ying, Jean-Philippe, and Sha Wang, *The Internal and External Governance of Blockchain-Based Organizations: Evidence from Cryptocurrencies*, SSRN ELECTRONIC J. (2017).

[8] *Ethereum White Paper on A Next Generation Smart Contract & Decentralized Application Platform*, https://ethereum.org/669c9e2e2027310b6b3cdce6e1c52962/Ethereum_Whitepaper_-_Buterin_2014.pdf (2014).

[9] Hanna Halaburda, *Blockchain revolution without the blockchain?*, 61 COMMUN. ACM, 27-29. *(2018)* doi: 10.1145/3225619

traditional intermediaries. This can result in more democratic decision-making processes that reflect the views and interests of all stakeholders.

However, the use of DAOs can also lead to a lack of accountability and responsibility, as decision-making becomes decentralized and fragmented. The changes in corporate governance structures brought about by DAOs may corporate performance and accountability in several ways.

First. DAOs are more resilient to external shocks and disruptions due to their decentralized nature, which improves their ability to adapt to changing market conditions.

Second. The contractual terms governing the operation of DAOs are publicly accessible and characterized by full transparency. As such, financial information relating to a DAO, for instance, is accessible on the blockchain to any interested party, rather than being limited to a company's accounting department.[10] DAOs utilize smart agency contracts that operate on a blockchain network, enabling principals and agents to register debts and promises, and facilitate the creation of markets, among other functions that may not have been previously contemplated. Smart contracts offer complete transparency by making all contract terms publicly accessible. Therefore, DAOs offer greater transparency and accountability, which can enhance their reputation and trustworthiness.

Third. DAOs offer a more democratic and inclusive approach to decision-making, which can improve stakeholder engagement and satisfaction.

B. Legal and Regulatory Issues

i. Legal Personality

Traditionally, a legal entity is formed through state registration and recognition. The said entity then acquires a legal personality and has the capacity to own property, enter into contracts, and sue or be sued in court.

In the case of a DAO, there is no legal entity created through state registration. Rather, the organization is created and governed through computer code and smart contracts, which operate in a decentralized and automated manner.

[10] Fenwick, M., Kaal, W. A., and Vermeulen, E. P. M. (2017). *The "unmediated" and "tech-driven" corporate governance of today's winning companies. In How to Organise Now for Success.*

Consequently, there is a significant question as to whether a DAO has legal personality.

DAOs may be characterized as a form of partnership or association; however, they do not possess legal personality as recognized by state authority. DAOs even lack the legal personality comparable to that of an investment fund.[11]

Regulatory challenges in the United States ("**US**"), where most DAOs have originated, have resulted in the emergence of two primary forms of DAOs: (i) "unwrapped"; and (ii) "wrapped".

Unwrapped DAOs have no formal registration in any jurisdiction and rely on internal digital dispute resolution procedures to manage the organization. Wrapped DAOs, *per contra*, employ existing legal structures, including state-domiciled corporations such as the Delaware Limited Liability Corporate ("**LLC**"), to register the DAO as a corporate or non-profit entity, granting it legal personality.

The legal system in the US allows for member-managed LLCs, which may be a suitable legal framework for DAOs. Participants in such LLCs operate the firm jointly with limited liability protection, and no registered director or proprietor is necessary.[12] This structure is compatible with DAO collective mechanisms and has proved to be relatively useful in the early phases of their growth.

However, to ease the collaborative design of DAOs, the legal foundations of member-managed LLCs are considerably amended through the amendment of the operating agreements. Through the application of contractual arbitration clauses, the contractually altered operational agreements offer a level of legal enforceability to the actions of a DAO. If a dispute emerges between the members of a DAO, the arbitration provision requires that any issues be arbitrated. This grant DAOs functioning inside the US regulatory environment a level of predictability while also supporting their distinctive decentralized and autonomous character.[13]

Wyoming and Vermont have recently passed legislation allowing DAOs to register as LLCs or blockchain-based LLCs ("**BBLLC**") under their own names, granting

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[11] Julien Thevenard, *Decentralised Oracles: A Comprehensive Overview*, MEDIUM (Jan. 15, 2019), https://medium.com/fabric-ventures/decentralised-oracles-a-comprehensive-overview-d3168b9a8841.

[12] Timothy Neilsen, *Cryptocorporations: A Proposal for Legitimizing Decentralized Autonomous Organizations*, 5 UTAH L. REV. 1116-1117, (2019).

[13] Tiffany Minks, *Comment, Ethereum and the SEC: Why Most Distributed Autonomous Organizations Are Subject to the Registration Requirement of the Securities Act of 1933 and a Proposal for New Regulation*, 5 TEX. A&M L. REV. 405, 405 (2018)

them legal personality.[14] Articles of association must be filed by DAOs to identify the smart contracts that run the system, and they can define whether the DAO is controlled by members or autonomously by algorithms. States are not permitted to change or facilitate the organization's internal governance under these arrangements.

State courts, on the other hand, can step in if one member prefers a suit against another.[15] The Wyoming model specifies the quorum necessary for proposal acceptance, requiring that fifty percent of DAO members support a decision. The legislation also allows for amendments to the articles of incorporation if the underlying smart contracts change, allowing the business to develop as it grows or evolves.[16]

It is therefore legally feasible that a DAO, being a self-executing digital entity, could be granted legal personality due to its algorithmic governance and ability to autonomously execute actions. A DAO, arguably, is more self-sufficient and has greater agency than a traditional company, which relies on human agents to carry out all stages of decision-making and action-taking, including formation and communication.

ii. Jurisdiction

Determining the jurisdiction for a DAO can be complex. It may be possible to establish jurisdiction based on the creator or leader of a DAO. In cases of tort or delict, the location where the events took place can be used to determine

[14] SF0038 Decentralized Autonomous Organizations, Wyoming Senate Bill 38, 17-31-105, (2021)
[15] Vermont Statute on the Blockchain-based Limited Liability Companies, 11 V.S.A. ss 4173,
[16] Max, Joshua, Gordon, Steven, and Bryan, *Mapping the Future of Legal Personality*, 69 (2020) MIT COMPUTATIONAL L. REP. 2.

jurisdiction, taking into account the location of the other contractual party and the location where negotiations and promotions occurred.[17]

The legal representative of a DAO can be identified based on their marketing efforts, such as attracting new investors or promoting the benefits of membership in the DAO.[18]

If a promoter has no legal right to represent the DAO, they may be liable for misrepresentation. However, if the promoter does have legal rights to act as the owner, creator, manager, or representative of the DAO, they must be able to provide evidence of their authority.[19]

The emergence of a community-based jurisdictional order in the online space has been prompted by the phenomenon of corporations and communities regulating themselves and establishing their own jurisdictional order, commonly referred to as an online jurisdiction.[20]

The founders and participants of Maverick DAO have adopted blockchain technology to facilitate self-organization and self-governance of their assets, without relying on the government to provide a legal framework or protection. They rely solely on technology and the principle of "code is law". Similar to traditional company law, the founders and participants of these DAOs voluntarily subject themselves to the rules and regulations of the organization. Maverick DAO operates by self-regulating and establishing their own jurisdictional order, without requiring the intervention of a state to legitimize their existence.[21]

The founders of Maverick DAO made a deliberate decision to select the code of the DAO as the legal framework governing their company.

However, it is evident that the efficiency of any legal framework for DAOs would be substantially affected by legal norms in other jurisdictions. While unitary national or state-level measures, such as those enacted by Wyoming and Vermont,

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[17] Mark, Wulf, and Erik, *The "unmediated" and "tech-driven" corporate governance of today's winning companies. In How to Organise Now for Success Tomorrow*, SSRN ELECTRONIC J. (2017)

[18] *Decentralized Autonomous Organization Toolkit* (2023), WORLD ECONOMIC FORUM,: https://www3.weforum.org/docs/WEF_Decentralized_Autonomous_Organization_Toolkit_2023.pdf.

[19] Peder Østbye, *Exploring DAO Members' Individual Liability*, SSRN ELECTRONIC J. (2022).

[20] UTA, JURISDICTION AND THE INTERNET: REGULATORY COMPETENCE OVER ONLINE ACTIVITY. CAMBRIDGE: CAMBRIDGE UNIVERSITY PRESS., (2007) DOI:10.1017/CBO9780511495311.

[21] *Introducing maverick: An infrastructure for the most liquid markets in Defi*, MEDIUM (Nov. 26, 2021), https://medium.com/maverick-protocol/introducing-maverick-a-protocol-for-decentralized-permissionless-trading-and-staking-of-any-asset-40b2a8bb1d54.

are admirable, addressing the issue successfully requires a unified and standardized worldwide solution.

Established international legal frameworks, such as those pertaining to money laundering and terrorism financing, can provide valuable lessons, as pioneered by the Financial Action Task Force ("**FATF**"), an *ad hoc* membership body organized under the umbrella of the Organization for Economic Cooperation and Development ("**OECD**").[22]

iii. Liability

DAOs differ from traditional corporations. DAOs do not have a clear chain of command or designated officers. As a result, it can be challenging to attribute individual liability for the actions of the organization.

Further, since DAOs may lack legal personality, they cannot be held accountable as a legal entity. The individual members of the organization may bear any liability that arises from the actions of the DAO. In the event of a breach of contract or other legal violation, members of the DAO may face personal liability.[23] This liability may be imposed based on their level of involvement in the organization's decision-making processes, their actions on behalf of the organization, or their level of investment in the organization.

Additionally, the decentralized nature of DAOs poses challenges for determining jurisdiction. Absent of a physical location for the organization, determining which laws and regulations apply to its actions can be difficult. The absence of a central authority or governing body for DAOs makes it challenging to enforce legal decisions against the organization or its members.

To mitigate these legal risks, DAOs may establish clear governance structures, legal agreements, and compliance with applicable laws and regulations.

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[22] Jack, '*Summary: The DAO Model Law*', MEDIUM, (Jun. 2021), https://medium.com/@mycelium-eth/summary-the-dao-model-law-51fd4febbd4.

[23] Andrew Hinkes, *The Law of the DAO*, COINDESK (May 19, 2016), https://www.coindesk.com/markets/2016/05/19/the-law-of-the-dao/

Nevertheless, it is crucial to recognize that such measures may not entirely eliminate the legal risks associated with DAOs.[24]

In many jurisdictions, founders of DAOs may commence business without any formal documentation process related to traditional business entity formation. This procedural deviation engenders ambiguity regarding the legal status of the human participants affiliated with the DAO, primarily developers, governance token-holders, and users.

Therefore, the question arises as to whether they can be classified as a traditional business organization. This is particularly relevant in jurisdictions where formal registration and documentation are required, as the absence of these elements may result in the DAO being considered a general partnership, which has significant legal implications including (i) determination of profits a distribution, (ii) the governance structure of the DAO, (iii) its status in terms of regulatory compliance, and (iv) the potential for developers, token holders, and other stakeholders to be held personally liable for any debts incurred by the DAO.[25]

In the event that a DAO lacks a corresponding legal entity, it may be deemed a general partnership. As far as contractual liability is concerned, each individual member of the DAO could conceivably enter into contracts and legally bind other members without their explicit consent or knowledge. Despite the fact that the DAO members may authorize a single individual to engage in commercial contracts on behalf of the entire organization, both the authorized member and the remaining DAO members may still be exposed to unlimited personal liability for any claims that may arise from said agreement, unless the passive members have individually contracted with the counterparty to limit their individual liability.[26]

C. Case Studies

i. Maker DAO

One example of a successful DAO is Maker DAO ("**Maker**"), which governs the Maker protocol. The Maker protocol enables anyone to create the Dai stablecoin using cryptocurrency collateral assets. Maker utilizes a two-token system

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[24] Tual Stephan, *On DAO Contractors and Curators*, MEDIUM (Apr. 10, 2016), https://blog.slock.it/on-contractors-and-curators-2fb9238b2553.

[25] Michael Anderson Schillig, *Decentralized Autonomous Organizations (DAOs) under English law*, L. & FIN MKT. REV. (2023)

[26] Mark, Evan and Kelley, *Legal Implications of Decentralized Autonomous Organizations*, ROPES AND GRAY (Apr. 2022) https://www.ropesgray.com/-/media/files/articles/2022/04/20220414_bloomberg_dao_article.pdf..

consisting of the Dai stablecoin and the MKR governance token, which allows stakeholders to vote on proposals and oversee the implementation of the Dai stablecoin.

MKR token-holders serve as decision-makers for the Maker protocol and vote on policies that regulate the stability, transparency, and efficiency of the stablecoin. Maker's governance structure ensures that policies benefit all users of Maker, as token-holders are incentivized to coordinate the best policies for their mutual benefit.[27]

ii. Bankless DAO

Another example of a rapidly evolving DAO is Bankless DAO ("**Bankless**"), a decentralized community formed to promote the adoption and awareness of truly 'bankless' money systems, such as Ethereum, DeFi, and Bitcoin. Members of Bankless work collectively to propagate bankless media, culture, and education.

A native governance token grants members voting rights in proposals for Bankless and funds a community treasury that supports the pursuit of Bankless' goals. Members are free to organize into guilds and pursue sub-goals that contribute to Bankless' primary mission. The autonomous groups within Bankless demonstrate the organizational strength and evolving coordination abilities of DAOs in achieving their objectives.[28]

iii. Aragon Network

The Aragon Network ("**Network**") is a DAO that serves as a dispute resolution protocol, with its function being analogous to that of an online court. In the event of a dispute, a group of jurors vote on a predetermined set of possible outcomes to reach a final verdict. The jurors are incentivized to select the "correct" solution through a majority mechanism, which in turn determines their remuneration.

Aragon is characterized by a structured economic and governance flow, with its governance being overseen by its token holders, who operate in a similar manner to shareholders in a traditional company. Aragon is easily identifiable as an entity to both third parties and jurors, with its assets playing a supportive role in the

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[27] *The Maker Protocol White Paper*, https://makerdao.com/en/whitepaper.

[28] *Banklessdao White paper*, https://forum.bankless.community/t/banklessdao-white-paper/3130.

facilitation of its operations. Ultimately, Aragon's token-holders serve as the primary participants, while its assets remain secondary.[29]

III. LIMITATIONS IN DAO GOVERNANCE

DAOs, similar to any other organization, are subject to inherent limitations. DAOs lack a centralized authority to manage society, regulate individual and organizational behaviour, and enforce mutually agreed-upon regulations. This may result in suboptimal governance outcomes from a centralized standpoint. Yet, the developing governance design of DAOs can address this limitation by introducing more effective decentralized structures.

DAOs necessitate governance mechanisms to cope with potential gaps that may arise in the course of incomplete smart contracts. Corporate governance constitutes the provision of majoritarian default rules that cater to the gaps in parties' incomplete contracts.

However, both current legal infrastructure and developing coded governance solutions represent incomplete contracts, unable to forecast every issue that could arise within the respective entities. The decentralized code-based systems form a nexus of incomplete smart contracts that lack a reservoir of majoritarian default rules to address gaps. Corporate governance default rules are mostly unsuitable for blockchain-based entities, owing to factors such as natural language.[30] As a result, blockchain-based entities encounter governance hurdles similar to those faced by all governance systems that depend on incomplete contracts.

Further, DAOs are associated with practical shortcomings, such as the fact that token-holders and developers of DAOs are not foisted fiduciary duties, which can result in conflicts of interest without appropriate safeguards. DAOs may also necessitate frequent technical decisions by individuals who may not possess the necessary expertise, leading to inefficiency and lower voter engagement.

Additionally, some DAOs establish traditional business entities (e.g., banking) to carry out significant operations, but this approach raises numerous legal and regulatory concerns. Several DAOs enable unchecked voting-related, wolfpack-like and solicitation activities, along with undisclosed voting arrangements. DAOs often possess unclear or inadequate dispute resolution mechanisms, and computer

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[29] *Aragon/ whitepaper: An opt-in digital jurisdiction for Daos and sovereign individuals*, https://github.com/aragon/whitepaper

[30] Wulf Kaal & Craig Calcaterra, *Crypto Transaction Dispute Resolution*, 72 THE BUS. LAW. 109 (2017-2018).

code may contain design flaws, making it susceptible to cyberattacks and exploitation. The inherently decentralized nature of governance in DAOs can impede swift responses to security crises.[31]

In the given scenario, the need for international laws for DAOs cannot be overstated. Such laws would provide a comprehensive regulatory framework to govern DAOs at a global level, ensuring they are not subject to conflicting legal frameworks or operating outside the bounds of the law.[32]

IV. CONCLUSION

DAOs represent an innovative and novel way to organize and conduct businesses, projects, and communities without a centralized authority. *Per contra*, the decentralized and global nature of DAOs poses significant challenges in terms of their legal status and applicability of existing legal frameworks. It is critical to recognize that DAOs operate beyond the traditional legal boundaries of national borders and jurisdictions, making it challenging for local laws to regulate them effectively.

The development of international laws for DAOs would provide guidance on several critical issues, including governance, ownership, liability, and dispute resolution. Without a standardized international legal framework for DAOs, there is a risk of legal challenges, disputes, and a lack of accountability. These factors could ultimately hinder the growth and adoption of this emerging technology. Policymakers must recognize the importance of creating an international legal framework that supports the development and adoption of DAOs while also protecting the interests of all stakeholders involved. International laws would provide a clear and comprehensive regulatory framework to govern DAOs, ensuring their legal compliance, and enabling their sustainable growth and development. It is imperative that policymakers work together to create a

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[31] Kevin Schwartz & David Adlerstein, *Decentralized governance and the lessons of corporate governance*, THE HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Jun. 4, 2022), https://corpgov.law.harvard.edu/2022/06/04/decentralized-governance-and-the-lessons-of-corporate-governance.

[32] Patrick Daugherty & Louis Lehot, *DeFi and the DAO: How the Law Needs to Change to Accommodate Decentralized Autonomous Organizations*, FOLEY & LARDNER LLP (Dec. 14, 2021), https://www.foley.com/en/insights/publications/2021/12/louis-lehot-defi-dao-how-law-needs-to-change.

standardized international legal framework for DAOs, promoting their responsible use and ensuring the protection of all stakeholders involved.

DAOs have the potential to significantly disrupt traditional corporate governance structures. The decentralized and autonomous nature of DAOs offers a new way of organizing and operating businesses that challenges the centralized, hierarchical models of traditional corporations. DAOs offer increased transparency, accountability, and efficiency, as well as the potential for more democratic decision-making processes. These advantages could incentivize traditional corporations to adopt some aspects of DAOs into their own governance structures. However, the legal and regulatory challenges surrounding DAOs need to be addressed before they can be fully integrated into traditional corporate structures.

UNPACKING THE COMPETITION (AMENDMENT) ACT 2023: AN IN-DEPTH EXAMINATION OF ITS PROVISIONS AND CONSEQUENCES

- Saachi Kale

ABSTRACT

*The Competition (Amendment) Act, 2023 ("**Amendment Act**") received presidential assent on 11th April, 2023 and was officially published in the Gazette of India. The first draft of the Amendment Act, released by the Ministry of Corporate Affairs in 2020 based on the report of the Competition Law Review Committee ("**CLRC**"), has finally taken the shape of a legislation.*

The Amendment Act has ushered in noteworthy changes to the field of competition and transactional law in India. These changes encompass the introduction of new provisions pertaining to deal value thresholds, settlement and commitment, etc. In this article, the author aims to critically examine these key amendments undertaken, with a focus on highlighting their impact on the economy to thoroughly understand the implications of the Amendment Act.

KEYWORDS: Competition, Amendment, Transactional, Law, Implications.

I. PREFATORY CONTEXT: INTRODUCTORY NOTE

The Amendment Act is one of the most crucial changes to the Competition Act, 2002 (**"Principal Act"**) in the last twenty years.[1] The Principal Act has seen previous amendments in 2007[2] and 2009.[3] However, the Amendment Act will have significant implications on how deals, mergers, and acquisitions are conducted in India.

Additionally, the Amendment Act will impact competitive dynamics in the marketplace, altering the way firms vie for market share and strive to outperform one another. New market issues may arise that were not previously addressed by existing competition laws. For example: the rise of digital markets, e-commerce, and platform-based economies has presented unique challenges that require updates to competition laws to effectively address anti-competitive behaviour in these sectors.

The Amendment Act is, however, silent on its applicability in the digital sector, which has been left to the Committee on Digital Competition Law ("**CDCL**") to be deliberated upon.

While the Amendment Act has introduced several positive changes, it has also brought about negative impacts, including certain loopholes. Although new provisions have been incorporated, there are still certain issues on which it remains silent, which will be further discussed in this article.

II. KEY AMENDMENTS AND ITS IMPACT ON COMMERCE

The amendments are expected to bring about significant changes to the existing framework. The author will explore their potential implications on competition policy, enforcement, and regulation. The discussion will provide insights into the anticipated impact of the amendments on businesses, consumers, and the overall competitive landscape, and shed light on the potential challenges and opportunities arising from the proposed changes to the Principal Act.

A. Section 6(2A): Time Prescribed to CCI for Approving Combinations

The time limit prescribed to the Competition Commission of India (**"CCI"**) for approving combinations has been reduced to 150 days as opposed to the 210 days

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[1] The Competition (Amendment) Act, 2023, No.9, Acts of Parliament (India).

[2] *The Competition (Amendment) Act, 2007*, No.39, Acts of Parliament (India).

[3] *The Competition (Amendment) Bill, 2009*, PRS INDIA (Dec. 11, 2009), *https://prsindia.org/files/bills_acts/bills_parliament/2009/Competition_Amendment_Bill.pdf.*

provided in the Principal Act. This shall mean that CCI has 150 days from the day the notice is sent to CCI, to either approve the combination or to pass an order under Section 31 of the Principal Act.[4]

AMENDMENT	IMPACT
CCI shall have 150 days to approve a combination.	The expected impact of this amendment is expediting the timelines for approval set by the CCI, which will increase transaction certainty and reduce firm anticipation. However, there may be a potential rise in information requests from case officers, leading to clock stops in the approval process.[5] This could burden case officers with administrative duties of preparing detailed reports for submission to the CCI before recommending transaction approval, posing challenges in workload and resource management. Nevertheless, the overarching goal is to streamline and accelerate the approval process under the Amendment Act.

This provision in the Principal Act mandated any person or enterprise who intends to enter into any combination, such as a merger, amalgamation, acquisition etc, to send a notice to CCI, which shall include all details of the proposed combination and transaction, "*within 30 days*" of the Board of Directors of the enterprise approving the combination and/ or the execution of an agreement approving to the proposed combination.[6] The Amendment Act substitutes the thirty-day period to "*after any of the following, but before consummation of the combination*."

This indicates that firms will now have to intimate CCI about any combination after the performances mentioned under Section 6(2)(a) and Section 6(2)(b) but before the final execution of the combination.

AMENDMENT	IMPACT
Notice shall be sent to CCI before	This amendment aligns with the narrative of ease of doing business. It resolves the long-standing confusion about what triggers the requirement to file a notice with the CCI within thirty days in case of a combination.

[4] This section of the Act lays down powers of the Competition Commission in approving or disapproving combinations which may have an appreciable adverse impact on competition in the market. Competition Act, 2002, No. 12, Acts of Parliament (India) § 31.

[5] Avantika Kakkar, *The Competition (Amendment) Bill, 2023: An Analysis of key amendments and some unanswered questions,* CYRIL AMARCHAND MANGALDAS (Apr. 19, 2023 9:39PM), https://www.cyrilshroff.com/wp-content/uploads/2022/08/Client-Alert-Competition-Act.pdf.

[6] *Supra* note 4.

AMENDMENT	IMPACT
consummation of transaction	Now, the trigger document is irrelevant, and parties only need to ensure that the transaction cannot be consummated before obtaining CCI approval or the expiration of 210 days from the date of filing the Notice. In the past, there have been instances where parties were penalized for delay in filing notices based on their interpretation of the trigger event, even if they filed on a later date.[7]

B. Section 5: Deal Value Thresholds

Section 5 of the Principal Act regulates combinations based on the asset value and turnover of the parties. However, the Amendment Act amends Section 5 by inserting a new clause in the form of a deal value threshold (“**DVT**”) which states that any merger, amalgamation, acquisition or transfer of control of a business will require the approval of CCI by sending them a notice of the combination under Section 6(2) of the Act, if the value of transaction exceeds INR 2000 crores. This provision is applicable only if the target enterprise has “*substantial business operations in India*”. This term is not defined and remain ambiguous. However, the Amendment Act stipulates that the CCI will define the term once it releases its draft regulations.

AMENDMENT	IMPACT
Transaction value exceeding 2000 crores will require approval of CCI	DVT refers to any form of consideration, whether direct or indirect, that is introduced in a business transaction. However, there is a need for further clarity in defining the term. The requirement for the target to have "*substantial business in India*" lacks clear definition, leaving room for ambiguity. It is not specified what constitutes substantial business, which may potentially impact smaller deals that may not be required to be taken to the CCI due to their low DVT.

[7] *Competition Law Hotline,* NISHITH DESAI AND ASSOCIATES (Apr. 20, 2022, 12:50AM), https://www.nishithdesai.com/generatePDF/5158/4.

C. Section 27(b): Penalty Imposed for Anti-Competitive Behaviour or Abuse of Dominance

Section 27(b) in the Principal Act imposes a penalty of not more than ten percent of the average turnover for the last three years, on enterprises violating Section 3[8] and/ or Section 4[9] of the Act. The Amendment Act has inserted an explanation to Section 27(b) which reinstates that the "*turnover*" referred to in the provision shall mean the global turnover of the enterprise. This means that the penalty will now be calculated based on the global turnover, i.e., total income of the business derived from operations worldwide, as opposed to the turnover in the relevant market.

AMENDMENT	IMPACT
Penalty to be calculated on global turnover	The recent amendment reverses the Supreme Court judgment in the *Aluminium Phosphide Case*,[10] changing the basis for calculating penalties for violations under Section 3 of the Principal Act. Earlier, penalties were based on a percentage of the turnover, but now it will be based on global turnover, aiming to capture the turnover of digital markets. This change may require global companies to restructure their operations in India to comply with the new rule. The relevance of global turnover in assessing the impact of a combination transaction in India may be questioned, as no harm is caused globally.

D. Section 48A: Settlement and Section 48B: Commitment

The Amendment Act introduces Section 48A and Section 48B as a settlement/ commitment provision wherein parties can apply for settlement/ commitment after the Director General ("**DG**") has submitted his report to the parties. However, the settlement/ commitment shall be done before the final order has been delivered by the CCI. This shall be followed by a settlement/ commitment agreement wherein the CCI may direct the parties to incorporate certain behavioural changes and in some cases, impose a settlement fee on the parties. However, if the CCI

[8] This section of the Act provides for the prohibition of anti-competitive agreements between enterprises. *Supra* note 4 at § 3.

[9] This section of the Act provides for the prohibition of abuse of dominant position by an enterprise in the market. Supra note 4 at § 4.

[10] Suo-Moto Case No. 02/2011 (In Re: Aluminium Phosphide Tablets Manufacturers).

passes an order regarding the settlement/ commitment application, the same shall be the final order and shall not be appealable. In case of rejection, the CCI will proceed with its inquiry under Section 26 of the Principal Act.[11]

AMENDMENT	IMPACT
Introduction of provisions for Settlement and Commitment	Cartels and horizontal agreements have been excluded from the above-mentioned provision; despite being recommended by the Standing Committee. Although, cartels have the benefit of the leniency provision under Section 46 of the Principal Act which allows the whistle-blower protection to parties,[12] it cannot be equated to Section 48A and Section 48B because these provisions are paving the way for speedy delivery of justice and preventing litigation, the benefit of which should be extended to cartels.

III. CRITICAL ANALYSIS OF THE AMENDMENT ACT: A BOON OR A BANE?

The Principal Act, derived from the Monopolistic and Restrictive Trade Practices Act, 1969, was introduced to regulate firms from creating a monopoly and abusing their power, thereby impacting consumer choice. However, the current law, which is two-decades old has failed to effectively scrutinize transactions in the present era of rapid technological innovations, increasing start-ups and has failed to consider other factors affecting transactions. The Amendment Act is introduced to fill the gaps in these unanswered questions and perhaps bring about reforms to better regulate competition in India. Whether the Amendment Act has succeeded to that effect is to be examined further in this article.

A. Implications of the Settlement/ Commitment Provision: Favourable or Unfavourable?

The Amendment Act has introduced reforms such as enabling the parties to opt for the settlement/ commitment provision. Settlement and compensation are welcomed changes in the Amendment Act. However, it is important to note that these provisions only apply to abuse of dominance and vertical agreements, and not to cartels which are covered under the leniency regime. One notable aspect of the settlement process is that no appeal shall lie once the settlement is reached.

[11] This section of the Act provides for the procedure for an inquiry into certain agreements and dominant position of enterprise as per Section 19 of the Act. *Supra* note 4 at § 26.

[12] This section of the Act provides for the powers of the Competition Commission to impose lesser penalties on an enterprise found to be in violation of Section 3 of the Act. *Supra* note 4 at § 48.

The settlement process begins when the DG's report is submitted. The parties may approach the CCI to settle the matter before the final order is passed. If a settlement is reached, the CCI will incorporate the same into its order. However, it is worth mentioning that opting for settlement could imply an admission of guilt for violating the provisions of the Principal Act, which may be detrimental to the charged party's business, potentially discouraging firms from choosing the settlement approach.

It is unclear if firms can agree to commitments without admitting guilt or violation of the Principal Act. This lack of clarity may deter parties from opting for settlement. Nevertheless, the provision is seen as a positive move towards reducing litigation and resolving disputes in a timely manner. CCI has expressed satisfaction with the progress of the leniency regime and aims to extend similar provisions to abuse of dominance and vertical agreements as well.

B. Implications of the Revised definition of "Control"

The Amendment Act has proposed a novel definition of control to mean "*the ability to exercise material influence, in any manner whatsoever, over the management or affairs or strategic commercial decisions or another enterprise or group*". In *UltraTech Cement Limited v. Jaiprash Associates Limited*,[13] the CCI determined that material influence and the existence of the variables which allow a business the power to affect the affairs and management of the company are included in the definition of control.

This includes, *inter alia*, voting power, ownership stake, board seat allocation, or other privileges. Accordingly, the definition of control under the Amendment Act appears to be consistent with *UltraTech*.

Additionally, the Securities and Exchange Boards of India ("**SEBI**") established two criteria applicable to the *Jet-Etihad case*[14] to ascertain whether or not the acquirer (Etihad) will achieve joint control over the target (Jet) according to the terms of the transaction agreement, *viz*.

First. The buyer has the ability to hand-pick the majority of the target company's board of directors; and

Second. The buyer will now be able to influence the company's management and direction.

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[13] UltraTech Cement Limited v. Jaiprakash Associates Limited., 2018 SCC OnLine Del 6499.

[14] Etihad Airways PJSC and Jet Airways (India) Limited. Combination Registration No. C-2013/05/122. Decided on: 12.11.2013.

As a consequence of the application of the said twin-test[15], SEBI concluded that Etihad did not acquire joint control of Jet since it would have the power to choose just two of Jet's twelve directors. Since this is now resolved on a case-by-case basis, the meaning of control under the Principal Act becomes crucial. It will aid future transaction structuring. Since the SEBI takeover rule mandates an open offer to the target company's shareholders,[16] if the acquirer gets control of the target firm, knowing whether a transaction will result in the acquirer's control is crucial.[17]

C. Implications of the "Gun Jumping" Regulations

Gun Jumping, although, not defined under the Principal Act, means putting a standstill obligation on parties to maintain competition between each other while their transaction/combination is under the approval process by CCI.[18] There are two types of gun-jumping:

First. Procedural under Section 6(2) of the Principal Act; and

Second. Substantial under Section 6(2A) of the Principal Act.

The breadth of the CCI's knowledge over the preceding decade was on full display in its eleven gun-jumping decisions released in 2022.[19] The following actions were deemed inappropriate by the CCI:

First. Avoiding notifying authorities because of the (disputed) exclusive authority of specialist sectoral regulators;

Second. Premature consolidation due to the possible flow of information between parties (despite clean team arrangements);

Third. Forgetting to notify the first part of a transaction because of an incorrect assessment of jurisdictional thresholds;

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[15] Order in the matter of acquisition of shares of Jet Airways (India) Limited (hereinafter referred as "Jet") by Etihad Airways PJSC (hereinafter referred as "Etihad"), http://www.sebi.gov.in/cms/sebi_data/attachdocs/1399545948533.pdf.

[16] Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

[17] Lovesh Mamnani, Biprojeet Talapatra, *An Analysis of the Competition (Amendment) Bill 2022,* Apr 20 1:38AM, https://tclf.in/2023/01/13/an-analysis-of-the-competition-amendment-bill-2022/.

[18] Praveen Raju, Jahnavi Joshi, *India: Gun Jumping Under the Merger Control Regime,* Sep. 15 2022, *https://www.mondaq.com/india/corporate-and-company-law/1230292/gun-jumping-under-the-merger-control-regime.*

[19] Sonam Mathur, Shubhang Joshi, Dhruv Diskshit, *India: Competition (Amendment) Bill 2022 signals potential changes to merger control regime,* Apr 20 2:03AM, https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/2023/article/india-competition-amendment-bill-2022-signals-potential-changes-merger-control-regime.

Fourth. Failing to notify because of an incorrect application of the Item 1 exemption; and

Fifth. Failing to notify because of an incorrect turnover computation by excluding subsidiaries of the target enterprise.

The CCI fined *Adani Green/SB Energy*[20] INR 5,00,000 in March 2022. The CCI found a provision in the transaction agreements that allowed for the acquirer to offer non-binding feedback to the target and for the parties to share information. The CCI expressed concern that the provision allowed the merger to go into effect before receiving approval. The CCI elaborated, saying that the inherence proportionality test and an examination of the effectiveness of measures designed to prevent any anticompetitive impact are the basis for such an evaluation. According to the CCI, the level of collaboration allowed by the provision exceeds what is necessary to keep an eye on and protect the economic worth of the target. The CCI further said that the purpose of the parties is irrelevant for determining whether or not there was a gun-jumping infringement since even the prospect of competition distortions (without proper protections) is enough to establish a violation.

The CCI has matured as a regulator as seen by its decisional practise and tough and aggressive enforcement in situations of Gun Jumping offences in 2022. The amendments incorporated in 2023 shall impose additional scrutiny over parties since the time period for approval of a combination by CCI has been reduced, thereby, further deceasing the time for parties to resort to violations such as Gun Jumping.

IV. CONCLUDING NOTE AND RECOMMENDATIONS

The Amendment Act has overall been a boon in regulating competition in various aspects. It has introduced provisions such as Settlement and Commitment, which aim to expedite dispute resolution and reduce litigation. However, despite these advancements, there are still loopholes that need to be addressed.

The Competition Amendment Act lacks clarity on certain aspects, such as the implications of the revised definition of control and the potential deterrent effect of settlements on companies admitting guilt. Further, gun jumping and the suspensory effects of merger notifications remain areas that need more comprehensive regulation.

[20] Adani Green Energy Limited, Combination Registration No.C-2021/05/837, Order under Section 43A of the Act.

It is crucial for the CCI to address these gaps through well-defined regulations and notifications to ensure effective implementation of the Amendment Act. By closing these loopholes, the CCI can further strengthen competition regulation in India and promote fair competition in the market, benefiting consumers and businesses alike.

According to the author, the following are a few recommendations, if implemented, could possibly provide some clarity post amendment of the Competition Act, 2002:

First. It is recommended that DVT should be increased such that it is sustainable over time, and then utilize the exemption provision under Section 54 if smaller transactions need to be exempted. However, this approach has not been taken due to the already passed amendments, and therefore, nothing can be done at this point. However, the author suggests that guidelines be issued to thoroughly define DVT, as consideration can come in various forms and cannot be simply based on a transaction amount.

Second. Guidance is needed on what will be considered as substantial business operations in India. Since asset value and turnover are not considered in the threshold for the amendment, it is important to have clarity on the definition. Otherwise, it may defeat the purpose of this provision.

Third. The original definition of the hub and spoke model in the proposed bill was broad, encompassing not only agreements between entities in the same production or service business but also including entities that serve as hubs for agreements among other entities engaged in the same business, such as associations of manufacturers for a specific product. However, concerns were raised that this broad definition might also inadvertently cover intermediaries in online businesses. As a result, the standing committee recommended that the definition be refined to specifically include only those entities that intend to further the agreement between entities in the same business.[21] However, the final language in the eventual statute did not fully address this concern, as it covers both scenarios. Therefore, it is suggested that further clarification

[21] *Standing Committee Report Recommends Sweeping Changes to the Indian Competition (Amendment) Bill 2022*, KHAITAN & CO. (Apr. 24, 2022 5:08PM), https://www.khaitanco.com/sites/default/files/2022-12/Standing%20Committee%20Report%20Recommends%20Sweeping%20Changes%20to%20the%20Indian%20Competition_0.pdf.

be provided via notifications to ensure that intermediaries in online businesses are not unintentionally included under the Hub and Spoke Model.

Fourth. Including horizontal agreements and cartels within the settlement/commitment provision is suggested as a means to achieve the main objective of avoiding lengthy litigation and never-ending legal cases. Extending the coverage of this provision to include cartels would streamline the resolution process for cases involving these practices and help mitigate the potential negative impacts of prolonged litigation.

THE COMPETITION AMENDMENT ACT 2023: A GAME CHANGER FOR MERGERS AND ACQUISITIONS

- Pavitra Dubey

ABSTRACT

*The Competition Act, 2002 ("**Principal Act**") has been amended in order to provide for more vigorous mechanism for regulating the key amendments include "hub and spoke," "penalties on global turnover for anti-competitive behavior", enhanced powers for the Director General ("**DG"**), certain definitions like "control" and "relevant market" have been broadened. The amendment provides for higher penalties for anti-competitive behavior, with fines being imposed on 'global turnover' rather than the 'relevant turnover'. This is expected to act as a strong deterrent for companies engaging in anti-competitive practices. The amendment also empowers the Competition Commission of India ("**CCI**") to impose penalties on businesses found to facilitate anti-competitive behavior like cartelization, even without actively participating in it.*

*The article additionally compares the amended act with the Principal Act and further explains the loopholes that still exist in the legislative framework, like the issue arising in determining the power of DG which is also violative of Section 126 of Evidence Act, 1872 the compulsory deposit of money in order to challenge the order of CCI, and intellectual property rights ("**IPR**") as a defense is not permissible in instances, where there is abuse of dominance.*

In this article, an unbiased and precise analysis is made of the provisions brought forward by the newly-passed bill is presented in a critical manner for any lay-man to understand the modifications.

KEYWORDS: Competition Act, Competition amendment Act, Intellectual Property Rights, Competition Commission of India, Evidence Act

I. INTRODUCTION: SETTING THE STAGE FOR THE COMPETITION AMENDMENT ACT 2023

The Principal Act[1] was laid to curb abuse of dominance/monopoly which the Monopolistic and Restrictive Trade Practices Act, 1969 ("**MRTP**") failed to do, in order to sustain the healthy competition in the Indian market. The aim of the Principal Act was to restrict any person or enterprise from entering into such combinations or arrangements which has appreciable adverse effect on competition ("**AAEC**") or abuses its dominant position in the relevant market.

With the commencement of the Principal Act, the Indian market has grown exponentially. There has been an up-thrust in the operation of businesses and companies based on internet and technological advancement have been set up. Observing such developments, the Ministry of Corporate Affairs ("**MCA**") in the year 2018, constituted the Competition Law Review Committee ("**CLRC**") to check the implementation of the act and coherence with India's ever-growing economic fundamentals. In 2019, certain lacunae were found in the existing framework and therefore several changes were recommended for structured dealing of the market competition.

Further in 2022, the MCA came up with certain amendments to be made to the Principal Act and the same were referred to the Joint Parliamentary Standing Committee ("**Standing Committee**") for a detailed review and consultation with various stakeholders. MCA, on the suggestions made by the standing committee, brought certain additional amendments and the draft was put forth in the Parliament on 8th February, 2023.

Furthermore, after taking the report into account, Lok Sabha passed the Competition (Amendment) Bill, 2023 on 29thMarch, 2023, and the Rajya Sabha without discussion, passed it on 3rdApril, 2023, to amend the Principal Act ("**Amendment Act**").

II. HISTORY: THE EVOLUTION OF COMPETITION LAW IN INDIA

MRTP marked the beginning of competition law in India, with the intention of preventing monopolistic practices and promoting fair competition in the Indian market. However, it became clear over time that MRTP was insufficient to address the changing economic landscape of India.

[1] The Competition Act, 2002, No. 13, Acts of Parliament, 2003 (India).

In 1999, the Indian government established a high-level committee to recommend a modern competition legislation in line with global trends. The committee reviewed various competition laws from around the world to identify characteristics that would be relevant to India's contemporary environment.

The Raghavan Committee submitted their findings to the government in May 2000, leading to the enactment of the Principal Act in 2002. The act aimed to promote fair competition and protect consumers from anti-competitive practices, establishing the CCI to enforce its provisions.

Since its enactment, there have been several amendments made to the Principal Act, including provisions for mergers and acquisitions in 2007 and increased penalties for anti-competitive behavior in 2009. In 2023, the Amendment Act aims to strengthen enforcement mechanisms and increase penalties for non-compliance with CCI orders.

The Amendment Act seeks to revise India's current competition law in response to instances of anti-competitive conduct by major corporations, particularly in the technology industry. These instances include high-profile cases involving Google's legal battle with the CCI and Amazon's alleged anti-competitive behavior in India. Google was fined $21 million by the CCI in 2018[2] for abusing its dominant position in online search advertising, a decision that was upheld by the Competition Appellate Tribunal in 2020.

Powerful corporations can use their market power to limit competition and harm consumers. "Deal value threshold" under the proposed amendment would bring these instances under the purview of CCI. Furthermore, expansion of penalty provisions through the Amendment Act would impose larger penalties based on the global turnover of enterprises. Such terms could allow CCI to impose greater penalties similar to the European Union, where Google had to incur a fine of over 4 billion USD.

Similarly, Amazon was accused of engaging in predatory pricing and providing preferential treatment for certain sellers on its platform,[3] which led to an investigation by the CCI and a finding that Amazon had violated competition law.

[2] Google LLC v. Competition Commission of India, 2023 SCC OnLine SC 88.

[3]Amazon.com NV Investment Holdings LLC v. CCI, 2022 SCC OnLine NCLAT 238.

Finally, the Facebook-WhatsApp acquisition[4] also raised concerns about data privacy and competition in the messaging app market, and the CCI found that the acquisition had reduced competitive constraints in the market. However, due to threshold constraints, the CCI could not investigate the issue even though around 130 million users were affected. Such acquisitions are *per se* beyond the scope of the CCI as the target company is small enough to escape the thresholds of the Principal Act.

The Amendment Act is modeled after similar laws in other countries, such as Europe's Digital Markets Act and Australia's recent legislation requiring tech giants to pay news publishers for their content. The Amendment Act significantly impacts the operations of large corporations in India and creates a more equitable playing field for all businesses.

III. KEY FEATURES OF THE RECENT AMENDMENT: WHAT'S NEW AND WHY IT MATTERS

The highlights of the Amendment Act are as follows:

First. The Provision of 'Deal Value Threshold' has to be added in Section 5[5] of the Principal Act, which states that any deal that has a value of more than INR 2000 Crore (approx. USD 242 million) needs to get an approval of CCI before heading towards the combination. Also, the outer time frame for the CCI to pass order has been decreased from 210 days[6] to 150 days.

Second. The proposed bill has modified the definition of "Control" given in Section 5[7], and defined it as "the ability to exercise material influence over the management, affairs, or strategic commercial decisions".

Third. The Bill extends the Director General's powers to investigate defilements under the Act.[8]This includes the DG's power to seek information and papers from legal advisors appointed by the parties. This may be in conflict with the restrictions of lawyer-client

[4] Menlo Park, *Facebook to Acquire WhatsApp*, Investors, (Feb. 19, 2014), https://investor.fb.com/investor-news/press-release-details/2014/Facebook-to-Acquire-WhatsApp/default.aspx.

[5]The Competition Act, 2002, § 5, No. 13, Acts of Parliament, 2003 (India).

[6] The Competition Act, 2002, § 6 (2A), No. 13, Acts of Parliament, 2003 (India).

[7]*Supra* note 5.

[8] The Competition Act, 2002, § 26(1), No. 13, Acts of Parliament, 2003 (India).

confidentiality included in Section 126 of the Indian Evidence Act of 1872[9].

Fourth. The provision for 'Settlement and Commitment' has been modified. As per Section 48A introduced in the Competition (Amendment) Bill, 2023, if a party offers settlement (includes monetary compensation) or commitment (includes both behavioral and structural conduct), then the CCI is authorized to close the proceeding against them as specified under this bill. Additionally, a regulation can also be brought by CCI in order to explain the manner and implementation of this framework.

Fifth. The bill of 2023 proposes to recognize 'Hub and Spoke' arrangement in the Section 3(3)[10] of the Competition Act, 2002, which means that the parties who are not actively involved in cartel formation but merely intend to participate in its furtherance can also be penalized for such formation, as they act as a 'Hub' and facilitate/coordinate the cartelization amongst competitors.

Sixth. The bill further widens the ambit of 'Relevant Market' as defined in Section 19 of the Principal Act[11]by expanding its definition and including the production of services or goods as substitutable by suppliers.

Seventh. Additionally, the bill also brought change in the nature of punishment of certain offences including failing to comply with CCI orders on entering into anti-competitive agreements and abusing its dominant position, from fine to penalty.

IV. COMPARISON AND ANALYSIS: OLD LAW VS. NEW LAW

A. Criteria for Regulating Transactions by their size

The Principal Act prevents any person, enterprise or group "*entering into a combination which may cause an 'appreciable adverse effect on competition'*".[12] This framework consists of 'threshold' limits[13] as to the value of assets and turnovers of the parties, which when crossed; triggers the competition law mechanism.

[9]The Evidence Act, 1872, § 126, No. 1, Acts of Parliament, 1872 (India).
[10]The Competition Act, 2002, § 3, No. 13, Acts of Parliament, 2003 (India).
[11]The Competition Act, 2002, § 19, No. 13, Acts of Parliament, 2003 (India).
[12]*Supra* note 10.
[13]*Supra* note5.

This included "*gross assets of more than INR 1,000 Crore, or gross turnover of more than INR 3,000 Crore*",[14] amongst others. The Amendment Act expands such scope, engulfing not just the value of the parties in question, but the transactional value in isolation as well, which is fixed at INR 2,000 Crore as the trigger. This directs at the consideration a party is willing to pay for acquiring the target and covers big tech deals, where the target may not have a large asset base,[15] generating insignificant revenue, but is valued based on data or innovation[16].

The perplexity that whether the target or the acquirer was required to have 'substantial business operations' in India was done away with by clearing the ambiguity in the final bill, that the target is required to have such business operations in India, irrespective of the purchaser's existence.

B. Duration for Sanctioning Combinations

As per the Principal Act, a total of 210 days were granted to CCI to pass an order regarding the combination.[17] However, the Amended Act condenses this time limit to 150 days, after which, if no decision is taken on the part of CCI, the combination would be deemed to be approved.

This transformation includes the lessening of the thirty-day limit to form prima facie opinion[18] to a twenty-day limit, from application.

Decreasing the waiting period for approval, this would put undue burden[19] on the CCI but considering the CCI's vast experience in resolving complex competition transactions within sensible time periods enables expeditious and more reliable decisions on matters enhancing business confidence.

C. Notification before Consummation of the Combination

Businesses were required to intimate the CCI about the anticipated deal within the time limit of thirty days of the amalgamation, merger or agreement's execution. This amendment would do away with such timeline and will be determined based on case-to-case circumstances. Flexibility is promoted by this decision for the

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[14] *Id.*
[15] PARK, *Supra* note 4.
[16] Ministry of Corporate Affairs, *Report of Competition Law Review Committee* (2019),
[17] *Supra* at 6.
[18] The Competition Act, 2002, § 29, No. 13, Acts of Parliament, 2003 (India).
[19] Standing Committee on Finance, Ministry of Corporate Affairs, *The Competition (Amendment) Bill*, 2022 (No 52, 2022),

process of intimation by the parties, which would be done now before consuming the combination deal.

D. Concept of 'Control' and its Implications for Categorizing Business Combinations

'Control' is defined as having control over the management/affairs over an enterprise or group.[20] This classifies businesses into a range of enterprises exercising control over other enterprises.

The Bill modifies such description, while making it more precise and specific, as the ability to exercise material influence and impact over the strategic and important commercial decisions of the enterprise, inclusive of its management and crucial affairs. Such step puts forward greater clarity and lucidity for scrutinising transactions.

E. Anti-competitive Agreements

Section 3 of the Principal Act states "Anti-Competitive Agreements"[21] involving Horizontal Agreements[22], i.e., between enterprises indulged in similar or identical business activities and Vertical Agreements[23], i.e., between parties at diverse stages or levels of same production chain.

The Amendment Act adds non-competitor and non-market participant enterprises engaged in dissimilar or different business activities, not actively involved in cartel activities, while merely 'intending to participate' or actively co-ordinating in the furtherance of such deals which are rendered as causing AAEC. Such agreements are regulated more effectively when entities that are not directly involved also take part.

Internationally recognised hub and spoke arrangements are brought under the umbrella of CCI and this inclusion strengthens the regulation while broadening the scope of CCI's powers to inquire.

F. Commitment and settlement in Anti-Competitive Proceedings

Following several provisions like Section 3 (Anti-Competitive Agreements), Section 4 (Abuse of Dominance), Section 19 (Inquiry) etc, the Competition

[20] *Supra* at 5.
[21] *Id.*
[22] *Supra* note 10.
[23] *Id.*

Commission is empowered to initiate inquiry proceedings[24] on contravention of such provisions. Further, the present Amendment brings in the options of:

First. Settlement, referring to an agreement between the CCI and a party under investigation to terminate proceedings upon payment of a settlement amount by the party, and

Second. Commitment, involving an undertaking given by a party under investigation to modify its conduct or take certain actions to eliminate any concerns raised by the CCI regarding its conduct,

Following which, the CCI may close the inquiry proceedings. What this means for the industry is that, the proceedings for dealing with unfair market practices being fast-tracked can be concluded more quickly, encouraging faster resolution and that businesses are motivated to comply with the rules on their own, promoting self-regulating phenomenon.

G. Certain Offences being Decriminalised

The current mechanism modifies deterring punishment capabilities of the CCI.[25] The initially imposed fine is transformed to civil penalty provisions. Under its umbrella, some offences including non-compliance with the CCI's decisions and DG's directions with respect to anti-competitive agreements and dominance abuse, also fall. Previously, failure to comply with such orders brought upon a fine extended to INR 1 Lakh for each day during which this non-compliance continues, subjected to a maximum of INR 1 Crore, as settled by the CCI. The proposed change reduces the load on the judicial system and offers a punishment that is more appropriate in relation to specific offenses while being proportionate to the contravention.

H. Applicable Turnover

Under the Principal Act, the CCI is empowered to impose not more than ten percent penalty on the average turnover for the preceding three financial years of the party under contravention.[26] The Supreme Court ("**Sup. Ct.**") clarified this,[27] by declaring turnover to be relevant turnover for imposition of penalty, and not a

[24]*Supra* note8.
[25]The Competition Act, 2002, § 43, No. 13, Acts of Parliament, 2003 (India).
[26]The Competition Act, 2002, § 27, No. 13, Acts of Parliament, 2003 (India).
[27]Excel Corp Care Ltd. v. CCI(2017) 8 SCC 47.

general turnover. This directs imposition of penalty on that portion of the turnover, which is directly related to anti-competitive conduct.

The Amendment Act includes "global turnover" into this definition[28] and allows the CCI to impose a fine on all the products and services sold by an enterprise. This overcomes the Sup. Ct.'s restrictive decision towards anti-trust penalties and could result in increased penal fines for multi-product global businesses and may prove debatable, while also enhancing the deterrent effect of law. For business moguls and conglomerates, infringement even by small enterprise divisions would result in massive penalty coverage.

The apprehension of payment of a substantial portion of the company's turnover, i.e., ten percent of all of its products and services, would generate a sense of accountability and the consequence-of-actions idea in the commercial minds of the promoters and directors involved, resulting in lesser confidence in such anti-competitive conducts.

I. Relevant Market

The Amendment Act widens relevant product market to include products and services interchangeable by not only the consumer but the supplier as well. Further, it recognises buyer cartels. This inculcates the supplier's perspective as well and is more comprehensive than the previous descriptive constraints.

J. DG & Members of CCI

Appointment of DG is now in the hands of CCI, in accordance with the approval of the Central Government. Previously, Central Government was entrusted to appoint the DG. This may not cause impact, as prior approval of the Central Government is a pre-requisite for the appointment of DG.

Further, according to the Principal Act, individuals serving as the chairperson or members of the CCI are required to possess professional expertise of a minimum of fifteen years in specific fields, namely economics, business, management, law or competition-related issues. The Amendment Act seeks to augment this criterion by including experience in the realm of technology.

[28] *Supra* note26.

V. SIGNIFICANT ISSUES & RECOMMENDATIONS

A. Conflict between the DG's powers and the rules of evidence in India

Powers of the DG of CCI[29] are extended to receiving co-operation by all employees, officers, and agents of a party under scrutiny, who would provide all data and information with respect to the party involved. The term 'agents' here, include legal advisors, bankers, etc., which in turn is incoherent with the provisions of Evidence Act, 1872.

Section 126 specifically lays down that no pleader, lawyer, or attorney etc., should disclose any information without client's consent, such information being professionally communicated.[30]

However, the DG cannot examine the external legal advisors and only the ones employed by the enterprise itself, i.e., the in-house counsels.

B. Mandatory Deposit Requirement for challenging the CCI's orders –

Many businesses utilize the review and appeal mechanisms in the Indian legal framework as delay tactics. Frivolous appeals to the National Company Law Appellate Tribunal ("**NCLAT**"), High Courts and the Sup. Ct., choke the pipeline of fine imposition, where only 0.8% of the fine imposed from 2012-2018 (i.e., INR 121 Crore out of INR 13,524 Crore) was realised.[31]

Presently, only on payment of 25% of the amount imposed by CCI's order or the amount decided by NCLAT, can a party file an appeal to the NCLAT. Such rule, even though hinders the review procedure, promotes adherence to the CCI's decisions while the appellate proceedings are undergoing.

C. Inadequate Consultation with the Stakeholders –

The Amendment Act has undergone an inadequate consultation process and some provisions were brought upon the table only after it being passed by the Lok Sabha. No concrete discussions regarding policy took place before passage. Reportedly, the passage was amidst chaos and confusion, without actual

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[29] The Competition Act, 2002, § 41, No. 13, Acts of Parliament, 2003 (India).
[30] *Supra* note 9.
[31] PRS Legislative Research, *The Competition Amendment Bill, 2002*, PRS LEGISLATIVE RESEARCH (Aug.06, 2022), https://prsindia.org/billtrack/the-competition-amendment-bill-2022.

deliberation.[32] The anti-trust law must sustain healthy competition and promote consumer interest. Due process and procedure established by law should be followed for the passage of any law. Haste would prove detrimental.

D. IPR as a defense is not permissible in instances where there is abuse of dominance

The Principal Act allowed for exemption to IPR in anti-competitive agreements,[33] but did not take the defense of abuse of dominance into consideration

Even though the CLRC had provided for such recommendation encouraging exclusivity in creations, the Amendment Act is silent on this and the gap remains unaddressed.

E. Lack of Inclusions of Ideas

Several proposals with respect to competition advocacy and compulsory dialogue between sector regulators and competition authority were left unconsidered and overlooked by the Amendment Act.

F. Fostering a Culture of Research-Driven Competition for India's Digital Economy

With the transformation of the competition realm worldwide, new challenges to fair competition have arisen, such as higher obstacles for new entrants, excessive dominance of a few firms, low pricing to drive out rivals, strong customer loyalty, positive feedback loops, biased platforms, and consumer irrationality. For India to stay ahead of the curve, it is important to foster a culture of competition that is driven by research and advocacy.

VI. CONCLUSION: THE FUTURE OF COMPETITION LAW IN INDIA

The Amendment Act is one of the most important pillars towards progressive growth and development of the antitrust landscape. Various gaps in the existing governance framework have been filled.

However, certain lacunae need to be addressed, including, *inter alia* collaborative mechanism for better implementation of the Amendment Act; more clarification

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[32] Ravisekhar Nair, *Competition Act Amendment: CCI gets more enforcement tools to address emerging challenges,* MONEYCONTROL (Apr. 03, 2023), https://www.moneycontrol.com/news/opinion/competition-act-amendment-cci-gets-more-enforcement-tools-to-address-emerging-challenges-10356241.html.

[33] *Supra* note 10.

and advice on hub and spoke arrangements; clarity on settlement provision. Additionally, the benefits and detriments of the augmented timeline should be checked and balanced keeping in mind the interest of consumers.

Further, in spite of potential benefits of competition, certain sectors such as coal mining have been under the monopolistic control of state-owned enterprises. Other sectors that appear to be open have been unable to fully realize the advantages of competition due to significant government interference, particularly in the power sector. This situation persists because of the absence of a national competition policy ("**NCP**"). In a way forward, India requires a NCP like other countries such as the Australia, Mexico, United Kingdom, Denmark, the Philippines, Italy, Turkey, Hong-Kong, Malawi and Botswana. *Per contra*, a preliminary version of NCP was prepared in November 2011 in India, but it remains untouched in the records of the Ministry of Corporate Affairs.

The above proposals aim to further enhance and sustain competition in markets, safeguard the interests of consumers, and ensure freedom of trade for market participants. The Amendment Act is a positive stride towards ensuring a level playing field in the market, promoting equitable competition and proving a progressive step towards an all-encompassing dynamic competition law framework.

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