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CONTENTS

EDITORIAL

1. WORLD TRADE ORGANIZATION AND NETWORK SOCIETIES: EVOLVING MODELS OF PUBLIC-PRIVATE PARTNERSHIPS IN INDIA
   JAMES J. NEDUMPARA 1

2. ARTICLES 2(4) AND 51 OF UN CHARTER: FORCE GAPS AND THE UNILATERAL EXERCISE OF THE RIGHT OF SELF DEFENCE AGAINST NON-STATE ACTORS
   HIMANIL RAINA 36

3. ANALYSIS OF THE COMPETING CONTROL TESTS: STATE RESPONSIBILITY FOR ACTIONS OF PRIVATE ARMED GROUPS
   ABHIK CHAKRABORTY 60

4. THE IMPACT OF THE CALVO DOCTRINE ON THE PRINCIPLES OF PROTECTION OF FOREIGN NATIONALS IN THE AREA OF INVESTMENT
   EDRINE WANYAMA 78

5. RISING THREAT OF A DEBT CRISIS: A FRANTIC CALL TO THE ODIOUS DEBT DOCTRINE
   DEERGHA AIREN AND SANJANA ROY 97

6. LINKING CYBER ATTACKS AND THE USE OF FORCE IN PUBLIC INTERNATIONAL LAW: AN EXERCISE IN INTERPRETATION
   PRATIK RANJAN DAS 120

7. IMMUNITY OF THE UNITED NATIONS AS AN INTERNATIONAL ORGANISATION: TIME FOR A RELOOK IN LIGHT OF THE HAITI CHOLERA CASE
   MAITHILI PAI 142
8. Deciphering the ‘Grey Area’ in Bilateral Investment Treaties: A Study of ‘Umbrella Clause’

Bhargav Kosuru and Shlok Bolar
EDITORIAL

The NALSAR International Law Society functions as a wholly student driven initiative, with our focus primarily on spreading the culture of international law amongst the members of the legal fraternity, both in India, and abroad. Although the Society had concerned itself primarily with international law awareness events in the past, it was the vision of the current Executive Board (2014-15) to begin an International Law Journal. Pursuant to this, and on behalf of the entire Board, Rahul Mohanty and Devarshi Mukhopadhay were instrumental in overseeing the entire publication process and the University nod for the inaugural issue. In addition, the Board is grateful to Rakshanda Deka, for her invaluable assistance in the Journal design.

NALSAR International Law Journal comprises of the most recent developments in the field of both public and private international law, around the world. Being a registered member of the International Law Student’s Association (ILSA, U.S.A), the Society also actively undertakes the activities prescribed by the ILSA, such as essay competitions. The Journal boasts of a highly qualified Peer Review and Advisory Panel, and an extremely efficient student Editorial Board, which has resulted in the timely completion of what seemed to be an uphill initiative.

In this issue of the Journal, we have incorporated a wide range of articles, some dealing in policy questions, some a normative analysis of a contemporary international legal position and some attempt a theoretical and descriptive analysis of contemporary debates in International Law. Prof. James Nedumpara’s article highlights the issue of widening of international law beyond traditional confines of “law of nations” and illustrates the role of networking societies in WTO engagements. Articles by Himanil Raina and Pratik Ranjan Das engage in a debate about a very contemporary issue of great significance—that is scope of Article 2 (4) of UN Charter and prohibition of use of force in light of modern issues like attacks by non-state actors and cyber-attacks. On a similar vein, Abhik Chakraborty’s paper deals with questions of attributability that has become especially important in this age of irregular warfare. Edrine Wanyama’s article examines the theoretical and normative
underpinnings of the Calvo Doctrine and its importance especially for the Third World nations. A similar normative analysis of Odious Debt doctrine and the modern use thereof, has been ably done by Deergha Airen and Sanjana Roy. Bhargav Kosuru and Shlok Bolar have done a thorough analysis of Umbrella Clauses of Bilateral Investment Treaties (BITs), which have remained a contentious area of law despite proliferation of BITs in modern day world. Maithili Pai’s paper on Liability/Immunity of international organisations such as the UN also provides a normative as well as descriptive legal argument for relooking at the immunities of UN—a timely issue keeping in mind the growing presence of such organisations and possible violations such employees or officials and agents of such organisations.

The inaugural issue of the Journal seeks to create the necessary space for further academic dialogue in the field of international law. The Society was encouraged at the response that it received from its contributors across the country and abroad, and intends to serve as a crucial platform for fruitful academic pursuit and international legal dialogue in the near future.

We hope this endeavour succeeds in future to provide as a forum for scholarship in International Law in India, where the need for such Journal was being sorely felt since a long time.
WORLD TRADE ORGANIZATION AND NETWORK SOCIETIES: EVOLVING MODELS OF PUBLIC-PRIVATE PARTNERSHIPS IN INDIA

James J. Nedumpara*

I. INTRODUCTION

The establishment of the World Trade Organization (WTO) in 1995 is one of the significant achievements of the international community in recent history. As an organization, the WTO plays a role which is unparalleled to any other international institution. Take the case of India. The WTO put an end to India’s several decades’ of practice of maintaining quantitative restrictions on balance-of-payment grounds\(^1\), required India to change its automobile policy\(^2\) and import policy on several agricultural products,\(^3\) and mandated India to institute product patents for pharmaceutical, agricultural and chemical products;\(^4\) on the other hand, the WTO, helped India seek market access in textiles,\(^5\) IT and

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1 World Trade Organization, India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, WT/DS90.

2 World Trade Organization, India – Measures Affecting the Automotive Sector, WT/DS 146.

3 World Trade Organization, India – Measures Concerning the Importation of Certain Agricultural Products from the United States, WT/DS 430.


5 World Trade Organization, United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India, WT/Ds DS33; World Trade Organization, Turkey – Restrictions on Imports of Textile and Clothing Products, WT/DS34; World Trade Organization, European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS 246.
pharmaceutical products,\textsuperscript{6} challenge protectionist antidumping,\textsuperscript{7} subsidies measures\textsuperscript{8} in key markets, and impugn various disguised restrictions on trade.\textsuperscript{9} These are only a few illustrations.

The WTO administers an intricate system of agreements. These agreements straddle the boundaries of manufacturing and agricultural goods, services and intellectual property issues and an array of interrelated issues such as environment, development, human rights, health, food security and safety, renewable energy, electronic commerce and domestic taxation. In a fast globalizing and shrinking world, upcoming trade arrangements and emerging geometry of trade groupings and negotiations often acquire newer complexities and challenges. In other words, the challenges presented by the new trade arrangements are no longer relevant or confined to the province of central or state governments, but are potentially significant to each one of us.

There are several scholars who argue that the WTO has been epiphenomenal;\textsuperscript{10} that the changes happened before it was created and they are largely internally caused by way of responses to changed external market and political contexts. Although this debate is inconclusive, several development scholars have written on the role of WTO in ushering in global economic integration and catalyzing domestic trade-related capacity against the backdrop of rising constraints of legal knowledge, financial endowment and political

\begin{itemize}
\item \textsuperscript{6} \textit{European Union and a Member State – Seizure of Generic Drugs in Transit}, WT/DS DS408.
\item \textsuperscript{7} World Trade Organization, \textit{European Communities – Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India}, WT/DS141.; \textit{United States – Anti-Dumping and Countervailing Measures on Steel Plate}, WT/DS 206.; \textit{United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties}, DS345..
\item \textsuperscript{8} \textit{United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India}, WT/DS 436; \textit{United States – Continued Dumping and Subsidy Offset Act of 2000}, WT/DS 217.
\item \textsuperscript{9} \textit{United States – Import prohibition of Certain Shrimp and Shrimp Products}, WT/DS 58.
\item \textsuperscript{10} Edward A. Fogarty, States, Nonstate Actors, and Global Governance: Projecting Polities 5 (2013).
\end{itemize}
There have been rich and illuminating case studies on the reciprocal and often recursive role of the WTO on countries such as Brazil, India, Mexico, and China. Most of these studies eloquently narrate how certain developing countries have been able to establish sustainable and effective mechanisms to identify trade barriers and tear them down through negotiation, consultation and formal dispute settlement. In particular, these studies detail how countries that once remained on the sidelines in international trade negotiations started engaging more actively and effectively in the WTO process.

Formally, only sovereign nations or independent customs territories could be constituents of the WTO. International trade and commercial diplomacy were often handled by the Foreign Affairs or Trade/Commerce officials in most countries right since the days of the GATT. But in fact, it is often private parties or non-state entities—individuals, industry bodies and civil society organizations—that play key roles in shaping the WTO. The last twenty years also witnessed a major shift with even the most insulated government agencies and policy mandarins reaching out to the private sector for the purpose of designing more effective and targeted strategies for WTO participation.

Considering the dynamics of international trade negotiations and dispute settlement, developing countries need to pool their resources in defining trade priorities, identifying trade barriers, coordinating negotiating positions and strategies and in effecting compliance of domestic measures with international trade rules. As Peter Drahos mentioned, this is an essential imperative when the weak nations bargain with the strong and powerful players in the international trading system. In addition, international trade commitments require a strong and complex process of domestic enforcement, especially for developing countries.


14 Peter Drahos, When the weak bargain with the strong: Negotiations in the World Trade Organization, 8(1) International Negotiation 79-109 (2003).
The internal processes to revise legislation, administrative rules, practices, and implement trade commitments require inputs from the concerned stakeholders. In addition to enforcing international obligations at the domestic level, there is a complex mechanism to avoid disputes that may arise out of these international treaties. In many ways, these internal processes to identify negotiating positions and decisions on potential claims against other WTO members take place in discrete ways. It requires a cadre of people who are well versed and familiar with nature of the WTO process and trained in its finer details and operation to suggest specific and concrete steps to leverage their countries’ positions. As Shaffer et al demonstrate, investment in trade law and policy have helped countries such as Brazil to assume a leadership role in WTO governance, dispute settlement and monitoring other Members’ implementation of various WTO commitments. In international trade capacity building literature, the concerned stakeholders who work at the interface with their governments and trade representatives are often referred to as the “third pillar”. The third pillar traditionally involves industry bodies, law firms and consulting firms, think tanks, academia, journalists and a broad array of individuals and civil society groups.

This study is about the role of the so-called third pillar in India in WTO matters. There is an oft-repeated criticism in India that the third pillar has remained outside the negotiating processes for decades together and, more specifically, during the Uruguay Round negotiations. To my knowledge, the extent of civil society participation in the WTO related matter before or after the establishment of the WTO is not well documented. On the contrary, there is a perception, if not an overwhelming belief, that India signed most of these agreements without any public consultation and serious understanding of their implications. This article attempts to shed some light on this accusation, although a proper and adequate examination of this issue may require more research and stakeholder interviews and review of government documents. In short, this article seeks to examine the background of trade policy making in India, the role of the industry bodies and certain civil society organizations in enhancing India’s capacity for international trade negotiations during the Uruguay and Doha Rounds of trade negotiations, and the process of building such capacity. The article seeks to enlist and narrate certain steps taken by India to defend its interests and shape the international trade legal order which is often associated with the WTO. In other words, the article examines the role of the third pillar as India sets out to evolve as a more mature player in the international trading system and assigns new roles and responsibilities for various
public and private actors in the new paradigm of public-private partnership in international trade issues.

II. GATT, India and the Insulated Domestic Industry

Before the 1991 economic reforms in India, India was a closed economy, built on a socialist model of five-year plans, with a maze of restrictions and controls on business, investment and industrial activities. Given its colonial heritage, India was wary of undertaking serious international commitments or engaging with multilateral agencies. While maintaining a protected environment India erected a sclerotic bureaucracy administering what was known as the “License Raj.” Although the term Licence Raj is spoken with derision in current times, even the makers of modern India had serious concerns about the stifling role of the Licence/ Permit Raj. Dr. C. Rajagopalachari, the first Governor-General of India noted more than sixty years ago:

I want the corruptions of the Permit/Licence Raj to go. …. I want the officials appointed to administer laws and policies to be free from pressures of the bosses of the ruling party, and gradually restored back to the standards of fearless honesty which they once maintained. [...] I want real equal opportunities for all and no private monopolies created by the Permit/License Raj.\(^\text{15}\)

The development strategy conceived by India immediately after independence focused on setting up giant heavy industries. However, the focus on erecting giant industrial structures, enhanced by the import-substitution policies, did not succeed in creating the “temples of the future”\(^\text{16}\), but established grossly inefficient public sector. The country, neither its government nor its private sector, had much of a focus on the global, on engaging with foreign markets.\(^\text{17}\) The bureaucracy was closed and non-transparent and the private sector who engaged with it for trade did so, for obvious reasons, to seek quota rents from the complex licensing system. The country made few trade commitments under the WTO’s predecessor, the General Agreement on Tariffs and Trade (GATT) and used exceptions and derogations, for far too long, to administer its complex import licensing system.

\(^{15}\) C Rajagopalachari, Swarajya (July, 1957)

\(^{16}\) Prime Minister Nehru referred to these industries as the “temples of the future”.

\(^{17}\) India’s share in world exports steadily declined from 2 percent in the late 1940s to as low as 0.4 percent in 1980.
The political and economic climate that prevailed in India during 1965-1975, had a significant impact on the policies which India followed for the next two decades. The Indian economy grew at a rate of 4.1 percent during 1951-1965. During 1965-1975, the Indian growth rate declined to 2.3 percent and the population grew at 2.3 percent per annum. This gave rise to the popular expression “Hindu” rate of growth, which was a growth rate around 3.5 percent per year and just 1.9 percent per capita.\(^\text{18}\) The Industrial Development and Regulation Act of 1951 (for short, “IDRA”) ensured that industries were set up and expanded only with obtaining a license. The government had power over approval of any proposal on capacity, location, expansion of production facility and the foreign exchange required on the import of plant and machinery.

In addition to industrial licensing, the government introduced small-scale industry (SSI) reservation policy in 1967 by creating a list of items which could be exclusively manufactured by small-scale units. Small-scale units by definition were relatively small with an investment of INR 0.75 million or less in plant and machinery. The SSI list included products such as clothing, knitted textiles, shoes, leather products, sports goods, stationary, office products, furniture, etc. Although the rationale for this reservation is not available from any official documents, it appears that labour-intensive nature of the products could have been considered in drawing up the SSI list.

After the second Five Year Plan which was started in 1956, in conjunction with tight import licensing procedures, India applied high levels of tariff protection. In fact, physical import controls were introduced since 1940s to conserve foreign exchange. The substantial foreign exchange balances which were built during the Second World War eroded by 1956 resulting in a substantial real appreciation of the Rupee in relation to the then fixed rates with the Pound Sterling and the U.S. Dollar. Regulation of balance of payments became the central concern of India’s economic policy. The period starting from 1956 to 1966 was

characterized by comprehensive and tight administration of import controls. Arvind Panagariya notes that by mid-1970s India’s trade regime had become so repressive that the share of non-oil and non-cereal imports in the GDP fell from the already low level of 7 percent in 1957-58 to an even lower level of 3 percent in 1975-76. The tight import licensing conditions opened up significant differences between the domestic and international prices. In order to offset this anti-export bias resulting from increasingly overvalued exchange rate, export subsidies including import of duty free raw materials was provided.

India re-introduced liberalization in the midst of emergency in 1975. In 1978, the P.C. Alexander Committee (for short “Alexander Committee) recommended that products not produced domestically should be freed from licensing through inclusion in the open general licensing (OGL) list. The Alexander Committee also recommended that the imports could be broadly divided into three categories: banned, restricted and OGL list. The OGLs operated on a positive list basis and the items included in the list did not require a license from the Ministry of Commerce. The OGLs did not necessarily mean that imports under this category were free. There were strings attached to this list such as the actual user condition and grant of necessary licenses from the industrial license authority. Furthermore, in 1976 when the OGL list was first introduced, it only had 79 capital goods. The list expanded to 1170 capital goods and 949 intermediary inputs in 1988. The OGL list accounted for nearly 30 percent of the imports by April 1990.

A. Uruguay Round and the negotiations creating the WTO

In the light of the ever increasing categories of protection as outlined above, India had, perhaps, one of the most protected trade regimes during 1970s-1980s. Even in early 1990s, import duty protections were one of the highest in India. The maximum tariff in 1990-91 was 355% and the simple average applied tariff rate was 125%. India’s share in world merchandise export was around 0.4% at this time. In addition, despite its reforms involving a


reduction of tariff rates, India’s import regime was also subject to different types of quantitative restrictions (QRs), which remained in effect at the time India joined the WTO in 1995. These restrictions took various forms as non-automatic licenses, imports through canalized agencies, special import licenses (SIL), and actual user criteria. The government imposed these restrictions on the grounds that India had unfavorable balance of payment (BoP) conditions.  

India engaged in the Uruguay Round Multilateral Trade Negotiations in this context, involving its trade liberalization reforms, on the one hand, and its continued concerns regarding balance of payment issues and non-competitive domestic sectors, on the other. India had embarked on a path of unilateral trade liberalization by the time the Uruguay Round was coming to a close, but that liberalization remained constrained in scope. The liberalization was partly couched as home-spun reforms, but was influenced to a great extent by conditionalities imposed by the International Monetary Fund.  

The Uruguay Round negotiations were broad in their coverage, encompassing fifteen distinct areas as set forth in the Punta del Este Declaration which launched the round. Although the issues on the agenda remained fairly broad, India was not particularly concerned with a number of issues. In particular, India was most concerned about textiles, agriculture, patents, services and trade-related investment measures. The most controversial issues from India’s standpoint were agriculture and patents.  

India’s domestic industries which were completely insulated from foreign competition sensed danger and started speaking up. Once the broad contours of the Uruguay Round were identified, there was a vehement reaction in India regarding the government’s alleged capitulation on these issues. Most articles which appeared in the national press and scholarly


22 Martin Wolf, *India in the World, in India’s Economy: Performance And Challenges 369, 389* (Shanker Acharya & Rakes Mohan eds., 2010)


journals focused on the implications of the new WTO rules regarding agriculture and pharmaceutical patents. An organization by the name Karnataka Rajya Ryota Sangha (KRSS) organized a protest in Bangalore which attracted a half a million crowd to protest against the Dunkel Draft. The opposition political parties had earlier organized mass movements to protest against the Dunkel Draft, the working text prepared by Sir Arthur Dunkel, the Director-General of the GATT. Effigies of Dunkel were burnt on the streets of Delhi when the proposals came out in 1991. These parties saw the acceptance of the Dunkel draft as a convenient tool to attack the Narasimha Rao Government regarding its economic policies. The perception among the general public was that the Indian government, which had been vociferous in its demands in the early phase of the Uruguay Round in opposing certain new topics on the trade agenda such as intellectual property and services, eventually yielded, in part as a result of ‘pressure’ from the IMF. After the Marrakesh Agreement establishing the WTO was signed, V.M. Tarkunde, a retired judge and a well known social activist, wrote an article in the Economic and Political Weekly (EPW) in September 1994 which captured the sentiment regarding the WTO agreements covering the new areas. Tarkunde argued that while developed countries provide subsidies to their farmers, India provides it to consumers (under the public distribution system) who cannot otherwise buy the product. EPW had earlier carried an article by S P Shukla, former Indian Ambassador to the GATT, where he argued that if national interest (i.e. IP protection for plant varieties and medicinal preparations) required India to opt out of the Final Uruguay Act, India should “face isolation with courage and conviction.” But this view did not find support even among social activists such as Tarkunde, who argued that India should opt to be part of the comity of nations, rather than remain outside of it.

25 Andrew lang, world trade law after neo-liberalism: Re-imagining the global economic order 75 (2011)

26 J.P. Singh, Services and TRIPS during the Uruguay Round, in Negotiating Trade: Developing Countries In The Wto And Nafta 59 (John S. Odell ed.,) at 59.


B. The Government’s Consultation Process during the UR Negotiations

The Uruguay Round negotiations had attracted wide attention in India, although the process of consultation before or after trade negotiations is not well documented. During the negotiating phase (1987-1994), the Indian Parliament created several Parliamentary Committees to advise the government on the negotiating process. The Arjun Singh Committee was appointed by the Parliament in 1992 to examine the issues, although the deliberations of the Committee are not available.\(^{30}\) A particularly notable committee was headed by Inder Kumar Gujral, who later became the Prime Minister of India in 1997. The Gujral Committee was appointed by the Parliament to solicit views and prepare a report on the impact of the WTO Agreement on India.\(^{31}\) The committee took up the Dunkel draft proposals for in-depth study. In 1993, the committee held around 24 meetings and invited senior government officials from the Ministries of Commerce, Agriculture, Chemicals and Fertilizers, Science and Technology, and Textiles, Indian negotiators in Geneva, members of industry associations and individuals to elicit their views on each topic under negotiation. The Committee reports were submitted to the Parliament in 1993. In addition to the deliberations before the Committee, the Lok Sabha and Rajya Sabha conducted debates on the Dunkel draft. A special sitting of both houses of the Parliament was convened to discuss the implications of the new treaty. This development was unique since the Government of India was not required to have any new treaty ratified by the Parliament under the Indian Constitution. The overwhelming view in Parliament was that, notwithstanding the imperfections in the existing system and the new draft Dunkel proposals, India should not remain outside the GATT or the new agreements. The Gujral Committee was also of the opinion that with the ratification of the Uruguay Round agreements, trade negotiating countries such as the United States would not be able to adopt unilateral trade sanctions against it, and that it was thus in India’s interest to be part of the new trade regime.\(^{32}\)

Although the Government had consulted industry and a few key ministries, civil society organizations generally alleged that the Indian government had failed to properly

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32 Gujral Committee Report, at 64.
consult with Indian civil society regarding India’s negotiating positions and the agreements’ implications. For example, Bhagirath Lal Das, a former Indian Ambassador to the GATT, wrote:

The Uruguay Round of negotiations has exposed several points of weakness in our preparations and strategies. Some of these are given below as illustration:

... 

Though the subjects of the negotiations were to have long term impact on almost all aspects of the economy, there was not enough consultation within the country on the implications and the lines to be taken. These negotiations were to go far beyond the traditional area of market access and would have substantial impact on production process in all three broad spheres of economic activity—agriculture, industry, and services. Besides, they were to cover investment and intellectual property rights, thereby influencing technological development. The seriousness of the coverage of the negotiations required a system of wide-ranging internal consultation within the various wings of the Government as well as between the Government and various interest groups engaged in production and trade. Full public awareness of the implications of the emerging agreements was vital. But, except at the very end, there was hardly any transparency in this whole process with respect to informing and consulting the agencies outside the Government. And even within the Government, there was hardly any serious involvement of various ministries vitally connected with the subjects, except perhaps towards the end. 33

There are, however, indications that the Indian civil society was relatively active during this period in challenging the official position taken by the government during the Uruguay Round. Indian civil society activists filed three cases before the Supreme Court of India challenging the Uruguay Round agreements on federalism grounds. 34 They contended that Indian State Governments (sub-federal units) were not consulted for purposes of the Uruguay Round negotiations, even though their exclusive Constitutional powers were affected. For example, to meet the obligation of Article 70 of the WTO Agreement on Trade-


34 The Court reasoned that although Agriculture is a state subject, agriculture trade negotiations fell in the domain of trade policy which was a function assigned to the Federal government. Entry 14 of List I of the Seventh Schedule of the Constitution permits legislation to be made in regard to “entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.”
Related Aspects of Intellectual Property Rights (TRIPs Agreement), an ordinance, the Patent Ordinance 1994, was promulgated on December 31, 1995 by the President of India. The Indian Constitution permits the President of India to legislate when the Parliament is not in session and it is considered necessary to take immediate legislative action. A number of State Governments including Maharashtra, Orissa, and Kerala, challenged the ordinance in court, contending that the changes in patent laws were implemented without properly consulting them.

Indian civil society engagement at the time of the Uruguay Round was nonetheless fairly active, although it focused on only a few areas. For example, the Gujral Committee received written comments from a number of Non-Governmental Organizations (NGOs). NGOs such as the National Working Group on Patent Law (NWGPL), Gene Campaign, industry associations such as the Confederation of Indian Industries (CII), ASSOCHAM, Organization of Pharmaceutical Producers of India (OPPI), Indian Drug Manufacturers Association (IDMR), think-tanks such as the Centre for Policy Research (CPR), the Indian Institute of Foreign Trade (IIFT), and leading agricultural economists such as M S Swaminathan, provided substantial technical inputs before the Gujral Committee. The deliberations of the Committee indicate that the Uruguay Round actually witnessed a marked change from the past practice, where civil society engagement was virtually nonexistent. Nonetheless, there were severe reactions in India to the WTO agreements, especially those affecting sensitive sectors.

C. Reaction in India to the Dunkel draft proposals: Textiles and Agriculture

The Indian government saw an opportunity regarding trade negotiations over textiles and clothing, where it considered that its sectors were more competitive. The textiles industry constituted the largest single industry in India, accounting for twenty percent of the country’s total industrial output, and nearly twenty-five percent of India’s merchandise exports in 1990-91. The Multifibre Agreement (MFA), which entered into force in 1974, and which superseded arrangements that had been governing trade in cotton textiles since 1961, permitted developed countries to apply quantitative restrictions on imports in this sector. The phase-out of this regime was thus of considerable interest to India and its textile industry.

India was, nonetheless, concerned that the actual phase-out of the MFA would be ‘back-loaded’ so that the Indian textile industry would have to wait longer to benefit from the sector’s opening. On the whole, the government perceived that the gains for the country from opening trade in textiles and clothing constituted a trade-off for India’s comprehensive commitments under the General Agreement on Trade in Services (GATS) and the TRIPs Agreement. The services sector, which has grown exponentially since the WTO’s creation and is currently the most prominent symbol of India’s emergence as an economic power, was not considered to be India’s strength at the time. For example, receipts on invisibles such as services, investment income, and transfers constituted only 2.4 percent of the GDP in 1990-91 compared to 21 percent in 2012. In particular, the information technology sector, which is the driving force of India’s service exports today, is still developing.

The implications of the WTO agreements on the agricultural sector remained particularly controversial. The Dunkel draft proposals and the resulting WTO Agreement on Agriculture required tariffification of import quotas, reduction of average import tariff equivalents, and reduction of export and domestic subsidies. At least three quarters of the Indian population was dependent on agriculture for its livelihood. Agricultural interests contended that reduction in duties would lead to cheap imports and could potentially disrupt the domestic agricultural sector. Critics of the Dunkel proposals also contended that the aim was not to reduce subsidies on agriculture trade, but to permit the developed countries simply to change the nomenclature of their subsidies from one form to another, thus unfairly maintaining developed country advantages. For example, civil society organizations noted that decoupled income support permitted under the proposals (referring to support that is not linked to greater agricultural production) would not help a developing country like India, which had neither the resources nor the incentives to grant subsidies for limiting agricultural production.

Some discussions in the Indian Parliament suggested that the WTO regime could pave way for the destruction of the Indian agricultural sector. However, a number of econometric


studies conducted at the time of the Uruguay Round indicated that, even if other countries liberalized trade, such policies were unlikely to have an impact on domestic agricultural prices.\textsuperscript{38} According to a study by Pursell and Gulati, the resulting changes in relative world agricultural prices would have a negligible impact on India’s comparative advantage as indicated by the differences between domestic and world agricultural prices in the 1980s and 1993.\textsuperscript{39}

Despite protests and criticisms regarding India’s agreement to liberalize its agricultural sector, the Confederation of the Indian Industry (CII) felt that opening the agriculture sector could present important opportunities. CII, in its submission before the Gujral Committee, maintained that, if developed countries cut their subsidies, both domestic and export prices of food products would increase. There were also reports that some of the internal discussions within the Indian Department of Commerce and independent studies conducted by Indian research think-tanks considered that liberalization of agriculture would be good for the Indian economy. It was, however, difficult to convince the skeptics of liberalization of the benefits of opening this sector.

The key concerns from the Indian government’s viewpoint were whether the government could support the public distribution system for domestic food aid and maintain agricultural subsidies for poor farmers. A number of experts before the Gujral Committee contended that the Dunkel Draft on Agriculture would not deprive India of this flexibility.

**D. Reactions to Intellectual Property Rights Issues**

The Dunkel draft proposals attracted particular controversy in India on account of its inclusion of intellectual property commitments under what would become the TRIPs Agreement. Most Indian commentators contended that the TRIPs Agreement was biased against India and other developing countries and perpetuated an unequal world economic order.\textsuperscript{40} The objective of the Indian Patent Act of 1970 was to ensure that patents did not lead to monopolization and dominance by foreign companies of the Indian market, resulting in

\begin{itemize}
  \item \textsuperscript{39} \textit{Id.}
\end{itemize}
higher prices for medicines and food. The Indian Patent Act of 1970 (the law which existed before the WTO regime became operational) restricted the field of patentability and granted only process and not product patents with respect to agricultural, pharmaceutical, and chemical products. It also restricted the term of patents and created an elaborate system of licenses to ensure that patents were worked in India. The sentiment which prevailed in India regarding the extension of patent protection for pharmaceutical products is well illustrated by a statement of Indira Gandhi, the former Prime Minister of India, which is often quoted in India. Prime Minister Gandhi declared before the World Health Assembly in 1982 that “[t]he idea of a better-ordered world is one in which medical discoveries will be free of patents and there will be no profiteering from life and death”.  

India was an opponent to introducing intellectual property rights in the Uruguay Round negotiations from the very beginning. Muchkund Dubey, a former Indian Foreign Secretary, notes as follows: “India until the last days of the resumed mid-term review session firmly adhered to the position that GATT was not the forum to discuss norms and standards of IPR protection nor could higher level of IPR be part of a liberal multilateral trading system.” According to the Times of India, a major Indian newspaper, India decided against taking a firm stand on the issue at the later stages of the Uruguay Round in large part because of possible trade retaliation by the United States under Section 301 of the 1974 Trade Act. Biswajit Dhar, an India economist, notes as follows, “[t]he pressure put on India remains among the more stark examples of the threatened use of unilateral action of trade retaliation by a major trading country to realize its objectives in the multilateral negotiations.

A wide-ranging debate arose in India on the implications of India’s acceptance of the Dunkel draft texts. During a special sitting of the Lok Sabha, the lower house of the Indian Parliament, to discuss the Dunkel draft, the Indian opposition parties argued that the Dunkel draft would have deleterious consequences for India’s farming interests, drug industry and distribution system. Chitta Basu, a Member of Lok Sabha participating in a debate on the


42 Times of India, Apr. 17, 1989 (available with the author). Section 301 of the US Trade Act of 1974 gives the President broad discretionary authority to threaten, impose, or defer a wide range of retaliatory actions based on the USTR’s findings and the country’s broader interests and obligations.

Dunkel draft argued as follows: “[t]he Dunkel Text in relation to TRIPS is totally against all the major elements of the Indian patent regime. It places tremendous hindrances to our domestic enterprises, research and development efforts etc. It would result in the price increase of medicines, pesticides beyond the capacity of the common man.”

Atal Bihari Vajapayee, who later became the Prime Minister in 1997 said, “[t]he proposal is comprehensive enough including all affairs of life. It includes the areas of medicine, cotton cloths, agriculture, industry, services, investment, technology, employment, environment, and culture etc. …The Dunkel Draft text ‘ is such a document that will have to be either accepted in full or will have to be rejected in full.”

Vajpayee was referring to the danger of signing on a Single Undertaking which has to be accepted in full or rejected in full.

Interestingly, the public response in India to the inclusion of trade-related intellectual property rights was not one-sided, as sometimes depicted. With the initiation of economic liberalization in 1991, some sections of the Congress Party began favoring changes in patent laws. The Gujral Committee also commented that India was not able to obtain relevant technology due to the absence of India’s recognition of product patents in some sectors.

The stand taken by the Indian industry associations during this time presents further interesting background. ASSOCHAM, the country’s third leading industry association, did not hold the view that drug prices would excessively increase if India accepted the Dunkel Draft. The Organization of Pharmaceutical Producers of India (OPPI), consisting of large international and domestic research companies, held a similar view. CII placed on its ‘wish list’ for the government to pass the patent bill to conform to the TRIPs

45 Id.
46 Lok Sabha Debates, http://parliamentofindia.nic.in/lsdeb/ls10/ses5/1923129202.htm (last visited July 28, 2015); Reflecting on the Single Undertaking, Arvind Panagariya notes, “India remained opposed to the agreement until the end, but was left with no choice but to sign it after all others had done so.” Arvind Panagariya, India: Asia’s Emerging Giant (2008), at 279.
47 Gujral Committee Report.
48 Id. at 42.
49 Id.
Agreement. In 1997, the Federation of Indian Chambers of Industry and Commerce (FICCI) established the International Institute of Intellectual Property Development (IIPD), seeking to promote a patenting culture amongst the scientific and technical community and the use of intellectual property rights as a strategic tool to advance business interests. Some domestic pharmaceutical firms that had prospered under the old patent structure, believed that they could earn significant revenues from a regime where pharmaceutical product patents are recognized. Dr. Reddy’s Laboratories, a major pharmaceutical firm, had been advocating a change in policy since 1984. A senior official at Ranbaxy, another leading Indian pharmaceutical firm said, “India has a deficient system as far as providing intellectual protection goes, therefore we see the need for a radical change….It is a myopic view that multinationals will dominate the industry, as players are emerging at all levels.”

The initial resistance to contentious issues such as agriculture and IPR issues had become weaker and the Narasimha Rao government had unleashed far reaching economic reforms in 1991, 1992 and 1993. Joining the Marrakesh Treaty in April 1994 was almost an inevitable outcome for India.

II. RISING INDIA, WTO AND THE CIVIL SOCIETY

The WTO became a reality in 1995. The Uruguay Round resulted in commitments that went far beyond the results of the earlier negotiations. One of the new agreements, namely Agreement on Agriculture touched upon sensitive areas of domestic policy such as domestic support, whereas General Agreement on Trade in Services (GATS) introduced a new set of disciplines and commitments on various categories of services and to an extent investment related aspects, and TRIPS, the most controversial of all, introduced disciplines on protection of various categories of intellectual property rights. The WTO also brought in separate agreement covering various aspects of trade in goods and binding duties on broader categories of commodities.


The breadth of new commitments was potentially overwhelming for a country that assumed few commitments in its nearly 50-year participation in the GATT. India had bound a mere 6% of its tariff lines before the Uruguay Round. From 6 percent, India increased its tariff commitments to almost 65 percent as part of its Uruguay Round commitments. To be precise, India bound its tariff for 3375 tariff lines at the 6-digit level. Out of the 3375 tariff lines, 683 tariff lines belonged to the agriculture sector. Tariffs were non-agricultural products were bound at 40 percent for finished goods and 25 percent for intermediate goods. On agricultural goods, India bound its rates at 100 percent on primary goods, 150 percent on processed goods, and 300 percent on edible oil products. However, India had bound its rates on certain agricultural products during the previous trade rounds at zero.

India has made commitments in 33 activities, as compared to an average of 23 activities for all developing countries. India’s objective in the service negotiations was to offer entry to foreign service-providers in cases considered to be most advantageous in terms of capital inflows, technology, and employment. Although, India was conservative in offering commitments in the GATS negotiations, India had embarked upon a process of unilateral liberalization. India had also joined the Information Technology Agreement (ITA).

A. India’s response to joining the WTO

Since joining the WTO, India has adapted to play a more constructive role in the WTO system. It could not do so under its internal arrangements under the GATT. India rather had to create new linkages with stakeholders and liaison more regularly with them in a more transparent way. WTO documents were to be regularly shared with the private sector and legal opinions regularly sought from non-governmental lawyers and other trade experts. The government also realized that seeking legal opinions from government empaneled lawyers

54 PIIE, India in the GATT and WTO (Citation details). India renegotiated the tariffs on several agricultural products whose tariffs were historically bound at very levels by recourse to Article XXVIII negotiations of the GATT 1994.
need not work in specialized areas such WTO, and the Department of Commerce sought the help of private lawyers.  

Joining the WTO also meant that India had to implement a number of WTO commitments. The reduction of import duties had been initiated in 1991 and the subsequent years. The Foreign Trade Regulation Act, 1992 created the Directorate-General of Foreign Trade (DGFT) which was responsible for administering import licensing and tariff quotas. Implementation of trade remedy legislations required strong and capable domestic institutions. In order to implement the trade remedy legislations, the Customs Tariff Act 1975, was amended by the Customs Tariff (Amendment) Act 1995, and specific rules were created. Enquiry points were notified for TBT and SPS Agreements. India had to eliminate several localization and domestic use requirements which fell in the category of prohibited trade related investment measures (TRIMS). A number of IPR legislation also required changes to comply with the WTO regime. While conforming to the WTO obligations was a challenge, there was an increasing awakening that participation in the WTO was not a zero sum game. The Indian bureaucracy realized that if India has to play a key in negotiations, India has to be a demandeur of market access in export markets and pursue offensive interests in several areas and products. Furthermore, India’s loss in a few disputes such as India-Patents and India-QR helped India realize the importance of preserving and zealously safeguarding the concessions it received in several products and sectors. As India realized from its participation in various disputes, WTO was way too different from the GATT in terms of its uncompromising nature of its process and functioning.

B. Hybridized Processes and their Effects in India: Involvement BUSINESS TRADE ASSOCIATIONS, THINK TANKS AND RESEARCH INSTITUTIONS

India has revised its laws and institutions so as to comply with WTO law while doing so with some leeway in ways that continue to protect its interests. Although the WTO treaty stresses on “compliance,” recent liberal trade and development scholars stress on the


importance of engaging in hybrid policymaking within constraints, imitating while inventing, adapting while adopting. Despite the presence of restrictions and positive obligations, there is flexibility to carve out policy space for regulatory autonomy. To give an example, in implementing the TRIPs agreement following a famous WTO complaint against it, India was forced to provide patent protection for pharmaceutical patents. It did so after a long internal study in a way that came up with innovative definitions of the key requirements, namely that a patent must claim must be novel and an inventive step.\textsuperscript{58} It thereby can narrow the scope of patent claims recognized. It also made it considerably easier to challenge patents, including both pre- and post- grant challenges (while countries including the US only provide for post-grant challenges), and it permits these challenges to occur before an administrative body than the traditional courts in India. India implemented this framework after several rounds of consultations and internal discourses and deliberations with the concerned stakeholders.\textsuperscript{59}

The major attitudinal change initiated within the government was to get rid of the non-transparent image. In the place of a few bureaucrats making decisions, the trade policy making process became much broader involving government officials in other departments and more importantly outside actors.\textsuperscript{60} The launch of Doha Round of Trade Negotiations was a critical moment in mobilizing the various interest groups and other private and public stakeholders in WTO affairs. The government invited the industry and the civil society for consultations. Industry associations such as the Federation of Indian Chamber of Commerce and Industry (FICCI) and the Confederation of Indian Industry (CII) conducted various stakeholder consultations during the launch of the Doha Round of trade negotiations and various other WTO ministerial conferences. There are also other industry organizations such as ASSOCHAM and PHD Chamber that used to conduct industry wide consultations on WTO matters before and after key events such as Ministerial conferences and closure of free trade agreement (FTA) negotiations.

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The feeling that change in global rules could adversely affect their business drove the interest, while a few other emerging sectors such as pharmaceutical and information technology companies saw an opportunity in global markets. Organizations such as CII started the ‘India Everywhere’ campaign with a view to showcasing India to the outside world.\(^61\) Indian business heads and political leaders became a regular feature at the annual meeting of the World Economic Forum in Davos. CII opened an office in Geneva in 2003 in order to regularly monitor the developments in the WTO negotiations and update the industry of the developments.

Most of the leading business trade associations are supported by the Industry through member subscriptions. FICCI has over 2,50,000\(^62\) members whereas CII has over 7400 members, from private as well as public sectors, including SMEs and MNCs and an indirect membership of over 100,000 enterprises from around 250 national and regional sectoral industry bodies\(^63\). These are the two largest business trade associations in India and work as umbrella associations. Organizations such as the FICCI and the CII have large secretariats and separate divisions including economic analysis units. FICCI established a WTO, FICCI and Foreign Trade Division with Manab Majumdar as its head. The CII too established a Trade Policy Section, which is currently headed by Pranav Kumar.

The apex industry associations operated as a hub for knowledge dissemination and information gathering. The apex organizations were networked with smaller industry associations and promptly passed on requests from the MoCI on specific issues of consultation to concerned industry stakeholders. The sector specific industry partners, in turn, consulted the business enterprises and provided their feedback. The apex organizations relied upon the skills and sector familiarity of industry participants in apprising the MoCI of the feedback received. Such consultations were more helpful in the context of the non-agricultural market access (NAMA) negotiations at the WTO as well as in preparing


\(^{63}\) Confederation of Indian Industry (CII), [About us](http://www.cii.in/About_U.aspx?enc=ns9fJzmNKJnsoQCyKqUmaQ==) (last visited July 30, 2015).
the product lists for liberalization in the FTA negotiations. Importantly, such consultations also provided an opportunity for affected sectors and stakeholders to articulate their views better.

The capacity of the apex industries and sector specific industries in offering informed feedback to the MoCI was a matter of priority to the government. In the run up to the Doha Ministerial, FICCI and CII organized a number of stakeholder consultations. The consultations were used by Department of Commerce to explain the technical issues to the stakeholders and, in return, to elicit the views of the domestic industry. As a matter of practice, the consultative process built-in two essential facets -- a pre WTO Ministerial Conference consultation and a post Ministerial Conference briefing. These events are generally mega events attended by a wide spectrum of stakeholders and even delegates and representatives from other governments. Another recent initiative is the standard conclave initiated by CII on product and services standards. The standards conclaves have in the past attracted several sectoral experts in India and abroad and is widely believed to provide the Indian industry a platform to discuss the opportunities and challenges presented in the post-tariff regime where non-tariff measures care considered as the major obstacles to international trade. In addition to these mega events, the Department of Commerce also organizes smaller events which are attended by senior level government officers. In short, the industry bodies works in tandem with the government in establishing a viable and sustainable mechanism for public consultation. A list of such consultations, based on available data, is included in Annex I.

The role played by the UNCTAD, MOCI and DFID Project on “Strategies and Preparedness for Trade and Globalisation in India” (for short, “Capacity Building Project”) merits special discussion. The Capacity Building Project was started immediately after the launch of the Doha Round and continued until 2010. This project had two interrelated components: Component I and Component II. Component II was primarily focused at outreach activities and in strengthening human and institutional capacities in responding to trade issues. UNCTAD and the project partners conducted a series of stakeholder consultations in several cities in India. The Capacity Building Project conducted three

national level consultation meetings at the time of Cancun Ministerial conference; six consultation meetings prior to the Hong Kong Ministerial and another fifteen consultation meetings after the Hong Kong Ministerial. It also held thirteen consultation meetings on India-Thailand FTA negotiations, ten consultation meetings on India-ASEAN FTA, seven consultation meetings on India-EU Trade and Investment Agreement negotiations, seven consultation meetings on India-Japan FTA negotiations, five consultations meetings on SAFTA and six meetings on India-EFTA FTA negotiations. The Capacity Building Project also held sector specific meetings on steel, fisheries and antidumping and subsidies issues. These consultation meetings were held either alone or in conjunction with apex level parties such as FICCI and Textiles Committee and a number of regional partners. Through a network of partners, the Capacity Building Project was able to mobilize farmers, fisher folks, small producers, producers, etc to articulate their interests and concerns in shaping India’s approach to WTO/FTA negotiations. The process of seeking inputs helped in identifying the problems and constraints faced by various industries and agriculture in accessing export markets.

Box I: Network Community under UNCTAD-MoCI-DFID Project

<table>
<thead>
<tr>
<th>Sectors</th>
<th>Tier I partners</th>
<th>Tier II partners</th>
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<tbody>
<tr>
<td>Agriculture</td>
<td>APEDA and CITA</td>
<td>72 partners</td>
</tr>
<tr>
<td>Small and Medium Enterprises</td>
<td>FICCI and FISME</td>
<td>111 partners</td>
</tr>
<tr>
<td>Textiles and Clothing</td>
<td>Textiles Committee and India Merchants Chamber</td>
<td>181 partners</td>
</tr>
<tr>
<td></td>
<td>MPEDA and Seafood</td>
<td></td>
</tr>
</tbody>
</table>

Marine Exporters Association of India (SEAI) 50 partners


After 2001, the MoCI worked with various state governments in establishing WTO cells in various states. The objective of the WTO cells is to provide awareness of the WTO Agreements and to provide direct feedback to the MoCI. WTO cells were established at the state level in Kerala, Punjab, Andhra Pradesh, Maharashtra, Rajasthan, Tamil Nadu, Uttar Pradesh, Orissa, Karnataka, West Bengal, Madhya Pradesh, Delhi.

67 Brief on WTO Cell Industries, Commerce & Investment Department, Government of the Punjab (on file with author).
69 Id.
70 Id.
71 Id.
72 Id.
73 Id.
74 Id.
76 Id.
77 Id.
Tripura, Nagaland, Haryana and the Union Territory of Dadra and Nagar Haveli. Generally, the WTO cells are headed by junior level officials and have found it difficult to make a difference. However, some of the more active WTO cells such as the one in Karnataka, Kerala and Punjab have been able to provide training to a number of state level officials on WTO matters.

In addition to opening the door for stakeholder consultations, the Indian government started using research think tanks for analytical work. In a way, commissioning research work to domestic think tanks and agencies was necessary to reduce the over-dependence on multilateral institutions such as the World Bank which had its own neo-liberal perspective on trade liberalization. Component I of UNCTAD Capacity Building Project had one of its objectives the strengthening of the capacity of India’s policy makers and other research organizations in conducting technically sound and analytically rigorous research work on trade matters. A few organizations such as ICRIER, RIS and NCAER had already been involved in WTO work and continue to consider it as a core area of focus. ICRIER’s WTO initiative is headed by Anwarul Hoda who was a Member of the Planning Commission and was a former Deputy Director General at the WTO from 1995 to 1999. ICRIER has published series of research papers on international trade issues; its website has listed ten substantive research projects, sixty working papers, various policy papers, edited books and newsletters on trade matters during the period 2002-2012.

The use of academically driven think tanks and research organizations had a serious handicap. In most cases an understanding of trade policy and negotiating dynamics were crucial in yielding practically useful reports for the MoCI. The creation of the Center for

78 Id.
79 Id.
80 Id.
81 Id.
83 Id.
WTO Studies (CWS or the Centre) was to an extent aimed at bridging this gap. The Centre consists of academics and those seconded to it from government, primarily the Department of Commerce to which the Centre reports. For example, the two senior most staff of the Centre were career civil servants and their exposure to the ‘real world’ issues help them to guide and direct the work of the Centre in an effective way.

The Centre was established with a three-fold mission: (1) research for the MoCI; (2) liaison between the MoCI and industry and civil society; and (3) general capacity building and information diffusion through organizing workshops and publishing newsletters and reports. The Centre plays a key role in providing carefully considered responses to various queries raised by the Department of Commerce. The Centre has also in recent times tied up with the reputed World Trade Institute in Bern to provide highly subsidized tailored courses in key WTO topics for India law students and young legal professionals with the help of some renowned experts in trade law and policy including former Ambassadors and a former Appellate Body Member. These initiatives of the Centre contribute in a significant way to the development of an epistemic community in WTO law.

Through acting as a liaison with the private sector, the Centre aims to build consensus for negotiations. The Centre thus provides a platform where government and domestic stakeholders can come together to discuss the government’s positions and the reasons for them, backed by the Center’s research. The Centre also publishes annotated versions of the WTO disputes which are published within a fortnight of the publication of the WTO panel and Appellate Body reports. As the WTO panel and Appellate Body reports get longer and complicated, the Center seeks to provide edited versions of the report free of cost. The Centre also commissions various independent studies to outside consultants and researchers. As of June 2015, the Centre’s website indicates that it has completed around 45 study projects for the Ministry, and around 50 capacity building programs. Of late, the Centre has started engaging a number of student interns from various National Law Schools and other premier private law schools in India round the year.

84 The interviewee referred to this latter aspect as capacity building but in fact what was done was the diffusion of information.

The legal capacity building in various law schools in India has been steadily improving. When Ramakrishna Hegde was the Union Commerce Minister, a WTO Chair was instituted at the National Law School of India University (NLSIU) in Bangalore in 1996. However, the endowment for this Chair is roughly around $60,000, and will have to be administered with the help of the interest accumulation. Although MoCI wanted to establish Chairs in premier law schools, it has not received the support it needed. NLSIU had also started one of the first student edited Journal on international trade law entitled *The Indian Journal of International Economic Law*. The National Law University in Jodhpur is also offering a special stream in International Trade and Investment Law and has been running a Journal entitled *Trade, Law and Development* since 2009. The Jindal Global Law School where I am teaching has been running special streams on international trade law and trade remedy law to the LL.M students. Jindal Global Law School also runs a research center on international trade and economic law (CITEL) where students from students from the leading law schools in India and abroad are offered a paid internship under the Global Research Internship Program (GRIP). The Gujrat National Law University (GNLU) has been hosting one of the popular trade law moot court competitions in India since 2011. Despite these admirable examples of public-private capacity building networks in India, it is evident that the extent of trade related capacity building in Indian law schools is considerably less when compared to other institutions in China or some other South East Asian countries.

It is also a matter of fact that the government or private sector support in creating capacity is WTO and related matters is significantly less when compared to certain other areas such as IPR law. The Ministry of Human Resources Development (MHRD) has instituted 18 intellectual property Chairs in various Universities across the country. Five National Law Schools in India have MHRD sponsored Chairs. In addition, the Indian


87 Interview with Henry Gao, Associate Professor, Singapore Management University (May 27, 2015).
government provides an opportunity for technical and management training institutions in India for participating in the WIPO Worldwide Academy’s Distance Learning courses.\(^\text{88}\)

Among the research think tanks in the field of international law, the Indian Society of International Law (ISIL) occupies a central position. In addition to running one of the oldest journals in India in the field of international law namely the *Indian Journal of International Law*, ISIL conducts various training programs for the officers of the Indian Foreign Service (IFS) and the Indian Economic Service (IES).\(^\text{89}\) ISIL also conducts a one year diploma course on international trade law and offers refresher courses to University teachers and students in India on topics including international trade law.

There are very few institutions outside Delhi working in the field of international trade economics or trade law. The Administrative Staff College of India (ASCI) in Hyderabad offers occasional training programs in trade law and has on its rolls Ambassador S. Narayanan who served as India’s Ambassador to the WTO between 1995 and 2001. Organizations such as ASCI focus on conducting training programs and workshops to state level officials. The Centre for Development Studies (CDS) in Thiruvananthapuram has established a Chair on plantation issues with the support of the Ministry of Commerce, which also addresses issues relating to the plantation sector and the WTO. In 2008, CDS organized a series of lectures on international trade issues with the support of UNCTAD.\(^\text{90}\)

While discussing the role of non-governmental organizations, organizations such as CUTS International play a key role in taking the debate on trade issues to the masses. CUTS has established a Centre for International Trade, Economics and Environment (CITEE) which is headquartered in Jaipur with presence in Nairobi, Lusaka and Hanoi and Geneva. CUTS-CITEE has around 20 professional staff and more than a dozen fellows and routinely conduct studies, stakeholder meetings and conferences on international trade and WTO matters. In addition to CUTS International, civil society organizations such as Third World Network,
Oxfam and Global Development Network (GDN) work on certain specific aspects of trade policy.

The emergence of civil society organizations in the aftermath of the creation of the WTO was a noticeable change in India. The establishment of the WTO has led, in a remarkable way, in the diffusion of capacity at multiple levels and in fostering of public-private partnerships in India. The central and as well as the state governments that had conducted limited consultations with the industry or affected citizens in the past has established WTO cells or other coordinating mechanisms to elicit the views of the industry and the stakeholders. In other words, creation of network societies and the deepening of the consultative process between the government and the private sector and individuals has been one of the remarkable contributions of the WTO legal order.

III. CONCLUSION

As this study indicates India has followed a pluralist model of trade related capacity building right since the days of the Uruguay Round trade negotiations. The controversial nature of topics such as agriculture and intellectual property rights forced the Indian government to reach out to industry bodies and other stakeholders even during the Uruguay Round. The setting up of Committees under the chairmanship of I.K. Gujral and Arjun Singh during the final phase of the Uruguay Round led to broad-based stakeholder consultations. .

The substantial difference during the post-Uruguay Round is the qualitative improvement in the nature of engagement between the government and the so-called third pillar. Progressively, there is a deep level of engagement between the government and other industry bodies on negotiating issues and concerns as evidenced by the number and periodicity of consultations after the establishment of the WTO. As some of the stakeholders have confirmed, the feedback received in the ongoing Doha Round stakeholder consultations fed into the negotiating agenda of the Government of India and has resulted in meaningful intervention by India in the international trade negotiations and enforcement of international obligations at the domestic level. For example, the views of the civil society were crucial in implementation of product patent for pharmaceutical products and the preparation of various product lists in the FTA negotiations. In addition, the views of the Indian industry were taken
into consideration during the NAMA negotiations under the WTO and preferential and bilateral trade agreements. As a result, the Government of India has been able to successfully conclude a number of comprehensive economic treaties such as the India-ASEAN, India-Singapore, India-Korea and India-Japan agreements in the few years. Although this study has referred to only a few national industry apex bodies and think tanks, it is unmistakable that there is a bottom-up coordination and participation from the Indian industry associations to proactively shape the trade policy agenda of the government of India. Empirical evidence has also confirmed that the pluralist model of public-private partnership has also significantly helped in diffusion of capacity at multiple levels and has also helped the Indian negotiators in securing domestic support for sensitive issues such as Trade Facilitation and Information Technology-II agreements.

**Annex I: Stakeholder Consultations by Indian Industry Bodies and Research Organizations**

<table>
<thead>
<tr>
<th>S. no.</th>
<th>Organization(s)</th>
<th>Date</th>
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<tr>
<td>1.</td>
<td>CII, Seminar on “China’s Accession to WTO: Impact on Indian Industry”</td>
<td>15 March 2002</td>
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<td>2.</td>
<td>FICCI, Roundtable on “WTO Negotiations on Industrial Tariffs and Market Access”</td>
<td>29 November 2002</td>
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<tr>
<td>3.</td>
<td>FICCI, Stakeholder Consultation Workshop on “India-Japan Free Trade Agreement and Economic Partnership Agreement”</td>
<td>20 March 2004 (Mumbai)</td>
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<tr>
<td>4.</td>
<td>FICCI, RIS and IUCN, Regional Conference on “Agenda for WTO Hong Kong Ministerial: Challenges for South Asia”</td>
<td>20 August 2004</td>
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<td>No.</td>
<td>Event Description</td>
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<td>5.</td>
<td>FICCI, Seminar on “India-Singapore Comprehensive Economic Cooperation Agreement (CECA): Opportunities for Indian Business”</td>
<td>20 August 2005</td>
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<td>6.</td>
<td>FICCI, Industry Consultation Session on “India-ASEAN Free Trade Agreement”</td>
<td>25 January 2006</td>
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<td>7.</td>
<td>FICCI and SAARC Chamber of Commerce and Industry (SCCI), Stakeholder Consultation on “SAFTA: Opportunities and Challenges”</td>
<td>13 March 2006</td>
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<td>8.</td>
<td>FICCI and CENTAD, National Consultation on “WTO and India: Strategising Beyond Hong Kong”</td>
<td>20 March 2006</td>
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<td>9.</td>
<td>FICCI and SRC, National Seminar on “Making Globalisation Work: An Indian Perspective” with Nobel laureate Professor Joseph E. Stiglitz</td>
<td>18 December 2006</td>
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<td>10.</td>
<td>FICCI and MOIC, Industry Consultation Session on “BIMSTEC Free Trade Agreement”</td>
<td>7 July 2007</td>
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<td>11.</td>
<td>FICCI, Workshop on “India-EU Free Trade Agreement Negotiations: Identifying Products of Concern to India”</td>
<td>24 August 2007</td>
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<td>12.</td>
<td>FICCI, MOIC and CWS, IIFT, Stakeholder Consultations on “India-EU Free Trade Agreement in Services”</td>
<td>29 November 2007</td>
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<td>13.</td>
<td>FICCI, Regional Conference on “Deepening South Asian Economic Integration”</td>
<td>24 July 2008</td>
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<td>14.</td>
<td>CII and CWS, IIFT, Stakeholder consultations on “NAMA Sectoral negotiations”</td>
<td>September-October 2008</td>
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<td>15.</td>
<td>FICCI and CWS, IIFT, Interactive Meeting on “WTO Proposals for Sectoral Tariff Negotiations”</td>
<td>3 October 2008</td>
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<td>16.</td>
<td>CWS, IIFT, Consultations with Industry on “India – EC FTA on Trade in Services”</td>
<td>28 November 2008</td>
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<td>16 February 2009</td>
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<td>18</td>
<td>FICCI, India Infrastructure Summit 2009</td>
<td>20-21 March 2009</td>
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<td>19</td>
<td>MOIC, FICCI and CWS, IIFT, Sensitive list of India for “Indo-EFTA FTA in collaboration with UNCTAD”</td>
<td>3 May 2009 (New Delhi); 4 May 2009 (Ahmedabad) and 27 May 2009 (Kolkata)</td>
</tr>
<tr>
<td>20</td>
<td>FICCI and CWS, IIFT, Stakeholder Consultation on “India’s FTAs with EU and EFTA Countries”</td>
<td>27 May 2009</td>
</tr>
<tr>
<td>21</td>
<td>FICCI, Global SMEs Summit 2009</td>
<td>28-29 July 2009</td>
</tr>
<tr>
<td>22</td>
<td>MOIC, FICCI and CWS, IIFT, Consultations with Domestic Industry on “India EFTA-FTA and India-EU FTA”</td>
<td>31 July 2009 (Hyderabad) and 4 August 2009 (Mumbai)</td>
</tr>
<tr>
<td>23</td>
<td>FICCI, MOIC, CWS, IIFT and UNCTAD, Stakeholder Consultations on “India’s FTAs with EU and EFTA Countries”</td>
<td>4 August 2009</td>
</tr>
<tr>
<td>24</td>
<td>FICCI, Seminar on “Enhancing Trade and Investment India- Thailand”</td>
<td>12 August 2009</td>
</tr>
<tr>
<td>25</td>
<td>FICCI, CWS, IIFT and MOIC, Stakeholder Consultation on “India’s FTAs with EU and EFTA Countries”</td>
<td>20 August 2009 (Mumbai)</td>
</tr>
<tr>
<td>26</td>
<td>CII and CWS, IIFT, Capacity Building Programme on “WTO Agreements &amp; SPS/TBT database”</td>
<td>27 August 2009</td>
</tr>
<tr>
<td>27</td>
<td>CII, CWS, IIFT and MOIC, Workshop on “SPS/TBT Database and WTO Agreement”</td>
<td>31 August 2009</td>
</tr>
<tr>
<td>28</td>
<td>FICCI, National Stakeholder consultation on “WTO negotiations”</td>
<td>8 December 2009</td>
</tr>
<tr>
<td>29</td>
<td>CWS, IIFT, FICCI and MOIC, National Stakeholder Consultation on</td>
<td>8-9 December 2009</td>
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<td>Date/Location</td>
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<tr>
<td>30</td>
<td>FICCI, Seminar on “India-ASEAN Free Trade Agreement in Goods: Implementation and Operational Issues”</td>
<td>16 February 2010</td>
</tr>
<tr>
<td>31</td>
<td>FICCI and CUTS, Programme on “Strategic Trade Regulations and Practices for Indian Hi-Tech Industry”</td>
<td>25-26 March 2010</td>
</tr>
<tr>
<td>32</td>
<td>FICCI, Roundtable with Mr. R.P. Singh, Secretary, DIPP on “National Manufacturing Policy”</td>
<td>17 May 2010</td>
</tr>
<tr>
<td>33</td>
<td>CWS, IIFT and MOIC, Consultation with Indian Industry on “EU REACH Regulation”</td>
<td>30 April 2010 (Mumbai); 6 May 2010 (Kolkata) and 22 May 2010 (Ahmedabad)</td>
</tr>
<tr>
<td>34</td>
<td>FICCI, Seminar on “Proposed Anti-Counterfeiting Trade Agreement (ACTA) and TRIPs: Issues and Implications”</td>
<td>28 May 2010</td>
</tr>
<tr>
<td>35</td>
<td>FICCI, Stakeholder consultation on “India-Turkey FTA”</td>
<td>28 July 2010</td>
</tr>
<tr>
<td>36</td>
<td>FICCI, Industry consultation on “India’s Free Trade Agreement with EU, Japan and EFTA”</td>
<td>31 July 2010</td>
</tr>
<tr>
<td>37</td>
<td>FICCI, National Seminar on the “Business Implications of the Asia-Pacific Trade Agreement (APTA) on India”</td>
<td>7 December 2010</td>
</tr>
<tr>
<td>38</td>
<td>CWS, IIFT, Meeting on “Carve-out in Agriculture negotiations”</td>
<td>31 January 2011</td>
</tr>
<tr>
<td>39</td>
<td>FICCI, Industry Consultation on “Sectoral Tariff Negotiations in WTO”</td>
<td>31 May 2011</td>
</tr>
<tr>
<td>40</td>
<td>FICCI, Roundtable on “Strengthening Regulatory Framework and Enhancing Capacity in India’s Accountancy Services Sector”</td>
<td>8 February 2012</td>
</tr>
<tr>
<td>41</td>
<td>FICCI and CWS, IIFT, Seminar on “Trade Facilitation and Dissemination of the Study on Trade Facilitation Gap Analysis”</td>
<td>29 February 2012</td>
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<td>42.</td>
<td>FICCI, Facilitating Trade in South Asia: Sharing Best Practices and Exploring Regional Solutions</td>
<td>12-13 June 2012</td>
</tr>
<tr>
<td>43.</td>
<td>FICCI, ICRIER and Konrad Adenauer Stiftung (KAS), Stakeholders’ Consultation on “Enhancing India-EU Bilateral Trade, Investment and Collaboration in Services”</td>
<td>7 July 2012</td>
</tr>
<tr>
<td>44.</td>
<td>FICCI, Roundtable on “India-Singapore CECA”</td>
<td>11 July 2012</td>
</tr>
<tr>
<td>45.</td>
<td>CITEL, JGLS and CWS, IIFT, International Conference on “Managing Growth in a Changing World: What Lessons can the BRICS learn from each other”</td>
<td>6-8 December 2012</td>
</tr>
<tr>
<td>46.</td>
<td>CII Partnership Summit 2013 on the theme: “Global Partnership for Enduring Growth”</td>
<td>27-29 January 2013</td>
</tr>
<tr>
<td>47.</td>
<td>FICCI, MSME Summit 2013 on “Integrating MSMEs with the Global Value Chains”</td>
<td>14 May 2013</td>
</tr>
<tr>
<td>49.</td>
<td>FICCI, Industry consultations on the theme “Rules on Origin in India’s FTAs”</td>
<td>26 July 2013</td>
</tr>
<tr>
<td>50.</td>
<td>CII and MOIC, India’s International Trade Strategy and Industry Consultation on “WTO Bali Ministerial and FTA Challenges”</td>
<td>29 July 2013</td>
</tr>
<tr>
<td>51.</td>
<td>FICCI, Industry consultations on the theme “Trade in Environmental Goods”</td>
<td>26 November 2013</td>
</tr>
<tr>
<td>53.</td>
<td>CII &amp; MOCI, Standards Conclave 2015 on the theme “Role of Standards”</td>
<td>21 May 2015 and 16-17</td>
</tr>
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<thead>
<tr>
<th>Number</th>
<th>Event</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>55.</td>
<td>FICCI, Industry Consultation on “Rules of Origin in Regional Comprehensive Economic Partnership Agreement”</td>
<td>6 June 2014</td>
</tr>
<tr>
<td>57.</td>
<td>CII and WEF, Indian Economic Summit</td>
<td>5 November 2014</td>
</tr>
<tr>
<td>58.</td>
<td>CII and MOIC, 2nd India-CMLV Business Conclave “ASEAN – India Economic Engagement”</td>
<td>12 December 2014</td>
</tr>
<tr>
<td>59.</td>
<td>CII Partnership Summit, 2015 on “Partnership for Shared New Realities”</td>
<td>15-17 January 2015</td>
</tr>
<tr>
<td>60.</td>
<td>CII, National Conference on “India’s Domestic Reforms Need for Factor Changing Global Trade Regime through Mega-Trade Blocks”</td>
<td>7 April 2015</td>
</tr>
<tr>
<td>61.</td>
<td>CII, Seminar on “Services Sector: Strengths &amp; Opportunities b/w India and Gulf/Middle East/West Asia/North Africa (MEWANA)”</td>
<td>23 April 2015</td>
</tr>
<tr>
<td>64.</td>
<td>CII, SEPC and MOIC, Global Exhibition on Services 2015</td>
<td>24 August 2015</td>
</tr>
</tbody>
</table>

Source: FICCI, CII & CWS, IIFT
ARTICLES 2(4) AND 51 OF UN CHARTER: FORCE GAPS AND THE UNILATERAL EXERCISE OF THE RIGHT OF SELF DEFENCE AGAINST NON-STATE ACTORS

Himanil Raina*

ABSTRACT

The article examines the right of self-defence against non-state actors under the use of force regime in international law and also examines the issue of force gaps in the U.N Charter. A survey of the historical evolution of the law relating to the use of force is conducted before examining the shortfalls of the U.N Charter and the accompanying I.C.J jurisprudence. A wider understanding of the Article 51 right to self-defence is developed with reference to the Charter’s negotiation history, the I.C.J’s jurisprudence and state practice. The relevant literature is surveyed to provide the broad outlines of the different approaches to accommodate an expanded understanding of Article 51. By tracing the development of the value hierarchy underlying Article 2(4) the larger policy questions inherent in the modification of the existing use of force regime are addressed while addressing challenges to the continued vitality of the use of force regime. Finally a look is cast across the horizon to identify and flag emerging trends in the use of force by various actors so as to establish the case for the need to give Article 51 an expansive understanding.

I. INTRODUCTION

On the issue of use of force it is essential to distinguish at the outset its unilateral exercise by a State and the use of force flowing from authorization granted by multilateral groupings of nations (international organizations and not a ‘coalition of the willing’). In the latter there is

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91 The United Nations Security Council (U.N.S.C) being the relevant multilateral grouping herein. Regional organizations are not addressed in this instance; See also: Report of the High Level Panel on Threats, Challenges and Change, “A more secure world: our shared responsibility”, (2 December 2004), Para 188-190, U.N. Doc. A/59/565.
little by way of limitations imposed upon the use of force which can be exercised against not just an imminent but even a latent threat. While the proposition that the right to unilaterally exercise the right of anticipatory or pre-emptive self-defence is available to a state is a contested one there is little dispute that the power to bestow such a right accrues to the U.N.S.C. 92 Indeed it is up for question whether the U.N.S.C has powers to alter the traditional requirements of necessity and proportionality when a state uses force in self-defence as well.93 The unilateral use of force by a State however presents a minefield of ambiguous uncertainties and unresolved dilemmas compounded by both the constant evolutions and revolutions in the field relating to the use of force. There are debates over the scope of the term self-defence, armed attack and even force itself. Another central theme relates to whether the U.N Charter imposes an absolute prohibition on the use of force or whether it permits the use of force consistent with the purposes of the United Nations (encompassing issues like the rescue of nationals, humanitarian intervention, Responsibility to Protect (R2P) and force in pursuit of self-determination). The issue which this Article deals with (while addressing some of these aspects on a need by need basis) pertains to force gaps in the U.N Charter and the unilateral use of force against Non-state Actors in exercise of the right of self-defence.

II. EXAMINING THE HISTORICAL EVOLUTION OF THE LAW RELATING TO THE USE OF FORCE

The distinction between just and unjust wars was one known to both the Romans and the Greeks.94 While the just war theory can in a certain form be traced to the *jus fetiale* in Rome95 this theory did not experience its heyday till taken up by the Christian Church. Christianity


95 A. S. Hershey, *The History of International Relations during Antiquity and the Middle Ages, 5 AJIL. 919, 920 (1911): “The jus fetiale consisted of certain rules and ceremonies or modes of procedure for declarations of war and ratification of treaties…and their guardianship was entrusted to a special body of priests known as the College of Fetiales.”
though initially pacifistic (Christians were forbidden from even enlisting as soldiers),\textsuperscript{96} upon its intermingling with the ‘secular power of the Roman Empire’\textsuperscript{97} as the ‘Christianization of the Roman Empire’ ensued\textsuperscript{98} saw the concept of \textit{bellum justum} recast and brought to the fore by St. Augustine. Subsequently endorsed and expounded upon by a variety of scholars (most prominently St. Thomas Aquinas) a just war was understood as an act that only a sovereign authority with the right intentions could wage upon having a just cause (just cause understood as self-defence, restoration of what was stolen, the avenging of injuries and promotion of Christianity).\textsuperscript{99}

The decline of papal supremacy and the rise of co-equal sovereign states in Europe existing in a primitive balance of power system (post Westphalia) led to a situation wherein there was no objective standard or authority to determine the justness of a war.\textsuperscript{100} The secularization of war led to a dangerous situation where since wars could be just on both sides the use of force threatened to undermine the international order rather than strengthen it.\textsuperscript{101} With the Middle Ages drawing to a close, eminent scholars (labelled by some as the fathers of international law) began importing Catholic doctrines about just war into the new legal system, with the addition of new reasons of what amounted to a just war as per their own respective national biases.\textsuperscript{102} This led to the belief about the “extra legality” of war (an activity not legal or

\begin{small}
\textsuperscript{96} J. von Elbe, ‘The Evolution of the Concept of the Just War in International Law’, 33 AJIL. 667 (1939).


\textsuperscript{98} MALCOLM NATHAN SHAW, INTERNATIONAL LAW, 811 (Cambridge University Press: 7th Ed. 2014).


\textsuperscript{101} MALCOLM NATHAN SHAW, INTERNATIONAL LAW, 812 (Cambridge University Press: 7th Ed. 2014); YORAM DINSTEIN, \textit{WAR AGGRESSION AND SELF DEFENCE}, 68 (5th Ed. 2012): Victoria, Grotius and Gentili all agreed upon this point.

\textsuperscript{102} YORAM DINSTEIN, \textit{WAR AGGRESSION AND SELF DEFENCE}, 67-68 (5th Ed. 2012): Dinstein enumerates how Victoria, Ayala, Suarez and Textor each advanced their own favoured enumeration of the just causes of war.
\end{small}
illegal) taking root whereby the right of the “unfettered use of force” was seen as an attribute of statehood. Seen as a meta-juristic phenomenon war was considered an activity which International Law could regulate but neither institute nor establish. What occurred is what J.L Kunz called the replacement of the concept of bellum justum with bellum legale, a situation wherein the legality of wars was no longer measured by the justness of the cause of wars even as the breach of norms of existing international law became relevant. This situation wherein every party involved in an armed conflict would appeal to justice meant that the just war doctrine came to a “cul de sac” which is why the differentiation between just and unjust wars was abandoned in the 19th and early 20th century.

The Hague Peace Conferences of 1899 and 1907 while formalizing the freedom to resort to war also marked a modest effort by States curtail this freedom. Article I of Convention III of 1907 Relating to the Opening of Hostilities introduced the procedural requirement of giving a prior and unambiguous warning before commencing hostilities. Article I of Hague Convention II of 1907 relating to Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts (also called the Drago Porter Convention) limited a State’s right to use force to recover contractual debts provided the debtor state did not refuse an offer of arbitration or an arbitral award. Article 2 of Convention I for the Pacific Settlement of International Disputes (both 1899 and 1907) decreed that prior to making ‘an appeal to arms’


104 JAMES CRAWFORD, BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 744 (8th Ed. 2012).

105 A. Nussbaum, Just War – A Legal Concept, 42 MICH.LR. 477 (1943).

106 YORAM DINSTEIN, WAR AGGRESSION AND SELF DEFENCE, 75-77 (5th Ed. 2012): Dinstein quotes J. Westlake, W.E Hall and Oppenheim in support of the same.

107 Joseph L. Kunz, Bellum Justum and Bellum Legale, 45 AJ.I.L. 532 (1951).

108 YORAM DINSTEIN, WAR AGGRESSION AND SELF DEFENCE, 68 (5th Ed. 2012):


the contracting parties would have resort to the good offices or mediation of foreign states (third parties also being permitted to extend such facilities throughout the hostilities without it being taken to be an unfriendly act). The effect of these principles was to establish the independent interest of the international community in the “prevention or cessation of international armed conflict”. The Bryan treaties entered into bilaterally by the United States from 1913 onwards sought (of the parties) to refrain from all hostilities by providing for a ‘cooling-off’ period of one year within which a conciliation commission to which the dispute was to be referred had to submit its report. While the reference of disputes commissions was optional in The Hague Conventions this became an obligatory requirement in the American treaties.

The aftermath of World War I led to the adoption of the Covenant of the League of Nations following the Paris Peace Conference which for the first time attempted to concretely shape and channelize what had hitherto been a State’s unrestricted right to initiate war as and when it pleased. While it did not prohibit the use of force itself the idea behind the provisions of the Covenant (Articles 10-16) was that a State did not ‘resort to war’ without having submitted its case first to an international decision or at least international consideration. What was set up was ‘a sliding scale of conditions’ in a spectrum encompassing the postponement of war at one end and a prohibition in waging war on the other. On the question of self-defence, the Covenant required Member States to aid each other when faced by external aggression thus implicitly recognizing the right to individual and collective self-defence. Notably when the Council of the League put a question to a commission of jurists

115 Ibid.
116 Fiona Nga-woon Leung, *Resolving the conundrums in Articles 2(4) and 51 of the Charter of the United Nations – A Matter of Treaty Interpretation*, LW 4635 Independent Research, City University of Hong Kong, Run Run Shaw Library, City University of Hong Kong, School of Law, 5, available at: http://lbms03.cityu.edu.hk/oaps/slw2010-4635-lnw806.pdf
whether measures of coercion not war were consistent with the Covenant they said that the answer could be a yes or a no depending on the circumstances of the case and the nature of the measures of coercion adopted.\textsuperscript{118} Notwithstanding the same there were numerous ‘gaps’ in the Covenant regime which permitted a recourse to war. Situations falling within a Party’s domestic jurisdiction [Article 15(8)] or scenarios where there was no unanimity in the Council or majority in the Assembly [Article 15(7)] or the Council or the Assembly’s inability to agree upon recommendations in 6 months (the time frame being ‘reasonable time’ for a judicial decision or arbitral award) are prime examples of such gaps.\textsuperscript{119}

The steady entrenchment of the international community’s interest in use of armed force by a state did not happen overnight.\textsuperscript{120} The Locarno Treaties of 1925 between certain European states were consistent with the Covenant of the League of Nations with regard to obligations for the peaceful settlement of disputes before taking recourse to war. Where they did depart from the Covenant was in their express distinction between offensive wars (which would violate the treaties) and defensive wars (which would not).\textsuperscript{121} The 6\textsuperscript{th} Assembly of the League adopted a resolution stating that a ‘war of aggression’ constituted ‘an international crime’ in 1925 and in the 8\textsuperscript{th} Assembly in 1927 a resolution prohibiting wars of aggression was passed unanimously. The 6\textsuperscript{th} Pan America Conference in 1928 saw 21 American republics declare wars of aggression as crimes against the human species.\textsuperscript{122} The most striking development in this phase was the General Treaty for Renunciation of War as an Instrument of National Policy in 1928 (known also as the Paris Pact or the Kellogg-Briand Pact) which signalled a progression from jus ad bellum to jus contra bellum.\textsuperscript{123} The Pact obliged its signatories to settle disputes by exclusively peaceful means and not war. Brownlie notes that the Pact had 63 state parties with only four states in existence before World War II who were not bound

\begin{itemize}
\item \textsuperscript{118} J. L. Brierly, \textit{International Law and Resort to Armed Force}, 4(3) Cam.LJ . 315 (1930–2).
\item \textsuperscript{119} YORAM DINSTEIN, \textit{WAR AGGRESSION AND SELF DEFENCE}, 83 (5th Ed. 2012)
\item \textsuperscript{120} Edward Gordon, \textit{Article 2(4) in a Historical Context}, 10 Yale J. Int’l L. 274 (1984-1985).
\item \textsuperscript{122} James Brown Scott, \textit{The Sixth Pan American Conference}, 22(2) A.J.I.L. 357 (1928).
\end{itemize}
by its provisions. Some of the important issues this Pact failed to address were the issue of self-defence (expressly) and forcible measures ‘short of war’. The outbreak of World War II accelerated the process of the creation of a new collective security system. Hence from the Atlantic Charter to the United Nations Conference at San Francisco both the “policy and the core of the language” barring nations of an unlimited right to use force already existed before the U.N Charter came into force.


Article 2(4) of the U.N Charter prohibits members of the U.N from using or threatening the use of force in their international relations against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. Article 2(4), a corner stone of the U.N Charter, has been called the very heart of the Charter or the basic rule of contemporary public international law. Article 51 provides for an inherent right of self-defence if an armed attack occurs against the nation until such a time that the United Nations Security Council (U.N.S.C) takes the necessary measures to maintain international peace and security. These provisions were coupled with a new collective security system (prominently Chapter VII) which granted the U.N.S.C the authority to determine the existence of a threat to or breach of international peace and adopt binding military and economic measures against an aggressor state. The onset of the Cold War accompanied by its selective security systems ensured that the UN collective security system failed to live up to its promises. Some have postulated that the restrictions on self-

124 JAMES CRAWFORD, BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 745 (8th Ed. 2012).
125 YORAM DINSTEIN, WAR AGGRESSION AND SELF DEFENCE, 85 (5th Ed. 2012)
130 PETER MALANCZUK, AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW, 27 (7th Edition, 1997); Thomas M. Franck, Who Killed Article 2(4) or: Changing Norms Governing the
defence are reciprocal to the Charter’s promise of collective security. Absent protection by the Charter rules pertaining to the use of force States are not bound by the restrictions imposed on them either.\textsuperscript{131} If such a view is accepted it becomes imperative that the exact contours of the right of self-defence be identified. If such a viewpoint is not accepted it becomes even more important to for there to be clarity as to the scope and nature of the right of self-defence given how it becomes the sole forcible recourse available to State in an international environment where the U.N.S.C overseen collective security system is dysfunctional.

The exercise of the right of individual self-defence is subject to the concerned State having been the victim of an armed attack.\textsuperscript{132} This holds true not just under the U.N Charter regime but also under customary international law as was held in the Nicaragua case.\textsuperscript{133} A troubling point is the fact that there exists no definition of what an armed attack is. In the Nicaragua case however the International Court of Justice (I.C.J) imported the definition of Aggression annexed to United Nations General Assembly (U.N.G.A) Resolution 3314\textsuperscript{134} when it said that: “an armed attack must be understood as including not merely action by regular armed forces across an international border, but also the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to (inter alia) an actual armed attack conducted by regular forces, ‘or its substantial involvement therein’.”\textsuperscript{135} The latter part of the definition


\textsuperscript{134} Case Concerning Military and Paramilitary Activities in and against Nicaragua, (Nicar. V U.S), Merits, Judgment, I.C.J. Reports 1986, Para 176-177, (27 June): It was also reiterated therein that simply because customary international law is comprised of rules identical to those in treaty law that did not mean that the treaty law supersedes customary law such that the customary law doesn’t have an existence of its own.

has been sourced from Article 3(g) of U.N.G.A Resolution 3314, indicating that the ICJ has implicitly linked the concepts of ‘aggression’ and ‘armed attack.’\textsuperscript{136} (not a problematic proposition given how Article 1 of the definition of aggression defines it as the use of armed force by a State inconsistent with the UN Charter). Article 3 of Resolution 3314 enumerates the following as acts of aggression (a non-exhaustive list):

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Two factors become immediately evident. First is the requirement of an attack of sufficient gravity. This was a point the I.C.J expounded upon when it said that the gravest forms of use of force (which constituted armed attack) had to be distinguished from the less grave forms.\textsuperscript{137} With two subcomponents of scale and effects this requirement being context

\textsuperscript{136} KIMBERLEY N. TRAPP, Can Non State Actors Mount an Armed Attack, in THE OXFORD HANDBOOK ON THE USE OF FORCE IN INTERNATIONAL LAW 683 (Marc Weller eds., 1st ed. 2015).

specific is necessarily a variable standard.\(^{138}\) The position taken by the I.C.J is that intervention (example – funding) or even the use of force below the threshold of armed attack (ex - the provisioning of weapons/logistical support or simply violence of limited destructive magnitude) does not permit a forcible response. The problem here is the arising of a force gap, a situation wherein an aggressor’s coercive action if below the required standards of gravity leaves the aggrieved state with no lawful military recourse.\(^{139}\) Second is the fact that the article contains nothing about non-state actors not working for or directed by the State. The inbuilt state authorship requirement means that unless the attacks of the non-state actors are imputable to a state the aggrieved state cannot respond under Article 51 as lacking the same an armed attack cannot be deemed to have occurred.\(^{140}\) In addition to Nicaragua, the I.C.J upheld the position that the Article 51 right is available only in case of attack by another State in its majority judgments in the Israeli Wall Advisory Opinion\(^ {141}\) and the Armed Activities case \(^ {142}\) (both occurring post 9/11). Furthermore, this was the position taken by the Organization of American States (O.A.S) in response to Colombia’s military operations conducted within Ecuadorian territory against a Colombian Revolutionary Armed Forces (‘FARC’) training camp.\(^ {143}\) This is problematic for, as Kimberly Trapp notes, a definition of ‘armed attack’ limited to attributable force “fails to respond to the security concerns of states which may be the victim of un-attributable armed attacks”.\(^ {144}\)


\(^{141}\) Legal Consequences of the Construction of a Wall In the Occupied Palestinian Territory, Advisory Opinion, I.C. J. Reports 2004, Para 139, (9 July).


It has been seen thus far that neither the Covenant of the League of Nations, the Kellogg-Briand Pact nor the U.N Charter established a comprehensive regime relating to non-state actors and the use of force. It is necessary to examine then whether the inattention paid to non-state actors in the use of force regime was deliberate or accidental. That the question of the indirect use of force/irregular attacks (much less non-state actors independent of the state) did not merit any significant attention of the drafters of the U.N Charter is known well enough.\(^{145}\) As Edward Gordon notes however, “Article 2(4) is not merely the product of some momentary burst of enthusiasm; it is a deeply rooted rule of international law embodying a fundamental presumption that the use of force by states in pursuit of their national interests poses an unacceptable danger to the larger community.”\(^{146}\) To an international community for whom the reality of Nazi Germany’s Panzer columns Blitzkrieging their way through Europe (on the pretext of self defence in most instances) was a very real memory, the drafter’s choice requiring states to sacrifice autonomy in the interests of security represented a core principle upon which the Charter was built.\(^{147}\) Anthony Arend bluntly identifies the value hierarchy underlying Article 2(4) as one in which “the maintenance of international peace was to be preferred to the pursuit of “justice”.”\(^{148}\) A retreat from communitarian values in the post-Charter period has led Arend to postulate that in the Post Charter self help period a reordering of values has led to justice being valued above peace (even as there is no consensus as to what a just goal is).\(^{149}\) Such a development has (purportedly) occurred in an era when the rise of individual human rights has become the key distinguishing feature of modern international law.\(^{150}\) In an international environment where the U.N.S.C is more often than not deadlocked and indirect forms of aggression are by far the most common forms of


aggression the inability of the Charter regime (and the ICJ) to address the same would greatly weaken the use of force regime.151

IV. A WIDER UNDERSTANDING OF ARTICLE 51

Article 51 is silent as to the source of an armed attack, a point noted by Judge Kooijmans152 in his separate opinions in the Israeli Wall Advisory Opinion in addition to Judge Buergenthal’s153 declaration. Judge Higgins in his separate opinion in the Israeli Wall Advisory Opinion154 and the Armed Activities case took the same view as well.155 Similarly an examination of the negotiating history of the Charter gives no concrete basis for reading in or excluding the requirement of state authorship in an armed attack. Considering that discussions around the proposals regarding the right to self-defence never focused on the source of the attacks, this is more indicative of the earlier postulation of the framers not having paid much attention to the indirect use of force/irregular attacks than anything else. However the fact also being that reference to attack “by any state” was dropped in later proposals, a state authorship requirement cannot be found unless as Kimberly Trapp notes one seeks to consider the same as implicit.156

The 9/11 attacks marked a turning point in the law in this field. While before 9/11 there was no general support for the proposition of the right to self-defence against terrorist attacks this changed with Operation Enduring Freedom.157 The 9/11 attacks were branded as “armed attacks: by both N.A.T.O (North Atlantic Treaty Organization) and O.A.S with even Russia

153  Legal Consequences of the Construction of a Wall In the Occupied Palestinian Territory, Advisory Opinion, I.C. J. Reports 2004, Separate Opinion of Judge Buergenthal, Para 6, (9 July).
and China approving America’s decision to use force in self-defence.\textsuperscript{158} Most importantly the U.N.S.C via Resolutions 1368\textsuperscript{159} and 1373\textsuperscript{160} recognizing that terrorist acts constituted a threat to international peace and security condemned the 9/11 attacks while recognizing the inherent right to self-defence in that context.\textsuperscript{161} In the same month at the meeting of the Ministers of Foreign Affairs of the Organization of American States with reference to the 1947 (Rio de Janeiro) Inter-American Treaty of Reciprocal Assistance (Article 3(1)) the attacks against the United States were held to be attacks against all American states.\textsuperscript{162} Article V of the Washington Treaty of 1949 (regarding an armed attack against one member as an attack against all) was invoked for the first time with the equivalent Article IV of the ANZUS Treaty invoked some days after that as well. All said the United States enjoyed near unanimous support for its actions.\textsuperscript{163}

Article 1 of the 2005 African Union Non-Aggression and Common Defence Pact refers to the harbouring or support of terrorists as an act of aggression. The right to use force extraterritorially against terrorists was claimed by Australia in 2002. Russia’s repeated assertions of its right to respond extraterritorially, notably against Chechen rebels in Georgia in 2007 were not met by a principled condemnation by the international community.\textsuperscript{164}

Similarly, Israel’s use of force against non-state actors (Hezbollah) in the host state (Lebanon) in 2006 experienced a broad degree of international acceptance. Both the U.N.S.C members and the U.N Secretary General recognized Israel’s right to defend itself.

\begin{itemize}
\item Carsten Stahn, \textit{Terrorist Attacks as “Armed Attacks”: The Right of Self Defence, Article 51(1/2) of the UN Charter, and International Terrorism}, 27(2) Fletcher F. World Aff. 35 (2003).
\item MICHAEL SCHMITT, \textit{Counter-Terrorism and the Use of Force in International Law}, in INTERNATIONAL LAW AND THE WAR ON TERROR 25 (Fred L. Borch and Paul S. Wilson eds., International Law Studies Volume 79: Naval War College (2003)).
\item RC.24/RES.1/01, Twenty Fourth Meeting of Consultation of Ministers of Foreign Affairs, O.A.S Doc. OEA/Ser.F/II.24 (September 21, 2001).
\end{itemize}
Proportionality, rather the lack thereof, was the grounds upon which Israeli actions were criticized.\(^\text{165}\) Given that proportionality is a customary law requirement which kicks in to regulate the manner in which the right to self-defence is exercised, by taking Israel to task upon this point its right to self-defence was implicitly recognized.\(^\text{166}\) Neither was Ethiopia’s intervention in Somalia beginning in late 2006 to attack terrorist groups condemned by the international community (individual states, African Union or the U.N).\(^\text{167}\)

Turkey’s use of force in northern Iraq in 2007-2008 against Kurdish PKK bases came in the wake of numerous PKK attacks on Turkey over the years.\(^\text{168}\) While widespread sympathy was expressed by states for Turkey’s position it was also urged to pursue a solution through diplomatic means. Its ultimate resort to force however (which culminated in a massive ground offensive) saw international reactions that called for the Turkish response to be proportionate, but none (with the exception of Iraq) formally condemned Turkey’s actions.\(^\text{169}\)

How are such developments to be reconciled with the I.C.J’s jurisprudence (as seen in Nicaragua, Israeli Wall and the Armed Activities case)? Trapp observes that one plausible interpretation is to see these decisions as valid only within their specific factual context rather than generally applicable statements of law.\(^\text{170}\) Additionally it is necessary to bear in mind the point James Green makes about treating I.C.J judgments as an expression of the law even though it may not be representative of the same.\(^\text{171}\) While the I.C.J in Nicaragua itself


\(^{166}\) KIMBERLEY N. TRAPP, Can Non State Actors Mount an Armed Attack, in THE OXFORD HANDBOOK ON THE USE OF FORCE IN INTERNATIONAL LAW 691 (Marc Weller eds., 1st ed. 2015).


recognized that it lacked ‘authority to ascribe to states legal views which they do not themselves advance’,\(^{172}\) more important is Green’s point that, “any judgment represents at best a ‘freeze-frame’ of that law”.\(^{173}\)

An examination of the 3 (relevant) I.C.J cases judgment on whom was delivered post 9/11 however indicates that there is actually no concrete bar presented by the I.C.J’s position. In the Oil Platforms case judgment delivered in November 2003 it was simply observed that the exercise of the right of self-defence necessitated that the nation exercising such a right first demonstrate that an armed attack as understood in Article 51 of the U.N Charter and the customary law on the use of force had occurred.\(^{174}\) While the I.C.J did observe the need for armed attacks to be imputable to states, in the Israeli Wall judgment of July 2004, it drew great flak for not engaging with the real burning issues relating to use of force.\(^{175}\) By noting that the attacks having emanated from Israeli occupied territory Article 51 was of no relevance in the matter the court did not deal with use of force issues at any length.\(^{176}\) Given the existence of a radically different legal framework in the occupied territories efforts to transplant the I.C.J’s holdings therein to a different set of circumstances is a dubious proposition at best.\(^{177}\) In the Armed Activities case decided in December 2005 Judge Simma observed that: “What thus remains unanswered by the Court is the question whether, even if not attributable to the DRC, such activities could have been repelled by Uganda through engaging these groups also on Congolese territory, if necessary, provided that the rebel attacks were of a scale sufficient to reach the threshold of an “armed attack.”\(^{178}\)


\(^{176}\) Legal Consequences of the Construction of a Wall In the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, Para 139, (9 July).


It is thus seen that the I.C.J deliberately chose to not engage with the question of a state’s response to an armed attack conducted by non-state actors unattributable to a state.\(^{179}\)

Incident to a state’s sovereignty is a duty not just to protect its own people but also avoid harming its neighbours – a duty of vigilance which requires a state to ensure its territory is not used to the detriment of other nations.\(^ {180}\) This duty was recognized in the Corfu Channel\(^ {181}\) case in addition to a host of U.N documents (most prominently the U.N.G.A Friendly Relations Declaration\(^ {182}\) and U.N.S.C Resolution 1373).\(^ {183}\) In a situation where there has been a breach of this duty in the form of an armed attack emanating from a state as Judge Kooijmans held in his separate opinion in DRC v Uganda: “It would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State, and the Charter does not so require.”\(^ {184}\)

Given this state of the law it is indisputable that there now exists a consensus that a response targeting non-state actors for armed attacks launched by them from foreign territory is within the bounds of the right to self-defence of the responding nation.\(^ {185}\) What precisely the exact contours of this right are however is unresolved as of now. Upon surveying the existing field


\(^ {180}\) Case Concerning Armed Activities on The Territory of the Congo, (DRC v. Uganda), Declaration of Judge Tomka, I.C.J. Reports 2005, Para 2-4, (December 19).

\(^ {181}\) The Corfu Channel Case (United Kingdom v. Albania), Merits, Judgment, I.C.J Reports 1949, at 22, (9 April).


Monica Hakimi identifies three models used to understand the modalities of this right. One is that a state can respond when the threat simply emanates from another State. This model would treat the origin of an attack from another territorial state as signifying the State’s inability or unwillingness to deal with the situation. No state however has expressly called for such an expansive right to self-defence. The second instance is where the territorial state actively harbours/supports the non-state actors or possesses no control over the area where from the non-state actors operate. Post 9/11 various states have acted upon the harbor and support standard. However, state practice invoking the ungoverned space standard has been ambiguous at best and lacking at worst. The third allows a state to respond when the territorial state from where the threat originated is unwilling or unable to address the threat. The model has been invoked on a variety of occasions by countries ranging from Israel, Turkey, Iran, the United Kingdom, U.S.A and Russia. While the third model subsumes the second one it is broader in that it permits the use of defensive force even in situations where the host state exercises control and pro-actively attempts to suppress the violence but is ineffective in doing so.

These models help determine in what situations a military response against non-state actors may be undertaken. Once such a decision is made vexing questions as to what kinds of targets may be struck arise. As noted by Carsten Stahn: “A single terrorist act can be planned in one country by terrorists from a second country, executed against targets in a third 

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187 Monica Hakimi, *Defensive Force Against Non State Actors: The State of Play*, Int’l L. Stud. 91. 15 (2015): Hakimi says so even while noting that most states have not condemned Israel’s attacks on weapon caches in Sudan and Syria which Israel claimed were heading towards Hamas or Hezbollah.


country by terrorists recruited in a fourth country using weapons acquired in a fifth.”  

Given this reality the question of determining against which nations (and what targets) force can be used in self-defence becomes crucial. A popular method towards making this determination seeks to make a distinction between the use of force targeting only non-state actors (and their bases of operations) and use of force targeting the host state from where the non-state actors operate. The idea here is that host state collaboration is required only in the latter situation and not the former.  

This position has been countered by others who question the very basis for identifying such a distinction in the I.C.J’s jurisprudence.  

Even to that ever-growing and increasingly preponderant body of scholarly literature advocating that the extraterritorial unilateral exercise of the right of self-defence against non-state actors is available in international law opposition can be found. Antonio Cassese remarked that Resolution 1368 was ambiguous and contradictory betraying a wavering U.N.S.C struggling between the desire to take matters in its own hands and resignation at the prospect of the United States using force unilaterally. As both Cassese and Gray note while the right of self-defence was recognized by the resolution, in its preamble it defined the terrorist attacks as a ‘threat to the peace’ and not ‘armed attacks’. Judge Koroma in his declaration in the Armed Activities case while propounding upon Nicaragua and the Oil Platforms case stated that it was necessary to distinguish between a states’ support for armed groups (including granting them access to its territory deliberately) and a state enabling groups of this type to act in another State. Koroma held that while the first would be an armed attack, the second constituting no more than a breach of the peace would invoke the


international responsibility of the state with the consequence that a unilateral use of force would be justified only in the first case and not the second.\footnote{195}

On the question of the force gap existing in the U.N Charter it has already been noted\footnote{196} how this was a conscious choice at the time of the framing of the U.N Charter. Benjamin Zweifach identifies 4 responses available to a state to respond to acts of violence not breaching the threshold of an armed attack. Police action and assistance from the Security Council are two of these options. The third and the first of the two controversial responses is the deferral of action till such a time that repeated breaches of Article 2(4) become an armed attack cumulatively. This happens by virtue of the accumulation of events doctrine which recognizes that numerous small-scale uses of force (below the armed attack threshold) can collectively amount to an armed attack.\footnote{197} It has been argued that the international reaction to Israel’s and Turkey’s practice signals international willingness to accept this doctrine.\footnote{198} That said the blurring of the temporal dimension of self-defence by this doctrine risks converting this limited right into “open ended license to use force.”\footnote{199} The final method is the use of countermeasures. Whether countermeasures may be forcible in nature is a controversial issue as the I.C.J did not rule out this possibility in Nicaragua.\footnote{200} Judge Simma in the Oil Platforms case found it problematic to read the reference to counter measures in Nicaragua as a

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\footnotetext[195]{Case Concerning Armed Activities on The Territory of the Congo, (DRC v. Uganda), Declaration of Judge Koroma, I.C.J. Reports 2005, Para 9, (December 19).}
\footnotetext[200]{Case Concerning Military and Paramilitary Activities in and against Nicaragua, (Nicar. V U.S), Merits, Judgment, I.C.J. Reports 1986, Para 249 (27 June).}
\end{footnotes}
reference to only ‘pacific’ counter measures. Yoram Dinstein however has opposes such a view.

My concern however is not with rooting for any of the particular three models or their sub variants. Nor is it probing the issue of the kinds of targets that may be legitimately struck or the validity or otherwise of the many methods of plugging the force gap. What I seek to examine are the larger policy questions underlying the issue of the expansion or contraction of the unilateral right of self-defence.

V. LOOKING INTO THE FUTURE

On one hand there exists the classical international law model of State sovereignty, non-intervention and the prohibition on the use of force. On the other hand the modern (contemporary) model is characterized more by its respect of human rights and the proliferation of international organizations around which the international community is organizing itself. In the reordering of values in the contemporary international environment where the value of justice holds much greater weight with regard to peace than in the classical law model, the great irony observes Zweifach is that the “new” decentralized emphasis upon inter-state justice is remarkably similar in some aspects to the self-help pre-Charter legal regime.

Such developments beg the question of the continued relevance of the Charter regime relating to the use of force, even prompting questions as to whether this regime is still regarded as obligatory by states. Louis Henkin’s observations from near half a century ago still hold weight in this regard though. In so far as the purpose of Article 2(4) is understood as being


202 YORAM DINSTEIN, WAR AGGRESSION AND SELF DEFENCE, 208-209 (5th Ed. 2012):


the establishment of a norm of national behaviour and helping deter its violation there is broad agreement that traditional wars between nation states have indeed become less frequent. Henkin opined that even if 2(4) fulfilled the purpose of ending conventional wars and not intervention, that even if it promoted the perpetration of violence through intervention in lieu of conventional wars it would represent an immense advance in international order. 206 To the extent that Henkin’s observations are informed by a value hierarchy underlying Article 2(4) which values peace over justice he is undoubtedly correct. But in a now altered international environment Glennon’s point that there is a wide gap between Article 51 and the reality of state behaviour is not without merit. 207 One way of looking at the ‘ritual incantations’ of self-defence is to identify a ‘normative drift’ as the concept is increasingly stretched to include a variety of situations under the rubric of use of force. However the fact that states have not reopened debates about armed reprisals and instead chose to locate their use of force as a sub set of self-defence and not an independent exception to the prohibition on use of force shows that “the system has not lost its capacity to channel debates.” 208

The Covenant of the League of Nations came in response to World War I and the U.N Charter (with its use of force regime) came as a response to World War II. The post-Cold War world however is still awaiting a legal regime suited to its peculiar needs. Ruys and Verhoeven remark that in 1986 the I.C.J held that there existed a ‘general agreement’ on the acts that could be treated as being armed attacks. 209 In today’s world characterized by the use of force against terrorists and an upswing in the use of anticipatory self-defence they label the chances of such a ‘general agreement’ as being little more than a ‘utopian dream’. 210

210 Tom Ruys and Sten Verhoeven, Attacks by Private Actors and the Right of Self Defence, 10 J. Conflict and Sec. L. 320 (2005).
The lesson to be taken from the development of the law relating to the use of force around the World Wars is that while they acted as galvanizing events, the law had always been in a steady state of development with the transformations affected by those great conflicts not happening overnight. A steady development of the law seeking to further cull the force gap left in the U.N Charter has been occurring for quite some time now. What the galvanizing moment shall be for the next event which shall bring about fundamental changes to the use of force regime is up for guesses (if at all this and not a piecemeal approach cumulatively bringing about change happens). It is true that interstate conflicts fought over vital interest inspired conflicts that change borders, reshape societies, alter the international system, even calling into question the survival of the nation, what Douglas MacGregor calls “wars of decision” cannot be ruled out in the future.²¹¹ For as Colin S. Gray says while the employment of military force is indeed costlier in today’s exponentially more globalized world than it used to be it isn’t necessarily less useful or usable.²¹² That said, absent strategic shocks irregular warfare and not wars of decision are going to dominate the future as the line between regular and irregular warfare becomes increasingly blurred.²¹³

The shift to from a state centred system (emphasizing territoriality) towards one with greater interdependence (emphasizing connectedness) following the end of the Cold War has resulted in a dramatic increase in the number and influence of sub-state and trans-state actors.²¹⁴ With globalization and the information revolution bringing about a diffusion of both infra and

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²¹⁴ Michael Evans, From Kadesh to Kandahar: Military Theory and the Future of War, 56(3) Naval War College Review. 134 (Summer 2003).
inter-state power the calculus between states, markets and civil society is being realigned. The present era is one where the growth of the middle class means that the majority of the world’s population is not impoverished. This is happening as individuals and groups have greater access than ever before to lethal and disruptive technologies allowing them to perpetrate large scale violence. The net effect of these developments is the placing of a very high value on the hierarchical rearrangement of the norms of peace and justice. Aggression by non-state actors (possibly amounting to armed attacks) and actors acting in concert with or under the direction of states conducting attacks below the armed attack threshold are primed to increase. While the former is easily understandable the latter can be grasped with reference to the reemerging concepts of Hybrid Warfare (and Counter Unconventional Warfare), Compound Warfare and Unrestricted Warfare. Without probing in any depth into all of these widely varying ideas certain common themes may be referred to. The development of such theories envisages a pattern of conflict oscillating in multiple domains between both low intensity and high intensity warfare. Such theories envisage a combination of conventional and unconventional means not just in the realm of force (which might very well include criminal elements as well) but also the use of information and political operations all acting in subordination to a unified command. A textbook example of the ability of states to use such approaches in an aggressive manner has

215 Michael Evans, From Kadesh to Kandahar: Military Theory and the Future of War, 56(3) Naval War College Review. 133 (Summer 2003).

216 National Intelligence Council, GLOBAL TRENDS 2030: ALTERNATIVE WORLDS. 8, Office of the Director of National Intelligence United States of America (December 2012).


219 COUNTER-UNCONVENTIONAL WARFARE, United States Army Special Operations Command Whitepaper (26 September, 2014).


221 LIANG QIAO and XIANGSUI WANG, UNRESTRICTED WARFARE, (PLA Literature and Arts Publishing House: 1999).
been well in display in Russia’s intervention in Ukraine since 2014\textsuperscript{222} demonstrating to what lethal effect this force gap in the U.N Charter can be exploited.

The reason there does not exist a dominant test among the multiplicity of approaches to plug this force gap can be found in the status of the prohibition against the threat or use of force as a jus cogens.\textsuperscript{223} Being a non derogable norm, alternations can be made only by subsequent norms of the same character to displace/alter the use of force regime. Until a very strong unifying theme is found to push nations in this direction this is unlikely to remain unchanged.


ANALYSIS OF THE COMPETING CONTROL TESTS: STATE RESPONSIBILITY FOR ACTIONS OF PRIVATE ARMED GROUPS

Abhik Chakraborty*

ABSTRACT

In today’s world, countries are increasingly trying to use private armed groups for war or other such purposes. The question regarding the State responsibility for the acts of such private groups becomes interesting in such cases. To determine state responsibility, one needs to establish the degree of control over such an armed group. The International Court of Justice has come up with the effective control test to decide the issue. The International Criminal Tribunal of Yugoslavia and the International Criminal Court have devised a more relaxed test of overall control. However, the debate still revolves around the correct test that is to be applied. It seems that even the International Law Commission did not conclusively take sides and left the matter subject to interpretation. Contentions have been raised about the mandate of ICTY and the ICC to extrapolate issues of state responsibility of international law to determine questions of criminal responsibility of individuals. In the paper, I have rebutted such contentions. I also argue that the overall control test is more suitable in the present day context because of primarily two reasons. Firstly, the effective control test is supported by state practice. Secondly, the evidentiary threshold of the overall control test is more reasonable than the effective control test.

I. INTRODUCTION

The concept of State Responsibility for the actions of private groups through attribution has been present in International law for considerable amount of time. One early example is the Zafiro case, in which the Great Britain-US Arbitral Tribunal held US responsible for looting by the civilian crew of a private ship that was being used as a supply vessel by the American naval forces in the Spanish-American war.¹ In attributing the civilian conduct to the US, the

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Tribunal emphasised that the captain and the crew were in fact under the command of a US naval officer who had come on board to control and direct the movements of the ship. The Mexico-US General Claims Commission applied the same rule in the Stephens case, which involved a killing committed by a member of an auxiliary of the Mexican forces. The Commission found that the killing was attributable to Mexico as it was difficult to distinguish them from the official forces.

The concept of State Responsibility since the time when the above two cases arose has evolved substantially. In fact, the law has been codified in the form of Articles of State Responsibility which has a fair amount of authoritative value. However, with an enhanced focus on this aspect, a recent trend can be seen wherein States are trying to use private armed groups discretely to fight their ugly wars in order to avoid liability.

One such example is the case of disintegration of Yugoslavia. In the aftermath of the breakup, the Balkan wars were fought by non-state actors aided by the States. Similarly, in Iraq, there were reports which suggested that United States engaged private contractors to wage its war against terror. It is a well-known fact that in Afghanistan, the Taliban which was the official government at the time of 9/11 is said to have actively supported organisations such as Al Qaida which in turn inflict misery on thousands of lives outside their

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2 Id.


country.\textsuperscript{7} In Kashmir, it is said that separatists, with the backing of the State of Pakistan are waging a battle against the Indian state.\textsuperscript{8} More recently, some writers have questioned Russia’s involvement in blowing up of a Malaysian Aircraft recently by a secessionist group in Crimea.\textsuperscript{9}

The principal issue of international law that arises from the above scenarios is that whether the State can be held liable for violation of international law obligations due to the acts of these private armed groups. The law on State Responsibility as it stands today can be broken down to three prongs.\textsuperscript{10} Firstly, there needs to be an international obligation in question. Secondly, there has to be breach of such an obligation. Thirdly, the breach must be attributed to the State. This paper will restrict itself to this third prong of attribution. The attributability of the State for such actions of private groups heavily depends on the degree of control which it exercises over them. The legal position with respect to this is not settled. Different legal regimes have suggested distinct tests to determine the extent of control which has given varying results in relation to accountability of the State. State responsibility in such cases completely hinges on the test of control one uses.

In this paper, firstly, I will discuss the control tests as discussed by the International Court of Justice (hereinafter ICJ) in Nicaragua and Genocide Convention cases (Part II). Secondly, I will focus on the overall control test as propounded by the International Criminal Tribunal for Yugoslavia’s (hereinafter ICTY) Appeals Chamber (Part III). Thirdly, I will highlight the stance taken by the International Law Commission’s Article on State Responsibility on this issue of control (Part IV). Lastly, I will put forth my arguments regarding this issue in an attempt to settle this conflict (Part V).


\textsuperscript{8} Alexander Evans, \textit{The Kashmir insurgency: As bad as it gets}, Small Wars and Insurgencies Volume 11, Issue 1, 2000.


II. THE TWO CONTROL TESTS PROPOUNDED IN US V NICARAGUA

In the Nicaragua case, the link between the Contras, who were assimilated from all across Latin America, and the United States of America was examined.11 The essential question of State responsibility for acts of private armed groups, thus, was addressed by the ICJ for the first time in this case. The Court devised two Control tests, the Test of Complete Dependence and the Effective Control Test in order to answer the above question.12 As per the Complete Dependence Test, it was needed to be shown that the Contras were completely dependent on US to determine whether they were acting as a de facto organ of the latter state.13 The Court defines the Complete Dependence in the following words

“What the Court has to determine at this point is whether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.”14

There were a number of factors which the Court put forth to determine the extent of dependency. Some of them were logistic and military and financial support provided to the entity15; creation of the entity by the State; the payment of the leaders of the entity16 by the State and such other factors.17 Essentially, this test has a high threshold and the entity needs to have complete autonomy in its functioning.18 The extent of control must be similar to the

12 Id.
14 Supra note 11, para 109.
15 Id, para 112.
16 Id, para 112.
17 Id, paras 110-115.
18 Ibid, para 114.
type of power the State has over its own forces and only then can the acts of this entity be attributed to the State even if such acts were committed against specific instructions.\textsuperscript{19} The entity, then, may be called a de factor organ of the State. Then, the latter cannot escape liability for the actions of this entity even if its domestic law does not grant a de jure status to this entity as for all practical purposes it is an extended arm of the State.\textsuperscript{20} In the said case, the Court did not feel that the relationship of Contras with the US was such that the former may be called a de facto organ of the state.\textsuperscript{21}

The second test which the Court formulated was the effective control test.\textsuperscript{22} It has been said that this test is supplementary to the above mentioned strict control test.\textsuperscript{23} The ICJ falls back on it when the parameters of the latter test that is requirement to prove the relationship of agency are not sufficiently distinct.\textsuperscript{24} However, if the Court feels that the relationship that the entity shares with a state is that of partial dependence\textsuperscript{25}, such that the entity was under the effective control of a State in respect of an operation which caused atrocities, then, the Court may apply this test.\textsuperscript{26} According to this test, it needs to be shown that the atrocities committed by the entity were under specific direction or communication from the State.\textsuperscript{27} In this particular case, the Court acknowledged that the US had a major role to play in the financing, equipping, planning of operations and even selecting personnel.\textsuperscript{28} However, these factors

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\textsuperscript{21} \textit{Supra} note 11.

\textsuperscript{22} \textit{Id}, para 115.

\textsuperscript{23} \textit{Supra} note 11 para 160. \textit{Supra} note 20, Genocide judgment, para 43. \textit{See} also Prosecutorv Tadić, Case No IT-94-1-T (1997), para 22 (sep and diss op McDonald).

\textsuperscript{24} \textit{Id}.

\textsuperscript{25} \textit{Supra} note 11, ¶112.

\textsuperscript{26} \textit{Supra} note 11, ¶ 112-115.

\textsuperscript{27} \textit{Supra} note 11, ¶ 115.

\textsuperscript{28} \textit{Id}.
\end{quote}
alone could not justify the claim that the Contras were under the effective control of the US.\textsuperscript{29} Additionally, it needed to be shown that State explicitly gave directions with respect to the specific operation of the armed group which caused the atrocities.\textsuperscript{30} As this could not be found in this case, the ICJ refused to hold that the effective control test was satisfied. In terms of the two tests, all the judges agreed that this should be the position with respect to state responsibility for acts of entities committing gross violations. Interestingly, Judge Robert Aggo\textsuperscript{31} also stamped his approval of the Court’s rationale behind formulating the effective control test.

\textbf{III. THE OVERALL CONTROL TEST PROPOUNDED IN THE TADIC CASE}

In the nineties, the disintegration of Yugoslavia had led to a lot of conflict in the Balkan states. Tadic was a prison officer in Bosnia who was charged with criminal responsibility for the crimes committed under his command.\textsuperscript{32} In order to determine the charge, the ICTY had to establish the nature of conflict that is whether the conflict in Bosnia was international or non-international.\textsuperscript{33} This question became important as there are different sets of crimes and thresholds which depend on the characteristic of the armed conflict.\textsuperscript{34} Although the conflict was between different ethnic groups, there was involvement of State machinery. In this case it was argued by the Prosecutor that the Federal Republic of Yugoslavia (FRY), was controlling Republic of Srebenica (private armed group in question) and therefore, the conflict should be deemed to be international in nature.\textsuperscript{35}

\begin{itemize}
\item \textsuperscript{29} \textit{Id.}
\item \textsuperscript{30} \textit{Id.}
\item \textsuperscript{31} Roberto Ago was the second Special Rapporteur for International Law Commission on State Responsibility. Separate Opinion of Judge Ago (English translation), paras 14–19.
\item \textsuperscript{32} The Prosecutor v Dusko Tadic (Judgment) ICTY-94-1-A (26 January 2000).
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} Rome Statute, International Criminal Court.
\item \textsuperscript{35} \textit{Supra} note23, Tadic Trial Chamber. Tadic was a commander in this group which operated mainly in Bosnia.
\end{itemize}
To answer this question, the Trial Chamber relied on Nicaragua’s effective control test as given above.³⁶ Thereafter, it analysed the relationship which the Serbian forces shared with FRY and came to the conclusion that it was an ally of FRY, but it cannot be deemed to be a de facto part of the State and thus, it held that the conflict was non-international in nature.³⁷

In an acclaimed dissent, Judge McDonald did identify the two different tests propounded by the ICJ.³⁸ She held that the present relationship of the Serbian groups with FRY would fall under the ambit of the first control test and the groups were deemed to be agents of the State thus internationalising the armed conflict.³⁹

When this case came before the Appeals Chamber of the ICTY, it held that the Trial Chamber’s decision was incorrect. It acknowledged the significance of the Nicaragua control Tests but it refrained from using either of the tests while ignoring the test of complete control and dependence. The Court gave two reasons for avoiding the effective control test. Firstly, the Chamber was of the opinion that this test goes against the basic principle of State responsibility.⁴⁰ The Court states that this principle was formulated so that States do not act through private agents and then avoid responsibility by stating that such agents are not de jure organs.⁴¹ To establish responsibility, there needs to be an element of control over the private agents but the degree of control cannot be stringent and has to vary based on circumstances.⁴²

According to the Chamber, an individual may need specific instructions from the State for his every act, but, an organised armed group has the capacity to act without explicit instructions for its every operation despite being under the control of the State.⁴³ Secondly, the Chamber found that the effective control test was not in consonance with State practice as generally acts of paramilitary units were attributed to the State. This was because there was an element

³⁶ Prosecutor v Tadić, Case No IT-94-1-T (1997).
³⁷ Id, paras 605–606.
³⁸ Supra note 23, Separate and Dissenting Opinion of Judge McDonald, at 292.
³⁹ Id.
⁴⁰ Supra note 36, paras 117-120.
⁴¹ Id.
⁴² Id.
⁴³ Id.
of overall control despite the fact that all actions of such units were not directed by the State.\textsuperscript{44}

With this, the Court devises the standard for the overall control test. To prove that an entity was under the overall control of the State, there must be evidence of the latter financing, equipping, providing operational support or training the private armed groups.\textsuperscript{45} Additionally, the State needs to be involved in planning, organising, directing or coordinating its military conduct.\textsuperscript{46} However, it does not have to be shown that the State was giving specific commands or choosing the military targets in respect of the wrongful conduct of the entities.\textsuperscript{47} Hence, one can say that the threshold of overall control is lower than that of the effective control. After applying this test to the facts, the Chamber arrived at the conclusion that the conflict was international in nature, thus, overturning the Trial Chamber’s ruling. It is interesting to note that even the International Criminal Court (hereinafter ICC) has approved of the overall control test.\textsuperscript{48}

**IV. ILC Draft Articles on State Responsibility’s Stance on This Subject**

The International Law Commission (ILC) was formed in 1949 to develop international law.\textsuperscript{49} The Draft Articles on State Responsibility were adopted by the ILC on August 9, 2001.\textsuperscript{50} Although they may not be binding, but, scholars have claimed that they reflect developing customary law.\textsuperscript{51} Additionally, as the articles have been drafted by renowned publicists, they

\begin{itemize}
\item \textsuperscript{44} \textit{Id.} para 124.
\item \textsuperscript{45} \textit{Id.} paras 131, 137, 138, 145.
\item \textsuperscript{46} \textit{Id.}
\item \textsuperscript{47} Prosecutor v Delalić, Case No IT-96-21-A, Judgment of 20 Feb 2001, para 47.
\item \textsuperscript{48} Prosecutor v Thomas Lubanga Dyilo (Judgment) ICC-01-04/01-06 T C (14 March 2012).
\item \textsuperscript{49} \textit{Supra} note 10.
\item \textsuperscript{50} \textit{Id.}
\item \textsuperscript{51} \textit{Id.}
\end{itemize}
may be deemed to have some authoritative value in light of 38 (1) (d) of the ICJ Statute. As already mentioned in the introductory part, the law on this subject has three prongs, of which, I will be focussing on the third prong of attribution.

According to the ILC, ‘attribution of conduct to the State as a subject of international law is based on criteria determined by international law and not on the mere recognition of a link of factual causality.’ The fundamental rule is that decisions of the State as an autonomous person must be attributable to the State. Decision making is presumed where the author of the act is an organ of the State. This is enshrined in Article 4 which talks of conduct of organs of States. If it is not an organ of the State, the link between the organ and the State can be in two forms: de jure or de facto. The de jure link is illustrated by Article 5 which reads about Conduct of entity empowered by law of that State to exercise elements of governmental authority. The de facto link is illustrated by Article 8 which talks about conduct of organs directed or controlled by the State. This paper is only concerned with the de facto links which the private organs can have with the state.

The whole complexity of the notion of a defacto organ lies in this concept of action undertaken ‘on behalf’ of the State which can be found in the second version of the text adopted by the Commission in 1974:


54 Id, Crawford at 264.


“The conduct of a person or group of persons shall be considered an act of the State under international law if it is established that such person or group of person was in fact acting on behalf of the State.”

James Crawford in his report on this issue cited several precedents: the judgments on the merits by the ICJ in the Nicaragua case, the awards of the Iran-US claims Tribunal in Yeager, the case of Loiziduo and finally the Tadic case. It was acknowledged that multiple international courts deciding similar issue was resulting in the fragmentisation of the international legal order. A rough sketch of the debate was drawn and it was seen that there were supporters of a strict conception of the de facto organ based on the notion of complete dependence or at least effective control on one hand and supporters of a relaxed conception in the form of the overall control test on the other hand.

From this point of view, the formulation that was chosen in the end by the ILC is a good compromise, in the sense that it is sufficiently vague to allow different interpretations. James Crawford was in favour of a more subjective conception of attribution, in keeping with Robert Ago. His draft was worded as follows:

The conduct of a person or group of persons shall also be considered as an act of the State under international law if

a) the person or group of persons was in fact acting on the instructions of or under the direction and control of, that State in carrying out the conduct.

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59 Supra note 53, at 266.
60 Id.
61 Id.
The solution chosen by the ILC in article 8 consisted of replacing the ‘and’ between ‘direction’ ‘and control’ with ‘or’:

*The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of person is in fact acting on the instructions of or under the direction or control of that State in carrying out the conduct.*

The criterion of control thus becomes an autonomous criterion, alternative in relation to the other two.\(^64\) The ILC abstained from qualifying the type of control that is required. That being the case, it can thus be understood as a subjective condition of attribution, ‘effective’ or ‘overall’ control – or as an objective condition, a form of factual link, just like an ‘instruction’ given or ‘directives’.\(^65\) As we have seen, the entire debate about state responsibility for the acts of the private armed bodies revolves around degree of control the state exercises over these organs.

**V. Analysis of the Two Tests**

A perusal of the preceding parts of this paper will show that the control tests as envisaged by the two different adjudicating bodies are distinct. In this part, I will argue that the ICJ’s effective control test should be shunned and the overall control test is best suited in the present times. I will begin by rebutting the counter arguments against the Tadic judgment. Thereafter, I will put forth three arguments to suggest why the effective control test is apposite in today’s context.

**Rebutting the Criticism of the Tadic judgment**

The criticism of the Tadic judgment is mainly two fold.\(^66\) *Firstly*, it is argued that ICTY Appeals Chamber did not have jurisdiction to examine the control tests used by ICJ to

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\(^{65}\) *Id.*

\(^{66}\) *Supra* note 20, Genocide Convention case. *See* also International Law and the Classification of Conflicts, (Elizabeth Wilmshurst ed, Oxford University Press, 2012) 59-60.
determine state responsibility. This stems from the fact that the mandate of the ICTY was to determine criminal responsibility of individuals. Secondly, it is contended that it is not reasonable to apply the same test to establish the nature of armed conflict and to establish State responsibility for acts of private bodies. In other words, the issue was that whether in determining the nature of armed conflicts, the Court needed to extrapolate principles of state responsibility under international law. The ICJ was of the opinion that the Appeals Chamber need not have done so.

Even James Crawford expressed the above doubts with respect to the legality of the Tadic test. There is some opinion which states that the ILC with its Articles 4 and 8 effectively endorsed the complete dependence test and the effective control test respectively. This was also the view of the ICJ in the Genocide Convention case. However, it can be seen that Article 8 is worded in such a way so as to allow multiple interpretations. The drafters, moreover, had examined a wide range of jurisprudence on this subject in addition to the ICJ decision in Nicaragua. Therefore, it will not be fair to state that the ILC has adopted only the effective control test while neglecting the overall control test. Rather, Article 8 is sufficiently broad to accommodate either or both of the tests.

In connection with the aforementioned criticisms, Spinedi has wondered whether it is in fact possible to find out the nature of armed conflict without looking at the principle of state responsibility.

67 Id.
68 Id.
69 Id.
70 James Crawford, INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY (Cambridge University Press 2002) 112.
72 Supra note 20, Genocide Convention case.
73 Supra note 53, 269.
74 Supra note 59.
The two questions are profoundly interlinked which indeed makes it difficult to separate them. Moreover, if an attempt is made to delink them like the way it was done in the Genocide Convention case, a situation of anomaly may arise. This is because on the same fact situation, the ICTY deemed the conflict to be international while the ICJ refused to impute State Responsibility for the acts of the armed group. In essence, it means that it is recognised that Serbia was waging a war against Bosnia through the private organs. However, Serbia cannot be held responsible for any violations of international law obligations by these organs during the said war. Therefore, to avoid such absurdities in the future, it is imperative that the issues of the nature of armed conflict and State responsibility be read together.

The Suitability of the Overall Control Test in Today’s Context

I argue that the overall control test is the most appropriate one because of primarily two reasons. Firstly, it is supported by State Practice. Secondly, the evidentiary threshold of the effective control test is exceedingly stringent.

A. State Practice

It can be said that the strict technicalities of the effective control test devised by the ICJ have not been adopted by any other legal regime. The Iran-US Claims Tribunal case was the first body to determine state responsibility for misdeeds of private bodies. In this case, the Court imputed responsibility to Iran for the actions of the ‘revolutionary guards’ irrespective of whether specific instructions in respect of the violations were given by the State. In Behrami and Behrami case, the question which arose was regarding the State Responsibility for the


76 Both the Genocide case and the Tadic case were set in Bosnia. In Genocide case, the question was about whether acts of Republic of Srebenica (private armed group) could be attributed to Federal Republic of Yugoslavia (FRY). In Tadic, it was to be decided the degree to which FRY was controlling the private group to decide whether the conflict was international.

77 Id.

78 Yeager v. The Islamic Republic of Iran17 Iran–US CTR, p. 92.

actions of NATO Forces. The Court held that since the international organisation was exercising an ultimate control over the forces, the respective States were not responsible. In the Loizidou\(^80\) case, the European Human Rights Court was satisfied that Turkey had an overall control over the organisation which inflicted misery on the victims. The Court clarified that a focussed control over the activities performed by the private bodies was not required to be shown. In Ilaşçu\(^81\) case, the same Court held that the Russian government was aware or should have been aware that the terrorist organisation they were supporting was capable of such acts and thus, should be held liable for breach of the human rights committed by the private body. UN Working Group on Arbitrary Detention used the overall control test to impute responsibility to Israel for acts of an organisation which was charged with allegations of arbitrary detention in South Lebanon.\(^82\) Thus, we see that the requirement of instruction with regard to the specific atrocities was not needed to be proven in these different cases which suggest the dilution of the effective control test. In an Inter-American Convention of Human Rights case, the Court refused to look into the ICJ jurisprudence while deciding Colombia's state responsibility for the actions of a paramilitary group that it had engaged. The decision went against Colombia as it had cooperated and coordinated with the private organ and was not able to prevent the crimes.\(^83\)

Therefore, it is reasonable to state that bar the ICJ, no other legal regime has mandated the requirement of specific instructions given by the State in respect of each operation which violates international law. Therefore, one may even contend that the ICJ decision is not backed by State practice.\(^84\)

\(^{80}\) Loizidou v. Turkey, ECtHR, Preliminary Objections, judgment of 23 Mar, 1995, Merits and Just Satisfaction, judgment, 18 Dec. 1996.

\(^{81}\) Ilaşçu and others v. Moldova and Russia, judgment of 8 July 2004.


\(^{83}\) Mapiripdn Massacre’ v. Colombia (2005) Inter-Am Ct HR (ser C) 134, [123].

\(^{84}\) Antonio Cassesse, who was the President of the ICTY as well as a judge in the Tadic Case, states that the Appeals Chamber’s decision and not the ICJ’s interpretation was in sync with the state practice. In Tadic, the Appeals Chamber looked at jurisprudence of three courts to arrive at the conclusion See Supra note 83 at 653.. See also Amanda Tarzwell, In Search of Accountability: Attributing the Conduct of Private
B. Effective Control Test has an excessively high threshold of evidence

Some scholars argue that it is extremely difficult to prove that the State instructed and directed every operation which led to an international law violation. For instance, if a state hired a Private military contractor to conduct investigation and instructed them to use means which would amount to torture, then such an instruction would fall within the ambit of the effective control test.\(^{85}\) However, if the private entity is contracted to operate in a broader range of activities (such as combat operations in a particular nation such as the use of Blackwater by the US in Iraq), it might be difficult to pinpoint directions issued by the State in respect of each operation carried out in the region.\(^{86}\) More importantly, there are hardly instances where States engage these private bodies through a formal contract. In order to exploit this loophole of high evidentiary threshold, states generally would exercise an overall control over the armed group but stop short of giving explicit instructions to violate international law.

Tarzwell also claims that the effective control test has been difficult to enforce practically which has resulted in insufficiency of evidence needed to hold the State liable.\(^{87}\) Cassesse acknowledges the practical considerations behind the formulation of a high threshold by the ICJ as otherwise; the Court would be flooded with new cases.\(^{88}\) Wolfrum argues that such a strict standard would lead to failure of the law in holding States liable as it is improbable in most cases to find evidence showing explicit orders from the State in respect of an operation which caused atrocities.\(^{89}\) With an increasing number of States preferring to use private

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\(^{85}\) Supra note 1, Tomkings.

\(^{86}\) Id.

\(^{87}\) Supra note 84, Tarzwell.

\(^{88}\) Supra note 84, Cassesse, 654, 665.

actors, it is the responsibility of the Courts to ensure that States do not avoid responsibility for their actions because of a high threshold.\textsuperscript{90}

In practice, the ICJ has never been able to hold the State responsible for the acts of the private agents by using the effective control test. Therefore, despite there being evidence of an overall or ultimate control which the US exercised over the contras, US escaped liability for their actions as there was no proof that US instructed and directed each operation which caused the atrocities. In the fog of war where there are hundreds of combat operations conducted, it is unreasonable to expect evidence which would show that the States were in complete control of each such operation. Moreover, if the State does intend to commit violations of international obligations, it is impractical to assume that the State would be careless enough to leave behind such tangible proof which would implicate it. Therefore, in my opinion, the overall control test should be used which has a practical threshold for evidence as it is not required to show specific instructions issued by the States in respect of violations of international obligations.

VI. CONCLUSION

This paper has highlighted the raging debate on the choice of the control tests to determine State Responsibility for actions of private entities. Some writers have neglected both the effective control and the overall control test in favour of a strict liability approach. Such an approach as the one suggested by Proulx would be too wide in its scope.\textsuperscript{91} A lot of times the States themselves are victims of the actions of the private entities which are operating within its territories. In such scenarios, it would be absurd to hold such States responsible for the

\textsuperscript{90} Supra note 84. Vice President Al-Khasawneh, in his dissent of the Genocide judgment, noted that the effective control test is "too high a threshold". He added that this test would allow the States to conduct criminal policies through private actors with ease. See, eg, Genocide Judgment [2007] ICJ Rep 43 (Judge Skotnikov; Judges Ranjeka, Shiand Koroma). Genocide Judgment [2007] ICJ Rep 43 (Vice-President Al-Khasawneh).

acts of these private bodies merely because the latter originated or is stationed in the State’s territory.

The ICJ’s effective control test places the evidentiary threshold beyond the reasonable limit as a result of which States have never been held liable using this test. The requirement of proof of specific instructions given to the private actors in respect of the operation which caused violations of international obligations is almost impossible to be shown in this century. There are some scholars who argue that effective control test, in fact, has been tacitly rejected by most countries post the terrorist attack on the World Trade Centre in 2001.\footnote{Elizabeth Nielsen 17 U.C. Davis J. Int'l L. and Pol'y 151 2010-2011. Roidiger Wolfrum, The Attack of September 11, 2001, the Wars Against the Taliban and Iraq: Is There a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?, 7 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 1-78 (2003)} The rationale behind such an argument stems from the fact that the United States justified its invasion of Afghanistan after the 2001 incident by citing its right to self-defence. The fact was that the attack was perpetrated by Al Qaeda, a private entity. The US, with the support of the world, insisted that the government of Afghanistan was responsible.\footnote{Carsten Stahn, \textit{Terrorist Acts As "Armed Attack": The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism}, 27 FLETCHER F. WORLD AFF. 35, 37 (2003). Antonio Cassesse, “Terrorism is also Disrupting Some Crucial Legal Categories of International Law,” \textit{European Journal of International Law} 12 (2001): 993, 996-997. See also Mark A. Drunbl, “Victimhood in our Neighbourhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order,” \textit{North Carolina Law Review} 81 (2002): 36.} However, the legal requirements in order to pin the blame on the government can never be satisfied if one follows the strict threshold of the Nicaragua control test.\footnote{Id.}

On the contrary, the overall control test merely requires a link which establishes that the State financed, equipped the private organisation in addition to assisting them with strategy and planning. It is a fair standard to impute the blame to the State for actions of an agency which it has supported. Moreover, this test is supported by state practice. The use of the effective control test will simply allow the States to circumvent the law and carry out violations of international law through private bodies which would be against the doctrine of state responsibility. State’s liability in such cases is pivoted on the control test that one uses. Therefore, in all the scenarios which have been mentioned in the introductory part of the
paper, states such as the United States, Russia and Pakistan have a higher probability to be found liable for the acts of the private groups if one uses the overall control test rather than the effective control test. It can only be hoped at this juncture that the ICJ reverses its rigid stance on this topic.
The Impact of the Calvo Doctrine on the Principles of Protection of Foreign Nationals in the Area of Investment

Edrine Wanyama*

ABSTRACT

The world has increasingly become a global village. International law is now getting more and more recognised as having binding force of states parties to the different international law instruments. The global village can be seen international; trade, environment law, governance of the sea, treaties law, usage of air space, regulation in armed conflicts, criminal law, diplomatic relations, disarmament law, education, science and culture, health, human rights and humanitarianism, governance of international organisations, refugees and stateless persons, succession of states and international Economic law. Because of these developments, the world economy has grown stronger and states are not only interested but have embarked on foreign investments. Despite the growing world economy and increased investments, the laws that regulate relationships between States do not appear to be fair and balanced. This exists amidst paradigm target of developing and weaker States by the developed and stronger States for heavy investments. This calls for urgency in protection of weaker States against the stronger developed nations. Since international law is based on legal framework, legal protection of the weaker States is crucial for addressing the gaps between States in the area of economic investments. In this paper, I assess the impact of the Calvo Doctrine on the principles of protection of foreign nationals in the area of investment. Highlighted are the national treatment standard, fair and equitable treatment standard in international investment law, “De jure” and “de facto” principle, indirect expropriation investment principle, most-favoured-nation treatment principle and the minimum treatment Standard which have over time formed importance in the area of governance and guidance for better relations between nationals and foreigners in the area of investments.

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I. INTRODUCTION

For traditional emphasis of the foreign policy, and the concretization of national sovereignty, non-intervention and territorial integrity together with the urge to hold national law as supreme over international law and furthered cognizance of domestic courts, Latin American States though of strategies to regulate their relationship with European States and the United States of America (USA). Political defence, economic independence and regulation of foreign investors topped the agenda. Latin American States unanimously sought after the attainment of equality between nationals and foreigners through what is commonly referred to as the national standard policy. One of the steps was the propounding of the Calvo doctrine.

The Calvo doctrine (doctrine) is named after an Argentinean Jurist, Carlos Calvo who in the twentieth Century between 1824-1906 sought to put forward a concept of domestic nationalism from a legal perspective in the area of foreign investments. Thus, the doctrine is a foreign economic doctrine that is applied to international economic relations. It essentially prohibits diplomatic protection or intervention before local recourse is exhausted. An investor, under this doctrine, has to resort to local courts of the States in which his or her investments are found as opposed to those of his or her home country.¹ As such, according to the doctrine, all disputes arising from an investment in a particular State lie with the justice systems of that particular State.

Essentially, foreign nationals not limited to investors but also extending to foreign diplomats should not violate territorial sovereignty of the host State and its judicial operations or undermine their judicial independence. Thus the doctrine works to prevent abuse State jurisdiction of majorly the developing and yet weaker nations for they possess low bargaining power in contrast to the potential investors, who are developed, powerful and with high bargaining power by virtue of their economic levels. Within the aforementioned is forms part of the reasoning for the Calvo doctrine. The assumption under this doctrine is that a foreigner or alien investor at the time of starting the investment waives his or her diplomatic rights in case of disputes from the commercial transactions or she is involved in.

Notably, this principle has been integrated in many constitutions and treaties in the States of Latin America. For instance, it is found under article 27 of the Mexican Constitution provides that:

…the State may grant the same right to foreigners, provided they agree before the Ministry of Foreign Relations to consider themselves as nationals in respect to such property, and bind themselves not to invoke the protection of their governments in matters relating thereto; under penalty, in case of noncompliance with this agreement, of forfeiture of the property acquired to the Nation.2

Further article 63 of the Political Constitution of Peru, 1993 provides that:

National and foreign investments are subject to the same conditions. Goods and services production and foreign exchange are free. If another country or other countries adopt protectionist or discriminatory measures which are detrimental to the national interest, the State may, in defense of it, adopt similar measures.

In all contracts of the State and public corporations with resident aliens, these shall subject to the national laws and courts of competent jurisdiction and surrender to any diplomatic claim. Contracts of a financial nature may be excepted from national jurisdiction.

The State and other public corporations may submit their controversies arising from their contractual relation to courts specially established by virtue of treaties in effect. They can also submit them to national or international arbitration in the manner provided by law.

From the above example, we can draw the general analysis that states of Latin America have adopted protectionism of the nationals as opposed to foreign reliance on diplomatic immunity, the minimum standard of treatment and the invocation of military power or stronger economic power.

Accordingly, the Calvo doctrine is premised on State equality, which is a display of sovereignty. Under the principle, internal affairs of one State should not be interfered with in the name of diplomatic rights that accrue to foreign States or aliens from other states. They should in the circumstances be given no better treatment than that accorded to ordinary citizens. Summarily put, the Calvo doctrine aims to ensure that that the non-interventionist policy by States is limited and that all persons, both nationals and foreigners are accorded

equal treatment. Nevertheless, scholarly arguments show that the Calvo Doctrine falls short as it has never attained the status of a principle of customary international law since it was in one way or another creating room for States’ excuses for going behind their treaty obligations save for the stated circumstances under the International Law Commission’s (ILC) Draft Articles on State Responsibility, articles 20-25.

II. JUSTIFICATIONS FOR THE CALVO DOCTRINE

As earlier noted, the Calvo doctrine was generally accepted by the Latin American States in the assured hope of restriction to diplomatic protection of foreign investors. There is to that extent no doubt as to that being the justification of incorporation of the Calvo doctrine, later the Calvo clause in Treaties, constitutions as illustrated above in the constitutions of two states and in domestic legislation. The Calvo clause was mainly based on mainly dimensional factors that were in favour of it inclusive of:

a) an alien has no right legally to demand treatment better than that accorded to nationals of the state; and

b) there is no logical or judicial reason under international law for not holding an alien to his contractual waiver of diplomatic protection.

Falling within the justification for the Calvo clause are the writings of Manuel R. Garcia-Mora. In one of his articles, he noted that; firstly, the provisions exclude diplomatic protection under any circumstance in the area of investments as is for example indicated in


article 27 of the Mexican Constitution as cited above.\(^7\) Secondly, diplomatic protection would only be given in cases that involved denial of justice.\(^8\) One such example can be drawn from the Bolivian Constitution, the then article 18 which provided that:

Foreign subjects and enterprises are, in respect to property, in the same position as Bolivians, and can in no case plead an exceptional situation or appeal through diplomatic channels unless in case of a denial of justice.

Over time even the new Bolivian Constitution has maintained the position though with some laxity as to favourability of judgment. For instance, article 320 provides that;

Every foreign investment shall submit to Bolivian jurisdiction, laws and authorities, and no one may cite an exceptional situation, nor appeal to diplomatic claims to obtain a more favorable treatment.\(^9\)

Thirdly, in case of the law provisions that qualify to fall within the meaning of denial of justice. This is illustrated by the then article 25 of the Constitution of Nicaragua of 1987 which provided *inter alia* that;

Aliens may not use diplomatic intervention except in cases of denial of justice. The latter will not be so understood in the case of an executory verdict unfavorable to the claimant. Those who violate this provision will lose the right to reside in the country.

The Constitution however as amended through 2005 does not contain the above provision implying a fundamental change from the incorporation and strict reliance on the Calvo Clause to more foreign investment climate for aliens.\(^10\) Now article 27 provides that;

All individuals are equal before the law and have the right to equal protection. There shall be no discrimination based on birth, nationality, political belief, race, gender, language, religion, opinion, origin, economic position or social condition.\(^11\)

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\(^8\) Id.


\(^11\) Id.
Foreigners have the same rights and duties as Nicaraguans, with the exception of political rights and other rights established by law; they may not intervene in the political affairs of the country.\textsuperscript{12} The State respects and guarantees the rights recognized in this Constitution to all persons who are in its territory and subject to its jurisdiction.\textsuperscript{13}

Further, Article 100 provides that:

The State shall promulgate the Foreign Investment Law so that it contributes to the socioeconomic development of the country, without damaging national sovereignty.\textsuperscript{14}

To the contrary, the Constitution of the Republic of Honduras maintains the provision above mentioned (article 25) that the Constitution of Nicaragua has eliminated.\textsuperscript{15}

Fourthly, the constitutional provisions which do not expressly provide for the Calvo Clause but incorporate the provision that the alien for all purposes is subject to treatment and obligations equal with nationals.\textsuperscript{16} An example of this can be drawn from the Cuba Constitution which provides under article 34 that:

Foreigners residing in the territory of the Republic are considered equal to Cubans: in the protection of their persons and assets; in the enjoyment of rights and fulfillment of obligations recognized in this Constitution, under the conditions and with the limitations that the law establishes; in the obligation to observe the Constitution and the law; in the obligation to contribute to public expenditures in the manner and amount that the law establishes; and in submission to the jurisdiction and decisions of the tribunals of justice and authorities of the Republic.\textsuperscript{17}

\begin{itemize}
\item \textsuperscript{12} Id.
\item \textsuperscript{13} Id.
\item \textsuperscript{14} Id, article 100.
\item \textsuperscript{15} Article 35 of the Constitution of the Republic of Honduras provides that; Foreigners may not file claims nor demand indemnity of any kind from the State, except in the form and in the cases in which Hondurans may do so. They may not resort to diplomatic channels except in cases of denial of justice. For such purposes a decision that is unfavorable to the claimant is not to be taken as a denigration of justice. Persons who contravene this provision shall lose their right to reside in the country.
\item \textsuperscript{16} Supra note 7.
\item \textsuperscript{17} The Constitution of the Republic of Cuba, 1976 (as Amended to 2002), article 34. Also available at \url{http://www.constitutionnet.org/files/Cuba%20Constitution.pdf} (accessed April 21 2014) see also article 99 of the El Salvador which provides that; Foreigners shall not resort to diplomatic channels except in case of denial of justice and after exhausting the legal recourses they have available, also available at \url{http://confinder.richmond.edu/admin/docs/ElSalvador1983English.pdf} (accessed April 21 2014), see also
\end{itemize}
From the above, it is quite clear that the requirement of equality for both national and foreigners and the requirement for the exhaustion of domestic remedies be resorting to a foreign jurisdiction has undergone changes. Amidst the changes is the tendency to stick to what has been incorporated in the constitutions of most of the Latin States where the Calvo clause originated. Within these is the need to protect nationals from powerful States or foreigners who are economically empowered. The Calvo clause was as such intended to act as a shield to the sharp spear originating from that strength of the foreigner that would consequentially stab the national.

Its usage therefore would imply a strike of balance between nationals and foreigners. The national’s origin is of the host State to the foreigner. A treat that would expressly appear to be unfair would be to subject the national to foreign jurisdiction and therefore surrender of territorial sovereignty of the host State to foreign jurisdiction. It thus suffices to note that the Calvo Clause was a strategic move that would ensure that the weak nationals are protected from the whims and powers of strong foreign nationals. In this very light the sovereignty of the host state is also protected.

Where one, not being a national of a particular States chooses to settle in such a State, then he or she must be bound by the laws of that State. The presumption is that such person addresses himself/herself to the law and the different justice systems of the intended host country. Where he chooses to settle in a different State, then it would be undermining of the sovereignty of a particular country for that person to be accorded special treatment. The equal treatment serves to show equality of all persons under the jurisdiction of a particular State. This reasoning is further grounded in the case of George J Salem case, 33 (United States v Egypt) in which the arbitration commission declared that;

“As a rule, a foreigner must acknowledge as applicable to himself the kind of justice instituted in the country in which he did choose his residence including all deficiencies of such jurisdiction, imperfect as it is like any other human work.”

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Furtherance of this has been applied in the Claim of Rosa Gelbtrunk case where the arbitration Commission declared that;

The State to which he owes national allegiance has no right to claim for him as against the nation in which he is resident any other or different treatment in case of loss by war—either foreign or civil—revolution, insurrection, or other internal disturbance caused by organized military force or by soldiers, than that which the latter country metes out to its own subjects or citizens.¹⁹

III. EVALUATION OF THE IMPACT OF THE CALVO DOCTRINE ON PRINCIPLES OF PROTECTION OF FOREIGN NATIONALS IN INVESTMENT

The reading of the Calvo doctrine shows a deliberate intent for governments of particular states to avoid responsibility over losses and injuries in the times of civil wars or troubles. During the 20th Century, civil wars rocked the world including the two major World Wars. The acceptance and incorporation of the Calvo clause in the laws of States was a disadvantage to foreign investors as they could not recover for injuries or losses suffered. It is possible to attribute the law investment levels during the 19th Century in some of the States to the Calvo clause because they would hardly have recourse to the injuries suffered. The aforementioned facts present the intended objectives of the minimum international standard that was aimed at capital countries’ inclination toward protecting their nationals who invested in other States.²⁰ All injuries aliens were subjected to in this regard were considered to be against the Sending state. Further, by interest of States and the need to balance rights, it is visible that states today have taken on the “De jure” and “de facto” treatment, provided for foreign investors in national laws and regulations. Debates nevertheless surround this aspect as to whether this principle does not work against national treatment.²¹


Where a provision for mandatory indemnity to foreign investors by host states where there was placing of responsibility for indemnity on the host States’ governments, powerful states would exorbitantly benefit from the weaker States. This would create indifferences as the powerful States would be grated fatal privilege in their favour, opposed to the weaker host states. Nationals and foreigners would therefore be given unequal treatment, an attribute so unfair to nationals for foreigners. This kind of treatment would tantamount to abuse of the principle of fair and equitable treatment standard in international investment law which had to ideally go hand in hand with other standards of treatment and also referred to as the “absolute”, “non-contingent” standard of treatment.  

22 This standard had to be treated, run and measured against the customary international law minimum standard, which as earlier noted would not measure up to the Calvo doctrine as it had failed to qualify as a customary international law practice and had origins in the 1948 Havana Charter for an International Trade Organisation. No doubt to say, this partly encourage investment by nationals and yet on the one hand discouraging foreign investments. Foreign investors saw investment with absence of possibilities of government indemnification by host states as a risk not worthy their investments. The national treatment standard would be seen to work to the disadvantage of the host state and vice versa while at the same time be seen as a total opposite of the aforementioned where the alien was favoured. Calvo has restated his doctrine by way of conclusion as follows;

1. The principle of indemnity and diplomatic intervention in behalf of foreigners for injuries suffered in cases of civil war has not been admitted by any nation of Europe and America
2. The governments of powerful nations which exercise or impose this pretended right against states, relatively weak, commit an abuse of power and force which nothing can justify and which is as contrary to their own legislation as to international practice and political expediency.  


Amidst the different restrictions in the area of indemnity against the State by foreigners, there were some exceptions that could be relied on by foreign investors if they were to attain some remedies. Such exceptions included; actions which are directly against foreigners or that are subject to the jurisdiction of a particular State; where injury resulted from illegal acts, contrary to the law or treaties of the country in which the illegal act was committed and no redress had been obtained to that effect; in cases of grave violation of international law with more focus on violation of rules of civilized warfare and in cases of denial of a palpable violation of justice or undue discrimination against foreigners by authorities. This created a platform of resort for recovery of losses incurred by foreign investors in the stated circumstances. It of course serves as an incentive for further foreign investment because of the presence of assured recovery where it is sought.

The Calvo Clause further highlighted State responsibility over national in balance with responsibility over aliens. Thus citizens of a state must be given greater treatment than that accorded to foreigners as laid down in the North American Dredging Company case of 1926 where the United States-Mexican Claims Commission stated that under clause 18, Mexicans would not enjoy more rights than those accorded to them since they were aliens in the U.S.A. the Commission after analyzing the agreement found that the Treaty “establishing the Commission dispensed with the need to exhaust the local remedies rule.” It follows that where the commission found it right after analysis, the foreigner would either be entitled to diplomatic protection or waived diplomatic protection that he or she cannot claim diplomatic protection. Counter to this was that under article IV (1) of the 1955 Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States, companies of either party was to be given fair and equitable treatment. Thus this could eminently cover the Iran claims against United States.

In relation to capital investments, there would be possibilities of pooling resources from host states through borrowing. Usually resources of the host or lending states have to be taken into

24 Id, p.36.
account when capitalist borrowing is to be made. In this particular line, the foreign investor has to look into the degree of credit that he or she is to take from the host State and the security must be in tandem and the borrower knows that he is dealing with a sovereign State which usually should not be exposed to legal judgments and the execution of judgments against it.\(^{26}\) This made it quite complex as contracts between private individuals and States are obligatory according to the conscience of the sovereign and may not be subjected to a compelling force.\(^ {27}\) This meant that since they do not confer rights of action, the alien investor was put at risk as there was no freedom and independence of states in the area of economic investments. Worse still is that the host State had the advantage of choosing the time, interest and the manner in which a creditor was to meet the payments of borrowed capital. The national treatment standard was seen to be prevailing to the detriment of the international minimum standard that could have benefitted foreign investors.

What stood out of these transactions is that States could trade in a friendlier and business oriented manner as they were guided by treaties. Thus in *Elettronica Sicula S.P.A.*, Elettronica Sicula was a case brought before the ICJ by the United States against Italy for breach of the FCN treaty that prohibited arbitrary and discriminatory measures and constant protection and security. The ICJ’s Chamber held *inter alia* that protection and security must confirm to the minimum international standard and that reference to "constant protection and security" cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed.\(^ {28}\) It is further been emphasized that unlawfulness in domestic or municipal law does not necessarily amount to arbitrariness at international law. Described by the ICJ’s Chamber as “wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety”.\(^ {29}\)

Foreign investors in the name of submitting to local jurisdictions for all claims made exorbitant claims for destroyed properties especially in the times of civil war that added onto

\(^{26}\) Id p.29.

\(^{27}\) Id.

\(^{28}\) ICJ, Recueil 1989, Section 108, p.65. see also note 23.

\(^{29}\) Id Paras. 124 and 129.
their capital. The claims were based on the fact that the host governments owed responsibility to foreigners though they were later made with excessive demands based on erroneous principles. This benefitted the foreigners but was on the other hand a blow to the hosting States. For instance, Moore on Arbitration reports that in 1873 Civil War claims by Great Britain amounted to $96,000,000 though only $2,000,000 was awarded to the claimants. This acted as disincentive to firstly the host State to continue with the Calvo Clause especially for the fact that the claims were possibly facilitated by fraud and as well to the foreign investors as to whether they were to continue with more investments in States that had incorporated the Calvo Clause in their constitutions and domestic legislations. The National standard of treatment out rightly worked to serve the interests of the aliens. Nevertheless, it was not welcome for them and on the contrary, host States were overwhelmed with the exorbitant claims. The Calvo doctrine was hence perceived with differences as to its relevance.

In the need to promote foreign investments after looking into the history of foreign investments and the related principles, states have increasingly adopted policies that are in favour of foreign investments. Opposed to the old Calvo doctrine, states across the globe have embraced open trade and investment regimes that even more favourable for foreigners than to the nationals. Tax incentives and holidays have continued to be a benefit for foreign investors at the cost of nationals. This has resultantly encourages foreign investments and therefore leading to economic development. This has for instance been the case in Nicaragua, Uganda, Kenya, Nigeria and Cameroon among others. This trend is cross-cutting especially in the developing and the under developed world.

The Calvo doctrine consequentially led to the formation of the larger world trade Institutions such as the World Trade Organisation (WTO). Bilateral investment agreements were also developed and entered into as one of the ways of protecting foreign investments. Nicaragua for instance in 1960,

\[30\] See Moore on Arbitration, I, p. 692-693.
American Common Market (CACM), of which Costa Rica, El Salvador, Guatemala and Honduras are also members.\(^{31}\)

These agreements have further been integrated in variety of regional blocks which run on regional agreements in investment such as the East African Community, the European Union and the Inter-American Block and countries where trade policies have been reviewed by the (WTO). This is the case for instance in Iceland, Israel, Bangladesh, Norway, Korea, Singapore, Côte d'Ivoire, Guinea Bissau and Togo, China, Uruguay United Arab Emirates, Trinidad and Tobago, Turkey, Cambodia, Zimbabwe, Guinea, Mauritania, India, European Union, Hong Kong - China, Congo (DRC), USA, Honduras and Malawi among others.\(^{32}\) This shows that out of the Calvo doctrine, the principle of Most Favoured-Nation treatment (MFN) in international investment law emerged. As a result, greater trade investment opportunities for foreigners have emerged. Foreign investments continue to flourish and increase because there has been a general will of States to promote it. Under the MFN, the following best claims the justification for developments in the investment industry by foreigners.

> [C]lauses link investment agreements by ensuring that the parties to one treaty provide treatment no less favourable than the treatment they provide under other treaties in areas covered by the clause. MFN clauses have thus become a significant instrument of economic liberalisation in the investment area. Moreover, by giving the investors of all the parties benefiting from a country’s MFN clause the right, in similar circumstances, to treatment no less favourable than a country’s closest or most influential partners can negotiate on the matters the clause covers, MFN avoids economic distortions that would occur through more selective country-by-country liberalisation. Such a treatment may result from the implementation of treaties, legislative or administrative acts of the country and also by mere practice.\(^{33}\)

Thus “an investor from a party to an agreement, or its investment, would be treated by the other party “no less favourably” with respect to a given subject-matter than an investor from

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32 Id.

any third country, or its investment”\textsuperscript{34} this is partly attributed to the developments in the Calvo doctrine and as a result, foreign investments have been encouraged. Hence in Maffezini v. Kingdom of Spain (2000), the tribunal decided that;

\begin{quote}
[B]y virtue of the MFN clause of the 1991 Argentine-Spain Bilateral Investment Treaty, the claimant had the right to import the more favourable jurisdictional provisions of the 1991 Chile-Spain Agreement and, as a result, to resort to international arbitration without being obliged to submit its dispute to Spanish courts for a period of eighteen months beforehand.\textsuperscript{35}
\end{quote}

The Tribunal further decided that; “In all matters subject to this Agreement, this treatment shall be no less favourable than that extended by each Party to the investments made in its territory by investors of a third country.”\textsuperscript{36} Further, the Tribunal concluded that;

\begin{quote}
“…if a third-party treaty contains provisions for the settlement of disputes that are more favourable to the protection of the investor’s rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favoured nation clause as they are fully compatible with the ejusdem generis principle…”\textsuperscript{37}
\end{quote}

Further in point is that the development of International Investment Agreements (IIA) is attributed to the historical builds that surrounded the customary nature of international law and State responsibility lives and properties of aliens.\textsuperscript{38} There are all pointers that these arose from the Calvo doctrine especially from dispute settlements by claims commissions and international claims to the usage and abuse of diplomatic protection by powerful states due to the gaps in international law. Abuse of diplomatic privileges continued even though was against the Hague Convention for the Pacific Settlement of International Disputes (Hague Conventions) provided for state parties ‘to use their best efforts to ensure the pacific

\begin{flushright}
\textsuperscript{34} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\end{flushright}
settlement of international differences.\textsuperscript{39} Issues of Colonial territories and extraterritorial jurisdiction arose and the minimum standard of treatment stood out in the governance of relations between nationals and foreigners. For instance, in 1926, two cases of \textit{Roberts v. United Mexican States} and \textit{U.S.A. (L.F. Neer) v. United Mexican States} were decided in light of the Minimum Standard of Treatment. They are landmark decisions in relation to injuries suffered by foreign nationals. Thus in \textit{U.S.A. (L.F. Neer) v. United Mexican States}, Paul Neer was a U.S. national who was murdered while returning home from a mine. His wife filed a claim for compensation against the Mexican government for lack of due diligence in the investigation and prosecution of the murder. The commission found that it was not proper for an international tribunal to decide as to the appropriateness of procedure and as such found that there had been no breach of the international minimum standard on the treatment of aliens. The commission pronounced that;

\begin{quote}
The propriety of governmental acts should be put to the test of international standards, and… The treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether this insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial.\textsuperscript{40}
\end{quote}

In the \textit{Roberts v. United Mexican States}, the claims commission specifically stated that;

\begin{quote}
[\textit{F}]acts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of the authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization.\textsuperscript{41}
\end{quote}

Alongside the aforementioned more realistic measures that would promote principles of foreign investments including the IIA and Bilateral Investment Treaty (BIT) programmes

\textsuperscript{39} Id, citing article 1 of both conventions ((1898-1899) 187 Con TS at 410 and (1907) 205 Con TS at 233).


\textsuperscript{41} See Roberts Claim at 80.
which were first developed by German and remarkably remembered to have been the first to sign one with Pakistan in 1959. The first BIT has been a point of reference for most of the present BITs. From these BITs discrimination in the area of investment on the basis of nationality is discouraged and as such both national and foreign investors are entitled to the same protection. In the result, capital investment and transfers are encouraged. Now with regional and multilateral agreements such as the North American Free Trade Agreement (NAFTA) and the Organisation for Economic Co-operation and Development (OECD), goods can freely move and threats of loss have been minimized. Trade and investment as between foreigners, nationals and states is therefore promoted. No delimitation is that these are some of the benefiting principles that have been a result of the evolution of the Calvo doctrine from a more national centric principle to principles that are unicentric.

As a result of the Calvo doctrine from its inception and evolution, there were concerns as to the future of foreign investments and trade generally. The reasoning was that the investment climate for foreigners was not favourable as expected. Principles governing foreign investments were increasingly put to test. The League of Nations thus between the 1920s and 1930s embarked on efforts aimed at codifying treatment standards. International law was consequently codified and responsibility for damage done in territories to the person or property of foreigners was placed on States. This meant a creation of a difference away from the national treatment standards that seemed to work to the disadvantage of foreign investors. The environmental of operation of foreign investors consequentially became better especially with the codification of the Convention on Treatment of Foreigners of 1929-1930. Nevertheless, even these developments to some extent were not working to a totality in advantage for foreigners. For instance, the seventh Conference of American States in Montevideo leading to the Montevideo Convention (Convention on the Rights and Duties of States, 1933) placed foreigners and nationals of states at equal footing when before the law. Article 9 provides *inter alia* that; Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of the nationals. From the convention, it was quite visible that States

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42 Supra note 38 p. 42.
were still holding onto the Calvo doctrine and were more interested in equal protection of all persons. It may not have worked to the benefit of foreigners.\(^{43}\)

Today, it appears all the developments in the Calvo doctrine and the principles of foreign investments are in favour of the foreigner or alien to the local or the national. Most of the agreements reached in other area of investments as between States, individuals and States or individuals and foreign investors as they contain clauses that usually provide for resolution of arbitration disputes in powerful States. The development of the indirect expropriation and the right to regulate in international investment law as an investment principle has had significant impact on property of aliens. In this line, all aliens were entitled to adequate compensation if their property was to be taken away from them.\(^{44}\) It gave them confidence and protection of losses that would otherwise have resulted. Nevertheless, weaker States and the Nationals of weaker States usually have low bargaining power that they usually suffer injustices brought about by financial inferiority. This state of affairs has been a result of the long historical constructions of the Calvo doctrine and the different emerging States as to the national treatment opposed to the international minimum Standard of treatment.

The Calvo doctrine to the utmost benefit of the foreign investor was a design that would encourage investments by investors. This is because it sought to strike a bridge between the gaps of equality that existed between nationals and foreigners. Civil and political equality were clear and legal equality was paramount as between foreign individuals and nationals. To the contrary, there was promotion of immigration and investments and recourse for the foreign investor was only in the case of situations of denial of justice.\(^{45}\)

\(^{43}\) See id, p. 16-18 for extended discussions on this particular issues of balance of rights between foreigners and nationals of States.

\(^{44}\) The expounded discussion on the indirect expropriation found in OECD (2004), “Indirect Expropriation and the Right to Regulate in International Investment Law”, *OECD Working Papers on International Investment*, 2004/04, OECD Publishing. [http://dx.doi.org/10.1787/780155872321](http://dx.doi.org/10.1787/780155872321) (accessed May 06, 2014). It is noted that; “Customary international law does not preclude host states from expropriating foreign investments provided certain conditions are met. These conditions are: the taking of the investment for a public purpose, as provided by law, in a non-discriminatory manner and with compensation.”

\(^{45}\) See Santiago Montt, “What International Investment Law and Latin America can and should Demand from Each Other. Updating the Bello/Calvo Doctrine in the BIT Generation” p.7
IV. CONCLUSION

The Calvo doctrine has worked to the benefit of both the foreigners and nationals. It was however controversial from the point of inception as it was considered discriminatory in nature and a hindrance to economic investments. Foreign investors did not feel protected while at the same time made exorbitant or extravagant demands for compensation by States. Developing States have also been reluctant in accepting the doctrine due to the influence from Latin American States from which it originated in the name of preference of national law in the treatment of foreign investments by host countries.\(^{46}\) It nevertheless worked to protect weaker States and nationals from powerful states that were invoking diplomatic protection and power to the disadvantage of weaker states. It was a doctrine of importance and shortcomings. As history has no taints of evil, it had its own good, the bad and the ugly that it cannot be regarded as irrelevant but as one that has contributed greatly to the regulation of foreign investments and the development of principles on foreign investments in the world that its effects are felt up to the present times that States are evening dwelling towards its embrace. For instance as a point of historical reference and embrace, it was;

...incorporated into agreements between Central and South American countries and advanced on occasion in diplomatic correspondence with the United States and European countries. But the Latin American States were generally too weak during this period to withstand the demands of the Western powers that injuries to foreign nationals be remedied according to the Western conception of international law.\(^{47}\)

It is further been argued that the principles of protection of foreigners, in particular the minimum standard of treatments has had negative impacts on good governance with the abandonment of bad faith requirement being problematic.\(^{48}\) Fair and equitability to a free standing standard is extremely dangerous to good governance and the removal of the requirement for exhaustion of all the domestic remedies of administrative and judicial nature,


\(^{48}\) See supra note 23.
is one that undermines sovereignty of host States. The contrary should ideally be in case of miscarriage of justice or where sentiments of a futile nature would arise.
RISING THREAT OF A DEBT CRISIS: A FRANTIC CALL TO THE ODIOUS DEBT DOCTRINE

Deergha Airen and Sanjana Roy*

ABSTRACT

The mammoth cost associated with the Bataan Nuclear Power station has intensified the international community's attention to the staggering debt that confronts Philippines. Some argue that it is fundamentally unfair to force the Filipinos to repay funds that the regime of Ferdinand Marcos used at least in some circumstances to oppress them and violate their human rights. These debts connoted as odious debt can be repudiated by any country as they were taken without the people’s consent, not used for public welfare and with creditor’s full knowledge. Instead not just Philippines, but a host of other nations have decided to not repudiate rather restructure their debts with their creditors. This paper enquires into the reasons behind such decline of use of this doctrine, and argues why it is important to resurrect this ‘doctrine’ in the interests of justice, apart from offering a few possible solutions towards achieving this objective.

The apparently formidable reason behind revocation of the odious debt doctrine (ODD) by the countries is the alleged fear over severe reputational harm which might prevent the creditors from investing in those countries.

Admittedly, that sovereign debt restructuring mechanism (SDRM) due to its endorsement by the International Financial Institutions and the subsequent adoption by the countries provides the sovereigns an alternative to the ODD, and thereby reducing the possibilities of isolation in the international credit market. Hence, SDRM came up as a middle path and was widely accepted by the sovereign nations. This acceptance provides justification for austerity measures, apart from imposition of severe conditionalities on the debtor nation. This happens notwithstanding the people’s mandate. The bailouts by the IFIs and subsequent debt reduction are not without the desires of the institution’s politically powerful members. The paper concludes by arguing that repudiation of debt will severely harm the reputation of a nation which might blacklist them in the eyes of creditors is nothing but a conjecture. In this regard, Ecuador provides a fine example of a nation which took a courageous step to scrutinize its debt and refused to pay a major chunk of it, thus defeating the major criticism of invocation of ODD by nations.

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I. INTRODUCTION

“Going down a mountain is usually easier than going up. But finance seems to work differently from the law of gravity. Reducing debt, that is, “deleveraging”, has proven to be harder slog than the climb of the debt mountain.”

A nation’s ability to repay its debts portends difficult times both for the country and its citizenry. Citizens of the country face a possibility of a substantial breakdown in the standard of their living. The general rule states that the sovereign entities must pay the debts of predecessor regimes, thus augmenting the liability of the present day governments. The public ire further rises when they realize they are being made to pay for a debt which was not incurred for their welfare, but ended up in the hands of a despot. By doing this the odious regime has not just destructed the present but has also doomed the future. Then, why should any country bear the brunt of this debt?

Odious debt is more of a literature than a doctrine. The question is whether the acts of the past were such that we should leave a country of what would otherwise be a current obligation. The guiding intuition is moral rather than economic. The doctrine is more aspirational than operational. The question of obligation becomes more mystifying because the doctrine is not codified nor formally accepted in any precedent. The doctrine of odious debts is based on the concept that the debts despot incurs should not form a continuing obligation for states emerging from the grips of a despotic government. The modern concept of odious debts was first articulated in the post-World War I context, by the jurist Alexander Nahum Sack, in his 1927 book *The Effects of State Transformations on their Public Debts and Other Financial Obligations*.

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For Sack, odious debts were debts contracted and spent against the interests of the population of a State, without its consent, and with full awareness of the creditor. Sack (1929) wrote as follows:

“If a despotic power incurs a debt not for the needs or in the interest of the State, but to strengthen its despotic regime, to repress its population that fights against it, etc., this debt is odious for the population of the State. The debt is not an obligation for the nation; it is a regime’s debt, a personal debt of the power that has incurred it, consequently it falls within this power….The reason these ‘odious’ debts cannot be considered to encumber the territory of the State, is that such debts do not fulfil one of the conditions that determines the legality of the debts of the State, that is: the debts of the State must be incurred and the funds from it employed for the needs and in the interest of the State. ‘Odious’ debts, incurred and used for ends which, to the knowledge of the creditors, are contrary to the interests of the nation, do not compromise the latter – in the case that the nation succeeds in getting rid of the Government which incurs them – except to the extent that real advantages were obtained from these debts.”

The doctrine was adopted as a respite for the debtor countries that were so hard stripped for repayment that repudiation of the debt was the only possible solution. The doctrine though adopted for the country’s advantage, turned out to be a Frankenstein monster as most of the countries disagreed to invoke the doctrine for fear of reputational harm. Instead, the countries sought refuge in another mechanism called the Sovereign Debt Restructuring Mechanism (SDRM) which received the blessings of the international financial institutions and the creditors alike.

This paper tries to articulate the reasons for such decline of the ‘doctrine’ and suggests a few possible solutions for the resurrection of the same. Part I will discuss the gradual evolution of the doctrine, Part II will enumerate the causes of the doctrine and the various loopholes in it, Part III provides a comparative study between SDRM and doctrine, Part IV provides a case

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5 Id.
study of Ecuador by which reputational harm as an aftereffect of Odious Debt Doctrine (ODD) is challenged, and Part V provides some concluding suggestions.

II. A GLIMPSE INTO THE PAST

Before discussing the causes, effects and the various concepts associated with the doctrine, it is useful to explore the historical development of this relatively unknown doctrine.

United States Refusal to Assume Cuban Debts – 1898 Paris Peace Conference

The first direct application of the concept of odious debt was possibly during the United States of America’s repudiation of Cuba’s debts which became the liability of the American government after the Spanish American war. The Americans refused to undertake liability for the debt which was owed by Spanish secured by Cuban revenues by connoting those debts as ‘odious debts’. The American Commissioners refused the liability of the debts because: (1) they were incurred for purposes that were hostile to Cuba’s ultimate independence, (2) Without consent of the Cuban people, and (3) in order to finance programs intended to ensure that Cuba would remain a Spanish territory. The loans were used to quell Cuban insurrection against Spain. The United States further argued that the lenders knew their funds would be used for this purpose and must have known the inherent risks of non-repayment when lending for such purposes. Spain made the classic argument based on a narrow legal interpretation of the international law governing succession that the United States was bound notwithstanding the circumstances surrounding the use of the loan.

In the end, neither Cuba nor United States of America assumed liability for the debt, although Spain never abandoned its position on the matter.

7 Id. at 188.
8 Id.
Soviet Repudiation of Tsarist Debts

After the Revolution of 1917, the Provisional Government of Russia initially agreed to repay the outstanding debt of the Tsarist government. A wide variety of authorities have calculated the total state debt and state guaranteed debt at somewhat over thirteen billion rubles.\(^9\) By 1918, Russia had defaulted on its debt. Alexander Nahum Sack who was a minister in the Tsarist ruled Russia said the debts were incurred for personal obligations only, and hence, they did not bind the state. So, these debts were odious and they were unenforceable against the successor regime, given the evidence that Tsarist Russia did not rule in the interests of its population.\(^10\)

Tinoco Arbitration – 1923 (Great Britain v. Costa Rica)

A form of the odious debt doctrine found its way to the International Court of Arbitration in 1923 when Britain brought Costa Rica to court.\(^11\) This arbitration is often referred to as the Tinoco Arbitration over which William Howard Taft presided as sole arbitrator. Costa Rica had been ruled by a dictator, Fredrico Tinoco, who entered into a number of agreements with private entities.\(^12\) A number of those contracts served to benefit Tinoco or his family members personally. After Tinoco retired and left office, a Costa Rican domestic law called the Law of Nullities No. 41 repudiated all of these contracts.\(^13\) Taft agreed that the Tinoco Government was a de facto Government capable of binding the State to international obligations. Despite this, Taft emphasized the fact that the debt in question did not create a valid public debt, nor was it in the public interest. The evidence established that the funds were used for the personal enrichment of the regime and that the Royal Bank of Canada was aware of this, since the transactions “were made at a time when the popularity of the Tinoco


\(^13\) *Id.*
Government had disappeared, and when the political and military movement aiming at the overthrow of that Government was gaining strength”. 14 Thus, Taft by validating the Law of Nullities paved the way for a comprehensive ODD.

After being taken up only sporadically in the literature of 1980s, 15 the doctrine expected a revival after the fall of the Apartheid government in South Africa when the Truth and Conciliation Commission recommended canceling certain debts terming them as odious, 16 a momentum that was sustained by a number of civil society groups. 17 Just as the doctrine regained academic interest in the new millennium, 18 some members of the Bush administration in certain periodicals called for the application of the doctrine to Iraq in 2003. 19

Yet, even if this doctrine has not been invoked explicitly by any country but it forms the basis for the repudiation of debt of many countries.

III. WHAT COMPELS COUNTRIES TO TAKE ODIOUS DEBT

Countries take debt for satisfaction of public needs. The crisis ensues when the causes of the people are mired with the personal uses of a government or dictator. The net results are that the country faces a mammoth burden of a debt.

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14 Howse, supra note 5.


16 Id.


19 Id.
Over-borrowing may be the result of three key distortions. First, political leaders frequently have incentives to borrow above socially optimal levels.\textsuperscript{20} These incentives can be for the personal benefit of the rulers. Second, over borrowing may link to moral hazard resulting from bailout packages and other forms of official sector support.\textsuperscript{21} The presence of bailout packages may induce creditors to lend at reckless levels since official bailout packages enable repayment that is beyond a socially optimal level.\textsuperscript{22} The tax payers of the debtor country pay the price for this overpayment because debtor countries tend to repay what they borrow from official lenders.\textsuperscript{23} Third, over borrowing may result from the absence of seniority rules for sovereign debtors because new lending dilutes the claim of existing creditors.\textsuperscript{24}

However, the traditional causes of odious debt can be more specific. The causes are (a) colonial domination, (b) suppression of a national liberation movement against local non-democratic regime or a foreign controlled regime, (c) genocide, apartheid or other crimes against international law, (d) a regime that commits gross and systematic violation of human rights, or other instances of similarly profound harm to the members of the population of debtor state.\textsuperscript{25}

Nowadays, regimes do not take debts that are apparent on the face of it as odious. Instead, they indulge in activities like crony capitalism which in the garb of welfare actually robs the nations, as happened in the case of Philippines in which its’ ruler Marcos received bribes of at least $80 million, and much of the construction of the Bataan Nuclear Power station was


\textsuperscript{22} supra note 20.


\textsuperscript{24} Patrick Bolton and Olivier Jeanne, Structuring and Re-structuring Sovereign Debt- The Role of a Bankruptcy Regime, 115 J. POL. ECON. 901, 913-18 (2007).

done by companies in which Marcos had an interest.26 Completed in 1984 at a cost of more than $2 billion, it was never used because it was built on an earthquake fault at the foot of a volcano.27 It would be hard for any bank to say it was acting in good faith by lending to build a nuclear power station on an earthquake fault; even the most cursory evaluation would show this to be a foolish loan.28 Filipinos will never benefit from a single watt of electricity, but the people are paying $170,000 per day for the power station.

**Why does the odious debt doctrine stumble?**

The ODD suffers from inherent lacunae. The countries seem reluctant to invoke this doctrine for repudiation of their debt. It is high time that the world should anatomise the doctrine as to decipher the reasons for its decline.

There is also the problem of regime behaviour shifting from time to time. It is likely that rulers with shorter time horizons will be more prone to looting their countries. This complicates the time calculation for assessing odious debts.29

Although, the ODD was recently evoked in Iraq and Nigeria, both regimes ultimately declined to enforce the doctrine for policy reasons. In 2003, after the fall of Saddam Hussein, the United States originally declared Iraq's debt to be odious. But the United States later decided this created a risky precedent and consequently dropped the odious debt claim, choosing instead to negotiate with the Paris Club for “an 80% cancellation of Iraq's debts”.30 In a similar turn of events, in early 2005, Nigerian President Olusegun Obasanjo faced a request from the Nigerian Parliament to repudiate the country’s debt, which was incurred


28 *Id.*


largely during military dictatorships. President Obasanjo decided instead to negotiate with the Paris Club for a 60% reduction of the debt.  

Given that it’s key terms are inherently vague and unexplained, the odious debt principle is a doctrinally weak concept. For example, the very heart of the ODD itself, the word “odious,” remains remarkably undefined.  

Sack’s stipulation that only those debts contracted in furtherance of “the needs of or interest of the nation” should be considered non odious can be interpreted in a number of ways.  

One possible approach could seek to quantify the net benefit to the state of every government outlay, from domestic educational spending to the price of the rulers’ personal expenses.  

Where odiousness is the question, how does one decide whether the patriotic benefit of viewing the head of state descending from an opulent jet can justify the plane’s price tag? On the other hand, does one expect one’s officials to fly coach? What ought to determine the reputational value that such an airline give to the ruler? To decide these questions is similar to the question of administrability to discerning whether an entire regime is odious.  

Another potential evidentiary complexity relates to proof of the third prong of the ODD: the creditor's subjective awareness of that the debts were for odious purposes. The “subjectivity” of that element requires an inquiry into the mind of the creditor specifically, which presents a formidable evidentiary challenge for the sovereign claimant. Absent any records of communication between the sovereign claimant and the creditor exhibiting as much, the best or only proof of the creditor's “subjective” knowledge may be in the creditor’s own files.

31 Id.

32 Angelo, supra note 11.


Considering that the sovereign claimant requires this evidence in order to prove a claim against the creditor, access to the creditor's files for this purpose may prove a nearly impossible task.  

Alternatively, a liberal interpretation of “absence of consent” treats that element as automatically satisfied by showing of the second element. In other words, proof of the “absence of benefit” prong creates a presumption that an “absence of consent” exists as well, based on the logic that a population would naturally refuse to consent to something that is not for their benefit.

The odious debt doctrine, however, is problematic for two important reasons: first, the doctrine is judicially inadministrable because it requires judges to answer inherently political questions, and second, it is excessively narrow in scope. Administrability poses an insurmountable problem for the Sackian rule of odious debt. Also, administrative technicalities involved in such an adjudication process are exceptionally complicated-specifically the projects of choosing qualified judges, ensuring impartiality, and locating the necessary evidence.

The question of popular consent commonly devolves into a discussion of the contracting regime’s odiousness, not that of the debt themselves. A tribunal’s ability to decide whether the government is odious or democratic is extremely difficult and for odious debt to become an enforceable legal doctrine this problem must be solved. Additionally the balance struck between the interest of the debtor consent and creditor complicity produces a conjunctive rule with narrow application. Because each of the factors must be satisfied before a debt can be properly termed odious and in this regard Lee Buchheit has explained it beautifully as “like a

36 Angelo, supra note 11.

37 Id.

38 Id.


40 Lewis, supra note 34.
Las Vegas slot machine, all three cherries must simultaneously come into alignment before the Sackian odious debt bell starts to ring”.  

When a dictator steals a percentage of debts proceeds yet puts the bulk of the debt to good use, Sack’s three pronged rule is unfit to resolve this dilemma. Two notable aspects of this precedent stand out. First, the American position exceeded the terms of the doctrine because it refused to assume any of the debt when at least 25% of it fell outside its own definition of odiousness. Second, they did not feel it necessary to arbitrate the debt. These potential injustices show why the use of a tribunal and the duty to arbitrate are important safeguards to prevent opportunistic state behaviour.

Another problem with the doctrine is it fails to account for the fungibility of money. Funds procured for a non-odious purpose can easily be used for an odious one. For example a debt that funds the construction of hospital, could enable funds from another revenue stream to be used for odious purpose. The doctrine provides no protection in this situation.

The “odious debt” standard also comes with serious policy risks, including the risk of incentivizing sovereigns to mismanage the country or to exploit local resources as an alternative venue for financing, disincentivizing lenders to lend, and discouraging sovereigns from correcting the deficiencies in their regulatory systems that produced their financial crises in the first place.”

Since the ODD would discourage lending to despots, another policy concern is that despots alternatively will turn to “funds from sources that may harm” the country. By placing a burden on creditors, the ODD would prove a strong deterrence for lenders from engaging in transactions with governments known to be despotic. If a despot is deprived of borrowing from lenders, it may likely resort to domestic means of financing its interests: for example,

41 Buchheit, supra note 39.

42 King, supra note 25.

43 Id.

sale of land or other valuable state assets, natural resource extraction contracts, and other forms of foreign direct investment (FDI). Such exploitations by the despotic government would likely harm the country’s economic resources, natural environment, and population at least as much as the debt would. “Given the odious debt doctrine’s moral imperatives and normative goals,” Ochoa writes, “it seems unreasonable to develop a functional odious debt doctrine that will give despots cognizable incentives to make yet more use of these methods of financing their regimes.” Thus, while purporting to be a remedial measure, the odious debt doctrine runs the risk of being equally or more destructive than the situation it would attempt to circumvent.

The liberal interpretation of the “absence of benefit” prong requires lenders not only to predict how the borrowing state will potentially use the loans but additionally to forecast the possible long-term impact of those potential uses—a very demanding burden. Given the high liquidity of the international lending market, lenders would likely be easily dissuaded by this high risk of investment loss and would choose to put their money elsewhere.

Another obvious reason for caution under real world conditions is that the ODD could increase the cost of capital for all sovereigns, good or bad, because the doctrine would introduce a new risk for lenders. The possibility that their debts might be branded as odious, they would demand a higher risk premium. If the policy is confined to truly odious regimes, these costs would be limited; but a broader policy might have onerous effects on sovereign

\[\text{Id. at 131.}\]

\[\text{Id. at 136.}\]

\[\text{Id. at 130-132}\]

\[\text{Id. at 110.}\]

\[\text{Greece and the odious debt doctrine.}\]

finance. Overall, these economic considerations suggest that odious debt doctrine can only be welfare-enhancing if it is carefully circumscribed.51

IV. SOVEREIGN DEBT RESTRUCTURING MECHANISM

The official tasks of the IMF as laid down in the Bretton Woods Article of Agreement which is providing resources to member countries experiencing temporary balance of payments under strict conditionality.52 IMF lending programs are often associated with a sharp and sustain redirection of the course of economic policy. Such programs are initiated when a country faces the need for external adjustment. The IMF provides (co-) financing and the country puts in place a program of policy to redress actual and potential external imbalances.53

Over the past several years, the international community has devoted considerable attention to improving arrangements for resolving financial crisis and for the restructuring of unsustainable sovereign debt.

These efforts have benefited from the active participation of sovereign debtors, market participants, workout professionals, lawyers, economists and the “official sector” including the IMF.54

The SDRM was first designed by Anne Krueger55 and endorsed by the IMF Executive Board between 2001-03. It is based on the recognition that there is a need for a fundamental change

51 Patrick Bolton and David Skeel, Odious Debt or Odious Regimes? 70 LAW AND CONTEMPORARY PROBLEMS, 83-107, Odious Debts and State Corruption(Autumn, 2007).


in the international financial system. The SDRM envisages establishing, through an amendment to the IMF Articles of Agreement, a treaty-based framework to restructure sovereign debt.\textsuperscript{56} The SDRM is said to intend to accomplish what diplomats, gunboat captains, administrators, and judges of the last two hundred years failed to achieve: a method by which the official sector could bring on orderly workouts of private sector claims against distressed sovereigns without shouldering the full moral, political and financial possibilities of these workouts.\textsuperscript{57}

SDRM is expected to work like this: first, it envisages a legal framework that would enable a qualified majority of creditors to make critical decisions, including but not limited to the acceptance of final restructuring terms, that would be binding on private creditors holding external claims.\textsuperscript{58} SDRM would aggregate claims across different instruments and the qualified majority (about 75\% of creditors) would make decision binding on all. The voting provisions of the SDRM would be applied to the stock of claims in existence at the time of its establishment and not only to contractual claims but also judgment creditors.\textsuperscript{59} Second, the SDRM proposes a Dispute Resolution Forum that would be given exclusive jurisdiction over all disputes that may arise during restructuring proceedings. Finally, the SDRM proposes the possible inclusion of official Bilateral Creditors (Paris Club), as a separate class, designed to facilitate the resolution of inter-creditor equity issues.\textsuperscript{60}

\begin{footnotes}
  \footnote{60} ORDU, supra note 58.
\end{footnotes}
The Paris Club is an informal group of creditor governments from major industrialized countries that meets monthly (in Paris) to help debtor nations restructure their debts. The restructuring procedures used in Paris Club negotiations are generally viewed as closed and not at all transparent. The Paris Club members will recommend to their countries that they reduce the debts owed to them only if the IMF has certified that the debtor country cannot meet its debt-service obligations, the debtor country agrees to comply with certain policy changes specified by the IMF, and the debtor agrees that it offer terms to commercial creditors that are not more generous than the terms it negotiated with the Paris Club.61 Sovereigns and their official creditors tend to reach agreement quickly and relatively inexpensively in a Paris Club rescheduling and Paris Club restructurings tend to be “successful” largely because public creditors are willing to make concessions based on geopolitical, nonfinancial considerations.62

With respect to multilateral debts, the SDRM envisages that claims owed to International Financial Institutions (IFIs), such as the IMF and World Bank, be excluded from the process. This in keeping with the preferred creditor status is believed to be shielding the IMF from the risk of non-payment and restructuring. The IMF can then provide financing when other lenders would be unwilling to do so, and the IFIs could then maintain their role of enhancing economic growth and financial stability as well as provide a public good that, in the long run, is in the interest of all stakeholders.63

_Causes for the rise of SDRM_

The international financial community, including IFIs, has rejected the validity of the odious debt doctrine. Specifically, the IMF has resisted efforts to interfere with contractual relations between a sovereign and its lenders by disqualifying odious debt from repayment.


Representatives of the IMF have stated that such interference would constitute a radical change in the validity of creditor claims and the sanctity of contracts and that such a change would have adverse implications for the operation of capital markets. The IMF appears to have accepted the contentions of capital market investors that introducing the new risk factor of potentially having their debts deemed odious and thus unenforceable would undermine the efficient operation of secondary sovereign bond markets and would have an adverse effect on emerging-market borrowers to issue bonds in the primary bond markets.

**International Financial Institutions**

IMF lending is controversial can be attributed to many reasons: Firstly, IMF makes loans based on the economic or political desires of its politically powerful members (often the United States). These creditor nations, some suggest, insist on an IMF bailout to protect loans made by the nations’ domestic banking institutions or demand that the IMF provide support packages to countries for geopolitical rather than economic reasons. Secondly, the austerity measures as suggested by IMF as a precondition for giving further loans often puts the debtor country in a dilemma, that of repudiating the debt or repaying a past odious debt that results in severe human rights violation on its citizens. The debt crisis often results in chronic poverty and under-development. With nearly all countries spending more on debt service than on education, health, housing, water, food and human development, there is no doubt that debt burden had severely impacted the population of these countries. Exceptional

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67 ORDU, *supra* note 58.
circumstances can require exceptional responses but the way policies were adopted and implemented in these contexts clearly failed to respect international standards.\textsuperscript{68}

The justification for imposing austerity measures were for regaining confidence for those countries which had difficulties in borrowing money in the global markets because market did not have confidence in their ability to repay their debts. In order to regain that confidence, these debtor countries had to demonstrate their willingness to be virtuous by eliminating their deficits, reducing public debt, cutting wages in order to be competitive and engaging in structural reforms.\textsuperscript{69} In this process these nations drifted far apart from policies which they had promised to their people.

International Financial Institutions in general, the International Monetary Fund (IMF) lends to sovereigns when private lenders will make loans only on the terms prevailing in the capital-markets. The IMF often lends in its capacity as an international development institution that provides humanitarian aid,\textsuperscript{70} rather than as a financial institution whose lending decisions are based on a debtor’s creditworthiness or borrowing capacity.

Some members of the financial community criticize this lending practice, contending that IMF lending creates a moral-hazard problem by encouraging sovereigns to borrow recklessly (knowing that an IMF bailout is likely) and by encouraging creditors to lend recklessly (knowing that the same bailout will ensure repayment of those imprudent loans).\textsuperscript{71}

\textit{Maverick Creditors}


\textsuperscript{70} The IMF is an international organization of 184 member countries established to promote international monetary cooperation and exchange stability, to foster economic growth, and to provide temporary financial assistance to countries that are experiencing balance of payments difficulties caused by, for example, budget deficits, inflation, or currency valuation problems. International Monetary Fund, Article I – Purposes, http://www.imf.org/external/pubs/ft/aa/aa01.htm.

\textsuperscript{71} DICKERSON \textit{supra} note 62.
Sovereign debt is an enormous problem for third world nations, in these nations financial resources are limited and, often under intense international pressure, money is siphoned away from infrastructure and social problem to make principal and interest payments on money owed abroad.\textsuperscript{72} African countries for example now spend twice as much on average repaying foreign debt as on providing healthcare.\textsuperscript{73} Forty one countries defined by the World Bank as heavily Indebted Poor Countries (HIPC), thirty three of which are in Africa owe about $200 billion in foreign debt. Though there are several movements to alleviate some of the difficulties caused by the massive debt problems, much of the movement has been aimed at Multilateral Creditors. Little mention has been made in these movements to private creditors of sovereign nations. These creditors have become more numerous and can collectively control an enormous portion of countries debt.\textsuperscript{74}

Restructuring sovereign debt by contract or by law requires unanimous vote of the creditors.\textsuperscript{75} Yet a problem may arise when a creditor refuses to go along with the majority. The recalcitrant creditor may attempt to recover on his own, by bringing suit in a court. Often it means that a nation’s attempt to undertake a badly needed restructuring during a financial crisis is hampered.\textsuperscript{76}

The often-cited Peru-Elliott example is illustrative of the inequities that can arise from successful holdout litigation at the expense of creditors that have consented to restructuring. The perception of unfairness results when a holdout creditor recovers an amount exponentially greater than the recovery in voluntary restructuring realized by pari passu


\textsuperscript{74} Kenneth N. Gilpin, \textit{Darts Clash with Brazil over Loans}, N.Y. TIMES, (Oct. 23, 1993).

\textsuperscript{75} Lee C. Buchheit, \textit{Sovereign Debtors and their Bondholders}, UNITAR TRAINING PROGRAMME ON FOREIGN ECON. REL. 7 (2000).

creditors\textsuperscript{77} and the price such holdout creditor paid to purchase the debt instrument on a secondary market.\textsuperscript{78}

Indeed, these creditors pose a major threat to other creditors in their chances of recovery when they decide to hold out, thus forming one of the major glitches of SDRM.

V. SOVEREIGN DEBT RESTRUCTURING v. ODIOUS DEBT

Odious debt is in some ways more limited and in some ways more broad than the general sovereign-debt restructuring that was the focus of policymakers only a few years ago. It is more limited in that only certain loans fall within the doctrine's purview. The regime has to be “odious” and the loans have to be issued with the lender understanding that the proceeds would not benefit the nation’s citizens.\textsuperscript{79} It is broader in that, for loans that are deemed odious, they are eliminated rather than reduced.\textsuperscript{80} Whereas the various SDRM that have been proposed seek to pare down debt to sustainable levels, the ODD does not focus on overall debt loads. It is the nature of the debt rather than the amount of the burden that determines whether relief will be granted.\textsuperscript{81}

A country’s ability to reduce its debt should not depend on who its friends are.\textsuperscript{82} In SDRM the trend which has been prevalent is that the restructuring generally depends upon the will of the IMF which means the will of the powerful countries controlling it unlike ODD which does


\textsuperscript{79} Patrick Bolton and David Skeel, Odious Debts or Odious Regimes?, 70 LAW AND CONTEMP. PROBS. 83 (Autumn 2007).

\textsuperscript{80} Omri Ben-Shahar and Mitu Gulati, Partially Odious Debts?, 70 LAW AND CONTEMP. PROBS. 47 (Autumn 2007).


\textsuperscript{82} RASMUSSEN, supra note 81.
not discriminate between countries but is rather impartial towards all of them who meets the
criteria.

Thus, Odious debt and sovereign-debt restructuring are neither inextricably linked nor
inevitability distinct.

**Which one should be chosen?**

ODD is mostly criticized as people believe that it is unable to reconcile the interest of the
debtor and the creditor. But going by the very essentials of the doctrine creditors knowledge
is a pre requisite for proving a debt as odious this implies that a creditor had complete
knowledge about the regime it was lending finance to. Even after then if the regime fails to
repay the loan questions of reconciling the debtors and creditors interest cannot arise. One
has to look at the reason why the doctrine was formulated by Sack in 1927, the most
important being to provide a defense to the debtor states to repudiate a debt which was not
incurred by them but by a previous regime to satisfy its own personal interest.

On the other hand, SDRM which is believed to receive the support of creditors is not without
its own share of flaws. One of the flaws being “sovereign immunity” which is a significant
obstacle, compelling a sovereign to repay. SDRM though provides the creditor with the
benefit of restructuring but the restructuring may not be favourable to all creditors and not all
creditors would agree to terms and conditions of restructuring once getting into the process
then also they may exercise their option of starting separate legal proceedings and in that
sovereign immunity poses a great threat as it immunizes a sovereign state from the
jurisdiction of a foreign state's courts.83 Since sovereign immunity generally protects the
sovereign from both criminal and civil liability,84 that presents a significant obstacle for
creditors seeking satisfaction of their debts through judicial intervention.


84 Curtis A. Bradley and Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign
Even the approving creditors reluctantly agree to the terms and conditions of SDRM in order to avoid the most likely alternative that of a lengthy court battle.

VI. ECUADOR BREAKS THE MYTH: CAN OTHER COUNTRIES FOLLOW

“Life comes first, repaying debts second.” ~ Rafael Correa

The financial crisis and the Third World Debt crisis which began in the late 1970s both share a similar cause: reckless and irresponsible lending. Lenders extended credit to the developing nations with little regard to the quality of loans in the late 1970s which led to the third world debt crisis of 1980s. Developing nations across Asia, Africa and Latin America continue to suffer ill effects of crisis even today. The case of Ecuador is not unlike many other developing countries: impacted originally by third world debt crisis, it is beginning to feel the brunt of the current crisis. The origin of Ecuador's debt date back to 1976-79 when under the dictatorship of Supreme Government Council, Ecuador contracted $3.4 billion in debt. Of this nearly two-thirds was used for military expenditures. After multiple rescheduling, borrowings Ecuador’s external debt rose to $10 billion in 2008. In 2007, Ecuador paid $ 1.75 billion in debt service, more than the government’s spent on healthcare, social well being, housing and urban development and the environment combined. Cornered with strong claims of the illegality of some of its debt and mounting political pressure to free up resources to invest in social services the Ecuadorian government faced a difficult decision. It had the option of either defaulting on its debt or restructuring.

In this context, the government of Ecuador led by Rafael Correa in July 2007 established an independent, international Public Credit Audit Commission to examine the origins, nature and the impact of the country’s sovereign debt. The Commission completed the report in September 2008, which documented claims of irregularities and illegitimacy in the

contraction of Ecuador’s public debt. Engaging in a year of analysis and research the commission took a comprehensive approach to Ecuador’s debt and reviewed the country’s debt to commercial creditors, multilateral banks and bilateral donors. The work of the commission was made public. Based on the findings of the commission the government declared cessation of payments for 70% of Ecuador’s debt. Furthermore, they rid themselves of the interest they had to pay till 2012 or 2030. They saved at least $ 7 billion, which was great for the country. This allowed the government to increase its spending on education, health, creation of employment and improving infrastructure.

The repudiation of debts by Ecuador abolished the biggest myth surrounding invocation of ODD, that of inviting severe reputational harm. To the amazement of ODD critics, Ecuador has gone relatively sustained period of economic progress since its repudiation. Annual growth in Gross Domestic Product has averaged 4%. Unemployment is below 5% and the percentage of Ecuador’s 16 million people living below the poverty line has dropped to 25% from 45%. Standard and Poor’s, a leading credit rated agency recently raised its long term debt rating on Ecuador saying, “the government has shown greater signs of pragmatism with efforts to attract foreign direct investment in the oil and mining sectors, re-engage multilateral institutions and boost public investment to try to stimulate economic growth.”

VII. SUGGESTIONS

One way of addressing the problem of repudiation of odious debt is to have an international institution declare ex ante that a regime is odious. This approach would have the advantage of deterring lending to odious regime since creditors would have to exercise a due diligence before such lending. Even after conducting the due diligence and finding out that a regime is odious a creditor still extends credit to that regime the creditor cannot ask for any relief since one cannot approach the court with unclean hands. Regarding the international institution


87 COX, supra note 86.
which should be bestowed with the responsibility which should declare a regime as odious. The Security Council seems as most favourable option as it has been given the task of maintaining international peace and security under Article 24 of the United Nations Charter. The Security Council is a more appropriate body because it has got more political acumen then any international Court and it possesses more enforcement power than any legal forum. However, the Security Council should be given the liberty to consider the opinions of jurists and major non-governmental organizations like Transparency International. But the final task of declaring a regime as odious would rest with the Security Council.

The three essentials of the odious debt doctrine should be clearly defined so that there should not remain any ambiguity in it and which can suit the current situation of the world. The first essential which states that a debt would be odious if not taken without the consent of the people should clearly define that the consent is free and unconditional. The third essential of proving the full knowledge of the creditor proves to be a strenuous task for the debtor nations. It should be remembered that the doctrine was formulated as a defense for the debtor nations and so if a regime is already declared as odious the third essential becomes automatically defunct as it would be presumed that a creditor has the knowledge before lending to any nation.

VIII. Conclusion

ODD as a doctrine can prove to be a good option to solve the debt crisis of many countries if used in a diligent manner, as it provides an option to the countries to repudiate their debt without compromising the interests of the people of their country unlike other alternatives. To solve debt problem what is needed is a courageous step, belief in the capabilities of the country, and to make sound economic policies rather than following the mandate of the IFIs. This paper has set out to analyse ODD, its shortcomings and the viability of the doctrine in the current scenario. It is hoped that in the years to come the lenders and borrowers will come together to tackle this problem more effectively in the interest of human dignity and the common interest of all.
LINKING CYBER ATTACKS AND THE USE OF FORCE IN PUBLIC INTERNATIONAL LAW: AN EXERCISE IN INTERPRETATION

Pratik Ranjan Das*

ABSTRACT

Jus ad bellum, the body of international law governing the use of force lays down principles which regulate the manner in which force can be utilized legally. According to this existing structure of international law, the categorization of the concept of a cyber-attack within the ambit of the principles governing use of force remains largely unexplored. ‘Force’ as per international law may be prohibited, but there is scarcely any criteria to determine whether any assault which does not involve a conventional military strike would even fall within the ambit of the definition of force as per international law. Thus, it remains to be seen if cyber-attacks would satisfy the criteria of force in international law. In the previous century, given the limited nature of technological innovation in warfare, such a lacunae in the existing law did not pose too much of a legal conundrum. However, in the present day, given the technological evolution of the nature of warfare and the part that cyber warfare has played in this evolution, it becomes necessary to link attacks of this nature to established principles of international law. This paper will thus seek to explore questions related to the acceptability under jus ad bellum, of a cyber-attack or computer network attack (CNA). The focus of the paper will be to show that traditional applications of the use of force prohibition fail to satisfactorily safeguard shared community values threatened by such attacks. The paper seeks to remedy the lacunae in the law by proposing an alternative model for analysis of the attacks based on a scrutiny of consequences caused by such cyber operations. This new normative structure seeks to suggest that by way of the evolution of customary international law it is highly probably that CNA can be categorized under the ambit of the prohibition against use of force.

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I. INTRODUCTION

The use of computer systems in modern methods of warfare has grown exponentially since the turn of the century. This has given rise to a large number of new threats so far as international peace and security go; threats which are of a nature different from anything previously catalogued in the annals of international law. One of these new threats is by way of cyber-attacks or computer network attacks (hereinafter CNA). CNA through the use of computer code allow an assailant to target, infiltrate and then infect or destroy the computer systems of an enemy from the comfort of a computer terminal situated far away. Systems that are targeted in such a manner are essential for the control of important military operations or basic civilian facilities. Thus CNA provides not just a different means of attack, but also a whole new category of vulnerable targets as well as different results based on the whim of the attacker. Given these unique characteristics of CNA, it is necessary to understand how such a phenomenon would interact with the prevailing international legal framework.

II. NATURE AND SCOPE

The prohibition of use of force arising out of Article 2(4) of the UN Charter has acquired the status of customary international law1 and has even been elevated to the threshold of *jus cogens.*2 Given this fact, this paper seeks to analyze if a CNA could fall within the ambit of this prohibition. The paper will seek to first, examine the prohibition of the use of force in international law. It will then probe into the nature of a CNA and its potential for causing harm and destruction. Based on such consequences, it will examine both the traditional and the more modern nuances of international law prohibiting the use of force. An analysis will

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be presented trying to use the existing set of tests and standards to classify CNA as prohibited under the norm embodied in Article 2(4) for being a use of ‘force. The paper will conclude with a short comment on the evolution of international law and techniques of interpretation which support and justify the need to include CNA within the ambit of the prohibition on the use of force.

III. INTERNATIONAL LAW AND THE PROHIBITION OF USE OF FORCE

The introduction of the notion that force is inherently destructive and must be prohibited evolved with the treaties of Münster and Osnabrück (collectively termed the Peace of Westphalia). The idea behind the prohibition of the use of force, at that time, was to prevent wanton death and destruction in order to allow human society to live peaceful and productive lives. Even today, international law seeks to prohibit the use or threat of force for much the same reason. Under the current international law regime, the United Nations, established after the Second World War, was tasked with maintaining international peace and security and protecting succeeding generations from the ‘scourge of war’. The United Nations Charter expressly prohibits nations from the use or threat of force. The source of this prohibition of the use of force is the monopolization of force by the state. Thus, no matter what the provocation, a nation which is a signatory to the Charter may not use force to settle a dispute or conflict. The drafters of the Charter, following the philosophy of Woodrow Wilson’s Fourteen Points felt that such a strict ban on force as a tool to settle discord would encourage nations to opt for peaceful methods of dispute resolution.

However, the Charter provided only one understanding of the notion of force in international law. While the Charter is no doubt an important source of international law, the prohibition of the use or threat of use of force has an existence independent of the Charter as well. This prohibition has been laid down in several other international instruments as well. Furthermore, even beyond the textual constraints under Article 2(4), the prohibition on use of force is considered to be a peremptory norm from which no nation is allowed to derogate from under any circumstances. The importance of this norm may be further highlighted by the fact that it has been described as the ‘corner stone of peace’, ‘the heart of the UN Charter’ and ‘the basic rule of contemporary international law’.

Given the high standing of the prohibition of the use of force in international law, it is clear that military attacks are prohibited except in the event of force being utilized in self-defense or when authorized by the UN Security Council. Thus, generally, measures such as economic sanctions or diplomatic pressure are not subject to this restriction, even if they exact tremendous costs on the target state. This prohibition has been elaborated on as a


10 C.H.M. Waldock, The Regulation of the Use of Force by Individual States in International Law, 81 REC. DES COURS 451 at 492 (1952), as cited in MOSLER, supra note 5, at 112.


12 MOSLER, supra note 5.

13 U. N. Charter, art. 51

14 Id., art. 39.
principle of international law in the Declaration on Principles of International Law, 1970.\textsuperscript{15} This declaration systematically laid out the following reasons for the initial institution and subsequent importance given to the prohibition of the use of force in international law.\textsuperscript{16} As per this analysis, five important issues emerge. The first and possibly the most obvious issue is that wars of aggression constitute a ‘crime against peace’ and those who cause such wars may be held accountable for the same under the principles of state responsibility in international law. Second, since states cannot resort to war to resolve conflicts, they must not threaten or use force to violate existing international boundaries or to find a solution to disputes with other states. Third, acts of reprisal involving the use of force are barred. Fourth, states must not use force to deprive peoples of their freedom and right to self-determination. Fifth, states may not organize, instigate, assist or participate in any acts of civil strife or terrorism in another state’s sovereign territory and may not encourage the formation of armed militia for incursions into other states’ territory.\textsuperscript{17}

All these principles show that the prohibition of threat or use of force in international law sees force in its conservative sense, in a strictly military manner involving the use of conventional weapons. This is further emphasized by the fact that attempts to bring economic force within the ambit of force under Article 2(4) were rejected outright by the international community.\textsuperscript{18}

IV. DEFINING COMPUTER NETWORK ATTACK AND ITS POTENTIAL

A computer network attack or CNA is an information operation encompassing all actions intended to discover, alter, destroy, disrupt or transfer data stored on a computer system. CNA constitutes offensive information manoeuvres including activities as varied as military

\textsuperscript{15} General Assembly Resolution 42/22, the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, 1987; See G. Arangio-Ruiz, The UN Declaration on Friendly Relations and the System of Sources of International Law, Alphen aan den Rijn, 1979.

\textsuperscript{16} R. Rosenstock, The Declaration on Principles of International Law Concerning Friendly Relations, 65 AJIL 713 (1971)

\textsuperscript{17} Id.

deception, physical attack, psychological operations, electronic warfare and special information operations.¹⁹

The dependence of the global community on computer technology in both military and civilian sectors has only increased with each passing decade. Significantly, the use of computers and computer networks has become far more than a matter of convenience – in several cases they are intrinsically connected to survival. For example, international air traffic control relies almost completely on linked computer networks as do several other sectors such as telecommunications, emergency response, electricity generation and railways.²⁰ Hand in hand with the spread of technology in the civilian sector is the increased application of computer in the military. Since the success of computer technology in the 1990-1991 Gulf War, the use of computer-enabled logistics, communications, intelligence, guidance systems and force application on the battlefields of the twenty first century has increased significantly.²¹

Interestingly, it is this near universality of computerization in both civilian and military capacities which has created a new enhanced degree of vulnerability for any computerized system. Whether quantitative or qualitative in nature, the incredible advances made possible by breakthroughs in computer technology have given rise to the possibility of civil and military systems being increasingly exposed to the threat of exploitation by a wide range of opponents. Indeed anyone from an economic, political or military competitor to a radical terrorist outfit or criminal ring may utilize these newfound vulnerabilities to cause widespread damage and destruction through CNA.

The scope for utilization of CNA is immense. Opponents of developed nations, who cannot hope to prevail on the battlefield, or even in the boardroom due to the technological and fiscal


²⁰ Id.

superiority of these states, may turn to CNA in order to compete asymmetrically with such
developed states. Such opponents will not seek to counter its opponent’s strengths, head on,
but rather, circuitously, employing unorthodox means such as CNA to strike at important
centers of gravity. Thus, the impact of CNA is similar in this respect to that of possession of
weapons of mass destruction (WMD) to offset conventional military and economic
weaknesses. It offers analogous asymmetrical benefits.

One such major benefit is that, based on a traditional analysis of the prohibition of use of
force doctrine, CNA does not meet the threshold of force in international law. As such, CNA
will not merit a response involving the use of force as it itself. Due to this factor and the
potentially grave impact of a CNA on a state’s infrastructure, it can prove a high gain, low
risk option for a state, which would otherwise be outclassed militarily and economically. The
risk posed is further heightened by the fact that militarily and economically developed
nations are heavily reliant on computer systems, thus providing a whole host of attractive
potential targets for a cyber-strike. Thus, cyber-attacks can be used to simply shut off the
essential electricity generation facilities to cut power to an opponent’s control center by
causing its computer network to malfunction via a set of cyber commands transmitted from
one system to another. This example clearly encapsulates the fourfold manner in which a
CNA changes the scope of modern warfare.22 First, it creates a whole new category of targets
which were earlier largely out of reach. Second, it cuts out the need to employ kinetic force to
destroy a target by creating a similar impact through the transmission of a few coded
commands. Third, while it removes the need to actually have to physically destroy an
opponent’s strategic asset in order to gain an advantage – it can create the same advantage by
simply shutting down one of many key functions or services or by altering or misdirecting
data. Fourth, CNA stretches the traditional notion of territorial integrity since in most cases
CNA will not involve the crossing of political borders by any tangible physical weapon of the
attacker be it military personnel, equipment or projectiles.

22 Schmitt, supra note 19, 888.
V. FITTING CNA INTO THE DEFINITION OF ‘FORCE’ IN INTERNATIONAL LAW

There are two parallel schools of thought with regard to the definition of ‘force’ in the UN Charter. The traditional approach seeks to restrict ‘force’ to conventional armed or military attacks. The more modern outlook on the other hand, seeks to avoid an instrument based conceptualization altogether, instead preferring to rely more on the effect of an attack rather than the instrument employed to see if it meets the threshold of ‘force’. Ironically, the two schools often rely on similar source material to support radically different arguments.23

Traditional Notions of ‘Force’ in International Law – Excluding CNA from the ambit of ‘Force’

One commonly accepted conceptualization of force is from the positivist school, which seeks to propagate the idea that the term ‘force’ must be taken literally.24 The positivist school agrees that the term ‘force’ lacks a definitive meaning.25 However, scholars rely on the fact that the Vienna Convention on the Law of Treaties, 1969 stipulates that international instruments may be interpreted as per their ordinary meaning and context.26 To understand context, one would have to examine several devices, among them, the preamble of the international instrument to be interpreted.27

In this regard, positivist jurists point to the fact that the Preamble of the UN Charter restricts the meaning of ‘force’ by stating that armed force should not be used save in common

23 By way of explanation, the source material referred to above includes treaties, customary international law and other international law doctrines which speak of the prohibition of the use or threat of use of force.
24 Matthew C. Waxman, Cyber Attacks as “Force” under UN Charter Article 2(4) in INTERNATIONAL LAW AND THE CHANGING CHARACTER OF WAR 45-46 (Raul A. Pedrozo and DariaP. Wollschlaeger eds.)
25 DINSTEIN, supra note 5, at 88.
26 Vienna Convention on Law of Treaties, 1969, art. 31(1) [hereinafter VCLT].
interest.\textsuperscript{28} Thus, the Preamble conceptualizes ‘force’ in two specific scenarios—first, in terms of a prohibition of threat or use of force (as seen in Article 2(4) of the Charter) and second, in terms of the exception to the prohibition, wherein force can be used in common interest (collective security as shown by Charter VII of the UN Charter). The fact that the term ‘armed’ qualifies the term ‘force’ in the Preamble as well as in Chapter VII establishes that ‘force’ in the UN Charter must refer to armed force alone.\textsuperscript{29} As a result, according to jurists belonging to the positivist school, the interpretation of ‘force’ must be in the nature of armed force.\textsuperscript{30}

Apart from a bare interpretation of the Charter, jurists who subscribe to the traditional school of thought point to the fact that the \textit{travaux preparatoires} also state that a prohibition on military force does not include prohibition on economic and political pressures. This creates a clear line of differentiation between armed force and economic sanctions or political boycotts.\textsuperscript{31} When the Charter was being drafted, there was a motion to include economic sanctions within the ambit of force. This motion was rejected by the drafters. This clearly shows that the intention of the drafters of the UN Charter was always to restrict the ambit of the term force to conventional kinetic force. Moreover, this interpretation of ‘force’ has also been endorsed by various jurists.\textsuperscript{32}

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28 U.N. Charter, \textit{supra} note 5, Preamble. \\
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Furthermore, unequivocal state practice characterizing cyber-attacks as uses of ‘force’ is lacking. This is due to the Article 2(4) prohibition extending solely to state action. Very few states have definitively been identified as the initiator of cyber operations that constitute use of force. While some have argued that the International Court of Justice has sought to extend the understanding of ‘force’ in international law to include not just conventional kinetic attacks, but also attacks by weapons as varied as chemical, biological and nuclear weapons, jurists of the traditional positivist school believe that a clear distinction can be drawn between such weapons and CNA. First, such weapons cause death and devastation on a massive scale. Second, they operate on the same principle as a conventional warhead, i.e. a projectile with a deadly payload is launched at a target. Both these attributes effectively put such weapons in a class of their own. In fact, each of these types of weapons has one or more treaties to specifically prohibit or regulate their use. The only reason they have been clubbed under the Article 2(4) prohibition is due to the inherent similarity in terms of consequence between the use of such a weapon and the deployment of a conventional military warhead. Thus, the so called extension of the ambit of Article 2(4) to such weapons would not allow for the application of Article 2(4) to CNA on the same reasoning.

Countering Traditional Arguments – ‘Force’ seen in a New Light

Although textually sound, when viewed within the narrow context of treaty law, the positivist approach does not properly reflect the realities underlying the prohibition of use of force. It must be remembered that the UN Charter was drawn up at a time when cyber operations had not been contemplated. Modern methods of warfare have challenged the traditional interpretation of ‘force’ and such challenge has come by way of differing interpretations prevalent under customary international law. The desire for a broader interpretation of ‘force’ surfaced during the drafting of the General Assembly’s Declaration of Friendly Relations.

34 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Report 226, at 244, ¶ 39
Brazil raised a motion to include economic sanctions and diplomatic boycott within the ambit of force. While the motion failed to get the required number of votes, it was not rejected out of hand as a similar motion had been at the time of the drafting of the Charter.

Apart from an outright attempt to change the conceptualization of force, this prohibition has undergone significant evolution. The prohibition of use of force is a *jus cogens* norm.\(^{36}\) As such, in order to allow such a peremptory norm to further the objectives of the UN Charter\(^ {37}\), the interpretation of ‘force’ in the changed paradigm of warfare brought about by the modern era, must take future developments into account.\(^ {38}\)

In this changed paradigm, an alternate interpretation of Article 2(4) becomes necessary. Such an alternate view suggests that the prohibition of the use of force applies “to any use of force, regardless of the weapons employed”.\(^ {39}\) Thus, mere usage of a computer as opposed to conventional weapons does not disqualify cyber operations from constituting a prohibited use of force.\(^ {40}\) This view would shift the focus of analysis of ‘force’ in international law from one which looks at the instrument involved to one which examines the purpose and general consequences of an action.\(^ {41}\) Kinetic military force is simply one form of force which produces a particular type of destructive effect. It is the most well-known and hence the

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40 INTERNATIONAL GROUP OF EXPERTS, NATO CCD COE, *TALLIN MANUAL ON INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE: PREPARED BY THE INTERNATIONAL GROUP OF EXPERTS AT THE INVITATION OF THE NATO CENTRE FOR CYBER DEFENCE CENTRE OF EXCELLENCE 45* (2013) [hereinafter TALLIN MANUAL].

41 Waxman, *supra* note 24, at 46
easiest to observe and identify. However, with the rise of modern warfare technologies over the latter half of the last century, some states\(^{42}\) have pushed the notion that ‘force’ includes other forms of pressure that threaten state autonomy.\(^{43}\)

The International Court of Justice has in fact in its judgments over the latter half of the previous century taken note of the multifarious nature of ‘force’. The Court has recognized in the *Nicaragua* case that there exists a normative ‘gap’ in international law between ‘force’ and an ‘armed attack’. The Court found that there are “*measures which do not constitute an armed attack but may nevertheless involve a use of force*\(^{44}\)” and distinguished “*the most grave forms of the use of force from other less grave forms.*\(^{45}\)” This means that there is a normative framework which classifies all armed attacks as uses of forces, but not all uses of force are armed attacks. This is clearly seen from two provisions of the UN Charter. *First*, the drafters chose to restrict the manner in which the UN Security Council can respond to breaches of international peace and security to simply conventional military measures by specifically mentioning the words ‘armed force’, while leaving out the term ‘armed’ from the prohibition of the use or threat of force in Article 2(4). *Second*, the drafters chose to use of the term ‘armed attack’ instead of ‘use of force’ in Article 51 (which deals with self-defence). Thus, based on a test of ‘scale and effects’\(^{46}\), it is the end result of an act that must be considered to ascertain whether an event amounts to a use of force.\(^{47}\) The International Court of Justice has in fact, in the *Legality of Nuclear Weapons* Advisory Opinion advocated a consequence or effect-based rather than an instrument-based test for determining if ‘force’

\(^{42}\) Most notably developing nations during the period of the Cold War when there was a quantum leap in the manufacture of weaponry due to the arms race between the Soviet Union and the United States of America.


\(^{44}\) Nicaragua v. U.S., *supra* note 2, ¶ 195

\(^{45}\) *Id.*


The Court in this case, states that the provisions of the UN Charter prohibiting the use of force,

“apply to any use of force, regardless of the weapons employed. The Charter neither expressly prohibits, nor permits, the use of any specific weapon, including nuclear weapons. A weapon that is already unlawful per se, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the Charter.”  

These words of the Court nullify the reasoning that due to the ability of certain weapons (such as chemical, nuclear or biological warheads) to cause mass destruction on a scale similar to kinetic weapons, they can be treated as a class unto themselves. As a result, the narrow interpretation of ‘force’ given by the positivist jurists can be widened just far enough to accommodate this special class. The Court has thus unequivocally put to rest that fact that the words of the Charter in Article 2(4) do not categorize force in any manner, but applies across the board to the use or threat of use of all manner of hostile force. The intention of the drafters of the Charter therefore is not to specify that it is illegal to use certain weapons by virtue of their nature, but to ensure international peace and security by making sure that no matter what the nature of the weapon is, if it is capable of causing destruction, its use is prohibited. Thus, in the context of CNA, when the effects of cyber operations, direct or indirect, have consequences similar to kinetic, chemical or biological force, regardless of their magnitude and duration, they would reach the threshold of norm embodied in Article 2(4). Hence, cyber operations are understood to be prohibited under Art 2(4).

48 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Report 226, at 244, ¶ 39

49 Id.


Such an approach is increasingly gaining favour in the international community. Michael N. Schmitt, in a seminal article on this very issue, suggests a set of criteria to determine whether a cyber-attack constitutes force.\(^{53}\) In his opinion, connecting CNA to force requires consideration of multiple factors that characterize military attacks, including severity, immediacy, directness, invasiveness, measurability and presumptive legitimacy.\(^{54}\) Richard A. Clarke, the former Special Advisor to the United States President on Cyber Security, proposed a doctrine called ‘cyber equivalency’ by way of which cyber-attacks are to be judged by their consequences and not the weapons used to create these consequences. They would be judged as if they were kinetic attacks, and may be responded to by kinetic attacks, or other means.\(^{55}\) Other legal experts have proposed similar tests emphasizing effects.\(^{56}\)

Another possible interpretation of Article 2(4), though admittedly, one which lacks the significant backing in the academic community is focused on the violation and defence of rights; especially those that protect a state’s right to freedom from interference in its internal affairs.\(^{57}\) Such an approach potentially links ‘force’ to improper intrusions into the internal affairs of another sovereign state, rather than a narrow set of means and instruments. During the early years of the United Nations, this view was advocated by again a set of developing countries looking to break the hegemony of the select few developed world powers on tenets of international law and justice.\(^{58}\) Aside from the relatively shaky textual support for this

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52. Christopher Greenwood, Self-Defence, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Jan. 5, 2012; INTERNATIONAL GROUP OF EXPERTS, NATO CCD COE, TALLIN MANUAL, supra note 40.

53. Schmitt, supra note 19, at 914-915.

54. Id.

55. RICHARD A. CLARKE, CYBER WAR 178 (2010)


57. Waxman, supra note 24, at 46

58. Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (Dec. 21, 1965) (“all . . . forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned” and “No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to
approach, realistically speaking, such an approach would effectively mean weaving together
two basic principles of international law — prohibition of use of force and non-intervention.
This would create widespread confusion as to which principle would apply in a specific
scenario, what the thresholds for action by an overarching body like the United Nations
would be and several other issues. However, it must be said that this approach suggests
possible analogies with cyber-attacks and other covert operations aimed at undermining
political and economic systems.

VI. FILLING THE GAPS – FITTING CNA INTO CONTEMPORARY THEORIES REGARDING THE
PROHIBITION OF THE USE OR THREAT OF USE OF FORCE

Based largely on historical precedents, nations appear to agree that a variety of unfriendly
actions, including unfavourable trade decisions, space-based surveillance, boycotts, severance
of diplomatic relations, denial of communications, espionage, economic competition or
sanctions, and economic and political coercion do not rise to the threshold of a use of force,
regardless of the scale of their effects. Only an attack which causes some physical damage or
loss of life and property, similar to a military strike would qualify as a use of force under the
scale and effects test. However, it is not enough simply to classify cyber operations in this
theoretical milieu. The reason for this is that cyber-attacks possess certain unique
characteristics which differentiate them from both conventional military ordnance as well as
the other methods of intervention and surveillance mentioned above. This necessitates a
different approach towards any legal analysis undertaken regarding the status of CNA in
international law.

This approach requires not just a theoretical consideration of international law principles, but
also their practical application in the international relations of the present day. On such a
more practical note, it must be investigated whether a nation is the subject of a recurring set
of cyber-attacks or if a state wishes to conduct such a cyber-attack without intending to give
the other side a legal basis for regarding its action as a catalyst for a general state of

obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of
any kind.”)
hostilities.\textsuperscript{59} In such a situation, two possible scenarios emerge. The first is if the attack has a destructive effect similar to that of a kinetic or conventional attack. In such a scenario, irrespective of the fact that it is a cyber-operation, such an attack is a use of force. In terms of legal approaches, this form of attack is easier to classify. A simple, largely non-controversial application of the effects-based method would classify such a CNA as a use of force in international law. Such a view has now been accepted by a number of jurists and scholars in this field.\textsuperscript{60} However, as per the second scenario, if the attack does not reach this threshold in terms of effect, a more precise test must be developed in order to determine if there has been a use of force or not.

The reason why such a test is necessary is because the vast majority of cyber operations do not look to cause permanent damage to any system. Attacks generally look to inconvenience a user, denying him the ability to properly utilize the subject of attack. Such a denial of service may have an effect as crippling as a conventional attack, but as per the conventional approach or even the scale and effects test, would not qualify as use of force. The diverse nature of CNA allows for methods such as the use of Trojan horses, viruses, and malicious codes, hacker activities through radio waves or international communications networks, which have the capability to destroy information systems or functions relying on them.\textsuperscript{61} Such measures may entail disablement or destruction of infrastructure by remotely taking control of their supervisory control and data acquisition (‘SCADA’) systems.\textsuperscript{62} Attacks such as the ones in Estonia and Georgia or the use of the Stuxnet virus on the Iranian nuclear program are good examples of this approach. In Estonia and Georgia, computer systems in parliament, hospitals, emergency call systems, banks and other targets were forced to shut

\textsuperscript{59} Herbert S. Lin, \textit{Offensive Cyber Operations and the Use of Force}, 4 64 JOURNAL OF NATIONAL LAW AND POLICY 72 (2010).

\textsuperscript{60} Schmitt, \textit{supra} note 19; Dinstein, \textit{supra} note 5; Johann-Christoph Woltag, \textit{Cyber Warfare, in} MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW (Rudiger Wolfrum ed., 2010)

\textsuperscript{61} Waxman, \textit{supra} note 32, at 11.

\textsuperscript{62} Johann-Christoph Woltag, \textit{Cyber Warfare, in} MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW (Rudiger Wolfrum ed., 2010).
down. The Stuxnet virus, used on the Iranian nuclear program, infected hundreds of computers in main operating systems of the Bushehr and Natanz nuclear facilities forcing them to shut down temporarily. Both these attacks show that cyber operations which do not cause physical damage, but simply prevent the use of the affected systems, can be just as harmful as those that cause destruction. Therefore, there is a clear need to analyze the nature of these attacks in light of the use of force discussion.

The nine criteria developed by Michael N. Schmitt as a test to determine if a cyber-attack constitutes force is fairly comprehensive in that it looks at criteria as varied as the severity of the attack, its immediacy, directness, degree of invasiveness, measurability and presumptive legitimacy in an attempt to classify the consequences of such CNA as falling within the extremes of simple economic coercion and all-out armed conflict.

However, even under the nine-fold test developed by Schmitt, the three sets of attack mentioned above (i.e the attacks in Georgia and Estonia, as well as the planting of the Stuxnet virus) would not qualify as use of force under the effects-based model. They were never intended to cause damage. At maximum, the attacks in Estonia and Georgia were meant to cause inconvenience to the authorities whilst the purported aim of the Stuxnet virus was to delay the development of a nuclear weapon in Iran. Given that such complexities allow cyber operations of this nature to escape the tag of use of ‘force’, it is highly probably that they will become regular features of military strategy in the near future. Their strategic importance is also borne out of the fact that CNA is largely undetectable. Only a few nations of the world today have the capacity to track and trace a CNA to its source. Evidence of the fact may be found in the three examples cited above. While there is some speculation that Russian authorities were behind the attacks in Estonia and Georgia, in an attempt to destabilize these nations, nothing has been proven till date. Similarly, while the Iranian government


65 Shackelford, supra note 63, at 208.
proclaims that Israeli or Western intelligence agencies launched Stuxnet in order to sabotage the Iranian nuclear program, they are unable to pin down the blame on any one state due to the fact that they are unable to trace with any degree of certainty the source of the virus.

However, there can be no doubt that the impact of such operations is antithetical to the principles of peaceful settlement of disputes and non-intervention in the sovereign territory of other states. Thus, teleologically, even if cyber defence strategies employ non-violent means, if they are coercive, they may not circumvent the Art 2(4) prohibition since they would still be contrary to the principles of the UN as they constitute breaches of peace. Jurisprudence on such ideas is however severely limited.

Some scholars are of the opinion that given the unique nature of CNA, it should be subjected to a discreet and separate body of law formulated solely for its regulation. While it is true that given the complexities of warfare in cyberspace, the concept of CNA sits uneasily with the existing laws of war, the solution to these complexities is not to carve out a niche for cyberspace in international law. One of the main reasons against such a move would be implementation. International law is implemented on the basis of state consent. Hence any new treaty on cyber-attacks could simply be ignored by states which feel the military and strategic benefits of CNA to their individual causes outweigh the need for regulation by the international community. Further, while it may seem difficult to fit CNA within the broad contours of international law as it stands today, finding a suitable definition for CNA given its rapidly evolving nature is nigh on impossible. Even if it were possible to categorize each and every possible type of CNA and every avenue from where an attack might occur, such a list would become outdated the moment a newer and more effective technology for propagating attacks was invented. Law cannot hope to keep pace with the speed of technological innovation in this regard. Hence, it becomes necessary to explore other way of

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67 Michael Schmitt, supra note 19, 912 (stating that though Article 41 of the UN Charter cites “interruption of... communication” as a “measure not involving armed force”, some forms of computer network attack would certainly fall within the ambit of his characterization. However, many forms would not. Furthermore, the drafters of the UN Charter could not have contemplated cyber-attacks and, thus, to reason that cyber-attack is a “measure not involving armed force” by virtue of Article 41 is over-reaching).
legally regulating CNA. It is true that the considerable legal opacity surrounding this largely obscure operational environment means that international law required a purposive interpretation in order to be able to apply to CNA. However, it may be argued that the current apathy in this regard will only lead to a continuing definitional vacuum which in turn would encourage an ‘offensive incentive’. In other words, the longer the international community waits to resolve this controversy, the more attractive and lucrative will offensive cyber operations that undercut the ‘use of force’ threshold seem to belligerent states and non-state actors. Since this threshold is ultimately in the eye of the beholder, it is only a matter of time before one state’s cyber espionage is another state’s cyber-attack. If the line between spying and attacking in cyberspace has to be clarified retrospectively, it may be too late. Since it has already been established that the law cannot keep pace with the science of CNA, the only viable method left to the international community is to use the broad principles of existing international law to prevent the spread of cyber-attacks. Evolving legal principles developed in the past to suit the needs of the present is the only way of ensuring the law keeps pace with that which it seeks to regulate and is not lagging behind.

In this regard, the key to justifying the widening of the ‘use of force’ threshold lies in the intention behind its establishment in the first place. It may be argued that the threshold of ‘force’ extends to any situation when death or destruction of property is a likely possibility. The intent behind prohibiting the use of force was to encourage peaceful settlement of disputes. These two notions are two sides of the same coin. By allowing CNA to slip under the threshold of ‘force’, the international community is doing the concept of peaceful settlement of disputes a disservice. This is due to the fact that, CNA provides a new and effective alternative method of conflict resolution, albeit one which has a huge scope for destructive consequences. Thus, a clear mechanism must be developed by which the prohibition on the use of force can be extended to CNA in a viable manner. Any such mechanism would have to look into two aspects—identification and consequence. With regard to identification, the key challenge would be to distinguish between cyber espionage, which has long been deemed acceptable by the international community and cyber-attack.

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68 Untangling Attribution: Moving to Accountability in Cyberspace, U.S. House of Representatives Committee on Science and Technology (2010) (statement of Robert K. Knake, Senior Fellow for Cyber
In this regard, the nine criteria laid down by Schmitt are a step in the right direction. However, these criteria require extensive refinement. One must be able to tell to what extent any one criterion will influence the final decision on whether an attack is liable to be outlawed. Also, one must be able to resolve conflicts between conflicting criteria such as severity, measurability and presumptive legality. Possibly the most effective method doing this would be one where certain criteria are considered to be trigger criteria while others are considered to be a question of intent. For example, if the severity of an attack is such that it looks to destroy life or property, not physically, but by invasion of secure systems and theft of sensitive data, the same may be categorized as a use of force on a preliminary analysis of the circumstances alone. However, if a cyber-attack is meant to simply shut down the systems of an opponent, a more thorough examination of intention must be undertaken. If the intention behind such a measure is to for instance, topple an existing government, these attacks would be categorized as illegal. However, if the intention were more benign, some amount of leeway could be granted. This is due to the fact that cyberspace has myriad applications not all of which are inherently sinister. Once the process of identification and classification is complete, deciding the consequences of this breach of international law would be a relatively simple matter. The Charter grants the UN Security Council extensive powers to ensure peace and security and several agencies exist which are able to exercise a wide array of measures against a defaulting state. Deciding consequences would be a simple matter of matching a particular type of attack with a particular response as is the case with an armed attack and self-defence in international law presently.

VII. CONCLUSION

Since time immemorial, there has always been an uneasy coexistence between technology and warfare. Each feeds off the other, creating the basis for both progress and eventual doom. In the midst of this cycle, the law seeks to ensure that humanity maintains some degree of
acceptable conduct. To keep abreast of the standards of acceptability, the law has had to keep growing and evolving. In fact, with regard to the laws of armed conflict, the norm prohibiting the use of force itself has over the years undergone several evolutions. In its infancy, it was simply characterized as force related to military attacks. As time went by, jurisprudence expanded the scope of the norm to include activities ancillary to military attacks as well. Tests such as the “effective control” test\(^{69}\) and “overall control” test\(^{70}\) sought to again reform how this prohibition would apply. The ambit of ‘force’ was also significantly altered to take into consideration technological developments such as the birth of nuclear, chemical and biological weapons.\(^{71}\) Thus, the norm prohibiting use of force has now reached a sufficient degree of sophistication and flexibility which allows us to detract from a purely instrument based approach, to an approach aimed more at the consequences of state action. Such an approach is seen as more viable, given that the object of this principle is to ensure global peace and security.

Thus, in the absence of any global instrument to regulate CNA, cyber operations have to be brought within the ambit of the prohibition of use of force. Such attacks aim to destabilize and disrupt state activities, often lead to destruction of property and have the potential to cause loss of life. The most viable method to check and regulate CNA is to apply the existing techniques of interpretation and develop a working model of classification of different forms of CNA under the threshold of ‘force’ as per the norm embodied in Article 2(4) of the Charter. While this would require showing a certain degree of disregard to the initial conceptualization of these principles, there can be no doubt that given the circumstances and the potential for destruction that a medium like CNA possesses, the end does justify the means. It is hoped that the world’s leaders will take cognizance of this grave threat and take positive steps to ensure that the full weight of the general framework of international law is brought to bear on cyber operations. It is safe to say, that we cannot afford a lacunae in the law in a field where the consequences of the same might be chaos and anarchy.

\(^{69}\) Nicaragua v. U.S., supra note 2

\(^{70}\) Prosecutor v. Dusko Tadic (Appeal Judgement), IT-94-1-A

ABSTRACT

The legal personality as well as the functional immunity of the United Nations (‘UN’) were established in the founding Charter of the UN. In addition to Article 105 of the UN Charter, the Convention on the Privileges and Immunities of the United Nations was adopted in 1946, further cementing the immunity of the United Nations. It is argued that the immunity of the UN also has a basis in customary international law. However, most of this issue is still unchartered territory and there is no consensus.

This note discusses certain developments in the concept of immunity of the UN through existing legal instruments and judicial decisions. The recent Haiti cholera case calls for re-evaluation of the basis of immunity of the UN and whether immunity can be claimed when the UN is responsible for breach of human rights obligations. Based on principles of international law, I conclude that the UN cannot claim immunity when it does not fulfil its obligations to provide an alternate mode of settlement or when it breaches its obligations under international human rights law.

I. INTRODUCTION

The law of immunity is one of the classical branches of international law.1 Norms regarding the special privileges and immunities of diplomats are among the oldest in international law. While these privileges and immunities were traditionally limited to heads of states as well as diplomatic representatives, there has been a gradual extension of these traditional privileges

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and immunities to also include international organisations.\textsuperscript{2} This trend indicates the increasing importance of international organisations, especially of the United Nations (‘UN’) as an actor in international affairs.\textsuperscript{3}

Part II of this essay deals with the theoretical basis of immunities for international organisations. Part III delineates the development of immunities with regard to the United Nations and the special challenges that it creates. In Part IV of this essay I analyse a few significant decisions on the issue of UN immunities. In Part V, I provide concluding remarks.

II. THE THEORETICAL BASIS OF IMMUNITY FOR INTERNATIONAL ORGANISATIONS

The basis of the jurisdictional immunity of international organisations is the ‘functional necessity’ theory, which means that international organisations should enjoy such immunities as are necessary for their effective functioning.\textsuperscript{4} They must not be impeded in their purpose by any form of vexatious litigation. When it comes to actual application of immunities, even though the instruments speak of functional immunity, this has led to \textit{de facto} absolute immunity of international organisations. The first reason for such an interpretation by Courts is the vagueness of the concept of “functional necessity”. The determination of the functional necessity of the organization is subjective and as aptly stated by Reinisch, “The fundamental problem is clearly that functional immunity means different, and indeed contradictory, things to different people or rather different judges and states.”\textsuperscript{5}

Michael Singer has argued that the attitude of States regarding granting jurisdictional immunity to international organisations of which it is a member is mostly ambivalent.\textsuperscript{6} On one hand, the State wants its domestic laws to be complied with within its territory. Further, it

\begin{itemize}
\item \textsuperscript{3} \textit{Id.}
\item \textsuperscript{4} \textit{Supra} note 1, at 132.
\item \textsuperscript{5} August Reinisch, \textit{International Organisations before National Courts} (2000).
\end{itemize}
also has an obligation to ensure that the rights of its citizens or persons within its territory are not violated. But on the other hand, the State being a member and having a stake in the international organization itself, would want to see the organisation fulfill its purposes. A logical conclusion is that lesser the interference of States, the more its functional independence and ability to fulfill its purposes. The plaintiffs in most cases filed in against international organisations are relatively powerless individuals or small corporations. Thus States do not want to go against the will of larger international organisations of which they are members themselves.

III. IMMUNITY OF THE UNITED NATIONS AS AN INTERNATIONAL ORGANISATION

When the UN was established in 1945, it was considered necessary to confer upon it the status of a legal person under the domestic law of its Member States, since such a domestic legal personality was a prerequisite to enable it to effectively perform its functions and manage numerous practical needs. Article 104 of the UN Charter states that the “Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.”

With regard to the question of privileges and immunities that the international organization should enjoy, a functional concept was adopted by the drafters of the UN Charter. Article 105, paragraph 1 states that “[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.” Under Article 105, paragraph 2, representatives of Members of the United Nations and officials of the Organisation are granted similar privileges and immunities on the basis of the functional theory. Paragraph 3 of Article 105 gives the General Assembly the power to

7  Id.
8  Id.
9  Id.
10  Id.
make recommendations regarding privileges and immunities or to propose a convention, which would become effective upon ratification by Members.\(^{12}\)

In pursuance of its powers under Article 105, paragraph 3 of the UN Charter, the General Assembly by Resolution 22(I) (1946) approved the ‘Convention on the Privileges and Immunities of the United Nations’ (‘Convention’) and proposed it for accession by each Member of the UN.\(^{13}\) The Convention is one of the most widely ratified instruments.\(^{14}\) As of April, 2015, the Convention has been ratified by 161 of the 193 UN Member States.\(^{15}\) The Convention’s core provision granting jurisdictional immunity is found in Article II, section 2, which runs as follows: “The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.\(^{16}\) Thus the effect of this Convention is that the United is granted immunity from every form of legal process in the absence of an express waiver.\(^{17}\) nd accepted by most of the members, asserts that the UN possesses juridical personality. The convention also provides for such matters as immunity from legal process of the property and officials of the UN.

While interpreting the articles of the Convention and other conventions which create juridical personality for these International Organizations, several member governments have, by domestic legislation, likened them to a “body corporate.”\(^{17}\) Even though the provisions in the UN Charter and the Convention on Privileges and Immunities of the UN deal with the concept of functional immunity, the UN has been granted absolute immunity from the

\(^{12}\) *Supra* note 2, at 515.


jurisdiction of various national courts of member states. The functional necessity rationale for immunity has rarely been questioned by Courts or decision makers.

The *de facto* “absolute” immunity of the United Nations is mitigated by Article VIII, Section 29, of the Convention which requires the United Nations to “make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party”. The General Convention’s obligation to provide for alternative dispute settlement in case of the Organization’s immunity from legal process can be regarded as an acknowledgment of the right of access to court as contained in all major human rights instruments. Yet, this obligation is only limited to obligations of a ‘private law character’ Thus, this does not address claims that arise in the ‘public law’ sphere. I will be discussing this and some other issues in the subsequent section.

**IV. Judicial Approach to the Immunity of the United Nations**

Due to its unique history and the broad and universal functions that it performs, the UN enjoys virtually absolute jurisdictional immunity. However, expansion in the activities performed by international organisations such as the UN couple with increased rights-awareness of those who might be adversely affected by the privileges and immunities of international organisations, has triggered questions about the legitimacy of absolute immunity from domestic jurisdiction. Recent cases indicate a trend of increasing willingness to challenge the immunity of the UN on the basis that such immunities violate the claimant’s rights of access to justice and right to a remedy.

In *Boimah v. United Nations General Assembly*, a suit was brought against the United Nations General Assembly alleging employment discrimination. Joseph Boimah, the plaintiff, was a temporary employee in the document department of the United Nations General Assembly.

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19 *Id.*

20 *Supra* note 6, at 56.

Assembly, and was subsequently dismissed in spite of his requests for a permanent position.\(^\text{22}\) He claimed that others with whom he had worked had been given permanent positions, and the department had continued to hire persons (presumably of different races or nationalities), while refusing to hire him on the ground that there were no vacancies.\(^\text{23}\) While deciding the case, the court cited Article 105(1) of the UN Charter, which states that UN shall enjoy privileges and immunities in the territory of its members as are necessary for fulfilment of its purposes.\(^\text{24}\) Further, the Court relied on Section 2 of the Convention which provides that the United Nations shall enjoy immunity from every form of legal process unless it has expressly waived its immunity. The Court held that the United Nations was immune from an employment discrimination suit brought by a temporary worker at the United Nations. Since it is clear from recent case law that an international organization’s self-regulation of its employment practices is an activity which is integral to the “fulfilment of its purposes”, immunity must extend to this area.\(^\text{25}\) The Court concluded that in the absence of an express waiver by the United Nations, the plaintiff's complaint would be dismissed.\(^\text{26}\) The emphasis on express waiver acknowledged that in order for international organizations to carry out their functions effectively, they should not be subject to suit unless immunity is expressly waived.\(^\text{27}\) Various such cases of employees taking actions against international organisations have caused debates regarding the extent of immunities that should be bestowed upon international organisations. Some scholars have argued that since employees will always be in a relatively inferior bargaining position, it would be difficult to obtain such a waiver of

\(^\text{22}\) Id. at 70.

\(^\text{23}\) Id. at 70.


\(^\text{25}\) Supra note 22, at 71.

\(^\text{26}\) Id.

\(^\text{27}\) Supra note 25.
immunity from international organisations.\textsuperscript{28} Thus, this requirement of express waiver provides limited or no redress for employees of international organisations.\textsuperscript{29}

In \textit{Mothers of Srebrenica et al v. The State of Netherlands and the United Nations},\textsuperscript{30} a claim was brought against both the Dutch government as well as the United Nations for the Srebenica tragedy that occurred in 1995. Srebrenica in Eastern Bosnia was attacked by Bosnian Serb forces resulting in the deaths of between 8,000 and 10,000 individuals. Members of Dutchbat, (the Dutch unit under the command of the UN) were in charge of the enclave that fell. Mothers of Srebrenica, a Dutch Association representing 6,000 survivors, along with other family members of the deceased, demanded compensation from the UN and the Netherlands alleging that both were responsible for the failure to prevent genocide at Srebrenica. The Supreme Court of Netherlands upheld that the UN enjoys absolute immunity from prosecution, even in light of the gravity of the accusations alleged by the Mothers of Srebrenica. The holding was premised on Article 105(1) of the UN Charter as well as Section 2 of the Convention. It was held that the accusation that the “UN was negligent in failing to prevent genocide is a serious accusation but not so compelling as to prevail over immunity.”\textsuperscript{31} In response to the plaintiffs’ claim that there was no alternate procedure that provided access to a court of law, the court expressed “regrets” that the UN has not provided for alternative proceedings in conformity with its obligations under Section 29 of the General Convention.\textsuperscript{32}

One of the most significant human rights challenge to the absolute jurisdictional immunity has been what is popularly known as the ‘\textbf{Haiti Cholera case}’. In October 2010, there was an outbreak of a cholera epidemic, which is now the largest in the world having killed over

\begin{flushleft}
\textsuperscript{28} \textit{Id.}
\textsuperscript{29} \textit{Id.}
\textsuperscript{31} \textit{Id} at 5.10.
\textsuperscript{32} \textit{Id.} At 5.13.
\end{flushleft}
8,000 people and sickened more than 600,000.\textsuperscript{33} The cholera outbreak is being directly attributed to UN peacekeeping troops from Nepal, a country that is the third largest contributor of forces to the UN Stabilization Mission in Haiti (“MINUSTAH”).\textsuperscript{34} The UN had deployed over 1,000 personnel from Nepal to Haiti without screening them for cholera, a disease that is endemic to Nepal and with which some of the personnel were infected. These recently transferred personnel discharged raw untreated sewage into the Meille Tributary, which flows into Haiti’s primary source of drinking water, the Artibonite River, causing an outbreak of cholera in Haiti. Various tortious and contractual compensations claim were brought against the United Nations by the victims of the Cholera epidemic alleging negligence, gross negligence and recklessness by the UN and MINUSTAH. Relying on its organizational immunity from suit, the U.N. refused to address the merits of the complaint or the factual question of how the epidemic started.\textsuperscript{35}

In a recent decision on January 9, 2015 the Southern District of New York Court in \textit{Delama Georges et al v. the UN},\textsuperscript{36} has held that the UN is immune from the suit. The Court based its finding on Article 105, paragraph 1 of the UN Charter as well as the provisions of the Convention which grant the UN immunity from legal process unless there is an express waiver of the immunity. In particular, the Court reiterated the requirement of an express waiver and since the waiver of immunity was not raised by either of the parties. The plaintiffs had also alleged that the defendants had failed to establish any alternate dispute resolution mechanism or claims commission for resolution of claims made by those who have been injured and survivors of victims. To this the Court responded “Nothing in the text of the CPIUN suggests that the absolute immunity of section 2 is conditioned on the UN’s


\textsuperscript{34} \textit{Id}.

\textsuperscript{35} \textit{Id}.

providing the alternative modes of settlement contemplated by section 29.”37 In effect, this implies that the UN’s failure to offer an alternate mode of settlement does not affect its position of immunity or the requirement of express waiver. A noteworthy contribution of this decision however, is the analysis of the language of Section 29 and whether the requirement of providing alternate modes of settlement is discretionary or mandatory. It was observed in this decision that the phrase that the UN “shall make provisions for appropriate modes of settlement of disputes” suggests that effective dispute resolution in private law matters is not merely discretionary and aspirational, but rather mandatory and perhaps enforceable.38 While this outcome was predicted and is consistent with a catena of decisions that have upheld UN immunity over the rights of individuals, this case has explored certain new dimensions such as the mandatory language of Section 29 with regard to private law matters. Subsequent to this decision, human rights lawyers in New York are preparing to file an appeal against the decision which if successful, may change the manner in which the United Nations can be held accountable for its actions.39

Courts have started noticing that there may be an incompatibility between the doctrine of absolute immunity for the UN and international human rights law. Some scholars have argued that the UN’s legal personality as enshrined in Article 104 of the UN Charter means that the UN is also bound by customary international law and international human rights law.40 The fact that the United Nations has an international legal personality has already been decided by the International Court of Justice in an advisory opinion, rendered in connection with a specific request by the General Assembly of the United Nations at its third session in the Reparation for Injuries case.41 The United Nations filed a suit in regard to its employees

37  Id. at p 7
who had been injured by the illegal act of a sovereign state while these employees were acting in an official capacity. In rendering an advisory opinion on this matter, the International Court of Justice held “that, in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a Member State, the United Nations as an Organization has the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage caused to the United Nations.” 42 The legal personality of the UN means that it has the capacity to enter into legal relations, as well as has legal rights and duties. 43 Since the legal personality of the UN has allowed it to enforce its rights as was done in the Reparations for Injuries case, by virtue of this legal personality it is also required to perform its legal duties and its obligations under international human rights law.

One of the fundamental tenets of international human rights law is that whenever a right is violated, a remedy must be provided. The UN claiming to be the world’s foremost promoter of human rights, its act of flouting responsibility behind claims of immunity is irreconcilable with the basic notions of justice. Further, the UN also has obligations to respect human rights under Articles 1(3), 55 and 56 of the UN Charter. Thus, the position that the immunity of the UN prevails over its international human rights obligations is untenable.

V. CONCLUSION

In the last 50 years, the UN has grown so powerful as an international organization that it may be said to influence every aspect of human life. 44 Even though the UN is presumably the world’s largest promoter of human rights, it has always relied on its immunity from jurisdiction as a shield from any suit or claim. Due to its history and the wide range of functions it has come to perform in the last few years, the time is ripe for the efficacy of the legal rules governing the organization to be re-evaluated. Due to increased rights awareness,

42 Id.


44 Supra note 14.
there has been a trend of cases where victims, employees, smaller organisations as well as corporations have posed serious challenges the immunity of the UN. While Courts are becoming more assertive in enforcing Section 29 and casting an obligation upon the UN to develop alternate dispute settlement mechanisms, there is also increasing support of the view among scholars that the UN having a legal personality, is itself bound by international human rights obligations, and the shield of immunity can no longer be used to deprive people of their fundamental rights of access to justice and access to a remedy.
DECIPHERING THE ‘GREY AREA’ IN BILATERAL INVESTMENT TREATIES: A STUDY OF ‘UMBRELLA CLAUSE’

Bhargav Kosuru* and Shlok Bolar**

ABSTRACT

Majority of Bilateral Investment treaties provide for a dispute resolution provision, i.e., the rationae materiae jurisdiction, which may extend to all/any obligations entered into with the foreign investors and the other Contracting Party. Such a provision which extends to providing blanket protection to foreign investors in case of breach of such obligation is known as an ‘umbrella clause’. Over the past decade, there has been a lot of ambiguity in determining the scope and applicability of the Umbrella clauses under the BITs. The International Centre for Settlement of Investment Disputes has rendered conflicting decisions regarding the same which made the law surrounding umbrella clauses ‘gray’ in its applicability. We are of the opinion that majority of these decisions are conflicting under the impression that adjudicatory bodies under the Contracts should have exclusive jurisdiction with respect to Contractual claims. The objective of this paper is to distinguish between such contractual and Treaty obligations and make efforts to reduce the downside of such interpretation by suggesting a suitable approach and argues in favor of the interests of bona fide foreign investors. We will elucidate various tests evolved by the ICSID while interpreting the umbrella clauses, and suggests the most robust approach for determining the matter. On the other hand, we will also discuss various practical difficulties which are ‘said to’ arise out of broad interpretation of umbrella clause that is said to result in multiple or parallel proceedings before the ICSID and the domestic fora along with internationally recognized doctrines of res judicata and lis pendens.

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I. INTRODUCTION

Throughout the past half-century, the field of international investment law has been largely defined by the rise of bilateral investment treaties (hereinafter referred to as ‘BIT’s for the sake of brevity).¹ Majority of cases in investment arbitration have been pivoted around BITs. These treaties typically provide for investor-State arbitration by offering consent to arbitration Tribunals. As the name suggests, a BIT is an agreement between two countries that governs the treatment of investments made in the territory of each state by individuals or companies from the other state.² These BIT’s usually embody dispute resolution clauses the ‘rationae materiae’³ jurisdiction (i.e., subject-matter jurisdiction) which is not homogeneous. Some BITs cover only disputes relating to an obligation under that agreement, others extend the jurisdiction to any kind of obligation arising out of investments (as described in the BIT).⁴ These clauses may not limit the scope of dispute resolution to the Contracting Parties only; some of these clauses broaden the obligation on part of the Contracting State by providing protection to foreign investor(s) who may enter into an investment agreement with the host State. These types of clauses are called as ‘umbrella clauses’. These provisions have also been referred to as ‘elevator clause’, ‘mirror effect clause’, ‘parallel effect clause’, and ‘pacta sunt servanda’⁵ clause.

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⁵ Latin for ‘agreements must be kept’.
An umbrella clause requires each party to the BIT to observe any obligations it may have entered into with regard to investments of nationals (or companies) of the other party. The idea behind the metaphor ‘umbrella clause’ is that it brings otherwise independent investment arrangements between a Contracting State and private investors from the other Contracting State under the treaty's ‘umbrella of protection’. The umbrella clause blurs the line between contract and treaty.

The provisions in BITs for investor-State arbitration are by no means concrete and standardized. Most of the BITs refer the matter to the International Centre for Settlement of Investment Disputes (hereinafter referred to as ‘ICSID’ for the sake of brevity) or the United Nations Commission on International Trade Law (hereinafter ‘UNCITRAL’) or other forms of arbitration are referred in the alternative. Our main focus in this paper is with respect to conflicting decisions rendered by ICSID. Certainly, this concern arises because of the deficiency of textual and interpretative guidance provided by investment treaties alleviating the multiple facets of umbrella clauses.

Further, ICSID has in various pronouncements, given diverse interpretations on the scope and applicability of umbrella clause. Having regard to the wording of most umbrella clauses, without a conceptual framework of their function, scope, and effect in mind, will scarcely solve the difficult interpretative conundrums associated with their relevance and implementation. The controversial question of the ‘umbrella clause’, as stated recently by Emmanuel Gaillard has, "divided practitioners and legal commentators and remains unsettled in the international arbitral case law". No issue in the field of investment

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8 YANNACA-SMALL K., *Supra* note

arbitration is more fundamental, or more disputed, than the distinction between treaty and contract,\textsuperscript{10} which is why the authors hereby make an effort to distinguish the same.

The question is whether, through an ‘umbrella clause’ in a BIT, sometimes also called an ‘observance of undertakings clause’, contractual claims of an investor having a contract either with the State or with an autonomous entity (an organ of the State) are automatically and \textit{ipso jure} transformed into treaty claims benefiting from the dispute settlement mechanism provided for in the BIT,\textsuperscript{11} as against the domestic courts of the host state which often have the exclusive jurisdiction with respect to the Contract. Before proceeding to the issues, let us first understand intention behind such clauses by studying the brief historical background and evolution of these umbrella clauses into investment treaties.

\begin{section}{II. Brief History of Umbrella Clauses}

The origin of umbrella clause can be traced back to a 1954 draft settlement agreement involving the Anglo-Iranian Oil Company's which included an ‘umbrella treaty’ between Iran and the United Kingdom incorporating a guarantee to protect the investor’s interests, "incorporated or referred to in a treaty between Iran and the United Kingdom in such a way that a breach of the contract or settlement shall be \textit{ipso facto} deemed to be a breach of the treaty."\textsuperscript{12}

The umbrella clause evolved further in the 1959 Abs-Shawcross Draft Convention of Investments Abroad.\textsuperscript{13} The authors explained that the umbrella clause is a reflection of

\begin{thebibliography}
\bibitem{11} El Paso Energy International Company v. The Argentina Republic, ICSID Case No. ARB/03/15, ¶ 70 (Decision on Jurisdiction)
\bibitem{12} Anthony C. Sinclair, The Origins of the Umbrella Clause in the International Law of Investment Protection, 20 Arb. Int'l 411 at 415-16, (2004); See Yannaca-Small, K., Supra Note
\bibitem{13} The text of the Abs-Shawcross Draft reprinted in The Proposed Convention to Protect Private Foreign Investment: A Round Table, 9 J. Pub. L. 115, 116-18 (1960); See Yannaca-Small, K., Supra Note
\end{thebibliography}
universally accepted principle of ‘pacta sunt servanda’. Later in 1967, ‘umbrella clause’ was present in Article 2 of OECD Draft Convention on the Protection of Foreign Property which provided that each Party should ensure protect the undertakings in relation to property of nationals of any other Party. Soon after, umbrella clauses had found their way into BITs, notably in the first known BIT i.e., the Germany-Pakistan BIT of 1959, which influenced the U.S. Model BIT in 1983 and Model BIT of Germany in 1991, which was later on followed by subsequent Model BIT’s. It is estimated that, of the 2500 or more BITs currently in existence approximately 40% contain an umbrella clause.

III. INTERPRETATIONS GIVEN TO UMBRELLA CLAUSE

The very first case examined by an international tribunal addressing an umbrella clause arose in 1998 in Fedax NV v. Republic of Venezuela, where the tribunal, completely unaware of its effects, gave no particular attention to the clause. Later in the case of Lanco

14 Ibid at p. 120
17 U.S. MODEL BIT, ARTICLE 11(4), (Jan. 21, 1983)
19 U.S. MODEL BIT, ARTICLE 11(2), (Feb. 24, 1984), Each Party shall observe any obligation it may have entered into with regard to investments; 1987 U.S. MODEL BIT ARTICLE 11(2), (Sept. 1987)
21 Fedax NV v Republic of Venezuela, ICSID Case No ARB/97/3, (Award on 9th March 1998)
22 YANNACA-SMALL, K., Supra Note 8
International Inc. v. The Argentine Republic, the Tribunal, while interpreting the umbrella clause, denied that an exclusive jurisdiction clause could exclude ICSID jurisdiction particularly relying on Article 26 of ICSID Convention. It held that the claims are not subject to the jurisdiction of the exclusive fora, because those claims are not based on the Contract but allege a cause of action under the BIT. In effect, once valid consent to arbitration is proven, any other forum should decline jurisdiction to address dispute. This is the landmark case, which recognized that contractual claims can be differentiated from treaty claims and are covered under BITs.

Lanco’s decision has been further referred by the Tribunal in Compañía De Aguas Del Aconquija S.A. and Vivendi Universal v. Argentine Republic (hereinafter ‘Vivendi Annulment case’). The ICSID Tribunal held that the claim put forth by the claimant under BIT could be distinguished from that of a contractual claim and thus, the exclusive jurisdiction clause in the Concession Contract did not bar the jurisdiction of ICSID even if the matter was presented before such Tribunal in the first instance. This case has later been used in majority of cases while giving effect to the umbrella clauses.

Interpretation given in Pakistan and Philippines

In the period of 2003 – 04, ICSID has, in SGS v. Pakistan and SGS v. Philippines come to two different conclusions regarding the scope and applicability of umbrella clauses. These two landmark cases have redefined the umbrella clauses and play a crucial role in understanding this topic.

23 Lanco International Inc. v. The Argentine Republic, ICSID Case No. ARB/97/6, (Jurisdiction award on December 8, 1998)

24 Consent of the Parties, ICSID CONVENTION, REGULATIONS AND RULES, ARTICLE 26, ICSID/15/REV. 1, (January 2003)


26 SGS v. Pakistan, ICSID Case No. ARB/01/13 (Decision on Jurisdiction, August 3rd, 2003)

27 SGS v. Philippines, ICSID Case No. ARB/02/6 (Decision on Jurisdiction, January 29th, 2004)
In *SGS v. Pakistan*\(^{28}\), the claimant had entered into a pre-shipment inspection contract with the government of Pakistan. The BIT contained a provision for dispute resolution in the ICSID, and also an umbrella clause that assured the adherence of commitments the parties have entered into with respect to the investments of the investors of the other party. It was a contended by Pakistan that ICSID did not have jurisdiction over contractual claims and that even assuming it has, it cannot interfere as the parties have agreed on the exclusive forum for dispute resolution in the Contract which should prevail over the international forum under BIT. SGS on the other hand contended that the umbrella clause in the BIT elevated all contractual disputes to the status of investment treaty disputes. The Tribunal held that the umbrella clause was merely procedural and did not contain any substantive legal obligation. Rejecting the arguments made by SGS, it held that such elevation of contractual claims into international obligations would result in opening of floodgates against the consent of the States and the Tribunal declined to assume jurisdiction over contractual claims.\(^{29}\)

In *SGS v. Philippines*,\(^ {30}\) the Tribunal gave a conflicting interpretation to the umbrella clause in Switzerland-Philippines BIT. The dispute arose concerning how much the Philippines owed SGS for unpaid comprehensive import supervision services provided under a contract between the parties (the ‘CISS Agreement’). Philippines objected to the tribunal’s jurisdiction on the ground that the claim was ‘purely contractual’ in nature and therefore subject to the jurisdiction of forum mentioned in the clause in the CISS agreement, being courts of the Philippines.\(^ {31}\) SGS countered that jurisdiction was found in Article 25(1) of the ICSID

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28 Pakistan, *Supra note 30*

29 *Ibid*, ¶ 190

30 Philippines, *Supra note 31*

31 *Ibid*, ¶¶ 17 and 22
Convention,\textsuperscript{32} which provided for jurisdiction over a legal dispute arising directly out of an investment when there was consent by the parties in writing.\textsuperscript{33}

The tribunal gave a broad interpretation to the umbrella clause while disagreeing with the decision in Pakistan,\textsuperscript{34} the Tribunal held that umbrella clause did elevate contract dispute to treaty obligation, but made a distinction between ‘jurisdiction’ and ‘admissibility’ and said that specific dispute resolution clause entered into by the parties in the Contract will prevail over the umbrella clause which is a general provision in the BIT even though there it has jurisdiction based on the maxim, \textit{generalia specialibus non derogant}.\textsuperscript{35}

In our view, the interpretation rendered in \textit{SGS v. Philippines}\textsuperscript{36} is to an extent useful for the protection of foreign investors. Even though the Tribunal ultimately held that the case is inadmissible owing to the exclusive jurisdiction clause, it accepted in theory that the relevant umbrella clause was valid in terms of its purpose to elevate contractual breaches into treaty breaches, and it is within the powers of an ICSID tribunal to exercise jurisdiction over a contractual dispute brought under the protection of an umbrella clause.\textsuperscript{37} The approach taken by \textit{SGS v. Philippines}\textsuperscript{38} was endorsed by various authors\textsuperscript{39} and celebrated as an \textit{integrationist} approach trying to harmonize overlapping norms and procedures in a

\begin{footnotesize}
\begin{enumerate}
\item Jurisdiction of the Centre, ICSID CONVENTION, REGULATIONS AND RULES, ARTICLE 25, ICSID/15/REV. 1, (January 2003)
\item \textit{Ibid}, ¶ 16; ICSID CONVENTION, REGULATIONS AND RULES, ARTICLE 25, ICSID/15/REV. 1, (January 2003)
\item Pakistan, \textit{Supra} note 30
\item Latin maxim of interpretation: the provisions of a general statute must yield to those of a special one.
\item \textit{Philippines}, \textit{Supra} note 31
\item \textit{Ibid}, See also \textsc{Merić Sar}, \textit{Afraid of the Shadows?: Revisiting Umbrella Clauses in Investor-State Dispute Resolution}, \url{http://www.academia.edu/8776513/AFRAID_OF_THE_SHADOWS_REVISITING_UMBRELLA_CLAUSES_IN_INVESTOR-STATE_DISPUTE_RESOLUTION}
\item \textit{Philippines}, \textit{Supra} note 31
\item \textsc{Meric Sar}, \textit{Supra} note 41; \textsc{Liber Amicorum in Honour of Robert Briner}, ICC PUBLISHING, PUBLICATION 693, at p. 601
\end{enumerate}
\end{footnotesize}
pragmatic fashion. We are of the opinion that *Philippines* was a successful attempt towards broadening the scope of umbrella clause, however, it is not beneficial to the investors if they are obliged to approach the domestic tribunal in the first instance.

**Contractual claims and Treaty Claims**

**Broad Interpretation:**

Initial attempt was made by the Tribunal in *Philippines* so as to include contractual claims within the ambit of treaty obligation. This interpretation of umbrella clause was followed in *Eureko B. V. v. Poland*; the Tribunal, held that the smallest of obligations of the Contracting State with regard to investments was protected by the BIT and could give rise to jurisdiction under the treaty to ICSID, which however received strong dissent of the arbitrator Mr. Jerzy Rajski. In this case, the Tribunal also explicitly rejected the argument that a distinction should be made between *acta iure imperii* (Government acts) and *acta iure gestiones* (commercial acts) of a State in relation with the application of an umbrella clause. We will be discussing the difference between state acting as a merchant and as a sovereign and the evolution of sovereignty test subsequently.

The Tribunal in the case of *Noble Ventures Inc. v. Romania*, enhanced the scope of umbrella clauses so as to internationalize every contractual claim. The Tribunal followed the same line of reasoning, stating that "an umbrella clause is usually seen as transforming

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40 *Philippines, Supra* note 31

41 *Ibid*


44 *Eureko B.V., Supra* note 46, ¶¶ 115-134; *see also* Duke Energy Electroquil Partners & Electroquil S.A. *v. Republic of Ecuador, ICSID Case No. ARB/04/19, ¶ 325, (World Bank), (Award of August 18, 2008)*

45 *Noble Ventures Inc. v. Romania, ICSID Case No. ARB/01/11 (Award, October 12, 2005)*
municipal law obligations into obligations directly cognizable in international law”. While it considered the umbrella clause as an exception to the well-established rule of general international law that in normal circumstances per se a breach of a contract by the State does not give rise to direct international responsibility on the part of the State. Tribunal held that the breach of a contract being assimilated by the umbrella clause to a breach of the BIT is thus “internationalized”. In Impregilo v. Pakistan, the arbitral tribunal held that even if a treaty and contract claim should perfectly coincide, they remain analytically distinct, and necessarily require different enquiries. In our opinion the stance taken by the Tribunal in the Eureko B.V. and the Noble Ventures is highly benign for the investors as it holds up the essence of an Investment Treaty.

In the case of Noble Energy Inc. and Machalapower CIA. LTDA. v. The Republic of Ecuador And consejo Nacional De Electricidad, the Respondents argued that ICSID lacked jurisdiction over purely contractual claims and that the umbrella clause contained in the BIT could not transform contract claims into claims based on a treaty. Claimants relied on the umbrella clause contained in the BIT to establish that the Tribunal had jurisdiction over both treaty and contract claims. According to the Respondents, the Claimants purported to use the umbrella clause contained in the BIT to allege that breaches of the Agreements constitute treaty violations. The Tribunal found jurisdiction on basis of the Investment Agreement by giving broad interpretation to the umbrella clause.

46 Ibid ¶ 53
47 Ibid ¶ 54
48 Impregilo S.p.A. v Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, ¶ 260, (Decision on Jurisdiction of April 22, 2005); Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, ¶ 72, (Award on Jurisdiction of August 6, 2004)
49 Eureko B.V., Supra note 46
50 Noble Ventures, Supra Note 49
51 Noble Energy Inc. and Machalapower CIA. LTDA. v. The Republic of Ecuador And consejo Nacional De Electricidad, ICSID Case No. ARB/05/12, (Decision on Jurisdiction of March 5, 2008)
52 Ibid, ¶ 230, p. 66
Narrow Interpretation:-

ICSID tribunals on one hand gave maximum effect to umbrella clauses in the above decisions, and on the other hand in Toto\textsuperscript{53} followed the principle laid down in Philippine’s\textsuperscript{54} case, and held that, the contractual claims remain based upon the contract and are governed by the law of the contract. Parties remain subject to the contractual jurisdiction clause since they have submitted jurisdiction exclusively to the domestic courts for settlement, Tribunal hence cannot exercise jurisdiction over the contractual claims arising from the contract without referring disputes to municipal courts.\textsuperscript{55} Similarly, in Salini v. Jordan,\textsuperscript{56} the Tribunal insisting on the generality of language used in so-called ‘umbrella clause’ rejected the claim to ‘elevate’ the contractual claim into treaty claims.\textsuperscript{57}

Further, in Joy Mining v. Egypt,\textsuperscript{58} Tribunal found that an umbrella clause in the BIT cannot operate to transform a contract claim into a treaty claim, unless there exists a clear violation of the Treaty rights and obligations or a violation of contract rights of such an extent as to trigger the Treaty protection.\textsuperscript{59} This rendered the forum selection clause in the contract significant with respect to contract claims.\textsuperscript{60} The effect of umbrella clauses shrank furthermore in the case of Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic,\textsuperscript{61} the Tribunal did not accept this approach by rejected

\textsuperscript{53} Toto Costruzioni Generali v. Lebanon, ICSID Case No. ARB/07/12 (Decision on Jurisdiction of September 2009)

\textsuperscript{54} Philippines, Supra note 31

\textsuperscript{55} Toto, ¶ 202, Supra note 57


\textsuperscript{57} Ibid, ¶ 126

\textsuperscript{58} Joy Mining Machinery Ltd. v. Egypt, ICSID Case No. ARB/03/11, (Award on Jurisdiction, August 6, 2004)

\textsuperscript{59} Ibid, ¶ 81

\textsuperscript{60} Ibid, ¶ 89
argument that broad interpretation which imposed no limitation on the right of investors to sue the State is an unbalanced interpretation which cannot prevail.62

The tribunal in *Iberdrola v. Guatemala,*63 came to a conclusion that umbrella clause in Guatemala-Spain BIT only referred to the matters concerning that treaty and that the BIT does not give “general consent to submit any kind of dispute or difference related to investments, but only those related to violations of substantive provisions of the treaty itself.”64 We are of the opinion that the Umbrella Clause is an instrument to protect the investing party from contractual disputes arising only out of the investment that is covered under the BIT, but not so as to convert every contractual claim into a treaty claim. A limitation has to be imposed on the type of investment for which protection under umbrella clause can be given by drafting the BITs more carefully and specifically. The definition of investment and the prerequisites to qualify as investment will be dealt in the subsequent chapters.

**The principle privity in contractual claims and BIT’s:-**

Some treaties specifically protect contractual undertakings made by a State *vis-a-vis* foreign investors and provide for redress through international arbitration in case of a breach. In the case of *Burlington Resources Inc.v. Republic of Ecuador,*65 Ecuador objected to the jurisdiction of the Tribunal over Burlington's surviving umbrella clause claims, over Burlington's fair and equitable treatment and arbitrary impairment claims, which Burlington was seeking to reintroduce ‘through the back door’. Ecuador objected to the Tribunal's


62 *Ibid*., ¶ 97


64 *Ibid*, ¶ 306

65 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, (Decision on Jurisdiction, June 2nd, 2010)
jurisdiction over Burlington's surviving umbrella clause claims because (i) there was no ‘obligation’ that could be elevated to the Treaty level, and (ii) if par impossible there were any such obligation, Burlington was not privy to it. The ordinary meaning of ‘obligation’ involves a ratione personae[^66^] element, a relationship between an obligee and an obligor, between a creditor and a debtor. Moreover, if there were nevertheless any obligations that could be elevated to treaty level, Burlington could not rely on them for lack of privity. The principle of privity is essential to contractual obligations. The Tribunal had no jurisdiction over the (a) umbrella clause claims, (b) the fair and equitable treatment and arbitrary impairment claims,[^67^] unless privity is established. This judgment, however, received strong dissent from one arbitrator Mr. Francisco Orrego Vicuña:

“It is concluded, that legal relationship exists only between the Respondent and the Claimant’s subsidiaries, but not the parent company that is claiming under the Treaty, including its claim for breach of the umbrella clause [...] The obligations to which the umbrella clause refers are also those relating to investments. It would not really matter whether the protected investment is a minority one, what matters is that the Treaty has intended to protect all qualifying direct or indirect investments. The latter make take many different forms [...] The Treaty does not make that distinction and if this had been the intention it would have had to be spelled out. A tribunal is not empowered to write into the treaty what the parties have not agreed to.”[^68^]

The rationale for coming to this conclusion is based in the light of the extensive jurisprudence of commercial arbitration tribunals, most notably those operating under the International Chamber of Commerce arbitration rules, to extend the reach of the arbitration clause to third parties when there is a link between that party and the signatory of the contract. That link relates not only to obligations of the third party that are called into account but also relates to


[^67^]: Burlington Resources Inc, ¶ 142, Supra note 69

[^68^]: Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, ¶ 5-8, (Dissenting Opinion, June 2nd, 2010).
the rights that it is entitled to enforce. This very trend is also present in England which abolished the doctrine of privity of contract and allows a benefit to be conferred upon a non-contracting party.\footnote{Ibid, ¶ 6}

In the case of Standard v. Tanzania,\footnote{Standard Chartered Bank v. The United Republic of Tanzania, ICSID Case No. ARB/10/12, (Award, 2 November 2012)} where the claimant must necessarily be a national or company of the contracting party, the tribunal found that an indirect chain of ownership did not satisfy the requirements under the Treaty. The tribunal’s rationale behind this is that, despite the fact that the claimant owned a significant interest in the company it could not be said that those were his investments.\footnote{Ibid, ¶¶ 196-197} The tribunal noted that, “the claimant must demonstrate that the investment was made at the claimant’s direction, that the claimant funded the investment or that the claimant controlled the investment in an active and direct manner.”\footnote{Ibid, ¶ 230} The authors concur with this view; a stakeholder (be it a natural person or a corporation) does not have a right to approach the Tribunal if they do not qualify to be an ‘investor’ within the meaning given under the Treaty. Even if the Treaty provides protection to indirect investments, it is to be noted as to who is the investor in such case. There has to be a relationship of obligee and obligor for an obligation to arise in the first place.

**General and Specific Investments:**

It follows from Article 25 of the ICSID Convention that one of the prerequisites for jurisdiction of the ICSID Centre is that the legal dispute arises directly out of an ‘investment’. The meaning of the term ‘investment’ is therefore essential to establish jurisdiction *ratione materiae* of the Centre and key in defining the types of disputes that can be settled by ICSID
In the case of *Philip Morris Asia Ltd. v. The Commonwealth of Australia*, it was disputed that certain claims are plainly outside the scope of protection of the BIT, whether as a matter of the fair and equitable treatment standard established under ‘umbrella clause’. PM Asia's claim is that Australia has breached its obligations under other international treaties, which is the Paris Convention and two other WTO Agreements, and that this amounted to a breach of the ‘umbrella clause’ of the BIT. The umbrella clause in this BIT requires that each Contracting Party shall "observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party". However, on substance, the ‘umbrella clause’ could not be understood as encompassing general obligations in multilateral treaties. It was held by the tribunal by placing reliance on the relevant jurisprudence, that the ‘umbrella clause’ in that BIT only covered commitments that a host State had entered into with respect to specific investments. Therefore, obligations under other multilateral treaties cannot be an ‘obligation’ within the meaning of the treaty. Treaty only covers the obligations entered into with respect to investments.

The definition of ‘investment’ as held by the Tribunal is “an economic arrangement requiring a contribution to make profit, and thus involving some degree of risk”, for purposes of establishing jurisdiction as well as treaty obligation. The tribunal in *Caratube International Oil Company (CIOC) v. Kazakhstan* accepted the control test which the respondents submitted. It was held that the person in question did not have control of the claimant’s company. The tribunal found that there is no reasonable economic motive behind the person’s alleged investment in the claimant’s company. For the purpose of

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74 Philip Morris Asia Ltd. v. The Commonwealth of Australia, UNCITRAL PCA Case No. 2012-12

75 The Hong Kong - Australia BIT, Article 2(2), (15 September 1993)

76 Caratube International Oil Company LLP v. The Republic of Kazakhstan, ICSID Case No. ARB/08/12, (Award, 5 June 2012)

77 *Ibid*, ¶ 455
understanding the definition of ‘investment’ for establishing jurisdiction under Article 25 of the ICSID convention, three factors may be taken into consideration, i.e., contribution, risk and duration. In the case of Electrabel v. Hungary, the Tribunal noted that there is general consensus between the Tribunals with respect to the three objective criteria; the Tribunal held, “there is a general consensus that the three objective criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk are necessary elements of an investment.” The existence of an investment must be assessed at its inception and not with hindsight. In our opinion, the intention of the Contracting parties has to be taken into consideration to determine if the Treaty was entered into with respect to general investment or specific investment. In addition, the investment has to satisfy the three objective criteria in order to approach the ICSID under Article 25 of the ICSID Convention. ICSID Tribunals have also developed the sovereignty test in a few cases to limit the scope of the ‘umbrella clauses’.

The Sovereignty Test

The ICSID tribunals in few cases came up with the sovereignty test by drawing a distinction between the State entering into the contract in discharge of sovereign functions or as a merchant for purely commercial reasons, the latter not being covered under the ‘umbrella of protection’. In CMS v. Argentina, the Tribunal while analyzing the Argentina-United States BIT held that “not all contract breaches result in breaches of the Treaty”, even when there is an umbrella clause present. It held that purely commercial aspects of a contract do not receive treaty protection, the umbrella clause operates to elevate a contract dispute to a treaty

78 Jurisdiction of the Centre, ICSID CONVENTION, REGULATIONS AND RULES, ARTICLE 25, ICSID/15/REV. 1, (January 2003)

79 Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, (Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012)


81 CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, (Award on May 12, 2005)

82 Ibid, ¶ 299
claim only when there is significant interference by governments or public agencies with the rights of the investor.\(^{83}\) This result was consistent with the narrow interpretation endorsed by Pakistan\(^{84}\) and Joy Mining\(^{85}\) that the umbrella clause itself is insufficient to elevate a contract claim, yet tribunal was willing to give meaning to the umbrella clause in the presence of ‘significant interference’ by the host government.\(^{86}\)

The Tribunal in El Paso,\(^{87}\) disagreed with the view taken in Philippines\(^{88}\) and held broad interpretation to umbrella clauses so as to include all the obligations and not only of any contractual obligation with respect to investment will have ‘far reaching consequences’ and render the BIT useless.\(^{89}\) These ‘far reaching consequences’ were discussed by a well known specialist of ICSID, Mr. Christoph Schreuer:

“Some of the practical consequences of a broad interpretation of the umbrella clauses could be such as if investors were to start using umbrella clauses for trivial disputes. It cannot be the function of an umbrella clause to turn every minor disagreement on a detail of a contract performance into an issue for which international arbitration is available. For example, a small delay in a payment due to the investor and interest accruing from the delay would hardly justify arbitration under a BIT.”\(^{90}\)

The Tribunal went on to distinguish between State acting as a sovereign and as a merchant while entering into the contract, (in)famously known as the sovereignty test to determine if

\(^{83}\) Ibid

\(^{84}\) Pakistan, Supra note 30

\(^{85}\) Joy Mining, Supra note 62

\(^{86}\) CMS Gas Transmission Co., ¶ 301–303, Supra note 85

\(^{87}\) El Paso, Supra note 15

\(^{88}\) Philippines, Supra note 31

\(^{89}\) El Paso, ¶ 76, Supra note 15

treaty obligation arises on breach of such contract. This concept of sovereignty confines the power of customary international law to stabilize investor-State contracts. What is primarily lacking in this context is a procedural remedy for investors to hold host States accountable in an international forum. Instead, under the dualist conception of international law the relationship between foreign investors and host States is mediated through an inter-State prism that requires investors to seek diplomatic protection on the international level through its home State.

The conduct of the State body in question was discussed in a much more ambiguous decision of *Sempra Energy International v. Argentina*, where the Tribunal stated:

“The decisions dealing with the issue of the umbrella clause and the role of contracts in a Treaty context have all distinguished breaches of contract from Treaty breaches on the basis of whether the breach has arisen from the conduct of an ordinary contract party, or rather involves a kind of conduct that only a sovereign State function or power could effect.”

The Tribunal noted that the dispute before it arose from the violation of contractual commitments which impacted the rights the investor claims to have in the light of the provisions of the treaty and the guarantees on the basis of which it made the protected investment. It then went on to hold that it had jurisdiction over the investor's claim since it was founded on both the contract and the BIT and it creates an even closer link between the contract, the context of the investment and the Treaty.

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91 El Paso, ¶ 79, *Supra* note 15 ; See also Joy Mining, *Supra* note 62


93 Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, (World Bank), (Decision of the Tribunal on Objections to Jurisdiction)

94 *Ibid*, ¶ 310; see also CMS Gas Transmission, *Supra* note 85

95 *Ibid*, ¶100

96 *Ibid*, ¶101
However, the ICSID has, in various cases, rejected the sovereignty test, as we noticed from the case of *Eureko B.V.*, that an argument as to the distinction being made between *acta iure imperii* (Government acts) and *acta iure gestiones* (commercial acts) of a State in relation with the application of an umbrella clause was dismissed. Similarly, in a more recent case of *SGS Societe Generale de Surveillances S.A. v. The Republic of Paraguay*, wherein it was contended that there was a breach of contract by the State, without the exercise of sovereign powers, so as to not have triggered the Umbrella Clause in the BIT. Paraguay contended that Umbrella Clauses and BIT standards are not breached by a commercial conduct like the failure to pay under a contract. On the contrary, the Tribunal explained clearly its interpretation of the Umbrella Clause contained in the BIT with respect to obligations originated in the Agreement and reached the conclusion that it had jurisdiction. The tribunal noted that there was nothing in BIT that acknowledged or implied that the host state would only be required to observe its obligations if it abuses its sovereign power.

We are of the opinion that sovereignty test is irrelevant in determining the ambit of umbrella clause or rather the BIT as a whole in providing protection to the investors. The definition of state under public international law is wide enough to include every organ which discharges the state functions. The State enters into the contract as a whole even if it doing so for commercial purposes, and moreover, as held by the Tribunal in the case of *SGS v. Paraguay*, no such distinction is drawn by the treaty. Therefore, Sovereignty test is

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97 *Eureko B.V.*, *Supra* note 46


99 *Ibid*, ¶ 91

100 *Sir Robert Jennings QC, Sir Arthur Watts KCMG QC, Organs of the States for their International Relations, Ch.12, Oxford Scholarly Authorities on International Law [OSAIL],* (ISBN: 9780582302457), (19 June 2008)

101 Paraguay, *Supra* note 102
uncertain and unsupported in public international law and can render arbitrary outcome if applied.

IV. DIFFICULTIES ARISING OUT OF MULTIPLE PROCEEDINGS

Lis pendens and Res judicata

In most cases, it is argued that giving broad scope to the umbrella Clauses in BIT’s may result in multiple proceedings regarding the same subject matter. If ICSID entertains the matter under Umbrella Clause, questions relating to lis pendens and res judicata have been raised. The view endorsed in this paper is that ICSID taking jurisdiction under the Umbrella clause will not be converse to lis pendens or res judicata. These divergences were described to be ‘dangers’ of the ‘proliferation of investment arbitration’ and ultimate fiasco in investment arbitration. However, this is not the case; a sensible approach is required while addressing the issues of res judicata and lis pendens in international arbitration.

A simple definition of ‘lis pendens’ is lawsuit pending elsewhere. Lis pendens is an internationally recognized doctrine which is based on the principle that “parallel litigation in more than one country between the same, or related, parties in relation to the same, or related, issues may lead to injustice, delay, increased expense, and inconsistent decisions.”

According to the doctrine of res judicata, if a matter is adjudged by a competent tribunal, the same parties cannot raise the same issues before another tribunal and the award of the initial

102 Crawford, Supra note 14

103 Ibid

104 August Reinisch, The Proliferation of International Dispute Settlement Mechanisms, in International Law between Universalism and Fragmentation: Festschrift in Honor of Gerhard Hafner 107, 114 (Isabelle Buffard et al. eds., 2008).


106 Sir Lawrence Collins, Resolution on The Principles for Determining When the Use of the Doctrine of Forum non conveniens and Anti-Suit Injunctions is Appropriate, Session de Bruges, 2003
tribunal is considered to be final.\textsuperscript{107} Both these doctrines share a similar background, which is to restrain the abuse that the parallel proceeding might bring about with the intention of frustrating the genuine rights of another. The \textit{lis pendens} doctrine and \textit{res judicata} have a close relationship with the effect of a judgment. The doctrine of \textit{lis pendens} is complementary to the rule of \textit{res judicata}, predominantly to the negative effect side of the doctrine. The relation between the two can be summed up by saying that where the \textit{lis pendens} ceases, the \textit{res judicata} effect commences.\textsuperscript{108}

It may be argued that the ICSID and domestic adjudicatory bodies may have concurrent jurisdiction on the contractual claims if the umbrella clause is given a broader scope of application. Both these bodies are based on different normative sources which co-exist, yet there is no hierarchal affiliation that exists between these bodies. Therefore, often questions arise out of the conflict with respect to jurisdiction between ICSID and such domestic tribunal which is to adjudicate upon a purely contractual dispute.\textsuperscript{109} There is a high probability of two claims put forth before two different tribunals. While determining the similarities between the claims, in relation to \textit{res judicata} and \textit{lis pendens}, both domestic tribunals/courts and ICSID have commonly adopted three elements, i.e., (a) parties, (b), grounds and (c) object.\textsuperscript{110}

This test is known as the triple identity test in order to determine the real identity of a claim before a tribunal. The tribunal first checks if the parties (\textit{persona}) are same in both such claims made, which is an accepted practice virtually in all international cases. The second check is whether the cause or grounds (\textit{causa pentendi}) on which the action brought forth is

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\textsuperscript{108} \textsc{Emil Brengesjo}, \textit{Lis Alibi Pendens in International Arbitration}, Faculty of Law, Stockholm University

\textsuperscript{109} \textsc{Merić Sar}, Supra note 41

\textsuperscript{110} Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Germany v. Poland, December 16, 1927, PCIJ, Ser. A, No. 13, ¶ 57 (dissenting opinion); United States v. Canada, 3 UNRIAA, 1906, (Award of April 16, 1938, and March 11, 1941) ¶ 1952; Buyer v. Seller, Partial Award, ICC Case No. 9787, 1998, ¶ 186; Licensor v. Licensee, Final Award, ICC Case No. 6363, 1991, ¶ 197
\end{flushleft}
similar or not. The Court will determine this by looking at the arguments advanced by the parties. Thirdly, the Tribunal will look at the relief/prayer or object (*petium*) sought by the parties.\(^{111}\)

There is yet another element which is looked into i.e., whether there exists any concurrent proceeding pending before an international or domestic tribunal which referred to the same legal issues.\(^{112}\) However, international arbitration is not affected jurisdictionally by the fact that the same question is in the courts of one of the nations.\(^{113}\) In essence, doctrines of *res judicata* and *lis pendens* will only apply if two tribunals in question are international tribunals. Since investment tribunals are constituted in accordance with investment treaties and can be termed to be on ‘international level’, thus, there will effectively be no parallel effect since domestic tribunals cannot be equated on the same footing as an international tribunal. Hence, no *lis pendens* can exist between investment arbitration and domestic proceedings.

Some BITs mandate that the local forum ought to be approached before putting forth a claim in ICSID, as held by the Tribunal in *Philippines*.\(^{114}\) For example, in *Teinver v. Argentina*,\(^{115}\) there was a mandatory treaty requirement that the party must approach the domestic courts with the claim in the first instance, and only after 18 months have elapsed after such suit being brought up, international arbitration can be initiated. As long as the local proceedings dealt with the same subject-matter as the one brought to international arbitration, the treaty requirement is said to have been satisfied. Tribunal also clarified that party can be either of the two contracting parties to the treaty and is not necessarily the claimant who has to

\(^{111}\) *Emil Brengesjö*, *Supra* note 112

\(^{112}\) *De Ly, Sheppard, ILA Final Report on Res Judicata and Arbitration*, ¶ 29, Volume 25 - Issue 1, Kluwer Law International; *Yannaca-Small, Supra* note 21

\(^{113}\) Selwyn Case (interlocutory), 9 UNRIA A 380, p. 381

\(^{114}\) Philippines, *Supra* note 31

\(^{115}\) *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic, ICSID Case No. ARB/09/1*, (Decision on Jurisdiction, 21 December 2012)
approach the local fora. The tribunal, in *ICS Inspection v. Argentina,* did not accept the jurisdiction as the claimant failed to comply with the mandatory recourse to the domestic courts for 18 months, as set forth in the Argentina-UK BIT. This Tribunal also reiterated the mandatory approach to the contractual forum selection as held in the case of *Philippines*; the Tribunal noted “where a contractual claim is asserted under an umbrella clause, the claimant in question must comply with any dispute settlement provision included in that contract.”

Rationale behind this is the trend followed in public international law with stern adherence to procedural rudiments as evidenced in the recent verdict of the ICJ in the *Georgia v. Russia* case. Some BITs also contain a provision to estop the party from approaching by way of the umbrella clause if the contractual dispute is already submitted in any other forum. This type of provision is called as ‘fork in the road’ provisions.

**‘Fork in the road’ provisions**

In this context it is pertinent to note ‘Fork in the Road’ clauses which may also be a part of the BIT’s, which is based on the concept of ‘waiver’. Some BIT’s require investors to choose a single forum for relief and once a claim has been put forth, it is final, and consequently the investor loses his choice of bringing the claim to international arbitration. Such clauses are known as ‘fork in the road’. It is a distinctive treaty clause especially used in almost all United States BITs including the Model BIT.

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116 *Ibid*, ¶ 130-136

117 *ICS Inspection and Control Services Ltd. (United Kingdom) v. The Republic of Argentina, UNCITRAL, PCA Case No. 2010-9,* (Award on Jurisdiction, 10 February 2012)

118 *Ibid*, ¶ 251-252

119 *Ibid*, ¶ 250

120 *Georgia v. Russian Federation, Decision on Preliminary Objections, 1 April 2011,* ¶ 133-135, (International Court of Justice)

121 EMIL BRENGESJÖ, *Supra* note 112

122 *Ibid*
The function of a ‘fork in the road’ clause is to limit an investor to choosing only one of the contracted dispute resolution mechanisms. For example, if the investor agrees to submit the contractual claim to the local dispute mechanism bodies, then in the presence of a ‘fork in the road’ clause in the BIT, he will be precluded from claiming before the international Tribunal for the same claim once he brings the claim before such domestic Tribunal. In the absence of a fork-in-the-road provision, submission of the claim to the domestic courts will not preclude the investor from pursuing other dispute resolution choices under the BIT.123

The fork-in-the-road provision is said to be triggered in three cases i.e., as follows:

i. when the treaty claim has the same fundamental basis as the claim submitted to the local courts;

ii. when the factual components of a treaty cause of action have already been brought before the local courts; and

iii. when the treaty claim does not truly have an autonomous existence outside the contract.124

In the year 2009, the Tribunal, in the case of Pantechniki SA Contractors & Engineers v Republic of Albania,125 found that the investor’s claims were unacceptable from being heard by an ICSID tribunal because they arose out of the same contractual dispute that the investor had already brought before domestic courts. The relevant test expressed by the American – Venezuela Mixed Commission in the Woodruff case126 (1903): “whether or not the ‘fundamental basis of a claim’ sought to be brought before the international forum is


124  H&H Enterprises Investments Inc. v. Arab Republic of Egypt, ICSID Case No. ARB/09/15 (Decision on Respondent’s Objections to Jurisdiction)

125  Pantechniki SA Contractors & Engineers v. Republic of Albania, ICSID Case No ARB/07/21, (Award 30 July, 2009)

126  Woodruff Case, Reports Of International Arbitral Awards, Volume IX ¶ 213-223, (1903-1905)
autonomous of claims to be heard elsewhere;” was applied.\textsuperscript{127} This test is known as the ‘essential basis’ test which was followed in many cases including the Vivendi Annulment\textsuperscript{128} in 2002.

The second case to interpret and prevent another proceeding is \textit{H&H Enterprises Investments, Inc. v. Arab Republic of Egypt},\textsuperscript{129} where even though the claimant submitted that the fork-in-the-road clause has not been triggered, because Claimant’s claims pursued in the local \textit{fora}, on one hand, and the claims pursued in the present arbitration on the other hand do not meet the triple identity test, the Tribunal rejected this claim since the cause of action was found to be similar to merits of the case. Tribunal held that, Fork in the Road clause was triggered as soon as the Claimants proceeded against the Respondents in the Egyptian Courts.

Violation of such clause may result in the investor being barred from seeking identical relief in investment arbitration.\textsuperscript{130} In most case, where arbitral tribunals have addressed fork in the road provisions, it has come across certain distinctive characteristic in the claim put forth, for example, \textit{Alex Genin and others v. Republic of Estonia}\textsuperscript{131} where the tribunal held that claims were between different parties, concerning different relief on different cause of action. A ‘fork in the road’ clause will only be triggered when the actions have previously been submitted to local courts of the host State.\textsuperscript{132}

**Waiver**

Fork in the road clause is based on the principle of ‘Waiver’ i.e., the voluntary relinquishment or surrender of some known right or privilege. A waiver is characterized by a unilateral renunciation of a party’s rights, which may be done spontaneously or by choice,

\begin{itemize}
  \item \textsuperscript{127} Pantechniki SA Contractors & Engineers, ¶ 61, \textit{Supra} note 129
  \item \textsuperscript{128} Vivendi, \textit{Supra} note 29
  \item \textsuperscript{129} H&H Enterprises Investments, Inc., \textit{Supra} note
  \item \textsuperscript{130} EMIL BRENGESJÖ, \textit{Supra} note 112
  \item \textsuperscript{131} Alex Genin and ors. v Republic of Estonia, ICSID Case No. ARB/99/2, (Award of January 25, 2001)
  \item \textsuperscript{132} \textit{Ibid}
\end{itemize}
e.g. when choosing to resort to a treaty claim or contractual claim. There are two types of waivers: (1) Express waiver and (2) Implied waiver. Where the parties submit the claim to the international tribunal, it is a prerequisite to waive any other right to sue for the same cause. Implied waiver is when the conduct of the state strongly infers that it has waived its rights elsewhere. The effect of such waiver is that, the international tribunal will peruse the entire conduct of the host State (including municipal proceedings), and obviate parallel proceedings in between the international tribunal and the courts of the host State (if any). Waiver can also be a clause in itself independent of the ‘fork in the road’ clause effectively having the same outcome.

In the case of SGS v. Paraguay, the tribunal found that the treaty and contract claims co-existed, and the claimant was free to base its claims on one of the both. In the case before the tribunal, the claimant came before the ICSID tribunal for breaches of the BIT, more particularly under the umbrella clause. Therefore considering the basis of the claims found within the treaty, the ICSID tribunal was in a better place to analyze the claims in this respect, while the domestic courts would not likely to take the BIT issues into account. In that respect the tribunal denied to interpret the contractual forum selection clause as a ‘waiver’ of the ICSID arbitration. Therefore, in our opinion, except for the cases where there exists a ‘fork in the road’ clause, there cannot be an implied waiver of ICSID jurisdiction merely because the investor brought forth a claim before the domestic tribunals having jurisdiction over the contractual dispute. Unless there is an express ‘waiver’ mentioned in the BIT, ICSID generally does not interpret the contractual forum selection clause as ‘waiver’ to ICSID jurisdiction.

133 Emil Brengesjö, Supra note 112
134 Ibid
135 Paraguay, Supra note 102
136 Ibid, ¶ 130
137 Ibid, See also MERIC SAR, Supra note 41
V. CONCLUSION

As we can observe from various pronouncements given by the ICSID Tribunals with respect to the interpretation and applicability of the Umbrella clauses in BITs, there is a lot of ambiguity and conflict. This paper made efforts to take into consideration all such views regarding the same and to draw a conclusion by suggesting a suitable approach to tackle this situation. The most appropriate method is to be investment specific while invoking the jurisdiction of the ICSID or any International Arbitral Tribunal. The ICSID should not reject the claim on the grounds that the domestic forum shall have exclusive jurisdiction, as there is a difference between Treaty obligations and contractual obligations. It is accepted that a contractual obligation may be a part of the treaty, but that cannot preclude from superseding the jurisdiction of the International Tribunal. The authors are of the view that the object behind the umbrella clause is most essential that is to protect the interests of foreign investors. To give effect to the same, it is essential that the investor be given a right to approach the international arbitral Tribunal for which prior consent has been given by both the parties of the BIT. The domestic tribunal is considered to be an organ of the ‘state’ under public international law\(^\text{138}\), hence, there is always a chance for prejudice.

On the other hand, problems may still arise if investors were to start using umbrella clauses for trivial and petty disputes. It cannot be the function of an umbrella clause to turn every minor disagreement on a detail of contract performance into an issue for which international arbitration is available. For example, a small delay in a payment due to the investor and

\(^{138}\) ATTRIBUTION OF CONDUCT TO A STATE, CHAPTER II, ARTICLE 4, Conduct of organs of a State, “The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.” Available at: http://legal.un.org/legislative series/documents/Book25/Book25_part1_ch2.pdf, p. 31(last accessed: 1 August 2015).
interest accruing from that delay would hardly justify taking up arbitration under a BIT. It is to be hoped that investors will invoke umbrella clauses with the appropriate restraint.

We hereby disagree with the sovereignty test which was laid down by few Tribunals. In our opinion, it is irrelevant if the State was acting as a merchant or as a sovereign while entering into the contract with the foreign investor. Being an organ of the State, it is still obliged to the provisions in the BIT. Therefore, the sovereignty test is not the correct parameter to determine the jurisdiction of ICSID for the contractual claims. The test adopted with respect to the investment is the right way to determine the scope of the umbrella clause. To put a restraint on multiple or parallel proceedings, the authors believe that the use of ‘fork in the road’ clauses will be most useful in this front. However, if the investor, even after submitting a claim in the domestic forum, can bring forth a distinct claim under the BIT before the International Tribunal if the said claim can pass the triple identity test, in such cases, the Tribunal ought to admit the matter for merits.