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INDIAN PATENT REGIME AND THE WTO DISPUTES

Ayyagari Raja Rajeswari *

Abstract

One of the most significant achievements of the Uruguay Round was the conclusion of the TRIPS agreement. However soon thereafter arose a series of disputes and reported instances of non-compliance with the regulatory norms of the agreement. Indian Patent Industry has witnessed numerous complaints and there has been a global demand to strengthen its patent protection regime. This conflict is giving rise to many disputes at the WTO as well as domestic level with the recent Novartis judgment being the most controversial of all. The article therefore traces the TRIPS agreement and the development of the Indian Patent industry and thereafter it plunges in the most recently controversial judgment of the Novartis case.

The Dispute Settlement Understanding (DSU) of the WTO is a central element in providing security and predictability to the multilateral trading system.[1] Unlike the earlier GATT regimes which merely laid down the guidelines without binding force for settling disputes, WTO created a permanent institution called the Dispute Settlement Board (DSB) whose decisions are binding on

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1 *WTO Dispute Settlement Understanding*, Article 3.2.

the signatory members. There are other bodies like International Court of Justice (ICJ) functioning as dispute settlement agencies for the sovereign states. However the basic difference between DSB and ICJ is that the DSB system enjoys compulsory jurisdiction, something which ICJ does not. The extent of a panel's jurisdiction is premised on the subject matter of the dispute, *ratione materiae*, and the parties to the dispute, *ratione personae*.[2]

U.S. which earlier rejected the notion of copyright as an inherent and absolute right of creativity later subscribed to it under the US Berne Convention Implementation Act of 1988.

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2 David Palmeter, Petros C. Mavroidis, *Dispute Settlement in the World Trade Organisation- Practice and Procedure*, Cambridge University Press, Second Edition, 2004, p. 17.

3 *Supra Note* 1.

basic difference between DSB and ICJ is that the DSB system enjoys compulsory jurisdiction, something which ICJ does not. The extent of a panel's jurisdiction is premised on the subject matter of the dispute, *ratione materiae*, and the parties to the dispute, *ratione personae*.[4]

IPR Regime under the WTO:

The WTO made it mandatory for its signatory countries that they should adhere to the Agreement on Trade Related Aspects of Intellectual Rights (TRIPS) unconditionally without reservations. India being the founder member of WTO was hence obliged to incorporate TRIPS minimum standards as part of its domestic laws. TRIPS in fact is considered as one of the biggest achievements of the Uruguay Round multilateral trade talks.[5] Of course it has often been debated that when there are separate treaties/ organizations like WIPO regarding intellectual property rights, TRIPS was superfluous. WIPO is the UN agency to protect and regulate intellectual property rights (patents, copyright, trademarks, designs, etc.) for stimulating innovation and creativity.[6] U.S. which earlier rejected the notion of copyright as

4 David Palmeter, Petros C. Mavroidis, *Dispute Settlement in the World Trade Organisation- Practice and Procedure*, Cambridge University Press, Second Edition, 2004, p. 17.

5 www.tripsagreement.net, visited on 09-03-14.

6 http://www.wipo.int/about-wipo/en/ visited on 31-01-2014.

an inherent and absolute right of creativity later subscribed to it under the US Berne Convention Implementation Act of 1988.[7]

The main objective behind TRIPS is to provide at least the basic intellectual property protection to people through their respective nations who are members of WTO (World Trade Organization) and at the same time to maintain uniformity throughout in its implementation among the member nations[8]. WTO arrangements are generally a multilateral agreement settlement mechanism of GATT[9]. India, being a part of WTO had to accept all the multilateral agreements related to trade in goods and services, including TRIPS.

What follows is a brief description of the different rights secured under the TRIPS regime.[10]

Copyright

TRIPS Agreement ensures that computer programs will be protected as literary works under the Berne Convention and outlines how databases should be protected. It also expands international copyright rules to cover rental rights. Authors of

7 B. Zorina Khan, *Democratisation of Invention: Patents and Copyrights in American Economic Development (1790- 1920)*, Cambridge University Press, 2005, pgs 15-16.

8 Autar Krishen Koul, *Guide to the WTO and GATT*, Satyam Law-International, Second edition, 2010, p 442.

9 Multilateral Trade Agreements are those to which all the WTO members are parties whereas plurilateral agreements are those to which only some but not all members are parties.

10 http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm, visited on 31-01-2012.

computer programs and producers of sound recordings must have the right to prohibit the commercial rental of their works to the public. A similar exclusive right applies to films where commercial rental has led to widespread copying, affecting copyright-owners' potential earnings from their films.

Trademarks

The Agreement defines the types of 'signs' eligible for protection as trademarks. According to it service marks must be protected in the same way as trademarks used for goods. Marks that are very familiar and commonly popular in a particular member country are guaranteed additional protection.

Geographical indications

A place name is sometimes used to identify a product. This 'geographical indication' recognises not only the geographical specificity of a product, but more importantly, it identifies the product's special characteristics determined by its origins. Well known examples of GI include *champagne, scotch, tequila* and *roquefort* cheese. Wine and spirits manufacturers are particularly concerned about retaining place-names of their beverage to sustain its brand value. TRIPS Agreement thus contains special provisions to guarantee the geographic identity of these products. The agreement provides for further negotiations in the WTO to establish a multilateral system of notification and registration of geographical indications for wines. These are now part of the Doha

Development Agenda and they include spirits. Also debated in the WTO is whether to negotiate extending this higher level of protection beyond wines and spirits.

Industrial designs

Under the TRIPS Agreement, industrial designs must be protected for at least 10 years. Owners of protected designs must be able to prevent the manufacture, sale or importation of articles bearing or embodying a design which is a copy of the protected design.

Patents

TRIPS agreement says patent protection must be available for inventions for at least twenty years. Patent protection must be available for both products and processes, in almost all fields of technology. Governments can refuse to issue a patent for an invention if its commercial exploitation is prohibited for reasons of public order or morality. They can also exclude diagnostic, therapeutic and surgical methods, plants and animals (other than microorganisms), and biological processes for the production of plants or animals (other than microbiological processes).

Integrated circuits layout designs

The basis for protecting integrated circuit designs (topographies) in the TRIPS agreement is the Washington Treaty on Intellectual Property in Respect of Integrated Circuits, which comes under the World Intellectual Property Organization. This was adopted in 1989 but has not yet entered into force. TRIPS adds a number of

provisions, for example, protection must be available for at least ten years.

The TRIPS Agreement respects a country's national legal system to safeguard its right to intellectual property. It can adopt the Agreement's provisions so long as they meet the TRIPS minimum standards[11]. The 'minimum standards' approach provides a methodology for analysis but not a solution for every potential conflict between the IPRs and national policies.[12] The first ever dispute that was taken up by the WTO Dispute Settlement Body on IPR against India was on the issue of patents for pharmaceutical and agricultural chemical products. This case will be examined later in the project.

Indian IPR Regime and WTO Disputes:

When India enacted its Patent and Designs Act (1911)[13] it contained the provisions of both *product patent* and *process patent*. Being the colonial enactment this Act benefitted more. Hence, soon after independence the Act was thoroughly modified following the recommendations of the Justice Bakshi Tek Chand Committee which was formed in 1949 to examine if the existing patent law was helpful to promote innovation in independent India. But the Committee's recommendations on granting compulsory

11 http://www.wto.org/english/tratop_e/trips_e/trips_issues_e.htm visited on 31-01-2012.

12 Laurence R. Helfer, 'Intellectual Property Rights in Plant Varieties : An Overview with Options for National Governments', *FAO Legal Papers Online*, 31 July, 2002, p. 9.

13 *Patent and Design Act, 1911*.

licensing could not be enacted as the pending Bill lapsed. It was another report, the Ayyangar Report which pointed out that in no other country patents for food and medicine were unrestricted and absolute. It was emphasized that for such crucial sectors there should not be product patents and by doing so competition and innovation could be better promoted in Indian market. Hence was enacted the Patent Act, 1970 which came into force in 1972 thereby replacing the archaic 1911 Act.

Justice Bakshi Tek Chand Committee examined the effectiveness of the existing patent law to promote innovation in independent India whereas Ayyangar Report pointed out that in no other country patents for food and medicine were unrestricted and absolute.

India is one of the founding members of WTO institution. Yet, there were many Agreements with respect to which India had disagreements. Owing to the mandatory adoption of TRIPS India had to effect changes in the domestic IPR regime. Ever since Indian intellectual property laws have undergone drastic changes, especially the patent laws. India also introduced *a sui generis* model legislation of Protection of Plant Varieties and Farmers' Rights Act. Yet, despite such changes the developed nations like the US complain that India IPR laws offer poor protection to the foreign products and that they were in violation of such relevant clauses as the national treatment. There have been even threats

recently to list India under the Priority Foreign Country, a penal provision against those countries whose domestic IPR policies and practices are seen to be against the TRIPS mandates.

India's IPR Disputes

As noted above, Indian IPR was re-enacted to comply with the TRIPS obligations. Rather it was due to the two prominent cases which challenged the national practices before the DSB that forced India to effect policy changes to conform to the TRIPS minimum standards, which eased granting product patents to foreign firms. A brief recapture of IPR related cases against India is undertaken below.

A year after the WTO came into force the United States[14] questioned the legality of Indian obligations under the TRIPS in 1996 at the DSB pertaining to the granting of patents for pharmaceutical and agricultural chemical products. The major issues of dispute were related to the Indian non-conformity with Articles 27, 65 and 70.8 of the TRIPS. Article 27 mandates grant of patents and patent rights without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced once the eligibility conditions are met. It also contains certain exceptions. Article 65 deals with transitional arrangement whereby the implementation of the TRIPS

14 Panel Report, India-Patent Protection for Pharmaceutical and Agricultural Chemical Products, Complaint by the United States, WT/DS50/R, adopted 16 January 1998, as modified by Appellate Body report WT/DS50/AB/R, DSR 1998:1, p.41.

standards within one year of its coming into force may be postponed by the developing countries. Article 70 provides protection of TRIPS Agreement to such existing subject matter after the Agreement comes into force and the previous subject matter is eligible for patent protection under the earlier conventions like the Berne or Paris Convention. The panel established on the above case concluded that India had not complied with its obligations under Article 70.8 (a) or 63 of the Agreement. India appealed against this to the Appellate Body which too ruled that India failed to comply with Article 70 requirements. As a result of this, India assured the implementation of the decision by introducing a new legislation on this aspect. The *Patents (Amendment) Ordinance, 1999* was promulgated by India to implement the rulings and recommendations of the DSB.

Similar case was filed by the EU against India[15] in April 1997 in which the US too joined claiming its third party interests. This case was also filed for negotiations on the aspect of Product Patents for Pharmaceutical products and agricultural chemical inventions as well as the formulation of proper means for filing patent and their marketing rights. In this case too the WTO panel upheld the EU contention against India.

15 Panel Report, India-Patent Protection for Pharmaceutical and Agricultural Chemical Products, Complaint by the European Communities and their member States, WT/DS/79/R, adopted 22 September 1998, DSR 1998:VI, p.2661.

Thus, these successive adjudications by the WTO led India to enact relevant legislations like the Farmers' Act, Geographical Indications Act and cause amendments to the Patents Act to make it TRIPS complainant. Even after enacting these different legislations to provide protection to the rights of claimants and holders of patents, developed nations, EU and the US in particular, continue to question the Indian guarantees to patent production and the minimum guarantees mandated by the TRIPS. One such recent instance is the US criticism, led by its pharmaceutical lobby, of the Indian 'compulsory licensing' provision under the 2005 amendment to the Patents Act which allows compulsory licences twice.

Since the Indian government's decision to grant compulsory license to its drug manufacturer recently is under heavy attack, it is necessary to understand the concept. When a member country licenses companies or individuals other than the patent owner to use the rights of the patent — to make, use, sell or import a product under patent (i.e. a patented product or a product made by a patented process) — without the permission of the patent owner it is called compulsory licensing for patents. Compulsory licensing is very much recognized under Article 31 of the TRIPS (the Paris

Convention, 1883) for preventing its abuse by the exercise of exclusive rights.[16]

As per the TRIPS, member countries can permit another domestic producer to produce a product over which some other person/firm has patent rights, even without the latter's permission in some cases. Though TRIPS does not entail specific reasons for granting a compulsory license by a government, it is required that before doing so the country must have initiated negotiations with the patent holder for voluntary licence at reasonable terms. In case the patent holder declines the offer, only then the government concerned can proceed towards granting Compulsory Licensing. Provision is also made for the existing patent holder to be adequately compensated for extending similar right to another party. As mentioned above, in certain cases the requirement of prior negotiation with the patent holder may be done away with in case of "national emergency situation," "other circumstances of extreme urgency" or "public non-commercial use."[17] The Doha Declaration further adds public health[18] to these exceptions. In short, such exceptions overall offer reasonably enough scope for national governments to flexibly apply the TRIPS rules in granting patent rights.

16 Gopakumar G Nair and Andreya Fernandes, *Patent Policies and Provisions Relating to Pharmaceuticals in India*," Journal of Intellectual Property Rights, Vol. 19, January 2014, p. 10.

17 Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 31(b).

18 Adopted by the fourth Session of the WTO Ministerial Conference at Doha on 14 November, 2001.

The Indian Patent Act contains provisions for compulsory licensing as is allowed under the TRIPS and so far the same has been availed twice by the government. In fact, the US had issued such licenses many times and that too through executive orders. Whereas, India's two compulsory licenses issued so far are authorized under a duly enacted law, not through executive orders.

India issued its first compulsory licensing for patenting the drug, *Nexavar* (Sorafenib) to be manufactured by a leading Indian pharmaceutical company, NATCO Pharma Ltd. In March 2012 the second compulsory licensing was granted to BDR Pharmaceuticals International Pvt. Ltd. to produce *Dasatanib* (Sprycel). Both these licenses were issued in accordance with section 84 of the Indian Patents Act. Under this section compulsory licensing may be granted if:

- The reasonable requirements of the public with respect to the patented invention has not been satisfied or,
- The patented invention is not available to the public at a reasonably affordable price, or
- The patented invention is not worked in the territory of India.

In fact provision is made for negotiating a deal on license issuance with the patentee on reasonable terms and conditions and only when such effort is not successful within a reasonable time that application may be made under the section for grant of compulsory

licensing to a second party. This is in compliance with Article 31 of the TRIPS Agreement as mentioned already.

Moreover, as part of the 2005 amendments to the Indian Patent Act, an additional criteria for grant of patents was recognized. As per this, if it is proved that a new invention differs significantly in properties with regard to its efficacy as compared to the existing patented product, it is qualified for the issue of patent.[19] Novartis, the Swiss pharmaceutical company approached the India Patent Office of a product patent application for a specific compound, the beta crystalline form of imatinib mesylate. Imatinib mesylate is used to treat chronic myeloid leukemia and is marketed by Novartis as '*Glivec*' or '*Gleevec*'.

Under the provisions of the 2005 Act, Indian government rejected patent rights to produce such cancer drug to Novartis. The government justified its rejection on the ground that there was only an incremental improvement over the existing category of the cancer drug, meaning that *Gilvic* is not an innovative drug. Novartis challenged the Indian patent refusal to the Swiss drug mainly on two grounds: the constitutionality of the provision and; its compatibility with the WTO TRIPS Agreement (World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights). Its petition was rejected by the Madras High Court in 2007. On 1 April 2013, on its appeal against the High

19 *Indian Patent Act*, 1970, Section 3 (d).

court judgment the Supreme Court of India, affirming the previous rejection, confirmed that the beta crystalline form of imatinib mesylate failed the test of Section 3(d). The Court clarified that efficacy as contemplated under Section 3(d) is therapeutic efficacy.

Elaborating its position the Supreme Court raised issues about the meaning and content of therapeutic novelty in pharmaceutical products, and it maintained there could be several meanings for the concept of the term therapeutic efficacy. According to the court Novartis had submitted *no evidence* to convince that the beta crystalline form of imatinib improved the therapeutic effect of its cancer drug. Hence, Novartis, the patent company failed in substantively demonstrating that its drug carried an enhanced efficacy. The court felt that Novartis was in fact marketing an older form of the drug and it might be trying to use Indian patent to cover a drug that it was not actually selling. This point was well made by the noted American doctor Atul Gaitonde who says that pharma monopolist firms were misusing an existing drug formulation to extend the life of its patent, in effect seeking a secondary patent.

Such a practice will carry "serious implications for India's public health programme, especially in providing affordable drugs without in any way compromising on the treaty (WTO-TRIPS)

obligations with other countries."[20] Indian pharma companies, some of them like the Reddy Labs and Biological Evans (BE) are already global names, have succeeded in manufacturing generic medicines priced to cater to the affordable capacity of the country's poorer millions.

Offering a legitimacy argument to its position, Supreme Court maintained that the Indian Patents Act as amended in 2005 reflects the popular consensus of the Indian legislature. Section 3(d) was proposed by the government with the stated purpose of addressing concerns raised by members of parliament that the introduction of pharmaceutical product patent protection would substantially inhibit the availability of medicines for the population of India. India's WTO-TRIPS adoption enables enough flexibility to the country to adopt patenting standards to suit the Indian society's requirements. India, in the Supreme Court's opinion, had adopted a standard of pharmaceutical patenting that is stricter than that followed by the US or the EU.

A second case of IPR dispute in recent years is the Bayer case. The Supreme Court refused to entertain an appeal questioning India's compulsory licence policy by the Bayer AG, a German patentee. In 2011, the Indian Patent Office decided that Bayer had priced *Nexavar*, its anti-cancer drug, at an exorbitant price (Rs.2.8 lakh a month) and allowed NATCO Pharma Ltd, an Indian generic

20 C.L.R. Narasimhan, "Patented medicine and affordability," *The Hindu*, December 22, 2012.

company to produce the same drug at 1/30th of the original price (Rs.8,800). Bayer questioning the government's decision appealed to the Intellectual Property Appellate Board, a specialized tribunal, which upheld most parts of the decision of the patent office. Bayer approached the Mumbai High Court, then the Supreme Court which refused to entertain its petition.

Bayer questioned not only the issuance of the licence, but also the royalty rate imposed. Under the compulsory licence demands that the firm or the individual using the permit should pay appropriate percentage of royalty that meets to some extent the costs and value of the invention. Bayer argued that its R&D costs be taken into account to determine the appropriate royalty rate. But, it failed to furnish the details of R&D costs to the Indian patent office, nor to the supreme court. This is hardly surprising, "given that drug costs have been the best-kept secret of the pharmaceutical industry." In fact, laws of "most countries do not mandate a revelation of true drug costs. Unless we have this data, we will never know whether drug makers are undercompensated, overcompensated, or fairly compensated."[21]

21 Shamnad Basheer, "Patented price gouging and the enduring enigma of drug costs," Mint, December 17, 2014.

The Supreme Court's dismissal of Bayer's case had further infuriated the international drug companies which then subjected India to great pressure led by the US and the European Union. The successive Indian decisions involving the patent rights of the foreign drug producers were condemned as gross violation of the TRIPS commitments by the US pharmaceutical lobby which is actively backed by its government.

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There is therefore a demand to amend the Indian compulsory licensing provisions in particular and the IPR regime in general. This controversy also surcharged Indo-US political relations with senior officials of the US administration raising it with their Indian counterparts.

At the core of the above legal disputes is the ability of the Indian drug consumers to pay the price demanded by a patent holder, in these cases the foreign. By obliging the TRIPS obligations, cost of medicines in India has risen to the extent that even lifesaving drugs are not within a common man's reach. When Novartis was able to get exclusive marketing rights for its drugs in India over the domestic generic drug producers, it fixed the price of the drug at

US $ 2666, whereas the local generic producers were charging about a few hundred US dollars for the same.

The Novartis judgment was hailed not only by the Indian community, producers and consumers, but by many around the world including the original inventor of the drug *Gleevec* Dr Brian Druker who criticized the practice of predatory pricing by the big pharma companies and the way they make enormous profits.[22] In the words of the Supreme Court, there is huge difference between the rent-seeking practice of ever-greening and the beneficial practice of incremental innovation, and has clarified that Indian patent law forbids the former.[23] It is pertinent here to quote from the Ayyangar report which cautions against the consequences of a uniform economic policy without no regard for the specific local conditions:

> There is no uniformity in the economic problems which confront different countries at any time or even the same country at different periods of its history and account has therefore to be taken of the actual conditions in the manner of devising the precise adjustments which are needed to rectify the imbalance which the present system is apt to produce if left uncontrolled. [24]

Conclusion:

22 *Supra* Note 16.
23 Novartis Ag v. Union of India, (2013) 6 SCC 1.
24 *Supra Note* 16.

It may be concluded that though it is perceived by many countries that DSB would be a better forum for addressing issues arising out of the TRIPS operations, yet the importance of settlement of such issues through domestic legislation cannot be undermined. The domestic fora are more suitable to interpret any provision in the light of the circumstances and the overall objective of the Patent Act. The Indian Supreme Court has thus rightly upheld the philosophy of the Indian Patent Act that balances the rights and obligations of the stakeholders by providing affordable pharmaceutical products to the needy not only in the developing countries but also to the people for whom medicines are unaffordable even in the developed countries. It remains to be seen if such philosophy is adopted by WTO also, either through the changes being proposed through the Doha Declaration or by a more liberal interpretation of the TRIPS Agreement so as to safeguard the concerns of developing countries like India.

DEMOCRACY AS TERMS OF ENGAGEMENT IN SAARC

Puneeth Nagaraj[*]

Abstract

In the era of emerging economies the South Asian region of the world has the potential to play a very crucial role. Unified South Asian Region has the potential to bring about path breaking and trend setting changes in world trade and politics. However, legalization of politics and protection of vested interest has been the most dangerous impediment in achieving this status inspite of its recognized significance. Constitutionalism and democracy isn't always the preferred choice of governance and has been a victim of rampant alteration suiting the vested requirements. The article traces the resultant consequence of the said political instability in the South Asian region. It also gives an overview of the SAARC Charter, its short comings and its potential to bridge the gap between the expectations from the South Asian region and the reality it faces.

Constitutionalism is the idea of a *higher law* which acts as a limitation on the exercise of governmental power. The rationale behind placing a constitution above ordinary law is that the constitution is a product of the people's will and endeavors to

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protect their aspirations and ideals.[1] The constitution in essence is supposed to protect and enforce the rights of the people from whom it derives its power. One of the ways of achieving the stated purpose of constitutionalism is by recognizing that some rights are more essential or fundamental than other. This creates a separate class of rights that are guaranteed more protection than the others.[2] These are in the nature of the right to life, speech and other freedoms enlisted in a special section of the constitution[3]. The argument for having a separate recognition of such fundamental freedoms is that by according a greater protection to such rights, the State will be in a better position to guarantee these freedoms. It has been opined that there are five elements to constitutionalism, viz;[4] recognition and protection of fundamental freedoms; separation of powers; independent judiciary; review of constitutionality of laws; and, control of amendment of the constitution.

1 David Fellman in Philip P Weiner (ed.), "*Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas*" (1973).
2 Howard Jay Graham, "*Everyman's Constitution: Historical Essays on the Fourteenth Amendment*" (1968).
3 Constitution of India 1950, Article 19.
4 Sartori Giovanni, '*Theory of Democracy Revisited*' at 324, (1987).

Adherence to these principles will foster, as generally believed, respect for human worth and dignity. Constitutionalism is often associated with democracy with the belief that the former promotes the latter. Though there is no inherent contradiction between constitutionalism and democracy, yet very often democracy can subvert constitutionalism.[5] When Constitutionalism is subverted, the democracy is undermined.

South Asia is a region marred by political instability, often ruled by opportunistic politicians and autocratic rulers. To justify their ascendance to power, they alter the existing legal regime. This is termed as the legalization of politics and in South Asia has been seen as a limitation on constitutionalism.

Political Misuses practiced in South Asian countries where each regime seeks to protect its own interests and legitimize its exercise of power, the easiest means for which is to alter the constitution which confers upon them power in the first place, strikes directly at the heart of the constitutionalism.

Legalization of Politics:

Legalization of politics is a term used to describe the use of repressive laws against intimidate political opponents, regression of the judiciary to a mere handmaiden of the political executive

5 Charles M Fombard, '*Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties : Lessons from Southern Africa*' 55American Journal of Comparative Law at 8, (2007).

and various constitutional amendments which aggrandize the executive *vis-á-vis* other state sections.[6] All these political misuses are practiced in the South Asian countries where each regime seeks to protect its own interests and legitimize its exercise of power, the easiest means for which is to alter the constitution which confers upon them power in the first place.[7] This directly strikes at the basic spirit of constitutionalism. From a notion of constitutionalism as a means of protecting the aspirations of the people,[8] the legalization of politics further entrenches the existing imbalance in the distribution of wealth and power to act counterproductive to the very purpose of constitutional guarantees.[9] Instances of legalization of politics in some particular South Asian and their impact on constitutionalism are discussed below.

Doctrine of Necessity:

The Doctrine of Necessity was propounded by Henry de Bracton and later supported by William Blackstone. It is a term used to describe the basis on which extra-legal actions are invoked by state actors in the name of restoring public or political order. Stripped down to its bare terms it reads *that which is otherwise not lawful is*

6 Marzuki Mohamad, *Between Legalization of Politics and Politicization of Law: Politics, Law and Economic Development in Malayisa*, Akademika pp. 45-67 (July) 2004.

7 Mandel, Michael, *The Rule of Law and Legalization of Politics in Canada*, (1985).

8 *Supra* Note 2.

9 David Trubek, *Public Policy Advocacy: Administrative Government and Representation of Diffuse Interests*, (1979).

made lawful by necessity. The doctrine was applied in Pakistan which then came to be legitimized as a part of its constitution.

In Pakistan the doctrine of necessity was first exercised by the Supreme Court in 1954 to justify the political actions of Ghulam Mohammad.[10] Ghulam Mohammad who was the country's governor general dissolved the constituent assembly on the ground that it no longer represented the voice and aspirations of people of Pakistan. Though first this sheer political act was overturned by the Sind High Court subsequently it was upheld by the Supreme Court.[11] In its ruling, the Supreme Court used the Doctrine of Necessity to hold that the governor general's assent is necessary to enact any legislation into law and hence his discretion can override that of the Council of Ministers. Repeating similar ruling in the case of *Dosso v. Pakistan*, the Supreme Court upheld the decision of President Iskander Mirza to abrogate the constitution of the republic[12]. Later in 1973 the doctrine became integral part of Pakistan constitution legitimizing the Army's action to take over the government if it deemed necessary.[13] This was the position in the constitutional law of Pakistan until the 18th Amendment outlawed any attempts to overule the constitution.[14] Nevertheless, legalisation of politics wherein the judiciary toes the line of the

10 Amita Shastri and Jeyaratnam A Wilson, *The Post Colonial States of South Asia: Democracy, Development and Identity*.
11 Maulvi Tamizzuddin Khan v. The Federation of Pakistan, PLD 1955 FC 240.
12 State v. Dosso (PLD 1958 SC (Pak) 533.
13 *Supra* Note16.
14 *Supra* Note 9.

executive in upholding any amount of intervention by the executive in the functioning of the government was applied to justify the military rule in Pakistan for a collective period of over 30 years.

That South Asia is a region of recurring political instability cannot be ignored. The concentration of power in the executive in most of the states has ramifications for regional stability and harmony also can not be ignored.

Nepal

A second example of a South Asian state invoking the Doctrine of Necessity is Nepal. The Supreme Court of Nepal in 2010 ruled that except for the basic principles of federal democratic republic, human rights and an independent judiciary, all other provisions of the Interim Constitution could be amended as per the Doctrine of Necessity.[15] This decision has rather introduced a disturbing precedent for the future of Nepal. It essentially confers almost unbridled powers on the executive to amend the constitution as per its political exigencies. It has already been used to amend the interim constitution many times. Critics have denounced this judgment as a move that would strain Nepal's move towards

15 Nischal N. Pandey, *Doctrine of Necessity*, The Kathmandu Post, May 19, 2010, available at http://www.ekantipur.com/the-kathmandu-post/2010/05/19/oped/doctrine-of-necessity/208462/, (accessed on May, 2014)

constitutionalism leading to violation of principle of rule of law and rendering democratic governance weak.[16]

The Need for Meaningful Democracy in the SAARC Region:

There are enough sections who do not see that democracy should be the chosen political system in South Asia and such non-votaries of democratic philosophy represent a cross-section of communities representing religion, authoritarianism, ethnic nationalism and even monarchy. But the countries in South Asia have in their respective constitutions made a commitment to democracy and constitutionalism. Sufiur Rahman, the Director General of SAARC emphasizes the close link between democracy and development arguing that democracy is essential to improve the quality of the lives of the people in the region. The SAARC Charter under Art. 1 commits to improve the quality of living and achieve economic growth in the region and such a goal can hardly be realized without first ensuring a comprehensive commitment to democracy.[17]

It has also been found that trade, cultural exchange and other regional cooperation initiatives are more easily managed with democracies rather than other forms of government.[18] This is

16 Dev Raj Dahal, *Transformation in Nepal: A Personal Reflection*, presented at a High level dialogue organized by the General Federation of Nepalese Trade Unions.

17 BSS, SAARC Charter of Democracy Finalised, The Daily Star, September 6, 2010 available at http://www.thedailystar.net/newDesign/news-details.php?nid=153845.

18 Jeffrey J Anderson, *Regional Integration and Democracy: Expanding on the European Experience*, at 72.

evident from the success of the European Union which consists of democratically elected governments. No less important is the fact that lack of democracy in the region is a stumbling block in promoting intra-regional trade which is woefully short of the actual potential of the regional players.[19]

Consequences of the Failure of Democracy:

That South Asia is a region of recurring political instability cannot be ignored. The concentration of power in the executive in most of the states has ramifications for regional stability and harmony also can not be ignored. It is important to note that despite SAARC, most of the engagement between states occurs at a bilateral level for a host of reasons.[20] Every time there is a change in the regime in a particular state, its relations with other states is also affected. This is because each successive regime is hostile towards the policies of its political opponents.[21] This is not to mean that successful democracies are free of such issues. But constitutionalism and adherence to the separation of powers can reduce the chances of such an event and provide a platform for such issues to be resolved.[22] The challenge is perhaps more evident

19 Dushni Weerakon, *Does SAFTA Have a Future*, 36 Economic and Political Weekly 34 at 3218.

20 Elizabeth Krueger et al., *Impacts of the South Asian Free Trade Agreement*, Policy Analysis Workshop, LaFollette School of Public Affairs, Spring 2004.

21 Edward D Mansfield et al., *Democracy, Veto Players and the Depth of Regional Integration*, The World Economy (2008).

22 Krueger, *Supra* Note 24.

at the domestic level. Even a government that guarantees economic prosperity cannot justify making a tradeoff between the human rights of its citizens and economic development in a democratic setup, except in extraneous circumstances.[23] Thus, in the interest of better regional cooperation, it is imperative that SAARC take a decisive stand in favour of democracy.

The SAARC Democracy Charter: A Step in the Right Direction?

The idea of a SAARC Charter of Democracy was mooted by Sheikh Hasina, prime minister of Bangladesh at the 16th SAARC Summit in Thimphu. The thinking behind the Charter was to recognize and reaffirm the commitment of all South Asian nations to the concept of democracy. It was drafted by a Technical Committee in 2010 and received the approval the Standing Committee comprising foreign secretaries of all SAARC member countries in February 2013. The Charter contains many important provisions which recognize the supremacy of the respective constitutions, guarantee the independence of the judiciary and renounce unconstitutional measures adopted to change the head of a state. Though the provisions in themselves do not mean much in reality, the fact that the regional leadership had given detailed consideration and reached consensus in itself is a positive step toward the ideal of a democratic South Asia.

23 Anderson, *Supra* Note 23.

Conclusion:

In identifying democracy as a basis for progress in South Asia, the Charter underscores the need for stable democratic governments in an increasingly volatile region. Almost all the countries in the region are facing challenges to their democratic institutions and aspirations by sectarian and fundamentalist forces.

India despite its manifold shortcomings has had a fairly successful democracy in over the past six decades. Yet, the recent controversy surrounding corruption at the highest levels of government as also the growing threats to the well established liberal and secular values of the country can undermine its constitutional process. Pakistan continues to grapple with the all powerful military as also the fundamentalist forces which threaten the feeble voices of democracy and its institutions in the country. After years of civil war Sri Lanka is just returning to a normal public order on the island. However, the highly centralized presidential system which has no interest in restoring human rights and effect devolution of powers to the minority Tamil community as promised under Art 13 of the republican constitution does not augur well for a genuine constitutional order on the island.

The original constitution of Bangladesh enacted in 1972 was hailed as a progressive one incorporating key democratic values. But frequent amendments under successive regimes to meet their political exigencies have eroded its basic ideals. As a result

Bangladesh constitution has become privy to recurring political feuds of the bipartisan political system, each trying to undo the other's work. Nepal and Afghanistan, politically fragile and weak, are struggling to produce a constitutional order which, given the conflicting political values and demands of the rival groups, has not so far sent positive signals of enactment in immediate future.

SAARC as an organization has great potential to serve the interests of the people in the region though for a variety of reasons it has failed to live up to this potential. The Charter of Democracy has however well served in laying down a democratic roadmap and hopefully the South Asian states would strive to translate the template into a workable system. Odds are heavy, but the Charter can serve as an ideal to set in motion the process of actualizing it, given the political will.

WELFARE LEGISLATIONS: LEGAL ISSUES AND INDIAN JUDICIAL RESPONSES

Jacob George Panickasseril[*]

Abstract

The concept of a welfare state has been articulated and inspired by western political tradition. Post-colonial Afro-Asian independent nations borrowed the western cradle-to- grave concept in varying degrees to raise the socio-economic living standards of their people. Not all of their experiments however were successful and effective. India largely adopted the Irish Model of Principles of Social Policy in codifying its directive principles of state policy into its new constitution. Ensuing conflicts in balancing individual freedom as guaranteed by the fundamental rights with the philosophy of social justice led to state-sponsored welfare legislations being challenged before the judiciary. The Indian Supreme Court from time to time adopted itself proactively by finely balancing the constitutional provisions with legislative intent of welfare enactments and has thus played a key role in upholding the cause of social justice aimed at improving the conditions and status of under-privileged classes of society like the economically backward classes, women, children, rural and the poor and tribal communities.

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The modern era can be called the era of the welfare state. This particular form of state did not rise in a socio-economic vacuum but was the result of radical political developments that forced western states to adopt and implement the liberal and progressive political philosophies to qualitatively improve the conditions of its citizens. Such a policy was a radical departure from the traditional police state theory according to which the purpose of the state was only to protect its citizen from foreign invasions and conquests.[1]

The liberal school emphasised the importance of the rights of the individual as against the state and believed that the welfare of the society would be served if the state intervened in the social and economic domains of society. There is no single concept of what defines a welfare state as it evolved over centuries firstly in the western societies, followed later by non-western societies.[2] The development of the welfare state particularly in Europe and the United States should be understood in the context of prevailing liberal philosophies of state and society at the given time. What follows is a brief recapitulation of the welfare models of some of the European and developing countries.

1 K.J. Holsti, *International Politics: A Framework for Analysis* ,Sixth Edition (New Jersey, USA: Prentice Hall, 1992), 83.

2 Donald Moon, "The Idea of the Welfare State" in *The Oxford Handbook of the History of Political Philosophy*, George Klosko (ed.) (Oxford, UK: Oxford University Press, 2011), 661.

German and Nordic Models:

The development of the German welfare state must be understood in the background of the growth of Marxism in the nineteenth century. Marx's ideas were particularly appealing to the working classes in Germany who believed revolution was the means of bringing change in the capitalist society. Germany's legendary leader and statesman Bismarck attempted to deal with the rise of socialists in Germany by promoting pension and insurance schemes for the industrial workers, becoming hence the first country in the world to do so.[3] Nordic countries followed soon the German welfare model, though with difference. Pensions and insurance measures were extended to all citizens regardless of their class background. These measures were funded by taxes imposed on their citizens.[4] Denmark introduced a non-contributory, tax financed pension scheme in 1891 followed by Sweden in 1913.

The British Model:

As Britain transformed itself from a feudal to industrial society, its economic policies were steadily reformed to reduce the sharp class divisions within its conservative society. Various socialist ideologies –syndicalism, guild socialism, fabianism – served to build the ideological foundations of the growing labour movement. Twentieth century global political developments including the first

3 Michael G. Roskin, *Countries and Concepts: An Introduction to Comparative Politics*, (New Jersey, USA: Prentice Hall, 1992), 147.

4 Peter Baldwin, "The Scandinavian Origins of the Social Interpretation of the Welfare State" in *Comparative Studies in Society and History*, Vol. 31, No. 1 (1989): 8.

and second world wars in which Britain was a key actor also contributed to the decline of the imperial economy which was served by colonial exploitation. Thus as Britain was fighting world war two, the first major welfare programme was recommended by the Committee on Social Insurance and Allied Services, popularly known as the *Beveridge Report*, in 1942. The Report was implemented by the Labour government in the form of the Insurance Act of 1946 which provided protection for the old, sick and unemployed sections of the society. The Act also established the popular but controversial National Health Service (NHS) which made healthcare free to the public. These legislations thus build the modern British welfare state. Other welfare provisions included state control of school education by taking over from the church which controlled most of the schools. Labour party's fervent leader Aneurin Bevan played a key role in the implementation of the Beveridge Report which recommended construction of 'council' houses in contrast to private housing. These houses were placed under the local authorities and the citizens could afford tenancy without excessive rent.

American Model:

The United States of America right from its independence from the British empire followed the doctrine of economic liberalism which argued for the State's minimum interference in the public affairs and economy of its society. However, this free market discourse was seriously questioned and revised following the great economic

crash of 1929 which forced the collapse of America's market-led economy resulting in severe loss of incomes and employment. Shortly after taking over in 1933 as the President, Franklin D. Roosevelt responded with a series of radical measures meant to restore the shattered economy through public welfare policies. In short, the Roosevelt economic policies labelled as the *New Deal* sharply marked a departure from the free market economic philosophy of the American state. His reforms included the Economy Banking Act, National Industrial Recovery Act, Farm Credit Act and the Social Security Act, the last providing for contributory insurance and unemployment compensation scheme.[5] The federal government sought to restore confidence of the people by creating executive commissions which were placed directly under the control of the president. The purpose of these commissions was to introduce quick socio-economic reforms without legislative and judicial challenges.[6]

Welfare Models of Developing States:

Many countries in Asia and Africa which became independent in the aftermath of the second world war chose to follow their own welfare state models, adopting to their native conditions. In the west countries passed through stages of economic development from the era of the Industrial Revolution unlike the newly post-

5 Theodore J. Lowi and Benjamin Ginsberg, *American Government : Freedom and Power*, (New York, USA: W.W. Norton and Company, 1992), 716.

6 Cass R. Sunstein, *Free Markets and Social Justice*, (New York, USA: Oxford University Press, 1997), 319-322.

colonial states. The Soviet Union on the other hand, founded on the revolutionary ideology of Marxism-Leninism, abolished the very institution of private property and replaced it with a state-controlled economy in the name of proletariat dictatorship.

Newly independent countries had therefore before them two distinct templates for planning their democratic and economic activities. The strong state interventionist approach of the Soviet Union with its socialist appeal proved more attractive to these poor countries. However since these countries incorporated western democratic ideals in their freedom struggles, it also inspired their new constitutional experiments. An interesting point to be noted is that while for the western countries' economic progress preceded the granting of democratic rights to their citizens like adult franchise, the newly independent countries carried simultaneously the process of development agenda with political reforms which included full voting rights to their citizens immediately upon independence.[7]

Evolution of the Indian Welfare State:

Independent India had undertaken an extensive political debate before its new form of political system was legitimised by the constituent assembly which represented a cross-section of learned and experienced lawmakers. The constitution makers conceived a unique statute into which different shades of ideologies were

7 Gunnar Myrdal, *Beyond the Welfare State* (London, UK: Metheun, 1965), 89-92.

woven skilfully through debate and dissent. Explaining the *leitmotif* of the constitution Ambedkar argued that it was only 'a mechanism for the purpose of regulating the work of the various organs of the State.' The constitution cannot decide for the people on what form of social organisation to be followed as the people change with the times and circumstances.[8]

Having been inspired by the increasing role of the state in promoting the well-being of its citizens the constituent assembly incorporated the directive principles, modelled on the Irish constitution of 1937.[9] While the Irish constitution stated that the principles are meant for the 'general guidance' of its parliament the directive principles are 'fundamental in the governance of the country.'

H.M. Seervai discusses the background in which the fundamental rights and the directive principles came to be in juxtaposition to each other. Sir B.N. Rau in his position as constitutional advisor to the constituent assembly had suggested making the fundamental rights subordinate to the directive principles in his draft constitution. Whereas the former secured the rights of the individual the latter provided for the welfare of the society. There was every possibility that any welfare legislation implementing the directive principles could be challenged on the ground of violating

8 *Constituent Assembly Debates*, Volume VII, 402 (Monday, 15th November 1948).

9 Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, (New Delhi, India: Oxford University Press, 1999), 96.

the fundamental rights. He felt only an express provision in the constitution could save the directive principles from such a challenge.[10]

However the directive principles were made specifically non-enforceable. Explaining the rationale Ambedkar felt that the constitution provided a mechanism for political democracy in India. By political democracy it was meant the holding of regular elections to avoid the incidence of a dictatorship developing in India. However with democracy different people have different ideas as to how to achieve economic democracy. The constitution as a text is not to restrict the different ways of thinking of the citizens as to how to achieve economic democracy. In this regard the text of part IV was kept flexible in a deliberate manner.[11]

Judicial Debates on Fundamental Rights v. Directive Principles:

Having discussed the genesis of the directive principles it is important to remember that Article 37 of the constitution does impose an obligation on the State 'to apply these principles in making laws.' However, the fears expressed by Sir B.N. Rau came true when welfare legislations enacted by the central and state governments were challenged before the constitutional courts on the ground of violating the fundamental rights. This tension was

10 H.M. Seervai, *Constitutional Law of India: A Critical Commentary*, Volume II, Fourth Edition, (Bombay, India: N.M. Tripathi, 1993), 1924-1925.

11 *Supra* Note.8, p.494 (Friday, 19th November 1948).

reflected in *State of Madras v. Champakam Dorairajan*[12] where the Supreme Court struck down and held that the directive principles cannot override the fundamental rights as the latter is "sacrosanct and not liable to be abridged by any Legislative or Executive Act or order, except to the extent provided in the appropriate article in Part III."

This inherent conflict between Part III and IV of the constitution was aptly noted by Nehru when he introduced the Constitution (First Amendment) Bill in Parliament:-

> (O)n the one hand, in our Directive Principles of State Policy we talk of removing inequalities in raising people up in every way, socially, educationally and economically, reducing the distances which separate the groups or classes of individuals from each other, on the other hand we find ourselves handicapped in this task by certain other provisions in the Constitution.[13]

As successive Indian governments introduced welfare measures for different sections of the society, constitutional debates too sharpened and the judiciary gave various interpretations to the relationship between Parts III and IV. In the oft quoted case of

12 AIR 1951 SC 226.

13 XII-XIII Parliamentary Debates, Part II pp.8820-8822 (16 May 1951) cited in Parmanand Singh, "Nehru on Equality and Compensatory Discrimination" in *Nehru and the Constitution*, Rajeev Dhavan and Thomas Paul (eds.), (New Delhi, India: Indian Law Institute, 1992), 115.

Kesavananda Bharati v. State of Kerala[14] the Supreme Court drew a balance between the rights of the individual and the duty of the state:

> While most cherished freedoms and rights have been guaranteed the government has been laid under a solemn duty to give effect to the Directive Principles. Both Parts III and IV which embody them have to be balanced and harmonised-then alone the dignity of the individual can be achieved.[15]

The court stressed on the importance of the directive principles in the constitution and the role of the state in bringing about a welfare society:

> To ignore Part IV is to ignore the substance provided for in the Constitution, the hopes held out to the Nation and the very ideals on which our Constitution is built. Without faithfully implementing the Directive Principles, it is not possible to achieve the Welfare state contemplated by the Constitution.[16]

A few years later another constitution bench in *Minerva Mills v. Union of India*[17] held that the constitution is based on "the bedrock

14 AIR 1973 SC 1461.
15 *Ibid.* (Shelat and Grover, JJ.)
16 *Ibid.* (Hegde and Mukerjea, JJ.)
17 AIR 1980 SC 1789.

of the balance between Parts III and IV." The balance between them was thus interpreted as a basic feature of the constitution.

Thus it can be seen that while the directive principles have been inspired by Article 45 of the Irish constitution which was specifically stated to be non-cognisable by the courts the Indian courts have lent a different hue. The directive principles under the Indian constitution have been taken into consideration by the courts to adjudicate upon various welfare legislations whose provisions have been challenged and the courts have generally interpreted to promote *both* fundamental rights and the directive principles.

The Right Of Children To Free And Compulsory Education Act 2009:

The constitution incorporated the right to education into the directive principles vide Article 45 which stated: "The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."

This is the only directive principle which prescribed a time limit of ten years for implementation of its subject. Yet the state for more than one reason could not meet the deadline and hence enforcement of compulsory education remained a mirage. Taking cognisance of the unfulfilled constitutional promise of the right to

education the Supreme Court laid down in *Mohini Jain v. State of Karnataka*[18] that:-

> The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The State Government is under an obligation to make endeavour to provide educational facilities at all levels to its citizens.[19]

The court had however left unanswered the question of how the state was to guarantee the said right. Since Article 41 had a limiting provision of the state undertaking within the limits of its economic capacity and development the court clarified in *Unnikrishnan v. State of A.P.*[20] that the obligation of the state to provide for education after the age of 14 years was subject to Article 41.The right to education was thereafter elevated from the realm of a directive principle to a fundamental right with the passage of the 86th Constitutional Amendment Act 2002. The Right of Children to Free and Compulsory Education Act, 2009 (RTE Act) was passed in 2010 to implement the constitutional mandate of the 86th Amendment.

However, private management schools challenged the constitutional validity of the RTE Act on the grounds that it

18 (1992) 3 SCC 666.
19 *Ibid.* (Kuldip Singh, J.)
20 1993 (1) SCC 645.

violated Articles 19 and 30. Their grounds of defence were that earlier judicial decisions in *In Re Kerala Education Bill*[21], *St. Stephen's College v. University of Delhi* (AIR 1992 SC 1630)and *TMA Pai Foundation v. State of Karnataka*[22] had laid down the proposition that minorities had the fundamental right to establish and administer educational institutions under Article 30. In *Society for Unaided Private Schools of Rajasthan v. Union of India*[23] the court explained the role of the state in providing education to all:

> The manner in which this obligation will be discharged by the State has been left to the State to determine by law. The 2009 Act is thus enacted in terms of Article 21A. It has been enacted primarily to remove all barriers (including financial barriers) which impede access to education.[24]

The court also explained the significance of the title of the 2009 Act where the word *Free* "stands for removal by the State of any financial barrier that prevents a child from completing 8 years of schooling" and the word *Compulsory* "stands for compulsion on the State and the parental duty to send children to school".

The judgment thus held that the RTE Act was constitutionally valid and applied to unaided schools. The court however decided to form a constitution bench to make clear the position of minority

21 1957 AIR 1958 SC 956.
22 AIR 2003 SC 355.
23 (2012) 6 SCC 1.
24 *Ibid.* (Kapadia, C.J.)

education institutions. In *Pramati Educational and Cultural Trust v. Union of India*[25] the court held that private educational institutions are liable to admit students within the scheme of the 2009 Act and that the state had a role to play in taking on the burden of the expenses for disadvantaged students who could not afford the fees in these schools.

Therefore, private schools cannot have recourse to the protection of Article 19(1)(g) in refusing to admit students from weaker sections of the society. However the court held that minority schools do not fall within the ambit of the RTE Act. The court held that the RTE Act "insofar as it applies to minority schools, aided or unaided, covered under clause (1) of Article 30 of the Constitution is *ultra vires* the Constitution."

Thus, it can be seen that the right to education which was incorporated as a directive principle initially and then made a fundamental right has been read as subject to other fundamental rights in Part III by the latest interpretation of the Supreme Court.

Mahatma Gandhi National Rural Employment Guarantee Act 2005:

In a welfare state the citizen has a justifiable right as against the state to enforce his right to work. This means that the state is under an obligation to provide employment to the citizen and the right may be extended to an allowance when and where the citizen is not

25 (2014) 8 SCC 1.

employed. Many modern day welfare states in Europe are able to provide unemployment allowance for its citizens during periods of economic downturn. The influence of Keynesian economics has definitely played its part in making the state focus on employment especially in the aftermath of the Great Depression of the 1930s. Classical economic liberalism was unable to provide a solution to upheavals of that period and employment schemes were undertaken by these countries.[26]

In a developing state like India providing employment to its vast teeming population is a challenge which even the members of the constituent assembly realized. Though the term 'strive' in Article 38 was meant to ensure that the state could not hide behind its obligations under Part IV on the grounds of financial stringency or other circumstances, Article 41 limited the state to fulfil its obligations 'within the limits of its economic capacity and development'.[27] This was due to the fact that the possibility of the state providing for the wide range of welfare measures for the classes of citizens mentioned in the said article would be a considerable strain on the financial resources of the State and more so for a newly independent country like India.[28]

Several welfare schemes were introduced after independence to provide employment to rural citizens under such schemes as the

26 Mihir Shah, "Employment Guarantee, Civil Society and Indian Democracy" in *Economic & Political Weekly* Vol. 42 No. 45-46 (2007): 45.
27 *Supra* Note.8, p.495 (Friday, 19th November 1948).
28 *Supra* Note.10, p.1609.

Jawahar Rozgar Yojana, Swarnajayanti Gram Swarozgar Yojana and the Integrated Rural Development Programme (IRDP).These schemes however lacked the force of law and could be started and closed at the whims of government officials on grounds of inadequacy of funds.[29] The Supreme Court recognising this lacuna in *Delhi Development Horticulture Employees' Union v. Delhi Administration, Delhi.*[30] lamented that:

> This country has so far not found it feasible to incorporate the right to livelihood as a fundamental right in the Constitution...Thus even while giving the direction to the State to ensure the right to work, the Constitution makers thought it prudent not to do so without qualifying it.[31]

The court had earlier in *Olga Tellis v. Bombay Municipal Corporation*[32] recognised the right to livelihood within the broad confines of the right to life in Article 21. The Court also expressed its opinion that the State should create new opportunities to generate employment in rural areas from where large scale migration takes place to minimise the problem of slums developing in cities. This observation becomes particularly relevant in the context of the argument that the post liberalisation era results in jobless growth. For example, during this period the share of

29 Jean Dreze, "Employment Guarantee and the Right to Work" in *The Battle for Employment Guarantee*, ed. Reetika Khera, (New Delhi, India: Oxford University Press, 2011), 9.
30 (1992) 4 SCC 99.
31 *Ibid.* (Sawant, J.)
32 (1985) 3 SCC 545.

agriculture to the gross domestic product (GDP) reduced to just fifteen percent but still employed half of the workforce in the country.[33] Taking note of the need for generating rural employment the National Commission to Review the Working of the Constitution recommended inclusion of a new provision Article 21-C to mandate the state to guarantee the right to employment to rural citizens for eighty days in a year.[34] The promise of an enactment for guaranteed rural employment legislation was also one of the important reasons for the United Progressive Alliance to come to power in 2004. Within a year the National Rural Employment Guarantee Act (NREGA) was passed unanimously in Parliament.

The positive effects of passing the NREGA were that rural workers could escape from the web of exploitation of private employers. Secondly it was hoped that the workers would be in a better position to demand higher wages from these employers after obtaining a minimum wage under the Act.[35] The NREGA was not however the first welfare measure to attempt to tackle the issue of rural employment. What made the NREGA unique was that it made the government officials accountable by mandating them to provide employment within fifteen days to a person applying

33 IDFC Rural Development Network, *India Rural Development Report 2012-13*, (New Delhi, India: Orient Black Swan, 2013), 18.

34 *Report of the National Commission to Review the Working of the Constitution*, Volume I, (New Delhi, India: Universal Law Publishing, 2002), 63.

35 *supra* n.16, pp.4-5

failing which he would be entitled to unemployment allowance (Section 7(1)). This stipulation meant that the state could not escape under the guise of Article 41. The Supreme Court noted the obligation of the state in *Secretary, State of Karnataka v. Umadevi*[36]*:*

> A sovereign government, considering the economic situation in the country and the work to be got done, is not precluded from making temporary appointments or engaging workers on daily wages.[37]

Recently the Supreme Court in *Centre for Environment and Food Security v. Union of India*[38] justified similar logic in the following words: "The legislative scheme of the Act clearly places the 'right to livelihood' at a higher pedestal than a mere legal right." Thus the right to livelihood which was a non-enforceable right under Article 41 was read into Article 21 in *Olga Tellis* and thereafter the enactment of the NREGA has made it obligatory on the state to provide rural employment. The right to livelihood has thus become justifiable within the confines of Article 21.

The Scheduled Tribes And Other Traditional Forest Dwellers (Recognition Of Forest Rights) Act, 2006:

36 (2006) 4 SCC 1.
37 *Ibid.* (Balasubramanyan, J.)
38 (UOI) 2010 (13) SCALE 489.

During the colonial period the British, in need of forest produce especially timber for building its vast railway network in the Indian subcontinent, made the first attempt to assert State monopoly through the enactment of the Forest Act of 1878. This established the monopoly power of the British over forest lands and produce by converting the customary use of the forest by villagers as a 'privilege' to a 'right' exercised by the British.[39] The traditional dwellers living in and around the forests who utilised the produce of the forest for the purposes of firewood, food and allied products were no longer able to exercise the rights enjoyed by them for generations.

The constituent assembly sought to remedy the injustices committed to the Scheduled Tribes by restricting the freedom to move and settle in any part of India (Article 19(5)) and promoting their economic interests (Article 46). When various state governments enacted legislations to restrict land transfers from non-tribals to tribals the Acts were challenged as violating Article 14 of the constitution. In *Sri Manchegowda v. State of Karnataka*[40] the Court held that:

> The State, consistently with the Directive Principles of the Constitution, has made it a policy and very rightly, to preserve, protect and promote the interests of the Scheduled

39 Ramachandra Guha, "Forestry in British and Post-British India", in *The Adivasi Question*, ed. Indra Munshi, (New Delhi, India: Orient Black Swan, 2012), 30.

40 (1984) 3 SCC 301.

> Castes and Scheduled Tribes which by and large form the weaker and poorer sections of the people in our country.[41]

In *Samatha v. State of A.P.*[42] the court recognised the importance of forest land to the adivasis:-

> Agriculture is the only source of livelihood for Scheduled Tribes, apart from collection and sale of minor forest produce to supplement their income. Land is their most important natural and valuable asset and imperishable endowment from which the tribals derive their sustenance, social status, economic and social equality, permanent place of the abode and work and living.[43]

Welfare programmes such as social forestry and the Joint Forest Management (JFM) failed to achieve the objectives of involving the people actively as the main issue of access to non-timber forest produce (NTFP) especially bamboo was not addressed by these schemes.[44] The passage of the Panchayat (Extension to Scheduled Areas) Act in 1996 was a landmark legislation which extended the benefits of the 73rd Constitutional Amendment to Scheduled Areas and was expected to restore autonomy to the tribals.

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41 *Ibid.* (A. N. Sen, J.)
42 (1997) 8 SCC 191.
43 *Ibid.* (Ramaswamy, J.)
44 S*upra* Note 17, pp.184-185.

However, the Supreme Court laid more emphasis on the Forest Conservation Act 1980 and the Environment Protection Act 1986 which did not take into consideration the rights of the adivasis in the forest. As a result the court which was monitoring environmental matters through its mechanism of continuing mandamus passed a blanket order prohibiting all non-forest activities without obtaining approval of the central government. This effectively prevented the adivasis from collecting forest produce as they faced constant harassment from forest officials eager to implement the order of the court.[45]

The above circumstances led to the enactment of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 which contain certain features meant to ameliorate the plight of tribals and other traditional forest dwellers (TFDs). Section 3 of the Act grants to STs and TFDs the right to: -

- cultivate upto a maximum of four hectares even without proper title documents
- use minor forest produce other than timber
- protect and manage the forest to the community

The Supreme Court articulated the importance of the Act in correcting the injustice meted out to the forest dwellers by

45 Armin Rosencranz and Sharachchandra Lele, "Supreme Court and India's Forests", in *Economic and Political Weekly*, Vol. 43 No. 05 (2008): 11.

involving them in environmental conservation in *Orissa Mining Corporation Ltd. v. Ministry of Environment and Forest*[46]:-

> They have a vital role to play in the environmental management and development because of their knowledge and traditional practices. State has got a duty to recognize and duly support their identity, culture and interest so that they can effectively participate in achieving sustainable development.[47]

By focussing on the legislative intent behind the Act the court recognised that it was in the form of a social welfare measure:-

> The Legislature also has addressed the long standing and genuine felt need of granting a secure and inalienable right to those communities whose right to life depends on right to forests and thereby strengthening the entire conservation regime by giving a permanent stake to the STs dwelling in the forests for generations in symbiotic relationship with the entire ecosystem.[48]

Thus it can be seen that the court has interpreted the requirement of balancing the needs of the forest dwellers with environmental protection without compromising on either of the two unlike earlier measures taken by the state.

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46 (2013) 4 SCJ 454
47 *Ibid.* (K.P.S. Radhakrishnan, J.)
48 *Ibid.*

Conclusion:

The concept of a welfare state is shaped by the particular socio-economic conditions prevalent in each society. Welfare state models in developed countries have been formulated during times of economic crises and thus did not change the basic liberal structures within these countries. In contrast developing countries have been inspired by liberal values in the political realm but have imbibed socialist principles in the economic sphere. This tension between the two schools is reflected in the rights of the individual *vis-a-vis* the needs of the society debate in many developing countries especially in India.

The constituent assembly took cognisance of the above debate and incorporated the two features into Parts III and IV of the Indian constitution. The Supreme Court being an organ and creature of the constitution has contributed to this discourse through the interpretation of the relationship between Parts III and IV. While the court earlier was conceding to the primacy of the fundamental rights the realization of the socio-economic conditions of Indian society made the court make an active effort in reading the directive principles in a creative manner. The Supreme Court has now started looking not only into the legislative intention behind welfare legislations but also at the aspirations of the framers of the constitution. Ensuring fundamental rights such as the right to life to under-privileged classes of society like children, rural

unemployed and forest dwellers will have meaning only if they are read in the spirit of the directive principles.

Thus aided by constitutional provisions and backed by liberal interpretation of the relevant provisions by the courts from time to time, the Indian state has learnt to balance the rights of the individual and the broader welfare compulsions of the society and thereby ensure social justice to the citizens of India.

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- *Society for Unaided Private Schools of Rajasthan v. Union of India* (2012) 6 SCC 1.
- *Sri Manchegowda v. State of Karnataka* (1984) 3 SCC 301.
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INDO – BANGLA CONTINENTAL SHELF DISPUTE

Kritika Sethi[*]

Read the various media reports about the dispute over the delimitation of continental shelf maritime zone between the neighbouring Bay of Bengal littoral states, India and Bangladesh? Ever wondered why it took a period of forty years for the resolution of the same. This paper is a detailed exercise to examine the dispute over delimitation of the continental shelf between India and Bangladesh, the two adjacent coastal states in the Bay of Bengal. Pending the bilateral contention over delimiting the continental shelf between these countries, it is necessary to recapitulate the legal regime of continental shelf under the international law of the sea.

Article 1 of the Convention on Continental Shelf, 1958 (hereinafter referred as CCS) has defined the term continental shelf as referring: (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands."[1] Article 76 of the UNCLOS (United Nations Convention on the Law of the Seas, 1982) which is the final Act of the international law of the sea

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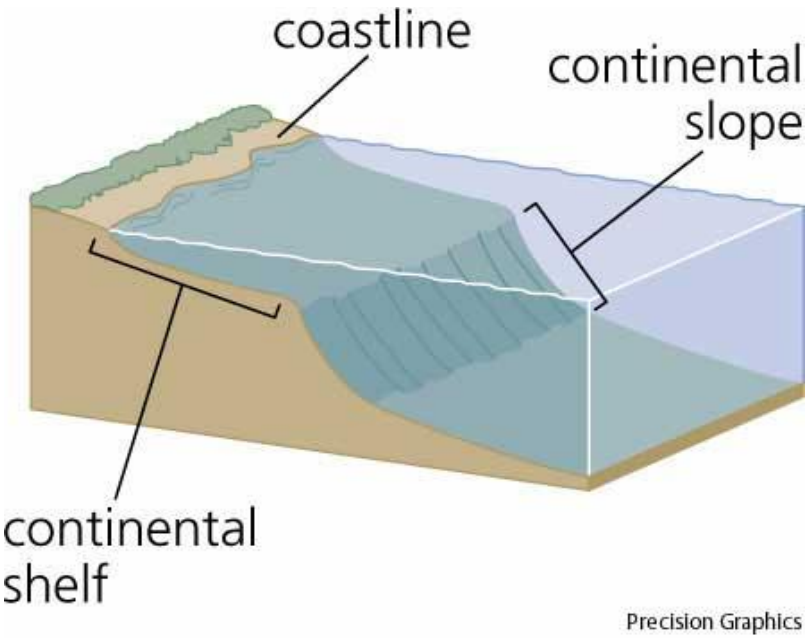
1 The Convention on Continental Shelf (CCS), 1958, Article 1.

binding on all the signatory states, further elaborates the legal meaning of continental shelf as:

> The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.[2]

In simple terms, it refers to that area which projects from the adjoining landmass into the sea and which is covered by shallow water. This region has become a frequent source of maritime jurisdictional disputes by virtue of the oil and gas resources found therein. Continental shelf as it locates in the maritime domain of a sea is illustrated below.

2 The United States Convention on Law of Sea, Article 76.



Traditionally, Continental Shelf was considered to be part of the high seas and hence all the states had the right of access to explore and exploit the marine seabed and subsoil resources available in the marine domain. Twentieth century however gradually witnessed certain Pacific states led by the United States contesting the traditional status of the continental shelf and began claiming sovereign rights over it. Following the discovery of oil in 11919 in the Gulf of Mexico, about forty nautical miles from the shore the US Department of State changed its existing position of no jurisdiction over the area toward exercising sovereign control over

3 American Heritage Dictionary, Houghton Mifflin Harcourt Publishing Company, 5th ed., 2013.

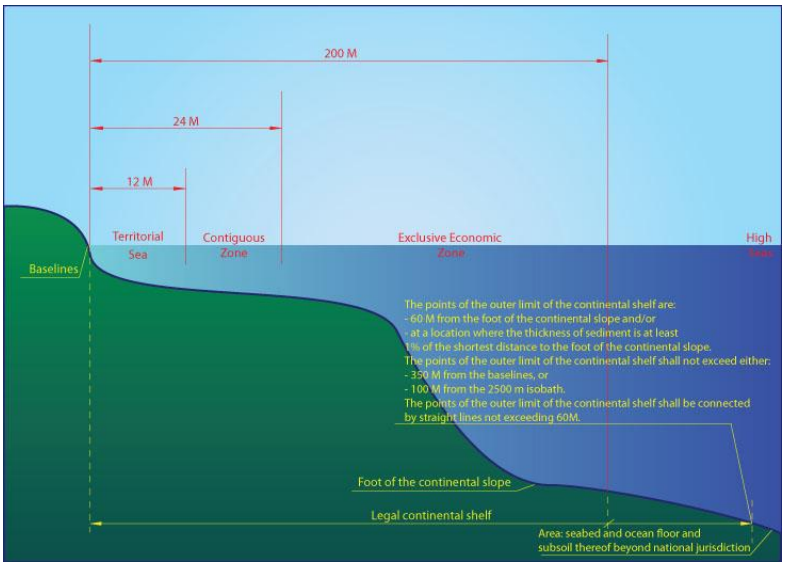
the area.[4] By virtue of the richness of the region in natural resources, various states started appropriating this region post Second World War. US' proclamation of its claim over the natural resources in the subsoil and the seabed of the adjoining coast was one of the first examples of a claim over continental shelf by a coastal state.[5] They did not claim their right over the water above the continental shelf. Other states like Argentina and El Salvador followed US example.

The 1958 CCS defines continental shelf in terms of its exploitability. The same definition was acknowledged as customary law by the International Court of Justice in the classic *North Sea Continental Shelf*[6] case. The outer limit of the extent of the continental shelf was not defined in the CCS. It was left to be determined by the concerned state by its technological developments as it allowed the exploitation of the superjacent waters beyond 200 nautical miles. This position has been modified by the Article 76 of the UNCLOS which defines the extent of the continental shelf to 200 nautical miles from the baseline. Following diagram better illustrates the technical position of the continental shelf.

4 William Burke, Myres McDougal, The Public Order of the Oceans, Martinus Nijhoff Publishers, 1962, p. 636.

5 Truman Proclamation, Proclamation 2667 - Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf. Available at: http://www.presidency.ucsb.edu/ws/index.php?pid=12332

6 ICJ Reports, 1969, pp. 3.



As indicated by the diagram, the territorial sea extends to 12 nautical miles from the baseline which is measured by the isobaths. The exclusive sovereignty over this region has been given to the coastal state which can devise laws to exploit the resources available in this region.[7] Other states do not have any claim whatsoever in this region. Contiguous Zone extends from the territorial sea to the extent of 24 nautical miles from the baseline. The coastal state has got limited control over this region. It can control this region only to the extent of preventing or punishing other states from committing any violations in its territorial sea. The Exclusive Economic Zone extends from Contiguous Zone to an extent of 200 nautical miles from the baseline. The coastal state has exclusive right over the economic resources available in EEZ.

7 Howard Bennett, The law of Marine Insurance, Oxford University Press, 2nd ed., 2006.

But, it cannot prohibit the passage of vessels of other states above or under the surface water.[8]

In order to appreciate the substantial change brought in by UNCLOS 1982 in the extent of a state's jurisdiction over the continental shelf, it may be relevant to revert the CCS position The open ended definition of 'continental shelf' under the Article 1 of the CCS widened the extent of exclusivity enjoyed by a coastal state over the adjoining continental shelf. The definition led to opening of floodgate of disputes between various states due to the extent of the continental shelf defined on the extent of its exploitability. The area was rich in minerals and other natural resources and since it was open to the states to extend their jurisdiction to the point of their exploitability, the developed states would have exploited the area at the cost of neglecting the right of the developing and the underdeveloped states.[9] This necessitated a relook at the definition of the Continental Shelf itself and a suitable modification to the same.

Accordingly, the UN General Assembly summoned the Third United Nations Conference on the Law of the Seas in 1973 with the objective of debating the definition and extent of the Continental Shelf. The developing countries had lobbied for acceptance of the proposal that the area of the sea-bed, ocean floor

8 *Ibid.*

9 R.R. Churchill, A.V. Lowe, The Law of the Sea, Manchester University Press, 3rd ed., 1999, pp. 224-226.

and the subsoil lying beyond the limit of national jurisdiction should be a part of the high seas and hence all the resources lying therein should be allowed to be claimed by all the states as part of the "common heritage of the mankind"[10].

India's Position on Continental Shelf at UNCLOS:

Post attainment of Independence in 1947, India used to proclaim the traditional territorial sea to the extent of three miles. It had issued four presidential notifications in 1955 and 1956. First notification was issued to claim "full and exclusive rights over the subsoil and the seabed of the continental shelf beyond the territorial sea zone"[11]. By way of another notification in 1956, it claimed territory to the extent of six miles from the baseline as its exclusive territory. Another notification in 1956 was passed to claim exclusive rights over the zone, extending beyond the territorial sea to an extent of 100 miles, for fisheries. Through the last notification in 1956, it claimed its contiguous zone.[12]

It is important to take note of the fact that at that point of time, the states all over did not consent to any particular extent of territorial sea. The US favoured territorial sea to the extent of 3 miles whereas the Soviet Union favoured a width of 12 nautical miles. This led to UNCLOS I. India had proposed that authorisation of

10 *Id.*, pp. 227-228; Conservation on the High Seas : Harmonizing International Regimes for the Sustainable use of Living Resources.

11 Continental Shelf- The Last Maritime Zone, UNEP/GRID-Arendal, 2009.

12 The International Law of the Sea and the Indian Maritime Legislation, Available at: http://indiannavy.nic.in/book/international-law-sea-and-indian-maritime-legislation .

the coastal state and a notification to the same is necessitated for the legal passage of a foreign warship through the territorial sea.[13] This proposal was not accepted. Hence, India refused to ratify all four Geneva Conventions under UNCLOS I. Further, UNCLOS I failed to resolve various issues like, *inter alia*, the width of territorial sea, extent of Exclusive Fisheries Zone.

UNCLOS II was convened to resolve the aforementioned issues which were left unresolved at the end of UNCLOS I. It set the width of the territorial sea at 6 miles in order to broke a middle ground, but it was not accepted by the majority.[14] This led to UNCLOS III. India had put forth various proposals in the conference. Some of them are archipelago status for Lakshadweep and Andaman and Nicobar Islands; smooth and free navigation in the straits and international waters which have been traditionally used by the states; regulating the scientific research in its exclusive economic zone by another state; prior notification for innocent passage of warships; territorial sea of 12 miles.[15]

Most of the proposals put forth by India in UNCLOS III were accepted and have been incorporated in the final draft. It named India as one of the 'pioneer investors' for seabed mining. Some

13 *Supra* Note 13.

14 Implementation of the law of the sea convention through international institutions : proceedings of the 23rd Annual Conference of the Law of the Sea Institute, Law of the Sea Institute, Conference 1989, Netherlands.

15 Daniel Hollis, Tatjana Rosen, United Nations Convention on Law of the Sea (UNCLOS), 1982. Available at: http://www.eoearth.org/view/article/156775/#.

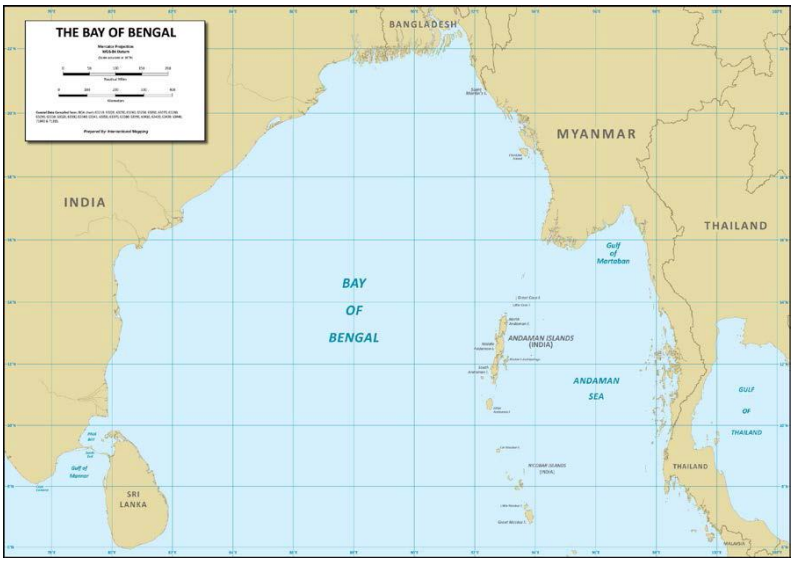
proposals like archipelago status for Andaman and Nicobar Islands, prior authorisation of the coastal state for innocent passage through its territorial waters were not accepted. India had ratified UNCLOS in 1995 whereas Bangladesh had ratified it in 2001.[16]

Indo-Bangla Dispute on Continental Shelf:

The roots of the current India-Bangladesh maritime dispute date back to the Indian Independence Act, 1947 of the United Kingdom which had partitioned British India into India and Pakistan. Sir Cyril Radcliffe had demarcated the boundary between the two countries. East Bengal was given to Pakistan and the remaining portion of Bengal in the west remained with India. This award was passed by him in his report titled 'Radcliffe Award' on August 13, 1947. The boundary between India and Pakistan was thus labelled as the '*Radcliffe Line.*'

The current dispute pertains to the delimitation of the territorial sea, exclusive economic zone and the continental shelf between the two adjacent coastal states, India and Bangladesh in the Bay of Bengal region as shown below:

16 Harun Ur Rashid, India-Bangladesh: UNCLOS and the Sea Boundary Dispute, Institute of Peace and Conflict Studies, July 14, 2014.



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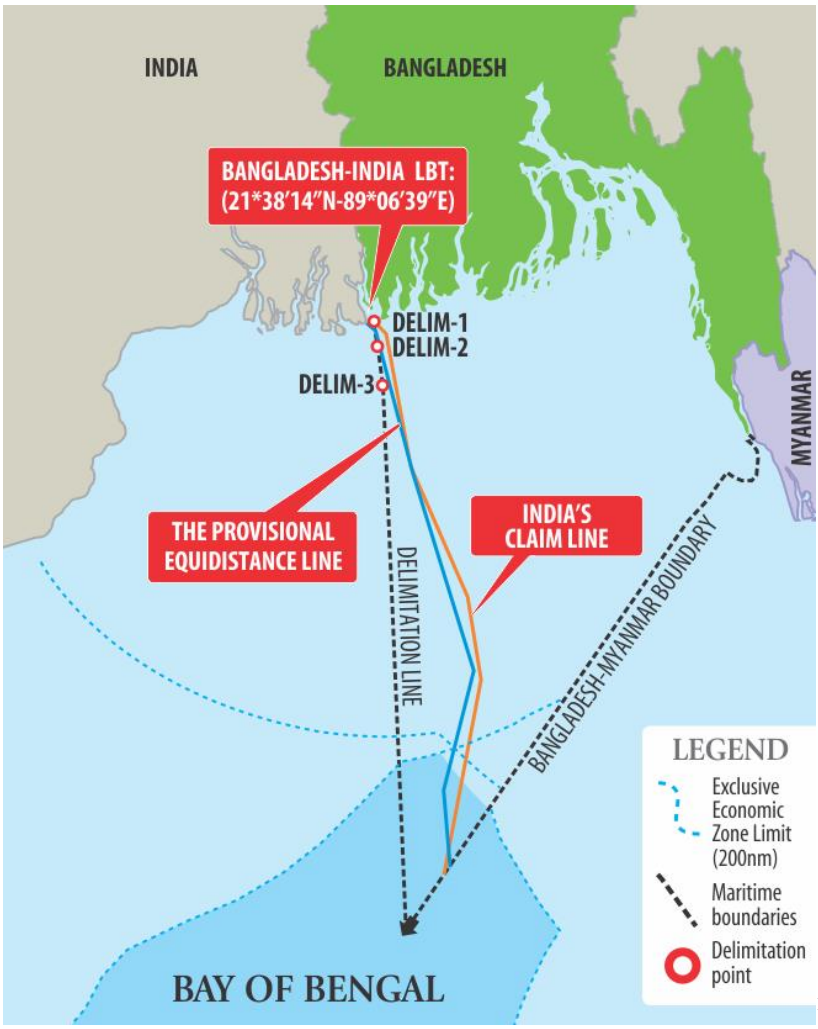
There was no previous agreement governing the maritime boundary division between the parties. In the absence of such an agreement, delimitation of territorial sea, continental shelf and exclusive economic zone is governed by Article 15, 83 and 74 of UNCLOS. Both parties however differed on the interpretation and application of the UNCLOS provisions on these maritime boundary issues. Bangladesh has claimed the boundaries in the region as depicted by the following figure.

17 Bangladesh v. India, Judgment of July 7, 2014.

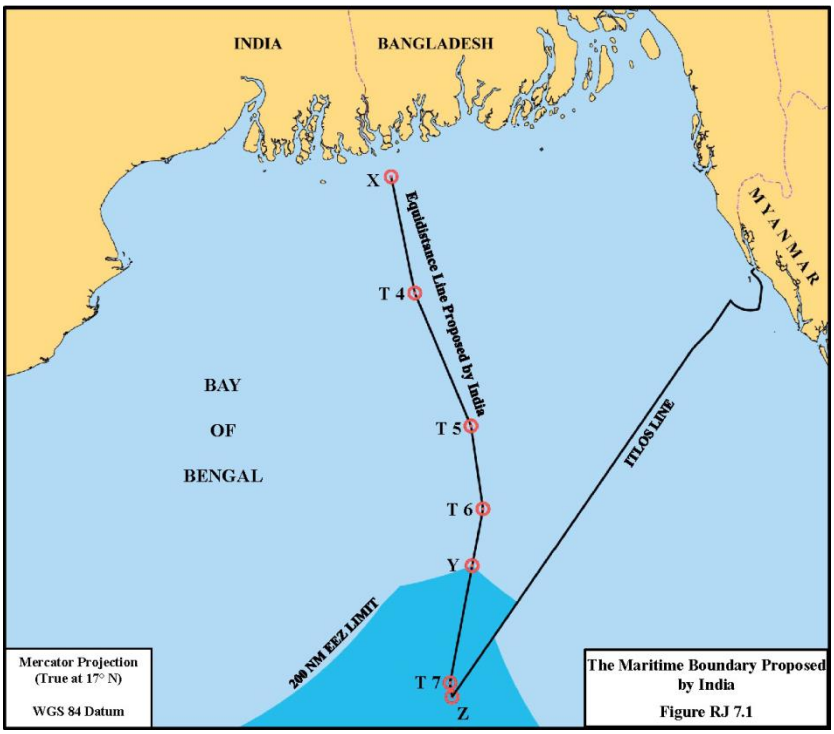


[18]

The dispute between the two countries was referred to arbitration by Bangladesh in accordance with Article 287 and Annex VII of the UNCLOS 1982, in 2009.[19] The article provides to the parties a choice of reference to International Tribunal for the Law of the

18 *Id.*
19 *Id.*

Sea, International Court of Justice or a special arbitral tribunal. Both the parties opted for arbitration on their dispute by the International Tribunal for the Law of the Sea. They also referred to the Tribunal to delimit the continental shelf beyond 200 nautical miles in the contended domain of the Bay of Bengal. On February 22, 2011, Mr. David H. Gray was appointed as the designated hydrographer. In 2013, the parties had organised a joint visit to the site to have an onsite picture of the issues at stake. India's claim to continental shelf was represented in the following manner.



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20 *Id.*

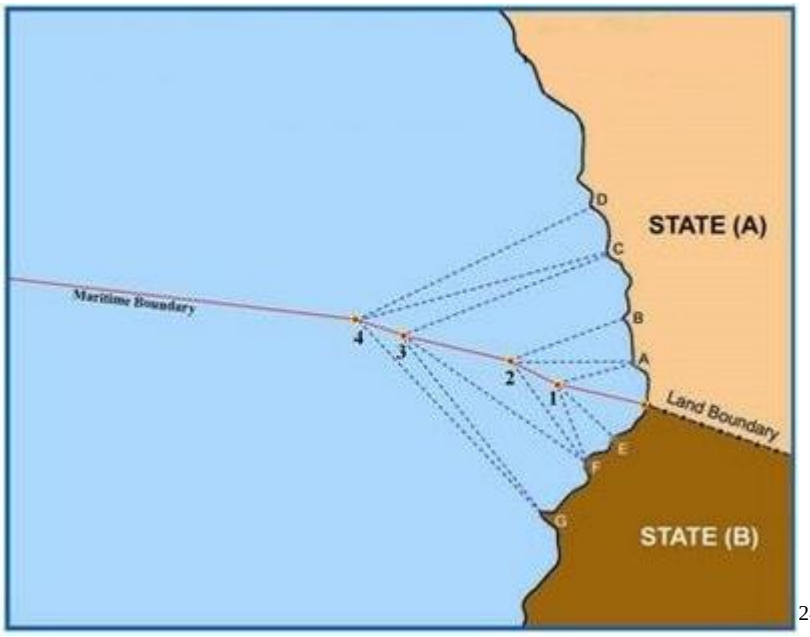
Delimitation of continental shelf:

There are basically two methods of demarcating the continental shelf between maritime neighbours: the *principle of equidistance* and the *angle bisector principle*. The equidistance principle involves the application of a three-tier process: identification of a provisional or a temporary equidistance line "using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place."[21] The next step is to take into account the various relevant circumstances in order to adjust the provisional equidistance line drawn in the first step for the purpose of ensuring justice and equity. And then the third step involves an ex-post facto cross-checking of the adequacy of the results achieved in the previous stage.[22] This process was supported by India in the delimitation of the continental shelf[23] as the following diagram indicates:

21 Romania v. Ukraine, Judgment of 3 February 2009, I.C.J. Reports 2009, p. 61 at p. 101; Libyan Arab Jamahiriya/Malta, Judgment 3 June 1985, I.C.J Reports 1985, p. 13.

22 Nugzar Dundua, Delimitation of maritime boundaries between adjacent States, UN, 2006. Available at: http://www.un.org/depts/los/nippon/unnff_programme_home/fellows_pages/fellows_papers/dundua_0607_georgia.pdf.

23 *Supra* Note 20.



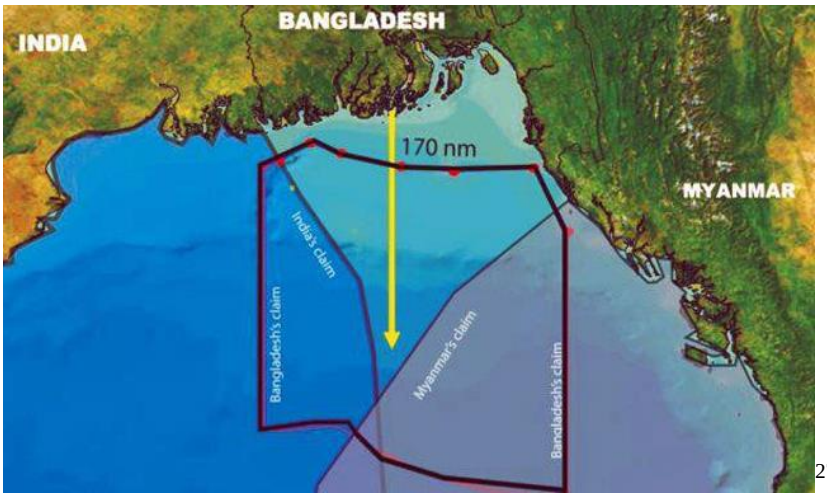
[24]

The *angle bisector principle*, on the other hand, refers to the method whereby the angle formed by the coastline of the states is bisected. The coastline of the states is assumed to be straight lines and the line which joins the intersection of the straight lines is the delimitation line.[25] This was proposed by Bangladesh for application to the delimitation of the continental shelf.[26] Its contention is depicted in the following figure.

24 Kisei Tanaka, Indo-Bangladesh Maritime Border Dispute Conflicts over a disappeared island, ICE Case Studies, Number 270, December, 2011. Available at: http://www1.american.edu/ted/ICE/taplatti.html.

25 *Supra* Note 28.

26 *Supra* Note 20.



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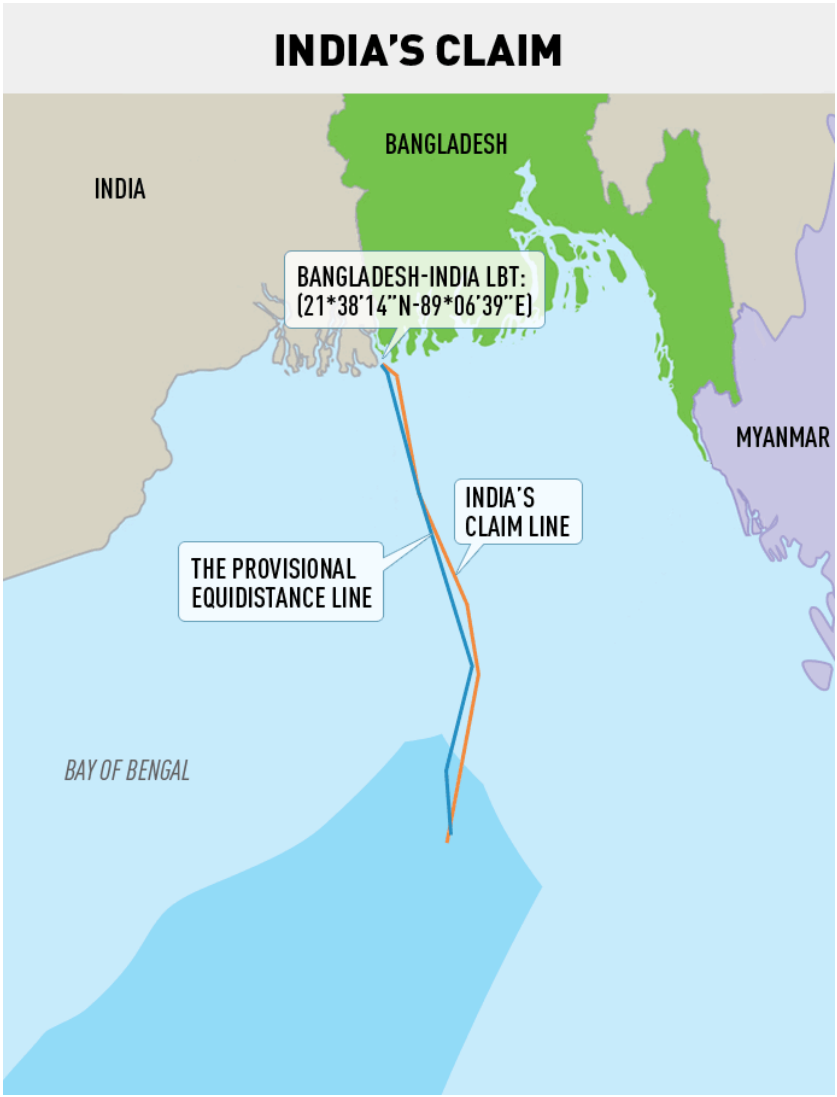
India had submitted the *Black Sea judgment*[28] as the leading precedent for applying equidistance principle under the international maritime law. It thereby refuted the relevance of the Guinea/ Guinea Bissau case cited by Bangladesh on the ground that it was a rare case and had not been followed in any of the subsequent cases. According to India no 'compelling reasons' were present in the present case to necessitate the application of the angle bisector principle as against the commonly accepted and applied equidistance principle.

27 Shahriar Asif, India and Bangladesh fight over 4,000 sq km of sea, Priyo News, Dec 7, 2013. Available at: http://news.priyo.com/2013/12/07/india-and-bangladesh-fight-over-4000-sq-km-sea-94107.html.

28 Romania v. Ukraine, Judgment of 3 February 2009, I.C.J. Reports 2009.



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In so far as Bangladesh is concerned it argued for the application of the angle bisector principle. To substantiate the argument

29 UN tribunal puts an end to 40-year-old India-Bangladesh maritime dispute, RT, July 16, 2014. Available at : http://rt.com/op-edge/172960-un-india-bangladesh-dispute-end/.

Bangladesh relied upon the *Nicaragua v. Honduras*[30] case pointing that the angle bisector principle was relevant to such coastal boundaries where the equidistance method is "not possible or appropriate."[31] It also recalled the observation made by the International Tribunal for the Law of the Seas in Bangladesh v. Myanmar[32] which read: "the angle-bisector method has been applied by courts and tribunals where recourse to [equidistance] has not been possible or appropriate."[33] Further in defence of its case Bangladesh referred to the Guinea Bissau case[34] which too applied the principle of angle bisector due to the concave shape of the coast in that region.[35] Based on these legal precedents Bangladesh pleaded that the "highly irregular coast of the Gulf of Maine, deep indentation of the Bengal Delta and the low tide elevation" necessitate the application of angle bisector method and not the equidistance principle, as claimed by India.

There is no strong precedence in the international jurisprudence on delimitation of continental shelf favouring the equidistance principle, the argument ran and that the exception was only in two cases after the *North Sea Continental Shelf* case. In other cases, an

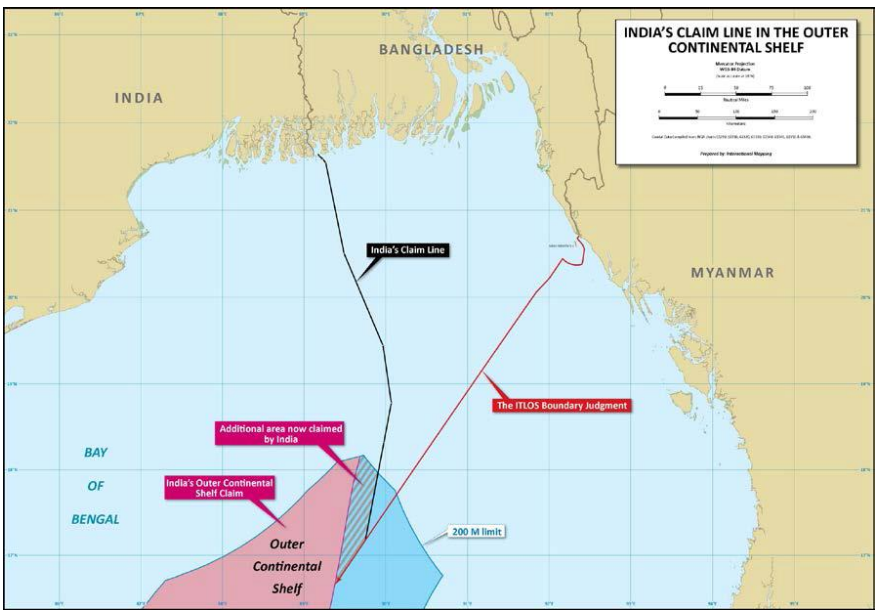
30 Nicaragua v. Honduras, Judgment dated Oct 8, 2007. Available at: http://www.icj-cij.org/docket/?p1=3&p2=3&k=14&case=120&code=nh&p3=4
31 *Id.*
32 *Supra* Note 25.
33 *Id.*
34 Guinea Bissau v Senegal, judgment of Nov 12, 1991. Available at: http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=73&case=82&code=gbs&p3=4
35 *Id.*

adjusted equidistance principle or a different method was applied for delimitation. It quoted from the *Nicaragua v Colombia* judgement in which the court said: "the construction of a provisional equidistance line *is nothing more than a first step* and in no way prejudges the ultimate solution which must be designed to achieve an equitable result."[36]

Delimitation of the Continental Shelf extending beyond 200 Nautical Miles:

What follows is a map-based explanation of the claims and counter claim for delimitation of continental shelf in the Bay of Bengal by the contending parties, India and Bangladesh.

India's outer continental shelf claim line

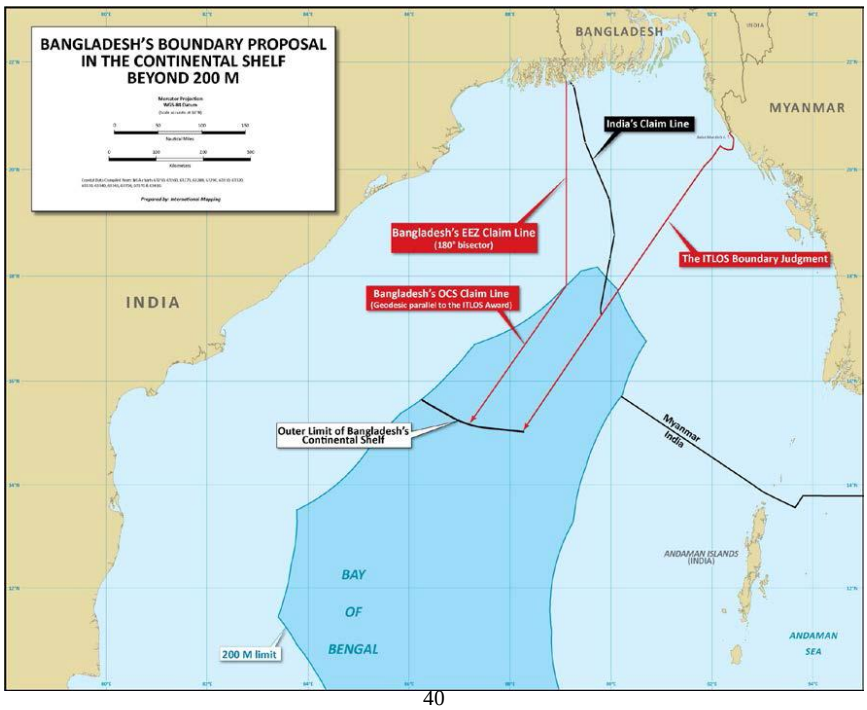


36 *Id.*

India claimed that the line drawn for delimiting the continental shelf within the 200 nautical miles zone should be automatically extended for delimiting the same beyond 200 nautical miles. In other words the same line of demarcation as applied in the 200 nautical miles zone should be the line of prolongation into the outer limits of the 200 nautical miles. It referred to the ruling over the Bangladesh-Myanmar[37] maritime dispute by the International Tribunal for the Law of the Sea. In this case the tribunal held that the delimitation method invoked within and beyond the stretch of 200 nautical miles should not change and that the same approach should be followed consistently.[38] In so maintaining India challenged the application of the *Maximum Reach* principle proposed by Bangladesh. According to this principle, the maritime boundaries are delimited in such a manner that the geographically disadvantaged country is allowed access to the maritime resources as a right.[39] The application of this principle was contested by India on the ground that such an application, going be previous case histories, was a choice of the parties involved, not for the court to order.

37 Bangladesh v India, Judgment of July 7, 2014, p. 139.
38 *Id*.
39 Jonathan I. Charney, "Progress in International Maritime Boundary Delimitation Law", *American Journal of International Law*, Vol. No. 88, 1994, p. 230.

Bangladesh's claim



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Bangladesh claimed that delimitation of the continental shelf proposed by it will help in dealing with the cut off effect caused by the concavity of the Bay of Bengal. Such an approach would be in consonance with the law of the tribunal's verdict in the case of Bangladesh-Myanmar dispute. In contended, as against India's argument, modification can be made to the delimitation line beyond the zone of 200 nautical miles to obtain an equitable result.[41]

40 Bangladesh v. India, Judgment of July 7, 2014, p. 140.
41 Bangladesh v. India, Judgment of 7 July 2014, p. 138.

Tribunal's Award:

It is interesting to note that the law of the sea tribunal had applied the equidistance principle in the first stage, without fully endorsing the legal contentions of either of the parties. The tribunal held that relevant circumstances of the case will be taken into account at the second stage of the application of the equidistance principle. It however had drawn a provisional line of delimitation which was adjusted to prevent an 'unreasonable cut-off effect' to the detriment of Bangladesh. In fact, as maintained by Bangladesh it took into consideration the concavity and the instability of Bay of Bengal while adjusting the equidistant delimitation line. Similarly the tribunal also took into consideration the seaward projections of the coast of Bangladesh which faces the west. Since there is only one continental shelf, the tribunal had taken into account that part of the continental shelf which extended beyond the 200 nautical miles extent. It had modified the principle of equidistance to achieve an equitable result given the concavity and instability of the coast. Hence, the tribunal neither accepted India's proposed delimitation line nor Bangladesh's. It had modified the provisional equidistant line in accordance with the cut offs and the peculiar nature of the coast in the present case to prevent inequity and injustice to any country

In its final phase of continental shelf delimitation process the tribunal compared the ratio of the relevant maritime space allotted to each party in the order to the ratio of their relevant coastal

lengths. This comparison reveals any disproportion in the order. The tribunal had specified that it is a means of rechecking the adjustment done and whether any further adjustment is necessitated to avoid disproportionality.[42] As was observed in *Nicaragua v Columbia*, this test is not a correlation between the lengths of the coast and their respective share in the maritime area. It is only to ensure the "equitableness of the delimitation line." In the present case, the ratio of the relevant coastal lengths was 1: 1.92 and the ratio of the allotted maritime area was 1:2.81. This was held to be not disproportional.

New Moore Islands/ South Talpatti:

The New Moore (as known in India) or South Talpatti (as called in Bangladesh) islands emerged in the Ganga Delta region of the Bay of Bengal after the Bhola Cyclone in 1971.[43] Both countries had claimed this island to be theirs in this dispute. It is located approximately 3.5 kms away from the Haribhanga River's mouth, thereby very close to the boundary of both the nations. Reference to the Radcliffe Map was made by India to resolve this issue. The authenticity of the same was challenged by Bangladesh. Further, it had challenged that the map does not depict the area with sufficient precision and was merely illustrative.

42 Romania v. Ukraine, Judgment of 3 February 2009, I.C.J. Reports 2009.

43 Kisei Tanaka, Indo-Bangladesh Maritime Border Dispute Conflicts over a disappeared island, ICE Case Studies, Number 270, December, 2011. Available at: http://www1.american.edu/ted/ICE/taplatti.html.

Other evidences were also similarly disputed by the two parties. Both parties agreed on the application of the *Thalweg* doctrine according to which the midstream of the main navigable channel determines the borderline pertaining to that island. If it is towards the west, then it would be Bangladesh's or vice versa. Since there has not been "any shipping or navigational activities around the length and mouth of the rivers", the tribunal had decided to locate the midstream of the main channel as it was in 1947 when the Radcliffe Award was passed. Subsequently the issue boiled down to determining the river flow. Reference was made to the map incorporated by Sir Cyril in the Radcliffe Award and it was held that since the river flows east, the island belongs to India.

Neither Article 74 nor Article 83 of the UNCLOS III specifies any particular method of delimitation. In such a situation, that method is applied which the states mutually agreed upon. In case of a disagreement, the method, which is determined or agreed upon by a peaceful settlement of dispute, is chosen. The tribunal is guided by the principles of justice and equity[44] and it succinctly differentiated between the two principles of delimitation of the continental shelf. Angle Bisector principle is applied only in those cases where it is impossible or unfeasible to construct one.[45]

44 *Supra* Note 25, 40, 44.
45 *Supra* Note 40.

In *Nicaragua v Colombia,*[46] the court had applied equidistance principle in delimitation of the continental shelf. It had taken into consideration the relevant circumstances of that case, i.e. certain islands and had accordingly shifted the provisional equidistant line. The tribunal had correctly taken into account the concavity of the Bay of Bengal and the instability to adjust the provisional equidistant line. Such "peculiar circumstances" in a particular case are taken into account to adjust the provisional equidistant line to avoid injustice and inequity. The existence of such circumstances does not lead to a rejection of the application of this principle *per se*. In other words, it is taken into account at the second stage i.e. after drawing the provisional equidistant line and not before the first stage.

The analogy drawn with the *Nicaragua v Honduras* case[47] by Bangladesh needs to be appreciated. At the same time it has to be noted that it was unfeasible to draw a provisional equidistant line whereas, it is not so in the present case. The Guinea/ Guinea Bissau case[48] was correctly not taken by the tribunal as a precedent as it was a special case which necessitated a special treatment.

Coming to the determination of the sovereign rights of the countries over the New Moore Island, the tribunal should have looked into the present status of the same by conducting a survey

46 *Supra* Note 26, 36.
47 *Supra* Note 40.
48 Bangladesh/ Myanmar case, Judgment of 14 March 2012.

or the like. As was accepted by the parties in the course of arguments before the tribunal, climate change has caused the island to disappear and it may have had an impact on the river flow. The tribunal should not have relied solely on the Radcliffe Award of more than four decades history and the original map therein. Moreover, the island in question surfaced in 1971, twenty four years after the partition award was delivered.

Conclusion:

The award by the International Tribunal for the Law of the Sea on the India-Bangladesh maritime dispute carries several positive implications. First, it is a win-win gain for both the countries, India and Bangladesh. India won sovereignty over the New Moore islands while Bangladesh obtained greater maritime zone, three fourth of the disputed area.[49] Secondly, by resolving the four decade old dispute which was often a key source of bilateral irritants, the award augured well for improving relations between the two neighbouring states. Lastly, the tribunal's award perhaps would set the precedent for an amicable division of the Teesta river, which has been another bone of contention between the two nations.

49 Rupak Bhattacharya, Delimitation of Indo-Bangladesh Maritime Boundary, Institute for Defence Studies and Analysis, August 19, 2014. Available at : http://www.idsa.in/idsacomments/DelimitationofIndo-Bangladesh_rbhattacharjee_190814.html.

TRADE FACILITATION MEASURES IN SAARC

Asmita Dhingra[*]

Abstract

There is no commonly agreed definition of trade facilitation in the international trade realm. In fact, trade facilitation has been referred to as 'the plumbing of international trade' as it focuses on the efficient implementation of trade rules and regulations. Indeed, what appears to differentiate trade facilitation from other trade issues is its focus on efficient processes which involve, among others, how efficiently implement agree trade policies or regulations, enable free transit of goods and services across national borders and clear related documentation without undue delays. In certain trade transactions, numerous regulations and procedures need to be observed. For trade and industry the cost of compliance with such regulations and procedures may be high, even higher than the cost of tariff paid. Procedures and regulations are more in international trade than in domestic trade, leading to higher transaction cost for international trade. Systematic rationalization of procedures and documents for international trade is therefore, an important development agenda.

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In a rather narrow sense trade facilitation efforts could simply address the logistics of moving goods through ports or more efficiently moving documentation associated with cross-border trade. In recent years, the definition has often been broadened to include the environment in which trade transactions take place. This includes transparency and professionalism of customs and regulatory environments, as well as harmonization of standards and conformance to international or regional regulations.

Since improvements in cross-border trade often involve improvements in domestic policies and institutional structures, the interpretations of trade facilitation have been broadened further. Further, in the light of the rapid integration of technology into trade facilitation, particularly through the mechanisms of networked information technology, the definition has come to embody a technological imperative as well. It naturally follows then that capacity-building efforts can also be considered as part of the trade facilitation effort. The UN agencies, World Bank, EU, APEC, OECD, ITC and the Commonwealth Secretariat invoke different explanations and scope of trade facilitation coverage. The Kelkar Committee Report of India on this subject defined trade facilitation as[1]:

> Trade facilitation revolves around the reduction of all the transaction costs associated with the enforcement of

1 Ministry of Finance, Government of India, *Report of the Committee on the Roadmap for Fiscal Consolidation*, September 2012.

> legislation, regulation, and administration of trade policies. It involves several agencies such as customs, airport authority, port authority, central bank, trade ministry etc. The main objective is to reduce the cost of doing business for all parties by eliminating unnecessary administrative burdens associated with bringing goods and services across borders….

Trade facilitation and NTBs:

The realm of trade facilitation is closely linked to the phenomenon of non-tariff barriers (NTBs). For various reasons following the Uruguay Round tariff liberalization, member countries have been restricting the trade flows through a complex variety of NTBs. While both developed and developing countries agree that focusing on trade facilitation would indeed reduce transaction costs of exports and imports, developing countries have been of the view that there are limits on the extent to which trade procedures can be harmonized. It is because of their lower levels of economic development, administrative traditions and capacities, poor technologies which impinge the effective enforcement of WTO trade liberalization commitments. Similarly, their scarce resources restrain modernizing and upgrading the cross-border trade facilitation measures. Nevertheless, most developing countries are committed to improving trade facilitation as part of their reform agendas but have reservations about whether there should be any 'bindings' by the WTO in this regard.

South Asia's Trade Facilitation Measures:

With Regional Trade Agreements (RTAs) taking centre stage in the world trade regime, regional groups like the EU, NAFTA and ASEAN have fairly succeeded in achieving impressive intra-regional trade figures. Thus intraregional trade accounts for 67 percent of the total trade volume for the European Union; 62 percent for Canada, Mexico, and the United States, members of the North America Free Trade Agreement (NAFTA); and 26 percent for the (ASEAN) group.[2] However, for the SAARC - a relatively younger economic group - intraregional trade accounts for only 5 percent of total trade.

Regional cooperation and its more advanced forms of regional economic integration would enable SAARC countries to integrate more efficiently with the rest of the world and take fuller advantage of global flows of investment, technology and trade opportunities. Regional integration permits diversification of individual economies and promotes development in their peripheral regions and permits overcoming of the constraints posed by the relatively small size of their individual markets and the low purchasing power in their economies. Integrating smaller economies into larger regional economic space expands the size of the market and facilitates cost reductions through economies of scale and scope.

2 United States Agency for International Development (USAID), *South Asian Free Trade Area: Opportunities and Challenges,* Nathan Associates Inc:: p. 1-249. (October 2005).

South Asia is among the economically least integrated regions in the world. The difference is due, in large part, to logistics challenges in South Asia that have kept trade transactions costs high despite higher tariff reductions in recent years.[3] It is estimated that if South Asian countries were to collectively attain trade performance measures equivalent to half the East Asian average, in terms of the World Bank's trade facilitation indicators, South Asian intraregional trade would expand by US$2.6 billion. India, the largest beneficiary, would see trade flows increase by US$1.1 billion.[4]

An important factor which hinders growth of intraregional trade among SAARC nations is the industrial disparity that prevails between India and the rest of the SAARC countries. Hence, there is a suspicion among SAARC member countries that trade promotion within South Asia would give India a chance to exercise its economic dominance over the smaller economies. According to S.C. Jain, this concern has played a major role in restricting the realization of potential benefits of trade among SAARC nations.[5]

Trade Barriers:

Higher tariffs and other trade barriers are the major causes discouraging intra-regional trade. In spite of the fact that the

3 World Bank 2007b, *World Bank Fact Sheet – South Asia: Growth and Regional Integratio,* (2007).

4 *Ibid.*

5 Jain, S.C. *"Prospects for a South- Asia Free Trade Agreement: Problems and Challenges*", International Business Review 8(4): 399-418 (1999).

proximity criterion of the gravity model is present for South Asia, high trade costs act as a major obstacle to the growth of intraregional trade. Important contributing factors to these costs are the poor and inadequate physical infrastructure, the lack of trade-related information, excessive regulations imposed by most governments in the region and prevalence of a 'negative list' of items.

Poor institutional structures and excessive government regulations have also reduced the ease of doing business in South Asia, which has lagged behind in implementing technology systems in customs and administrative procedures. Until recently customs procedures in South Asia had primarily focused on revenue collection and trade protection and hence there was no strong drive for increased efficiency and transparency. Steps have been undertaken to simplify and harmonise trade procedures, but SAARC members continue to demand a large and complex number of cross-border trade and transit documents.[6] For instance, at the India-Bangladesh border a consignment needs at least 22 documentations, more than 55 signatures and a minimum of 116 copies for final approval.[7]

SAFTA has a substantial potential in increasing intra-regional trade and efficiency-seeking restructuring of industry and creating

6 Taylor, Benjamin J, and John S. Wilson, *As SAFTA Gains New Momentum,' Trade Facilitation Should Remain Key Priority*,' World Bank (2009).

7 Banik, Nilanjan and John Gilbert, *Regional Integration and Trade Costs in South Asia*", Asian Development Bank Institute (ADBI), Working Paper No. 127 (2008).

supply capacities in relatively lesser developed members. Such possibility exists going by the encouraging experience of India-Sri Lanka FTA and other trade liberalization exercises in the region. By exploiting the locational advantages of the member countries, it may lead to the emergence of regional hubs for instance, Sri Lanka for rubber-based industries; Bhutan for forest-based industries; Bangladesh for energy-intensive industries. Yet the SAFTA suffers from several limitations that may not allow exploitation of its full potential. Factors inhibiting easier trade liberalization programme (TLP) include the long negative lists, poor infrastructure, few border posts, cumbersome customs procedures and several other such NTBs.

The member states of SAARC need to consider some decisive measures to realize gains that are possible from an agreement of this nature. One of the most crucial barriers for seamless overland movement across the borders appears to be lack of transport and transit agreements among SAARC member states. As a result, goods moving overland are required to be transhipped at the border which has considerable cost implications. There is also a lack of compatibility among the rolling stock in use in different railway systems in SAARC region. For a smooth movement across Bangladesh, there is a need to rationalize the railway gauge differences. In order to put in place a SAARC Regional Multimodal Transport System only modes investments would be needed to achieve substantial improvements in regional transport

connectivity. Many of the 'building blocks' are already in place, and SAARC can assist in creating an environment where these blocks can be combined to support an efficient regional transport system.

Trade facilitation measures under SAFTA:

The importance South Asian countries attach to trade facilitation has been reflected in their efforts made at bilateral and regional levels to facilitate liberal the flow of goods. Such initiatives include the India-Sri Lanka Free Trade Agreement (ISFTA), Pakistan Sri- Lanka FTA, Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC) and the South Asian Free Trade Area (SAFTA).

SAARC has expressly recognized and also carries important provisions aimed at improving the intra-regional trade and transit facilitation. Article 6 of the South Asian Preferential trade Agreement (SAPTA) stipulates that the "Contracting States agree to consider, in addition to the measures set out in Article 4, the adoption of trade facilitation and other measures to support and complement SAPTA to mutual benefit'.

Article 3 undertakes to eliminate regional barriers to trade and facilitating the cross border movement of goods between the

territories of the Contracting States.[8] In the same vein, Article 8 of *Additional Measures*, talks of improving the business visa regime.

Scope for Improvement:

An analysis of the various free trade agreements (FTAs) in the South Asian region that the vast majority of bilateral FTAs, to date, do not contain any specific trade facilitation measures. Some aspects of SAFTA do provide for regional trade facilitation measures, including requirements concerning the publication of rules and regulations, and the identification of enquiry points for exchange of information. However, SAFTA ignores many of the most pressing trade facilitation challenges facing the region: chiefly, infrastructure development and increased transparency in customs administration.

What is lacking in South Asia, unlike in East Asia and other developing regions, is the very limited trade integration efforts which entail the imperative of relaxing the existing serious cross-border barriers to facilitate flexible movement of interstate goods. The APEC for instance has set goals for paperless trading and increased transparency in customs administration. Unfortunately, SAFTA is far away from realizing some such strategies and has little to set benchmarks for measuring progress.[9]

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8 South Asian Free Trade Agreement, Article 3(1) (a), 6th January 2004.

9 South Asian Free Trade Area (2004), SAFTA Trade Facilitation Agreement, Available at http://www.saarc-sec.org/main.php?t=2.1.7 (Last Accessed June 20 2014).

Going forward, South Asia needs to prioritize the streamlining of procedures and to do so consistently across the region. Currently, streamlining and harmonization initiatives focus on the main trade gateways; these types of reform programs have often excluded secondary customs stations. This has implications for intraregional trade, which is often routed along less traveled corridors.

In South Asia, there is room for both more investment in modern infrastructure and more competition in providing transport services. Only some countries in the region are now beginning to provide high quality roads that can facilitate reliable trucking services.

Thus, trade facilitation relates to a wide range of activities at the border (import and export procedures, transport formalities, payments, insurance and other financial requirements). However, the concept of trade facilitation also is intrinsically linked to several factors behind the border. The quality of a country's domestic transport and logistics infrastructure and regulatory policies that affect the flow of goods and services within its boundaries are a vital part of the overall transaction costs of trade.

Role of India:

India plays a central role in trade integration in South Asia and is also at the helm of all regional trade facilitation and transit issues. It strengthened its bilateral links with neighbors by signing free trade agreements with Nepal, Bhutan and Sri Lanka and a

preferential trade agreement with Afghanistan. In recent years, India has taken several measures, both bilaterally and under the ambit of SAFTA, to facilitate trade in the region.

A number of measures have been implemented to liberalize the tariff regimes, non-tariff barriers and transport impediments. Yet intra-SAARC trade, continues to be very low (at about 5 per cent of the region's total trade), and India's imports from rest of South Asia is less than 1% of its total imports. This is largely due to the high transaction costs incurred while moving goods across the borders in the region. The strained relations between India and Pakistan, the two largest economies in the region, have also prevented fruitful implementation of the major chunk of trade facilitating measures in the region.[10]

In line with SAFTA provisions, India offered tariff concessions separately to the region's developing and Least Developing Countries (LDCs). India also maintained separate rules of origin (RoO)and sensitive lists for these two groups of countries. However, concessions offered to the first group are applicable only to Pakistan, since India has an FTA with Sri Lanka and any concessions applicable to LDCs are applicable only to Bangladesh, since it is the only LDC member under SAFTA with which India does not have an FTA. Thus, from India's standpoint, all tariff liberalization efforts with its SAARC members are done

10 Centre for Trade and Development (CENTAD) (2009), *South-Asian Yearbook of Trade and Development*, p. 226.

bilaterally. The negotiations with Sri Lanka, Nepal and Afghanistan take place under the respective bilateral trade arrangements. With Pakistan the tariff negotiations are done under SAFTA and with Bangladesh these take place under the LDC category.

In addition to tariffs, the SAFTA agreement contains provisions to address non-tariff, para-tariff and direct trade measures. Under the aegis of SAFTA, a Committee of Experts (COE) was formed to monitor, review and facilitate implementation of the agreement. Under the COE, a sub-group looks into problems related to non-tariff measures (NTMs) and para-tariff measures (PTMs) faced by member countries while entering into each other's territory.

In order to address TBT and SPS measures, India has actively engaged in capacity building with Nepal and Bangladesh. The measures include assessment of laboratories for export testing; supporting officials to develop certification systems; development of residue monitoring plans (RMP) and establishing a national accreditation system. Providing transit to landlocked countries has remained a major concern for the region, although several steps have been initiated to address the issue since 2010.[11]

11 Nisha Taneja et al, (2013), *India's Role in Facilitating Trade under SAFTA*, Indian Council for Research on International Economic Relations.

Conclusion:

A review of trade facilitation in South Asia shows continued weakness of the regional members in physical and service sector, infrastructure and regulatory environment. Even though South Asia has given considerable attention to trade barriers and quota restrictions, issues related to 'soft infrastructure' such as regulating red tape are said to be major causes of most delays in the region. It has been recognized that the costs involved in the trade in South Asia including customs and port inefficiencies exceed the cost of tariffs. Therefore, attention needs to be given to minimize regulatory hurdles.

The land-locked countries in the region face additional problems compared to other countries. Transit trade with such countries is usually governed by bilateral treaties. However, security concerns and political issues between countries, apart from the lack of infrastructure, have inhibited the smooth flow transit trade.

Another reason, in addition to the above, is the lack of political will to implement trade facilitation measures. One of the barriers is the widespread bureaucratic practices at customs and other key government institutions.

A key factor inhibiting most countries from implementing trade facilitation measures is the cost associated with large scale improvements in the trade infrastructure. Implementation of most trade facilitation measures depends upon the availability of basic

infrastructure and involves a substantial cost in terms of the initial set up and maintenance. The non-binding nature of these provisions of trade facilitation included in almost all agreements has contributed to the ineffectiveness of the measures and non-integration of regional trade.

The highlight of SAARC initiatives is the SAARC Trade Promotion Network. This is a joint effort of twenty eight leading Business Membership Organization (BMOs), public sector-trading departments, export promotion agencies and national institutions in the eight SAARC countries collaborating in this Network, It is managed by the Ceylon Chamber of Commerce (CCC), Sri Lanka, and implemented by German International Cooperation (GIZ) with funding from German Federal Ministry for Economic Cooperation and Development (BMZ). The portal aims to provide business information services for importers and exporters including Small and Medium Enterprises (SMEs) to avail trade opportunities in South Asia. Promotion of the regional network will bring about impulses for regional economic and social integration.

While much has been done and is in the pipeline, what the SAARC states need to realize is that mere agreements would not solve the problem but their efficient implementation will. Building smooth roads will be fruitless if fast track lanes are not considered and priority of goods in transit to cross the border is not categorized.

INDIAN MARITIME INFRASTRUCTURE DEVELOPMENT: LEGAL REGIME

Saloni Mathur[*]

India is a growing maritime power. It is a trite to say that infrastructure development has a significant role in accelerating in the economic growth of any nation. Infrastructure is understood as physical facilities such as roads, railroads, telecommunications, power and air and sea ports. Amongst these, maritime infrastructure has a significant role to play in the economic growth of a maritime nation like India with over ninety per cent seaborne trade. India's maritime infrastructure is very inadequate to meet the rapidly growing demands of the India's international trade and commerce. Although several policy initiatives are undertaken by the Indian government, there as yet is a lack of effective implementation of the policies and inefficient regulation by the authorities.

Infrastructure is generally defined as the physical framework of facilities through which goods and services are provided to the public. Its linkages to the economy are multiple and complex, because it affects production and consumption directly, creates positive and negative spillover effects and involves large flows of

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expenditure.[1] Through the offer of better intermediate inputs a well-planned and coordinated infrastructure results in cost reductions, profitability of production, higher levels of output, income, and/or employment. Thus infrastructure is often described as an 'unpaid' factor of production, since its availability leads to higher returns obtainable from other capital and labour.[2]

Maritime infrastructure essentially constitutes development of ports in order to facilitate trade through sea routes. Ports have been historically the gateways for the movement of commercial goods and services across the seas to other foreign destinations, coastal or hinterland countries. The history of trading among nations traces back to the use of sea routes as the most viable option for trading as it was the cheaper, safer and faster mode of transportation, compared to other means of transportation. The basic objectives of seaports are listed below[3]:

a. Provide unimpeded navigation to ships and other forms of maritime transport.
b. Offer shelter and safe accommodation to vessels
c. Provide facilities and services for quick, efficient and cost effective transfer of cargo between inland and maritime transport system and vice versa.

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1 Anup Chatterjee and K. Narendar Jetli, *Industry and Infrastructure Development in India Since* 1947 (New Delhi, New Century Publications, 2009), 154.
2 *Ibid.*
3 Abhijit Dutta, *Infrastructure Finance*: *An Indian Perspective* (New Delhi, Mahamaya Publishing House, 2007), 169.

d. Arrange for smooth aggregation and dispersal of cargo between port and hinterland.
e. Offer various services and facilities required by ships and cargo, namely, bunkers, fresh water supply and all other provisions of security including fire fighting.

In addition, ports discharge the following major functions[4]:

- *Quay transfer operations***:** The quay transfer operations links ship board activities with the port storage areas and occupies a very important position for indirectly routed cargoes. Its particular significance is as a regulator of ship operation. Unless the quay transfer is efficiently organized, it can cause delays to hook in the discharge operation or starvation of the hook in the loading operation.
- *The storage operation:* Storage operation is an essential port function which facilitates cargo to be received by rail or road, stacked/stored for loading to the vessels and for storing imported consignments for onward distribution in the port country's hinterland.
- *The receipt delivery operation***:** This is a part of berth operations involving connectivity between maritime and inland transport systems. It is a vital link between the port and the importers and the exporters in the hinterland. It depends

4 Namita Pandey and Nar Singh, *Containerization, Logistics management and Foreign Trade: Indian Perspective* (New Delhi, Shipra Publications, 2009), 182-183.

on the route that cargo will take as to where these operations will take place.

- *Road and rail operations:* It is a wide network of roadways and railways, crucial for quick and efficient movement of inward-outward cargo at the ports. It is necessary that the rail and road system be operated with utmost efficiency as they may become a bottleneck in converging/clearing of cargo, affecting other operations adversely.

India's Seaports

India's total major and minor ports are 13 and 184 respectively. Major ports currently deal with the bulk of port traffic around 75 per cent and the remaining are handled by minor ports. Major ports handle about 75 per cent of port traffic while minor ports handle the remaining. Major Indian ports are: Chennai, Cochin, Ennore, Kandla, Kolkata, Mormugao, Mumbai, New Mangalore, Paradip, Tutocorin and Vishakhaptnam. Port Blair is the latest port added to the list of major ports in 2010. Minor ports are located around the nine coastal states of Gujarat, Maharashtra, Goa, Karnataka, Kerala, Tamil Nadu, Pondicherry, Andhra Pradesh, Orissa.

The first port operations began when the Calcutta port was first commissioned in 1870 by the British while the Madras port was commissioned in 1881. As the colonial seaborne trade grew more ports around the Indian coast were established.

Following independence, port development proceeded though not at expected degree. In 1955, Kandla port was commissioned as a substitute to the Karachi port which went to Pakistan. In 1963, Mormugao was declared a major port after Goa was liberated from the Portuguese rule. A container port was commissioned in 1971 at the Cochin port and in 1974 the state of Karnataka got its first major port at Mangalore as also the country's tenth major port in the Tamil Nadu state of Tuticorin.[5] Jawaharlal Nehru Port Trust (JNPT) is the largest container port in India often referred as the 'king port of Arabian Sea'. In 2010, the government announced Port Blair as the new major port due to its strategic importance

India's Port Legislations

Indian Ports Act, 1908 was the first comprehensive legislation to regulate the Indian ports. Under the Act, 'port' also includes within its any part of a river or channel.[6] The Act is divided into VIII chapters along with one schedule which contains the details regarding the number and description of major ports in India. Under this Act, Central Government is empowered to codify rules for the operation of ports which among other powers include regulation of berths, stations, anchorages, movement of vessels, etc.[7] The Act empowers the government to appoint port officials under the designation of conservator for every port who is the

5 *Supra* Note 4.
6 Indian Ports Act, 1908, Sec 2(4).
7 Indian Ports Act, 1908, Chapter II.

overall authority to enforce port regulations and rules.[8] The Act also lays down general rules for the safety of shipping and the conservation of ports including rules for injuring buoys, beacons and moorings, improperly discharging ballast, graving vessel within prohibited limits, boiling pitch on board vessel within prohibited limits etc.

The Major Ports Trusts Act, 1963 was passed with an objective of constituting port authorities for certain major ports in India and to vest the administration, control and management of such ports in such authorities.

The Act establishes a Board of Trustees for each major port [9] comprising of a chairperson and/or deputy chairperson and other trustees eligible to be appointed.

The Act also empowers the Central government to constitute in respect of any major port the first Board of Trustees consisting chairman and/or deputy chairman. The Board shall be responsible for the day to day functioning of the port.[10]

Tariff Authority for Major Ports (TAMP) has been established under The Major Ports Trusts Act, 1963. This authority was first established in the year 1997. The prime objective of this authority is to supervise the port activities in order to maintain and promote

8 Indian Ports Act, 1908, Sec 8.
9 Major Ports Trusts Act, 1963, Section 3.
10 Major Ports Trusts Act, 1963, Section 110.

effective competition among port players for boosting private investment for the development of ports. TAMP is the economic regulator (solely) for the Major Ports and is charged with fixing and revising tariffs including tariffs of privately owned terminals.

However, with the rapid development of non-major ports which are regulated by the State government are at liberty to fix their own tariff. These minor ports are posing threat to major ports in respect to the traffic inclination towards them. Therefore, it is recommended that the scope of tariff regime of TAMP be expanded towards non-major ports also.

In 2009, a draft for Major Ports Regulatory Authority Act, 2009 was prepared by Ministry of Shipping. This Act will be successor to the provisions currently enshrined in the Major Port Trust Act, 1963 in so far as the working of TAMP is concerned which has been discussed in the following pages.

In addition to the above enactments, there are various other laws which deals with the maritime activities such as Inland Vessels Act, 1947, Coasting Vessels Act, 1917, The Merchant Shipping Act, 1958, Seamen's Provident Fund Act, Inland Waterways Authority of India Act, Dock Workers (Regulation of Employment) Act, 1948, Mutlimodal Transportation of Goods Act, 1993.

Capacity and Capacity Utilization of Ports:

The efficiency and productivity of a port is determined by its capacity to store, handle and manage the cargo movement. The Indian Ports have been suffering from capacity constraints which hinder its productivity and is therefore, detrimental to India's foreign trade. In order to improve the capacity of the ports, various initiatives have been taken up by the Government of India. These initiatives vary from boosting private sector involvement, relaxing norms for foreign direct investment, construction of new ports, expansion of berth capacities, undertaking projects with Public Private Partnership, installation of information technology system for safe and secured system at the ports. These initiatives have been included in the Maritime Agenda 2010-2020. The capacity of a port is the aggregate capacity of individual berths and depends on the type of commodity handled at that berth. The capacity of a berth is rated at the time of commission by considering parameters such as the kind of cargo to be handled, the number of days required for dredging, the quantity and efficiency of the equipment available etc. One criterion for determining efficiency of berth use is berth occupancy.[11]

Due to certain economic compulsions, the general cargo berths which have a relatively lower capacity rating than dedicated bulk or container berths are often used to load or unload bulk cargo such

11 *Supra* Note, 1, p. 222.

as coal. This naturally, increases the capacity utilization of the port temporarily.[12]

The following table shows the record of increasing cargo capacity of the Indian ports. This increase in the capacity has been majorly due to increased privatization of the development of the ports, construction of new ports and expansion of berths at the ports.

Capacity Utilization at Ports[13]

Year	**Traffic Handled (In million tonnes)**	**Capacity (in million tonnes)**	**Percent Utilisation (%)**
2000-01	*281.10*	*291.45*	96.44
2005-06	423.57	456.20	92.85
2006-07	463.78	504.75	91.88
2007-08	519.31	532.07	97.60
2008-09	530.53	574.77	92.30
2009-10	561.09	616.73	90.98

As per the government's data, the total capacity envisaged at Major Ports by the end of 11th plan period is at the level 1016.55 million tonnes, whereas the traffic at Major Ports is projected at the level of 708.09 million tonnes.[14]The maritime States (non-major ports) have drawn plans to increase the capacity of non-major ports

12 *Ibid.* p. 233.
13 Ministry of Shipping, "Maritime Agenda", Ports Wing, http://shipping.nic.in/showfile.php?lid=261 (accessed September 15, 2014).
14 *Ibid.*

at a CAGR of 17.33% during 2009-10 and 2019-20. This is proposed to be achieved through the development of existing ports and by setting up new ports. The maritime states propose to increase the existing capacity 346.31 million tonnes to 498.68 million tonnes by March 2012. At the end of 12th five year plan in 2016-17 at 1263.86 million tones and 1670.51 million tonnes in 2019-20 in contrast to its capacity to handle 346.31 cargo in March 2010.[15] Achieving the aforementioned targets is a challenge in itself for the Indian Port industry. The productivity of a port not only depends on its capacity and capacity utilization but also on certain other related factors such as rail and road connectivity, human resource management at the ports, lack of warehousing facilities etc.

Containerization

Containerization started in India in 1973 in a limited way with the creation of interim container handling facilities at Mumbai port and Cochin port. The container traffic since then has been recording impressive growth particularly since 1992-93, in tune with the increasing use of containers for all type of cargo in international trade.[16] Container traffic has been shown to exhibit a strong linkage to GDP growth and most developing countries have demonstrated a high level of correlation between the two. As the economy expands, and manufacturing output and purchasing

15 *Supra* Note 13.
16 *Supra* Note 4, p. 207.

power increases, imports and exports of intermediate and finished goods, which are typically containerize, would increase. The trend promises to be a large driver for India's containerized cargo in the future.[17] In addition, the containerization level in India at 68% is still low compared to international levels of around 80% and increased penetration of containerization will also push traffic volumes and growth rates. Container demand is forecast to grow from the current 6.5 million TEUs in 2008-09 to about 21 million TEUs by 2015.[18]

Investment in Port Industry:

With the advent of globalization and opening of the economy, it was realized that there was a need to upgrade and modernize the Indian Ports in order to increase the efficiency in foreign trade. For the same, the Government of India has been encouraging investment in the Port infrastructure.

Foreign direct Investment (FDI)

The Indian Port industry allows foreign direct investment under the Automatic route. The cap for foreign direct investment in the Indian Port Industry is 100 per cent for the construction and development of infrastructure.

An overview of emerging markets indicates that foreign direct investment in India has grown 15 times from $234 million in 1990

17 *Supra* Note 13.
18 *Ibid.*

to $ 20 billion recently. Each year India attracts FDI of over $ 3 billion placing the country amongst the fastest growing economies in South and South-East Asia, second only to China.[19]

Private Sector Investment

Private sector investment has proved to be a significant source of funding for the development and modernization of Indian ports. The establishment of Nhava Sheva International Container Terminal (NSICT) was a successful privatization project. Today, in order to boost private sector investment, the government has been encouraging projects in the form of public-private partnership. Currently, there are 22 private projects approved by the government. However, the nature of these projects has been limited to the establishment of container terminals. The government has been issuing guidelines for taking up new projects by the private sector for the development of the Indian ports. As per the government's report, the investments of some of the projects taken up at Major Ports have been estimated as Rs.109449.41 crores, of which Rs.72878.16 crores have been estimated to come from Private sector participation and the balance Rs.36571.25 would be funded through Internal Resources/EBR and Government Budgetary support etc.[20] Following are some m taken up by the government to boost investment in the port industry:

19 *Supra* Note 4, p. 217.
20 *Supra* Note 13.

Public Private Partnership (PPP)

The Government has been encouraging private sector participation in port development since 1996. The major areas which have been thrown open for private investment, mainly on Build, Operate and Transfer (BOT) basis. The main activities in the PPP model includes construction of cargo handling berths, warehousing facilities, establishment of container terminals, installation of cargo handling equipment, construction of dry-docks and ship repair facilities, etc by the mode of competitive bidding. For the same purpose, Government of India has provided Guidelines for Private sector Participation in Ports through Joint Ventures and foreign Collaborations. These specify areas of participation of Joint venture between Major Ports and Foreign Ports for construction of new port, development of new ports, improving productivity of an existing port facility by upgrading or modernization by either arranging finance or making the assets available.

The Government has issued guidelines on private sector participation in the Major Ports. These guidelines specify certain areas of privatization where private sector involvement is encourages. These areas are[21]:

- Leasing out existing assets of the port including construction of container terminals, warehouses, setting up captive

21 Ministry of Shipping, "Guidelines", Ports Wing, http://shipping.nic.in/writereaddata/l892s/78061666-PSPMajor.pdf (accessed September 22, 2014).

power plants, facilitating handling of bulk cargo, ship repair facilities etc.

- Leasing of equipment for port handling and leasing of floating crafts from the private sector
- Pilotage
- Captive facilities for port based industries

In 2008, the ministry has provided guidelines for Guidelines for Formulation, Appraisal and Approval of Public Private Partnership Projects which lays down procedure for approval of Public Private Partnership Projects sponsored by Central government. The guidelines establish a PPP Appraisal Committee serviced by Department of Economic Affairs to analyze the proposals under this model.[22]

With these initiatives to boost investment in the port sector, India now stands seventh largest in the world and second largest in Asia in the transport industry.[23]

Under the PPP model, both private sector and government jointly under take responsibility for the development and maintenance of ports on revenue sharing basis. In order to execute the PPP model, a Concession Agreement has to be entered between the government and the private players. The Ministry of Shipping has

22 Ministry of Shipping, "Guidelines", Ports Wing, http://shipping.nic.in/writereaddata/l892s/43683584-Guidelines%20PPPs.pdf (accessed September 21, 2014).

23 *supra* note 19.

provided a draft of Concession Agreements. Under this Agreement, the Board of Trustees of a port is the 'Concessioning Authority' and the private players who undertake the activity of operation; development and management of a port are referred as 'Concessionaire'. As per the agreement, joint responsibility is imposed upon both the parties who are liable in proportion in relation to their respective degree of negligence or default or omission as the case may be.

Problems faced by Indian Ports:

Despite of several measures taken up by the Government of India to improve the efficiency of the ports in India, there are several problems faced by the Indian Ports. These include the following:

- Hinterland connectivity the productivity of a port not only depends on its capacity and capacity utilization but also on certain other related factors such as rail and road connectivity, human resource management at the ports, lack of warehousing facilities etc. Lack on connectivity with the rail and road transport system reduces the efficiency of the ports leading to cost escalation.
- Drafts and Displacements with an overall increase in the size of ships in the industry as a whole, there is an urgent need to increase the drafts (water depth) of the respective ports.[24]

24 Gajendra Haldea, Infrastructure at Crossroads*: The Challenges of Governance*, (New Delhi, Oxford University Press,2009), 19.

- Storage Facilities lack of oil industry tankages at port locations have been is a problem for handling higher volumes. Though, additional tankages have been put up at Kandla, Goa, Cochin, Vishaka Patnam and Haldia. There is a need to establish more oil tankages at other ports.
- Lack of Information Technology Ports deal with a wide range of activities like movement of ships, passengers, cargo/container through different modes of transport, the loading and unloading of ship and interaction/clearance from different statutory bodies and port users[25]. There is a need for computerization at the ports (towards paperless regime), surveillance system, safety and security system management of a port, easy electronic flow of information, gateways provision for e-payment, SMS, E-mail, etc.
- Availability of Night Navigation and Pilots Lack of night navigation facilities hinders the loading or unloading of cargo after berth which results in detention of ships leading to congestion of traffic at the ports. These facilities must be available at every port in contrast to being only limited to the ports of Mumbai and Chennai.
- Labour Management at ports: The labour issues at the ports are governed by the labour laws. The Dock Workers (Regulation of Employment) Act, 1948 which governs the management of labour at ports establishes a Dock Labour

25 *Supra* Note 20.

Board which shall govern in accordance with the provisions of Industrial Disputes Act, 1947. However, this law ceased to be applicable on major ports. One of the major labour issues at ports is that of lack of skill and strength to handle cargos at the ports which hampered the productivity of the ports. In addition to this, safety of workers at ports is also an area of concern.

In addition to the above problems, lack of private investment, lack of effective implementation of government run projects, capacity constraints, labour intensive methods of cargo handling, lack clarity in the procedure of customs clearance also pose a threat to the productivity of the Indian Ports. In order to meet the aforementioned challenges, the Ministry of Shipping has taken various policy initiatives and developments which is discussed in the next section.

Recent Developments and Policy Initiatives:

Keeping in view the challenges faced by the Indian Port industry, there is a need to upgrade and modernize the existing ports. To combat this, the Government has taken up various measures to improve and modernize the ports by encouraging private sector involvement, introducing improved technological equipments at ports.

Sagarmala Project: The incumbent government has recently in June, 2014 announced its proposal to expeditiously take up this

project. This project was initially announced in 2003 with the objective to make the Indian Maritime Industry up to international standards for achieving rapid capacity expansion and modernization of Ports along India's East and West Coast. This project was undertaken to improve the standards of the Indian ports and match up with the global standards in terms of infrastructure, efficiency, increased capacity, and faster transportation, improved connectivity with rail and road facilities etc. However, no fresh guidelines have been laid for the implementation of this project. The concept has to be finalized under the authority of Ministry of Shipping.

Sethusamudram Ship Channel Project: Indian Government had announced the Sethusamudram Ship Channel Project for the creation of a ship navigation channel to suits different draughts through dredging/excavation in Adam's Bridge, parts of Palk Bay and Palk Strait.[26] This project has been taken up by the government in order to improve the transportation from the Tuticorin harbour by carrying out dredging for removal of certain rock impediments from the navigation route of ships. This project was initiated by the Government of India in 2004. The project is to be executed by the Tuticorin Port Trust with alliance of Dredging Corporation of India (DCI). This project was necessary to reduce the turning time taken by the vessel to reach the port. Due to the presence of some reefs

26 Sethusamudram Corporation of India, "Reports and Studies", http://sethusamudram.gov.in/Report&Studies/EIA/Comprehensive%20EIA/EIA.htm (accessed October 3, 2014).

in the route, the efficiency and productivity of the port was lowered. The project establishes a Sethusamudram Corporation Limited go carry out the operations of the project.

Maritime Agenda 2010-2020: To pace up with the global competition, the Ministry of Shipping had prepared a ten year work action plan known as 'Maritime Agenda 2010-2020' which is part of the effort to identify the areas for attention during the ten year period from 2010-11 to 2019-20[27], containing comprehensive plans about the policy initiatives for the maritime industry. This ten year period covers the last two years of the Eleventh Five Year Plan, the full five years of the Twelfth Five Year Plan and the first three years of the Thirteenth Five Year Plan.[28] The government has identified few bottlenecks in the growth of the Indian Port industry such as need of information technology the ports, each Major port should have at least four lane road connectivity and double line rail connectivity, lack of financial assistance by the government to certain Public-Private Partnership projects, lack of association with National Highways Authority of India (NHAI) to improve port connectivity

The Maritime Agenda sets up an action plan for the Indian Maritime Industry with the following goals[29]:

27 *Supra* Note 13.
28 *Supra* Note 13.
29 *Ibid.*

- Capacity building for ports of 3200 M.T. for handling about 2500 M.T. of cargo
- Improve Port performance standards to match up with the global standards
- Increase Coastal shipping and facilitate hassle-free multimodal transport
- To achieve a share of 5% in global ship building industry
- Promotion of use of the inland waterways for cargo movement
- To achieve and sustain the strength of Indian seafarers up to 9% of the global strength by 2015

Ports Regulatory Authority Bill, 2011: In 2011, the Ministry of Shipping introduced a Bill which provides for establishment of an Authority to regulate the functioning and performance of the ports. The salient features of the Bill are:

1. Establishment of Major Ports Regulatory Authority under the Central Government having jurisdiction over all the major ports.
2. Establishment of State Ports Regulatory Authority in each Maritime state (non-major ports) to be established under State government having jurisdiction over non-major ports in the respective Maritime state

3. The authorities so established shall discharge following functions namely[30]:
   (a) Formulation of tariff guidelines and specifying rates of different facilities and services by the Port Authorities and Private Operators
   (b) Monitoring the performance of the ports and laying down the performance norms
   (c) Advising the Central/State government
4. Establishment of Port Regulatory Authority Appellate Tribunal.

Recently, the Centre has established a committee under the chairmanship of Mohan Das Pai to review the functioning of Indian ports and Transportation system in India. The committee is yet to submit its report.

Conclusion:

Despite India being a growing maritime power, the performance of Indian Port industry is ranked lower in terms of performance according to the international standards. The Indian Port industry has to face number of which hampers the productivity of the ports. In order to augment the efficiency of the Indian ports, number of measures has been taken up by the Government such as 'smart city' around port project where each major port would develop

30 PRS India, "Port Regulatory Authority Bill, 2011", http://www.prsindia.org/uploads/media/draft/Draft%20Port%20Regulatory%20Authority%20Bill,%202011.pdf (Accessed October 3, 2014).

smart industrial city around the port area with international standards such as advanced township, SEZ, green city etc, encouragement to private sector to participate seriously in the shipping and port industry. Despite various measured taken up by the government, the Indian Ports still suffer from low productivity. Though there has been a relative increase in the foreign investment in this industry yet there is a thrust to provide effective guidelines to encourage private investment in this industry to bring efficiency. With this pace of initiatives by the centre there is a strong future for the Indian Maritime industry.

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THE EIGHTEENTH SAARC SUMMIT, KATHMANDU

Amb. Sheel Kant Sharma[*]

The 18th Summit that concluded in Kathmandu last month was successful in keeping the default SAARC process intact. In fact, in certain aspects, as will be explained below, the summit went further and sought to strengthen the default process. The SAARC Chair, Prime Minister of Nepal, Mr. Sushil Koirala, made considerable effort to improve the optics at the summit by bringing prime ministers of India and Pakistan together for a handshake and a photo opportunity with broad smiles. This improved optics is essential as it validates what has been the basic value of SAARC over the years i.e. to engender a modicum of comfort level among leaders of South Asian nations despite the overhang of deep political issues keeping them apart. With two nuclear weapon states and humongous armies impelled by endemic tensions this is no mean achievement to get all the leaders together, on the same platform, and talking to each other in good cheer.

What is more significant is that these leaders agreed to a summit declaration which reiterated the essence of SAARC in terms of goal oriented regional cooperation. While the subject has figured in previous summits too, this time the Kathmandu Declaration coveys the clear commitment of all SAARC leaders to work for a South Asian Economic Union and spells out the steps to achieve that goal

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[*] The author is a former member of Indian Foreign Service (IFS) and former Secretary General, SAARC.

"in a phased and planned manner through a Free Trade Area, a Customs Union, a Common Market, and a Common Economic and Monetary Union". The summit underlines a number of action points for regional trade which are also duly spelt out in the declaration, e.g., "putting into operation simplified and transparent rules of origin; implementation of trade facilitation measures; harmonization of standards relating to Technical Barriers to Trade (TBT) and sanitary and phyto-sanitary measures; harmonized, streamlined and simplified customs procedures; elimination of non-tariff and para-tariff barriers; and smooth and efficient transit and transport facilities".

This phased and planned manner of pursuing action is an example of what characterizes the default process of SAARC. Its incremental gains and slow progress fail to impress the critics. But it must be realized that there can be no big ticket success in South Asia without the plodding required to put back brick by brick the level of cooperation which existed even as late as until a decade or two after the partition of the subcontinent.

The obstinacy of diverse perspectives of that cataclysmic hour of independence from the British yoke makes big leaps very hard to make. To treat this reality as the millstone round regionalism in South Asia or to wish to escape it with piecemeal options would be giving in to what is called pessimism of intellect over optimism of the spirit. Can huge populations and the largest youth bulge in the

world be content forever being trapped in dire hostility? Can such hostility be ever quenched with the language of isolation or zero sum geopolitics? The virtual proximity through internet and social media of this billion and two thirds mass of humanity is bound to enforce its own compulsions sooner or later, for better or for worse. Alienating a big part of it due to inability of politics to resolve the issues is not particularly smart in current times. True, the meager gains of a regional cooperation paradigm do not offer early solutions but that should implore peoples in South Asia to introspect better about what may be lacking in their efforts.

Since summits catch attention and compel governments and peoples to spend some time thinking about these issues this is the right time to introspect. It is necessary to analyze why regionalism founders in South Asia in contrast with its enduring success in Europe and South Asia. In the current stage of SAARC's evolution EU's example and inspiration can be most relevant as SAARC faces the challenge of ineffective institutional arrangements and multiplicity of obstacles to translate declarations into action.

For instance the quote from the French statesman, Jean Monnet, in the nineteen fifties about the early European cooperative venture is very apt, "the European Union would be built 'through concrete realisations', creating at first a *de facto* solidarity. It is essential to develop habits of cooperation among nations which had so far only known relationships based on power."

When contrasted with this kind of beginnings, SAARC, based on ideals and principles and not on tangible action and concrete goals, was a hesitant and timid attempt at regional cooperation. The timidity is inherent in SAARC's Charter in that it bases itself on consensus on one hand and embraces on the other a whole spectrum of items in the socioeconomic agenda for the well being of the people.

EU had progressed through, step by step in selected sectors, in what could be described as "integration by parts" in the language of calculus. South Asia took upon itself the horrendously complicated problem of integrating a many body composite made up of 7 or 8 factors; each independently variable, and any of them could opt at any point to bring down the whole. An incremental progress in this problem antique demand far more than the member states of SAARC seem to be ready to commit so far in terms of resources, energy, institution building and perseverance. But by no means can this lack of readiness to come up to the plate be attributed solely to the political tensions.

The 18th summit tries to address some aspects of this by stressing steps to streamline follow up. The summit calls for all SAARC bodies, including the Council of Ministers, other ministerial meetings, and mechanisms to develop outcome-oriented policies, programs, projects, and activities. Furthermore, SAARC mechanisms are to be reviewed inter-governmentally every three

years by a Standing Committee of foreign secretaries to evaluate performance, achievements and constraints. Leaders addressed the problem posed by a large number of regional centers created over the past decades by endorsing their selective closure and merger, and attached importance to making them efficient, effective and result-oriented with programs and projects that produce tangible outcomes. Also figures importantly in the declaration is emphasis to enhance the institutional capacity of the SAARC Secretariat, in keeping with emerging realities.

The EU experience shows that even after leaders declare firm commitment how hard the work of implementation is and how action plans should be made and worked out within set timelines. Therefore to compare SAARC's evolution so far with the record of EU or even ASEAN is unfair since the circumstances and the size of total engagement in SAARC's case remains wide apart from that in other regions.

As for those who dismiss SAARC as a regional paradigm and suggest exploring other sub regional routes the factual picture is not that of a vast improvement in the sub regional forums like BIMSTEC too. And as for those who cynically dismiss SAARC but put their money on bilaterally addressing of the hard problems first, the question that arises is how much success even the bilateral routes have achieved in the past several decades? Since no single way seems to answer all questions why not pursue multiple

paradigms and explore their inter se synergies. SAARC Charter makes it clear that the paradigm of regionalism that it pursues is complementary to the bilateral and other multilateral routes.

Prime Minister Modi's statement to the summit lays down a very positive approach. He has made a range of substantive unilateral offers for SAARC while affirming India's determination to pursue cooperation both within and beyond SAARC. The spontaneous welcome already accorded to some of his offers, like SAARC satellite, for instance, indicates that within South Asian countries too there is an open and receptive mind set. These are significant take always from Kathmandu summit and the urgent need is to get on with work on the follow up. A good deal can be done in the two years till the next summit in Islamabad.

An Ambassador's reminiscences

BHUTAN: THE THUNDER DRAGON LEAPS FORWARD

A N Ram[*]

It is, perhaps, impossible for anyone who has come into contact with Bhutan not to fall in love with her at first sight. Its picture postcard landscape of towering snow capped mountains and fast flowing rivers and rivulets; its virgin and dense forests; its diverse flora and fauna; its amazing Dzongs, Chortens and Gompas; and, above all, its colourful, soft spoken, generous and captivatingly charming people with an ever present smile and a prayer wheel in hand- all bewitch and amaze one in a trance of tranquility.

In October 1968 on completing my assignment in the Ministry of External Affairs (MEA) in New Delhi, I was preparing to head for a routine foreign posting when, one evening on returning from the Ministry, my telephone rang and I was told that the Foreign Secretay, Mr. T N Kaul, wanted to speak to me urgently. I was sure that it was about a Parliament question that I had not adequately attended to! The booming voice on the other side enquired if I would proceed to the most exciting and challenging posting in the world. And, before I could contemplate and respond, he ordered that I should leave for Bhutan to assist in the consolidation of a new Mission we were in the process of setting up in Thimphu, in a week's time. This was the turning point in my

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young Foreign Service career that I was waiting for. The journey from Delhi to Thimphu – partly by air, jeep and on horseback- took over two days to complete with an overnight stop in Calcutta and a brief refreshment halt at the Bhutanese border town of Phuntsholing.

Once on my way, I encountered some of the most breathtaking sights and a new world – unspoilt and uncommersialised perfectly in tune with nature- was beginning to unfold with a mystery awaiting at each turn of the winding; wild animals including a tiger that came in our path near Bunakha (beyond present day Chuka); dense and virgin forests which would have been the conservationist's delight; isolated hamlets on mountain tops precariously perched and inaccessible; exquisite Monasteries and Chortens with prayer flags fluttering at every turn; occasional groups of women and children in their traditional attire of colourful Kiras and Khos, with their cattle and Apso, Damchi and mastiff dogs following. This was so unique and different from what one had imagined; I began to understand the meaning of the last Shangri-La about which I had read earlier. It was veritably from out of a fairy tale. The stillness of the mountains, the cold mountain air and the deafening sound of the fast flowing river below numbed one's faculties and true peace and tranquility became infectious.

My first look at the Thimphu Valley was from the imposing and large Semthoka Monastery, which stood as a sentinel guarding access to the Thimphu valley. On first glance the Valley appeared brown and barren, even elemental, devoid of all signs of habitation. As one approached Thimphu, one could spot very few isolated Bhutanese homes and a few shops. As there was no electricity, the Valley was beginning to get enveloped in dusk. And then I got my first glimpse of the Tashicho Dzong – an amazingly beautiful and large structure in white and brown colour by the Thimphu River with four towers in all the four directions housing the temporal and the spiritual seat of power. The Dzong, in fading light, appeared stunningly beautiful and awe inspiring. A monastery in the backdrop on the mountain stood in perfect harmony, as if overseeing the Dzong. There was a cluster of a few hutments outside the Dzong to its South and a few isolated houses towards Motithang, housing all of the nearly one thousand citizens of the Thimphu of 1968! Besides the Dzong, to its North, lay a vast vacant stretch of rock-strewn expanse, which was later, to become the site for the New India House. This area was dominated by the beautiful Dechencholing Palace in the North and the small and unpretentious Thimphu market along the Helipad/open space to the South. A small and strikingly beautiful elevated Monastery was to its West and the Thimphu River to its right.

The Indian Mission:

The newly opened Indian Mission then called the "Special Office" was located at Lungtenzampa overlooking the town along the main road to the Dzong and the Palace. It had a hutment for the Chancery and a small cottage as the Residence of the Special Officer, Mr. B S Das. Mr. Das and Mrs. Das were leaving for India on home leave the next day and kindly arranged for me to stay at their Residence until a small and functional bamboo/mud plaster cottage could be constructed for me just adjacent to the Old India House.

Looking back, these were the happiest and perhaps the most rewarding days of my life, notwithstanding the challenges of living in Thimphu with a wife and a small baby (both had joined me a few weeks earlier). Our immediate priority was to organize baby food and other essentials through the Indian Military Training Team (IMTRAT) whose head, a General (then Brigadier) T V Jegannathan was most helpful and generous with supplies, transport and medical cover. But for IMTRAT, life in the Thimphu of 1968 would have been difficult and demanding (even bread and meat had to be brought from Siliguri), even though the Royal Government extended exceptional assistance to us. His Majesty and the Royal Family themselves took the trouble to enquire about our welfare and ordered all manner of help. By November, our little cottage of two small bedrooms was ready and we were able to move in there before the onset of severe winter (temperatures were

already sub-zero) with modest basic furniture etc locally made to order from a Mr. Hing's Saw Mill in Phuntsholing, and furnishings etc. ordered through MEA which followed several months later. Mr. and Mrs. Das were a kind hearted, caring and a generous couple who obviously stretched themselves to ensure our maximum comfort. We spent much of our spare time and the long and lonely freezing evenings with them at their home next door, discussing, sometimes animatedly, all matters which helped us to cope with the bitter cold outside and even indoors. Our discussions also centred around the rapidly evolving India-Bhutan relations, Bhutan's transition and transformation, economic development and the impending first State visit by a President of India (V V Giri) to Bhutan in 1969.

I had the opportunity to get to know the Bhutanese lawmakers when I accompanied a Tsongdu (National Assembly) delegation to India in early 1969. The Bhutanese officials were very warm and friendly and often visited us and invited us to their homes. The small Indian expatriate community, about 50 in all, was closely knit and very supportive of each other. We often spent time together and I even learnt to play Bridge and other card games. The IMTRAT Mess was a popular place for social gatherings at which many Bhutanese friends also joined us. I recall some of us meeting the Finance Minister, Lyonpo Chogyal, to request him to permit us the use of the only cinema hall in downtown Thimphu, Lugar, to organize and present a variety of entertainment and

cultural programmes, which proved to be a huge success. The entire elite of Thimphu attended and cheered us. Thanks to Benji Dorji who was then the Paro Thrimpon (Magistrate) and whose lavish hospitality we had all enjoyed, we were also able to introduce cricket in Bhutan by playing some matches at the only air strip in Bhutan at Paro. Ganguly and Thakur willingly joined us and provided the logistics. Benji, Tobgye, Phub Tsering and some others were star attractions. Phub Tsering was an excellent table tennis player who successively won all the tournaments organized in Thimphu. Of course, the Paro Tsechu, the Thimphu Mask Dance Festival and the IMTRAT and DANTAK (Border Roads) Melas were occasions to remember for their colour, pageantry and cultural richness and diversity.

On a trek to a remote valley nearby, I realized how cut off the Bhutanese people were from developments outside. Man had just set foot on the Moon, an event that caused some consternation and disbelief in the Bhutan of the 60s, as indeed in some parts of India! I recall that my first formal call on the Home Minister (affectionately called "Home") soon after I arrived in Thimphu was an interesting experience. The Minister, Lyonpo Tamji Jagar, was a hospitable and gracious person of old world charm. He did not speak much Hindi. I was advised that in the Bhutanese custom, a guest if welcome is offered Yak butter tea or a drink three times to make him feel honoured and welcome. I later realized that one is supposed to merely sip the beverage and not gulp it down in one

go! Not used to alcohol as I am a teetotaler, I was beginning to feel sozzled and sick. My next recollection was my wife escorting me home with the Home Minister's Secretary. For many years Lyonpo Jagar and Lyonpo Dawa joked about my unique contribution to India - Bhutan friendship.

Bhutan in the UN:

My second opportunity to continue my most cherished association with Bhutan followed immediately. In September 1969, at the request of His Majesty King Jigme Dorji Wangchuck, I was asked to assist HRH Tengye Lyonpo (King's brother and Trade & Industry Minister) on an important three week mission to the UN Headquarters in New York and Washington DC to explore and promote the possibility of Bhutan's Membership of the UN. The swift evolution of Bhutan's international personality and exposure was impressive and smooth. From the membership of the Universal Postal Union (UPU) and Colombo Plan, Bhutan was now looking at UN membership and as also the membership of other international institutions.

This process received a giant push in 1970 when Bhutan was accepted as a full sovereign member of the world body, followed a year later by the membership of the Non-aligned Movement (NAM), SAARC, UN ECAFE, UNCTAD & other UN and International fora. Once again, it was an honour and privilege to be asked by the King of Bhutan to assist Lyonpo Sangye Penjore to

set up Bhutan's first permanent mission to the UN in New York. The initial months involved not only taking care of logistics but, more importantly, in helping to articulate Bhutan's policies on various new but momentous foreign policy issues. I was called upon to assist the Bhutan delegation in various international conferences including UNCTAD III in Chile and ECAFE in Tokyo, apart from conferences in New York and elsewhere.

The *Druk Thuksey* Honour*:*

A less important task was to inform people about Bhutan and its way of life. We were frequently invited to give lectures and to respond to growing media curiosity on this very unique country. I recall one such event organized by the prestigious Asia Society of New York at which my presentation evoked much interest and resulted in my being invited to give several other lectures. I was called for consultations to Thimphu and my advice was constantly sought on many matters. In New York I spoke for Bhutan, my wife and I dressed in Bhutanese Kira and Kho on formal occasions and served Bhutanese cuisine while entertaining at home. A colleague of mine in the Diplomatic Corps, not knowing us and looking at my wife, enquired if Bhutanese women looked like South Indians adding knowledgably that he was aware that there had been great cross border migration of populations between India and Bhutan for hundreds of years! For my modest efforts, in 1974 after my assignment with the Royal Government was over, I was conferred one of Bhutan's highest decorations, *Druk Thuksey* by His

Majesty King Jigme Singye Wangchuck at the National Assembly of Bhutan in Thimphu, a rare honour. The citation and the praise showered upon me were very humbling and overwhelming, reflecting Bhutanese generosity and close friendship with India.

A word about Bhutan's swift international exposure and its identity. Many people ignore the fact that India, in the discharge of her responsibilities and obligations, had all along helped, supported and facilitated the fulfillment of Bhutan's international aspirations. There is no parallel example in international relations of such total cohesion and understanding in bilateral relations as between these two South Asian neighbours, Bhutan and India, notwithstanding the asymmetry of size and population. The fact that I, an Indian diplomat, was involved in this process so integrally demonstrates the total trust and cohesion between the two countries. Neither Bhutan nor India on any occasion that I can recall had cause to disagree with each other, not even on the pace of evolution. Both countries, it was clear, respected and understood each other's sensitivity and core interests. Bhutan's vote in December 1971 on Bangladesh (I was then in New York with the Bhutanese Mission) is a manifestation of this deep trust. India, on her part, stood by Bhutan all the way. Today both countries enjoy an enduring partnership in which both have an abiding stake, which has no parallel in history.

End of the Mission:

On return from deputation with the Bhutan Mission to the UN (PMB) in New York in August 1973, I was initially deployed as deputy secretary in the MEA's northern division looking after relations with Nepal and Bhutan for a very short period. I had the privilege of being called to Thimphu once again to brief the Royal Government and the foreign minister, Lyonpo Dawa Tsering (with whom I had stayed), on matters concerning PMB and to receive one of Bhutan's highest Civilian decorations *Druk Thuksey* from His Majesty the King, Jigme Singye Wangchuck in October 1974. My love affair with Bhutan was thereafter interrupted for five years because of postings elsewhere, but I was able to keep in constant touch with events and friends in Bhutan. It is impossible to obliterate from memory what had become an inseparable and integral part of myself.

In May 1979, fate ordained me to resume my direct involvement with Bhutan when I was appointed as joint secretary (Head of Division) incharge of Nepal and Bhutan, an opportunity I was quick to seize with both hands not attempting to conceal my ecstasy and the excitement of a child. I had always hoped to do this job and consider it as one of the most important and challenging desks in MEA. This was by far the most satisfying and significant assignment I had ever handled in my career particularly as it involved participating in policy formulation and its implementation at the crucial operational level. What made things easy for me was

the excellent support I received from my colleagues Nirupama Rao and Neelam Deo and the guidance of foreign secretary R D Sathe whose full confidence I was fortunate to enjoy. India-Bhutan relations were now on an irreversible course of partnership; there was near total understanding on all major issues; new proposals aimed at unleashing Bhutan's enormous untapped potential were conceived and implemented; and there was marked reciprocity and mutual respect for each other on the basis of sovereign equality.

Sharing Bhutanse water:

While the Chukha Hydel Project was the flagship project there were others too like Nanglum, perhaps, not as spectacular or visible. High-level visits were regularly exchanged at all levels and the relationship now appeared to have a critical mass which self-propelled it to a higher momentum. I was able to visit Bhutan very frequently and with each passing visit I found myself increasingly involved in the Bhutan story and her evolution and transformation as the most prosperous country in South Asia, a tribute to its farsighted leadership and to the vision of Indian leaders starting with Pandit Jawaharlal Nehru whose historic visit in 1958 across the Chumbi valley was the beginning of this unique process. As we celebrate forty years of the establishment of India-Bhutan resident diplomatic Missions we must salute the vision of India's first prime minister and the late King Jigme Dorji Wangchuck who are truly the architects of this shared vision.

It was during this period after our Mission was established that the new India House project was conceived. Mr. B S Das, Special Officer of India and my superior who had conceptualized the project in 1968 would be happy to see his dream project realized. It was he who selected the site from out of a few alternate sites offered to us and was intimately involved with its designing, layout and architecture. The Royal Government too was involved and was consulted at every stage. The façade of the buildings and their exterior colours had to conform to the Bhutanese style, which was mandatory. In the end, the New India House was a blend of tradition and modernity. It had large comfortable rooms for various occasions, central heating and had used local skills, materials and architectural designs to the extent possible. The India House Club emerged as a popular place for sports, cultural activities and social gatherings. In a small way we were all involved and participated in this project. The MEA considered it as its most prestigious project then and spared no effort or cost to make it the pride of Thimphu.

I left Delhi on transfer in November 1981, a very satisfied person. India-Bhutan relations had entered a new phase of irreversible interdependence and integration as two sovereign nations. While the late King Jigme Dorji Wangchuck was the fountain source of this policy of close ties with India even as Bhutan evolved its international personality and developed her external relations as a sovereign country, unfortunately he could not see the fulfillment of his vision as he died at a very young age in 1972 at Nairobi,

leaving his young son, the next King of Bhutan, Jigme Singye Wangchuck, to translate his dream into fruition. In that sense both he and King Jigme Singye Wangchuck were the architects of modern Bhutan who gave it an international personality and introduced far reaching domestic political and economic reforms and liberalization through democracy and an elected polity. They were visionaries and nation builders in a true sense and showed the way to others on democracy and good governance with the purpose of enhancing and ensuring the Gross National Happiness (GNH) of the country and its people.

As the Joint Secretary in MEA, it was my privilege to witness from close quarters these profound and momentous changes. Bhutan was on the move and one could sense the excitement in the people, specially the youth. The King was the source, symbol and architect of this resurgent Bhutan- an ancient traditional society which was about to change and transform itself into modern times in its own unique way without parallel in history. Bhutan, in my view, is the best example of synthesis between the old and the new; between tradition and modernity; between material progress and spirituality; between needs of development and conservation; between progress and deep rooted belief in its culture; and between old values and the new challenges of development. It is noteworthy that Bhutan managed the inevitable effects of transition in a very smooth and exemplary manner, avoiding upheavals and disruptions, as is often the case. Once again His Majesty the Kind

himself managed and calibrated change with unusual farsight and deftness carrying all his people with him in this process through full participation and involvement. It must be added that once again India was fully supportive of Bhutan's aspirations and this found resonance in India's sensitive approach towards Bhutan at a crucial time.

As Ambassador in the second home:

Just when I thought that my long involvement with Bhutan had come to an end, I was asked in Sept 1983 to proceed to Bhutan as Ambassador (some years ago the status of our respective Missions had been upgraded to full Embassy). By now Bhutan had become my second home and I could hardly conceal my happiness to go back to a land and its people I loved so well and have known for so long. So, I reappeared in a fast changing Bhutan in a new incarnation, even more passionate and intense than ever before. I was privileged to know most of the personalities and was aware of the profound changes that had taken place in Bhutan.

It was a new Bhutan that I was called upon to serve in. Bhutan now had foreign embassies and representation abroad; the small diplomatic community and international experts, now part of the Thimphu landscape, threw up a changed situation as well as new opportunities, even as Bhutan reaffirmed the centrality of India to it. To that extent, our role and relations acquired a new dimension necessitating even greater sensitivity on our part. The younger

Bhutanese friends with whom I had worked earlier were now in high positions of authority. Lyonpo Khandu Wangchuk, Lyonpo Tsewang, Lyonpo Yeshy Zimba, Lyonpo Ugyen Tsering, Lyonpo Jigme Thinley, Lyonpo Sangye Nidup Dorji, Tsering Wangdi and many others were among those with whom I was looking forward to interact once again. Of course, senior Ministers and others I had worked with earlier were still holding responsible Ministerial positions and it was not difficult for me to pick up threads from there.

The senior Indians on deputations or working in Bhutan were all well respected. Some of those with whom I worked included General R P Singh of IMTRAT, General Dasgupta of Border Roads, K N Thakur, Police Advisor N Rao of Chukha Authority, C P Vohra of Geological Survey, N S L Rao of Development Ministry and R K Dhar, the UNDP Head. The Thimphu of the 1980s, it appeared to me, was somewhat less informal and, perhaps, more structured, though still highly open and accessible. The bureaucracy was very professional and competent. I was also fortunate as the Northern Division in MEA first under N N Jha and later K Srinivasan had two exceptionally bright officials in Dinkar Khullar and Sudhir Vyas (the latter is at present serving as our Ambassador in Bhutan and has rich experience of handling relations with Bhutan). The depth, quality and scope of India - Bhutan dialogue had now expanded and deepened; in a way India had become even more central to Bhutan than before and the

interdependence, friendship and understanding was much deeper now.

The India House was now ready to be occupied and one of my priorities was to shift the residence to this sprawling estate. There were, no doubt, teething problems but the move was overdue and necessary. I was, with the help of my wife, able to install the furniture, furnishings etc, already ordered from Delhi, quickly. Even the Indian objects d'arts were ordered through MEA and arrived in time for prime minister Rajiv Gandhi's visit in Sept 1985. The gardens and the estate were given a new look; the India House soon became a local landmark and even ordinary Bhutanese were eager to see it from the inside. It was accessible and buzzing with activity and visitors. Newspapers and journals carried stories about the estate and write-ups and photographs of it began to appear in an assortment of magazines.

However, as it was easy to lose contact with the ordinary citizens from this gated estate, it was necessary to reach out and keep the estate open and accessible. This was done to the extent possible. Groups of children, students, women, traders and business persons all visited our estate as they were curious to see this new landmark of Thimphu. Thimphu of the eighties was dramatically different from the Thimphu of the earlier days. It was a well spread out township of about 20,000 population; it had now excellent infrastructure by South Asian standards; the market, flooded with

goods and people, was buzzing with activity and was a happening place for the young people; shops were full of Indian and Chinese merchandize available at affordable prices (the Bhutanese people now had enough purchasing power, greater than an average Indian); there was even public transport, hotels, restaurants (the Swiss bakery being the most popular), a radio station, video parlours, playgrounds and a club. Thimphu, in my view, was the most beautiful, comfortable and livable South Asian capital city.

India-Bhutan relations too had entered a new phase, particularly following prime minister Rajiv Gandhi's visit in September 1985, his first visit abroad after becoming the Prime Minister. Bhutan now had a well developed and recognized international personality; it had hosted international conferences in Thimphu and had even provided the venue for the Sri Lanka peace dialogue in 1985; it had, thanks to pragmatic policies, emerged as the most prosperous South Asian country in per capita income terms; it began to assert on issues affecting its national interest and appeared to display new confidence; it felt confident enough domestically also, even in the wake of changes introduced to usher in democracy and liberalization, to put new systems in place; and it was, on all occasions, happy to reaffirm its close relations with neighbour India and India's pivotal place in its scheme of things.

Adieu to the Himalayan beauty:

It was time for me to move on and to bid adieu to my love fest with Bhutan. Although in Washington DC where I was transferred – and in all my earlier and subsequent postings- I had a special corner at my home dedicated to Bhutan with my modest but handsome collection of Bhutanese artifacts etc. on display, my direct involvement with Bhutan had now ceased. The call of Bhutan is irrepressible and I tried to remain in touch by organizing events at home to inform my guests of Bhutan's unique culture, its people and history. The Asia Society of Washington DC helped me organize one such event at my home when I had requested Bhutan's then Ambassador to the UN, Lyonpo Jigme Thinley, to give a lecture, which was so well attended that I was encouraged to arrange other similar events! While on assignments abroad I invariably tried to meet transiting Bhutanese friends; removed, as I was from Bhutan my contacts had became less frequent. In MEA, where I subsequently served as Secretary on my last assignment in the Indian foreign service I was from time to time indirectly and on an ad hoc basis involved with some matters concerning our relations with Bhutan. More recently, after retirement, I was very happy to help organize a roundtable on Bhutan at the India International Centre and to speak at a seminar organized by the Academy of SAARC Writers on GNH, mainly to update and inform myself with the current scenario. Bhutan's Ambassador in India, Lyonpo Dago Tshering and others knowledgeable about Bhutan, spoke and enriched the discussion. But the void in my

heart is hard to fill. India House and the Bhutan experience had changed me forever. Bhutan is permanently a part of me and I am the richer and happier for that experience.

R.K.Mishra, Rajesh Gangakhedkar, *et al* (ed.), ***PUBLIC PRIVATE PARTNERSHIP: THE NEED OF THE HOUR,***

Reviewer: Anita Singh[*]

In many developing countries including India, infrastructure bottlenecks have been a serious constraint on the national plans to industrialise their economies at a rapid pace. South Asian infrastructure too is one of the weakest in the world as identified by several studies including the World Bank report. Now that the South Asian countries including India have recognised the infrastructure development as the essential component of the growth strategies, policy issues such as project identification, investment, concession agreement, partnership strategies, end-user conditions, etc. need to be urgently addressed. There as yet is no well-defined policy framework in India defining the different aspects of the infrastructure domain. The book under review is a very timely exercise which examines some of the policies and difficulties of executing the fast growing infrastructure domain in India. It is an intergovernmental and international organization which was established in 1974 by United Nations. It is primarily a research, training and consulting organization in the field of public sector enterprises. IPE is India's premier public sector research and consultancy institution which also promotes management education, training and research.

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The book is a compilation of edited papers contributed to a seminar on jointly organised by the Institute of Public Enterprise (IPE), Hyderabad and the International Centre for Promotion of Enterprises(ICPE), ICPE is a UN intergovernmental body which was established in 1974 primarily as a research, training and consulting organization in the field of public sector enterprise. IPE is India's premier public sector research and consultancy institution which also promotes management education, training and research. The book is published by Bloomsbury Publishing India Private Limited, in 2014.

Public-private partnership (PPP) has emerged as a major and most frequently preferred mode of encouraging project management across the world and in India. PPP which is essentially a cooperative venture involving the public and private sectors whereby the government provides the public goods in collaboration with the private sector. In the past two decades, governments have increasingly turned to private sector to provide infrastructure services in various crucial sectors of national importance like energy, communication, transport and water sectors which were traditionally under the sole control of the government controlled state bodies. . However with the advent of the free trade regime and the increased role given to the private sector in economic development and growth strategies, states

across the globe have chosen the PPP model as an ideal strategy to combine the best of the public and private sectors in executing the infrastructure projects. Consequently India too has employed the PPP in its national policy of building and upgrading its very poor infrastructure facilities.

The book is a compilation of numerous well researched and critically analysed articles on the public-private partnerships which focuses on various pertinent aspects of PPP in Infrastructural Sector in India. The well-selected articles cover a wide range of issues that has arisen or carries the potential to arise in the future with regards to public-private partnership arrangements in various key infrastructural sectors. The prime focus of the book remains on the aspects of infrastructural finance under PPP, the risk associated with it and the means and modalities of financial risk management. These range of articles examine how the sources of finance and the financial risk management has shifted from public or government sector to private sector. It critically analyses the finance process, legal norms, its efficiency and finally the issues and challenges that have arisen in PPP model of infrastructural finance.

Apart from infrastructural finance, the articles further examine the various facets of PPP model in key infrastructural sectors like ports, civil aviation, sustainable, roadways, primary and secondary education, tourism and water delivery mechanism and information and communication technology.

Few of the articles are also dedicated towards the modalities of waste management and role of PPP model in waste management. These articles cover not only an international and comparative perspective but also analyses the effectiveness of implementation of such a model at a regional level.

The book further dwells upon various contemporary issues that have arisen during the practical implementation of the PPP Model in infrastructure sector of India. In this regard, the wide and diverse range of articles have also analysed issues like the governance of the public-private partnership model, land acquisitions for PPP projects which have been a subject matter of controversy in the last few years, possibility of skill development and skill empowerment through such a model and evaluation of mid-day meal schemes in schools and the possible role of PPP Models.

Thus the book through the compilation of twenty seven articles has brought together very useful and pertinent research on fundamental and core areas of the PPP model in key infrastructure industries of India. Though the range of infrastructural sectors which are discussed in the book are diverse, however, it is certainly not exhaustive. There have many other infrastructural sectors in which the government has allowed the entry of private entities subject to certain safeguards. Few instances of such sectors would be space

sector, insurance, defence and procurement and production of defence equipments, retail sector, etc.

Barring the above mentioned areas, the book successfully presents its readers with comprehensive compilation of information and a very practical and useful research on a very pertinent issues and public policy relevance to the domain of infrastructure and a very emerging, high priority agenda on India's industrial growth. The book should be very useful for students and professionals who are looking to explore the knowledge on the said area and may be studied by scholars and experts as well who envisage a stable creative regime of public private partnerships in Indian infrastructure industry.

South Asian Association for Regional Cooperation

SAARC

EIGHTEENTH SUMMIT

HEADS OF STATE OR GOVERNMENT

EIGHTEENTH MEETING

Kathmandu, 26-27 November 2014

Eighteenth SAARC Summit

Kathmandu, Nepal

26-27 November 2014

KATHMANDU DECLARATION

"Deeper Integration for Peace and Prosperity"

The President of the Islamic Republic of Afghanistan His Excellency Mohammad Ashraf Ghani; the Prime Minister of the People's Republic of Bangladesh Her Excellency Sheikh Hasina; the Prime Minister of the Kingdom of Bhutan His Excellency Tshering Tobgay; the Prime Minister of the Republic of India His Excellency Narendra Modi; the President of the Republic of the Maldives His Excellency Abdulla Yameen Abdul Gayoom; the Prime Minister of Nepal Right Honourable Sushil Koirala; the Prime Minister of the Islamic Republic of Pakistan His Excellency Muhammad Nawaz Sharif; and the President of the Democratic

Socialist Republic of Sri Lanka His Excellency Mahinda Rajapaksa;

Having met at the Eighteenth Summit meeting of the South Asian Association for Regional Cooperation (SAARC) held in Kathmandu, Nepal on November 26-27, 2014;

Reaffirming their commitment to the principles and objectives of SAARC for ensuring the welfare and quality of life of the peoples of South Asia;

Recognizing that after nearly thirty years of its existence, it is time to reinvigorate SAARC's regional cooperation and revitalize SAARC as an effective vehicle to fulfill the developmental aspirations of the peoples of South Asia;

Determined to deepen regional integration for peace and prosperity by promoting mutual trust, amity, understanding, cooperation and partnership;

Declared as follows:

Regional cooperation

1. The Heads of State or Government expressed their strong determination to deepen regional integration for peace, stability and prosperity in South Asia by intensifying cooperation, *inter alia*, in trade, investment, finance, energy, security, infrastructure, connectivity and culture; and

implementing projects, programmes and activities in a prioritized, result-oriented and time-bound manner.

South Asian Economic Union (SAEU)

2. The Leaders renewed their commitment to achieve South Asian Economic Union (SAEU) in a phased and planned manner through a Free Trade Area, a Customs Union, a Common Market, and a Common Economic and Monetary Union.

3. The Leaders acknowledged that SAARC Member States, particularly the Least Developed and Landlocked Member States, face structural constraints and challenges that result in their weak productive capacity affecting their competitiveness in external trade due to, among others, high trade and transit cost. They committed to enhance support to the Least Developed and Landlocked Member States in their development efforts, with a view to ensuring equitable benefits of free trade arrangements. In this context, they agreed to effectively implement the existing preferential facilities under SAFTA and SATIS.

SAFTA and Trade Facilitation

4. Directed SAFTA Ministerial Council and SAFTA Committee of Experts to accelerate free trade in goods and services in the region putting into operation simplified and transparent rules

of origin; implementation of trade facilitation measures; harmonization of standards relating to Technical Barriers to Trade (TBT) and sanitary and phyto-sanitary measures; harmonized, streamlined and simplified customs procedures; elimination of non-tariff and para-tariff barriers; and smooth and efficient transit and transport facilities. They also called for early operationalization of SATIS by finalizing the schedule of commitments.

5. They called for timely and comprehensive reforms of the global economic and financial architecture to make it inclusive and responsive to the needs of Least Developed, Land-locked, and Small Island Developing States (SIDS).

6. They reaffirmed that SIDS would require special attention in view of their unique circumstances and particular vulnerabilities in realization of sustainable development.

SAARC Development Fund

7. They agreed to strengthen the Social Window of the SAARC Development Fund (SDF) and operationalize its Economic Window and Infrastructure Window at the earliest for effective implementation of regional and sub-regional projects. In that context, they stressed on expeditious development of projects under SDF addressing the livelihood issues of the peoples of the region. They agreed to expand the

Governing Board of SDF by including a representative of the National Focal Point of the Member States.

Connectivity

8. The Heads of State or Government welcomed the significant progress towards finalization of the SAARC Motor Vehicles Agreement and SAARC Regional Railways Agreement and agreed to hold a Meeting of the Transport Ministers within three months in order to finalize the Agreements for approval. They renewed their commitment to substantially enhance regional connectivity in a seamless manner through building and upgrading roads, railways, waterways infrastructure, energy grids, communications and air links to ensure smooth cross-border flow of goods, services, capital, technology and people. The leaders emphasized the need for linking South Asia with contiguous regions, including Central Asia, and beyond by all modes of connectivity and directed relevant authorities to initiate national, regional and sub regional measures and necessary arrangements.

Energy

9. The Leaders directed the relevant SAARC bodies and mechanisms to identify regional and sub-regional projects in the area of power generation, transmission and power trade, including hydropower, natural gas, solar, wind and bio-fuel,

and implement them with high priority with a view to meeting the increasing demand for power in the region. The Leaders welcomed the signing of the SAARC Framework Agreement for Energy Cooperation (Electricity).

Poverty Alleviation

10. The Leaders reiterated their strong commitment to free South Asia from poverty and directed the Ministerial and Secretary-level mechanisms on poverty alleviation to review the progress and revisit the SAARC Plan of Action and its effective implementation, also taking into account the Post-2015 Development Agenda.

11. They recognized the potential of cooperatives in achieving inclusive, broad-based and sustainable economic growth and development, and called for sharing of experiences, expertise and best practices in this sector.

Post-2015 Development Goals

12. The Leaders recognized that the Post-2015 Development Agenda, following its adoption at the UN, would present opportunities to compliment national and regional efforts on sustainable development. They directed to initiate an Inter-Governmental process to appropriately contextualize the Sustainable Development Goals (SDGs) at the regional level.

Agriculture and Food Security

13. The Heads of State or Government agreed to increase investment, promote research and development, facilitate technical cooperation and apply innovative, appropriate and reliable technologies in the agriculture sector for enhancing productivity to ensure food and nutritional security in the region. They also underscored the importance of promoting sustainable agriculture. The Leaders directed to eliminate the threshold criteria from the SAARC Food Bank Agreement so as to enable the Member States to avail food grains, during both emergency and normal time food difficulty. The Leaders urged for early ratification of the SAARC Seed Bank Agreement and directed to constitute the Seed Bank Board, pending completion of ratification by all Member States. The Leaders also directed the relevant SAARC bodies to finalize the establishment of Regional Vaccine Bank and Regional Livestock Gene Bank.

Environment

14. They directed the relevant bodies/mechanisms for effective implementation of SAARC Agreement on Rapid Response to Natural Disasters, SAARC Convention on Cooperation on

Environment and Thimphu Statement on Climate Change, including taking into account the existential threats posed by climate change to some SAARC Member States. They welcomed the decision to establish the SAARC Environment and Disaster Management Centre. The Leaders underlined the urgency for the global community to arrive at a Protocol, another legal instrument, or an agreed outcome with legal force applicable to all by the end of 2015, based on the principles of Common but Differentiated Responsibility (CBDR), Respective Capabilities and Equity under the UNFCCC.

Blue Economy

15. They recognized the manifold contributions of ocean-based Blue Economy in the SAARC Region and the need for collaboration and partnership in this area.

Health

16. The Leaders recognized the importance of achieving universal health coverage (UHC), improving health regulatory systems, preparedness for emerging and remerging diseases, and the challenges posed by anti-microbial resistance and non-communicable diseases. They endorsed the Male' Resolution on Regional Health Issues adopted at the Fourth Meeting of the SAARC Health Ministers. They urged to continue the

remarkable progress by SAARC countries in the last decade in response to AIDS with the aim to end AIDS epidemic in the region by 2030. They also directed to complete all necessary processes for upgrading the SAARC TB Reference Laboratory at SAARC TB and HIV/AIDS Centre (STAC), Kathmandu to Supra-national Reference Laboratory with necessary funding from SDF.

Education

17. The Heads of State or Government expressed their resolve to eliminating illiteracy from the region in line with the global goal of education for all and ensuring quality education in all institutions by reforming curricula, teaching methods and evaluation systems adequately supported by physical, technical and other facilities. The leaders agreed to promote regional cooperation in the field of vocational education and training. They directed their Education Ministers to develop a Regional Strategy for Enhancing the Quality of Education in order to raise the standards of South Asian educational institutions in order to better serve the youth in the region. The Leaders welcomed the progress with regard to the South Asian University.

Youth

18. They emphasized the need for adopting appropriate national policies and programmes for utilizing the youth force and their skills for economic and social development, especially through the creation of productive self-employment opportunities. The Leaders welcomed the declaration of July 15 as the World Youth Skills Day at the 69th Session of the UN General Assembly and agreed to commemorate, as appropriate, the said event by SAARC.

Women and Children

19. They directed the relevant authorities to take effective measures for preventing the trafficking in women and children and their exploitation.

Social Protection

20. The Leaders acknowledged the special needs of the elderly, women, children, differently-abled persons, unemployed persons, and persons working at hazardous sites and agreed to develop and strengthen social protection for them and to share best practices in this regard.

Migration

21. They also agreed to collaborate and cooperate on safe, orderly and responsible management of labour migration from South

Asia to ensure safety, security and wellbeing of their migrant workers in the destination countries outside the region.

Science and Technology

22. The Leaders agreed to develop capacity of the Member States to apply space technology for socio-economic development and the welfare of the peoples through experience sharing among themselves. In this context, they welcomed the offer of India to develop and launch a satellite dedicated to SAARC Countries.

Telecommunication

23. The Leaders directed for collaboration and engagement among public authorities and private stakeholders in the Member States to lower telephone tariff rates for facilitating greater contacts among the people of the region and called for rationalization of the tariff structures.

Tourism

24. The Leaders expressed their resolve for making South Asia an attractive common tourist destination in a sustainable manner. They directed relevant bodies to effectively implement SAARC Action Plan on Tourism (2006) particularly through initiating appropriate public-private collaboration. They also called for effective and full implementation of their existing

decision to charge nationals of SAARC Member States fees for entry into archaeological and heritage sites as applicable to their own nationals.

Culture

25. They directed to effectively implement the SAARC Agenda for Culture and agreed to take measures to preserve and restitute the South Asian cultural property and create a SAARC heritage list together with the operational guidelines. They declared the year 2016 as the SAARC Year of Cultural Heritage and tasked the relevant bodies to develop an action plan for its success. They also agreed to develop a cultural trail linking major Buddhist historical sites in the region. The Leaders further agreed to facilitate access of persons visiting prominent and holy sites of Islam, Hinduism, Christianity and all other major religions in South Asia.

Media

26. The Leaders, recognizing the reach and influence of media, urged both public and private media to share responsibility in the efforts towards promoting understanding and cohesiveness of the SAARC Member States and their peoples.

Combating Terrorism and trans-national Crimes

27. The Leaders unequivocally condemned terrorism and violent extremism in all its forms and manifestations and underlined the need for effective cooperation among the Member States to combat them. They directed respective authorities to ensure full and effective implementation of the SAARC Regional Convention on Suppression of Terrorism and its Additional Protocol, including through enacting necessary legislations at the national level to root out terrorism. They reiterated their call for an early conclusion of a UN Comprehensive Convention on International Terrorism. They agreed to take effective measures to combat illicit trafficking of narcotics and psychotropic substances, arms smuggling, money laundering, counterfeit currency and other transnational crimes. They also agreed to establish a cyber crime monitoring desk.

Governance

28. They reiterated their strong commitment to ensure good governance for sustainable development by promoting accountability, transparency, the rule of law and people's participation at all levels of governance.

29. The Leaders, while expressing satisfaction over steady progress in democratization in South Asia, committed to further promote and institutionalize peace, stability, democracy and development as the common aspirations of the

peoples of South Asia. In this context, they agreed on the need for cooperation and collaboration within SAARC on issues of common interest and concern to Member States.

Strengthening SAARC processes

30. The Heads of State or Government acknowledged the need to enhance the visibility and stature of SAARC in international fora by, *inter alia*, forging common positions on issues of mutual interest and seeking group recognition in various multilateral institutions.

31. The Leaders directed all SAARC bodies, including the Council of Ministers, sectoral Ministerial, other bodies and institutions to develop outcome-oriented policies, programmes, projects, and activities. The Leaders directed rationalization of the work of the SAARC mechanisms, which could be reviewed inter-governmentally every three years by a regular session of the Standing Committee with a view to evaluate performance, achievements and constraints.

32. The Leaders agreed to enhance the role of the Secretariat, commensurate with the objectives of SAARC, its areas of cooperation as well as the decisions and agreements reached in the past. They committed to enhance the institutional capacity of the SAARC Secretariat, in keeping with emerging

realities, to enable it to fulfill the responsibilities entrusted to it, in an effective and efficient manner.

33. The Leaders expressed satisfaction on the decision to rationalize the number and activities of SAARC Regional Centers through their selective closure and merger. They reiterated their resolve to make the remaining SAARC Regional Centres and specialized institutions efficient, effective and result-oriented and directed these institutions to initiate programmes and projects that produce tangible outcomes.

34. They agreed to hold henceforth the meetings of the SAARC Summit every two years or earlier, if necessary, the Council of Ministers once a year, the Standing Committee at least once a year, and the Programming Committee at least twice a year. They also agreed to make the Programming Committee a Charter body of SAARC.

SAARC Observers

35. They welcomed the participation of Observers from Australia, the People's Republic of China, the Islamic Republic of Iran, Japan, the Republic of Korea, Mauritius, the Union of Myanmar, the United States of America, and the European Union at the Summit. In furtherance of earlier decisions on establishing dialogue partnership with States outside the

region, the Leaders appreciated the Study undertaken by the SAARC Secretariat to review and analyze the engagement with the existing Observers to establish dialogue partnership. The Leaders directed the Programming Committee to engage the SAARC Observers into productive, demand-driven and objective project based cooperation in priority areas as identified by the Member States.

Nineteenth Summit

36. The Leaders welcomed the offer of the Government of Islamic Republic of Pakistan to host the Nineteenth Summit of SAARC.

SAARC DEMOCRACY CHARTER

Inspired by the common objectives of all South Asian States to promote the welfare of their peoples, to provide all individuals with the opportunity to live in dignity, and to realise their full potentials as enshrined in the SAARC Charter;

Also inspired by the general objectives of all South Asian States to promote peace, freedom and social justice;

Further inspired by their shared commitment to the rule of law, liberty and equal rights of all citizens;

Reaffirming faith in fundamental human rights and in the dignity of the human person as enunciated in the Universal Declaration of Human Rights and as enshrined in the respective Constitutions of the SAARC Member States;

Recognizing that inclusive policies, including constitutional protection developed in keeping with the wishes of the people, are essential for developing trust and understanding between and among communities;

Affirming that broad-based participation of people in institutions and processes of governance creates ownership and promotes stability;

Convinced that economic growth and social development based on justice and equity and democracy are interdependent and mutually reinforcing;

Reaffirming that the pursuit of inclusion, good governance, and poverty alleviation, especially the elimination of extreme poverty, are essential to the promotion and consolidation of democracy;

Aware that tolerance and diversity are critical in creating effective foundations for a pluralistic democratic society; and

Convinced that undemocratic and unrepresentative governments weaken national institutions, undermine the Constitution and the rule of law and threaten social cohesion and stability in the long-run.

The Member States of the South Asian Association for Regional Cooperation (SAARC), in the spirit of consolidating democracy in South Asia, hereby commit to:

- Reaffirm the sovereignty of each Member State;
- Ensure the supremacy of their respective Constitutions and uphold their spirit;
- Continue to strengthen democratic institutions and reinforce democratic practices, including through effective coordination as well as checks and balances among the Legislature, the

Executive and the Judiciary as reflected in the respective Constitutions;

- Guarantee the independence of the Judiciary and primacy of the rule of law, and ensure that the processes of appointments to the Judiciary as well as the Executive are fair and transparent;

- Adhere to the UN Charter and other international instruments to which Member States are parties;

- Recognise the role of political parties and the civil society in a democracy; and

- Renounce unequivocally any unconstitutional change of an elected government in a Member State;

Accordingly, Member States undertake to:

- Reinforce the linkage of development and democracy;

- Promote sustainable development and alleviation of poverty through good governance, equitable and participatory processes;

- Promote democracy at all levels of the Government and the society at large;

- Strengthen democratic institutions and processes in all national endeavors with due focus on decentralisation and devolution;

- Promote equality of opportunity, equality of access and equality of treatment at the national level, in keeping with the respective constitutional provisions, as safeguards against social injustices and stratification;

- Inculcate democratic values in society through education and awareness building;

- Ensure gender mainstreaming in government and society;

- Uphold participatory democracy characterised by free, fair and credible elections, and elected legislatures and local bodies;

- Encourage all democratic forces in South Asia, including elected representatives of the people, to unite against any unconstitutional change in government in any South Asian country, and work towards the restoration of democracy in keeping with the SAARC Charter; and

- Promote adherence to these decisions and fulfilment of this Charter, if necessary through an institutional mechanism.

INDIAN PRIME MINISTER MR. NARENDRA MODI'S HISTORIC ADDRESS TO THE CONSTITUENT ASSEMBLY OF NEPAL, AUGUST 3, 2014.

The Prime Minister, Shri Narendra Modi, in a historic address to the Constituent Assembly of Nepal, today said that Nepal's Constitution would set an example for the whole world, especially to strife-torn regions, as a model for leaving the path of violence, and how a peaceful and democratic process can help achieve goals.

Shri Narendra Modi, said he was deeply touched to be the first foreign leader invited to address this Constituent Assembly. He said this was a gesture of respect from the Nepali people, not only to him, but to 125 crore Indians.

Asserting that India would always support Nepal's sovereign right to choose its own destiny, the Prime Minister said India wished for a democratic and prosperous Nepal, which would rise as high as the Himalayas, and set an example for the whole world.

The Prime Minister, began his address in Nepali language, saying his Government accorded top priority to relations between the two countries – which he added – were as timeless as the Himalayas and the Ganga. They were relations built on the bonding of hearts, and a shared cultural heritage. "Humaare sambandh kaagaz ki

kashtiyon se aage nahin badhe hain. Humaare sambandh dilon ki daastaan kehte hain."

Dwelling on the shared heritage, the Prime Minister said he belonged to the land of Somnath, began his journey in national politics from Kashi, and had now arrived at the feet of Pashupatinath. This is the land that gave birth to Lord Buddha, who held the whole world spellbound, the Prime Minister remarked.

All the wars that India has won, have witnessed Nepali blood being shed, and Nepalis attaining martyrdom defending India, the Prime Minister observed. "I salute the Nepali braves who have laid down their lives for India", Shri Narendra Modi said.

The Prime Minister quoted Field Marshal Sam Manekshaw to highlight the bravery of the Gorkha soldiers.

Noting that the world was keenly observing the Constituent Assembly of Nepal, the Prime Minister said that the members of this assembly were not just drafting Constitutional provisions, or rights of different sections of society. The Constitution of Nepal should be a document like the "sanhita" of Vedas and Upanishads, the Prime Minister said - it should define a new direction for the country. But, the Prime Minister added, "Rishi-Man" – the mind of a sage – is required for this task. The mind which can see far, which can anticipate problems, which can think of taking society

forward even a hundred years later. The Rishi-Man had developed the Vedas and Upanishads – such application was required now.

Giving the example of the Indian Constitution, the Prime Minister said it unites different parts of India, and represents the hopes and aspirations of 125 crore Indians. He said that the Constitution of Nepal would inspire the hopes and dreams of not just the people of Nepal, but the entire world.

Elaborating on this theme of "Yuddh se Buddh ki ore" – the Prime Minister said, that once upon a time, the great King Ashoka had adopted this path and created history. Today, the members of this Constituent Assembly had shunned the path of violence and embarked on building a Constitution, that would be a beacon of peace and hope, not only for Nepal, but also for various strife-torn regions of the world.

I congratulate those who have left the bullet, in favour of the ballot, the Prime Minister said.

Nepal is a sovereign nation; let this sovereign nation touch the heights of Himalaya; let the world take notice, the Prime Minister asserted.

Let the Nepali Constitution be one in which all sections of Nepali society feel that it is a bouquet where one flower represents them and their aspirations, the Prime Minister said. "Har Nepali ko lage

ki yeh ek aisa guldasta hai jismein mere ek phool ki bhi mahak hai."

May the sanvidhaan (Constitution) represent the ideal of "Sarvjan Hitay, Sarvjan Sukhay."A Constitution unites, it does not divide, the Prime Minister said. He added that it should not collapse under the weight of the present, but build on hopes for the future. That, the Prime Minister said, would be "Rishi-Man" – the mind of a sage – which would make a Constitution for future generations.

Let commas and full-stops not become poison for the future, the Prime Minister urged the Constituent Assembly.

Noting that a Federal Democratic Republic is the goal of the Constituent Assembly, the Prime Minister said India respected and welcomed it, and hoped it would be reality soon.

Referring to India-Nepal relations, the Prime Minister remarked that when an adverse wind blows in Nepal, India too feels cold. Therefore, the Prime Minister remarked, how can India be happy if Nepal is unhappy. Giving the example of the Kosi floods in Nepal, the Prime Minister said his Government has been working since yesterday itself to help provide relief.

Speaking on economic issues, the Prime Minister said Nepal's hydropower potential can resolve India's power shortage. He said this potential, if harnessed properly, can make Nepal a prosperous country. Referring to an age-old saying – paani aur jawaani pahaad

ke kaam nahin aate – the Prime Minister said the time had come to change this thought. India and Nepal are both young nations, and we can give our youth opportunity by harnessing natural resources. India wants to walk shoulder-to-shoulder with Nepal in its journey of progress, the Prime Minister asserted.

In a series of announcements, the Prime Minister said pipelines would be built to help transport oil to Nepal. He said scholarships to students from Nepal would be increased. India would help Nepal emerge as a major exporter of herbal medicines. India would also help develop the tourism potential of Nepal, both as a spiritual, and adventure tourism destination.

The Prime Minister gave a HIT formula for Nepal, saying India wants to help Nepal build highways (H), information highways (I) and transways - transmission lines (T).

The Prime Minister announced that he is keen to double power supply to Nepal.

Stating that the sooner Nepal comes close to us, the better, the Prime Minister urged that the bridge on the Mahakali river and the Pancheshwar multi-purpose project should be taken up at the earliest.

Noting that it is more expensive to make a telephone call between India and Nepal, than it is to make a call between India and USA, the Prime Minister said he is keen to change this fact.

The India-Nepal border should not be a barrier but a bridge which helps bring prosperity to both sides, the Prime Minister said.

He offered assistance to Nepal in the fields of organic farming, and soil health.

The Prime Minister announced that India will give Nepal 10,000 crore Nepali rupee concessional line of credit, for its development.

May the friendship between India and Nepal live long, and may Nepal rise higher than the Himalayas, the Prime Minister said.

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