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COVID-19 AND ECONOMIC LOCKDOWN: DIAGNOSIS AND CURE OF LEGAL-ECONOMIC ISSUES

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FOREWORD

My heartiest congratulations to the Editorial Team of RGNUL Financial and Mercantile Law Review for successfully conducting the Essay Competition on Implications of COVID-19 on Industry and Economy, 2020. This compilation consists of the top entries received by the Editorial Board from students of various educational institutions of the country and I feel honoured to write the foreword of this edition. The objective of the Law Review is to better understand the laws regulating the activities related to trade and commerce in the markets of India and other Southeast-Asian jurisdictions. This special edition intends to initiate a discourse on the legal and economic scrutiny of the issues, implementation, and impact assessment of the policy decisions adopted by the Government of India to tackle the outbreak of the pandemic COVID-19. Furthermore, it attempts to find possible solutions and diagnosis of the situation through the discourse.

The sudden outbreak of the virus has rendered our economy dormant to a great extent and has impacted it negatively. COVID-19 has altered the dynamics of working structures around the world and has forced a huge part of the workforce to work digitally through their homes. This not only impacted the economy of our country but also impacted the nation on social, political, and psychological fronts. The current edition discusses the impact that financial and corporate sector of the country has borne due to COVID-19. The unforeseen pandemic has acted as an impetus for human minds to think in novel and innovative ways. This perhaps, is the most positive and heartening outcome. The legal sector of our country has also been affected and hence impact assessment is crucial for all the stakeholders.

Rodney D. Ryder

Founding Partner, Scriboard Advocates & Legal Consultants

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COVID-19: IMPLICATIONS UNDER THE INDIAN COMPETITION LAWS

- Kunal Mehra[1]

I. INTRODUCTION

Undisputedly, these are trying times, not only for small businesses but also for conglomerates. In more ways than one, the COVID-19 pandemic has raised similar if not identical issues for most enterprises. Certainly the businesses are facing huge challenges including total collapse of demands, severe uncertainties and disturbances in the supply and distributions chains, severe liquidity crunch owing to delays in receiving payments even for past supplies / services, managing employee relations both in terms of retention and salaries. Business plans and the forecasts for the year 2020 have gone for a toss and there is a huge sense of uncertainty in relation to a host of issues including business continuity, cash and credit cycles and meeting fixed costs. In more ways than one, the COVID-19 pandemic has brought most businesses to a grinding halt with a deep dark tunnel ahead. Organisations are considering a host of measures to manage and survive this crisis.

Faced with these challenges, businesses may feel the need to realign themselves including exploring creative and innovative ideas for

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surviving this huge turbulence. Due to the lockdown and restrictions imposed by governments across the world, there may be unprecedented collaborations, communications and co-operations even amongst competitors, particularly in relation to the production, distribution, supply, sharing of data, infrastructure and other logistics related to essential commodities and healthcare products. Under the circumstances, these measures may be laudable and perhaps even necessary in some cases. However, some organisations may be tempted to indulge in activities to take advantage of this situation, while others, and particularly those with liquidity and other resources at their disposal, may see this as an opportunity to acquire their competitors and become stronger.

The million dollar question is whether even in these challenging times, are the businesses expected to adhere to the competition law requirements and compliances? The answer is overwhelmingly in the affirmative. In the Indian context, all businesses and companies are required to continue to work within the four corners of the provisions of the (Indian) Competition Act, 2002 ("**Competition Act**") as well as the relevant rules and regulations made thereunder. The very basis of any competition law regime is to try and ensure a level playing field for all concerned and at the same time ensuring that the ultimate consumers are getting all the possible benefits. Therefore, in the absence of any specific exemption(s) or relaxations from the application of the Competition Act, all its provisions will continue to be applicable to all enterprises. The COVID-19 crisis notwithstanding, any action violative of the provisions of the Competition Act is likely to be scrutinised by the Competition Commission of India ("**CCI**").

II. ANTI-COMPETITIVE AGREEMENTS

The Competition Act stipulates that any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India shall be void. Further, in relation to cartels, the Competition Act stipulates that any agreement amongst competitors which (a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; or (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition in India.

Interestingly, any agreement entered into by way of a joint venture that increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services, escapes the above presumption ("**Efficiency Exception**").[2] Further, while conducting competition assessment, the Competition Act enables the CCI to have due regard, *inter-alia,* to the accrual of benefits to consumers; improvement in production or distribution of goods or provision of services; and promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services (**Beneficial Factors**).[3]Enterprises or rather competitors attempting to take protection

[2] Competition Act, 2002, No. 12, Acts of Parliament, 2002, s. 3(3).
[3] *Id.*, s. 19(3).

under this umbrella will need to demonstrate the efficiencies achieved as well as the ultimate benefits to the consumers.

A. Abuse of Dominance

No entity or group that enjoys a position of dominance or strength with the ability to act independent of market forces, shall impose conditions in relation to purchase or sale of goods or services that are unfair, discriminatory, restrictive, exploitative or exclusionary. The CCI has not shied away from imposing penalties in the past and would be following the activities of some dominant players closely, particularly any action that may be seen to either create shortfall in supply and consequential raising of prices or seeking to benefit from the same owing to their market position.

B. Merger Control

Any acquisition of control, shares, voting rights or assets that breaches the prescribed thresholds requires notification (in the prescribed form) to and prior approval of the CCI. In the absence of any specific exemption, the parties entering into any combination are expected to be mindful of all competition law related considerations and requirements. That said, the regulatory scrutiny may be higher to ascertain whether any party(ies) is (are) trying to take advantage of the COVID-19 situation.

III. EXEMPTIONS / RELAXATIONS BY COMPETITION REGULATORS WORLDWIDE

Recognising that these are extraordinary circumstances, in their endeavour to assist businesses to sustain themselves, certain jurisdictions have granted temporary exemptions to facilitate certain specified kinds of collaborations amongst competitors. These are primarily in relation to provision of essential goods and services, the underlying principle being that such collaborations may be necessary to increase efficiencies and ultimately benefit the consumers. Some prominent examples of such exemptions are as follows:

(i) In the European Union, the European Competition Network ("**ECN**") has published a joint statement[4] on the application of competition law during the COVID-19 crisis, emphasising that cooperation between companies to ensure the supply and fair distribution of scarce products to all consumers will not be scrutinised. In this context, the ECN will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply. However, the ECN has clearly indicated that products protecting consumers' health need to remain available at competitive prices and that it will therefore not hesitate to take action against companies taking advantage of the COVID-19 crisis by cartelising or abusing their dominant position. The ECN also stressed the possibility for manufacturers to set maximum prices for their products, which may be useful to mitigate unjustified price increases at distribution level. The European Commission has launched a dedicated website to provide guidance to companies, associations and their legal advisors regarding the compatibility of certain actions with EU competition law. A mailbox has also been set up for those seeking informal guidance. Further, the European Commission has published a

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[4] European Competition Network, *Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis*, *at* https://webgate.ec.europa.eu/multisite/ecn-brief/en/brief/editorial (last visited June 13, 2020).

Temporary Framework ("**Framework**")[5] for the antitrust assessment of increased business cooperation between competitors in response to the Covid-19 pandemic. The aim of the Framework is to reduce shortages for essential products and services. These are mainly but not necessarily medicinal products. Under the Framework, competitors may lawfully appoint an independent third party to coordinate certain activities, gather certain information or develop projections relating to demand and supply provided, however, that no individual information is exchanged amongst competitors. Competitors may also need to coordinate production, stock management and potentially distribution of essential products to ensure that there is no shortage of said products. Such a coordination may be allowed if it is (a) designed and objectively necessary to increase output in the most efficient way; (b) temporary in nature; and (c) being limited to what is strictly necessary to eliminate the shortage.

(ii) In the United States of America, the Department of Justice and the Federal Trade Commission have issued a joint statement[6] stipulating that certain specified collaborations amongst competitors will be presumed to be pro-competitive.

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[5] *Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak*, EUROPEAN COMMISSION (Apr. 8, 2020), https://ec.europa.eu/info/sites/info/files/framework_communication_antitrust_issues_related_to_cooperation_between_competitors_in_covid-19.pdf.

[6] *Federal Trade Commission and Justice Department Issue Joint Statement Announcing They are on Alert for Collusion in U.S. Labor Market*, FEDERAL TRADE COMM'N (Apr. 13, 2020), https://www.ftc.gov/news-events/press-releases/2020/04/federal-trade-commission-justice-department-issue-joint-statement.

(iii) [7]In the United Kingdom, the Competition and Markets Authority has issued a statement stipulating, *inter-alia*, that where temporary measures to coordinate action taken by businesses: (a) are appropriate and necessary in order to avoid a shortage, or ensure security, of supply; (b) are clearly in the public interest; (c) contribute to the benefit or wellbeing of consumers; (d) deal with critical issues that arise as a result of the COVID-19 pandemic; and (e) last no longer than is necessary to deal with these critical issues, it will not take enforcement action.

IV. POSITION IN INDIA

Pursuant to the announcement of the lockdown, the CCI had initially decided[8] not to accept any filings/submissions until March 31, 2020 including (a) any fresh merger filing and/or submissions in respect of any existing filing that is in the process of being reviewed; (b) any pre-filing consultation request; (c) any fresh complaint in respect of anti-competitive (such as cartel and bid rigging) and/or abusive practices; and (d) any filings/submissions in respect of existing antitrust proceedings. Subsequently, the CCI has issued public notices (latest on April 20, 2020[9]) stipulating that the combination notices as well as information regarding anti-competitive agreements and abuse of dominant market position, may

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[7] Competition & Markets Authority, *CMA approach to business cooperation in response to COVID-19, at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875468/COVID-19_guidance_-.pdf (last visited June 13, 2020).

[8] *Measures in view of threat of CORONAVIRUS/ COVID-19 pandemic*, COMPETITION COMM'N OF INDIA (Mar. 23, 2020), https://www.cci.gov.in/sites/default/files/whats_newdocument/scan1.pdf.

[9] *Measures in view of threat of CORONAVIRUS/ COVID-19 pandemic*, COMPETITION COMM'N OF INDIA (Apr. 20, 2020), https://www.cci.gov.in/sites/default/files/whats_newdocument/Notice20042020.pdf

be filed electronically. Further, parties to a combination may also avail pre-filing consultations through video conference. For all the matters listed for hearing up to May 3, 2020, fresh dates will be notified. As the lockdown has been extended, the CCI may issue a similar notification.

The Competition Act stipulates that the Central Government may, by notification, exempt from the application of the Competition Act or any provision thereof, and for such period as it may specify in such notification, *inter-alia*, any class of enterprises if such exemption is necessary in the interest of security of the State or public interest. The Government has been taking several measures to deal with the situations that have arisen due to this pandemic and taking cue from several other jurisdictions, may issue a specific exemption exercising this power.

Significantly, in a welcome move, the CCI has issued an Advisory to Businesses in Time of Covid-19 ("**Advisory**")[10] on April 19, 2020. The Advisory acknowledges that Covid-19 has caused disruptions in supply chains, including those of critical healthcare products and other essential commodities / services and that the businesses may need to coordinate certain activities, by way of sharing data on stock levels, timings of operation, sharing of distribution network and infrastructure, transport logistics, research and development, production etc. to ensure continued supply and fair distribution of the products. It refers to the Efficiency Exception and the Beneficial Factors that have been discussed above and stipulates that the Competition Act has in-built safeguards to protect businesses from sanctions for certain coordinated conduct, provided such arrangements, as mentioned above, result in increasing efficiencies. The

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[10] *Advisory to Businesses in Time of COVID-19*, COMPETITION COMM'N OF INDIA (Apr. 19, 2020), https://www.cci.gov.in/sites/default/files/whats_newdocument/Advisory.pdf.

Advisory clarifies that only such conduct of businesses which is necessary and proportionate to address concerns arising from COVID-19 will be considered. It also cautions the businesses not to take advantage of COVID-19 situation to contravene any of the provisions of the Competition Act.

V. SOME PRACTICAL IMPLICATIONS AND GUIDELINES FOR BUSINESSES

(i) Covid-19 pandemic has affected one and all and its adverse implications on businesses, domestically as well as globally, are likely to be felt for the next several months. However, despite the said situation, competition laws continue to apply.

(ii) Competition laws continues to prohibit anticompetitive behaviour, especially where businesses seek to take advantage of the Covid-19 pandemic situation to coordinate joint actions with the aim to make up the losses.

(iii) It will be unwise to think that the COVID-19 crisis shield the businesses from the prohibition to engage in anticompetitive behaviour. Therefore, business should not engage in any activity that would otherwise considered anticompetitive if the Covid-19 pandemic situation was not there.

(iv) The competition authorities will not tolerate actions by businesses who are enjoying significant market power, even where such market power is only temporary in nature and due to the emergency situation, that seek to exploit their position.

(v) When cooperating with competitors, businesses need to put the necessary safeguards in place to ensure compliance with competition laws.

(vi) The competition authorities around the world are monitoring the situation very closely and are not shying away from taking actions against businesses whose actions are either squarely breaching the set parameters or at least raising suspicion

(vii) In relation to merger control, although almost all competition authorities appear to be trying their best to cope, given the challenging situation coupled with various lockdown and other restrictions that have been imposed on regular operations, the timelines in relation to competition assessment and enquiries are bound to get stretched and must be factored in by the businesses while undertaking mergers and acquisitions.

(viii) Businesses should closely engage with their legal advisors, both internal as well as external, to ensure that the actions that they are planning to undertake are not likely to fall foul of the applicable competition law provisions.

VI. CONCLUSION

These are challenging times and there is no doubt that competing businesses will be exploring to collaborate by using innovative means, more so if the lockdown gets extended. Using the crisis arisen due to the Covid-19 pandemic as an opportunity to make profit by resorting to practises that adversely affect consumers, particularly excessive pricing due to increased demand but shortage in supplies could definitely attract scrutiny by the CCI. Only time will tell whether the government will consider specific exemptions or temporary suspension of certain provisions of the Competition Act during this period. However, for the time being, the Advisory issued by the CCI definitely indicates the mindset of the regulator and businesses should be careful not to indulge in opportunistic practices with a view to benefiting in the short term, as these could have an adverse outcome in the long term.

EMERGING MARKETS AT CROSSROADS

- Abhimanyu Gupta[1]

I. INTRODUCTION

If Earth is Gods' canvas, he took a white brush and painted the canvas blank to draw a fresh picture anew, a much better version of the former.

Businesses will reshape, skill sets will drift to the new demand landscape post crisis. Every crisis has changed the way we work, travel and evolve, this will be just more severe and prolonged in terms of ripples that would follow in the coming years. To put things in perspective, with just some days under mandatory work from home, companies and governments have started rethinking operational capacities and business models.

It will be a tough ride for the Emerging Markets, quick and strong revival is all they hope for. Lack of proper medical infrastructure and paucity of resources makes them vulnerable to financial and economic dislocations. With dollar strengthening, their dollar borrowings become expensive in times when they need maximum foreign financing. Colossal capital outflows and hostile foreign takeovers is another hanging sword. But the light at the end of the tunnel, is the latest positive growth

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[1] Abhimanyu Gupta is a Quantitative Risk Analyst at the Bank of America. The views expressed are personal.

projections made by IMF for India and China, the outliers to the negative growth world in 2020. There have been widespread and frantic efforts by Central Banks to rescue economies and prevent or delay an economic recession. With a large pie of the population engaged in the MSME and unorganized sector, government fears the fallout of this segment and thus steps have been taken to fund their businesses and keep them afloat.

We assess the implications of the unprecedented foray into the Quantitative Easing (QE) by the EM Central Banks (CB). The COVID-19 shock led to significant tightening in global financial conditions, which could not be offset by rate cuts and liquidity-easing measures in EM. With concerns also growing about the funding of fiscal deficits, this pulled EM central banks into the world of QE.

II. THE DEVELOPED MARKET (DM) EXPERIENCE

A. What can we learn from QE in developed markets?

When the US first did QE in 2009, there were two big concerns: 'currency debasement and runaway inflation'. Neither materialized in the long term. The Euro area and Japan also had similar experiences with QE. In fact, the common denominator across DM has been the "Japanification" of yields. Currency debasement is the key concern, and EM currencies are at a disadvantage since they are not used in FX reserves, unlike the major DMs. Moreover, FX losses might occur even without a pickup in inflation. We believe EM central banks will have to unwind QE before their DM counterparts. This could require global policy coordination, and might only by possible if the public-health crisis remains contained in EM.

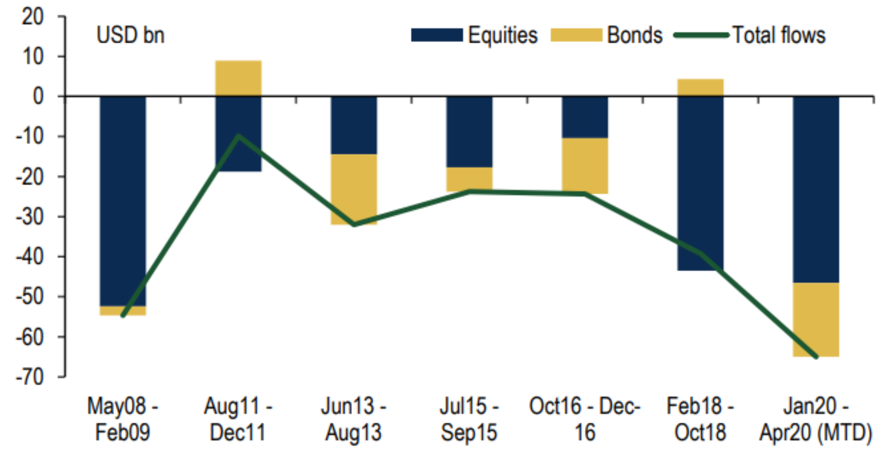
Exhibit 1: Unconventional monetary policy in emerging markets

B. COVID brings QE to emerging markets

The shock from the COVID-19 outbreak has been so large that outflows from EM Asia (ex-China) have surpassed global financial crisis (GFC) outflows (Chart 1). This has led to a tightening in financial conditions. In response, emerging Asia central banks have gone into overdrive, adopting strong liquidity easing measures coupled with monetary easing. The urgent need for fiscal stimulus has also significantly strained government balance sheets, leading to "unthinkable" widening in fiscal deficits. For example, Indonesia relaxed its budget deficit cap of 3% of GDP for 2020-22 and is now looking at a potential deficit of 5.1% of GDP deficit this year. EM central banks have responded by attempting to fund their governments' expenditures to manage the health and economic crisis. In this note, we discuss: (1) what EM central banks have announced in terms of funding government deficits, with a focus on EM Asia, (2) how their plans compare to DM central bank actions, i.e. traditional QE, and (3) the potential implications for markets, including the end game.

III. EM ANNOUNCEMENTS ON LIQUIDITY SUPPORT

Chart 1: Outflows from EM Asia have surpassed GFC outflows



Source: Bloomberg. Note: Equity flows include data on India, Indonesia, Korea, Philippines, Taiwan and Thailand. Bond flows include data on India, Indonesia, Malaysia, Philippines, Thailand and Korea (only KTB).

Most central banks have eased reserve requirements, initiated bond buyback operations in the secondary market and unveiled long-term repo operations. Some have announced QE. Others could seek ways to directly buy bonds from the government in the primary market. Below we detail the measures taken by the major EM Asia central banks.

A. India – Been there, done that. But no explicit announcement

The Reserve Bank of India (RBI) bought bonds directly from the government in 2002. Since the FRBM (Fiscal Responsibility and Budget Management) Act came into effect in 2003, the RBI has not bought bonds directly from the government even though it has undertaken large-scale open-market operations involving bonds for many years. Even though the RBI has not made any explicit announcement, partial funding of the fiscal deficit through the RBI is almost inevitable, in our view. A clause in the FRBM Act allows the RBI to do this without seeking special approval from the government.

B. Korea, Thailand – Will do if needed

The Bank of Korea has so far conducted one open-market operation (about USD 1.2bn) in the last month and announced another in the last policy meeting. Both involve bond purchases in the secondary market. The Bank of Thailand (BoT) has bought over USD 6bn worth of bonds (exceeding outflows worth USD 2-3bn) since the beginning of March to prevent bond yields from rising. So far, neither of these banks has said anything about buying bonds directly from the government if needed. That said, there are currently no laws in place that prohibit the BoT from buying bonds in the primary market.

C. China – No need to do it

The People's Bank of China (PBoC) is not allowed to purchase government bonds in the primary market. The PBoC conducted cash bond transactions in the secondary market during the early 2000s to manage liquidity, but this measure has become less popular in recent years as more liquidity management tools have been created. However, the PBoC does actively facilitate absorption of high government bond issuance through liquidity injections (for instance, reserve ratio requirement [RRR] cuts) and window guidance.

IV. HOW THINGS FARED IN DMS?

QE typically includes government bonds but it can cover other instruments as well. For example, agency mortgage-backed securities (MBS) have been included in both the Fed's current package and its measures after the financial crisis. European Central Bank (ECB) QE covers corporate bonds. The Bank of Japan (BoJ) has gone the furthest, purchasing equity exchange traded funds (ETFs). QE does not include measures to support market liquidity. For example, the Fed is using its Section 13(3) emergency powers to purchase investment grade corporate-bond ETFs, some high-yield bonds, commercial paper, municipal bonds and other assets. These actions are NOT considered part of QE. The dynamics of QE in DMs are debated over its long seen impact on the inflation and currency valuations. The lessons are similar from other developed markets. Inflation continues to undershoot in the Euro area and Japan despite aggressive central bank asset purchases. Currency weakness has not been a major concern in either region. The BoJ has even instituted yield curve control, which is similar to QE except that the central bank targets prices rather than purchase quantities. Even this measure has not created a surge in inflation. In summary, the cost of QE in developed markets has somewhat counterintuitively been a step closer to "Japanification": sustained zero or negative policy rates, flat yield curves, falling inflation expectations and depletion of central bank ammunition.

V. WHAT MOTIVATED THE EM CENTRAL BANKS FOR QE?

In our view, the main motivation behind the QE announcements by EM central banks was to prevent tightening of financial conditions, which was due to (1) portfolio outflows (have surpassed those during the GFC) and (2) expectations of significant widening of fiscal deficits to fund the healthcare crisis. With governments announcing measures to support their economies, financial conditions would likely have tightened further had the central banks not either injected liquidity or announced some form of QE.

VI. IMPLICATIONS FOR MARKETS

A. EM at a disadvantage:

If an emerging economy doing QE does see a big pickup in inflation, markets could quickly lose faith in the central bank's willingness or ability to respond. The result would be FX depreciation. Another disadvantage for EM central banks is that their currencies are not reserve currencies. This removes a source of demand that tends to prop up the major DM currencies.

B. Don't focus on Inflation:

We are likely facing the worst economic shock in nearly a century. As much as central banks might attempt to ease supply conditions, demand could remain very weak. This could suppress credit growth and keep a lid on inflation. As a result, domestic banks are likely to park surplus liquidity in government bonds for lack of better investment opportunities.

C. Raising the Stakes:

If there are sustained currency losses in EM, inflation and capital-flight risks would rise. This would prompt central banks to tighten policy abruptly, weakening their economies further. One way this scenario could play out is if COVID-19 continues to spread in EM after the US and Europe have brought it under control and re-opened their economies. Inadequate healthcare resources in emerging economies make this a serious concern.

VII. FINAL REMARKS: WHAT IS THE END GAME?

A. How will this massive policy experiment end?

EM central banks would need to tighten prematurely, which would be messy and painful. Avoiding such an outcome could require some policy coordination. If one of the big three central banks is eyeing the exit, it would have to warn its EM counterparts before signalling to the markets. In other words, the global surge in QE has been synchronized but not coordinated. The unwind will need to be coordinated but not synchronized to avoid another crisis.

Countries that have negative NIIP or current account deficits are likely to be more prone to financial crises when expectations of policy normalization pick up. Putting everything together, the risks are again to the downside. Stepping back, given the unprecedented nature of the COVID-19 shock, it is hard to fault EM central bankers for their unprecedented response. But such aggressive easing comes with a wide range of risks that we are only beginning to understand.

TRADE IN THE TIMES OF COVID-19: POLICY IMPLICATIONS ON THE INDIAN ECONOMY

- Ananya Singh and Kavya Jha[1]

> *A system of perfectly free commerce…distributes labour most effectively and most economically: while, by increasing the general mass of productions, it diffuses general benefit, and binds together by one common tie of interest and intercourse, the universal society of nations throughout the civilized world.*[2]
>
> \- David Riccardo

I. INTRODUCTION

The preventive and protective measures taken by various nations during the novel coronavirus (COVID-19) pandemic, which has affected 187 countries and claimed 251,562 lives as of May 5, 2020,[3] have triggered a protectionism versus free trade debate. The economic implications of COVID-19 are manifold, with international trade being an

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[2] DAVID RICCARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 134 (1953).

[3] Coronavirus Research Center, JOHN HOPKINS UNIVERSITY (Apr. 8, 2020, 11:15 AM), https://coronavirus.jhu.edu/map.html.

important facet. Lockdowns and restrictions on movements have interfered with labour supply and mobility, which have in turn caused a halt in production and disrupted supply chains globally.[4] The World Trade Organization (WTO) predicts global trade to fall by 13 to 32 per cent in 2020 as a result of the extremely high uncertainty associated with COVID-19.[5] This crisis is being likened to the 2008 global financial crisis. Just like international trade never resumed its previous trend after 2008, it is highly unlikely, even in the most optimistic scenario that trade will resume to its earlier trend once the pandemic is contained.[6]

With the Indian economy spiralling down recently, economists were counting on the last quarter of the current financial year for recovery.[7] However, the spread of COVID-19 and the subsequent stringent measures, including a national lockdown, have led the economy to a level from where recovery looks like a distant dream. The lockdown has created a supply slump by bringing the production of non-essential goods and services to a standstill.[8] On the demand side, there has been a significant fall because of decreased employment and income levels coupled with the postponed purchases due to low confidence levels amidst

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[4] *Coronavirus (COVID-19): Joint actions to win the war*, ORG. FOR ECON. CO-OP. & DEV. (Apr. 30, 2020), https://read.oecd-ilibrary.org/view/?ref=119_119674-tbcxotkmhb&title=Coronavirus_(COVID-19)Joint_actions_to_win_the_war.

[5] World Trade Org., Press Release, *Trade set to plunge as COVID-19 pandemic upends global economy* (Apr. 8, 2020), *at* https://www.wto.org/english/news_e/pres20_e/pr855_e.htm.

[6] *Id.*

[7] *Impact of Covid-19 on the Indian Economy*, FEDERATION OF INDIAN CHAMBERS OF COMMERCE & INDUS. (Apr. 30, 2020, 6:05 PM), http://ficci.in/spdocument/23195/Impact-of-COVID-19-on-Indian-Economy-FICCI-2003.pdf.

[8] *Coronavirus lockdown: List of what will be affected and what will be available*, THE HINDU (Mar. 23, 2020), https://www.thehindu.com/news/national/coronavirus-lockdown-list-of-what-will-be-affected-and-what-will-be-available/article31140332.ece.

the uncertainty.[9] There has been a substantial decrease in Indian exports as well as imports. In April 2020, the exports were estimated to be as low as $27.96 billion, a fall of 36.65% in comparison to April 2019.[10] The imports were estimated to be $ 27.80 billion in April 2020, a decrease of 47.36% with respect to April 2019.[11] Thus, COVID-19 might have long drawn, perceptible negative effects on the Indian economy.

II. THE POLICY RESPONSE

To avert the world economy from a global recession, governments worldwide have come up with a number of measures. A direct outcome of the pandemic is the export restrictions and elimination of import tariffs on certain goods. For instance, the European Union exempted VAT and import duties on the import of certain goods in the context of the pandemic.[12] More than 80 countries have imposed export restrictions covering medical supplies, with some countries also extending the restrictions to food supplies, and even toilet paper.[13] A case in point is the United States, which used to be at the forefront of trade liberalization. But in the times of COVID-19, the Trump administration has imposed tariffs worth $5 billion on the import of medical supplies from China and has asked the American companies to restrict the supply of face masks to

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[9] *supra* note 7.
[10] Ministry of Commerce and Industry, Press Release F. No. 1/3/2019-EPL-1 (Apr. 15, 2020), *at* https://commerce.gov.in/writereaddata/UploadedFile/MOC_637225730430502497_Press%20Release%20March%202020.pdf.
[11] *Id.*
[12] *COVID-19: Trade and trade-related measures*, WORLD TRADE ORG. (May 1, 2020, 1:33 PM), https://www.wto.org/english/tratop_e/covid19_e/trade_related_goods_measure_e.htm
[13] *Export Prohibitions and Restrictions*, WORLD TRADE ORG. (May 1, 2020, 12:43 PM), https://www.wto.org/english/tratop_e/covid19_e/export_prohibitions_report_e.pdf.

South American countries and Canada.[14] Similarly, France and Germany also banned the export of medical supplies, and were condemned for not helping virus ravaged Italy.[15] Measures like these, along with supply disruptions in various nations, have adversely affected international trade.[16]

India has also resorted to export restrictions and import promotion of certain medical and surgical equipment, from as early as January 2020.[17] For instance, import of ventilators, face masks, Personal Protection Equipment (PPE) etc. have been exempted from customs duty and health cess till September 30, 2020.[18] However, several export restrictions have since been relaxed. Most notably, the export of hydroxychloroquine, which had initially been banned, was subsequently allowed stating humanitarian grounds as the reason.[19]

In April 2020, India amended its Foreign Direct Investment Policy such that overseas investment by any entity of a country sharing a land

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[14] *Covid-19 is bringing out protectionist instincts*, FINANCE TIMES (Apr. 19, 2020), https://www.ft.com/content/ed78b09c-80a3-11ea-8fdb-7ec06edeef84.

[15] Harry Broadman, *Protectionism Makes The Coronavirus Even More Lethal*, FORBES (Mar. 31, 2020), https://www.forbes.com/sites/harrybroadman/2020/03/31/protectionism-makes-the-coronavirus-even-more-lethal/.

[16] *Global Trade Impact of Coronavirus (COVID-19) Epidemic*, U.N. CONFERENCE ON TRADE & DEV., https://unctad.org/en/PublicationsLibrary/ditcinf2020d1.pdf (last visited Apr. 25, 2020).

[17] *supra* note 12.

[18] Ministry of Finance, Govt. of India, *Government Grants exemption from Basic Custom duty & Health Cess on import of Ventilators, PPE, COVID mini Test Kits & Face & Surgical Masks* (Apr. 2020), *at* https://pib.gov.in/newsite/PrintRelease.aspx?relid=201139.

[19] Amiti Sen, *Analysis India's change of heart on hydroxychloroquine exports lacks conviction*, THE HINDU (Apr. 12, 2020), https://www.thehindubusinessline.com/economy/analysis-indias-change-of-heart-on-hydroxychloroquine-exports-lacks-conviction/article31321731.ece.

border with India would require prior government approval.[20] Since China is the only significant trading partner amongst India's neighbours, a presumptive but plausible explanation of the amendment is that it is a protectionist measure against the recent increase in Chinese investment in India.[21] India has also been actively promulgating relief policies to facilitate trade, such as, inter alia, extending the Foreign Trade Policy for a year,[22] giving temporary relaxation with respect to Foreign Portfolio Investor requirements,[23] and launching a digital platform for issuance of e-certificate of origin to exporters.[24] Export oriented units have been exempted from the lockdown from April 20, 2020.[25] To ensure regular supply, the Ministry of Shipping has suggested not imposing any additional container detention charges in respect of export and import

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[20] Ministry of Commerce & Indus., Govt. of India, *Government amends the extant FDI policy for curbing opportunistic takeovers/acquisitions of Indian companies due to the current COVID-19 pandemic* (Apr. 2020), *at* https://pib.gov.in/PressReleasePage.aspx?PRID=1615711.

[21] Harsh Pant & Nandini Sarma, *India Cracks Down on Chinese Investment as Mood Turns Against Beijing*, FOREIGN POL'Y (Apr. 28, 2020), https://foreignpolicy.com/2020/04/28/india-china-fdi-restrictions-coronavirus/.

[22] Ministry of Commerce & Indus., Govt. of India, *Foreign Trade Policy 2015-2020 Extended for one Year; Other Immediate Relief Measures also announced* (Mar. 2020), *at* https://pib.gov.in/PressReleasePage.aspx?PRID=1609704.

[23] Securities & Exchange Board of India, Circular, *Temporary relaxation in processing of documents pertaining to FPIs due to COVID-19* (Mar. 2020), *at* https://www.sebi.gov.in/legal/circulars/mar-2020/temporary-relaxation-in-processing-of-documents-pertaining-to-fpis-due-to-covid-19_46455.html.

[24] Ministry of Commerce & Indus., Govt. of India, *Commerce and Industry Minister Launches Common Digital Platform for Issuance of Electronic Certificates of Origin* (Sept. 2019), *at* https://pib.gov.in/newsite/PrintRelease.aspx?relid=193213.

[25] Ministry of Home Affairs, Govt. of India, Order No. 40-3/2020-DM-I(A) (Apr. 15, 2020), *at* https://www.mha.gov.in/sites/default/files/MHA%20order%20dt%2015.04.2020%2C%20with%20Revised%20Consolidated%20Guidelines_compressed%20%283%29.pdf.

shipments over the Free Time Agreements. The Ministry has also advised shipping lines against the application of any additional charges.[26]

The Organisation for Economic Co-operation and Development (OECD) recommendations for trade facilitation during the COVID-19 pandemic, wherein trade costs have risen, are threefold. Firstly, make all trade related formalities transparent and accessible; secondly, expedite standard formalities to make room for COVID-19 related controls; lastly, digitize processes as much as possible.[27] Indian policies, such as allowing e-certificates and other relaxations, conform to these recommendations. India has also ratified the Trade Facilitation Agreement, and has manifested it in its National Trade Facilitation Action Plan.[28] These measures help not only in accelerating trade, but also in reducing physical contact. While the OECD has called for international cooperation in the form of, inter alia, removing trade restrictions,[29] the WTO has stressed upon transparency in trade during these uncertain times.[30]

III. THE CASE AGAINST PROTECTIONISM

Deborah Elms, the Executive Director at Consultancy Asian Trade Centre, has stated that adopting trade restrictions and prioritizing the

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[26] Ministry of Shipping, Govt. of India, *Shipping Lines advised not to impose container detention charges on import and export shipments at Ports* (Mar. 2020), *at* https://pib.gov.in/newsite/PrintRelease.aspx?relid=200780.

[27] *Trade Facilitation and the COVID -19 pandemic*, ORG. FOR ECON. COOPERATION & DEV. (Apr. 22, 2020), https://read.oecd-ilibrary.org/view/?ref=130_130609-v8jn83j1j3&title=Trade-facilitation-and-the-covid-19-pandemic.

[28] Cent. Board of Indirect Taxes & Customs, National Trade Facilitation Action Plan 2017-2020, *at* https://www.cbic.gov.in/htdocs-cbec/home_links/trade_agreement.

[29] *supra* note 4.

[30] *Transparency- Why it matters at times of Crisis*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/covid19_e/transparency_report_e.pdf. (last visited May 3, 2020).

domestic industries by different countries "makes sense".[31] Countries have been resorting to protectionist measures, mainly with the aim of securing adequate supplies for their residents. They are striving to maintain the stability of prices and to fend off the fear of shortage in domestic markets.[32] WTO allows levying of tariffs in cases where a domestic industry has suffered. In the present scenario, this is easy to prove.[33] However, there is emerging fear that this provision may be misused by governments in order to support their favoured sectors or industries.[34] Nations might try to negate the competition from foreign players by imposing tariffs. Additionally, governments worldwide have been allocating trillions of dollars to sustain domestic companies.[35] This state intervention is perceived as an anti-competitive practice. Many countries might retaliate through imposing an anti-subsidy tariff called "countervailing duty". All these could lead to the development of protectionist sentiments.[36]

However, economists have warned about the perils of adopting protectionist measures in the current circumstances. Protectionism results in a shortage of supply, which leads to increase in prices. Dan Ikenson, the director of Herbert A. Stiefel Centre for Trade Policy Studies, has rightly

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[31] Yen Nee Lee, *Coronavirus pandemic will cause a 'much bigger wave' of protectionism, says trade expert*, CNBC (Apr. 9, 2020), https://www.cnbc.com/2020/04/10/coronavirus-expect-a-lot-more-protectionism-says-trade-expert.html.
[32] Aaditya Mattoo & Michele Ruta, *Viral protectionism in the time of coronavirus*, WORLD BANK BLOGS (May 1, 2020, 8:00 PM), https://blogs.worldbank.org/voices/viral-protectionism-time-coronavirus.
[33] Chad Brown, *COVID-19 Could Bring Down the Trading System: How to Stop Protectionism From Running Amok*, FOREIGN AFFAIRS (Apr. 28, 2020), https://www.foreignaffairs.com/articles/united-states/2020-04-28/covid-19-could-bring-down-trading-system.
[34] Lee, *supra* note 31.
[35] Chad, *supra* note 33.
[36] *Id.*

observed, "through trade, we move from subsistence to abundance".[37] Restriction of trade might result in limiting the "scope of specialization"[38]. Protectionist measures at a time like this will only intensify the conundrum of supply disruptions. According to Aaditya Mattoo, the Chief Economist for East Asia and the Pacific Region at the World Bank, the trade restrictions imposed by countries "almost always prove to be counterproductive."[39] This follows from the fact that more often than not, protectionist policies invite retaliation, as seen in the ongoing US-China trade war.

At present the competition market forces are already structurally restricted because the concentration of production of PPEs and medicines is in the hands of a few countries.[40] Thus, many countries depend on others to combat the virus, and restricting trade would adversely affect the quality of health care in these countries at the time of a health emergency.[41]

IV. THE WAY FORWARD

With proactive and flexible policies, India can emerge as a winner in the course of the current pandemic. It is imperative that India seizes this opportunity, wherein China, one of the largest global exporters, has lost international trust. The companies that are moving out of China should be incentivized to move to India. For this, India is planning to create a land

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[37] S*potlight: Economists call for free trade to fight COVID-19 pandemic amid rising protectionism*, XINHUANET (Apr. 3, 2020), http://www.xinhuanet.com/english/2020-04/03/c_138943573.htm.
[38] RICHARD MCKENZIE & DWIGHT LEE, MICROECONOMICS FOR MBAS: THE ECONOMIC WAY OF THINKING FOR MANAGERS 211 (3d ed. 2017).
[39] *supra* note 37.
[40] Broadman, *supra* note 15.
[41] Mattoo & Ruta, *supra* note 32.

pool, almost double the size of Luxembourg.[42] The government has introduced the Companies (Amendment) Bill in March 2020, which, inter alia, decriminalizes minor non-compliances under the Act. This has been done with the sole objective of moving India's rank upwards in the Ease of Doing Business Index.[43] For the same purpose, the government has also formed a central task force, which has been trying to provide incentives by making judicial procedures smoother and allocating land to the companies.[44] While the recent amendment to the FDI Policy helps in preventing opportunistic acquisitions by Chinese companies, there is also a need to ensure that India does not miss out on greenfield investments.[45]

Before formulating trade policies, the foremost priority in a health emergency is to ensure proper supply and distribution of necessary goods in the country, to keep the workforce in good health and working ability.[46] It is also pertinent for governments to be mindful of the probability of a second wave of COVID-19 and take long term and far sighted measures.[47] Further, the agenda of free trade should be kept in mind. The World Bank has been stressing on the need of providing aid to different countries on

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[42] Shruti Srivastava, *India offers land twice Luxembourg's size to firms leaving China*, THE ECONOMIC TIMES (May 5, 2020), https://economictimes.indiatimes.com/news/economy/policy/india-offers-land-twice-luxembourgs-size-to-firms-leaving-china/articleshow/75534412.cms

[43] Sandesh Kumar, *India: Promotion of Ease Of Doing Business By Legislature Via Introduction Of The Companies (Amendment) Bill, 2020*, MONDAQ (May 6, 2020, 4:14 PM), https://www.mondaq.com/india/corporate-and-company-law/928064/promotion-of-ease-of-doing-business-by-legislature-via-introduction-of-the-companies-amendment-bill-2020.

[44] Pradeep Thakur, *Adjournment cap on commercial cases to woo biz,* THE TIMES OF INDIA (May 7, 2020), https://timesofindia.indiatimes.com/india/how-india-is-planning-to-attract-firms-leaving-china/articleshow/75582901.cms.

[45] *supra* note 20.

[46] RESEARCH & INFO. SYSTEM FOR DEVELOPING COUNTRIES, COVID-19 CHALLENGES FOR THE INDIAN ECONOMY: TRADE AND FOREIGN POLICY EFFECTS 62 (2020).

[47] *supra* note 14.

the basis of producer comparative advantage.[48] Free trade will ensure an efficient production of essential goods and services along with its proper supply to the countries that need them the most.[49]

India should promote liberalization of trade through tariff reductions. This should be done not solely for medical and surgical equipment, but also for intermediate goods. This can help in the reduction of production costs, which in turn will lead to cheaper exports. Incentives like employee retention in the export sector can further help in promoting trade. Other measures to facilitate trade could include time relaxations in documentation and waiving off demurrage and container freight charges.[50] Micro, Small and Medium Enterprises (MSMEs) play a major role in India's exports and therefore, schemes like Intensive Subvention Schemes for MSMEs should be expanded in scope and extended over time.[51]

Infrastructure facilities need to be strengthened in order to avoid delays in exports. The government should designate certain ports and airports for specifically managing exports. It should also aim at assisting trade through deploying special flights.[52] The Confederation of Indian

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[48] *supra* note 14.
[49] Mattoo & Ruta, *supra* note 32.
[50] CONFEDERATION OF INDIAN INDUS., COVID-19 IMPACT ON INDUSTRY AND THE ECONOMY, *at* https://invest-india-revamp-static-files.s3.ap-south-1.amazonaws.com/s3fs-public/2020-03/COVID-19%20-%20Impact%20on%20Industry%20and%20the%20Economy%2024%20March%202020.pdf.
[51] Chandrajit Banerjee, *Covid-19 and foreign trade: How to ensure Indian exports survive the churning and pick up steam*, THE TIMES OF INDIA (Apr. 13, 2020), https://timesofindia.indiatimes.com/blogs/toi-edit-page/covid-19-and-foreign-trade-how-to-ensure-indian-exports-survive-the-churning-and-pick-up-steam/.
[52] *Id.*

Industry has advised that exports should be added to the ambit of "essential services" to ensure consistency.[53]

India should place strategic focus on trading with those countries, which are receptive to non-Chinese trading partners, and with whom it has good bilateral relations. It should also focus on importing countries less affected by the virus, as their demand would be relatively unaffected. For the short term, India should prioritize exporting goods that have a less elastic demand, such as textiles.[54] In addition, India should also focus on exporting components of different electronics because of their high Gross Merchandise Value.[55] After suffering from Chinese supply disruptions, India should diversify its imports. The reorientation of global value chains will create a potential for India to emerge as one of the largest players.[56] With an increasing number of countries adopting protective measures vis-à-vis food products, there is a lurking fear of food shortage amongst countries that rely on food imports. In such circumstances, India should strive to increase its agricultural exports.[57] Another area that needs attention is virtual trade in services, which do not require physical movement.[58] To achieve these ends, there is a need for enhanced cooperation through economic diplomacy and coordinated actions with world leaders and global players.

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[53] *supra* note 50.

[54] *supra* note 46, at 113.

[55] *Id.*

[56] Pushkar Mukewar, *View: Impact of COVID-19 on exports will be worse than the financial crisis of 2008*, THE ECONOMIC TIMES (Apr. 5, 2020), https://economictimes.indiatimes.com/small-biz/trade/exports/insights/impact-of-covid-19-on-exports-will-be-worse-than-the-financial-crisis-of-2008/articleshow/74978268.cms.

[57] Banerjee, supra note 51.

[58] *supra* note 46, at 62.

V. CONCLUDING REMARKS

In conclusion, it must be asserted that protectionist measures at this point will specifically affect the developing nations that are dependent on others for the import of medical supplies. Imposition of trade barriers will make trade unreliable. During these unprecedented and uncertain times of the COVID-19 pandemic, free trade should be the guiding principle. Policies should focus on expanding the scope of exports and tapping available opportunities. While India has proved that Indian lives cannot be compromised, Indian livelihoods need saving. This is a critical time for India. It needs to frame policies that will egg the economy on the path of stability and growth. India needs to capitalize on the changing dynamics of the global economic structure as China is beginning to lose its prime position. Finally, the words of Walter Block must not be forgotten, "Protectionism is a misnomer. The only people protected by tariffs, quotas and trade restrictions are those engaged in uneconomic and wasteful activity. Free trade is the only philosophy compatible with international peace and prosperity."[59]

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[59] Walter Block, *The Necessity of Free Trade*, 1 J. MARKETS & MORALITY 192 (1998).

A POLICY PUSHED BY THE PANDEMIC: THE ECONOMIC-LEGAL CONSIDERATIONS OF THE TELEMEDICINE GUIDELINES

- Nisha Gupta and Udaiveer Ahlawat[1]

I. INTRODUCTION TO THE TELEMEDICINE GUIDELINES

In an unforeseen turn of events, China saw its first economic contraction since 1976.[2] Countries across the globe are coming to the realisation that even though they cannot prevent the impending economic slowdown, they can certainly get creative in the legal-economic sphere to at least cushion the upcoming results of the domino effect. On the same front, the Government of India ("GoI"), amongst its many policy decisions to combat the adverse effects of this pandemic, released the Telemedicine Practice Guidelines[3] ("Telemedicine Guidelines") on 25th March 2020.

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[2] Keith Bradsher, *Coronavirus Could End China's Decades-Long Economic Growth Streak*, NY TIMES (Apr. 28,2020), www.nytimes.com/2020/03/16/business/coronavirus-china-economy.html

[3] Ministry of Health & Family Welfare, Govt. of India, Telemedicine Practice Guidelines.

The Guidelines form a part of the National Digital Health Blueprint[4] which aims to make the best use of the rapid internet penetration in India. Before these Telemedicine Guidelines were introduced, there was no specific legislation regarding the practice of e-consultation. The Indian Medical Council Act, 1956[5] ("**IMC Act**"), the IMC (Professional Conduct, Etiquette and Ethics) Regulations, 2002[6], Drugs and Cosmetics Act, 1940[7] dealt with telemedicine. Data privacy concerns depended on the provisions Information Technology Act, 2000[8] and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011.[9]

Therefore, to effectively remove the existing legal gap as well as to address the extreme circumstances brought in by the outbreak of the pandemic, the Telemedicine Guidelines have been introduced by the policymakers. This essay assesses the implementation and impact of this policy decision of the Government by analysing the many legal and economic issues involved. Through this discourse, the authors also attempt to offer possible solutions to the legal-economic issues in light of the pandemic.

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[4] National Digital Health Blueprint, *at* https://www.nhp.gov.in/NHPfiles/National_Digital_Health_Blueprint_Report_comments_invited.pdf (last visited May 7, 2020).
[5] Indian Medical Council Act, 1956, No. 102, Acts of Parliament, 1956 (India)
[6] Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002.
[7] Drugs and Cosmetics Act, 1940, No. 23, Acts of Parliament, 1940 (India).
[8] Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India).
[9] Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011.

II. TELEMEDICINE AIDING THE ECONOMY

A. The State of Indian Healthcare

Over 20% of India's population was said to suffer from at least one chronic disease as of 2016.[10] It has also been estimated that this state of affairs is likely to cost India a staggering USD 6.2 trillion from 2012 to 2030.[11] India's abysmal health record does not end there – especially considering that the country only spends 1.28% of its Gross Domestic Product on public healthcare[12] compared to the OECD average of 8.8%.[13] Home to the world's second largest population, India's current doctor-population ratio is 1:1456 opposed to the recommended 1:1000 of the World Health Organisation ("**WHO**").[14] While that may not seem all that bad, a recent study also estimated that 1 government doctor attends to over 11,082 people on an average in India – which is 10 times the WHO recommendation.[15] Also note that India only has 0.5 beds per 1000 people in comparison to the WHO's recommended 5 beds.[16] A cumulative result

[10] *Over 20% of Indians suffer from chronic diseases: Report*, THE ECONOMIC TIMES (Oct. 6, 2016), https://economictimes.indiatimes.com/industry/healthcare/biotech/healthcare/over-20-of-indians-suffer-from-chronic-diseases-report/articleshow/54676781.cms?from=mdr.
[11] *Id*.
[12] Himani Chandna, *At 1.28% of GDP, India's expenditure on health is still low although higher than before*, THE PRINT (Oct. 31, 2019) https://theprint.in/health/at-1-28-gdp-india-expenditure-on-health-still-low-although-higher-than-before/313702/.
[13] *Health spending set to outpace GDP growth to 2030*, OECD https://www.oecd.org/health/health-spending-set-to-outpace-gdp-growth-to-2030.htm (last visited May 7, 2020).
[14] Samiksha Goel, *The doctor-population ratio in India is 1:1456 against WHO recommendation*, DECCAN HERALD, www.deccanherald.com/business/budget-2020/the-doctor-population-ratio-in-india-is-11456-against-who-recommendation-800034.html (last updated Jan. 21, 2020).
[15] *India's health workforce crisis*, DOWNTOEARTH, www.downtoearth.org.in/dte-infographics/61322-not_enough_doctors.html (last visited May 7, 2020).
[16] *Hospital beds*, OECD DATA, https://data.oecd.org/healtheqt/hospital-beds.htm (last visited May 7, 2020).

of this is the ranking of the country on the Healthcare Access and Quality ("**HAQ**") Index – 145 out of 195 countries.[17]

The HAQ Index is based on country's amenable mortality rate – deaths that are potentially preventable if effective and quality health care is timely provided.[18] As of 2020, 65.97% of India's total population is rural[19] where effective healthcare is still considered to be "inaccessible"[20] inspite of the Government's efforts. Accessibility forms an important aspect of the Index simply because effective and timely action determines whether a life is saved or not. This topic of accessibility has gained greater significance for the whole of India in recent times due to the imposition of the world's largest lockdown[21] due to the outbreak of the pandemic. With the sealing down of areas[22], suspension of public transport,[23] and strict

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[17] *India 145th among 195 countries in healthcare access, quality*, THE ECONOMIC TIMES (May 23, 2018), https://economictimes.indiatimes.com/industry/healthcare/biotech/healthcare/india-145th-among-195-countries-in-healthcare-access-quality/articleshow/64282199.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

[18] *Healthcare Access and Quality Profile: India*, HEALTH DATA, www.healthdata.org/sites/default/files/files/county_profiles/HAQ/2018/India_HAQ_GBD2016.pdf (last visited May 7, 2020).

[19] *India – Rural* Population, TRADING ECONOMICS, https://tradingeconomics.com/india/rural-population-percent-of-total-population-wb-data.html (last visited May 7, 2020).

[20] Banjot Kaur, *Economic Survey 2018-19: Healthcare still inaccessible in rural India*, DOWNTOEARTH (July 4, 2019), www.downtoearth.org.in/news/health/economic-survey-2018-19-healthcare-still-inaccessible-in-rural-india-65443.

[21] Karan Deep Singh, *India, Day 1: World's Largest Coronavirus Lockdown Begins*, NY TIMES (Apr. 28, 2020), www.nytimes.com/2020/03/25/world/asia/india-lockdown-coronavirus.html.

[22] Alok Mishra, *Delhi has 100 containment zones: See full list*, THE TIMES OF INDIA (Apr. 28, 2020), https://timesofindia.indiatimes.com/city/delhi/coronavirus-outbreak-list-of-containment-zones-in-delhi/articleshow/75433978.cms.

[23] Anisha Dutta, *Covid-19 lockdown: Public transport may resume soon, says Nitin* Gadkari, THE HINDUSTAN TIMES (May 7, 2020), www.hindustantimes.com/india-news/public-transport-may-resume-soon-gadkari/story-NwQ95NOEXXyNgs3vhb260N.html.

stay-at-home and curfew orders,[24] the ability to access healthcare services has just become tougher – both, in rural and urban areas.

B. The Positive Relationship between Economics and Healthcare

Keeping in mind accessibility to health facilities, the Telemedicine Guidelines received a much-needed push by the Government of India – especially since as the health as well as the economic dangers of the pandemic were perceived.

The relationship between the two is long-established - economic performance and health performance are interlinked.[25] In fact, an improvement of just 10% in life expectancy at birth raises the economic growth by 0.3-0.4% each year.[26] Health has direct impacts on economic growth in terms of labour productivity, economic burden of ill-health such as absenteeism from work, learning capabilities of children and adults alike, and so on.[27] There are indirect impacts of health on the economic performance as well, for example – healthy parents are more likely to hold jobs and earn money to sustain a healthy family; healthy children are more likely to perform better at school thus ensuring better work opportunities in their adulthood.[28]

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[24] *During coronavirus lockdown 3.0, people can't step out for 12 hours*, THE HINDUSTAN TIMES (May 2, 2020), https://www.hindustantimes.com/india-news/during-lockdown-3-0-people-can-t-step-out-for-12-hours/story-sNLtp9M7EXswU74YdtrYHJ.html.

[25] Julio Frenk, *Health and the economy: A vital relationship*, OECD OBSERVER (May 2004), https://oecdobserver.org/news/archivestory.php/aid/1241/Health_and_the_economy:_A_vital_relationship_.html.

[26] *Id*.

[27] *Investing in Health for Economic Development*, WHO, www.who.int/macrohealth/action/sintesis15novingles.pdf (last visited May 7, 2020).

[28] *Id*.

The new motto of the Government – "*Jaan bhi, Jahan bhi*" (lives as well as livelihoods)[29] – falls directly in line with this relationship. GoI's new take on "health is wealth" communicates to the people the need for health and economic measures to go hand-in-hand. Policymakers must strive to find the perfect balance between the two goals. For example, policymakers need to ensure that healthcare is affordable for all without putting extensive burden on the national spending which is already dealing with several other issues.[30]

The introduction of the Telemedicine Guidelines is envisaged to help the GoI make its goal of achieving a fine balance of health and economic growth a reality. McKinsey Global Institute in its report titled "Digital India: Technology to transform a connected nation" ("**Report**") has stated that up to 50% of the current in-person outpatient consultations could be instead handled by e-consultations, i.e. through telemedicine.[31] This would not only help make up for the shortage of over 600,000 doctors in the country[32] and improve access to healthcare even in remote rural areas, but if India is able to even replace 30-40% of these consultations with telemedicine, it could save up to a massive USD 10 billion[33] with USD 4-5 billion in 2025 itself.[34] In fact, penetrating the

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[29] ANI, *Our mantra was 'jaan hai to jahaan hai' but now it is 'jaan bhi jahaan bhi': PM Modi*, THE NEW INDIAN EXPRESS (last updated Apr. 11, 2020), www.newindianexpress.com/nation/2020/apr/11/our-mantra-was-jaan-hai-to-jahaan-hai-but-now-it-is-jaan-bhi-jahaan-bhi-pm-modi-2128777.html.
[30] *supra* note 25.
[31] MCKINSEY GLOBAL INSTITUTE, DIGITAL INDIA: TECHNOLOGY TO TRANSFORM A CONNECTED INDIA 72, *at* https://www.mckinsey.com/~/media/mckinsey/business%20functions/mckinsey%20digital/our%20insights/digital%20india%20technology%20to%20transform%20a%20connected%20nation/digital-india-technology-to-transform-a-connected-nation-full-report.ashx (last visited May 7, 2020).
[32] *supra* note 15.
[33] *supra* note 31, at 26.

market seems to be an easy task since it is believed that if the Telemedicine Guidelines are given a push in the right direction, the country will be able to meet 60-80% of this potential by 2025 itself.[35] It has also been projected that the use of telemedicine cuts the cost of consultation by about 30% making it more affordable than in-person consultations.[36] The process also proves to be cheaper for the registered medical practitioners ("**RMP**") as Guideline 3.7.2 allows for the documentation of consultations to be maintained digitally which would significantly bring down the administrative costs.

Unsurprisingly, cumulatively these factors will benefit the rural population at large. As per Guideline 3.6 of the Telemedicine Guidelines, first consultations as well as follow-up consultations can be done through the mediums provided. This in turn would allow them to consult expert medical professionals sitting at their homes, ensuring that they wouldn't have to spend a large sum of money travelling to urban cities for the same or even having to depend on unqualified doctors to treat them.

Apart from the economic benefit of the Telemedicine Guidelines, these considerations are likely to improve the HAQ Index of the country which in turn will have certain economic advantages as explained by the positive relationship between health performance and economic performance.

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[34] *supra* note 31, at 62.
[35] *Id*.
[36] *supra* note 31, at 26.

III. THE LEGAL LOOPHOLES

With the outbreak of the pandemic looming over the country, the GoI started advising its citizens to start consulting their doctors over telephonic means instead of visiting hospitals and clinics in the interest of reducing chances of transmission of the virus.[37] The need for e-consultations has become all the more necessary with the never-ending extensions of the lockdown. However, there are many legal hurdles that need to be addressed before the country is on its way of making the best of telemedicine and its economic and health benefits.

When it comes to analysing the legality of telemedicine, the case that is often talked about is that of *Deepa Pawaskar v. State of Maharashtra*.[38] The two doctors involved provided e-consultation to the patient without conducting proper diagnosis and also wrongfully advised her against going to another hospital in spite of the doctors' physical absence. Ultimately, the patient died and the two doctors were charged under the offence of criminal negligence under Section 304 read with Section 34 of the Indian Penal Code.[39] Although the case was clear in its context that the charge of culpable negligence was due to the error in diagnosis and prescription without diagnosis,[40] the judgement created havoc and fear in the minds of RMP with regards to the "illegality" of telemedicine.

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[37] *PM Modi says goal is to ensure minimum loss of life, urges states to use technology and telemedicine to fight covid-19*, THE ECONOMIC TIMES (Apr. 2, 2020) https://government.economictimes.indiatimes.com/news/technology/pm-modi-says-goal-is-to-ensure-minimum-loss-of-life-urges-states-to-use-technology-and-telemedicine-to-fight-covid-19/74951364.

[38] Deepa Pawaskar v. State of Maharashtra**,** 2018 SCC OnLine Bom 1841.

[39] Indian Penal Code, Act. No. 45 of 1860, INDIA CODE (1860).

[40] *Medical professionals cannot escape liability on acting negligently: Bombay HC*, SCC ONLINE BLOG (July 29, 2018),

Although it is apparent that the judgement was wrongly interpreted by most concluding that telemedicine in itself is illegal, the fear regarding telemedicine is well-founded due to the lack of clarity that has been offered by the Indian policymakers in the past.[41] Telemedicine has long been a reality in the medical and technological areas, however was only recently acknowledged in India's legal sphere. The introduction of the Telemedicine Guidelines has since then have provided colour to the otherwise grey area and ascertained its legality.

In spite of the filling up of this void by the amendment of Regulation 3.8.1 of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations[42] and the insertion of Appendix 5 to the same, there are many more legal issues to be addressed.

A. The Nature of the Guidelines

First and foremost, it is to be noted that the guidelines only provide the "norms and protocols"[43] without clarifying whether they are professional norms or simply non-legislative measures. The only scope of clarity offered by the policymakers is that "these guidelines should be used in conjunction with the other national clinical standards, protocols, policies

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https://www.scconline.com/blog/post/2018/07/29/medical-professionals-being-put-on-a-pedestal-equivalent-to-mortals-cannot-escape-on-acting-negligently-bombay-hc/.

[41] Suraksha P., *Telemedicine has no legal backing, fraternity calls for regulation*, THE NEW INDIAN EXPRESS (Sept. 17, 2018), https://www.newindianexpress.com/cities/bengaluru/2018/sep/17/telemedicine-has-no-legal-backing-fraternity-calls-for-regulation-1872965.html.

[42] Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002.

[43] *supra* note 3, at 8.

and procedures".[44] This only raises the question whether a RMP can be held liable solely under these guidelines or not.

B. Jurisdiction

Talking about liability, the issue of jurisdiction also demands some clarity as well. Since the Guidelines are to be "used in conjunction" with other national policies, it is safe to presume that Section 13 of the Information Technology Act, 2000 may be utilised in determining the cause of action. Since the cause of action with regards to e-communication depends on the despatch and receipt of electronic records,[45] the use of the IT Act opens up further possibilities and thus, further confusion in determining the jurisdiction. The Guidelines do not offer any clarity with regards to this. In fact, the Guidelines only provides that in case of misconduct, the penalties will be as per the IMC Act, ethics and other prevailing laws, without making any mention to the issue of jurisdiction (Guideline 3.7.1.5). Therefore, it can only be ascertained that the Guidelines indirectly provide for complaints to be made to the State Medical Council where the RMP is registered for the same.

C. Data Privacy

The topic of data privacy and confidentiality are dealt under Guideline 3.7 which largely states that the RMP must abide by the IMC Regulations, 2002, the IT Act and any data protection and privacy laws notified from time to time. Considering that the Data Protection Bill, 2019 is yet to be passed and has been on hold due to the outbreak of the pandemic, there is

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[44] *supra* note 3, at 9.
[45] Ajay Garg, *Legal Issues in Telemedicine*, DIPLOMATIC SQUARE (May 19, 2019) https://www.diplomaticsquare.com/legal-issues-in-telemedicine/.

little relief with regards to the privacy concerns brought on by Telemedicine.

D. The Consumer Protection Act, 2019

Most importantly, from the point of view of the consumers, i.e., the patients, the Consumer Protection Act, 2019 ("**CPA 2019**") needs to be considered. Although the Consumer Protection Bill, 2018 included healthcare in the definition of services Section 2(47), the CPA 2019 in its current form has excluded it. However, it must be noted that the list as stated in the Sub-clause 47 is not exhaustive. The exclusion of healthcare from the definition via 'healthcare amendment' comes as an attempt to satisfy the medical fraternity that was in opposition to the same.[46] However, the Government of India since clarified that cases of deficiency of services in medical cases will come under the purview of 2019 Act.[47] To add to this, in the case of the *Indian Medical Ass'n v. V. P. Shantha*,[48] the Supreme Court stated that medical services fall under the purview of Consumer Protection Act, 1986 as long as consumers are charged for the service. This case stands good in law even after the introduction of the CPA 2019 because the legislature has not used its power to overturn the judgement with prospective effect.[49] This therefore allows the consumers of telemedicine to approach the consumer courts in case of any misconduct or deficiency of services. Keeping up with the digital advancements, the consumers can now file a complaint from anywhere as compared to the previous Act where the complaint had to be filed in an

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[46] Dipak Dash, *Consumer bill draft removes healthcare from services*, THE TIMES OF INDIA (June 25, 2019) https://timesofindia.indiatimes.com/india/consumer-bill-draft-removes-healthcare-from-services/articleshow/69935129.cms.
[47] *Id.*
[48] Indian Medical Ass'n v. V. P. Shantha, AIR 1996 SC 550.
[49] State of Karnataka v. Karnataka Pawn Brokers Ass'n, SLP(C) Nos. 8652-8656 of 2012.

area where the seller or service provider was located. This resolves the jurisdictional issues being raised by Telemedicine and CPA. Further, a consumer may also request a hearing through video conferencing thus reducing time and cost.[50]

IV. CONCLUDING THE DISCOURSE

Following the goals set out by the National Health Policy of 2017, the Government of India is set to increase its expenditure on health care from 1.28% to 2.5% of its GDP by 2025.[51] The relationship between health performance and economic performance cannot be overstated. For a country to grow, it is of utmost importance for its population to be healthy. The situation in India in its current state poses threat to both – the health and the economy. This has only aggravated with Covid-19 sweeping across the nation. Although the Telemedicine Guidelines were long pending, they received a much-needed push from the pandemic.

Even though, as discussed earlier, an effective implementation of the Guidelines will provide much needed aid to the economic problem, one might simply ask whether the Guidelines in their current form can be implemented effectively. Whether due to the laxity of the legislature or simply because of the rush with which they were pushed out, it remains no secret that the Guidelines present many legal loopholes that are yet to be straightened out.

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[50] Stuti Galiya, Consumer Protection Act, 2019 – Key Highlights, KHAITAN & CO. (Aug. 16, 2019), https://www.khaitanco.com/thought-leadership/consumer-protection-act-2019%E2%80%93key-highlights.

[51] *India to increase public health spending to 2.5% of GDP: PM Modi*, THE ECONOMIC TIMES (Dec. 12, 2018), https://economictimes.indiatimes.com/news/economy/policy/india-to-increase-public-health-spending-to-2-5-of-gdp-pm-modi/articleshow/67055735.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

However, it should be appreciated that given the pandemic, the Guidelines were introduced in a timely fashion to ensure to contain the transmission of the virus, amongst its other economic and health benefits. It is yet to be seen how the Consumer Protection Act, 2019 and the Data Protection Bill, 2019 (when passed) will react with the Guidelines. Up until then, the Government can continue relying on the Guidelines for its new motto – “lives as well as livelihoods”.[52]

[52] *supra* note 29.

COVID-19 ROPED WITH A HANDCUFFED UNORGANISED SECTOR HOG-TYING THE MIGRANT WORKERS

- Rasmani Raghuwanshi and Rithika Mathur[1]

I. INTRODUCTION

When a sudden outbreak of COVID-19 took a toll over China in the month of December 2019, it slowly started clenching the entire world in its fists. In India, when its effects were realised following the lockdown starting from March 25, 2020 many people were hit hard, as the virus unveiled the inherent economic divide in the country. The gavel of a pandemic thrashed the Indian economy when it was in its most sluggish phase. With the entire country coming down to a halt, the worst hit are the migrant workers in the unorganised sector who occupy the lowest rungs of the society. With no savings and a complete dependency on daily wages, they have become the most vulnerable. With the International Labour Organisation calling it the worst global crisis since the Second World War, the economy of developing India is dwindling and the contribution by migrant workforce, which forms a major chunk of the GDP, is shackled.

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The unincorporated sector has a considerably large share in the informal economy of India. This is ascertained by government sources like the Economic Survey[2] and NITI Aayog's Strategy for New India[3] which peg the employment rate of the unorganised sector at 93% and 85% of the total workforce, with the exact size still a mystery.[4] The annual inter-state migration flow is 9 million since 2011,[5] with the total number of internal migrants in the country being around 139 million.[6] The nature of work carried out by the migrant workers has encapsulated them in a grey area that is deprived of any effective government intervention with lousy economic policies. With the incoming of a global crisis, their precarious condition has once again garnered the spotlight, acting as a reminder to take immediate action.

The impact has gathered responses from both the administrative and the judicial ends, however, the material question is whether these reforms should only focus on keeping the migrants afloat amidst the lockdown or secure them in an economy which might slowly slip into a pool of economic recession.

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[2] Ministry of Finance, Govt. of India, Economic Survey 2019-20, Vol. 2, *at* https://www.indiabudget.gov.in/economicsurvey/doc/echapter_vol2.pdf (Jan., 2020).

[3] *Strategy for New India @ 75*, NITI AAYOG, https://niti.gov.in/writereaddata/files/Strategy_for_New_India.pdf (Nov., 2018).

[4] Prasanna Mohanty, *Labour reforms: No one knows the size of India's informal workforce, not even the govt*, BUSINESS TODAY (Apr. 26, 2020), https://www.businesstoday.in/sectors/jobs/labour-law-reforms-no-one-knows-actual-size-india-informal-workforce-not-even-govt/story/364361.html.

[5] Ministry of Finance, Govt. of India, *India on the Move and Churning: New Evidence*, Economic Survey 2017-18, *at* https://www.indiabudget.gov.in/budget2017-2018/es2016-17/echap12.pdf (Jan., 2018).

[6] Ministry of Finance, Govt. of India, Economic Survey 2017-18, *at* https://www.indiabudget.gov.in/economicsurvey/ (Jan., 2018).

II. IMPACT OF THE PANDEMIC LOCKDOWN ON THE MIGRANT WORKERS

The right approach to find the answers to such recurring questions involves a fundamental step of analysing the impact. As per the recent ILO Report, more than 400 million people in India are at a risk of falling into the poverty trap.[7] The current lockdown measures in the country, being one of the highest in the Government Response Stringency Index[8], have a great impact on the migrant workforce. With the announcement of lockdown, India saw a partition-like mass movement of migrant workers back to their villages.[9] This unplanned decision has left the lives of the migrants in a complete disarray.

In the present situation, where they have absolutely no food security, health safety or livelihood certainty, they are trapped in the debt cycle, with no income but certain unavoidable expenditures looming over their heads. Adding to the misery is the inevitable rise in food prices. The abandoned migrants, shorn of funds are not in a position to follow the social distancing norms in the absence of social security.[10] With masses of these workers forced to sleep under flyovers and on footpaths, their health security has become a major concern. The plight of these workers, which

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[7] *ILO Monitor: COVID-19 and the world of work. Second edition Updated estimates and analysis*, INT'L LABOUR ORG. https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms_740877.pdf (last visited Apr. 7, 2020).

[8] Thomas Hale et al., *Variation in Government Responses to COVID-19*, UNIV. OF OXFORD, https://www.bsg.ox.ac.uk/sites/default/files/2020-05/BSG-WP-2020-032-v5.0_0.pdf (last visited Apr. 29, 2020).

[9] Anirban Nag, *Why fixing unorganised sector can be Modi's biggest Covid-19 economic challenge*, THE PRINT, https://theprint.in/economy/why-fixing-unorganised-sector-can-be-modis-biggest-covid-19-economic-challenge/396754/ (last visited Apr. 27, 2020).

[10] Neeta Lal, *COVID-19 and India's Nowhere People,* THE DIPLOMAT, https://thediplomat.com/2020/04/covid-19-and-indias-nowhere-people/ (last visited May 1, 2020).

involves meagre reliance on unfulfilling government supplements has gained the attention of the entire country, as it realises the lack of government planning for this neglected section, leading them to a long-lasting economic agony.

III. RESPONSE OF THE GOVERNMENT

Within the unorganised sector, MSMEs (Micro, Small and Medium Enterprises), employing the largest share of migrant workers, are the worst hit, as they majorly rely upon the cash economy. Currently, they are also facing difficulties in procuring raw materials, engaging workers and reviving a disrupted transport infrastructure due to a halt in the economy. The MSME sector contributes 30% to India's GDP,[11] and therefore would seriously hamper the economy if it's left to struggle with the economic slowdown.

Government's response to tackle the current situation on the business front is in terms of slashing interest rates and increasing limits on NPAs (Non-performing assets). This is to prevent businesses from going down the insolvency drain. The government has further offered to make payments from the government's employee provident fund to avoid layoffs. The banks have also come up with special purpose loans with reduced interest rates up to 10-20 %.

While such policy decisions are from a welfare perspective for all the MSMEs in general, which employ a large number of migrant workers, in reality, they cater only to the problems of the large and the organised

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[11] Ritaram Chaurey et al., *The MSME sector is critical in times of COVID-19,* THE HINDUSTAN TIMES, https://www.hindustantimes.com/analysis/msmes-is-critical-in-times-of-covid-19/story-6Juiu9zs4jKUdkHLobT6WJ.html (last visited Apr. 28, 2020).

businesses. Such policy decisions seriously fall short in addressing the concerns of small and unorganised firms. As approximately 55 million firms in India employ less than 5 workers and about 94% of these firms are not registered with the government, it is highly unlikely that such businesses would contribute to the EPF and in turn could avail the contribution that government is making to the EPFO.[12]

The government has attempted to address the concern relating to wages through an order, released by the Ministry of Home Affairs[13] prohibiting the employers to cut wages of their employees. However, such limitations on the employers would only help migrant workers if they were working under an organised firm registered with the government in the first place. Further, the government even went ahead with transferring Rs. 500 in *Jan Dhan* accounts registered with women,[14] coupled with increasing MNREGA wages for all the workers from Rs.182 to Rs. 202 a day, even though such help won't make a world of difference when jobs are practically extinct amidst the *Janata* curfew.

Another response to this crisis by the government involved a decision to operate trains called "*Shramik* Special" to ferry the migrant workers back to their hometown who had been stranded across multiple states due to the lockdown. However, such measures are myopic considering the gravity of the situation, as even after reaching home they would still be devoid of a source of income to support their family or to

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[12] *Id.*

[13] Ministry of Home Affairs, Govt. of India, Order No. 40-3/2020-DM-I(A) (Mar. 29, 2020), *at* https://www.mha.gov.in/sites/default/files/MHAOrder_21042020.pdf.

[14] Christophe Jaffewlot et al., *Keeping poor safe in lockdown is a state responsibility, not an act of charity*, THE INDIAN EXPRESS, https://indianexpress.com/article/opinion/columns/coronavirus-india-lockdown-migrant-workers-labourers-exodus-m (last visited Apr. 30, 2020).

procure the essential items. A survey conducted by Stranded Workers Action Network (SWAN)[15] that covered 11,159 migrant workers revealed that between the stretch from April 8 to April 13, almost 90% of these workers did not receive any ration from the government and further around 90% of the people surveyed were not paid by their employers. Additionally, almost 70% of the workers that were interviewed claimed that they only had less than Rs.200 left with them during the time period from March 27 to April 13. These figures unveil the harsh reality of the circumstances these helpless workers are stuck in.

IV. RESPONSE OF THE JUDICIARY

The judicial spectrum, acknowledging the situation of the migrant workers in this lockdown, entertained a number of petitions. A Public Interest Litigation, filed in the Supreme Court by activists Anjali Bharadwaj and Harsh Mander, sought a direction to the government for the payment of wages to the migrant workforce. This was eventually rejected by the apex court in order to maintain the separation of powers, by refraining itself from intervention in the governmental budgetary allocations, which is the domain of the legislature.[16] The court took note of the present situation and demanded a close attention of the government in this matter, however the government has maintained its silence on the same. A further petition challenging the MHA order was brought before the Supreme Court which urged a subsidization of 70% of the wages by the government through funds like ESIC (Employees' State Insurance

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[15] *Lockdown Displaces Lakhs of Migrants,* THE HINDU, https://www.thehindu.com/data/data-96-migrant-workers-did-not-get-rations-from-the-government-90-did-not-receive-wages-during-lockdown-survey/article31384413.ece (last visited Apr. 26, 2020).
[16] Harsh Mander v. Union of India, Diary No. 10801/2020.

Corporation). Another petition sought the implementation of ONORC (One Nation One Ration Card) Scheme for the availability of the basic needs of migrants the most important being food and shelter.

Pleas seeking the fundamental rights of these migrant workers have seen most of the filings in the apex court in the months of March and April. However, the only substantive Supreme Court directions have come in respect of free testing of persons under the *Ayushman Bharat* Scheme and other sections of EWS as notified by the Government.[17] The large number of cases before the Supreme Court with limitations on the digital front has proved to the detriment of the migrant workers, as no immediate relief can be sought.

These policy responses are not able to suffice in the current state of lockdown when all the economic activities are shut. The world of migrants would further worsen when a meltdown hits the economy post the lockdown.

V. TOWARDS AN ECONOMIC RECESSION?

Amidst the ongoing crisis where these workers are not even able to sustain themselves, they might face another crisis when such a meltdown takes the form of a recession. The period 2008-2010 witnessed a recession across the globe that started from the USA when the unemployment rate increased to 23%.[18] With recent reports declaring that the US economy has

[17] Shashank Sudhi v. Union of India, Diary No. 10816/2020.
[18] M.K Venu, *Covid-19 economic blow will be unprecedented*, THE WIRE https://thewire.in/economy/covid-19-coronavirus-india-economy (last visited Apr. 28, 2020).

shrunk by 4.8%,[19] global business leaders fear for a U-shaped recession caused by the Coronavirus pandemic. Experts believe that the havoc created by the pandemic on the world economies might lead to a second depression after the 1930s. Reasons to believe the same are the recent crash of US stocks i.e. 18% within just 18 days that resembles the fall during the Great Depression.[20] This is of major concern considering the past patterns wherein the Indian economy suffered a slowdown which originated in the US markets.

Indian economy before the pandemic occurred was already witnessing a manufacturing slump, where negative growth was observed in the last two quarters in core sectors like oil, gas, etc. The timing was further vulnerable as the economy was also facing high unemployment rate, lack of investments and no source of increasing rural wealth and consumption.[21]

India is considered amongst the top 15 countries to bear a serious impact from COVID 19 crisis and UNCTAD has already estimated that the impact can cost India around US$ 348 million.[22] Considering the cost analysis as above, if such a recession comes, in that case, even the officials at higher levels would face layoffs or salary cuts. In such a scenario, the

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[19] Patricia Sabga, *Recession sign: US economy shrinks 4.8 percent in first quarter*, AL JAZEERA, https://www.aljazeera.com/ajimpact/recession-sign-economy-shrinks-48-percent-quarter-200429120958454.html (last visited Apr. 27, 2020).

[20] Dale Smith, *Experts say we're headed for a recession. Here's what that means for you*, CNET, https://www.cnet.com/personal-finance/experts-say-were-headed-for-a-recession-heres-what-that-means-for-you/ (last visited Apr. 29, 2020).

[21] *Manufacturing sector: Struggling to take off*, THE HINDU BUSINESS LINE, https://www.thehindubusinessline.com/opinion/manufacturing-sector-struggling-to-take-off/article28322705.ece# (last visited Apr. 30, 2020).

[22] *Trade Impact for coronavirus estimated at 348 million: UN Report*, THE TIMES OF INDIA, https://timesofindia.indiatimes.com/business/india-business/trade-impact-of-coronavirus-epidemic-for-india-estimated-at-348-million-un-report/articleshow/74487999.cms (last visited May 1, 2020).

future of migrants under the unorganised sectors without any clear legal guidelines to cover them, would be abysmal.

Therefore, every policy measure from now on, whether short term or long term should reflect and address the demographic in an all-inclusive manner, while considering the possibility of a recession in the near future.

VI. THE REQUIRED REFORMS

With a slew of domestic labour laws in place, the government seems to have overlooked their implementation. The problems faced by the migrant workers in this pandemic are not ordinary. The government has tried to come up with some short-term reliefs, however, their legal aspects still remain unattended.

Firstly, according to the Disaster Management Act ("**DM Act**"),[23] the Government is obligated to take necessary steps in helping the victims of the disasters and also in formulating a detailed machinery for mitigating the adverse effects. Taking into account all the relevant aspects, the Government should activate National and State Advisory committees in the field of disaster management and public health to manage and formulate a plan instead of passing ad-hoc orders.

Secondly, with respect to powers under DM Act, 2005, S. 46 empowers the State to constitute a National Disaster Response Fund towards meeting emergency expenses. The government should constitute such a fund in order to resolve the problem of wages to be paid to the migrant workers. Further, in exceptional situations like these, asking the employers who

[23] Disaster Management Act, 2005, No. 53, Acts of Parliament, 1992, s. 38.

themselves have no income of their own to pay full wages to their employees is unreasonable.

Thirdly, likewise, models followed in the United Kingdom and Canada can be adopted. In the UK, the government has announced the Coronavirus Job Security Scheme,[24] which covers 80% of the monthly wages of the employees. Similarly, Canada has announced Canada Wage Subsidy[25] which provides a 75% wage subsidy up to 12 weeks. Following such a scheme is achievable under the present statutes to provide an interim relief to the stranded workers.

Fourthly, further, experts have observed that India needs to revolutionise the social security system for its migrant workers.[26] For the short term, the government needs to provide insurance covers to all the workers and also enhance the working credit limits with banks. The Unorganised Workers Social Security Act, 2008 empowers the Government to promulgate schemes in relation to employment injury benefit, housing;[27] health and life cover.[28]

Fifthly, for the people undergoing treatment of COVID-19, the Government should provide them with paid sick leave, as it is done in the

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[24] Coronavirus Job Retention Scheme (Mar. 26, 2020) *at* https://www.gov.uk/guidance/check-if-you-could-be-covered-by-the-coronavirus-job-retention-scheme.

[25] Canada Emergency Wage Subsidy (Mar. 15, 2020), *at* https://www.canada.ca/en/revenue-agency/services/subsidy/emergency-wage-subsidy.html.

[26] Yogima Sharma, *Covid has exposed deep flaws in India's social security system: Experts*, THE ECONOMIC TIMES, https://m.economictimes.com/news/economy/policy/covid-has-exposed-deep-flaws-in-indias-social-security-system experts/articleshow/75218338.cms (last visited Apr. 25, 2020).

[27] Unorganised Workers' Social Security Act, 2008, No. 33, Acts of Parliament, 2008, s. 3.

[28] *Id.*

case of the service sector. Under the Employees State Insurance Act, 1948,[29] the Government can utilize funds collected by ESIC to make payments to the migrant workers who are undergoing treatment.

Lastly, there is an immediate need for cohesive policies to protect these most vulnerable groups of people not only during the lockdown, but also in its aftermath. Government can consider taking steps by facilitating the amount of Rs.6000 within the Pradhan Mantri Shram Yogi Mandhan Yojna to the migrant workers, generally given in three instalments, in one go. The Government can also consider relaxing the fiscal deficit target by some percentage to lift off the load upon businesses to pay taxes, allowing them to retain workers. If not through the scheme, the government can adopt a uniform policy of DBT (direct benefit transfer) wherein an approximate amount of Rs. 5000 can be transferred in the bank accounts of people who are over 25 years and an amount of 10,000 for those above 65 years. Likewise, any successful approach taken up by the government at this stage would require an effective amelioration of both legal and economic reforms.

VII. THE WAY FORWARD

Migrant workers, who are very much a part of the economy, are largely invisible from the official government data in the form of national sample surveys and the census. However, they are an integral part of contemporary India. The government has, through its plans and budgetary allocations, provided for schemes for basic conveniences for this faction of the economy. But, has it done enough? The schemes, policies and the plans are just a garb of welfare. The present laws have remained on the

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[29] Employees' State Insurance Act, 1948, No. 34, Acts of Parliament, 1948, s. 46.

paper, lacking real implementation. For instance, the benefits under Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 requiring registrations, remain unknown and unimplemented. Migrant workers, be it inter-state or inter-district, need to be recognised through proper reforms with their implementation by the Central and the State governments.

The present laws need to account for the current situation and provide for compensation and social security covers to these workers in the event of closure of an establishment or any other work due to natural calamity. Moreover, express provisions for a contingency fund in emergency situations like the present pandemic and a general scheme for transportation, food security and shelter need to be inserted, having the effect of law.

Time and again when a crisis strikes the Indian economy and the problems of these migrant workers surface up to mainstream society, huge uproar about making effective policy reforms that protect such workers are often witnessed, which are eventually submerged under the justification of larger economic interests. What the government has failed to understand is the importance of the migrant workforce as cogs in the economic wheel of our country. The uniqueness of their crisis comes from the abruptness of the public policy and not the nature of this workforce.

With the impact realised, responses analysed and lacunae identified, the real question still remains, is the government keen on giving equal representation to these people and focus on their needs in such exceptional circumstances when even a single wrong step can make or break the economy?

ANALYSING THE LEGAL CONSEQUENCES OF A WORK FROM HOME ECONOMY

- Khushali Mahajan and Rishabh Chhabaria[1]

I. INTRODUCTION

On the 31st of December 2019, China reported a number of pneumonia cases in Wuhan, Hubei Province leading to the identification of the novel Coronavirus (Covid-19, which would be one of the greatest healthcare and economic tragedies of the 21st century). Over the course of next four months, the virus would have pervaded across the whole world and would go on to claim over two lakh lives. The World Health Organization (WHO) after taking into account its startling spread as well as the alarming level of inaction, categorised the disease as a pandemic on 11th March, 2020.[2]

The effects of this pandemic are not limited to the healthcare sector. With lives across the globe coming to a halt, the effects have permeated into global and domestic economic systems. Prior to the declaration of the

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[2] *Who Timeline - Covid-19*, WORLD HEALTH ORG., https://www.who.int/emergencies/diseases/novel-coronavirus-2019 (last visited May 05, 2020).

pandemic, the UNCTAD had predicted a $1 trillion loss in the global economy.[3] With the situation becoming graver each passing day, this figure is only expected to be a small fraction of the consequences that are yet to surface. With India alone expecting a negative growth in the present financial year,[4] the estimated loss after the first three-week lockdown was $120 billion.[5] These estimates are only expected to rise as lockdowns across the world have been extended as the number of cases continue to rise.

Global shares have plummeted and central banks have slashed interest rates, which economic analysts believe to be losses so great, that governmental action would not be enough.[6] A systematic fall in the prices of crude oil, even before the declaration of the pandemic, was noticed as trade and travel bans extended beyond domestic borders.[7] Every country

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[3] *Coronavirus outbreak could cost global economy up to USD 2 trillion: UNCTAD,* THE ECONOMIC TIMES (Mar. 10, 2020), https://economictimes.indiatimes.com/news/international/business/coronavirus-outbreak-could-cost-global-economy-up-to-usd-2-trillion-unctad/articleshow/74560638.cms?from=mdr.

[4] *We should plan for negative growth rate this FY, says Arvind Subramanian*, THE INDIAN EXPRESS (Apr. 28, 2020), https://indianexpress.com/article/india/express-adda-live-updates-arvind-subramanian-coronavirus-economy-recession-india-lockdown-6382855/.

[5] Amit Mudgill, *How will India lockdown play out for economy & markets: 4 scenarios*, THE ECONOMIC TIMES (Mar. 25, 2020), https://economictimes.indiatimes.com/markets/stocks/news/how-will-india-lockdown-play-out-for-economy-markets-4-scenarios/articleshow/74804087.cms.

[6] Lora Jones, *Coronavirus: A visual guide to the economic impact*, BBC (Apr. 30, 2020), https://www.bbc.com/news/business-51706225.

[7] *Global crude oil prices fall as coronavirus spreads outside China*, THE ECONOMIC TIMES (Mar. 1, 2020), https://energy.economictimes.indiatimes.com/news/oil-and-gas/global-crude-oil-prices-fall-as-coronavirus-spreads-outside-china/74422710; Will Beacham, *Coronavirus, oil price crash - impact on chemicals,* INDEPENDENT COMMODITY INTEL. SERVICES (May 6, 2020), https://www.icis.com/explore/resources/news/2020/04/30/10462108/topic-page-coronavirus-oil-price-crash-impact-on-chemicals.

under lockdown is facing the problem of decline in the manufacturing sector, which has a cascading effect on surging unemployment rates.

The slowdown in the economy is however, not a complete stoppage on all forms of employment. With people living under quarantine, workspaces too have shifted from the public spaces of offices to the domestic spaces of living rooms. Working from home has emerged as the only solution to oil the gears of the economy. For obvious reasons, the sectors like manufacturing and production, construction, and many more cannot be sustained in the work from home model, but many IT companies, law firms, businesses, etc. seem to appreciate this model.

In Deloitte's "Future of Work Accelerated: Learnings from the COVID-19 Pandemic", while recognising International Monetary Fund's prediction of the magnitude of the current recession to be equivalent to the Great Depression, it is also elucidated that improvements in customer service, decision making and collaboration of various organisations have been documented.[8] The work from home model has been hailed as a blessing in disguise by a lot of employers, especially in the IT sector, because of the cutting of costs in the management and maintenance of physical workplaces like office campuses.[9] With the limited measures we have to gauge the benefits and disadvantages of the work from home model, the complete picture cannot be painted yet. However, like every great tragedy, this 21st century pandemic too puts forth a new dimension

[8] *Future of Work accelerated: Learnings from the COVID-19 Pandemic,* DELOITTE (Apr. 2020), https://www2.deloitte.com/content/dam/Deloitte/in/Documents/human-capital/in-consulting-accelerated-hc-consulting-noexp.pdf.

[9] *Coronavirus lockdown a blessing in disguise for IT sector, say executives*, BUSINESS STANDARD (Apr. 26, 2020), https://www.business-standard.com/article/current-affairs/covid-19-impact-more-people-in-services-sector-to-work-from-home-in-future-120042600500_1.html.

in the legal field. While most legal developments and concerns would be accurately recognised once the pandemic is over, two of the most imminent and pressing legal issues, of contractual obligations and privacy concerns that could possibly arise because of the work from home model shall be focused on in this article.

II. CONTRACTUAL OBLIGATIONS

In wake of the pandemic, many companies in India have asked their employees to work from home. While work from home strategy is well laid out in the IT sector, the same cannot be effectively implemented in the manufacturing sector.[10]

This has demonstrated a crippling effect on the supply chain since a party's ability to perform their obligations under a contract was compromised.[11] Therefore, suppliers may seek to avoid or delay the performance of contractual obligations due to such effects of the pandemic which could not have been reasonably foreseen or controlled by the performing party. For this purpose, they may invoke the *force majeure* clause under their contracts to prevent themselves from any liability which is to arise out of such non-performance.

The non-performance of contractual obligations would entail severe economic implications at the national and global levels due to non-

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[10] Lijee Phillip, *Covid-19 Impact: For manufacturers, work from home doesn't work,* THE ECONOMIC TIMES (Mar. 11, 2020), https://economictimes.indiatimes.com/news/company/corporate-trends/covid-19-impact-for-manufacturers-work-from-home-doesnt-work/articleshow/74569188.cms.

[11] Dipak Mondal, *Firms to seek protection under 'force majeure' as coronavirus disrupts businesses*, BUSINESS TODAY (Mar. 22, 2020), https://www.businesstoday.in/top-story/firms-to-seek-protection-under-force-majeure-as-coronavirus-disrupts-businesses/story/398905.html.

performance of contractual obligations at various levels such as on the part of farmers, manufacturers, wholesalers, retailers, service providers, etc. This stoppage in production of various goods due to non-procurement of raw materials and non-availability of workforce leads to shortage in both the domestic pool of commodities as well as exports.

It is estimated that the pandemic will have an adverse impact on the Indian economy between April and June, 2020 due to a decrease of almost 9% in the Gross Value Added (GVA) despite the $22.5 billion relief package announced by the government.[12] Statistically speaking, a single day of lockdown entailing zero production of goods and services is around Rs. 50,000 crore of real Gross Domestic Product (GDP).[13]

It can therefore be said that the pandemic is a *force majeure* event owing to its unfavourable impact, and the fact that its escalation could not have been anticipated and controlled by various contracting parties who are not able to fulfil their contractual requirements. However, it must be stated here that there does not exist an implied *force majeure* clause in an agreement but must be explicitly provided for in the contract entered into by the parties, in such a way, that the extent of protection under the clause

[12] Madhumita Jaganmohan, *Estimated economic impact from COVID-19 on India's GVA April-June 2020 by sector*, STATISTA (Apr. 17, 2020), https://www.statista.com/statistics/1107798/india-estimated-economic-impact-of-coronavirus-by-sector/.

[13] Madan Sabnavis, *Coronavirus Outbreak: How a prolonged shutdown will affect India's salaried class, jobs, farm production, manufacturing*, FIRSTPOST (Mar. 23, 2020, 9:39 PM), https://www.firstpost.com/health/coronavirus-outbreak-how-a-prolonged-shutdown-will-affect-indias-stressed-economy-cause-collateral-damage-to-jobs-farm-production-manufacturing-8179491.html.

will depend upon the explicit language and wording of the incorporated clause.[14]

Therefore, where the defence of *force majeure* is claimed by the performing party, it must be checked whether the clause is expressly provided for in the contract and can also be enforced under the given circumstances. In the absence of any such clause, remedy can be sought under Section 56,[15] due to the applicability of 'doctrine of frustration'.[16]

III. DATA BREACH AND CONFIDENTIALITY

To arrest the spread of the virus through community contact and to successfully implement social distancing, the Government of India advised companies to adopt the work from home policy.[17] Thus, companies and firms that hitherto maintained the highest standards of security and confidentiality, were forced into allowing the employees to switch to remote workplaces through their personal and 'unprotected' devices. It must be noted here that 'work from home' is not a standard norm or practice,[18] and there does not exist a comprehensive legal framework in India that supports the work from home structure.

Moreover, when working from offices, companies maintain a protected workspace and operate through exclusive in-house or protected

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[14] Lebeaupin v. Crispin [1920] 2 KB 714.
[15] Indian Contract Act, No. 9 of 1872, Imperial Legislative Council, § 56.
[16] Energy Washdog v. Cent. Electricity Regulatory Comm'n, (2017) 14 SCC 80.
[17] *Implement 'Work from Home' policy for employees: Govt advises companies,* THE ECONOMIC TIMES (Mar. 19, 2020), https://economictimes.indiatimes.com/news/economy/policy/implement-work-from-home-policy-for-employees-govt-advises-companies/articleshow/74718157.cms.
[18] *Coronavirus: Health scare forces work from home, but is India Inc ready?,* BUSINESS STANDARD (Mar. 23, 2020), https://www.business-standard.com/article/companies/coronavirus-health-scare-forces-work-from-home-but-is-india-inc-ready-120032300027_1.html

servers and provide for added safeguards such as data protection software, cloud services, virtual private network (VPN), endpoint encryption, firewalls, etc.[19] However, the same level of protection cannot be ensured when the employees are working from their homes as it increases the possibility of confidentiality breaches by unauthorised third parties.[20] Confidential information refers to the data or material that, having been designated as secret or confidential, only a limited number of authorized persons may know about.[21] In the past two months, almost 4000 fraud portals related to coronavirus have been created across the globe by cybercriminals and other mafia organizations.[22]

It must be noted here that India lacks a dedicated data protection legislation. While the Personal Data Protection Bill, 2019 was introduced in the Lower House of the Parliament, it is yet to see the light of day as a binding legislation passed by both houses.

It thus becomes pertinent to appreciate the remedies available with the provider of information for breach of confidentiality by the receiver of such information and the intermediaries.

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[19] Diane Wilson, *Hackers targeting employees who are working from home due to coronavirus*, ABC NEWS (Mar. 27, 2020), https://abc11.com/work-from-home-hacker-vpn-cybersecurity/6053032/.

[20] Vinod Malhotra, *Hackers are using Covid-19 disruption to infiltrate corporate networks*, THE ECONOMIC TIMES (Mar. 27, 2020), https://economictimes.indiatimes.com/tech/internet/hackers-are-using-covid-19-disruption-to-infiltrate-corporate-networks/articleshow/74837213.cms?from=mdr

[21] BLACK'S LAW DICTIONARY (9th ed. 2009).

[22] Sandhya Sharma, *Cyber chief's warning as hackers target PM's Covid fund*, THE ECONOMIC TIMES (Mar. 31, 2020), https://economictimes.indiatimes.com/tech/internet/cyber-chiefs-warning-as-hackers-target-pms-covid-fund/articleshow/74877953.cms?from=mdr.

A. Indian Contract Act, 1872

Generally, there exists a non-disclosure agreement (NDA) that has to be signed by the employee at the time of the employment. Thus, any instance of breach of this agreement of confidentiality on part of the 'receiver of information', would attract the provisions of Section 73,[23] or 74,[24] of the Indian Contract Act, 1872 whereby the 'provider of information' may file a suit for recovery on account of such breach.

B. Specific Relief Act, 1963

Under the Specific Relief Act, 1963 remedy can be sought in form of prohibitory injunction by a client or the 'provider of information' under Section 38 of the Act,[25] if he apprehends a breach of the agreement of confidentiality on part of the 'receiver of information' on the assertion of its right to confidentiality in its information.[26]

Until the application of prohibitory injunction is heard by the Court, interim prohibitory injunction can also be sought under Order XXXIX, Rule 1 and 2 of the Civil Procedure Code, 1908.[27]

C. Indian Penal Code, 1860

A party that stands in breach of the agreement of confidentiality can also be prosecuted under various provisions of the penal code. A party can be prosecuted under Section 403,[28] of the Indian Penal Code ("**IPC**") for

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[23] Indian Contract Act, No. 9 of 1872, Imperial Legislative Council, § 73.
[24] *Id.*, § 74.
[25] Specific Relief Act, 1963, No. 47, Acts of Parliament, 1963, § 38.
[26] Petronet LNG Ltd. v. Indian Petro Group, 2009 SCC OnLine Del 841.
[27] CODE CIV. PROC. (1908) Order XXXIX, rule 1, 2.
[28] PEN. CODE (1860) § 403.

in case of dishonest misappropriation of confidential information on his part, to his own use.[29]

Moreover, a person can also be prosecuted under the provisions contained in Section 405,[30] and 408,[31] for criminal breach of trust in case of dishonest misappropriation of property in such a manner that it stands in contravention with the provisions of law or it is against the spirit of contract entered into between the parties.[32]

It would be pertinent to note here that Section 405 does not use the word 'property' in a restrictive sense and thus data would be covered within the ambit of 'property' in Section 405 of IPC[33] and such a person can therefore be prosecuted for sharing the confidential information with an unauthorized third person.

D. Information Technology Act, 2000

The Information Technology Act, 2000 read with Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 seek to protect personal information and sensitive personal information or data.

Section 43A of the Act provides for penal consequences for negligence in implementing and maintaining reasonable security practices and procedures in relation to sensitive personal data or information by a body

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[29] Indian Oil Corp. v. NEPC India Ltd., (2006) 6 SCC 736.
[30] PEN. CODE (1860) § 405.
[31] *Id.*, § 408.
[32] Jaswantrai Akhaney v. State of Bombay, AIR 1956 SC 575.
[33] R.K. Dalmia v. Delhi Administration, AIR 1962 SC 182; Common Cause v. Union of India, (1999) 6 SCC 667.

corporate.[34] Thus, failure to adopt and implement a strong and adequate work from home policy, on part of the corporates, such that this 'negligence' leads to disclosure of such confidential information that causes wrongful loss or a wrongful gain to another person, the body corporate would be liable to pay compensation to such person on account of such disclosure.

Furthermore, Section 72A of the Act provides that when a person stands in breach of the contract by disclosing personal information of a person to an unauthorised third party, i.e. without the consent of such party, with the intent to cause of knowing that he will cause a wrongful loss or a wrongful gain to another party, can face a punishment of up to three years imprisonment and/or a fine to the tune of five lakhs.[35]

IV. THE WAY FORWARD

The human cost of the coronavirus pandemic is quite extensive and worrisome. The pandemic however, has not broken the systems in which we worked and lived, but has rather exposed a broken system. From the lack of health care facilities, to the ailing (im) balance in global wealth, the pandemic has brought to light all the problems that should have been noticed without a crippling global emergency.

As debilitating as the virus might be for the world, the experience that we shall gain while fighting might just revolutionise workspaces forever. The economic impact of working from home is yet to be materialised in quantitative data, but a lot of banking and IT leaders are

[34] Information Technology Act, 2000, No. 21, Acts of Parliament, 2000, § 43A.
[35] *Id.*, § 72A.

considering to continue the model even after situations normalise. Aditya Puri, the managing director of HDFC bank, considers the work from home model as a viable one, because of the benefits of saving costs.[36] In his view, the application of this model only highlighted how so many employs could have already worked from home.

Finland stands a world leader in the successful application of a work from home model.[37] The country has achieved this by allowing a statutory intervention in this regard, by passing the Working Hours Act in 1996,[38] which allowed workers to work flexibly. With the 2020 amendments in the Act, the flexibility is not limited to just the hours but also the place of work.[39] Not only has this reduced exploitation, but has improved employees' productivity, and hence succoured companies economically. As revealed by the 2015 Stanford study by Nicholas Bloom, [40] work ethic improves and sick leaves decrease when employees are allowed to work from home. Since a company's success is directly proportionate to the productivity of its workers, innovative ways have to be come up with in order to boost this productivity. The work from home model is what is supporting many industries at the moment, and it is this model that can perhaps be applied in the future too if inspiration is drawn from the Finland example of statutory intervention.

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[36] *supra* Note 18.

[37] Maddy Savage, *Why Finland leads the world in flexible work*, BBC (Aug. 9, 2020), https://www.bbc.com/worklife/article/20190807-why-finland-leads-the-world-in-flexible-work.

[38] Working Hours Act, 1996 (Fin).

[39] Mika Karkkainen, *Finland - New Working Hours Act brings changes to working hour arrangements*, LEXOLOGY (Sept. 12, 2019), https://www.lexology.com/library/detail.aspx?g=0a9a381e-3f35-487c-b853-9df5fc745244.

[40] Nicholas Bloom et al., *Does Working from Home Work? Evidence from a Chinese Experiment*, 130 QUARTERLY J. ECON. 165, 218 (2015).

If companies decide to adopt this model even after the lockdown is lifted, many workers of the lower rungs would be at a risk of losing their jobs. The question of compensations and the furore raised by labour unions would become the dominating factors in the intersection of law and economics. While issues like sexual harassment at workplaces would be mitigated, the new problem of dividing the line between professional and personal relationships in a virtual space shall emerge as a novel legal issue.

What the future has in store for the work from home model is not easy to gauge at this nascent stage. The economic viability of this model seems alluring, but the legal viability too has to be kept in mind, before the model is actually applied. Concerns like contractual liability and a safe environment which diminishes privacy and data beaches have to be considered. Lessons learnt from the ill experiences of coronavirus, should not be overlooked, but rather used to fix the broken system that allowed such a tragedy to happen in the first place.

INDIA'S DILEMMA WITH CHINESE INVESTMENTS

- Pranav Bafna[1]

I. INTRODUCTION

The word 'capital' is a unique homonym in the present day context. Both a business and a country cannot function without it, and ironically, both have been ravaged by the same pathogen, the Coronavirus. Not only has the virus destabilized the healthcare systems, it has also wreaked havoc on the capital markets. The Government of India imposed a nationwide lockdown to contain its spread, thereby restricting the movement of individuals into, out of and within the country. However, the economic consequences of the pandemic have led to the realization that India has to restrict the inflow of capital as well. The pandemic kicked off a huge sell off in the financial markets. The excess supply triggered the lower prices and the lower prices attracted the attention of India's much maligned neighbour, China.

When the People's Bank of China decided to go fishing, it caught a significant quantum of shares belonging to India's largest mortgage lender, Housing Development Finance Corporation Limited ('**HDFC**').[2]

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[1] Pranav Bafna is a student of B.A. LL.B. at ILS Law College, Pune.
[2] Rajesh Mascarenhas, *China's central bank buys 1% stake in HDFC,* THE ECONOMIC TIMES (Apr. 13, 2020),

Undoubtedly, this purchase created apprehensions across the board. The Government of India was compelled to react. The Department for Promotion of Industry and Internal Trade (DPIIT) responded *vide* a Press Note.[3] The Press Note is high on emotions but low on coherence. It seeks to send a message to India's neighbours, particularly China, that being opportunistic in India's capital markets will not be perceived as a virtuous act.

With the paucity of capital infusion from domestic as well as western investors, China's financial involvement in Indian industries has been generating significant traction. If left unchecked, it could have dire consequences for the Indian economy. While this emotive message rings loud and clear in the Press Note, its impact on the economy is debatable, particularly if this Press Note is to be succeeded by an elaborate Foreign Direct Investment ('**FDI**') policy with regards to investments having Chinese linkages. This article seeks to address this dilemma brought forth by the prevailing COVID-19 situation.

II. GROWING DEPENDENCE ON CHINA

The period between the year 2000 and the year 2014 witnessed a meteoric rise in trade relations between India and China. The trade between the two countries has grown from less than Two Billion US Dollars in the year 2000 to 38 Billion US Dollars in the year 2008 and

https://economictimes.indiatimes.com/markets/stocks/news/chinas-central-bank-holds-1-stake-in-hdfc/articleshow/75104998.cms

[3] Dept. for Promotion of Indus. & Internal Trade, Govt. of India, Press Note 3, 2020 Series, DPIIT File No.: No. 5(5)/2020-FDI Policy (Apr. 17, 2020).

95.5 Billion US Dollars in the year 2018.[4] However, neither was China deeply invested in India nor was it dependent on Indian companies for technology. India's burgeoning trade deficit with China indicates that this trade relationship has been a one way street.

The year 2014 is perceived as an inflexion point in the economic ties between the two nations. Approximately one-third of the 800 Chinese companies entered the Indian market during that year.[5] Further, approximately 42% of these were in the manufacturing sector and 25% in the infrastructure-related sector. The rest were in telecom (9%), petrochemicals (8%), and software and IT (4%).[6] Although official records are unavailable, China's cumulative investment in India can be pegged in excess of 8 Billion Dollars. A substantial rise from the 1.6 Billion Dollar cumulative investment figure in the year 2014[7].

While investors have been bullish about India's future, not many have been able to back their words with their wallets. Other than Chinese investors, the risk tolerance threshold of investors has been low. This has been observed in the start-up space wherein eighteen out of India's twenty three multibillion dollar start-ups have received equity infusion from Chinese companies.[8] Failure to keep this in check might result in Indian

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[4] *India-China Trade and Economic Relations*, EMBASSY OF INDIA, BEIJING, https://www.eoibeijing.gov.in/economic-and-trade-relation.php# (last visited May 2, 2020).
[5] Ananth Krishnan, *Following The Money: China Inc's Growing stake in India-China relations*, Brookings India Impact Series March 2020, at 12, *at* https://www.brookings.edu/research/following-the-money-china-incs-growing-stake-in-india-china-relations/ (last visited May 2, 2020).
[6] *Id.*
[7] *Id.*, at 11.
[8] Swaminathan S Anklesaria Aiyar, *Erecting a firewall against China will only hurt India*, THE ECONOMIC TIMES (Apr. 23, 2020),

promoters becoming salaried employees of their Mandarin speaking owners. Alas, the ethos of "Make in India" needs to be backed by the ethos of "Fund from India".

It is imperative that India avoids this financial overdependence on other countries by maintaining a balance between domestic and foreign capital infusion, in the post pandemic world.

III. CHINESE MODEL OF CORPORATE GOVERNANCE

While India proactively seeks investments from institutions abroad, its uneasiness, particularly with Chinese investments, is palpable. This trepidation over Chinese dependence primarily stems from the Chinese Corporate Governance Framework. "It's important to remember that Chinese company relationships with the Chinese government aren't like private sector company relationships with governments in the West."[9] The Communist Party of China ('Party') wants economic growth, but not at the expense of tolerating any organized alternative centres of power.[10] Having seen business threaten to take over the state in Russia, Beijing has been determined to make sure that the same disaster does not befall China.[11] Thus, unlike in Western Companies, the demarcation lines between the Party and private enterprises have increasingly blurred.

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https://m.economictimes.com/news/economy/policy/view-ere…-against-china-will-only-hurt-india/articleshow/75280011.cms

[9] Interview with William Avenina, David E. Sanger, *In 5G Race With China, U.S. Pushes Allies to Fight Huawei*, THE NEW YORK TIMES (Jan. 26, 2019), https://www.google.co.in/amp/s/www.nytimes.com/2019/01/26/us/politics/huawei-china-us-5g-technology.amp.html.

[10] Richard McGregor, *How the State Runs Business in China*, THE GUARDIAN (Jul. 25, 2019), https://www.theguardian.com/world/2019/jul/25/china-busine…-xi-jinping-communist-party-state-private-enterprise-huawei.

[11] *Id.*

Unlike the erstwhile State-owned enterprises, the private enterprises function at the behest of the Party. In 2018, the Chinese securities regulator issued a new corporate governance code wherein listed companies were mandated to incorporate an expansive role for the Party in their internal guidelines[12]. In 2017, Party committees existed in around 70 percent of 1.86 million privately owned companies in China, with a presence that is destined to grow.[13] With the Chinese Government catering solely to the Party's ideology, one can infer that private enterprises are serving as instruments for wielding their soft power across the globe.

Jack Ma, founder of the Chinese conglomerate 'Alibaba' had famously said at the World Economic Forum 2007, "My philosophy is to be in love with the government, but never marry them"[14]. This quote speaks volumes about the influential position the Party holds with respect to the domestic affairs. While Indian corporations' 'notional interest' dictate their love for Chinese backers, it must not come at the price of India's 'national interests'. A coherent economic policy shall go a long way in avoiding unwanted influence.

IV. FOREIGN DIRECT INVESTMENT AND INVESTMENT ROUTES

Before its amendment vide Press Note 3, Para 3.1.1 of the Consolidated Foreign Direct Investment Policy, 2017 mandated that

[12] Daniel Rosen et al., *Missing Link: Corporate Governance in China's State Sector,* Asia Society Special Report, 7, *at* https://asiasociety.org/sites/default/files/inline-files/ASNC_Rhodium_SOEReport.pdf (last visited May 25, 2020)

[13] Federica Russo, *Politics in the Boardroom: The Role of Chinese Communist Party Committees*, THE DIPLOMAT (Dec. 24, 2019), https://thediplomat.com/2019/12/politics-in-the-boardroom-the-role-of-chinese-communist-party-committees/.

[14] Press Trust of India, *Jack Ma, China's richest man, is a Communist Party member*, OUTLOOK (Nov. 27, 2018), https://www.outlookindia.com/newsscroll/jack-ma-chinas-richest-man-is-a-communist-party-member/1429157.

investments by a Bangladeshi or Pakistani, corporation or citizen, ought to come from the "Government Route"[15]. In this regard, there were no restrictions for investments originating from China. The two key terms in this paragraph, "Foreign Direct Investment" and "Government Route" have been discussed hereunder.

"Foreign Direct Investment" reflects the existence of a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence on the management of the latter.[16] In other words, Foreign Direct Investment entails the transfer of controlling rights over the business to its prospective investor. Foreign Direct Investment is an important source of financing for transition economies as it helps to cover the current account deficit, fiscal deficit and supplements inadequate domestic resources to finance both ownership change and capital formation.[17] It also facilitates the transfer of technology, know-how and skills, and helps local enterprises to expand into foreign markets.[18]

In India, Foreign Direct Investment can come via two routes, namely, "Automatic Route" and "Government Route". Under the "Automatic Route", the non-resident investor or the Indian company does not require any approval from the Government of India for investment.[19] To add

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[15] Rule 6, Foreign Exchange Management (Non-debt Instruments) Rules, 2019, Gazette of India, pt. II sec 3(ii) (Oct. 17, 2019).
[16] Maitena Duce, *Definitions of Foreign Direct Investment (FDI): a methodological note* (Banco De Espana) Jul. 31, 2003, at 2, https://www.bis.org/publ/cgfs22bde3.pdf.
[17] SUDHIR KOCHHAR, FOREIGN EXCHANGE OPERATIONS UNDER FEMA 14.3 (2019).
[18] *Id.*
[19] Dept. of Indus. Pol'y & Promotion, Govt. of India, Consolidated FDI Policy Circular of 2017, *at* https://dipp.gov.in/sites/default/files/CFPC_2017_FINAL_RELEASED_28.8.17_1.pdf. (last visited May 25, 2020)

perspective, 100% FDI under the Approval Route is permitted in the manufacturing, infrastructure, petrochemicals and technology sector.[20] As highlighted earlier, these are the sectors wherein China primarily invests.

The "Government Route", requires consideration of investment proposals by respective Administrative Ministry/ Departments.[21] The said route is infamous for an unreasonably long screening process which can take six to twelve months.[22] If capital infusion is important, its timely infusion cannot be emphasized enough. The author believes, the higher transaction costs coupled with the opportunity cost due to the delay has diluted the desirability for investments through this route.

V. A STITCH IN TIME SAVES NINE

Not so long ago, the Government of India was frantically chasing Chinese investments. It was in awe of the economic metamorphosis its Chinese counterpart had undergone. In spite of the ongoing border conflicts, it has been a widely accepted perception that partnering with China could be of tremendous value. The Government tried to tread a thin line between balancing its economic interests while preserving the security of our borders. Our neighbours have leveraged on the "Automatic Route" and squeezed in to its fullest, pumping in billions of dollars nonchalantly.

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[20] *Id.*
[21] *Id.*
[22] Ashwin Mohan, *New FDI Law covering Chinese Investments sends dealmakers into a tizzy*, MONEY CONTROL (Apr. 23, 2020), https://www.moneycontrol.com/news/business/new-fdi-law-covering-chinese-investments-sends-dealmakers-into-a-tizzy-5183921.html

Investing in a growing India serves as a useful hedge to the Chinese economy which has been suffering with a flattening growth curve.[23] Further, investing in India, China's competitor market, augments the soft power that the latter could exercise over the former. Undoubtedly, the Chinese could not go wrong when it comes to investing in India.

India's less than desirable growth rate coupled with the COVID-19 induced market crash has devalued Indian companies tremendously.[24] The pandemic could be a once in a lifetime opportunity for China to go bounty hunting in the Indian markets and gain a substantial control in India's 'abandoned, yet beloved' assets. Alas - India would not only lose a huge chunk of its family silver to this pandemic, but also lose some vital soft power in its struggle for supremacy. In a lighter vein, Indian equities could be more addictive for the Chinese than their much-loved opium.

The Housing Development Finance Corporation has been the only ray of hope during India's banking crisis. When the People's Bank of China tried to take a piece from it, alarm bells went ringing across the nation. This minor purchase served as a timely reminder that India cannot lose its strategic assets to an erratic neighbour whose goodwill has been massively eroded by the Coronavirus. In fear of potential consequences, a change in policy was hastily introduced.

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[23] *China GDP Annual Growth Rate,* TRADING ECONOMICS, https://tradingeconomics.com/china/gdp-growth-annual (last visited on 25 May, 2020).

[24] Abhishek Raja, *COVID-19 and stock market crash,* OUTLOOK MONEY (Apr. 21, 2020), https://www.outlookindia.com/outlookmoney/equity/covid-19-impact-on-stock-market-4666

VI. INTERPRETING THE NEW POLICY

The Department for Promotion of Industry and Internal Trade is responsible, *inter alia*, for formulation of FDI Policy and promotion, approval and facilitation of FDI. A key concern for the Department has been the threat of opportunistic takeovers/acquisitions of Indian companies[25]. Consequently, it decided to tinker with the extant FDI Policy vide a press note on 17th April, 2020.Relevant extract of the revised FDI Policy has been reproduced hereunder:

> *3.1.1(a) A non-resident entity can invest in India, subject to the FDI Policy except in those sectors/activities which are prohibited. However, an entity of a country, which shares land border with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country, can invest only under the Government route.*[26]

Further, the Press Note also mandated that "3.1.1(b) In the event of the transfer of ownership of any existing or future FDI in an entity in India, directly or indirectly, resulting in the beneficial ownership falling within the restriction/purview of the para 3.1.1(a), such subsequent change in beneficial ownership will also require Government approval"[27].

While these directions were given merely in the form of a policy change, legal sanction was only given vide an amendment in the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019[28]. The said amendment ought to take effect from the date of its notification, 22 April, 2020. The notification was reproduced verbatim and the contents of the

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[25] *supra* note 3.
[26] *supra* note 3.
[27] *supra* note 3.
[28] *supra* note 15.

aforementioned Press Note substituted the erstwhile contents of Rule 6, Clause (a).[29]

On breaking down the notification, one can infer that any entity of a country which "shares a land border with India", or an entity whose beneficial owner is situated in or is a citizen of such country is instructed to obtain 'Government Approval' for making an investment in India. According to the author, the expression "shares a land border with India" would include the following countries, namely, China, Bangladesh, Pakistan, Bhutan, Nepal, Myanmar, and Afghanistan. Having reviewed the structure of FDI inflows into India, it is no secret that this phrase primarily targets investments originating from China. Consequently, questions have been raised on whether direct investments originating from Taiwan and Hong Kong shall also fall under the 'Government Route'.[30]

The scope of this notification has been confined to having a "beneficial ownership" in India-bound investments. The expression "beneficial ownership" has not been defined in the Press Note or in the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019. P. M. Devaiah, Vice Chairman & Group General Counsel for Everstone Capital has aptly remarked:

> *The PN3's stoic silence on the meaning of beneficial ownership that would trigger the approval process has caused a lot of anxiety. Cautiously, experts have even opined that pre-approval might be obligatory even where the beneficial ownership is de-minimis. While one could speculate that might not be intent of PN3, in times we are faced with, such intention cannot be ruled out. It's no*

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[29] *supra* note 3.

[30] P. M. Devaiah, *Social Distancing the Dragon*, BAR AND BENCH (Apr. 27, 2020), https://www.barandbench.com/columns/social-distancing-the-dragon.

> *accident, that PN3 has been notified as is under FEMA with no amendments establishing clearly a point of harmony between the two institutions to lay bare the unequivocal regulatory intent.*[31]

"Beneficial Ownership" in an organization can be assessed through various divergent tests like a percentage threshold test or through a test of control. The former being used under the Companies Act, 2013 while the latter is under the Prevention of Money Laundering Act, 2002 ('PMLA'). "Beneficial Owner" under PMLA "means an individual who ultimately owns or controls a client of a reporting entity or the person on whose behalf a transaction is being conducted and includes a person who exercises ultimate effective control over a juridical person"[32]. The definition of "significant beneficial owner"[33] provided under the Companies (Significant Beneficial Owners) Rules, 2018 is in connection with certain disclosure requirements for shares held in trust. In this regard, the rule stipulates that any person having ten percent or more interest - directly or indirectly - in shares, voting rights or dividend of the concerned entity could constitute a Significant Beneficial Owner. A threshold based definition brings tremendous levels of clarity. However, it fails to bring all the concerned companies under its radar. Particularly those who possess a beneficial ownership in substance, not necessarily as per the nomenclature. Thus, the test of control prescribed under Section 2(fa) of the PMLA would be an effective aid to vetting investments originating from India's neighbours.

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[31] *Id.*
[32] Prevention of Money-Laundering Act, 2002, No. 15, Acts of Parliament, 2003, § 2(fa).
[33] Companies (Significant Beneficial Owners) Rules, 2018, G.S.R. 100(E) Gazette of India, r. 2(h) (Jun. 13, 2018).

The stoic silence on the meaning of "beneficial ownership" will give a lot of sleepless nights to anxious investors. Particularly if the government's intention is to scrutinize investments at a *de-minimis* level.

VII. IMPLICATIONS OF THE POLICY CHANGE

Beneath the unspoken candour of the notification lies hidden, prolific foreign policy, national interest, economic security and an unwavering message of sovereignty.[34] The government may argue that the amendment was out of sheer urgency to protect India, however, investor sentiment has been hurt in the process. The government needs to assuage their pain for ensuring a faster economic recovery. Therefore, in the process of creating a friendly, open and predictable investment environment, the government will also need to more proactively safeguard longer-term considerations of security and privacy as it opens the door to new sources of investment.[35]

Akin to India's policy change, other major economies have also taken measures to curb the inward movement of foreign investments. For instance, Spain *vide* Royal Decree-Law 8/2020 ('RDL') defines "Foreign Direct Investments" as those investments by Foreign Investors to the extent they entail (a) reaching or exceeding the 10% threshold of the share capital of a Spanish company, or (b) obtaining an effective participation in the management or taking control of a Spanish Company.[36]

Further, the government needs to clarify its position on holders of warrants, right shares and holders of call and put options. There are a huge quantum of investment funds which have investments as well as

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[34] *supra* note 17.
[35] *supra* note 4, at 6.
[36] R.D.L. 8/2020, art. 7 (Spain).

shareholders in China and India. The government must clarify if the instant notification will apply to them. Basic rules of business suggests that nothing scares off an investor more than uncertainty.

The world's disenchantment with China will make India a potential destination for future supply chain routes. To win over its suitors, India needs to rise to the occasion and prove its mettle during times of crisis. With a consistent and litigation free investment climate, India can turn this crisis into its greatest ever opportunity. India's future FDI regime will go a long way in ensuring the same.

VIII. CONCLUSION

The pandemic has taught the world some critical lessons on survival - striving for a balance is better than striving for excess; overdependence on any entity can compound the devastation caused; and Chinese private entities are 'private' only in nomenclature. India's history with the East India Company must serve as a timely reminder to the higher echelons in the government that there is a stark difference between 'foreign influence' and 'foreign investment'. The future FDI Policy must send a loud and clear message that India is open to the latter, not the former. In other words, Chinese investments will be welcome, provided India's sovereignty is untouched.

Alas, just like the Coronavirus, there is no straight jacket cure to this dilemma. 'Social Distancing' ourselves has been a successful stop gap arrangement. However, the moment we decide to venture out, we will need a sustainable solution.

AWAKENING CORPORATE CONSCIENCE: THE CSR RESPONSE TO COVID-19

- Shefali Chawla and Tanya Nair[1]

I. INTRODUCTION

The current Coronavirus pandemic brought forth by the SARS-CoV-2 virus (coronavirus) began with the discovery of the novel virus in Southeast Asia in December 2019. Since then, it has resulted in thousands of deaths and severe disruption in economies all over the world. The novel coronavirus disease has affected everyone including huge corporations, governments and civilians. From social distancing to generating awareness, social responsibility holds intrinsic value in our battle against this deadly virus. How big corporates decide to exhibit morally and socially ethical behaviour, albeit at the cost of short term financial loss, amidst this world crisis will have a profound impact on a country's success to curb the spread of the virus and combat the economic crisis. Given this situation, this essay seeks to analyse the existent Corporate Social Responsibility ("**CSR**") laws in India and the response of the Government of India ("**GoI**") to the CSR law post-COVID-19. The essay further evaluates and assesses the move of the GoI and provides policy

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recommendations and suggestions to overcome the present shortcomings in its response.

II. LAW GOVERNING CSR – WHAT IS IT?

International jurisprudence on CSR is found in the United Nations Guiding Principles on Business and Human Rights. The guiding principles contained therein rest on three pillars which are the state duty to protect, the corporate responsibility to respect and access to remedy.[2] CSR may be seen as self-regulatory approaches adopted by entities to comply and align with human rights and international norms on sustainability backed with sanctions at the national level.[3] It is recognized that corporations are not philanthropic organizations, although corporate philanthropy forms an essential component of CSR, and alignment of business objectives with sustainability and growth is an equally important part of CSR.[4]

In 2013, India became the first country in the world to make CSR a mandatory obligation. The law on CSR in India is found in section 135 of the Companies Act, 2013 ("**Companies Act**") which mandates that every company having a net worth of rupees 500 crore or more, or turnover of rupees 1000 crore or more or a net profit of rupees 5 crore or more during the immediately preceding financial year shall spend, in every financial

[2] United Nations Office of the High Commissioner, *United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UNCHR (May 1, 2020, 5:54 PM) https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf

[3] Norms on the Responsibilities of Transnational Corporations Other Business Enterprises with Regard to Human Rights., UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003), *at* https://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/160/08/PDF/G0316008.pdf?OpenElement.

[4] Matteo Tonello, *The Business Case for Corporate Social Responsibility*, HARVARD LAW SCHOOL FORUM ON CORP. GOVERNANCE (Apr. 17, 2020), https://corpgov.law.harvard.edu/2011/06/26/the-business-case-for-corporate-social-responsibility/#26.

year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, to perform any of the activities listed in Schedule VII of the Companies Act.[5] The section also provides that every eligible company must establish a CSR committee, which will formulate the CSR Policy of the company. Schedule VII of the Companies Act includes *inter-alia* promotion of healthcare, sanitation, and disaster management.

Despite having mandatory CSR obligations, a piercing criticism of CSR in India is that this compulsory monetary contribution in the name of CSR merely reduces it to a CSR tax and does not give any positive impetus to businesses to align their business policies with social growth and imbibes the spirit of CSR.[6]

III. THE COVID-19 RESPONSE TO CSR LAWS – CSR CONTRIBUTION MAY BE USED TO FIGHT CORONAVIRUS

In a move aimed at gathering more funds to fight the coronavirus pandemic and encouraging companies to ramp up their efforts in the fight, the Ministry of Corporate Affairs ("**MCA**") announced in its circular dated March 23, 2020, that the spending of CSR funds for COVID- 19 will be treated as CSR activity.[7] For this, companies may spend their earmarked CSR contributions for activities such as promoting healthcare and sanitation, or disaster management as provided in entries (i) and (xii)

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[5] Companies Act, 2013, No. 18, Acts of Parliament, 2013, § 135.
[6] Aneel Karani, *Why the CSR law is not a success*, LIVEMINT (May 3, 2020, 11:43 AM), https://www.livemint.com/Opinion/1wIQwFPRyRckBMg5IugW1K/Why-the-CSR-law-is-not-a-success.html
[7] Ministry of Corporate Affairs, Govt. of India, General Circular No. 10/2020 (Mar. 23, 2020).

of Schedule VII of the Companies Act, 2013.[8] This was supplemented by an office memorandum dated 28th March 2020 which stated that contributions to the Prime Minister's Citizen Awareness and Relief in Emergency Situations Fund ("**PM CARES Fund**") will also be included in the ambit of CSR activity.[9] The clarification explicates that donations to the PM CARES Fund are covered under item (viii) of Schedule VII, which allows companies to make contributions to funds set up by the Central Government for socio-economic development, disaster relief, etc. as it was set up to tackle emergencies such as this pandemic.[10]

In furtherance of these notifications, the MCA has also released a list of Frequently Asked Questions ("**FAQs**") intending to clarify which activities would clearly fall within the ambit of CSR related to COVID-19.[11] These FAQs exclude payment of salaries and wages to employees and workers from the ambit of recognized CSR contributions. To this effect the MCA clarified that payment of salaries and wages to employees and workers is a statutory, contractual and moral obligation of all companies, and will not be considered as a CSR activity except in the situation that the company makes ex-gratia payments to its employees and workers, specifically to tackle COVID-19; in such circumstance, the payments may be admitted as CSR only as a one-time exception. This must also be coupled with an explicit declaration to this effect by the Board of Directors, which is duly certified by the statutory auditor. All in

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[8] *Id.*

[9] Ministry of Corp. Affairs, Govt. of India, Clarification on contribution to PM CARES Fund as eligible CSR activity under item no. (viii) of the Schedule VII of Companies Act, 2013, F. No. CSR-05/1/2020-CSR-MCA (Mar. 28, 2020).

[10] *About PM CARES FUND*, PRIME MINISTER'S OFFICE, GOVT. OF INDIA (May 2, 10:14 PM), https://www.pmindia.gov.in/en/about-pm-cares-fund/.

[11] Ministry of Corp. Affairs, Govt. of India, General Circular No. 15/2020 (Apr. 10, 2020).

all, any amount spent towards payment of salaries/wages would not be included in the calculation of the mandatory 2% CSR contribution under section 135 of the Companies Act.

It is also pertinent to note that the GoI has clarified that contributions made to the fund before March 31 would qualify for exemption under the Income Tax Act,1961 under section 80G of the Act which allows donations made to specific relief funds to be exempt from tax.[12] Additionally, the MCA has indicated that a company's contributions to the PM CARES Fund over and above the minimum prescribed CSR spends can be offset against its CSR obligations of subsequent years.[13] However, there has been no official notification regarding any such development. In other words, if the MCA decides to provide such an option, then companies may make tax-exempt contributions to PM CARES now to reduce their CSR liability for subsequent years by an amount equivalent to that contributed at this stage.

IV. AN ASSESSMENT OF GOI RESPONSE TO CSR LAWS IN LIGHT OF THE COVID-19 PANDEMIC

As noted above, the MCA has clarified that salaries/wages to employees, contract labour, etc. during the lockdown period in India cannot be adjusted against the CSR expenditure of companies as it forms a contractual and statutory obligation of the companies and ex-gratia payment made to temporary workers over and above the disbursement of wages specifically to fight COVID-19 shall be admissible towards CSR

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[12] Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020, § 4.

[13] Gaurav Noronha, *Govt clarifies on company's contributions to PM CARES Fund above CSR limit,* THE ECONOMIC TIMES (May 4, 9:17 AM), https://economictimes.indiatimes.com/news/economy/policy/govt-clarifies-on-companys-contributions-to-pm-cares-fund-above-csr-limit/articleshow/74907220.cms?from=mdr

expenditure.[14] The authors observe that this clarification is unobservant of the laws governing temporary workforce in India because of the following reason-

The Industrial Disputes Act, 1947 ("**ID Act**") requires the establishment of an employer-employee relationship to avail various protections granted under labour legislation.[15] Courts rely on an effective control test to determine the employer-employee relationship.[16] The permanency of relationship is an indicative criterion to determine effective control.[17] The Apex court, by a Constitution Bench, held in the case of *Secretary, State of Karnataka v. Umadevi*,[18] that those temporarily employed do not have a right to be absorbed in service. So, while, companies/contractors are obliged to pay their temporary workforce for the period stipulated in the works contract[19], companies owe no obligation to their temporary workforce so long as the works contract does not coincide with the lockdown period. Hence, the observation of the MCA is unfounded in law, although it has moral standing. Consider Uber India for example, which gives its drivers the status of "agents" or "partners" and not employees, the reason behind it being "lack of control" over its drivers.[20] Hence, Uber may contend that it has no accountability towards its drivers under Indian laws but only a moral obligation.

[14] *COVID-19 related Frequently Asked Questions (FAQs) on Corporate Social Responsibility*, MINISTRY OF CORP. AFFAIRS, GOVT. OF INDIA (May 1, 2020, 4:48 PM) http://www.mca.gov.in/Ministry/pdf/Notification_10042020.pdf.
[15] Balwant Saluja v. Air India Ltd., (2014) 9 SCC 407.
[16] Silver Jubilee Tailoring Houses v. Chief Inspector of Shops, 1974 SCR (1) 747.
[17] *Id.*
[18] Secretary, State of Karnataka v. Umadevi, 2006 (109) FLR 826 (SC).
[19] Payment of Wages Act, No.4, 1936, § 3(2).
[20] Ariene Reis & Vikram Chand, *Uber Drivers: Employees or Independent Contractors?*, KLUWER INT'L TAX BLOG (May 3, 2020, 1:54 PM),

The authors acknowledge that while payments may be routed towards the benefit of temporary workers as ex-gratia payments, however, the prevailing uncertainty around how these payments shall reach these workers in light of the existent lockdown or the impact of such payments on the CTC (Cost To Company) of companies may be a discouraging factor for corporate entities to utilize these CSR funds towards the welfare of their temporary workforce. The MCA should take into account this persistent problem specifically in relation with companies employing a major portion of their workforce as temporary workforce.

Secondly, it is also important to consider that in India, many companies have established long term programs intended to stretch over multiple financial years in association with implementing agencies such as NGOs, philanthropic foundations, etc. These programs relate to areas mentioned in Schedule VII of the Companies Act, such as women empowerment, promotion of sports, slum development, etc. However, with the onslaught of the novel coronavirus pandemic, these companies now have a tax-exempt[21] option to meet their CSR obligations in the form of contributions to the PM CARES Fund.

However, if companies seek to spend all their allotted CSR funds for such contribution, then it can mean those NGOs and other implementing agencies that rely heavily on corporate funding may face a severe crunch of aid for their on-going social benefit initiatives. Additionally, the general circular dated March 23, 2020 states that CSR expenditure for activities related to COVID-19 may only be under items (i) and (xii) of Schedule

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http://kluwertaxblog.com/2020/04/03/uber-drivers-employees-or-independent-contractors/?doing_wp_cron=1588781989.0741240978240966796875

[21] *supra* note 9.

VII, i.e. only relating to the promotion of healthcare, including preventable healthcare and sanitation, and disaster management. While these areas do provide companies with a large number of possible activities, it is important to understand that a lot of other CSR activities are equally important and cannot be risked facing a lack of monetary support from companies in these trying times. For example, healthcare facilities focusing on mental health, NGOs that operate old age homes, or organizations running domestic violence helplines, all still need CSR funding to continue their work. In fact, several sports governing bodies, such as the Cycling Federation of India and the Paralympic Committee of India have expressed that they expect a major crunch in CSR funding.[22]

In addition to this drawback as noted above the Corporate Affairs Secretary has also hinted at allowing companies to offset additional contributions made this year against their CSR obligations in future years.[23] While this does sound like a lucrative proposition to encourage companies to increase their efforts in battling the coronavirus pandemic, it can also have a dangerous effect on the various social development organizations that are dependent on CSR funding. This is because if companies make large contributions to funds such as the PM CARES Fund this year, and offset these amounts in the coming years, then this will leave them with no incentive or obligation to initiate new CSR programs in the other areas mentioned in Schedule VII. This will mean that welfare projects in other areas like promoting education, eradicating hunger,

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[22] *Some NSFs feel the pinch of reduced corporate funding due to coronavirus pandemic*, DECCAN HERALD (May 4, 2020, 01:33 AM) https://www.deccanherald.com/sports/other-sports/some-nsfs-feel-the-pinch-of-reduced-corporate-funding-due-to-coronavirus-pandemic-830090.html.

[23] *supra* note 10.

agroforestry, etc. will be left with little opportunities to receive CSR funding.

In light of this, the authors believe that companies with long term and on-going CSR projects with implementing agencies should have some obligations towards the existing or pre-planned projects and therefore, prevent these agencies from receiving setbacks in the post-COVID-19 world. For this, an option could be that the companies may be allowed to spend their CSR funds for anti-COVID-19 activities only after they have met their obligations with regard to their other projects.

Along with these concerns, the issue of CSR fraud has also reared its ugly head again, especially in light of the recent COVID-19 measures. In a report titled "Corporate Social Responsibility In India: Re-Engineering Compliance And Fraud Mitigation Strategies", Ernst & Young has reported that while companies are actively considering allocating their CSR funds towards anti-coronavirus programs, a number of them still do not have any mechanism in place to avoid frauds.[24] The report states that lack of due diligence on implementation partners, weak governance and limited management involvement may be major reasons for frauds in CSR programmes.[25] In line with the report, the authors also trust that as CSR spends to aid communities in need during the COVID-19 pandemic increase, the integrity, efficacy and success of these programs may be uncertain due to inadequate controls, governance and monitoring.

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[24] Sachin Dave, *Companies to see frauds in their CSR programs during COVID-19 pandemic: EY report"*, THE ECONOMIC TIMES (May 6, 2020, 11:33 PM), https://economictimes.indiatimes.com/news/company/corporate-trends/companies-to-see-frauds-in-their-csr-programs-during-covid-19-pandemic-ey-report/articleshow/75568307.cms?from=mdr.

[25] *Id.*

V. CSR IN THE COVID WORLD – WAY TOWARDS INTEGRATIVE CSR NORMS

In addition to the possible relook and subsequent redressal of the concerns raised in the previous section of this essay, the authors consider it crucial for the GoI and corporate entities alike to take into consideration the suggestions and proposals discussed here to make CSR an effective weapon to combat the crisis the world community faces as a consequence of this pandemic.

The authors emphasize that India's CSR laws currently are directed towards corporate philanthropy in the sense of the contribution of monetary capital as opposed to generating a positive social impact through ethical business practices. CSR constitutes of more than simply 'writing cheques'[26], moreover, the impact of CSR is higher when corporate entities align their corporate core competence with their social impact objectives.[27] Some notable examples of various companies across the world using their core strengths to tackle problems related to include AB InBev, a leading global brewer, donating disinfectant alcohol for producing hand sanitizer as reported by the World Economic Forum.[28] Closer home, the Mahindra Group is using its engineering ingenuity to develop low-cost respirators.[29] The need of the hour is for organizations to find innovative ways to reduce

[26] L.R. CRUTCHFIELD ET AL., DO MORE THAN GIVE: THE SIX PRACTICES OF DONORS WHO CHANGE THE WORLD (2011).
[27] Klaus Leisinger & Karin Schmitt, *Corporate Responsibility and Corporate Philanthropy*, UNITED NATIONS (May 4, 2020, 8:26 PM), https://www.un.org/en/ecosoc/newfunct/pdf/leisinger-schmitt_corporate_responsibility_and_corporate_philanthropy.pdf
[28] Katie Clift, Alexander Court, *How are companies responding to the coronavirus crisis?*, WORLD ECON. FORUM (May 5, 2020, 4:15 PM) https://www.weforum.org/agenda/2020/03/how-are-companies-responding-to-the-coronavirus-crisis-d15bed6137/
[29] *Id.*

the impact on public health and economies. Hence, the GoI should come out with non-mandatory guidelines and policy papers to sensitize businesses to the struggles of the country and encourage any form of innovative, albeit non-monetary, contribution of entities (irrespective of whether they fall within the ambit of Section 135 of the Companies Act). Within this context, corporate entities may also take note that the March 23, 2020 notification expressly states that items under Schedule VII will be interpreted liberally to allow a greater number of anti-COVID-19 initiatives to be considered as CSR. The authors opine that this incentivizes entities to contribute in the ways they can as companies may be able to consider their core values and weigh it with stakeholder obligations[30] to contribute to CSR in ways that has a palpable effect on their business. While the need to generate funds for the government treasury through a fund like PM CARES is important, the role companies play as direct contributors to social growth cannot be ignored.

VI. CONCLUSION

The authors conclude that an analysis of the CSR laws in India and the government response to CSR laws in times of COVID-19 suggests that the laws need significant refurbishment. Till now, companies have been treating CSR obligations under section 135 as a mandatory monetary obligation attracting penal consequences. The authors believe that this should be supplanted with soft instruments and directory provisions to inculcate "good corporate citizenship" principles amongst Indian corporate entities. The authors also highlight that the MCA clarification is

[30] Diana Robertson, *Corporate Social Responsibility and Different Stages of Economic Development: Singapore, Turkey, and Ethiopia*, UNIV. OF PENN. (May 4, 2020, 8:57 PM), https://repository.upenn.edu/cgi/viewcontent.cgi?article=1014&context=lgst_papers.

incongruent to the labour laws in India and hence, suggest tweaking the laws to provide the temporary workforce with rights in these testing times. Furthermore, the impact of the changes in CSR laws on implementing agencies, an important stakeholder to the CSR is also proposed for consideration. Additionally, these testing times call for stronger checks on CSR fraud and malpractices which demand stronger diligence and greater management involvement in CSR activities.