ADVANCED COURSE ON COMMERCIAL MATTERS

VERBATIM PROGRAMME REPORT – P965

Submitted by
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DAY 1
Session 1

Dr. Geeta Oberoi: Very good morning! So Justice Bobde is soon going to join us meanwhile I was thinking it's a small group why not start with your own introduction.

Participants: I am U C Dhyani from High Court of Uttarakhand at Nainital, I am Justice Paramjeet Singh from Punjab & Harayana, I am Justice Bansi Lal Bhat from Jammu and Kashmir High Court, Sundaresh from Madras High Court, Justice Waziri from Delhi High Court, I am Justice Narendar from Karnataka Bangalore High Coourt. Fortunately or unfortunately I am not a part of the bench I am part of the bar I just completed my law before that I was chief Commissioner of Income Tax I retired and I just finished my LLB and looking forward to my next round my name is Pramila Srivastava, I am Satish Sharma from Madhya Pradesh high court, Justice Manish Shrivastav from Chattisgarh high Court, Ramesh Ranganathan from Hyderabad, Justice R D Dhanuka from Bombay High Court, Nitin Jamdar from Bombay High Court.

Hon'ble Justice S. A Bobde: ...unless it is not your first visit you will discover that it is always profitable and delight to be here in this Academy. Personally I have not been a regular to the academy it is only recently I join there are some things I discovered happened here which do not happen in our daily routine one of them is learning we get so used to deciding cases without breaking new Grounds that it becomes jaded. In the Academy and lot of credit goes to the director and her team the material is very stimulating it gives you fresh insights, fresh insights into up common problems with the way what you're deciding everyday you start looking at it a fresh and there I think is the real value of the Academy apart from the beautiful surroundings and relaxation so and the experts also well chosen for instance in the last workshop family judges there was also topic on interpersonal communication how it is best for judge to communicate with litigating clients especially warring spouses now that completely new subject for us and it was the it give new insights and I'm sure you could make out from the expression in the hall that everybody was very happy at the new thing so this is what the Academy is all about and in fact I wish there was something some system by which the chief justice's persuaded a lot of

judges to come but I greatly appreciate the fact that all of you have come here welcome we would take much time will leave it to the experts to start the deliberations of the day and please feel free to ask talk turn it into a discussion we don't wanted to become boring. You can ask any question if there is some area of knowledge which is new for all of us we do not everything. So feel free to ask any question.

Mr. Porus Kaka: Hon'ble Justice Bobde, the director of the Academy, my colleague on the dais, distinguished judges in the audience. It is indeed an honor for me

to be present here again. I think this is the third year running that I have come so hopefully I'm doing something right to be invited again. I also agree with Justice Bobde that please feel free to interrupt me at any time to ask questions I have inspected specifically told the director that we should leave sometime in the end of this for questions and answers. Two things before I start justice bobde mentioned that the materialistic relating I must thank justice jamdar for last night drawing my attention to that thick binder that you received in...I went through it this morning and I must say that the the authors and the articles on international tax are of an extremely high quality. And I think you would be well advised to go through them when you do find time. I have been given this onerous task of boring you for two hours this morning. So I'm going to break it up into three subjects. The first subject you are seeing which is the interpretation of international tax law and transfer pricing. This is what we will be doing in the morning. My advice is like what I prefer is don't get carried away with the P.P.T. there you may read of your leisure. Justice sundaresan in the morning says is this really relevant to us. Well. All I can say is if it hasn't hit the high court's it's already about to. Both the mumbai and delhi high court and chennai high court and andhra pradesh High Court and kerala High Court I have been argued major international tax law cases. And if you think that that was a small amount wait till the transfer pricing dispute reach you. I propose to make a slight change from what I did last year. Take You Through basic treaty concepts also this year. And in case you are too bored by the end of the session in after the break. I will show you a small movie about BEPS. This is a movie that I update continuously year to year. It's a small little thing. And I'm very happy to tell you that is not touched by any sanskari sensor. With these few words, I now begin on the history of tax treaties what is really international

tax everyone says I practice international tax it's a wonderful word. But international tax is really International aspects of your domestic tax. Namely cross border tax tax involving cross border transactions cross border individuals cross border corporations. It's basically a dispute on Firstly the tax entitlement that a country has in respect of a person that may be situated outside India or in respect of a transaction that that person has with India. So if you will see this slide. The earliest treaty was with a country that seizes to exist. It started with Austria 1899. In 1920, the League of Nations started to play a major role in international tax issues. This as your honors are aware is a predecessor to the current United Nations. In 1928, the first model was published by the League of Nations. This really picks up after the end of World War one. And more importantly in the early 1960s when the O.E.C.D. started taking a lead role with regard to international tax. So the first model treaty that came out. When I see a model treaty it's like actually a model treaty. It is a basis of which countries are encouraged to sign similar tax treaties. What is the reason for the model treaty. As you're aware. International tax is extremely complicated. So this treaty consists of two parts. It can consist of the actual article. And it contains commentary. The commentary explains what the article means it's literally like having a legislation work by parliament with an annexure telling you what Parliament intended it to be so that when people signed treaties corporates, investors all of them not only know the article. But they know what is meant by the article because the whole purpose of a tax treaty is to avoid double taxation and give clarity to those who are engaged in cause cross border transactions. It's good for the country. It's good for the investor. It's a win win situation. However of course. Tax is a sovereign rights and when I say sovereign right I always get amazed how sovereign direct taxes. Let me say why and I'll come to this a little later. Specially from the point of view or some of the developing nations and of course I think it's actually. No that's not a correct statement is equally true for the developed world. Most in regard to indirect tax we have signed with the WTO. We have given up some of our rights with regard to decisions on indirect tax to international trade body. No country wants to do that for direct tax. They feel that that was an aspect of this of sovereignty that they do not wish to surrender. I really don't see the difference but some out there is a difference and revenues are consistently firm on the fact that direct tax already did want to

give up. However the compromise the tax treaty. So now we come to the O.E.C.D. model in this model OECD explains what are the articles and what is the meaning of these articles. India is not a member of OECD. It is viewed as a rich man's club. It's viewed as a club of the developing of the developed nations. However India has become an observer to the O.E.C.D. tax forum. What that entitles it to do is to put observations on the treaty models. So you have now three parts of the O.E.C.D. model that contains the articles. It contains a commentary of those who are the members of the O.E.C.D. within the commentry some countries say we do not agree to this interpretation. So there will be a big major interpretation of all the groups. Some countries may say no we do not agree to this interpretation and there are disputes. Then comes the observer Nations. China, India and many other countries who are observers to the O.E.C.D. not members to the O.E.C.D. But have put their own reservations. Now critically, these reservations are put though by the state but ultimately by the revenue authority and many decisions of the courts in India have said that these views of the revenue are not binding on the courts when they take the decision. Now I want to digress a bit because I have seen the reservations put by the major countries. I have seen by reservations put by China. I have seen the reservations put by India. Now these reservations were put in the late I think it was probably the late night. About 2007-08 if I remember correctly. And there is no doubt I agree with the point that India does not have to agree with everything that the O.E.C.D. says. But India as a country has the largest reservations on the entire commentary on small issues. And I do feel that that needs correction today. Because the whole purpose of a treaty is to provide clarity. If you see we don't agree with everything there's no clarity to those people who are investing. So on your major issues you can take whatever major issue on a revenue issue which affects India greatly take about vodaphone issue. You may say we don't agree with the O.E.C.D. commentary. But on smaller issues. On trivial issues, you don't have to put a reservation and everything. With these few words I go back into the history. So you will see the O.E.C.D. of taking a lead right up till the early 2000s. In 2000, a parallel forum started to be formed that's the United Nations Convention. Now India is a leading member of this UN Tax Committee and the view is that India is closer to the UN model and its commentary rather than the O.E.C.D. model. I've already said about what is international

tax. So I won't trouble you with that. But let us go to taxation systems. There are basically three taxation systems in the world. They are based on residency in these options. They are based on territory. And they are based on citizenship. These decide how countries are going to impose tax some impose it on residents. Something pose it only on transactions within their territory or with their territory. Some impose it like the United States on all citizens wherever located and wherever resident. The strangest thing about the US model is in the last ten years wen I grew up one of the aspirational things I was told is to get a green card. In the last ten years, that trend is reversed. I have seen many people giving up their green cards rather than acquiring them. And that is because if you are based in India you will still be liable to US tax which including federal and state US has state taxes also goes up to forty nine percent. India's tax rate with surcharge extra is 33%. So we've seen situations where actually people are now surrendering their green cards because United States goes on a citizenship issue. What are the issues in the global tax issue and this will be relevant for BEPS when I come to it later. Double taxation that's the whole basic point of the treaties. Fiscal evasion that is also a point of the treaties. Now the new baby which has become an elephant transfer pricing that some phenomenal thing as I said again coming back to what Justice sundarasan said is this relevant to us to give you a small example which sometimes shocks people when I say so. India has the largest jurisprudence on international tax and when I say the largest jurisprudence I'm not talking about between say India being thirty five percent of the world and China being thirty four United States being thirty three. India share of world tax jurisprudence will probably be nearly seventy percent all the other countries together only 30%. In transfer pricing, India's jurisprudence maybe 75%. Now that is only as a consequence of the system. So you will see India is the largest jurisprudence and this is going to come to every single high court and certainly to the Supreme Court has already come to the Supreme Court many a time but it continues to come to the Supreme Court. And these decisions as I said your decisions are looked on a global because when India India read renders a judgment on a particular issue it's not only qua if you interpret treaty model this judgement will be looked at in the U.K. and USA everywhere else. So therefore it is extremely relevant. Today, International tax law is where environment was ten years ago. Last year at the summit in

St Petersburg the G 8 and the G20 discussed only two things Syria and international tax. International taxes now the top of the political agenda. And it's at the top of the corporates also because of the view that you know people are able to avoid tax so this is an issue which is that is the issue of the times. So transfer pricing very simply means that when two companies are related. Whatever way by we are shareholding by way of management by we are there's a very wide definition of related companies. They have the power to make their own relations. That's the suspicion. They have the power to make their own relations. To adjust it to ensure that profits are left in what we call tax friendly jurisdictions. So for example of India has a tax rate of forty percent and you have two companies one sitting in Mauritius with a tax rate of three percent one is sitting in India with a tax rate of forty percent. The power of two related parties to arrange their affairs to ensure the profits are in tax friendly jurisdictions. Is great. That's where transfer pricing comes in. So what it does is it will ignore the actual relation not ignore it it can substitute a that's a better word. It will benchmark the transaction with third parties. So therefore if you have a related party A and B and you have a non related party C and D with an identical transaction and that is the greatest difficult to find that identical transaction. You will say that the profits that India will charge on A and B will not be what they decide. But will be benchmark against what C and D does. It's a notional. It's not a it is a notional tax and it really it is on the borderline between art and science. Some people call it science. I call it art. I sometimes think. You asked me a question. Thank god I am not a partner in a firm which is tied up with a foreign law firm abroad. Who would be called an associate enterprise. Because if I had to decide what my benchmarking fees on a daily basis well I would have no idea myself. So this is a. But it is done. And it's a huge area and today multinationals area of trade globally is enormous. On the adjustments on transfer pricing I will come to you with the figures on transfer pricing later when I come to transfer pricing. So therefore there is a specific part of the income tax statute called Section 92 there is a whole chapter actually it's a whole chapter on methods how to apply etc etc. The procedure is when there is an international transaction and there's a huge benefit to the chartered accountancy community and smaller benefits the legal community. The chartered accountancy community has to come up with detailed studies. These are all a

part of the return. These are all forms of an extra return when you're an associate enterprise. When the officer receives it he then decides that yes there is a circular. If the transaction is about more than five crore it is sent to a separate specialist cell in the tax department called the transfer pricing cell. They will pass an order determining the transfer price. That order comes back to the officer Officer passes an order in accordance with that order. This then travels up to the CIT appeals tribunal or whatever to the High Court Supreme Court. So there are now I think to the best of my knowledge three cases pending on transfer pricing in the Supreme Court. I mean coming out from the Delhi High Court and things like that. So the transfer pricing basically means that we will look at a third party transaction to determine your profits to ensure that you do not adjust them to come to a lower profit in in the country of source or a country residence. So if you will see. Now I was on the issues in the global tax scenario. Now what has become the most important issue which was not an issue ten years ago or fifteen years ago. Is the second bullet point. Second last bullet point on that page the double non taxation. That is the entire thing behind the BEPS agenda. Today, the power of global corporations to adjust their affairs to and completely legal. Completely legal the power of them to adjust their affairs to ensure that profits are left in tax friendly jurisdictions has encompassed or superceded the power of countries to take action. One country no matter how powerful cannot take action. Therefore there is a concerted global movement rules are proposed to be changed. We don't know how many changes will take place and that's what I will come to in the. So or easterly treaties were set up for double taxation. Now they find it has resulted in double non-taxation. And sometimes you'll be surprised this double non-tax nation is specific to be motivated by states. Therefore these tax friendly jurisdictions are not a result of the corporate the result of state policy. Take for example Mauritius. Take for example the Caribbean. These are states driven policies to encourage people to invest or encourage people to treaty shop. And if a state encourages you there is no harm in taking advantage of that advantage so these are absolutely legal now there's a movement to try and change that. Let's see where that goes and I will come to it so these. Now I come to the sources of international law and please distinguish this between source of income. It's a very different concept. So what is the in source of the first and most important part is

your domestic law without a domestic law you would not have an international concept. So for example our Income Tax Act and Section 90 in particular is the power of the state to enter into treaties. Last time when I was here I had asked a question which which which was a little surprising. But the the provisions of the domestic law allow the executive to enter into a treaty. That is the starting point there after the next point is the tax treaty itself. You will many a time have tax treaty to interpret. When you interpret them you will be assisted by the international commentary that are approved prevailing. Today we also have circulars of the CBDT which have been issued for certain interpretation. And specially for a country like India which has a common law background. The judgments and precedent are most important. In 2008, there was a very good seminar of the Brussels IFA Congress on this issue of how countries treat judgments and precedents. And we found the difference between civil law countries and common law countries. India being a common law country very very I would say is extremely friendly to international jurisprudence and that goes equally to a certain extent for the U.K. U.S. They look at look at other common law jurisdictions. While coming to an interpretation if the I specially the article is common. This is not true necessarily in civil law countries but it is changing. Even civil law countries France, Netherlands are looking at the judgments of countries across the world. Therefore your judgment I can assure you I've seen many a time. Indian judgments being referred to in international international books. So let us domestic statute law this is the first sauce. Principle sections are 5, 9 I'm not going to bore you with all these sections right now. You must remember that earlier on Section 90 was one of the most litigated sections. It came up to the Supreme Court in the famous case of Azadi Bachao. Now Section 92 of transfer pricing is rapidly overtaking section 90 as the most litigated section on international tax. So what is a tax treaty? Basically it's a contract contract not between individuals but between states. What is the objective over tax treaty? The most important objective is he a. Yes to prevent double taxation and now to prevent double non taxation but it basically allocates taxing rights to prevent double taxation. What does it do for example. You have a U.S. person who has a transaction with India. Each earns income from India. In the US tax treaty with India there will be a provision how so how this person is to be treated. And what the treaty is decided is basically allocation of the right

between the United States and India on how to tax this amount. There are two basic methods of taxation so I'll come to rightly in in tax treaties. One is called loosely the exemption method and second is the credit method. Why do I say loosely called exemption method? For example take Mauritius come to that we have a tax treaty with Malaysia's with says Capital gains even for Indian assets that means shares located in India of Indian companies will not be taxed in India. But will be taxable in Mauritius. This is an exemption method. We have a similar treaty with various countries saying for example immovable property. If it is located in that country in an exemption method country A will say I will not tax this income. Now the question is what a country B doesn't tax the income. That's not relevant. Because in the bargain that the two countries have decided currently as it is an allocation of the taxing right. For example if a certain profit is decided to be allocated to India. Whether India chooses to tax the profit or not tax a profit is not relevant in the interpretation of that article. So one is called exemption method. So it's not in exemption when I call it it merely says that A has the right to tax it and not B. The second is both countries have the right to tax which is the credit method and when it is taxed in a particular country the other country will give a credit for the taxes. So these are the two basic principles under which tax treaties operates. One is an exemption method. One is a credit method and you will see I mean everyone likes to pay lesser taxes I mean there is no doubt. There's no doubt. And everyone wants to structure their first to pay reduced taxes. And it's fully legal when the corporations take advantage. In fact Arthur Godfrey of the United States says that I am proud to be paying taxes to the United States. But I can be equally proud for paying half that amount. So there is there I mean this is a worldwide phenomenon and human nature is not going to change. So these are basically the object. Now again another principle of tax treaty and as you see this is laid down by Azadi Bachao Supreme Court. That treaties can never levy a tax. A tax must be in the domestic Law. They can never be a charge of tax under a treaty. If you will see the Andhra Pradesh judgement in the case of Sanofi it's laid down very critical things as to how and the object of tax treaties are to be interpreted. And one of the famous lines from that judgement is paragraph three.In recognition of the pejorative effect of the bill taxation an exchange of goods and services a movement of capital technology. Agreements were

entered into for removing obstacles that double taxation prevent presents to the development of economic development suit relations. Now let me stop for a minute and say why you can't charge. Recently the United Kingdom and India signed a protocol to the existing tax treaty. There to my surprise but it's a growing problem probably probably point of life going forward I found a provision of GAAR if you will be reading in the papers is an overall present overarching tax avoidance provision. It is known as a general anti avoidance rule. For example in our domestic law, we have specific of it in through as like dividend stripping. We have a clause that if you sell an item and you buy it back. If you have incurred a loss we incur a loss in within three months or nine months as a period it will be ignored. So there are specific anti avoidance rule. GAAR is an overall avoidance rules which applies to it. So UK and India have signed the protocol putting in a GAAR. But India has put off GAAR now for six years from three different finance ministers Pranab Mukherjee try to introduce it postponement it for...Chitambaram try to introduce it post poned it. Jaitley has now postponed it by two years. So we have a GAAR in a treaty. We still don't have a GAAR in domestic law and the interpretation will be till we have it that part of the protocol cannot be used. Now treaty is a contract. Now many a times I come to this difficulty when you have a case before you forget in tax law. When you have a case in civil law. When you see a contract before you especially as many of you are from a civil background. You never say Oh I think this is unfair so maybe I should give some benefit to the other party because you will see a contract is a bargain that the tree parties have signed. It's not for the court to now say oh you should get this and you should get that. Similarly a treaty is a bargain that the states have signed and why do I say so you will find some of the comments in Azadi Bachao. You will never know the reasons behind the bargain. For example Mauritius why do we give this benefit to Mauritius because significant populations from Indian origin in there, Is it because Mauritius consistently votes with us in the United Nations whether it's a Security Council or anywhere. We will never know the reasons. Is it because we get huge investments from Mauritius that was not the reason many signed the treaty. So the this is a political bargain or an executive bargain you may never know the reasons behind this bargain. But you will have to interpret the bargain. So this is important a treaty is a contract between the states. So I

think the main thing is when you are looking at a treaty look at the clause in its entirety. See what its object is see what the bargain is intended to be. If you feel that the bargain is X then the bargain has to be respected. This will be critical when you come to interpretation. Now what are the leading models and commentary for the interpretation issues. Certainly there are two models I have already said the OECD and the United Nations. Those models are already available. There is a third model and that is country specific the US has its own tax model. Then the last second last point Klaus vocal. He is the palkiwala of international tax law. His book is one of the most respected books internationally and that's that's a book that is used by many. In fact it was referred to by the Supreme Court several time. So these are the these are the commentaries you can use to interpret tax law. What are the forums I want trouble you but I would only like to show you the last item why have I added the Union Cabinet. The reason is the recent Vodafone experience on share transfer. Bombay High Court decided not transferable who advocated finally was the Union Cabinet saying you will not appeal to the Supreme Court on that decision. So I have added with respect to all these to the union. I'm told that under justice dattu's time we had a Supreme Court tax bench I was told is doing excellent work I do hope it continues. It was doing primarily international indirect tax I hope it comes to do more of tax problems. It's still there. And I'm glad to hear it as I see that that I said that that that is good news I do hope they go to international into in direct tax I don't want to specify. So this is these are the the the various forums. What is a forum not available in India. And that is the view of the Indian government. Each treaty signed by revenue officers within a treaty there is a provision that if there are disputes between a person as to where the how he's being taxed. He can go to his country. His country's tax department say look how the other countries treating me is wrong. Then the two countries sit together and decide how to implement that tax dispute. If they settle no problem because this procedure has been failing of found to be failing internationally. There is a global movement primarily in the developed world for arbitration that if two competent authorities that they are called fail to agree to a dispute within two years. It is referred to binding international arbitration. This is a position which many countries especially from the developed world I do not wish to single out anyone including India especially takes a

view that it is against our sovereignty and we will not agree to binding arbitration. My view a slightly different on this because after all you're trying to settle but again my view is not relevant. So this is a form that is not there I do believe ultimately it will happen. International Arbitration will happen. It's a question of time. I think it's a question of India, China all those countries being comfortable with the forum. Also comfortable with the commentary. Let's face it. So many of them don't accept our international operation. So therefore. But it will happen ultimately it will happen because remember today as the world becomes into a greater financial crisis there are two principle driving forces for the economy. One is tax because they need the tax. But the second is also foreign investment. If the second doesn't happen the country so to attract foreign investment they will have to give a system to investors to do what is our system. I am I'm in favor of it today as I said India's the largest tax jurisprudence of international case law because I was system has no provision for settlement. And in a way that's good. You can go to the assessing office that you have raise a demand of 60 I'm willing to pay thirty please let's close the case. You can do that you know where it's a very good thing for various other reason that we can do that. Who will decide whether it's sixty thirty twenty or ten. The tax tribunals, the high court and Supreme Court. And in all fairness, I have seen good and bad but ultimately I have seen that Indian the Indian judiciary has done a very good job considering the flood of litigation that it's been faced with. So this is this is some of the things. Now how do treaties and domestic law play out. This is where I wish to ask a question to the learned audience. Because last time some of the learned judges refused to accept that the answer I gave was correct. Suppose a treaty says A is not chargeable to tax. Suppose domestic law says A is chargeable to tax which will override which and the domestic law as far as India comes let me give it a little twist comes after the treaty has been signed. In India let me give you the answer, treaty will.....

Participant: Not Audible

Mr. Porus Kaka: The rule is treaties will always override the domestic law. The even prior or later in the United States. This later in point. It is provided in Section 90. It's really delegated it that's the the interpretation that a treaty will always override the domestic law.

Therefore. Therefore it is provided 90 but the only country that does not agree to this view but even then we respectfully the United States they have the last in point rhyme rule so the U.S. Senate can pass a law which overrides tax treaties but US US doesn't do it as rarely done it. Even then. Even then the courts are very reluctant to allow our treaty override by domestic law. If you will see the jurisprudence in the United States. They are very clear. Suppose there is a general provision passed by U.S. law there is a contrary U.S. tax treaty provision. They will never allow a general provision to override a treaty provision. Only if in a specific intended to override treaties will the courts respect. In India and in most of the countries of the world there is a different view that a treaty will always over a domestic law. And only to the extent of giving relief. Most countries allow treaty to override domestic countries. I would have to look that up some differences. They have. Yes they have a different system but to the best of my knowledge. That is normally a purpose of the relief in the treaty. The provisions of the treaty are specifically to give a clarity to investors and also to give relief a treaty is like an ice cream. The answer is that there is a power of the executive in 295 article to 295 of the Constitution to enter into tax treaty. This power is not curtailed by parliament. Secondly section 90 of the Income Tax Act It specifically which gives the power of the government to enter into treaties is a part of domestic law. And that provides of the treaty will apply when it has been signed. When this provision is there therefore it is the parliament which has decided giving the power to the executives to sign tax treaty and therefore assuming there is a conflict between a tax treaty and a domestic provision. The tax treaty will always prevail. Well it's really it's really the whole purpose is to facilitate the signing of these treaties. So you are right to a certain extent that is an anomaly. The executive can do something which Parliament has provided differently. But the answer is Parliament itself has given the power to the executive. Because otherwise tax rate is could not have been implemented. So that I think I think we are I'm limiting myself to tax treaties right now because the power to enter into a treaty is part of the statute and it is provided in that statute that to that extent the treaty will give relief and that's what our courts upheld. I do not want to enter into where the convert is executive.The state signs the treaty but the relief is for the individuals for the corporates who are governed by the treaty provisions. So the whole

purpose of the state signing it is to give relief to those person who are described in the treaties. Transacting entities persons are sometimes given to individuals and sometimes given to transaction the sometimes given each. I will come to it how the treaty works. Different sources of income into different provisions. So the state signs it. So you are. So you are writing the answer is it's similar to this. So for example in other laws where there is where there is no what I call an enabling legislation like the income tax. Suppose simply India signs a treaty saying that we will arrest everyone who brings drugs into India. That certainly can't be implemented without an enabling municipal law or a domestic law which makes that into place. So therefore without an enabling domestic law you are absolutely right and therefore prop as the answer is just signing a treaty is not sufficient. You require an enabling domestic statute to bring that treaty into life and that's where Section 90 of the Income Tax Act comes in. So therefore you are right India signed many treaties but there are trade has to made provisions of domestic law to give effect to these treaties. Income Tax Act has an enabling act. It has an enabling provision. Therefore under those provisions they can continue to sign it. If you look at the object of a tax treaty. Primarily it is to give relief ultimately has to be really. Whichever way you look at it. If treaty was to apply. I mean of domestic law was upright then no need to sign a treaty. So the object of the tax treaty is to carve out a system of taxation within that country which is slightly different from the way domestic law applies. This is peculiar to practice today if you for example the human rights conventions. Commercially it is important because without Section 90 I don't think they would have been in enabling provision allowing the central government or the executive to enter into treaties. The whole of object of tax treaties is to prevent double taxation. Because today you will have a person investing from the United States into India. He will pay tax on his income source from India. He will pay tax on his remainder income because his tax on a residence model in the United States. The whole objective of a tax treaty is to prevent that person being doubly taxed. So tax treaties facilitate the economic relations between the two nations. But they may have of to other objectives when I come to Mauritius as I said sometimes I wonder what is the real because Mauritius there is nearly no tax What is the object that treaty may have other objects and that's in the preamble. So the whole purpose of the treaty will be to facilitate the

development of commercial economic relations by providing clarity on how things are to be taxed by providing exemption from one country taxing a particular income by providing credit for the taxes paid in one country in the second country when you're going to this is the object of a tax treaty. To prevent double taxation of a person of an income of a transaction. For this reason real deviated from the general rule which other ways applies to other to which are yes absolutely. So you interpreted treaty much more holistically keeping its mind its objective and knowing that this wouldn't been signed by the diplomat not by a lawyer. This is the important principle laid down by our Supreme Court. This is the judgment of the Supreme Court 233 ITR 703. Now coming to very briefly of principles of treaty these are the general principles under the Vienna Convention I won't trouble you. India is not a signatory to the Vienna Convention. However our Supreme Court in Ram Jethmalani's case laid down the fact that these are general principles and even though India's not a signatory. We should look at them while interpreting treaties. Now I do not have much time for basic treaty concepts but there are residents. There's a concept of fiscal domicile. This concept you will find started by India. Started by our Supreme Court. What is the concept of fiscal domicile and this is important concept because the whole issue on treaties like Mauritius is very relevant or Cyprus or the United Arab Emirates. India signed the treaty with Dubai. Dubai has no income tax. So I have had many a situation the judges asking me what is the double tax that we are seeking to avoid that country has no income tax. So what is this treaty that we have signed so what is the answer. The answer is perhaps to facilitate trade I have not signed the treaty the executive signed the treaty. So then the concept of fiscal domicile what is this concept. Will you give relief to Dubai citizen in India? He pays no tax. Why should India give relief? So there is a concept of fiscal domicile meaning. Dubai has the right to tax whether it taxes that individual or not is not a relevant consideration for the Indian system to give him exemptions. Similarly look at Indian citizen suppose we were a charitable trust or we were a person entitle to various exemptions all we were a loss making concern who pays no tax. Can the United States on the other say that you have made no tax in India. Why should we give you a benefit of the treaty? The answer is payment of taxes is irrelevant. You must decide whether that country has the right to tax that person. Whether it actually taxes that

person or doesn't tax that person is irrelevant and that is what again is a principle laid down by a Supreme Court. And that's a correct answer. Various judgments on liable to tax you will see them listed out. Items numbers three and four are Delhi High Court, Mumbai tribunal dealing with the Dubai treaty. These are relevant. Now very briefly I'll come to the heads of income. Their various heads of income under the treaties similar to our income tax act. But the reason for this difference each head of income is treated differently because the treaty works differently. For example: Capital gains immovable property is taxed where the property is situated because of the different ways treaty want to whether it's an exemption method or a credit method broken up all these heads and tax them differently. Tax issues for one person. But is there an issue of rule of law. If the court decides. Taxpayers have to respect it and so does the revenue. The hue and cry raised over the vodafone incident has made me the government's wake up and stop this habit a retrospective amendments. So I believe in the longer run for us Indians vodafone was good. Today we are not face with retrospective amendments which we was faced with every single budget. So vodafone ultimately resulted in the in the people in hue and cry internationally. Governments woken up and today government says that we will not make retrospectively. Because what does a retrospective amendment do. The tax on it took a vote of on was a higher amount but on smaller amounts it undermined. If you want to undermine every level of our judiciary from the tribunals to the High Court to the Supreme Court you are laying down a very wrong system. So that I believe that's why Vodafone was good for us. It made the governments wake up and say we will stop this practice they'll be some rule of law. Even today, vodafone is liable to pay the tax there is no change in the law. Nobody is moving on and there's talks of a settlement but I don't wish to answer an individual but as a matter of policy. The government has very clearly said. No further retrospective amendments after that and that I believe is good for our country and our rule of existing ones even till today are on the statute book and remaining. That is when we have that I that. So few major decisions on international tax with us most respect. Here is where I believe the Supreme Court did get it wrong. They interpreted a word which says Malaysia may tax to mean Malaysia shall tax and India will not tax the absurdity of this judgment is if you will see our income tax act there is a legislation which

they are for passing then government it can issue a circular interpreting treaty provisions. India is the only country that has issued a circular interpreting an adjective. To say that for the purposes of the treaty May shall not equal shall. So this is some of the thing. Yes. That if it's may mean the India will still have the right to tax because here the Supreme Court said maybe it actually means it may be taxed only in Malaysia. So that is without atmost respect perhaps not necessarily the correct view. In international treaty law so India issued first the legislation then a circular of it said May shall not mean shall. Absolutely absolutely. Absolutely. But where is a unique situation where when you say I will issue a circular. It's a unique situation. You issue a circular for a treaty term a treaty term would mean Permanent establishment, Residence. You never issue a circular for what is the meaning of May. So these are the things I really don't have time for transfer pricing I did explain to it what it was. These are some of the major decisions you may look up. All I want to know show you the stakes in transfer pricing. These are the stakes and these are all newspaper reports these are the amounts involved. Starting from twelve: 1220 crore to 60,000 crores these are the adjustments made by the tax apartment. When I look at the adjustments I've....there are only two possibilities either there that we have wholly dishonest nonresidents investing into India or we are wholly arbitrary orders being passed. You all will be the judge. Then I have time I'll come back to transfer pricing. I I wish to close this out a bit. These are some of the issues in terms of pricing but since I have...These are some of the major judgments on transfer pricing and If I may point out Lee Fang is in the Supreme Court. I really apologize for extending way beyond but I hope this was some I mean I did like the debate. I hope I have clarified something not confused too much. But thank you for a very patient hearing.

Session 2

Dr. Geeta Oberoi: Welcome back. I think we should resume our session.

Mr. Porus Kaka: Thank you very much. It's it's it's really a pleasure to be here because this is the first place where I can feel comfortable in answering many questions from the learned judiciary without the fear of a client losing the case. I will reverse the order of my speech a little bit for time and more because it's more relevant to you rather than going to BEPS. First going to come to black money. And then I'll come to bear because lack money is something that all of us. So when I look back on black money in new don't have to pay attention to any presentation here. When I look at black money. When I look at black money if you look at 1947 and we start out India jawahar lal nehru spoke about India's tryst with destiny. You can put the lights on right now I'll tell you when to put them up. I just want to give you a little bit of India's tryst with black money. I think at the end of this address you'll be able to see whether India has been a success or a failure in my opinion it's only been a failure. So let's rewind to 1947 where we full off ethical in the inspirational leaders gained their independence to where we are today. Today we are desperately trying to find those ethical leaders again and I certainly believe that one on the greatest reasons for the change of government in Delhi and when I say Delhi I mean both at the national level and at the state level. The word black money and corruption have played a role like never before. Even internationally and that's the second part of my speech BEPS has come in. So let's let's look at the history of our provisions dealing with black money from 1947 till the recent black money act that has come last year. So we start out in in 61 from 47 to 61 we will seem to be OK. We introduced Section 68 and 69. There were no corresponding provisions in 1922. Under the 1922 act so by 61 you can see our moral fiber has started to decay and we had two provisions benami loans unexplained assests. Three years later just three years later 69A, 69B, 69C and 69D dealing with unexplained expenditure, Investments not disclosed, unexplained expenses amounts borrowed on hundi's came in. All these provisions were to catch taxpayers who did not explain their proper sources of income. India must be one of the few countries in the

world where tax officers check with the draws from your bank account not to see whether you are living within your means but to see whether you are living in excess of your means. Let me explain if your tax books show you frugally living like Mahatma Gandhi but your photos on page Facebook or page three show you living extract like Mr Malia be warned the difference can be added as unexplained income in India. So those who like statistics just the reported decisions on ITR on interpretation of 68, 69 Is more than one thousand cases. Sixty eight also has been amended many or times with a major substituent in 2012 to overcome some Supreme Court decisions. All these provisions were insufficient. So we find in seventy two that the greatest area of black money is immovable property. Allegedly, so we introduced 20A which allows the government to acquire immovable property. It was a relatively benign provision, it failed. In 86, we introduced a drastic provision or a drastic Chapter 20C which provided for no hearings for pre peremptory acquisition right of the government. I'm sure justice bobde will recollect many writs against acquisition of immovable property under this chapter. Finally the Supreme Court in the landmark Gotham case stepped in and said: You have to provide a hearing. You have to provide benchmarking before you acquire property. Chapter 20C was introduced when I entered my legal career and I have been witness to many absurd interpretations and now this is important and I have told the revenue also when you come to this new black money Bill. For example in 20C there was a provision that when the government acquires the property it will be free of all incumbrances. How did the officers interim. Interpret this provision. They took a view that if I was the landlord transferring property with sitting tenants. And only transferring the remainder man. When the central government acquires the words free of incumbrances means all the tenants also lose their possession which was absurd there was no intention behind the chapter to do this. Central government was trying to profit so the poor tenants who have nothing to do with the transaction. Who are not a part of the transaction are to be vacated. It's absurd. This interpretations lead to the courts stepping in. Once the cause stepped in with this ridiculous the chapter feel eventually. So anyway the chapter twenty see died in July two thousand and two. Then we had other provisions 269SS we have 269T we have, 269TT we have. At one stage we will run out of alphabets which prohibits taking of loans,

deposits payments other than by account payee cheques of more than just twenty thousand. Still we come to the late eighty's and ninety's where we find that despite all these provisions people were not even filing the returns of income. So what did we do we made it compulsory if you are a tenant of him or not owing more property or a tenant of a certain area, own motor vehicle. Even if you have a telephone or travel to a foreign country you must file a return of income. So you can imagine how bad this problem was when simply owning a landline made you a person who the taxman hired is eyes upon. Nothing stop the juggernaut of the Indian cash economy. I mean in the eighty's we had these images of the then Telecom Minister Mr Sukhram where it was alleged that he had a very poor sleep because his mattresses contained more paper than dunlop foam. Anyway. You know what I mean. But no party big or small was immune from this. So when you see that those in power are getting away with all this. How can you expect ordinary men to live. It is said that in matters of principle it is easy to have them when you are rich. The important thing is to have them in your when you are poor but that is not human nature. It is difficult to stealth tell the ordinary man that you must have principles when you see those above and not having them. Somebody said warm once said that money is the six sense which are allows you to enjoy the other five. India was running out at least a few in India were running after the six sense like never before. And more importantly outside the four corners of the tax law. With the abolishing the 20C we introduce another provision which is their capital 50 C with says when you today transfer immovable property for capital gains purposes it will be the ready reckoner value under the stamp duty Act which will be taken to be the value and not the value you put on the transaction subject to certain rules. Now what it's a consequence you have to deal with two departments? The stamp duty Department and the tax department. The success or failure of this provision is yet to be decided. So with this checkered history we continue to increase in with all these problems more with the symptom and the disease. In the last few years and this is something which you'll have to see coming up we have a new provision called 566 which makes transactions like capital transactions like gifts, money received from persons other then described designated family members or charitable trusts or a immovable property as income in the hands of the recipient. These are very harsh provisions. God forbid if you have a friend or

a family member not defined as a family member who is ill who needs more than fifty thousand rupees. If you paid that person fifty thousand rupees it will be treated as his income. These are the extent of the harsh provisions that we have in our statute. So we do to prevent black money and nothing has happened. So you can see how we have failed and there was no doubt that the anger of the public was rising. There were reports of Indians having the largest amount in Swiss bank accounts. And in two thousand and twelve you will see this chronology. The director of the C.B.I. says Indians have five hundred billion. He was contradicted by whom the government to say no no the amounts are wrong the amounts are lesser. Main thing that I want to point out that there's a see me and this is what I shared with the justice on the flight yesterday is that there was us. And I think that's perhaps there was a huge view that there was significant lack of political will in the drive against black money. Finally in two thousand and twelve. We have what is called white on black. Let me explain for the first time a white paper was issued on black money. I try to find out where we get this origin of the term white paper. And it comes like some good and some bad things from our colonial masters the U.K. parliament. These are supposed to be policy documents made by the government. With set out proposals for future legislation. It is supposed to be an authoritative report to understand an issue, solve a problem and make a decision. One of the first white papers was Churchill's in one thousand twenty two on the Jaffer rights between Arab and the Jewish population. Let me give you a few examples of this white paper. The estimates vary widely. The wanchu committee says between seven hundred to one thousand crores and sixty one. Doctor of Wanchu Committee doubles that two thousand three hundred to three thousand it because an NIPFP which is a government body says between nine thousand to eleven thousand crores in seventy five twenty thousand to twenty three thousand eight hundred. All fifteen to eighteen to twenty one percent of G.D.P.. You can see that the statistics differ widely. But at a minimum they are a quarter percentage of India's G.D.P. at the maximum it could be double or triple that amount. Next part of my eyes that surveys on our favorite Swiss banks. This part is hopelessly inadequate. What is the objective of a white paper to give statistic on what what should be our watch be Indian assets in swiss bank. This paper does nothing. It wants to debunk. How much Indians have insisted bangs. So the first thing it

says that there was a chain e-mail in two thousand and nine saying Indians had fourteen fifty six billion dollars in Swiss bank accounts. This email is wrong because the author of the email the Swiss banking Association doesn't exist. All right very well. The next report which is cited is also ridiculous ignored ignored. The only thing that that white paper brought out by the government says that Swiss National Bank in two thousand and ten has said that Indians assets in Swiss banks had gone down from twenty three thousand crores in two thousand and six to nine thousand crores in two thousand and ten. And the report happily goes on to say that now Indians funds in swiss banks is coming down. I find this amazing even assuming their deposits have come down by twelve thousand crores. The point is twelve thousand Crore has not become declared money. But probably shifted jurisdictions. What about that. What about the one thousand crore which according to you still lying in the Swiss banks. What are you doing on that nothing is done nothing in that quiet report there's something on illicit money or a report. Now a little bit of a secret. In paragraph 2 white paper lays out lists of two main ways and twenty three subways of making black money. If you have some spare time and more importantly some spare money read it. I'm not the author I'm only the messenger. One of the best conclusions I think about this report when I look at it is the cause of lack of money. And that is our ridiculous tax rates of one nine hundred seventy. I remember when my father was in practice and he used to tell me I mean at Tax rates of ninety eight percent seventy eight percent. People had no savings. If you have these kind of rates. You are making a society corrupt. So that is one of the greatest causes of Blackmoney. And yet now I come to the Vodafone case. Can you imagine. In the Black Money report. The vodafone cases cited as a as a as a part of black money. What of one has nothing to do with black money. Vodafone is a case as to whether a particular structure is genuine or not whether you accepted this is a structure which is declared to the tax authorities. You have to decide whether you accept the structure a genuine India has a right to tax the transaction or India's are not a right to try. It has nothing to do with black money. So the report completely makes the wood from the trees. But again with all this the view continues to grow the government is doing nothing. Finally there was a game changer. And what was that game changer Ram Jethmalani is writ petition in the Supreme Court. There after the Supreme

Court set up an SIT headed by two former Supreme Court judges whose reputation was unimpeachable for the first time I think we can see now actions being taken against individuals and corporates without the interference of the executive. You will note and again this says from newspaper reports please don't quote me that it's an allegation that our current prime minister said that we will all receive fifteen lakhs into a bank accounts once he became once if we came into power. What we get is the black money undisclosed foreign income and asset Act in one thousand fifteen twenty fifteen. This is the harshest bill so far extremely poorly drafted. It's going to lead to a plethora of litigation. It's just been born I will come to it later. Alongside these penal provisions. India never gave out give up its current policy. So in fifty one. Sixty five seventy five eighty one eighty five ninety six ninety eight. We had voluntary disclosure schemes in one form or another one was a success some were not. Finally in one thousand nine hundred six they were challenge and the government filed an affidavit in the Supreme Court and I hope the Supreme Court holds them to that affidavit that we will make no more VDI. voluntary disclosure schemes never help the country. They only help default us because they are avoiding taxes in the hope of the next one coming along. So VDI schemes as a matter of economic policy should be avoided they never have also the never been in benefit honest taxpayers who who probably paid taxes at higher rate. Some of the absurdities of nine hundred ninety eight, a lady declared jewelry worth rupees two crore with a precondition that husband should'nt know about it. There were a housewife born in sixty four declared jewelry purchased in sixty one people were flying down from Moscow London and Europe to make the reasons. In their children's names. We now come to twenty fifteen , the new black money Act of India. This provides a separate taxation of any undisclosed income any undisclosed assets and applies to all persons resident in India. Now the first thing that I have seen. And I think perhaps the the chartered accounts will be more familiar. Is I have seen many high net worth individuals. Seizing to be residents of India in the last one year. Because the act only applies to those who are residents in India. It applies to both foreign income and undisclosed assets and financial interests an entity. This is to be taxed at a flat rate of thirty percent plus a penalty of ninety percent. So if you have hundred rupees. Which is found. You will now have to pay one hundred twenty rupees. So hundred and

twenty percent. Is not look I have no problem If you caught on as a tax lawyer I believe tax avoidance and tax planning is one thing. Tax evasion is a wholly different thing and I have no sympathy on that side. So anyway if you feel that people of work found one hundred rupee of one hundred twenty that's fine that's your choice. But the act is very poorly drafted, very loosely drafted. I get scared when I see them of the provisions as to what will happen if suddenly you forget If you forget also to file because we Indians now alleged allowed to have bank accounts. And I can only share with your personal experience. About ten years ago I was approached by various bankers because we are allowed to have bank accounts from ours from our savings. And the offer was over we'll have it in Jersey or we'll have it in Barbados and we'll have it in the in in the moderation and I said please nothing doing. I do not want to have an account in any tax haven. Please give it to me in a country which India has recognised and therefore as with the U.K.. Now most people may not do that or that precaution. But the risk is suppose you have a bank account which you have opened for some particular purpose you forgotten about it or you are as suddenly get this act is very loosely drafted. My only thing is that the consequences are grave. Forget the financial consequences. There's been a T. of imprisonment from three years to ten years. There is even a penalty for abatement of six months to seven years. Now this is the part where bankers will get involved. Maybe justifiably. Because if they create a banker. Then we had this compliance window for people to declare these a man's before this activity. Four thousand one hundred forty seven Crore was declared in September. Out of which the press reports say that totally two thousand was only accepted as genuine the balance two thousand the government had already found out so those people couldn't make that declaration. So I asked my juniors to do some work I'm coming back to the famous fifteen lax that we're all going to benefit in our bank accounts. If you divide four thousand crores by our population which is about one point two billion. All of us are richer by rupees thirty four price in research before. And fifty five per se. If you now divide two thousand. We were twenty rupees. So I think what's scary is this compliance window itself has failed. So there is no fear of even perhaps this law. That is a scary part. Only one thing I would urge the revenue is implement this law against the big fish. Don't go after the students don't go after the smaller people because if you implement it harshly.

The courts will step in the courts will reduce the riger. So this is the situation of our black money provisions currently that. If you look now I can will come to BEPS in a minute which is the international position on black money. And all I can say is that if and I would urge the Supreme Court SIT If this is a this is a very grave area that we need to pay attention to. But we are still Straighting the symptoms not the disease. The cause of black money is our electoral system. The cause of black money is the exemption we give to agricultural income. When you have these kind of provisions they will result in that because people are going to use the system. So this is going to be a cause. And I can only end with a very famous Japanese proverb. It was said in the olden days. There are two kinds of persons who can convert Black into white and white into law and white into black. And those two persons in Japan were lawyers and painters. All I can say to the Japanese who made this statement that he was not living in post Independent India. You would find many more categories of persons who could do this. So with these few words I'll end with my black money part of the speech. I now want to come to BEPS and when I come to BEPS I want to show you this film which has not been touched by this Sanskari censor. My only request is this film will not be used when you pass your judgments. There are four categories of five categories in this. What I wanted to give you a flavor is what is BEPS all about what is the debate in the international community. So you will see politicians, you will see the corporates, you will see the NGOs and you will see the O.E.C.D. All these are now a part of the debate on international tax avoidance and how to solve the provision. It starts of with President Obama making a statement that there exists in the Cayman Islands a company which has two thousand addresses at the same address. Now he says that either this is the largest building in the world or it is the largest tax scam in the world that it's just it's.

[Video was Played]

This is still policy. It's real and until it is implemented by the governments it's not relevant for the judiciary. Therefore I wanted to give you a very small flavor of who are the players in this so you have the politicians and let me tell you there's a lot of hypocrisy on the side

of the politicians. If you will see for example the United Kingdom. United Kingdom's corporate rates are now going down between twelve to seventeen percent. It's rapidly on the borderline of a tax haven. This is what states are doing to attract investment. Now when a stage reduces tax rates this becomes competitive. So it's a competition to the bottom of the well. What happens today if I was an investor and I'm looking at U.K. corporate rates of twelve to seventeen percent. India's corporate rates of thirty five percent. U.S. corporate rates of forty five percent. Where would I put my investment? It's simple. The math us there for you. So the project is huge the project is mammoth into years the OECD is trying through the BEPS project to change international tax law from the last fifty years. So in two years the entire last fifty years work against these are still policies. So very briefly I'll go through this. This thing. So this is the project which is going on remember today whatever the countries are doing everyone except is absolutely legal. Nothing is wrong in that the point is the system is broken. And I agree with it. There are huge leakage is in the system. Today you have got countries competing for investment will give you marginal tax rates why would you not go there. Nothing illegal about it. So there are hugely leakages. But I think today's at the top of the agenda. And that's not because of tax planning. BEPS have come about because of the financial crisis of two thousand and eight it was born in two thousand and eight. So now if you will see some of the background. This is the core work of the O.E.C.D. remove international tax barriers in trade. And that's the purpose of tax treaties. Remember in my earlier speech I said. Tax treaties were designed to prevent double taxation. Today the finding is If they resulted in double non-taxation. So now there is a whole movement against double non-taxation. Classic example of double on taxation. But that's the law. I mean when there's no point the government is encouraging it. There is a view that the power of the global corporations permits them to do it unlike individuals things like that so we must change the system. Most importantly the G 20 is involved and not OECD which means India as a country as a member of the G twenty has a voice at the global tax table debate. So India is now a part of this process in resolving all that. Now look at some of the statistics. These are allegedly statistics that there's no corporation tax paid by a multinational U.K. despite having sales of four hundred million dollars. You saw some part in the slide that I gave it then US

Senate. Now you look at the last slide US companies are paying two percent of their taxes. How is that possible because of US tax law. US tax law does not tax unless you remit to the United States. So if you keep it offshore that is not tax and that's that is to encourage people to invest. But that result so this this global movement has a lot of things which we don't know where but today it's there. Now come to this a few statistics. In two thousand and ten it is stated that Barbados, Bermuda and the British Virgin Islands received more F.D.I. than Germany or Japan. Similarly, they in turn make more investments than Germany. But obviously because the investment coming into Barbodos will only be transiting to another point. Look at China the most investment comes into Hong Kong. More than the United States. Look at India most investments comes from Russia's. And these are all policy views of the government. But ultimately this is Treaty shopping. When they stop we don't know. These are all the action plans I won't trouble you but there are fifteen action plans to try and prevent this kind of double non taxation. These are policy views. India may implement some of them in its budget of twenty sixteen which is going to come about and what will be mainly it will be documentation on transfer pricing. And one of the greatest things I believe today is information information changes the world as justice jamdar says youtube gives you so much information believe me information changes the world. Tax departments are now going to require information from tax assessors like never before. One of the critical things that is going to be implemented is what we call is country by country reporting. So multinationals will have to disclose which countries then come is where are the assets where are the employees what other taxes that's played. That's going to be scary with upmost respect to the honorable members of the judiciary. It is made clear in the BEPS report that this is not to be used to make a blindfolded assessment. This is only to do or risk analysis and then a transfer pricing documentation. But I am scary that when this document comes there is already. You got five thousand rupees in Mauritius you got one hundred rupees in Malaysia in India. Pay on a proportionate basis in India. And that will be wholly wrong. So there is a lot of documentation that has to be provided. How it is to be used is scary. Some of the things. What are the rules of BEPS. I explain to the rules in my black money speech how India has done nothing. Look at globally. There are no rules. Germany and

France have bribed. Have bribed employees of Swiss banks to give them data of Germans and French nationals who have assets in Switzerland. The state is bribing to get India has got those names from because when those individuals give it to France or Germany. They at had a list of ten Germans and twenty five Indians. Germany has given that data to India. What has happened with a process where I don't believe much as happen. Look at this wonderful list wonderful slide of the it of the office of the Indian Express it says Indians are one thousand one hundred ninety five names in Swiss bank accounts. This is the amount which is there this is a wholly misleading title. When you see these names it says oh my goodness look we were out of this means nothing. Tying the accounts of the individuals will be a huge asset. And I can assure you that those with common names are going to have supposes a name of a Mr Shah a Mr Mehta or something which is common in India. And you receive a notice from the tax of the scene that prove this is not your. I can do something in reverse. So this is us. This is our lovely news article but it doesn't carry. There must be investigation into this to find out who these these accounts. There was a joke circulating on social media when this title came out. And again please don't send me to jail for this but it was said that after these names are there. In an arranged marriage scenario. If your name is not on that list. Your chances of finding a good spouse goes down. So this is this is some of the things. Now these I go on with the actions I want trouble you with them because I like to have questions and answers on this. But there's a lot of work being done at the international level. It's all there in my slides. But I'll come on some of the interesting things. On exchange of information let me come to Jethmalani case that's important because that's a judgment of our Supreme Court. What did the Supreme Court say they were interpreting whether documents come to us under a tax treaty of names from see Germany. Can it be disclosed in a P.I.L because jethmalani had filed PIL though I feel the part of the judgment setting up the SIT was correct? The Supreme Court has greatly erred in saying no no make those names public. I'll tell you why. To do when tax treaties are signed and countries make over these names. They only allow it to be disclosed to the Tax Court assuming that until that person is prosecuted. Only when that person is prosecuted and it goes talk to criminal court the name becomes public. The reason is today Germany may give an account which has my name. But till that name is

investigated it may be a legitimate bank account. Germany the other countries will stop sharing their data. Fortunately the Supreme Court has realized the SIT has realised and now you know it's very easy for us public people say oh no we want all that means we want them in the paper. But if you do that countries will stop sharing names because they will see that India is not treating it with the confidential as required by the treaty. SIT has stepped back and we no longer see these names coming forward but that doesn't stop there. I still believe once the names are given to the Government of India. They must investigate quickly. Prosecute quickly. Once you launch the prosecution the name can be made public because it goes to a criminal court. So that is the way not just to disclose it and get a quick quick headline. So this is the caution there. But Jethmalani on a separate part the judgment the Supreme Court has set up the site which is very very helpful. So going forward I would like to just deal with you are some of the documentation that we are going to require companies to give and that may come in the new transfer pricing rules that are coming in in the next budget. These are the three steps that are required from countries or companies in transfer pricing. They will have to prepare our master file. This will be filed at the headquarters. They will have to prepare a local file which will be filed at the source jurisdiction for example General Electric. It's a US corporation. It will prepare a master file containing information of all its subsidiaries filed in USA. It will prepare a local file for its India operations file it with the Indian tax department and the greatest game changer there we are look at it is item number three. A country where Country Report of all your global revenues. This will be filed at headquarters shared with the local governments under the tax treaty and this is scary if some of the documentation or the templates if I see when I look at this it shows you which income. How much tax you pay. What is the employees. What are the assets except except or and my greatest concern is how will the revenue authorities view it and thereafter. How will the judicially look at it. So I think these are the concerns of the corporates have going forward. The second template is an activity template. Again matching assets to activities. So yes the whole purpose of this from the always serious point of view is this is not to be used for assessment. This is only to be used to do or risk analysis. So for example when you see this documentation. And you hypothetically again for want of a better word say Apple.

You find that Apple has no employees in Ireland but has billions of dollars of revenue. That information can be used to do a proper transfer pricing adjustment. But if you use that as just meant simply for doing an assessment. It would be wholly wrong. That is the objective of this documentation. But again this will still come as a part of the rules. So this. Now only one principle. The Indian principle correctly held that look BEPS still a process it's these are all wishful thinking until it is implemented by law. It cannot be used at this stage of the thing. So this is this is what I have a briefly done. I think the little movie gives you an implementation I mean brief or well look of all people involved. Today we have N.G.O.s. some of the greatest tax documentation about corporate taxes are given by N.G.O.s. There is a Tax Justice Network. These are run by persons who are now so N.G.O.s are becoming important part of this debate. Corporates are equally important. Countries ultimately will have to reconcile two things that I said earlier. Everybody needs investment. Investment will happen If your policies are clear simple. I can speak as a lawyer for many multinationals. That we don't have a problem with paying taxes. It should be clear not arbitrary and certainly not excessive. I think everyone accepts that they have to pay a share of taxes. One of the greatest game changers is now paying taxes viewed as being socially responsible. That aspect is now going to filter into corporates. It's becoming relevant even in the boardroom level. So just of avoiding taxes and only remains remunerating shareholders is now going out. Taxes being viewed as a social cost. So there is a change the changes happening. Changes happening globally. And I do believe that in the next few years we will see some part of this legislated but again there is a great chance that this project may fail because if countries view that no I don't like this project. I'm not going to increase my taxes. I'm going to continue to be a tax haven. You will still have loopholes. Once you have loopholes. People will exploit them. Whether it's a success. Whether it's a failure. I cannot speak. But it is going to come. Many countries will implemented without the other countries involved India will probably be one of them as and when we implement it it will be there for you too. So with these few words I end I will come any any questions on BEPS. BEPS is like a stomach upset that the international tax community has has got. It is right. The international tax rules are broken. But whether the cure will work I do not know. So we can discuss this. If you want we can go back to

transfer pricing which we had in the morning I am now open I wish to finish within the time which is a lot and so on three minutes prior.....But when you come to the Income Tax Act you'll find the argument ignore what is accepted in the Customs Act you'll have to decide that. So I think with these few words I do not take any more of your time. It's been a pleasure here again being before you all and I look forward to interacting at some later stage. Thank you very much.

Session 3

Mr. Sanjay Sanghvi: Welcome back and very good afternoon. First of all I want to sincerely thank this academy each one of your lordship for giving me this opportunity appear before these two stand before this august gathering. I'll do my best to share my thoughts on the subject allocated to me. That's my commitment. The subject is economic of Advance Pricing Agreements. I want to spend a few minutes in terms of explaining what is Advance Pricing Agreement. The real background of I'll call it A.P.A. for short is cross border taxes...international transactions. And within that cross border taxation is it is it really connected with transfer pricing as Mr porus kaka briefly touch upon transfer pricing. What is transfer pricing: any transaction between two parties. Either or both of whom are not interested in first condition. Must be transacted at arm length prices. For example A Microsoft in India and Microsoft in the USA they're doing a transaction of purchase and sale of lets say a Software then the transfer pricing law expect them to transact at arms length meaning if particular software would have been sold by Microsoft USA to let's Apple USA $100 the our Income Tax law expects Microsoft India and Microsoft USA to transfer that hundred dollar. In other words if they transact at a price less than $100 under Income Tax Officer in India who is making the assessment of that's a Microsoft India will make an addition of the shortfall amount. That is the basic core of transfer pricing. The pricing for which you transfer the goods or services must me as if you are acting in independent uncontrol third party situation thats the core of transfer pricing. Second as the porus kaka also mention globally as well as in India about 60% of income tax litigation 60% of income tax litigation is centring around Transfer pricing. Therefore there was a sincere desire on the part of Government of India that can we create a forum can we create a mechanism by which we can try and pre-empt unnecessary litigation around Transfer pricing and having regard to the fact that like any other developing country India also needs foreign investment. I fyou wanted to strike a balance in terms of encouraging flow of foreign investment into the country at the same time to try and address unnecessary tax litigation. Let us not put MNCs or other foreign investors who were putting money in India to an un-advantagous situation where we could have done

something in advance to avoid some disputed tax position. With that twin objective in mind this device is this forum of advance pricing agreement. Most of the leading economies in the world economy in the world weather USA UK Japan Germany everyone has APA program. As the name suggests advance pricing agreement before a person enters into a transaction it can approach Central Board of Direct taxes (cbdt) to negotiate and enter into a contract in a simple words it is a contract between tax payer A limited and CBDT, Finance ministry that we propose to enter into this particular transaction. A limited has an associated enterprise related Party Lets in Singapore A Limited is going to import certain goods from Singapore related party is going to import some goods from its related party in Singapore outlets a a cost in the hands of Singapore markup a profit of 20% cost Plus 20 % Now, A Limited is very well aware that similar transactions which has already happened in the country maybe in the case of some of the other taxpayer and there have been some disputes with that tax authorities where the Indian assessing officer is saying that know if similar goods are imported by some other third party from third party vendor in Singapore the margin is not cost plus 20% its cost plus 30% differential 10% outstanding tax litigation. So there A limited will approach cbdt by filing an application by filing and filing an application with the cbdt where it will set out all the details that who is the applicant what is address what is pan number who is the related party with whom it is going to enter into the concern transaction which needs to be the subject matter of the APA all details are given at what price they propose transact how that propose price is in sync with the independent market forces that if I propose to import the good set cost plus 20% in a similar economic scenario of third party today also imported at cost plus 20% or in case of third party imported it cost for let say 25% then why I am proposing cost plus 20% so I need to explain to cbdt that there's some economic factors which needs to be taken into account justify the price of 20 % that is called Transfer pricing adjustment in the context of income tax law transfer pricing Transfer pricing adjustments. So A limited will have to explain its application to cbdt that will market price for that goods is cost + 25 %. I propose to import those goods at cost plus 20% and these are 3 reasons A B and C by which I sincerely believe that cost plus 25, cost plus 20 markup is justified in my case may be in third party scenario is taken by the vendor when it supply similar but here it is my

group entity it is my Parent company otherwise connected to my group so risk element of I defaulting on payment is very low and therefore they are able to supply those goods to me at cost plus 20%. As I said the background of APA is Transfer pricing first pont. Government wants to contain reduce unnecessary litigation by giving an opportunity to tax payers and sir kindly note the applicant could be a resident of India as well as non-resident of India who can make an application to cbdt for entering into APA. Now, who are related parties? Law calls it associated enterprises in simple words it is called related party. For example A limited and B Limited they have a common parents CLimited. C owns both A and B then A and C offcourse are related parties but A and B are also related parties they have common parents. This is an example of treating this A and B as associate party, associated enterprise for the purpose of transfer pricing. What is the significance of associated enterprise transfer pricing rules apply is only on transaction between two associated enterprise not to third party. This is one example of associated enterprise. Second example is if A limited participate directly or indirectly in the control management or capital of B Limited then both A and B are rated party. They are treated as related party or if a limited has minimum 26% equity ownership voting rights of B Limited because of that relation A and B are related party so any transaction between these A and B will be subject to transfer pricing adjustment. So therefore they are expected to deal transact at arms length there pricing for goods services purchase sale must be at market price so these are few instances where two parties are treated as related parties therefore transfer pricing rules will apply to them. So if you kindly see the punch line APA regime intends to attack root cause of TP dispute to provide tax certainity. So this APA mechanism was introduced by government in finance bill 2012 on the floor of Parliament hon'ble finance minister made a statement that while we want to encourage foreign investment for the development of the country we also want to want to see that the tax dispute centring around foreign investment and again within the basket of transfer pricing is bare minimum and therefore be proposed to introduce a p a mechanism so that is how they have introduced advance pricing agreement. It is a statutory provision section 92 CC advance pricing agreement section 92CC of income tax board the CBDT with the approval of the Central Government, may enter into an advance pricing agreement with any person. The person could be an

Indian corporation or a foreign Corporation determining the arms length Price or specifying the manner in which the arms length price is to be determined in relation to an interested transaction to be entered into by that person. So it is purely optional and once entered into ofcourse because it is bilateral contract it is binding on both the sides. What was the purpose of introducing APA scheme...FM said that to provide certainty and unity of approach in determining arms length price of interested transaction we propose to introduce APA. That is how it came in finance act 2012. APA is an agreement between taxpayer who could be a resident or non resident and CBDt determining the arms length price or manner of arriving at arms length prce. Principal will be decided it will be fixed.

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Full power have been deligated to CBDT to come out with rules for manner how APA will be implemented. All executive powers are with CBDT. There are three types of APAs unilateral, where only two parties are involved. second is the multilateral where you could have more than two jurisdiction. So you have one party in India second in USA third in Germany.

Discussion with Participants

As I said transfer pricing therefore APA is a very dynamic subject it is a business law. It can change over night also. So when a person makes an application for this agreement. There is critical assumption so if I approach CBDT that I am going to do this transaction with my related party in singapore and when I propose cost plus 20 I am taking same example cost plus 20 then I set out that when I am making this request for cost plus 20 I am assuming this three things will remain constant. Market forces will be same, this economic condition will be same this thing will be same. So the point here is law calls them critical assumption that is the technical statutory word. So based on those understanding specification and discussion of critical assumption CBDT agrees yes we are fine with this cost plus 20 they put the signature. That becomes the law for my assessment. Next year or after 2 months one of the critical assumption under goes drastic change which means my business model that transaction is no longer sustainable economically then I need to approach CBDT seeking a revision. Let say I enter into this cost plus 20 % model

for 5 Year 2015 to 2020 when I'm in 2018 one of the critical assumption is seriously changing which impacts my business model I make an application for revision they are more than happy to appreciate the business reality they agree for a revision than revise the agreement is entered into it says that for first two years as an example old APA will apply and for next three years the new APA will apply otherwise he may create a dispute that no mr. sanghvi I only apply the new one for all the assessment so board will also agree in writing for which period old agreement will apply for tax assessment and for which period new agreement will apply. Till december last month government has entered into roughly 31 APAs out of which 30 are unilateral. The first category and one is bilateral. Sir some of the core of APA mechanism: who can enter into APA eligibility. The person proposing to enter into transaction. So in our example A limited proposing to enter into a agreement to import goods from subsidiary in Singapore and that applicant could be resident of India or may be non-resident of india does'nt matter. What is the scope of APA. What is really covered? Four or five very crucial item. A limited is the contractual party/identified party no vagueness. It will be transacting with B limited in Singapore. Name, Address everything. Third A limited will be importing this particular item from Singapore. Again specific transaction, no vagueness. It has to be this not this. So APA will only apply to this not to this. So what is the binding effect of TPS very natural, very logical. It is binding on me as an applicant. It is binding on the tax authorities, the commissioner, principal commissioner and sub-ordinates. So transfer pricing officer cannot possible dispute this. Binding only in respect of transaction in relation to which the APA has entered upon. I may transact some other item from the very same party that cost plus 20 will not apply to this unless this is also subject matter of that APA. Now that agreement absolutely alright otherwise it no longer binds me or revenue if there is a change in law or there is a change in fact which has material impact on APA for example sir said....rate has undergone a change. So my critical assumption one of the critical assumption is so impacted that it is no longer economical sustainable for me as a business man to remain bound by that 5 years agreement because I am no longer making that much profit so I need to seek revision. I cannot pay tax on Cost Plus 20 any more because first I am not making that much profit anymore and if you go and do market survey independent parties are no longer making

cost + 20 in that area. To protect the interest of revenue CBDT is empowered to declare any APAs as void ab initio since day one if there was mis representation of facts or the APA was obtained by fraud, I was hiding some important information I mis-represented and therefore that will not have sanctity of law. Kindly note this second bullet non-compliance with the terms of the APA including critical assumption may lead to cancellation of APA. Infact there is a mechanism with say that once APA has been entered into it is a statutory duty of the applicant, a limited to file annual compliance report with tax department that whatever what the terms of the agreement based on which government trusted me I am fulfilling those. So there is a audit process. I have to first voluntary assume and necessarily file a compliance report plus transfer pricing officer will do TP audit. What A limited is saying that I have complied with one two three whichever the crucial thing of APA has actual done. So there is mechanism to verify because this is in advance reality may be different. So there is a checks and balance available. Third bullet transaction available under APA not subject to regular audit by transfer pricing officer. As I said once the cost plus 20 is accepted then you cannot say no it is not cost plus 20 cost plus 30 I will add 10 % so dispute wont be there. My assessment will be smooth. I know what is my tax liability in India. Validity period upto five years with an option to seek revision. It is also possible for an applicant to withdraw the application before the terms are finalised. If the terms are already finalised and sent to CBDT then you cannot seek withdrawal otherwise it is open for you to withdraw. This concept came last year roll back so I propose to first go to the further slide and I will come back to this. So how does APA really work. First step number one a person has to seek pre-filing consultation with CBDT. Now CBDT has a designated team which is called APA team. Their full time job is to focus on APA. They have good business understanding, understanding of law, commercial angle so you make an application for pre-filing consultation either you disclose your identity or you can seek a pre-filing consultation on name basis both the options are available. What is the purpose of or logic behind pre-filing. One offcourse it is in my interest if I am seeking APA I have decided that help me in making application. But government wants to first make an assessment whether given model of A limited is it really feasible for government of India. CBDT is government of India. is it really feasible for the government to India to pre-agree

on transaction price, transfer pricing, arms length price with this party for this model for upto five years. We are making loss to exchequer because business dynamic is such that in all probability 5 years will be loss gain for government of India let it pass through regular TPA assessment let it be done by the assessing officer we should not enter into APA. So they try and come to prima facie assessment whether it is a fit case for APA from economic angles. So once pre-filing consultation is stage is successfully cleared then one moves a formal application then one has to set out identity everything all details are given. Then there is preliminary processing of application in the course of the work in progress if I can call it work in progress one can seek amendment to application some facts might have changed so there is provision for change. It typically in our experience takes anything between 6 months to 12 months in a unilateral APA. What we have seen on ground level the responses are very very positive. The APA team is extremely positive, very receptive, the appreciate the business proposition they don't take any hard stand. The mind set is quite flexible they want to see that more and more APAs are entered into that is the whole purpose of government. So that is to the credit of tax department. So what are the keys to successful APA programme: Proper functional analysis, what is called benchmarking on which the it arrives at arms length price. Why my price of cost plus 20 % is a fair price, looking at the market forces I have to give reasons for that how I am proposing and why I am proposing cost plus 20. So one way to do similar condition, similar transaction...third parties are transacting at cost plus 20 or around 20. Let say third parties are transacting at cost plus 20 then I need to bridge that gap of 5% then I have to say I am taking less risk I am transacting with my parent company so there is no risk of bad debt not receiving money so therefore I deserve lesser profit margin. This is the Pre-filing consultation I was talking about. It is mandatory to have a pre-filing consultation before filing an application before as I said government make, the CBDT may come to a conclusion this is not a good case, not a fit case, it is loss, loss deal for government so they may not agree for an APA. So then there no question of making an application for APA. Pre-filing consultation result has to be positive for A limited to formally make an application.

Discussion with Participants

So mandatory to have pre-filing consultation before filing APA application an consultation outcome must be positive. They should be willing to enter into a APA. The APA team of CBDT to hold pre-filing to determine the nature and scope of APA what kind of transaction will be subject matter of APA will be clearly identified. They will also discuss the broad term of APA. What kind of...if they enter into a range concept that your arms length price is not cost plus 20 but cost plus minus 5% so they provide for a range. What interested transaction will be covered. SO import by A limited from B limited in Siingapore. These kinds of goods or these kinds of circular or services very very clearly identified. What ever understanding has been reached in pre-filing consultation will necessarly be reduced in writing and a copy will be given to the assessee/applicant. So he is knows that this is on record that this was the proposal, this was the discussion. Finally this is what has been agreed. So tomoprrow, later on based on these pre-filing consultation understanding I move an application then CBDT cannot take a U turn no no no we never said cost plus 20 we said cost plus 30. Everything is set out in black and white. Kind of memorandum and understanding. Revision of APA: An APA may be revised by CBDT either suo moto or on request of assessee or competent authority or DGIT (IT). So four parties either CBDT or A limited or competent authority, who is part of CBDT, the joint secretary or director general of income tax. Assessee is A limited , CBDT or competent authority or DGIT are all if I can call it government side. So either can move a application for revision or government can propose a revision. So why they request for revision in three case: Either there is a change in critical assumptions or there is a change in law that modifies matter covered by an APA. In case of bilateral or multilateral APA a foreign country may seek a revision to suit there requirement. So in these three cases, law provides for revision of APA. Revision at the request of assessee may be rejected by CBDT, reasons to be provided in writing. Revised APA to include date till which original APA is to apply and date from which revised is to apply. So again there is no dispute in the transfer pricing assessment. One after successful completion of 5 years one can seek a renewal of APA. One has to go through the whole process except prefiling consultation. You don't need to do a second round of pre-filing consultation. Otherwise you make a fresh application, one again pays the application fees and then seek a renewal. Application fee range from 10

lakhs to 20 lakhs if the transaction value is upto 100 crores then 10 lakhs, 100 to 200 crores 15 above 200 crores 20 lakhs. And non-refundable. Again very important cancellation of APA...a signed APA can be cancelled on five grounds: Failure to comply with terms of APA, Failure to file annual compliance report in time, Material errors in annual compliance report, No consensus on the terms of the revised APA, Effect cannot be given to rollback provision of an APA due to failure on the part of applicant. Now I will come back to roll back provision. When an APA is cancelled, it must record to the reason for cancellation. I suppose the principle of natural justice other side should know what cause government to cancel by agreement. It it will follow principal of natural justice which is proper hearing will be given to the assessee and it will also specify the effective date of cancellation. Then the order of cancellation shall be communicated to the assessing officer, concerned transfer pricing officer and foreign tax authorities in case it was bilateral or unilateral APA. I come back to rollback provision. What is Rollback? Originally APA mechanism was provided this provision was not there so in a year one year of introduction of APA government realised that while we are entering into APA for future years and there are almost 60 % TP litigation going on the country why not take it backward. Apply retrospectively because APA you may have agreed on principles...commercial principles. So Why not to apply same principles with the same party for the same transaction. So it says that you can....Now this third bullet is very important Rollback available only - In respect of ‘same’ international transaction to which APA applies. If return for rollback year has been furnished by the applicant before due date. and I must apply for rollback of all the four years not for one of the four years. Rollback not available if- Determination of ALP for said year (for which rollback is sought) has been subject matter of appeal before ITAT and such appeal has been disposed of before signing of APA; or Rollback has effect of reducing taxable income or increasing loss declared in the tax return for that year. There has to be something for government, something for tax payers. As Mr. Porus Kaka had displayed those numbers 60 thousand crores is the TPA adjustment in 14-15. In USA they have APA since 1991 before I economy opened up in 1992. Information collected in APA process is deemed as “tax return information” thus no loss of any confidential information. Another important point, law says that whatever information I am submitting in my

prefiling consultation that may not remain confidential it can be shared with the tax authorities otherwise in department field officers. So that is the concern meaning in case the negotiation fails I cannot entered into APA then my business information trade secret what has gone to department may travel to my assessing officer. In UK also they have a ‘Rollback’ facility. It is quite similar to USA. Only thing is that we are late entrant because our transfer pricing came into picture in 2001 and APA came in 2012 almost after a decade. So what is the beauty of APA. The punch line is "it helps in reducing the litigation". You prempt your price, you fix your price and that price assessment will take place so there is no issue of litigation. One more point if in a Rollback proposal in those 4 years period if in one of those years I had concluded MAP Mutual agreement procedure then I cannot apply that Rollback because something is already settled. And as I said the last bullet point business information shared with APA team during APA procedure can be shared with field officers. So it may not remained confidential but ones take a call that this the law do I want to make an application. It is not the case that law is silent on this point I come forward make an application then they share the information. They are saying it can be shared so it is upto you whether you want to make an application or you dont want to make an application. Till last month 31 agreements are entered. I am personally aware of 1 case but not....for 4 years. So are pending with CIT appeal, two are pending with ITAT so we have withdrawn the appeal. So with this I come to an end to my presentation. I hope it was of some use. Thank you very much.

Session 4

Dr. Geeta Oberoi: Good Afternoon. Now I ask my last speaker to introduce little bit about herself and take up her subject in the session.

Ms. Pramila Srivastav: Hon'ble sir Mr. Bobde, our chief justice, hon'ble judges of the high court, madam director, It is my privilege to totally my privilege to to address this August audience today. My background is that I retired in two thousand and twelve as Chief Commissioner of income tax and having had the privilege to work with the two judges in the past in my capacity as secretary advance ruling in hon'ble justice kadri and hon'ble justice suhas sen got me really interested in law and the other thing was that as you go higher up in hierarchy in bureaucracy you know less unless you read less and less. And you feel more and more important because everything is put up on the file for you and when you have a query you're too lazy to look up the circular yourself. You just write a note put up with the relevant circular. So I wanted to correct that I realize that after retirement here's the opportunity for me to take up law so I completed my L.L.B. and your honor I take the pleasure of posting that a qualified but first division that was four five months back. Got myself registered in the bar council and then after that I'm doing nothing. The reason being that I have not really made up my mind what to do whether my age I should be going to the courts and arguing with I can argue. I'm not very confident of myself. Meanwhile I have joined the National Securities Depository as director in the board that is NSDL from where you have maximum problems of PAN, TIN, DIN coming but that is a way small part of their work. Their major job is to be the national depository of all the securities and debt, documents and other things. Which brings me to our topic today that is the exchange control. May have the permission to start sir. So we need to understand what we mean by the cross border transaction. By it does exactly what it means in common English. We have heard a lot about OECD in today morning's presentation. So the definition at top is by OECD and I'm in India also has accepted it because it has a very logical definition. Cross border transactions between residents of different countries. The term of residence and residentiary had been emphasized in the morning so I'm not repeating that. Now the point is why you really do we have exchange

control in cross border transactions. Cross border transactions are roughly of three types: One is cross border financing an investment. The second is buying or selling of products and services. And the third one which is developing a lot these days is combined or shared services. We are having a lot of multinationals who are having a common office or common hub for giving out services to the centers all over the world. So the third point has become very important now. What really we mean by cross border financing or investment is given slight out of which the last point that is investments in FDIs forportfolio investors and foreign institutional investors. It is not investment. That has become very important for us from many angles today. And away he relevant topic because I mean because separate law and commerce from politics. And today our prime minister has been speaking a lot about make in India. That has led to a lot of liberalization of foreign direct investments which is really what we need because foreign direct investments are truly speaking long term investments in your development in the country. If you go to FPIs foreign portfolio investment or investments made by the foreign institutional investors that this is really short term investment for profit. And that really does nothing for a country. When they don't like it they walk off. So foreign direct investment is really important and on this point I would like to give you a little figure verbally. It is not in the presentation. Fortunately I remembered the figures although I seem to have misplaced the paper. So foreign direct investment is almost ninety percent of the foreign investment in India. It is going beyond Five hundred billion US dollars I don't have the exact figure here. Somewhere in my papers. But the foreign portfolio investment is very little that is almost FDI is almost a five hundred times more. The foreign portfolio investment is hardly one point something billion US dollars. While the FDI is running into five hundred billion US dollars today. India is growing as a of merging market. We may not be growing as an emerging manufacturing hub because of the difficulty in doing business in India. In spite of everything there are too many places where you need approvals where you need to get sanctions for starting business. And so long as it is democracy and so long as we have a union list and state list and the central list and the concurrence list. I mean sorry union no centralist. You have a whole lot of things figuring in different lists where either state or union can make laws and because of that for example

land I believe is in the state list. Now a person who wants to start manufacturing in India. He would have to acquire land owners of for that he will look up to the union union will look up to the state so that kind of difficulties are being faced in FSIs. But in spite of that we find that because it's a growing market alot of trading activities are increasing. There was a World Economic Report last year which I have also posted in one of my articles in international tax review. India more than China is the fastest growing economy. Although on honestly I think it is a little misleading to say that because fastest growing means percentage wise. What was the starting point we don't know. But today it could be really been true because China is facing a lot of problems. Their currencies into trouble. And because of that what was predicted by the world economic council could very well be true very well this year. I'm sorry I get diverted alot to economic aspect so please correct me when you want me to carry on. OK. Buying and selling products and services I will not going to details of this. Here the topic of say permanent establishment is a tax related term and why income tax becomes important although it not directly involved with cross border transactions. It is because ultimately that is what decides what a businessman will do whether he will invest in India and pay heavy taxes because he has a permanent establishment so will you go elsewhere and sort of launder his money and bring it back to India. So indirectly I would see that these items would affect exchange control. This combined research and shared services are also part of Cross border transactions today because we have heard about business process outsourcing. It is increasing a lot more because labor is cheap in India. That also has implications on exchange control. Let's put it this way. Exactly like e-commerce also has a lot of implication of exchange control. So is a plethora of developments happening today. I don't know with the developments are going faster or our laws are going at peace with them. That is a moot question. Now what do we really mean by exchange control that's a very very specific term. It is a government restriction on the moment of currency between countries in private transactions in foreign exchange. That's it. That is defined. And what we mean by transactions includes currency, bank transactions, book transfers. What was discussed in the morning about money laundering and Mauritius and everything comes in here. You have financial benefits provided by persons who are residents or citizens of one country two persons who are

residents or citizens of another country. OK. Now we come to the main topic that I'm supposed to discuss today. That was a little bit of background. Laws for exchange control started in 1939. Like my Income Tax Act also started in 1857 when the British army needed money they introduced Income Tax Act. So here again on a temporary basis defense of India Act was introduced and then as you can see this is just telling you a little bit about the background. The third paragraph is important 1991 was a watershed time for the exchange control. That does a time when economic liberalisation was brought in and foreign investments where sort. Before that it was more of a conservation of foreign exchange. That we should not have a deficit. It should not go out of control. So too many restrictions were put by FERA. 1991 onwards the FERA was done away with and we brought the Foreign Exchange Management Act. Earlier it was foreign exchange regulation Act. I will be just presenting the comparison to you for your benefit. OK. Before that my presentation and really the scenario in legislation as of today where foreign exchanges concerned is limited to three major acts: One is foreign exchange management act which replaced FERA, the second is foreign contribution regulatory act which came much later and the third one is prevention of money laundering Act which keeps coming in the news for all the wrong reasons. OK. Now the point is why have so many legislations what do they do. Why isn't FEMA enough that though came to my mind so I looked up and I found that FEMA was brought in...it is more like a mother act of the not directly linked with them legislatively. If you see there are objective FEMA was brought in to control the provisions relating to foreign exchange facilities. It was supposed to facilitate external trade and payment and maintain the balance in the foreign exchange market in India which is what the reserve bank of India is supposed to do today also and Reserve Bank is the common thread in all the three acts. Then we found that whenever you make a law. Then there are enough people to find a loophole. Then you make another law. Then some more people find a loophole. So since the RBI and the government is responsible for the monetary policy of India and maintaining the balance and maintaining the safety and security of India from I mean protecting it from terrorism, drug related money and lot of crime related money. Therefore they keep on bringing more and more specific acts and hence came the P.M.L.A. Prevention of money laundering Act and this was brought in to

prevent money laundering and to provide for confiscation of property etc. Then we had discovered that a lot of money was coming and going from India through another route that first foreign contribution. That also has been in the news recently for the...I think the government of India has cancelled 1500 or something non-government organizations licenses because of misuse of FCRA it is really fantastic the kind of mischief we can create in FCRA. Whatever kind of money you want to bring in. If you don't have a law in place you can pump in money from all sources for all purposes and in my open interest directly related to to the drug abuse introduction in India and also financing of terrorist activities. OK. Now the issue is this I will run through 3-4 slides quickly because I have just compared FERA and FEMA. FEMA is what is valid today FERA is gone. The issue was why did it have to go. Now what does common between the two of the axis that both are regulatory bodies FERA was and Reserve Bank of India other two authorities controlling them directorate of enforcement which is run by the government ministry is the enforcing agencies in both and they are apply not only to India but also to extra territorial jurisdictions where Indian involved. OK. Now this I will go very quickly only attention I would like to draw to you is number two where in FEMA it is a civil offense in FERA it was considered a criminal offense punishable as per CrPC. Appellate procedure ultimately goes to high court but new thing they haven't reduced in FEMA is appellate tribunal for foreign exchange chaired by Judge who is a High Court judge or is qualified to be a high judge. OK. Now a little bit about FEMA, It applies to the whole of India. It's a little bit of repetition and the branches and offices and agencies outside India owned and controlled by a person resident in India etc. Yes this is something I would like you to kindly have a look at. The overall structure of FEMA is not just legislation. You have a supreme legislation with seven chapters and forty nine sections that is the main FEMA Act. But after that that also provides for delegated legislation by the ministry which is more specific and under Section forty six of FEMA they are empowered which gives you five sets of rules and the five sets so rules are for different kinds of transactions which FEMA has sought to control. Besides that we have some odd subordinate legislation by Reserve Bank of India. Now that is really fantastic because besides the twenty seven sets of regulation every day you open the google and see the RBI portal you will find twenty thirty forty regulations coming

in so that is more like a daily routine. And really it is being controlled by the Reserve Bank of India. Technically we might say that FEMA by the legislature and Enforcement Directorate is the enforcing agency. But what is right and what is wrong on a day to day basis is determined by the Reserve Bank of India. So we go to the next one. There's an annual master circular issued by the Reserve Bank of India which gives you an overall picture of the theme or the policy for the year and that is not really done lately a lot of homework goes into it by the office of the governor of reserve bank before they take a view on what is to be done. Now that Master circle also controls the F.D.I. policy of DIPS. DIPS is a department of I think it is industrial. Yeah that's right. Promotion of industry and whatever but that isn't the Ministry of Industry it comes and that issues FDI policy under the guidelines of RBI. For FEMA law itself as I mentioned the first one is the super legislation that has forty nine sections, seven chapters out of which the chapter of this six is important because that gives her legal mandate to directorate of enforcement which is the enforcement agency. Now as the issue came up better Directorate enforcement handles both so here we have the answer. It handles FEMA as well as prevention of money laundering act. The Enforcing agency is common for both. These are if you wish to begin skip through because this is more for information right. One the last point I would like to reemphasize I know it's known to everybody but still when we talk about person all the time that is a very very broad term. I mean it is the same as an Income Tax Act. A person is a legal person really. OK. Then we come to FCRA that is foreign contributions regulatory act and this has in fact been sort of modified in December two thousand and fifteen. They have added some rules amended some rules of FCRA. Now FCRA is basically meant to control a lot of well this specifically mention members of parliament M.L.A., senior government dignitaries, judges. Everybody who is entitled to receive foreign hospitality or foreign gifts or even the media. I mean anybody that can control the public opinion. Really. They are supposed to perform under the rules of FCRA and violation of FCRA is treated very seriously. The implications will come in the next few slides. OK Here we go. Some things are exempted I mean the show might come I have my son in the US and he wants to send me money so can FCRA can catch me for that also? No. There are certain exemptions like US aid your Canadian Development Agency a lot of

the United Nations sent IMF. These people are exempt. If they are contributing in India for any kind of her benefit or a salary to emploed person or whatever. So exemptions are given in section three and four and detailed scholarships are so exempt. I would draw your attention to the last paragraph. Fifteen thousand N.G.O.s ran into trouble. Their license was cancelled by the Department for misuse of FCRA that is the foreign contribution regulation act. OK. Then we go to prevention of money laundering act. This is the third one FEMA was the first second was FCRA and the third one is a prevention of money laundering Act, 2000 and it was modified/amended in 2012. OK. I if everybody can read the first paragraph. I don't know how much of the truth is there. But I read in a reliable book.....he opened a laundary all over the city all over the country. That is what the book's says and its a very very author who is respected. It says that he opened laundry business all over the country with that money. But the reality is that a lot of dry cleaners don't take a check even today. So I don't know but basically it means legalizing your black money or illicit money and converting it into white. There's a set up called financial angle task force on money laundering. This was a step by G-7 in Paris and India also became part of it. Accepted it and decided to like it came in 89 but India brought the Act in 2002 to follow all suggestions made by the force on money laundering which was there in 1989. OK now. Money laundering Why do we need to bring it into the topic today. That is the control of foreign exchange because it the offense under money laundering and money laundering is basically converting black into white. It can very well happen the domestically in India. So why have it in todays presentation here is why. Offense committed outside India and the proceeds of such conduct of part thereof are remitted to to India. This is I have quoted from the section itself. If offense is committed in India and proceeds of crime transferred outside India. It covers offenses specified in parts A, B or C. of the Schedule to the act. Now this is very interesting because the case law I would be I presume it is just know circulated. That was relevant because the schedule in parts A, B and C are all relating to CrPC, I.P.C. murder, kidnapping, forgery, drug trafficking, narcotics. So that this where if the monies are brought in India that is not only dangerous for the economy but also for the safety and security of the nation which we have promised to uphold in our Constitution preamble. That case law is already with all of you. Very briefly speaking in two thousand

and seven this person was raided by the income tax and the income tax authorities passed on some documents found there to then enforcement directorate. The documents that were passed on related to as follows: One that he had three passports, two he had given a lot of instructions to various banks in Switzerland for transactions and he admitted that the bank accounts were his, third he had allegedly stolen a jewelry from nizam of hyderabad and sold it off to somebody. Those were the three issues that Enforcement Directorate found. But for some reason which I don't know not in the Bombay High Court judgment but for some reason after two thousand and seven the matter jumps to two thousand and eleven. No reply had come from abroad whatever the reason. But he was finally arrested in two thousand and eleven. He applied for bail and that is when the case really came up to Bombay High Court. It reached a decision that fine after sitting on the case for 4 years, the government has done nothing. And Enforcement Directorate has done nothing and billions of U.S. dollars or thirty six thousand crores worth of Indian Rupees have been found to have been transacted by him but you have not been able to prove it. And then you're trying to hang on to the case by saying that he had three passports and really possessing three passports is part of schedule A, B and C of PMLA because if he didn't have passport he wouldn't go abroad. If he didn't go abroad then you couldn't open the bank accounts and therefore his imprisonment continue. This logic was not bought by the Bombay High Court and it agreed to grant him bail. His bail application was accepted. But the within a fortnight roughly, the Supreme Court reversed the decision of the Bombay High Court. They gave the same logic that if so much of money has been invested then surely he must be doing illegal criminal activities and just because enforcement directorate has not found it doesn't mean it should be given bail. So the Supreme Court took a different view and rejected his application for cancellation of I mean his application for bail. But recently I saw in the newspaper this August that he has been released. I don't know why is released what we are doing with those x thousand crores found. But we means the government stuck to only two points. One is he sold diamond of Nizam. And second is why did he have three passports. So I think the case was pretty weak as it us. That case lost a in a more organized way then I am explaining is given in the summary I prepared which gives you the facts of the case and also the highlights of the judgement. I would request you to

find a little time to see it. OK. This is the situation of pendency said today. This matter came up very recently I think not even a month back. When our minister of state made a statement in the Parliament that more than six thousand cases are pending today. And out of which four thousand seven hundred eighty seven are said to be of FEMA and rest are of.....mostly at the Enforcement Directorate not the courts that postponed adequate is overloaded and I think that giving them some incentive or some overtime or creating some more post whatever but I don't know whether something is tangible has come through. This data is very recent not even one month old. Now these are all....some of the recent cases of foreign contribution. In case it came to the mind why have it. When we already have them. So these are some of the well known cases. On 28th December, FCRA tried to become a little more accountable and little more sort of transparent can we say. It says that the government is to receive account details of all the N.G.O.s. online. There was time I don't know where that was what year it was per quarter per quarter they are supposed to publish. What they have received from abroad. Now P.M.L.A. is in the news Bank of Baroda officer persists have been arrested no in this case what was happening is money was being laundered. Bank of Baroda had given out a lot of amounts to the Hong Kong and Shanghai Bank on the pretext of placing import orders which never really happened and when this case was cracked then and inquiry is still going on and they should involve was overseas transfer. I draw your kind attention six thousand one hundred seventy two crores of monies we have lost. I mean of course the fact that all the banks signed trouble because of non-performing assets and bad loans comes in the paper every second third day. But we never thought of the quantum one case the quantum is so huge. I will cover Black Money Act only in one slide. In fact Reserve Bank of India has taken out a circular. I keep forgetting the date. Yeah it was in September somewhere that what ever was declared under the black money act by the Indian citizens including the foreign assets will not be covered by any of the exchange control laws which really make sense because the whole spirit of black money Act was that if you declare what you have not declared before we will not hang you in common language. So it makes sense that the government has decided the Reserve Bank of India has decided to exempt black money act from all the foreign exchange control laws. I am a retired government servant. One fine day I get a notice give

me a reason why your account should not be surrendered to the US authorities under the FATCA Agreement. So rang the bank manager what's up. Apparently when this came the banks went happily passing on the circular to the subordinates like it happened my department also. And somebody somewhere said ahaa US agreement so nobody can stay no and even people who were getting one fourth of my pension also got the notice. So this was not supposed to be. But implementation is one thing we don't really pay much attention to. So they withdrew my notice with my reply and everybody else's reply and got a lot of wrapping on the nuckle from everybody. US has entered into almost one hundred countries. Recently it was entered into agreements. Under this FATCA. FATCA is law for USA not for India. But we have also entered into the agreement. I would like all the thinking person's and my hon'ble audience today to give thought we have entered into the agreement all right. And we all so excited about collecting the information and being the good boy and giving it to the US will US also give the information to us. I don't doubt although that is part of the agreement. It is mutual exchange. So this I felt was something that was not really as of today part of the topic I'm supposed to cover today. But I thought that let me mention because it just has financial implications it doesn't involve foreign accounts and sooner or later somebody will put it in FEMA or wherever. Thank you Sir!

Dr. Geeta Oberoi: I think none of you have some questions and queries so in that case can we give round of applause for hon'ble justice bobde.

DAY 2
Session 5

Dr. Geeta Oberoi: Very good morning to all of you there's there's some slight changes we're made to the schedule what we are proposing that we finish after 1 to 2 rather than having lunch we have 1-2 last session. And then two to three have lunch and then after three thinking to you for a trip to Bhimvetika it's nearby place. So if you if you agree to....then late lunch will be alright two to three. It's one and a half hour. Yes. Ninety minutes one side. Is it all. OK. Yes. So today we have our hon'ble justice A K Sikri with us judge Supreme Court of India so we give it to his lordship to give his introductory remarks and then we proceed with the technical sessions.

Hon'ble Justice A.K. Sikri: So good morning everybody and just because there was some confusion because of this nomenclature of session 5 so I just wanted to find out from the speaker Mr. Sujith Ghosh as to what he's going to cover. If you see the topic is issues arising out of interplay between laws pertaining to foreign trade and central tax laws. So therefore this is a foreign trade on the one hand and central taxs on the other hand. So that gives one impression and on that basis I asked Sujith Ghosh he said that he's going to cover this foreign trade development and Regulation Act and in the process what about the in the central tax laws. What are the concessions etc which I get when the interplay of that and on the other hand why I said confusion if you see this material which is given and session 5 material it says approach of Supreme Court in double taxation relief in India so did this cover DTAA so what I am thinking is that I asked Dr. Geeta Oberoi as to whether DTAA is covered yesterday so she is saying that this was just touched upon. So what I will do is then let us try to cover both the aspects. So we may not be I'm mean dealing with DTAA in detail but I don't know whether the case law discussions, the cases which have come touching various aspects. The problem is that itself needs a full session on that. So what I'll do is I'll just touch upon DTAA as to what it is and various facets of be DTAA we may not be able to cover but then when the cases come before you under this DTAA many of you must have I mean dealt with these cases how many of you have sat on Tax jurisdiction in

your respective courts. So many of you that Bombay you must have come across DTAA cases etc any the other who have done that and as exposure to DTAA. So therefore let us then have some discussion on this at least you should conceptually understand as well come justice waziri I thought delhi is not represented. Now, what is this DTAA? You know with globalization and foreign trade taking place and so many ventures, multinationals coming here Indians going abroad and it's not the phenomenon now after globalization it has always been there NRIs I wont NRIs, Indian residents who may be posted abroad or who may have some business venture abroad. So they are making their earnings in the foreign country also. They are earning in India as well. So it's a case scenario where Indian who is a resident here not non resident Indians. But Indian resident who is earning abroad. So the income which he earns abroad where it is liable to tax in India. As per the Income Tax Act it is liable to tax. Now, When he's earning in that country in that country also they would have laws. A person who has earned in this country should pay tax. So therefore an Indian who earns in other country and has to pay tax in India has to pay tax in that country also. Likewise, a foreign company or foreign individual comes here just reverse situation he earns here. So since he has earned or the company corporation earned in India they are subject to indian laws. Tax laws so they would be asking Indian authorities would be asking to pay tax and as per their domestic laws because this multinational company or another company or individual as I said is resident of some foreign countries it coming from UK. Now, they are subject to their U.K. laws. Tax laws. So they will be charging tax. So on there if this situation prevails then on the particular income earned by Indian who is earning in India and abroad but the income which he has earned abroad he would be subjected to tax there as well as here and vice versa and company coming here which is a foreign company a foreign national coming here here. They are on I mean they are employed. They earn here, they are getting salaries or may be businesses are there of many foreign companies and they are paying tax year as well as there. So if it is a forty percent here fifty percent there's out of hundred rupees earned ninety rupees would go in tax. So it would discourage them and it would discourage foreign trade. And it was discourage foreign collaborations and foreign business. So therefore to avoid this the this regime of the DTAA came. That is the two

countries would enter into an agreement. That is why direct tax avoidance agreement that how this tax should be awarded direct tax should we have I mean this double tax should be avoided. So that the individual or the corporation or any assessee we can say so is not to pay tax at two places and they are subjected to only one regime. On that actually we have the main provisions are Section 99A and 91 which you may go through as I said because the main topic is the other one on foreign trade so I won't take much time in introducing this aspect and there's an interesting. OK I'll come to the section ninety one in that sense bit late. Now these are mainly it is in the form of treaties. So two countries say India U.K so India has treaty with so many countries maybe eighty ninety or maybe more than a hundred countries where DTAA is entered into. So therefore if any Indian and the agreement is there is a with U.K. or with Germany or any other country and persons coming from there. They are on the...because of the treaty they would be paying tax in one country. Now the question arises where? How? I mean of course double taxation is to be avoided whether as per the treaty the taxes to be paid by them. A particular individual in India and not to pay in Germany or vice versa whether it is to be paid in Germany and not to be in India. So these normally and these treaties which are entered into you will find the there are two types or rather three types of treaties which are entered into. These are one is deduction method. First I will let you know in briefly that the nature of treaties one is called comprehensive treaty. Comprehensive treaties which provides avoidance of double taxation in respect of every kind of income. This maybe taxes an income capital gain etc. all types of incomes other is limited treaty which may provide avoidance of this double taxation only in respect of certain income. And these are normally limited income are shipping, air transport or estate or inheritance or gift only in respect of that so they are limited treaties and but most of the treaties are India which is entered into their comprehensive treaties. And then the treaty can be biliteral that is between two countries only or it can be multilateral because multilateral treaty today become necessary because a particular company a multinational company may have operations in more than one countries. If a treaty is between India and German as I was saying but they have operations in US also whether that income is to be treated as earned in Germany or in India. Although it is in US and it in multilateral treaty is not there it will create some problems so

that because of that multilateral treaty also. What kind of concession can be given on that there are three kinds of for treaties one is the deduction method. That in the treaty it would be provided. Say Indian resident who has earned some income in Germany that if you have paid whatever taxes you have paid in Germany that would be deducted while when you pay taxes here. Suppose the assessment is made as if he has earned their income in India which is subject to tax. And from that income once that income is assessed X amount whatever tax is paid that would be reduced and balance he will pay here. Other is exemption method. Exemption method is where it says that if the paid taxes in the other country on a particular income then on that income the entire thing is exempted. It will not be included as assessable income at all and the third is credit method that it is the tax etc accordingly but the credit is to be given in respect of the taxes which are paid. Now if I there after I only tell you that under Section 91. It provides there are certain provisions we have given that some countries as we call it unilateral relief. There may not be a treaty at all but still we give the benefit to our people here residence. So that is where it is provided in India has provided section ninety one that unilateral relief even for double taxation if tax is paid and the conditions of Section ninety one are...I mean satisfied. Some issues very interesting issues have come up as I said that we will not be taking much time on that and they would be about Normally residence. A particular income earned whether income earned in that country or not. That is before DTAA is made applicable because it applies on the concept of residency on that person isn't of this country particularly of the companies foreign companies. But there are many judgments of this nature and the concepts of permanent establishments that connection has to be there the can come and if a particular multi national and whether income is offshore income or it was earned in India. Those kinds of disputes have arisen. Interpretation of section nine etc which deals with this. And sometime what happens a certain issues which may arise also in respect of those where a person if he is resident of one country there's no problem. But some countries today recognize dual residency also. Like we have given NIO and other status etc now we have started giving. So if it is dual residency the person is treated as resident of Germany also resident of India also then he should be when the person is assessed where he should be treated as a resident and on that basis that treaty becomes applicable. So they are then

this is in case of dual residency they call it tie breaker rule. The tiebreaker is that they will see look here of where the person is substantially his interest residence with his family's living where his connection are all those kinds of formula which are provided there in to decide and that that is why it is called tie breaker.Now these are some of the aspects as I said that of course now and this BEPS you have seen. I mean you have gone through yesterday which may be I mean I think it was dealt with in detail yesterday. So this is an offshoot of that ultimately because the when the people have started avoiding at both the places they have many companies or individuals they're trying to see that it is avoided at both the places so then that has come and then there is another which is on that is called treaty shopping that where a person will find that where the taxes less in this regime or that as we have known there is a principle of avoidance of tax and evasion of tax. So this is basically the DTA we are not going into the case law. Coming to this foreign trade and central tax laws. If you have seen normally to encourage the foreign trade so that we have more exports there are many provisions under the not under the Income Tax Act. There are many provisions which give incentives because if you remember there have been the debates whether our income tax laws and even excise laws etc also there are many exemptions provided many concessions provided. Now one view is so far that is not been translated in amendments have not been that we should give it go by to all this concessional an exemption regime and reduce the rate of tax. Our imports are much more than the export. Mainly primarily because of oil imports and that may be one reason but in any case. We have to encourage and if you remember fifteen twenty years ago on exports there was no tax at all. It was totally exempted from tax and likewise there are many other exemptions or concessions given when some particular machinery etc for the purpose are even raw material is imported and that the after import and consumption of that for manufacturing of the goods and then it is exported again. So customs duties extra are they are concession argument. So on this in detail I request Mr. Sujith Ghosh to take over and…

Mr. Sujith Ghosh: Good morning. Hon'ble Justice Sikri, learned judges of the high court, people on the dais and off the dais. The whole issue that we dealing with in this session is rather controversial. It's controversial because the implementation agencies of these

policies are often two different wings of the government. And before I start about what those issues let me take you back in history. So the first legislation that came about was the defense of India Act way back before independence so that was an act that dealt with how to deal with imports and how it should be regulated and so on and so forth. Thereafter the first legislation that happened was the export import Control Act of 1947. It was 10 section legislation essentially providing power to the central government to come out with orders in relation to import and export. In those days. In those days. Effectively what used to happen was the policy makers would formulate the details of the various export incentives that the government wanted to gift to industries. In other words those were policies and those were not delegated legislation that's a very fundamental point that we need to bear in mind. So the statute did contemplate formulation of various orders etc but the implementation used to happen by the of administrative policies. And you have what was called The Red Book and the yellow book and so on so forth which all of that got rolled back in the in one thousand nine hundred two when the foreign trade regulation act came into existence. The foreign trade regulation act is a robust legislation it runs into some of 30 odd sections so to say. But the architecture of that is as follows. You have Section three and Section five which are the heart of this particular legislation. Section three gives the central government power to come out with orders to control, restrained, regulate imports and Section five which is the most important section of that section so provides that the central government shall by way of a notification formulate a foreign trade policy. In other words from the policy making as was generally understood. It took the character of a notification. The policy were to be introduced by way of the notification and Section five empowered the central government to come up with a notification and that notification was hereto be known as the foreign trade policy. The foreign trade policy therefore is not a policy document like a telecom policy or any other policy sort of delegated piece of legislation. That policy stays in force for five years and then keeps on getting amended every five years. They export import policy which is currently known as the foreign trade policy. Only duties to a known as the example I see that the foreign trade policy for the five years that it stays in in relevance has various features and various benefits that they intend to give to the industry engaging in exports and imports of a

defined kind. And I want to pause here then explain to all that whether the Section five notification that are issued any changes that may happen to those policies or the notification they're under can have a retrospective or is it going to be prospect effect. This is very important in the context that we live in a very dynamic world where the carry on business based on a certain policy document or notification. Industries do engage in a certain trade fashion. And if the government were to amend foreign trade policy or make any changes to the foreign trade policy which has an impact on a retrospective basis. Can that standard village of law? On occasion it had come before the hon'ble delhi high court and which was subsequently confirmed by the Supreme Court as well. Issue was in those days India was exporting lots of chickpeas to Pakistan and suddenly there was a surge of export of chickpeas and the government came out with their what is called as press circular saying that from so and so date chickpeas are to be banned. Export of chickpeas or to the banned. That circular Press release was made by the then commerce minister over television and so and so forth and they're after a official circular was issued by the DGFT which is the nodal body regulatory making that the chickpeas exporter shall be banned with effect from the date when that announcement was made on the press. Now industry went and went in arms and went to the High Court and the plea that was made was if you read Section five of foreign trade development act it uses the freight the central government shall formulate the the foreign trade policy and make change or amended it from time to time. The argument that was tendered before the High Court was the word time to time essentially means it will always have to have a prospective effect. So Intrinsically federal government any government any sovereign has a right to make retrospective legislation. But by virtue of specific language deployed into Section five the import of that is that amendment shall always be prospective in nature. Hon'ble high court did agree with that and they came to declare that any amendment in the foreign trade policy can only only be prospective and not retrospective. That decision got challenged before the Supreme Court another decision in Agri Trade Case and justice sinha's judgement at last paragraph you makes some mentions that yes indeed no amendment to foreign trade policy can ever be made retrospectively. So the reason why make this my point is that unlike most other fiscal legislations where there's an inherent retrospective

power. This legislation by word, by Design, by default has to have a prospect of application in terms of his amendments point one. Even though it reads as a foreign trade policy. It is not a policy of that nature duties a policy which is enshrined to a notification and therefore to delegate a piece of legislation. Third and most important thing that begs discussion is once a certain benefit is provided for under the foreign trip policy can you be said to have created a vested right. Let me before I go to the vested right concept I must explain what this foreign trade policy essentially does. So the foreign trade policy essential contemplates two very fundamental things. If you export goods from from India having manufactured goods in India and you have exported goods or issue export services. The international norm that to export goods and services and don't export taxes essentially means that all the taxes that I've got incurred in the manufacturing of producing of the so this is would have to get funded to do so it's a refund. So it is a refund mechanism of taxes incurred in relation to export of goods. So take an example if there is a manufacturer he purchases his raw material, he purchases labor and various other things on which it pays excise duty and sales tax etc. Whatever input taxes it has incurred if you do with the export the goods all of those taxes will be granted by way of refund or a drawback by the government. That is the simple short and simple context of this export benefit. The other aspect of the foreign trade policy is to do what is called an import substitution which essentially means and at that point time india had a very precarious foreign exchange threshold or balance. They were discouraging imports and they said that look instead of imported goods from outside the country. If you were to sort of goods from within the country. Those purchases to you made by you will be treated as a deemed export in the hands of the supplier meaning thereby if A were to sell goods to X in the Europe. He would have been treated as a physical exporter with goods would have physically moved out of the country. But instead of selling the goods to X in Europe if he were to sell it to Y in let's say in UP sitting in maharashtra than that supply even that is domestic in nature would be considered and construed as are deemed export so there was a dimming friction created to say that these physical movements shall be treated as a deemed export and therefore whatever benefits that would happen ordinarily accrue to a physical exporter would mutatis mutandis apply to a deemed exporter as well. Subject to norms and

condition. So foreign trade development act empowered a foreign trade policy. Under the foreign trade policy these are the benefits that comes out. Advance authorisation scheme. This essentially means that whatever raw materials you need to purchase from outside the country or domestically for the manufacture of goods meant for export. All of those all materials can be pushed free of customs and excise duties. This is an advance authorisation scheme. The deemed exporters will be eligible for the drawback of duties of excise and customs that they've suffered on the manufactured goods that they are supplied with those projects. You know projects who are actually doing imports substitution and sell from India scheme is with us because services that is exported from India outside the country. So the whole impetus of this foreign trade policies essentially to make sure that exporters gets tax benefits in the form of input side tax reduction. That is the fundamental of this. Now. What the controversy that comes about is that assuming for a moment you make an application for any of this licenses. These advance authorisation etc etc etc all of these are conferred as a as my slide shows is confide by the minister of commerce because a foreign trade development act comes within the domain of the Ministry of Commerce and the regulatory concern is DGFT who is the statutory authority under Section six of the foreign trade development act. The DGFT power is to carry on the purposes of this act and therefore he's the nodal agency. So you can claim any of the certificates by making application to the DGFT. Now assume for a moment that you made an application to the DGFT, you've already made the export but the DGFT does not approve your application. The question is under that situations: Can you go to the DGFT or the government or the court for that matter to say that there is a vested right that has been conferred on me through the foreign trade policy and that vest which right essentially entitle me to import goods and services free of duties. Whereas the DGFT seeking to deny those benefits. This is a controversy that had come about. Now decision of the Supreme Court in the case of S B international. This is very interesting decision and they had to make a departure. The thumb rule is there is no fundamental right to import. That's the thumb rule. Nobody can say that import it will have to import goods is a fundamental right. That's what the Supreme Court had laid down a long long back. And if that is not a fundamental right, you cannot go through the DGFT you cannot go to any of the regulators and say I have a

fundamental right of be eligible to import duty free goods because I will be exporting goods. So therefore nobody can say that there is a vested right that can be created no sooner than when you have made an application. However the Supreme Court of the same breath made a statement which then on thereafter become the law is that situation would have been different if the person at first exported the goods and there after he had come to DGFT for claiming those benefits because in that situation having exported the goods out of the country a vested right does get created in favor of the assessee and that vested right is that right to seek refund of duties that have been incurred in so far as exported goods have happened. So until you have made that export no right does accrue after you made the export the rights to accrue and now the present position that are theirs that Subhash Bhatnagar International decision was subsequently endorsed by the Supreme Court latter latter part also. To say that vested right can be created under the foreign trade policy that read with the foreign trade development Act once you have discharged your export obligations and made your applications and if the authorities were to withdraw those benefits retroactively or otherwise it would be seen to be denting the vested rights/accrued rights that have happened and those accrued rights can only be taken by way of statutory mechanism and not otherwise. I will come to that controversy little later. Suffice it to say that this full context of foreign trade policy is therefore complex because businesses that are dynamic, exports are dynamic and the operation of this doesn't happen by one agency it happened but two agencies and this is where I'm going to bring in the minister of finance. So the with this operates is that the Ministry of Commerce gives you that the certificate or license or script or whatever you might call it. But that does not necessarily entitle you to duty benefits. You will have to submit that before the customs and if there is no customs notification issued under the Ministry of Finance the Department of Revenue then there is no duty benefit available to you at all. Meaning thereby for any exporter related benefit there has to be a ministry of commerce minister finance notification under the customs act of a simple exercise that as the as the case may be which will provide the exemption from duties. And will also put a condition that those exemptions are subject to furnishing of necessary certificate from the DGFT's office so it works in tandem. You need the certificate from the DGFT or minister of commerce. You need the Minister of Finance

notification which will embody the conditions that are necessary and the goods that qualify under situations and of these the goods will be eligible for the due to benefits both of the put together will have to be submitted to the customs and only then the duty benefit will accrue to you. That's how it operates. That little little disjoint situation is that of SEZ act. Because that is that act is not coming under the foreign trade development act. It is used to be SEZ as a concept you used to be earlier under the foreign trade policy but it was carved out of the foreign trade policy and made independent piece of legislation which confers various duty benefits to special economic zones. These are deemed foreign creditors within the Indian Territory where activities that have been carried out are expected to be duty free in the sense that anything that is imported into the zone from outside the country or from within the country are defrayed from the duties in other words they don't suffer any duties. And there are two kinds of people that operate within the zone. One are the developers will develop the zone. In terms of physical infrastructure. Be the land. Be the infrastructure facilities the power facilities and various other amenities that are there in the utilities. And the second of the units who actually carry of the manufacturing process other service process that are meant for or in foreign exchange. And the benefits that applied to developer and units are by and large the same except that developers have a larger Levy because they are actually lead to infrastructure development and they don't have the obligation to on foreign exchange in the manner that the manufacturers of the service providers need to earn foreign exchange because the very purpose of SEZ was to earn foreign exchange and that has to happen only that can happen only by the person who is doing the revenue engine which is the units of the manufacturer service providers. Now. This is where the complication starts happening. That. As I mention the you know the foreign trade policy confers the tax benefits It envisages the tax benefits. The Ministry of Finance executes those tax benefits by way of section 25 notification or whatever else. Various other sections and in public interest it come up with the notifications. The issue that often arises is the executives endeavors to enact or interpret the notifications issued under the respective enactment in abeyance or in contradiction of FTPO or SEZ act. Now the reason why I make this point is as follows: Under the of foreign trade development act and back I'll take you back to foreign trade development at as I mention Section five gives

the power to notify the foreign policy. Section six gives the power to create a director general of foreign trade who is responsible for carrying out the policy. So he's a statutory ombudsman if you will responsible to carry out the policy. Under the foreign policy, section two point three empowers the DGFT to issue clarifications or interpret the policy and that power through interpret the policy vested with the DGFT is supreme and it cannot be questioned. The language used shall be binding under para 2.4 of the foreign trade policy, the same DGFT has been empowered to come up with procedural guidelines. Now that para under 2.4 of the foreign trade policy available with the DGFT to issue procedural guidelines is being used extenso to come out with various kinds of procedures which is typically known and if you were to follow it it will be is known as the handbook of procedure. The Handbook of procedure is factored and then the foreign trade policy because the foreign trade policy has about one hundred two hundred paragraphs but the hundred a procedure is detailed and extensive exercising the power in the para 2.3 the DGFT comes out with their interpretation of what the foreign trade policy envisages in terms of the concourse of the benefits that it envisages. And the conflict arises when that interpretation is in abeyance or is in derogation with what is specifically statutorily provided for in the foreign trade policy. The second level is that the DGFT office assumes power that are not so contemplated within the framework of the foreign trade policy leading thereby a situation where there is no you know there is assesse and regulator is at loggerheads and I'll take used to some examples of that. So power to clarify as I mentioned that the DGFT is responsible carry out the foreign trade policy and frame procedures. Contrary to this power those of you who deal with the central exercise act would have seen the central excise will notice that there is a central board of excise and customs who's also the regulatory in the sense for excise and customs matters. Similar to the C.B.D.T and I would not touch about CBDT because CBDT are at different footing. The power that is available to the C.B.E.C under the central excise act or the customs is to for the purposes of ensuring that there are no different practices ins of us classification on valuation of goods are concerned they can come up with instructions. And those instructions are binding on the lower authorities. However there is a caveat. The caveat in the in the section really dealing with the powers of C.B.E.C is that such powers shall not bind the

commission appeals. Meaning thereby the parliament very consciously realize that the executive instructions cannot impinge upon quasi judicial functions. The commission appeals will have to be discharging quasi judicial functions and therefore the executive instructions cannot be binding on the Commissioner appeal. In fact there is a very old decision from the Andhra Pradesh high court which went to the Supreme Court. That was in the context of the gift tax. There under the gift tax the provision used to read that the instructions of the board the then board as was there will not be binding on the commissioners appeal and the Supreme Court read that section to say that why Commissioner appeal it will not even be binding on the commissioners because the commissioners even though they may not be discharging a appellate authorities or appellate powers. They are still exercising quasi judicial function. Therefore therefore even though the statute specifically puts a caveat that the instruction shall not be binding on commissioner appeals. It does not mean the commissioners are also bound. And therefore the Supreme Court laid down that even commissioners are not bound in so far those instructions are concerned so that was under the gift tax many years back. However if you look to look at the contour of the para 2.3 of the foreign trade policy that provides that any instructions in any interpretation if doubt maybe they're DGFT shall interpret the policy and that policy shall be binding. It doesn't put any caveat whether the lower authorities discharging quasi judicial functions are to be bound or not. Resultant what has happened currently is that if there is any indication that the DGFT does issue those interpretations are taken as you know God's gospel truth. If you will call it by the lower authorities in discharging whatever function that they're discharging. But the matter is now being litigated I will not get into the details of that since may be unethical. But yes that issue is a large insofar as all of that. The second one was retrospective clarification again I made a mention very clearly the Supreme Court decision is there. In Agri Trade's Case where the court a very clearly held that the DGFT clarification cannot have a retrospective effect and therefore you cannot take away vested rights that got accrued. So in a sense clarification has become a founder for litigation. Implementation of exemptions I read with the Minister of Finance notification read with the certification licenses. And if there is a slip in either of the two In other words and very interestingly the license will contain the

conditions that you need to meet. If there's any language error or if there's any issue relating to the condition that are so typed in the licenses, the customs will not allow you to clear the goods because the reading of those licenses are made very strictly. And if there is any departure from the conditions so prescribe in the licenses then you have a fate with the duties will stand denied. After having received that benefit by a year for an order and then the cash. The nodal agency does some kind of internal audit or the post verification and comes to realize that those benefits that have been conferred upon you was not to be given at the first instance. The practice does far that was happening and continues to do sort of my mind is that on the basis of the self declaration the assessee are told look you have agreed that if I have given you any amount excess or if I have wrongly given you any amount then I shall have the power to recover it. Using this particular declaration which was format in the application and that application being an integral part of the procedure recoveries and actions would often be made by the DGFT office from various assessee across the length and breadth of the country. A challenge was made to this particular paragraph of this application to sit through very fundamental things. First the DGFT to is a creature of the statute. A creature of the statute necessarily would have to operate within the domain of that particular statute and that statute which is nothing but the foreign trade development act. The foreign trade development act has Section sixteen. It has Section fifteen which is the power to appeal. Section sixteen which is the power to review. And that Section sixteen says any decision and order made by an authority lower than the DGFT lower than will lie with the DGFT in a decision order laid by made by the D.G.F.T. will lay before the central government. And this review shall have to happen only within two years. So there are too stipulation that they provided. A. The status of the official who was discharging that function of having first given the benefit is the Lower than DGFT or DGFT himself. B. the date when that particular decision order was so passed. Fundamentally across across the length and breadth of the country what was happening was this reviews were happening with the same officer who was just five words what is really given the benefit. And what the court or the High Court in this case held was as follows. When Section sixteen provides for a particular power to review the DGFT in the garb of trying to enforce the foreign trade policy cannot create a parallel review

mechanism merely on the basis of concession or for that matter acquiescence by the assessee when he give the application that he shall return the monies. And therefore that eight point three point six was also a quashed. This is also before the Supreme Court I cannot go into what is happening there. So in effect what what I'm trying to lead out is that unlike tax legislations fiscal legislations where the jurisprudence is very very clear over forty fifty years of litigation and so on so forth. The literature in so far as the ultra vires action or alleged ultra vires action of the various authorities of foreign trade policy is still active very very rudimentary stage to my mind because thus far there hasn't been much much in how what kind of powers that the DGFT exercise what kind of powers does the lower authorities exercise because one one issue that is coming up very very very clearly is that when a person is granting those benefits is he exercising a quasi judicial power to begin with or is it merely an administrative function because the rules of engagement you will know in so far as administrative orders are concerned is different from that of that quasi judicial orders. So large projects would often take funding from IFC and ADB because that is the whole purpose of infrastructure banks of this kind that they will give term loans. For infrastructure growth and economic growth of the country. When you take a loan from any of these banks you need to discharge your interest obligation and there's no tax on interest. But every lending transaction apart from payment of interest also comes with the payment of various other administrative charges which could be upfront commitment charges which essentially means that look the bank said that I have organized Thirty billion dollars for you and I have made the ready cash available you said that are fifth of January you should pick up the money. If you picked up the money on fifth of January then my interest clock will start on fifth of January onwards. However you've chosen not to pick it up and fifth. But he chose to pick it on fifteenth. So for the ten days that I'm pulling them on you to pay me a charge. Ok that was a commitment charge. There are others and there's other various other administrative charges that in the in the lending business does happen where in addition to interest you pay various other administrative charges. Issue that comes about is that when somebody has taken a loan from any of these banks beat IFC beat ADB and discharging said administrative charges by whatever name called will these companies be liable to service tax. Revenue says that well for the them the

only Bible that they have is the Finance Act which provides for the charge of tax does not provide for any exemption in the specific context because the exemptions has to come by we are for delegated piece of legislation for delegated notifications or to see another notification issued on the finance act contemplate any exemptions insofar as services received from my IFC, ADB is concerned and therefore tough luck. You pay the tax. Industry pleads as follows: The Finance Act is fine but what about IFC act and ADB act which confers benefit of exemption from all operations and transactions of the bank. Because transactions by definition is a two way process you can transact with yourself thats called self...but that's not a transaction. And this is really is the very fundamental issue to begin with and these are the four question that is still being debated about. There is a tribunal decision as yet. As yet we don't have a High Court or the Supreme Court and therefore I thought will be interesting for us to appreciate. To begin with is there a conflict at all? Revenue makes out a case that there is a conflict because financer does not give an exemption but it can can we say that there is a conflict begins because at the end of the day. Let's look at it this way exemption is to be given by a fit delegated legislation. Mainly because a delegatee has not done so does not does that discolor or discredit the parent which is the parliament that has enacted under Article two fifty three the immunity under IFC Act and ADB Act. Is that immunity available under the IFC Act and ADB act which is a parent legislation not good enough and must you rely upon only a delegated legislation to confer tax exemption by a for notification. My view is that I don't see there is any conflict. They need to be both reconciled such that the directive principle of state policy that India has to respect international treaties cannot be whittled down. Should not be whittled down because if you do that it essentially means that in the year one hundred fifty six when India executed this agreements, the powers that be thought differently than what the political masters that are thinking today. That is not how the Constitution evolves because consistency of approach in international treaties is the most important unless the parliament specifically makes a departure. So which brings us to the whole thing the third bullet point that the concept of latter legislation to overrule the earlier legislation is a very well known concept because you know the Parliament is is supposed to know that the laws exist. And if it is making a specific departure it means that it has taken cognisance of the

existing law and any conflicting things that they have tried to override but unless there is a specific exclusion to that effect you cannot say the latter legislation will overrule the early legislation so to say. So overruling by implication will have to be looked at very carefully in the context of such treaties where it has been acted under Article two for three and the third is there is also very interesting point. And this is Supreme Court decision in the case of Labor case recall. One way to reconcile the differences by looking at a specific legislation will overrule the general now the Supreme Court says that to to understand what is the object of the legislation look into the preamble. That's how typical it is if it is assessed. But the problem is if you use that. If you use the parameter of tax collection then the Finance Act is a specific legislation. But if you look and use the parameter of immunity then obviously ADB and IFC act is a specific legislation because it was specific legislation to deal with IFC and ADB in so far as extraction or immunity to taxes concern and therefore by that logic also the specific law should with ADB act and not the Finance Act. So this is another controversy that is brewing in so far as the treaty protections are concerned and there are even the DTA there are a lot number of issues that are happening in so for a future what I was a concern in the overall context. And that is all I had because one hour was...What we have done since it our specific I'll give space you have said I was upstaining from using those so there's a decision of the gujarat high court in the case of Alstrom where this issue was brought up and gujarat high court very clearly laid down that in that situation DGFT action of trying to interpret the law contrary to the judicial decisions writ court will have jurisdiction and the courts will quash it then and there. Thank you sirs thank you very much.

Hon'ble Justice A K Sikri: Thank you sujith. It is already 10.20 and we had to have a break between 10 and 10.30 tea break so I have requested that tea would be here served tea or coffee and continue with this it will take five minutes more before winding up and but then after next session we can have real break. Two cases which came before us when I was recently sitting on the tax bench. One was home state of karnataka and it was very interesting issue. There is a in karnataka sales tax act the old act entry twenty five in their schedule six which was and it could levy tax on the processing and supply of photographs,

photo prints and photo negatives. Now the question was when you process it is tax on processing. Processing of supply...and supply of photographs for the prints and photo negatives. Now we have digital photography etc earlier there used to be that films and you will go and get it developed. Suppose you are going to a photographer say I need a passport sized photograph. So he'll take your photograph and then develop it and we will give it to you whether it is only a service is providing some element of service and the goods because there is there was a role the cost of the film. Then cost and developing etc cost of that paper but if the view was taken that that is a minimal cost. But the major cost is rather which is this which is service which is providing and it was more so when this...you have your own role. You took your photographs you went to Nanital you took and then you come back and give it to your photographer that you develop it and give it to me. So in that case so initially viewed that predominantly it was a service contract and this entry 25 was was held to be unconstitutional that there cannot be. So this case thereafter went and ultimately with some modification etc and on the entry also and not exactly on this. As I said that on the tax on processing supply of photograph and photoprints etc. There was some change in this I just ask him to get this I don't remember the exact details. After third attempt the state of karnataka succeeded after making amendments amendment amendments when he said that says some components where they said that could be a sale of goods and therefore VAT can be there to some extent. So that is one judgment and the other judgment which I could ask him and he could trace out immediately...Meanwhile I ask sujith to start on this and try that you have to finish it by 11.15 so that 15 mins given for discussion and we break for exactly at 11.30 for tea.

Session 6

Mr. Sujith Ghosh: This is one area which which is very confusing and of I graduated from national law school bangalore from 1995 this my 21 year as a professional. The reason why this haunted me ever since in the last 21 years is that law has evolved and evolved evolved and evolved and it has not remained stagnant. So if you start from the government...judgments to the.....builder association and 2 BC came, rainbow color labs etc etc. The whole jurisprudence has gone through a extremely vibrant change in the context of the dynamics of the industry or dynamics of the economy that we have today. Quickly you know this is something this is what is down the whole issue in in a very simple perspective. Separation of power between the state and center is the fundamental. So what is the propriety of the state of the sovereign cannot be impeached upon by the Center. So the center levies taxes which is in the form of central sales tax or finance act, service tax and so on and so forth. And the state levies VAT. The question is there are many are transactions which seemingly a bad appear to be services but are being considered to be something which is within the exclusives jurisdiction of the state and vice a versa. Dispute had arisen in so far as all of this is concerned to say that the propriety of the federal government to impose tax on something which is exclusive domain of the state how do we resolve this conflict. And that was the decision in the case of federal of Federation of Hotel and restaurant association it is a landmark decision constitution bench decision. Judgment authored by Justice Venkatachalliah if I remember right. That was a case where they came out with this concept of aspects theory. This aspect theory is now the rule and the only yard stick that is being used by the Supreme Court or for that matter used by various high courts to ascertain whether there is a legitimacy of a levy or not in the context of separation of powers. So this federation hotels judgment was in the context of taxes on expenditures. So expenditure tax versus luxury tax which was levied by the state. So expenditure tax was levied by the central government and luxury tax by the state and the appeal that was made was that when you are asked to pay an expenditure tax on the payments that you make while staying in a hotel having a...of four hundred rupees at that point in time. You effectively taxing luxuries. And therefore it is a colorable device to

which luxuries are being taxed in the garb of expenditure tax which otherwise falls within the exclusive domain of the state government. This was the whole controversy before the Supreme Court. The Supreme Court reconcile that by reliant upon the Canadian jurisprudence and this is very important. The Canadian jurisprudence came about this concept of aspect theory under Section 91 and 92 of the Constitution of Canada to say that the dominion and the states power will have to be reconciled to figure out that the same transaction may have different aspects and different aspects of the same transaction could be taxed by different authorities. That was the evolution of the jurisprudence of aspect theory. And this may I say is the concept. Subject which in one aspect and for one purpose fall within the power of a particular legislature may in another aspect and for another purpose fall within another legislative power. The law with respect to a subject might incidentally affect another subject in someway but that is not the same thing as the law being on the latter subject there might be overlapping but the overlapping must be in law. The same transaction may involve two or more taxable events in different aspects. But the fact that there is an overlapping does not detract from that distinctiveness of the aspects and this is therefore the grundnorm in ascertaining the legitimacy of any of the legislation which seemingly appear to be conflicting not overlapping when there is a state of the central government. The decisions that are relevant to this is renting a immovable property and and happy that justice sikri is here because he has been he has authored one of the landmark decisions which I am also carrying and I was hoping that he will make a point on that so that maybe when I come to the Slide if you could share your wisdom on that as well. So this immovable property has been a subject matter of large amount of litigation. So you immovable property as we all know there is a levy of stamp duty on sale of immovable property or leasing of immovable property. Under the Finance Act they came about an amendment the service tax architecture that came about in an amendment they introduced that renting of immovable property shall be liable to service tax. Industry went in arms to say that when you levy service tax on renting of immovable property effectively you are taxing a transaction in land and building immovable property which is not within the domain of the federal government and therefore it ultra vires and you have impinged. That was the logic that was brought to bear. Three sets of decisions happen and

these decision are relevant to trace the history because if you don't follow what how do you listen evolve you not know how what was the final outcome and the reason for that. So the first home solution writ petition was filed before the Delhi High Court. It was a division bench judgment where they challenge was on the notification and circular as also the legislation through which this renting of immovable property service tax was introduced.

The trance was...the levy was on services in relation to renting of immovable property that was the language. Services in relation to renting of immovable property or the division bench held was that in relation to renting of immovable property has two facets: The phrase in relation to and B) the think in relation to. Thing in relation to in immovable property. It is not a service so what the government or the parliament has tried to tax is things which are in relation to the immovable property which could be a service. Meaning thereby that there is no value addition involved in so far as immovable property is concerned. It is not an activity. It is not a service. So the tax is not on immovable property per se. Tax is in relation to immovable property which is a service and therefore the legislation is valid. OK. Retailer association decision of the Bombay High Court came about the same time where again the renting of immovable property was challenged because it was tax on land and building under entry 49 and this is what the bombay high court had to say: tax on land and building requires a different relationship with the land and I'm reading here if you could follow this one. It is a tax on the gentle ownership of the land renting is not a tax on land the assumption by legislative body that an element of service involved Is not irrational and absurd as long as the parliament does not intringed upon the field reserved for the state legislature the law is valid and within the legislative competence of the parliament. So they are very clearly said that this is not in relation to land per se it is in relation to something that raising a lot of land and therefore that is the high court didn't find that there was any conflict in so far is the jurisdiction was concerned. Now the Home Solutions retails first judgment was looked at by the larger decision bench decision of the Delhi High Court where hon'ble justice sikri was there then was then was before the delhi court and the very interesting proposition of law was propounded by the learned judges. What they said was that: If you see the definition of the taxable service it says renting of immovable property relation in furtherance of business and commerce. The

phrase was important in furtherance of business of commerce. So in the first home solution judgement what was the division bench held was there was no value addition in immovable property but then the larger bench decision by virtue of usage of the phase in relation to business of Commerce the hon'ble larger bench held that there is a value addition because inrelation to business of commerce by definition means there is an element of economic activity involved. Because if you are using something in relation to business or commerce your are furthering economic activity and therefore by necessary import there is a value addition and therefore they say that what is being...it is improper to say that there is no value addition and therefore tax is levied on those transactions and of course there was a plea made before the Delhi High Court that the aspects theory was to a switch which applied in the Canadian Constitution cannot be adopted in the Indian context because India has a defined constitution where separation of powers is very clear unlike section ninety one and ninety two of the Canadian Constitution that argument did not cut ice and therefore as things stand today the entire issue has settled at least at the high court level. Supreme Court has issues of the matter that there is a possibility and correctly so the service tax can levied on immovable property that is not to say that there tax levied on the land per se. It is being taxed on the activity of renting which is different from the land per se. So land is different from the activity in relation to land. Activity in relation to land is the renting part of that which is the subject matter of tax whereas land per se is a different concept and therefore you cannot say that there is an impingement by the state government on the central and vice so to say. So this is now the current jurisprudence as we speak. Of course we'll have to see how things span out as we time go. If you look at the twentieth century finance decision of the Supreme Court in the context of leasing. The Supreme Court says that it's a one time event as soon as you have signed the contract. It is that time when you signed the contract. It is that time when the transfer of control custody possession happens and it is that moment to which the lease rights gets created. By analogy I would say that even in lease of immovable property it is the same time when it is the convince is register which is why the rights accrue. Tax is on what is it on supply or taxes on transfer of the right. That is the moot question that will have to look at. I have had the occasion to argue a case where under the service tax so just as service tax levied on

rending of immovable property there's also a category which is called supply of tangible goods without transfer of control custody possession which is the antithesis antithesis to leasing. If leasing is subject to VAT finance our government of India say ok fine anything that is not a lease yet you have the possession of the asset where there is no transfer of control custody possession it is liable to service tax. The language there was that tax shall be levied on supply of tangible goods for use without transfer of control custody possession. In my case, levy came into existence if I recall right was in 2008. The contract for charter of those vessels which they're all coming from qatar carrying liquified natural gas was entered into in two thousand two two thousand two I contracted saying that you will manufacture the vessel and then you chartered it out. So two thousand two is when the vesting happened in that sense delivery happen happened in two thousand six. The levy came into force in two thousand and we argue that the levy came into force after the supply took place either taxable event of supply having taken place prior to the levy. They can be no charge of tax. It has found favored by the lower authority lower judiciary so to say SLP union has filed an SLP matter is subjudice we will see how it get evolved. Article 366 (29A) empowers the state to levy VAT on leases of goods and finance act declare services provides for temporary transfer of permitting the use or enjoyment of an intellectual property as liable to service tax and hiding leasing or licensing of goods without transfer of right to use also liable to service tax. These are the three conflicting situations or decisions that have come about on the right hand side is the TATA Sons judgement that my lord did make a mention which is now before the supreme court. So just to put context to this whole thing. Internationally finding out the.... intangible property is the toughest issue. Do you put the...of in intangible property with the location of the company where the company sits or the factory where the goods are getting manufactured or the place where it is registered. Now there are jurisprudence for ascertaining which jurisdiction suit can get filed to ascertain whether there is an infringement of your intellectual property for example transactions happening from the U.S. and the U.K.. There are jurisprudence to find out the where will the suit lies for protection of the intellectual property. Then those jurisdiction at anytime can it be adopted to find out how an intellectual property or intangible will have to be treated in the Indian context. Because we are dealing with a situation where that

company A could be dealing with multiple vendors or distributors across the length and breadth of the company of the country and therefore you cannot lay a pin point to say that they intangible reside in this state and this state alone and not in the state with a good maybe actually used. So that's the context in which this whole issue becomes relevant. Fact of the matter is after the Supreme Court decision in Tata Consultancy Services and various other decisions that happened the treatment of what is good has now become very clear that even tangibles etc are for goods. Once you have treated something or goods the question that comes about is that will you therefore give a different parameters for tangible goods and intangible goods. Because it is a deemed concept of goods that you characterize that something that is capable of being stored delivered, possessed, transferred etc and therefore intangibles fits all of those and therefore they are goods including electricity. If that be the case then should it not be the case is that whatever follows with the regular goods brick and mortar should automatically get up like the intangibles and there is no need to further differentiate how intelligible should be treated. This is the most important question that begs consideration considering the fact. In BSNL case and at para 96 five criteria mention that for a transfer of right to use goods the test that has to be met is that the transfer should be to the exclusion of the transferor to the exclusion of the world meaning thereby if I have said I have leave something to B then B should have the control custody position of the goods to the exclusion of the entire world including the transferor. That is the right that gets created in leasing. That is the right that gets in transfer of control has to the position because the words are control custody possession and the most important point is possession because possession as Benjamin's law prescribes jurisprudence prescribes possession is effective control. It is not custody which means if somebody can be said to be in possession only if somebody has control over their assest. No you cannot exercise control over assest if there are limitations on when you can use it or where you can use it and how you can use it can you sublet can you sub lease and so and so forth. And that test comes from 21st century finance, Supreme Court and several other supreme court decisions that possession is the most important thing and can you be said to be in possession if at the same time two parties are also using the assets. I would say with due respect that they don't. Now let us understand the Bombay High Court decision in Tata

Services I did not know justice sikri would would be there so it is not orchestrated you it so happened that you are here. The reason why justice laxman statement was departed from in the words of the honorable Bombay High Court was that the act at the Bombay act that was concerned. Did not specifically provide for exclusion. Did not specifically say that for a lease it has to be to the exclusion of the world. And therefore hon'ble judges said that I cannot therefore read the exclusion as a concept into the legislation with due respect the evolution of what is Lease has not happened to statutes. Evolution of what is least actually allahabad High Court laid down several decisions which also other high courts had a court evolution of what is lease happened by way of a judgement law. And what I've got crystallized is by appreciating what is controlled that's all that is there. So whether or not statute did provide that it should have been to the exclusion of the world or not. Once you we all agree that for the lease to happen there has to be a transfer of control. The Madras High Court Aegis entertainment I think this was a judgement where they said that temporary transfer of copyright holders use of enjoyment almost across sort of right to use goods to help their service tax is not livable on the transfer the right to use only on the temporary transfer of promoting the use of enjoyment. As a producer does not relinquish his rights. Transfer the right to use the distributors is temporary. Transfer a right to use an operation to use the goods operate in different fields merely due to overlapping is different cannot be differentiated. So this is where it stands. Of course we waited Tata Service is before the Supreme Court and batch of matters are all there we'll see what comes about it. The other decisions which I was quoting throughout was BSNL vs Union of India these are the four criteria: The fourth point that I mentioned that on the left corner. Legal right to the exclusion of the transferor. This is the most crucial thing that the entire industries you know trying to rely upon. Good once transferred cannot be transferred to another person. These are the test that was laid down. Delivery of possession must be distinguished from his custody. The transferee of goods may be in possession of while transferor has the custody of the goods. But this is the judgement where they distinguish between you know if you walk into the street and you flag a car. Is there a service of renting that is happening versus rent a cab like avis or any of those rental car companies. And that distinction was very well appreciated by the Andhra Pradesh high court to say that incident that is

concerned that is no renting at all. When you flag a car because you are taking a service. Take me from point A to Point B..because you have no control over the asset. You have no control over the driver you have no control about whatever he does the timing in which it he takes you around but when you take an avis rental car. There you have a complete control. You can hire and fire and so to say that I don't like this driver etc and that was what was held in Orissa High Court also. This is very interesting judgement. You know you have those trucks that goes around them have a logo of a company. So let's say I'm aditya birla group OK and I take somebody's truck to cement if you see the cement trucks that have those rollers They're still have a print of the name of the company. But that truck may not belong to the aditya birla group. The issue is whether the company that owns the truck has lease that truck to me because on the transport charges that I paid to the truck company for carrying my cement all around which is whatever from point A to Point B.. The issue that was discussed was that whether there was renting or not. What the hon'ble high court held was very clearly that look the fact that you put the emblem goes to show that you are telling the whole world this is aditya birla truck so that conduct is equally important to show that do exercise dominion over that it or not. Tomorrow if something goes wrong it is the aditya birla group brand image that gets impacted and therefore to that extent you exercise in control. So there lots of final point that have got evolved and this judgement is very very interesting in that context and twentieth century finance which determine when the transfer right to use happens. In fact the very interesting thing is that revenue always argues the contrary so for sales tax purposes they will agrue that it is a lease for service tax they will say no no it is not a lease it is supply of tangible goods because then you are having to deal with both the states and centre you don't know which were to go and in one case where I am arguing I am doing...precisely the same issue.

Hon'ble Justice A.K Sikri: Not Audible

Discussion with the participants

Mr. Sujith Ghosh: So it is not that they said it is it is. It has the properties of goods goods are after all what. It's a property sales on transfer of property. Property is a bundle of right and those bundle of rights which seem to be present in the D.P.P. that A it could be transferred possession. Ownership could vest it could be treated traded. It could be stored so it is not that intangibles were deemed to be good for the sake of convenience. It was that that the intangible were found to have all the attributes of property. A real property in that sense. And therefore it was held to be goods. Once you see this is goods then it is whether it is intangible or intangible how does it matter because to enter the threshold you look at that tribute. Why is actionable claims not not services not goods because that attributes are missing. But if tomorrow sunrise industries the Supreme Court lotteries etc If tomorrow that decision were to be overturned by larger bench so on and so forth and lotteries were to be found or any of the actionable were be found to have the proper properties and attributes of goods. Then you come back to the mainstream of goods. Then after they can be further chaffing and further crystallization and distillation, should it be? Look at the sales tax statutes of most states. It all started by trying to levy sale tax on intangible through the residuary clause. Then they started coming up with specific clause : Trademark, patents and other intangibles. So the evolution happened in that sense because they were not first they were not bold enough to consider trademark as goods in the statute they said OK fine. Let us use residuary see whether it flies if it flies then we will incorporate it. And they started growing. So therefore it is now well accepted it is goods. It is not a statutory fiction in that sense. It was by the by we have to attributes.

Discussion with the participants

Hon'ble Justice A.K Sikri: Any other one like to discuss. This was is very interesting this is what I thought but I said that I will interject as and when and did want to speak much because of reason I said all these issues have come up and we have decided many of such issues...home solutions but that is again there I can discuss but it is pending neither I will be able to decide or justice deepak mishra whose has authored the judgement will be able to decide that because he was our chief justice when that judgement was taken in delhi

high court. But then there is I mean in both the areas which Mr. ghosh has covered as far as high court are concerned there is a difference of opinion so it is ultimately nor to be settled by the supreme court and I don't at what stage that other matter is pending home solutions. As far as this aspect is concerned it may be resolved may be by the end of this month. So then we can break for since you were deprived in the earlier sessions now you have six minutes extra in the session.

Session 7 and 8

Hon'ble Justice A.K. Sikri: So we can start already its 11:57 but yeah requested that actually two sessions these are overlapping in any case some of the issues and this is what. Mr Shah is so saying. Rather it was his comment only. Which is correct and therefore I said that we can and since we are combining in any case. We tried to finish by 1:30. These two sessions, so that instead of to you we can advance the land a bit. And that will be a good balancing between service tax and sale tax, so therefore without much ado, I request Mr Shah to start.

Mr. Milan Shah: Very good afternoon to justice Sikri, honorable judges out here, it is an honor to be here and this is like thought sharing right and it is it is an experience for me as well i terms of you know being with judges across the country so, Thank you so much for the opportunity. What I've done today is the topic is was for ecommerce, taxation on ecommerce, and then of course I was going to cover beps Action Plan one which is tax on digital economy. Since e-commerce is a subset of the overall digital economy, I thought I might as well combine the two as it was difficult to de-link the two, so I've gone about I know you know somewhere there will be a mix of discussion, somewhere out also cover reps action plan. One at the end of and of my discussion on e-commerce. So this is what I'm going to cover, here would be a bit of over-view of the sector. I think this is, this is my effort in terms of basically capturing what is happening in recent times, e-commerce has been kind of growing valuations. You know, of the company is going high and the idea is basically this is here to stay. It is going to kind of grow and as we move from a developing economy to a developed economically. So there would be an over-view of sector. Then I would go are some typical business models, because from business model tax issues are arising as we see that which is the case even in the decisions or for that matter the reps action plan one where they have covered business model and then they've gone about explaining the tax issues and then of course the Income tax issues the core focus would be on income tax issues because there has been a lot of litigation that around it as Justice Sikhri was mentioning in the morning about B.T.W. I've tried in captured some discussions about BTW as well in terms of taxation focused on digital economy and there

would be an order your flips action plan one which is the second section which I am going to combine, so what is e-commerce basically, it is nothing but carrying out the transactions, commerce through internet so naturally it is kind of put it across. There's no human interface required and that is where the tax challenge kind of arises and this is typical e-commerce, how it works you have customer, you have customers goes on to the website, he make places and order, the order. He selects order basically out of the options given then out of the order of. Once he selects the order, you go to the banking channel make the payment from the bank. The order then gets dispatched from the warehouse and it is delivered ultimately for the customer so this is more of an ecosystem however most of this, most of the transaction as one would see is online, on digital and that is where the challenges come across because a customer could be located in country 'A', the website hosted on server in country B and ware-house would be in country 'C', now how do you kind of divide the tax rules amongst this. How do you kind of divide the overall tax rules in the tax location, that's the challenge, which one is facing today. Broadly this is the kind of ecosystem we have. We have online travel, I have not spent much time but I thought I'll just put it across because these are various segments which you have right now in e-commerce. You have travel portal, you have e-tel, basically the flipkarts of the word. Now online marketplace are the major part of e-commerce business is contemplated by online marketplace. You have 'ebay', 'amazon', Snapdeal e-base,if look at across most of them are Indian companies and we see now for an investment coming to India and the reason behind that is FDI in retail was was prohibited, is prohibited. Single branding till now was allowed but ultimately the expectation is that economy will open up and we'll see more players and all. And you will have 'paytms', these are the new payment models which have come in where you don't need a bank account to make a payment you don't need a credit card there's a 'paytms' wallet which is created, online wallet. You deposit money once and then you can use it throughout, again this is a technical term but basically it means that there are players who have tools to develop software so they kind of provide tools are now license to develop software So for example any mobile application you want to develop, I'll have programs which are available I don't have to kind of invest in them, buy those programs, I get going to easily by paying a very marginal rent. Another kind of

digital model is online advertising, so you have Google you have Yahoo, these are advertising which is either banner advertisements or we call research advertisements, which used to happen physical now is going on in mind so you have hoardings instead of hoarding to the Web sites have replaced it to go on Yahoo you'll have Banner advertisements to do is meant to be just small kind of ads which appear. Once you log in to a bitch. And a search is basically if you were to see you find a hotel and you put a name say Hotel in Bhopal, you'll have a list which will appear, Yahoo will or Google will charge based on how you want to prioritise your name. So if you were to have your name going to list their dared first or second row, then Yahoo will charge a service fee for that. So that's kind of revenue for them and the way it works is servers are located outside India. Again so website is supported by servers located outside India and Indian company generally works as an agent for the foreign company which has an India dedicated website. So today a Yahoo.co.in is a website which is owned by a foreign company, supported by servers located outside India but dedicated to Indian market. so today yahoo.com, the content would be slightly different. If you go to Yahoo.co.in It will be Indian content, so it will have language content. So this is how it works. There are other models I'll not dig much of time. But these are models which are going to come up as digital economy progresses because these are the infrastructure models, you have e-wallets which are going to be backbone, RBI recently kind of had given licenses, to companies to carry out a banking functions online Banking functions. Then you have participative network plate-form and then ofcourse the appstore. Now going into the main discussion, the income tax issues. So what are the challenges, now we looked at the business model to what are the challenges which are digital economic kind of faces. The immediate challenges the Nexus now today, as we discussed earlier that I could have my website, located it and sort of outside India I could have my product billiard from Warehouse in India. So being in India the only kind of provides or supplies the goods. I do maybe all the revenue it is generated it is gender to say which is located outside India. The server is again, could be located in the third country, because depending upon how the infrastructure cost is the U.S. for example will have a better kind of service base but a higher cost as against India. So you will have a situation where server is at certain different location. The entity which owns

the website is in a different location and warehouse or goods will be in a different location and ware-house d goods will be in different situation, and for all you know the customer would be located in completely different location.

So you can carry out a business today in a country without having a physical presence in India or a physical presence basically what you need is is an Indian agent who will provide one who worked as a marketing support for you and ultimately because of online medium you can carry out business in India without any restrictions, so the challenge is how do you establish nexus of any entity. What is the value of overall transaction which can be allocated to India, because the role played by the local party in India but a limited which is more of a marketing support role. So Nexus is a challenge. The data today data has become a mode of of Business, if that today a companies on data analysis for example of creating a lot of business. Data are created by you and me basically we provide data, they kind of have allocations done in terms of is preference etc and companies are very interested when they want to enter into India. To understand what is their taste, what products can work what are the areas of interest for example, so that data itself is the value chain in a digital economy, now that data as we discussed is collected across markets, across locations. Right, and exploited in a different location all together so a data analytics company will collect marketable data from users in India. And ultimately sell it to companies in US, right now whether the end when you should be taxed in U.S. because ultimately the customer is in US late. But the basis of the values derived in India because they data is generated from India. So, again rules are not kind of provided to alloacte this right and that is again a challenge. And ultimately we come to the characterization as we discussed in subsequent slide the biggest challenge which today digital economy faces is whether an income classified as a business income a business income is taxable in India only if there is a permanent establishment in India. And as we discussed because digital economy does not rely on physical presence in any country, the permanent establishment creation becomes difficult and so the business income get untaxed as against that the seeming come get characterized as royalty or FTS and you have a gross basis of taxation, so the characterization of a income in a digital economy is a real challenge and we'll see that further. This hour the sections are impacting digital economy you have the Act and the

T.T. have covered the TT aspect as well. Act you have Section five which talks about the total income section nine, a deeming provision again, where the income does not accrue in India but certain conditions are provided or rules are provided which assumes that the income is deemed to a accrue or arise in India. Then you have two tax-rate sections, Section forty four 'D' and section hundred fifteen 'A' both opposite. Hundred fifteen talks about back straight on gross basis taxation and gross basis. Forty forty DA talks about taxation a net basis. Net basis because the condition of forty four DA is there should be a permanent establishment and then of course section ninety Justice Sikri has mentioned earlier in the day. About section one being the enabler which provides India or to be allows India to enter into tax treaties with various countries in the treaty rilm, you have the relevant provisions or the articles would be Article five which talks about permanent establishment. Seven is of course in relation to five, and then you have Article twelve which is royalty and FTS, without getting much into detail, basically section nine is important out your section five enables nine is a subset of Section five it provides, It's a deeming provision, basically provides for taxation of non-resident in certain situations. There are three parts to it one is business going to action which is relevant for taxing and income as a business income. In India and so the tax rate is about forty percent for a foreign company and then you have a royalty in F.T.S provisions.

This is how a tax treaty article. Article looks like any tax treaty which India's entered, Indian tax treaty just to go back to history Indian tax treaty are based on UN model, going to convention we have conventions which we have one is UN more you can mention. Now there is UN model convention and third is the O.E.C.D. was the earliest followed by US and then UN model convention basically follow do we see the modal conventions and there would be hardly any difference between the UN model convention and an OECD. Except for certain situations where UN model has stressed on Source based taxation, for the reason that UN model has more of the looking countries and again OECD which focuses more on resident based taxation space taxation. So royalty and F.P.S. article will have about five or six of articles, Article twelve one will talk about distribution of right how much should a source country tax and how much your resident country tax, then article to do will provide gender your ceiling, ceiling would be in the form of rate that you

will charge tax only at ten percent for example then there would be a definition provided by article twelve three talks about any royalty or FTS which is effectively connected with a P should be taxed at what rate, should be taxed under article five and not Article twelve, that basically is that's basically what it says. Article twelve five that this is interesting article twelve five talks about where a royalty or FTS would arise to it would it also provides its own charging section in terms of where or what place would the royalty and F T S would arise and then there is Article two hundred six which is more unrelated party. This is how a generally permanent establishment article would look like. Five one is the basic P rule which we all know as fixed place P. This is the basic rule of P and five two his ability to five one in the sense that five two talks about certain illustrations on what constitutes fixed base, five three is again related to fire one in the sense that five three talks about exclusion that are specific exclusions of what should not constitute P for example of where the housing facility should not constitute of P or a five three.

Now take a case of digital economy as we discussed. In digital economy ware-housing forms of a key, process of the overall sales function, because the delivery time is of a sense in e-commerce function of the website in the outside India, the entity which owns the website is outside India so the entity which owns the entity is outside India is the warehousing facility or any Indian agent. So if the current the tax treaty provision excludes warehousing from the fixed base P ambit, then how would you tax in a digital economy, should be should be provisions not undergo change article five four is on agency P.. This is basically a depemdent agent P another another form of a permanent establishment. Five five is related to five four in the sense that it is an exclusion from an agency P, it talks about if any agent is Independence then the transaction which carries out constitute a permanent establishment and five six is more of an obvious, subsidary generally rely economically on the parent company and so there's a clarification of it says that merely because you have a subsidy to does not automatically create a permanent establishment for a foreign company. Profit and how that should be taxed. Seven one talks about business profit, taxable in the source country only if there is a permanent establishment. If there is no permanent establishment the business, profit does not get taxed as we spoke earlier. There is something called a force of attraction rule it is specific

to some of Indian tax treaty say India US tax treaty. Basically it says that if foreign company were to directly sell products to customers in India which are similar to what a P. E. selling in India, then by that analogy the same the the direct goods which are sold should also be packed in India. That's basically to say that a permanent establishment does play a role in India so it should be taxed in India. I will touch upon some of the key ones, seventy talks about what are the expenses which are deductible when you calculate business profits for a foreign company and excludes any payment which is made to head office and interrelated payment. Logic being that you cannot transact with your own self, the permanent establishment is of the head office. So we go to the first part, which is royalty, what I've done is I've gone through some of the basic provisions in the income tax law and then kind of got into the tax treaty provisions. And then did a case study so I'll quickly run through this section nine one six is the royalty provision basically in the income tax law. It says that any royalty which is payable by government to a non residence is always taxable, payable by a resident to a non-resident is always taxable, except for two exceptions. First exception is if it is used for the property right is utilise for business outside India of a non resident, then that should of the or basically not be taxable and It is useful or by a non-resident for making out owning any income. Outside India or going to basically to see that. If it is related to any business outside India or source outside India are not US and should not be taxable. Now, there is this second source rule which is the third part what basically it is a non resident to non resident transaction outside India can also be taxed in India provided, the transaction is in relation in relation to the non-resident pears business in India, or any income from any source in India. Basically are going to say that other then the two transactions other transactions between two non resident have been for a writer on a property license should not be taxed in India slightly heavy slide but basically the interesting part is the provisions of royalty also covers transfer of all out in the right. Generally a TT would cover use or right to use any property you are right but the need transfer of the scene property will get covered in the capital gains tax. As against that the provisions of the domestic tax know you've been covers transfers of right or property within the ambit of royalty. So that's the big bigger difference between the treaty and the act. And of course they have given illustrations of what are the

IPs they want to cover, it also covers imparting of any information concerning any scientific knowledge experience or skill and that is of course copyright related issue which which we've just seen a lot of litigation, not just restricted to use or right to use but also covers transfer all or any right in repect of copyright.

So, but ideas been subject matter of protected litigation on various counts and matters have reached high court and Supreme Court decisions have been delivered, ultim2012, when it introduced retrospective amendment in the form of these three explanations. Basically the idea was to address three different type of transactions. Through this retrospective amendment, explanation four was in relation to the copyrighted article. I did human generally a software to just sort of tool a physical medium. The argument was this is more of a copywrite vs copywrited article argument generally a software which was sold through physical medium through which you transfer tonight the software or a computer software it should be taxable as a royalty any consideration from there, then explanation five now explanation five was in relation to say for example you have website, treated as an equipment and the argument is any revenue which a foreign company earns through its website from India should not be taxed in India because the user is not provided me the right to use or possess a any right on the website because that website is available to we are so their bodies of site is nothing but a server space and the server space is available to various parties, and not dedicated to a particular user. So it should not be taxable in India because they is no possess any right. So explanation five came with this clarification that irrespective of whether user has possession or control over the right property or information or is irrespective of the location where the location is in India or outside India to be taxable in India. This is irrelevant from a digital economy because of the issues which we spoke about in terms of location of the eyepiece etc, then your explanation six again this is an interesting interesting litigation so you had all this satellite companies bandwidth companies, who provide transponder companies who provide space in the transponder bandwidth in the transponder. Their argument was the revenue which is generated out of the transponder use of these bees in the transponder should not be taxable as royalty because the process is general in nature it's not secret in nature. A user is a doesn't care in terms of how the data is kind of uploading or downloaded ultimately he

cares about the delivery of data so the process is more of a general in nature and approve agent of the Avoid be only go a secret process. So that is what be argument was and of course we saw a lot of litigation on that. So in 2012 again retrospective amendment was brought in to see that even if process with a general or secret in nature, any transmission process would be taxable as royalty this is basically to overrule the litigation which went to high court. This retrospective amendments are applicable from 1976 now one of the interesting present litigation which is going on is in relation to some of this retrospective amendments clarify some of the films, so for example process is classified to explanation six, same terms are used in tax treaty. Right now the question, which tax office today that is raising is why should this not be read into tax treaty mode of definitions or meaning which is provided under the domestic tax law. If tax treaty has Article thirty two, what we call article to do with says that any term which is not defined in the tax treaty will get its meaning from the domestic tax law. Broadly thats what it says, now process again the provisions of royalty are almost similar to what we have in domestic tax treaty except for the new ones as we spoke off. So since the provisions are similar, there is there is discussion in terms of whether now the argument that TT cover secret process does not stand now, because the process term is itself has been defined by the domestic tax law. There's a litigation which is going to be a I have spoken and I've kind of covered that in the later part but I thought I'll just touch upon or even for that matter explanation five which talks about equipment qualifies as royalty only if the user has a user has the possessory right out of control over the complaint. So there are some six seven kind of conditions which are given to see that. If this six seven conditions we generally spoke about possessory right over control are fulfilled in a contract, the use of the equipment qualify as a royalty, so explanation can again and again that have an impact on the on the tax treaty. Although explanation five is more about describing or including certain kind of expression. Consideration in this picked over any date property or information. But is experienced in six if we were to look at it actually which it process. So applicability of explanation five in tax treaty may be limited because this explanation consideration despicably needed property and information does not appear to certain treaties, but the process word is appearing in India. So as we discussed the definition of royalty these are model

conventions three model we spoke of. The definition are more similar, n each of the team ordered convention. Indian tax treaty are based on the UN model, the UN morning convention and the additional part which UN model convention covers in the royalty definition is the industrial commercial or scientific equipment, basically any permitted used out of use or right to use of industrial commercial or scientific equipment will qualify as royalty and there are decisions whcih says that website qualifies as industrial commercial a scientific equipment. So from a digital economy perspective, this is very important and not all Indian tax treaty has has this provision of equipment on to this we call it as equipment or do so not every Indian treaty has an equipment already so then the discussion is in treties where equipment royalty is concern is covered and indeed is very does not go or how would you distinguish it? Whether you would not tax a website or server, in treaties which does not go or industrial commercial scientific equipment related provisions. I do not get into much, but let me kind of take through the tax treaty. This is more of always you the more of a OECD model convention an article twelve one basically talks about beneficial ownership and this this term is used in the tax treaty that basically says that legal ownership of and IP is not the only reason that we will tax you. A transaction can be taxed if the, if the person was exploiting the IP is also the beneficial over and this term beneficial owner is defined in the OECD. So basically to say that the other then legal ownership today is time, who owns the IP is a question mark, who legally owns the IP because many countries do not have I P laws which requires registration so there's no legal ownership which can be established. So the question is that beneficial owner should be someone identified through transactions basically who is enjoying being come out of the exploitation and he's the person who should be taxed in a particular royalty arrangemnt. She's for technical service I mean this provision so similar to royalty. The domestic tax provisions to say that when used for technical services would be deemed to accrue or arise in case of a non resident. It's similar to what we covered in case of government payment is always taxable resident always taxable except for business carried out outside India and it is of non-resident, not not taxable unless it is in relation to business get it on in India, meaning of FTS fees for technical services. Basically it is defined to cover over managerial technical consultant services; it also includes provision of

services of technical or personal nature. This is important because India used tax treaty for example, covers only consultancy and a technical services it does not cover managerial services now that there is there is this litigation which is going on in relation to say that services to see that whether any human intervention is required to qualify any transaction as fees for technical services, against a facility. So provisions have been interpreted to say that and judicial precedence are held to say that if you look at managerial consultancy, it involves human intervention and since technical faults in between the two term, it should take colour the other two words and accordingly and if there is a human intervention in terms of providing technical services will qualify as fees for technical services. If it is an automated kind of a process then it should qualify as facility and therefore not taxable as fees for technical services. Again an important kind of provision from a digital economy perspective because it doesn't require human intervention, most of the places are automated. This we spoke off. Now in the tax treaty provisions on fees for technical service most of the treaties have similar provisions except for certain countries like US, Singapore which has its own concept called 'fees for included services'. Fees for included services is not narrower in ambit, as compared to fees for technical services. Few sporting goods services basically means and the right part is important so basically the provision says that any technical or consultancy services which are ancillary and subsidiary to the main property for which a royalty is charged, that should qualify as fees for technical service that's one part of the India U.S. tax treaty provision but the other interesting part which is where the discussion is is make available that do you mean by make available so the provision needs to see that make available technical knowledge experience skill, know how a processor consist of development and transfer of technical plan or technical design. What is make available is kind of discussed not defined but it is discussed why by illustration in the India US tax treaty as part of the memorandum of understanding. So as I said to make available leads to fees for included service provisions being narrower in the ambit as compared to fees for technical service, so as I said make available, what is make available is kind of discussed not defined but it is discussed why by illustration in the India US tax treaty as part of the memorandum of understanding. So as I said to make available leads to fees for included service provisions being narrower in the ambit as compared to

fees for technical service, because make available would mean that if this service provisions being narrower in ambit tomorrow it will do. Use the technology which it kind of has received through a service provider and is able to apply the technical knowledge or technology on his or and of on its own without taking the recourse to the service provider who has originally provided the services. Then it is make available in the sense that I should be trained in such a manner that tomorrow, I should be able to provide the same services to a third party. That is make available. If To the extent of services not provided by a foreign party then make available clause fails and so services are not taxable under F.I.S. article. So this is explained by an example, which is what I have listed. Now since we have considered some of the provistions of act and specific to be digital economy have kind of captured one case study to kind of highlight how in digital economy the international tax rules in the domestic tax rules application becomes difficult. We spoke about how characterization is one of the bigger issues in technology and digital economy world. So the case study goes about ABC India is basically a subsidiary of A.B.C. Singapore, A.B.C. Singapore has Indian indicated website and those website are operated on servers outside India. The role of A.B.C. India is basically to work as a reseller. So basically what A.B.C. India does is tomorrow if there is an Indian customer, like for example, this was a case in Yahoo India Pvt Ltd a Mumbai tabulant decision, Government of India wanted to promote certain destination to people in Hong Kong, you know to promote tourism and so it approached Yahoo Hong Kong to say that you advertise government of India's you know that plays on your website and I would be would be consideration. But since Hong Kong did not have any presence, India there's a subsidy of another Yahoo entity in India, Yahoo US India which acts as a reseller for all the Yahoo entities and so the customer approached India, who was acting as a reseller on a back to back basis, what he does this order Yahoo India does is when the customer approaches, it goes back to Yahoo Hong Kong and says that there is a customer who requires a particular size shape location banner advertisement request. So if you look at website, there are various places where banner advertisements appear, one is that the state center one is at right and down and below the page. The charges which I read by a website company is different so if the if you need a banner advertisement right at the middle, you need to pay

more right. So the cost are different so a Yahoo India will have to necessarily go to Yahoo Hong Kong, who's website where the banner advertisement is going to get displayed, To check whether an availability dared to display banner is meant for a particular period and it goes there yahoo will confirm and so then it goes back and conforms to the customer that yes you can we can contact to, so its reseller in a back to back basis. So then the Indian entity will basically get the advertisement, if you look at that are two servers, Server one will basically host website OK and server two is a server where the Indian entity the A.B.C. India will upload the banner advertisement. So that is a space which is given by empty server where Indian entity will have to take the advertisement from the customer and upload it on that server that sever will then support the main server where website is located, and been kind of for that upload the advertisement on the website. So the issue which came in was the consideration which Indian entity used to receive it be a part of the consideration because it's a reseller so it be a part of the consideration on a commercial basis sharing basis to the Hong Kong entity and the question was whether that consideration qualifies as royalty or fees for business income or of business income. Yahoo Hong Kong did not have any physical presence in India and so there is no question of a permanent establishment or a business connection. Because Hong Kong or India does not have to with treaty with Hong Kong, you yahoo Hong Kong gets go on by the domestic tax law. so the discussion from the tax office was that the payment should qualify as royalty and F.P.S. and not business income because it wanted to tax the revenue. So we are right now evaluating various arguments which were taken by the tax office and what the Mumbai tribunal held. first set of argument was website is an equipment as we discussed, because website supported by server is a commercial scientific equipment and so what payment has been made by India to Yahoo Hong Kong is to use the server space and so the website and so there is a right to use the equipment which is provided to the Indian entity by the Hong Kong entity and so the payment should be should be taxed this equipment royalty. That is what the argument was so if you look at it, explanation five as we saw earlier has a removed the condition of possessory right or control or any equipment for right to use of equipment qualifying as royalty. However, there is there is this classification provided in Conga Pankiwallah. If you look at the provisions of explanation

five six section nine one six which I had mentioned earlier, it only docks about. So let's go back, yeah, so it says that includes consideration in respect of any right property or information, Conga Pankiwallah says that equipment does not fit in any of the words equipment even I did it right not a property it should not qualify as property and of course it is not information. So, there is this Mumbai tribunal decision in case of writers which basically confirms the fact that portal is along with sort of it isn't a good man but there is this. Interesting kind of discussion in Congo bulkier not to say that a property and in equipment. Two different terms and a property should not encompass equipment. Because the manner in which it is used in the domestic tax law does not envisage you know equipment getting covered within the property word. Yes yes. But the property of would have you know, ultimately characteristics which, so probably get me anything. For the for that matter it would be for think there is often sort of it would be a property and sort of the. I mean is yes website is a property so ultimately while Conga Pankiwallah has a perspective but one will have to kind of get into more do you do check whether... Yahoo website is not focused on India. It is basically focus so yahoo has this concept like Google or any other domain. I'll just clarify a little yahoo Hong Kong's website is focused for population in Hong Kong or like Yahoo India Yahoo.co.in is an Indian website made for Indian population. Similarly Yahoo.co.hk is made for population in Hong Kong. Reason being the content of our local content So we'll have new details specific to home and that's where that that's where the intention of the government was in government wanted to promote Indian destination in Hong Kong otherwise it could have easily used yahoo.co.in for that matter because that's the Indian website, but it went to Hong Kong entity to see that because population is Hong Kong and they're going to use Chinese population are going to use this, it will promote the destination India. If we see home on Saturday we go sing up on whether there is to be taken in the act on this because I'm in India. From India ignored log on to Hong Kong, even if I were to the exact address, the understanding between.....I mean on this website of a which is as it says that which operates within Singapore and Hong Kong for residents of Hong Kong, it is like Indian product giving advertisement in a newspaper in Hong Kong with Hong Kong and pays for that purpose and that to me does being put in advertisement for that particular newspaper, so whether

that newspapers has earned income in the India only because the product is India, mean it may be simply fine by this manner in order to understand because it is an online that if if were me I'm in their Hong Kong website had the excess was there it was a word over everywhere, then maybe an Indian got there also some issues have risen and I remember in Asia also this was one of the arguments if I recollect it was judgment was six seven years ago by me, I may not be remembering at this stage It was through satellite transmission is there and this Zee TV or sony Tv or star TV so the one of the argument was that look it may be paying and it is for the viewers in India and therefore Indian people are benefiting, so which is which was it rather even a better place than this. But still we hear that the income is not a accrued in India. Yes it was similar as far as foreign companies are concerned they said we are not providing any services in India I mean at this person is coming, we have facilitating we have this satellite and from that satellite some what is going the benefit with a beard as or signals we are providing it but them where they utilize their signals whether it is in the money out of us in India other, but that may be the consumer but that is it that is a relation between the beneficiary or the viewer in India. That is a relationship between that viewer in India and says sony TV or be star TV start the week and for that access the up being like when you have your set box except when you subscribe to different of thing you pay you paper does great pretty and on that day upping the decks. This was the argument on this we are paying the tax, their tax is on the royalty paid to that satellite owner, so this was the issue if I remember, just coming back to your point why... Yeah, A Hong Kong in Hong Kong website generate its revenue from whom? It generates revenue from the users of the Honng Kong website because the revenue model is this is in the cost plus website so if I log on do have to say it on a new website, and I go and clicked on the banner advertisement that is when an Indian entity was owning the Indian website will earn revenue, similarly in the present case study Hong Kong entity you know so the approval of the revenue is outside, that is the matter that many come here discussing the subject of the person, we have be and it is of the hands of their company A.B.C. in Hong Kong which is not intimate to go to Singapore. So while we are discussing royalty the question was more from the approval perspective, irrespective how the characterization happens where is the place of occurrence it would be I mean somewhre

could be India, then the question is how do you characterize the income So what you're saying is. Then the population that is targeted is an Indian audience also. So then you will have the kind of bifurcate your revenue within various audience which if it is possible to be selected through website but there are so what do we know. So that's is the issue where you characterize an income as business income and then you say there's a business connection in India that's and you know only income it is that you would say only activities that are attributable to India should be taxed in here we are discussing royalty and the question is then equipment all be can equipment be treated as situated in India therefore equipment royalty and that is where there are judicial precedents following all Mumbai tribe and basically holding that it cannot be an equipment royalty because there is no possessory is right and control given to the advertiser or the Indian entity for that matter. The second aspect in royalty we discussed earlier was process royalty and the element of secret process or not being kind of taken away maybe in the domestic tax law TT till has that prohibition, still has the provision and so the other aspect was whether it's a process royalty part, let me go back. So if you look at it explanation six, it says, Process includes transmission by satellite cable, optic fiber and similar technology. So the emphasis is on transmission and the memorandum explained in the final section twenty twelve explaining why this was introduced somewhere also indicates that the idea of introduction was to override all those decisions. It shows that other decisions be joined in relation to transmission service provider override those decisions so that is why it is retrospective. So that is where the argument comes in that only if the consideration was recieved by the Hong Kong entity from the Indian entity for transmission services, should the same qualify as process roy even under the domestic tax law and limit the explanation six to say that this amendment or this explanation only coerced transmission process and any of the process other than transmission process, the argument of secret process still continues. It's an inclusive definition but then it includes transmission by so it seems that inclusion is towards the mode of transmission but the emphasis is that transmission is the only process which should be covered, Yes means process, process means it's more so that one is not exhaustive one. That's one line of argument. So so that's one line of argument then the second line of argument is the essence of arrangemnt is basically for

sale of apace an does not cover any process, as such so it's sale of space on a server, everything is process driven, and delivery of banner advertisement in the server and how it happens, I don't pay I mean the Indian entity doesn't pay for that. So that's kind of are there argument which is there of course, so, process royalty seems to be kind of more discussion point more relevant discussion under the point. Surprisingly that is on many aspects, but it does not get into recommendation process. It seemed that the G twenty and the other countries who were part of the discussion of process they could not come to an agreement on some of the recommendations of the debate to one of the recommendation which it did was that and I'll cover that in the subsequent slide is that nexus should be a redefined and permanent establishment concept should be redifined to cover economic presence as well. so place for technical service there is Sky sell decision with says that there's is this technology involved, there is no service which is provided it's more of a facility. Then under the treaty on equipment I did mention earlier in terms of OECD providing certain parameters to say that merely a use of equipment should not qualify as equipment royalty there has to be possessory right and control given to the customer, these are the conditions which it does lead down, and obviously in the present case as we've discussed earlier, it seems that the parameter are not fulfilled. So we're back in 1999, OECD realised that ecommerce is growing and it should kind of revisit the model convention OECD model convention and come out with a thought process in terms of how should OECD deal with some of the ecommerce transactions so it identified twenty eight categories of transaction in the a common situations. The person was assuming that income is able to wipe tech support people is in many cases not for the places because the country your presidence will definitely be taxed Yes but it could be a situation where India taxes are thirty percent Singapore tonight is seventeen percent of their the thirteen percent of saving which happens. So it appointed a technical advisory committee which was known as TAC in defied some twenty eight categories of different Transactions which can occur in e-commerce and then needs, it basically provided whether it you know it's the same can be taxable as royalty or business income. One of the category was something similar category seventeen, where the tax report basically has said that this is pure sale of banner advertisement it should not qualify as FTS and then of course India appointed constituted a

committee High powered committee to look at all the twenty eight categories of transaction from an Indian domestic tax law perspective and also a couple of tax treaties and provide its own kind of part process whether you know for same category OECD has kind of you know provided it s conclusion whether India agrees or not and then also the high powered committee says that it is sale of banner advertisement constitute business profit. This is basically what it says and it further goes to say that even under or didn't your definition of royalty that covers for the use or a right to use industrial, commercial or scientific equipment as I mentioned many of the Indian treaties does not have these provisions it does not and says that even in treaties where similar provisions are covered still it will not qualify as equipment royalty it should be a business profit. Treaty as we spoke earlier there's this discussion whether retrospective amendment should apply to tax treaty and there are certain kind of thought which are captured here to say that that retrospective of amendment should not be read in to tax treaty should not be read into tax treaty. Some of the some of the thoughts are that Section two generally provides for definition of terms which are applicable for all the provisions of the act. whereas in the present situation it is why an explanation under nine one six, that a term has been defined, so whether that meaning or that term definition should be applicable across all the sections or it should be restricted only to nine one six and that is one of the thought process. Of cause there are decisions to say that explanation should be restricted to only the section for which it is provided and they're not with the other provisions should not be extended to the other provisions and then subsequently of course various tribunals again had to your question to address similar arguments raised by the Tax Office and there are favorable decisions to say that you cannot read the process meaning into the provisions of the tax treaty. Now, so basically somewhere it leads to this conclusion that the payment by Indian entity to Hong Kong should not qualify as process royalty under the tax treaty even after the retrospective amendment. And then for fees for technical services make available condition doesn't get fulfilled, so this is one of the kids today are mindful of the time which we have. So I would want to skip the other I've captured the other is to me as well on cloud computing but I want you to distribute the material.

I have some slides on permanent establishment which I'll quickly run through, I am mindful of the time because then there is some discussion on the Beps part permanent establishment as we discussed earlier, broadly two types of P which are relevant, fixed place P to which is the basic rule its basically says that a fixed place through which the business of foreign enterprise wholely or partly carried out, one is physical please, there should be a physical place of a source country of the non-resident and it should be fixed and to that fix place, business of foreign entity is carried out. Then of course it qualifies as expats be construction is not right now relevant for us but Agency to the third type of P, it is in relation to a dependent agent. Because of digital economy now has various models where Indian Agents are appointed which helps in marketing and you know getting customers for the for the foreign entity for its website agency rule will be very important in the digital context. So it basically says that dependent agent one condition, the agent should be dependent another is it should have been truly conclude the contact or a right to or authority to habitually conclude the contract and of course there's an exclusion which we spoke off of preparing oxideral character. These are going to very important. One of the illustration I discussed in terms of warehouse and how that becomes a key activity for and digital economy, UN model convention again emphasis on source and there is an additional P concept which is service P which UN model has which OECD doesn't have many of the Indian treaties actually have this service peak laws which basically says that a foreign company were to send its employee in India and then render services to are related or a non related party and the stay of the employer to cross a particular threshold in India for example, the related by the service threshold is one day and a third party service has thirty days so if we're to cross that threshold, then there is a service P created of the foreign entity in India and so the P related implication arises, this is interesting because you know, transactions in digital economy, this P could be a could be a challenging point over a trigger point. This we discussed broadly this skip for the moment, preparatory and oximetry activities as I mention Article five three in the generally Indian treaties will have certain exclusions which which could be in the form of of the premises used purely to deliver products premises used to carry out advertisement in India to store it. Should I skip this should I go to beps action plan one because we have just about fifteen minutes, so I

understand there was this basic discussion about how beps came about and you know in yesterday's session. So one of the fifteen action plan, Action Plan one spoke of digital tax challenges in digital economy and some of the issues which we discussed in today's presentation were considered by beps, unfortunately because the countries could not come to conclusion there was a lot of discussion but the recommendations very few and the other kind of solutions which are provided mention that it should be left open to the countries individual countries to amend and domestic tax and try and address the situation, so what were the concerns, concerns were one was the tax planning to reduce the taxable income or shift the profit to law tax jurisdiction another concern was digital business model in the present situation does not have adequate tax laws or regulations and so it should be revisited and of course there was an indirect tax challenge. This we have discussed in the past slides, what were the key tax issues identified nexus data characterization this is where the recommendations which are expected to be implemented either through multilateral instruments which Justice Sikri spoke of in the morning or amending the tax treaty itself. So the recommendations there are basically two recommendations effectivity and both related to modifying the definition of permanent establishment which is provided in the tax treaty. first spoke of you know preparatory auxiliary activities the definition should change and it should exclude from a digital standpoint activities like warehousing which was pointed out, it would exclude that from preparatory auxillary because that's a very important activity which is carried out in a digital economic. So one of this edition was modified the list of exception which spoke up a pretty good luck sympathy and the other one was that because there is a religion. Being planned or shifting the base to a lot actually his diction been planned in a group. The one should introduce and in defragmentation tool to see that tomorrow tax office sort of will have to look at individual group entities club them together and see if all the group and to do tech getting old. In India for a foreign company whether, if put together constitutes a court activity and whether you know. Back should be taxed. Individually it may be a smaller activities and therefore irrelevant but when you put together whether it leads to taxation. In any country so it's a new and different men to do with should be proposed. Then look at it in terms of our illustrations which are provided by bets to say that you know. This is how you should it is but a broad

kind of statements which are made and then there is an illustration which is given this again is from the action plan which we are least book of local warehouse how it is important in the digital economic and whether that should be out of the. They put it in York City. Activity list in the newbie definition. The better to seventy two of the action plan. The other you come in nation is that the are deficient arrangement should be addressed by. Again modifying the definition of be. It could be a be a could be fixed base be you should modify the definition to address any active Fischel arrangement and there is an illustration which is given to say that the activity of C. is force. You know. Since in the truly Konami generally Aegis are used in a country to carry out the marketing and C.S. activity. If the activity of those sales person a source of Nikken. DIMITY all the same conditions are agreed with the customer by those agents and seemed kind of contact is signed off. Digitally because in today's time. Signing off contact is also not required between two parties seem kind of contact is ultimately a sign. Between the two parties, then it should qualify as a permanent establishment that agent or. The sales for of local subsidy should qualifies as a dependent agent permanent establishment. Then on trans uprising there become a nation and. This is more to do with intangibles there's an action plan which talks about intangibles. From a town surprising standpoint and how value should be given to all the entities within group who want to build some or the other way to creating value and intangibles. So any credible you a look at intrade happen to all the A group entities and legal ownership should not be given undue important. So this is where the theory commendation which came out of two seventy two page discussion in action plan one. Then there are certain options. As I mentioned earlier, which read. Evaluate it but not become in the affair that this are the options which can. It raises the challenges in digital economic but somehow there was no consensus on that. So one is a a new Nexus tuna should be introduced to do which talks about significant economic presence physical presence may not be required. But economic presence is sore significant that you should end up being taxed in that jurisdiction. So maybe you to go mystic tax law get a definition on significant economic presence and put down some criteria as which will ensure that you pay tax in the source country. Then there was this discussion about, you know there's this business to business transaction in business to consumer transaction to it basically two

models in e-commerce a business to business transaction would mean that there are bit. It is generally between to cooperate. For a platform to and on the site, now that is easy to identify it because corporate will have the obligation to be told Access. and so it will have to kind of evaluate whether payment is subject to be tolling or not but in a bid to see transaction. Like a retail transaction we just get it out online. We're turning never happens and I so there is always a revenue leakage which takes place because of B two C transaction. So one of the proposition was the loss of revenue source of new for going to be to see transaction introduce of be tolling back libby on certain type of withholding transaction. It is picked over there to be to be a would be to see the source country goes ahead and be told stacks. And then the foreign company has to kind of claim credit or return and clean the funds for that. So one of this addition was that that. Since it is so difficult to make it mandatory to be told tax on certain type of digital transaction and Korda tardos addition was on equalization Livy. Again It is similar to withholding tax to see that it is big do of the need to have transaction. You bring the tax on digital economic. So like a corporate bags you bring a particular tax on digital economics which is which is called as equalization Livy's to fax only digital economic companies. So that you can kind of distinguish them from the beginning mortar companies. So this three options were evaluated not recommended and better left it open to countries to introduce them to their domestic tax law. So what basically happened after all this discussion. It did not become in any space. Special rules for digitally Konami it discussed but it did not become an A because it failed that the challenges can be addressed by the other action plans like intangibles lake. What we discussed, amending the definition of P.. Digital economic challenges could be addressed by if you were to implement it he commanded sions in the current and the other action plans to Ted. Nor specific kind of us but also required for digital economy. But it said that since this is and work in progress again in two sixteen twenty sixteen. It will continue with this work there and it is expected that now. We indeed do indeed another kind of target date by when they will come up with the supplemental report where it will consider some of the duties dictions where some of the options which are not what he commanded have been implemented and how did they work and consider them as well and try and kind of come with a door buster become a nation.

But other than just the duty to come to visit did. Of course on be bad in G.S.T. Also there were a lot of discussions which took place but nothing concrete happened on that. So you know basically it said that international bad guidelines in accordion Indian manner. It should be developed some implementation. I could should be developed and this is. This is what some of the parts of and downs of how India sees action plan one. So there is a committee which has been set up to examine this itself. Taxation on digital economic come up with sums additions of their own. May be some discussions at all the options which are not by that committee. So broadly that the thought and Thank you, have really exhaustive and we love Brit presentation. I've actually, when you were discussing and we were talking about this e-commerce except raff. I was thinking today. We are hardly able to go to and visit market. My eighty percent shopping is each opting to say I'll go to Joe bombardment on the Flipkart except there are many to my book Sam and other added advantage is that to most of these orders they give you thirty days damn that no discounts is it done back without asking any questions and so what the issue is from an economic point of view of the excisions do erase. I was wondering. Things which are coming in my mind were that. Now it is a fine. When ever we buy a thing. It was not been few months ago where discharged. So maybe they're the vet authorities are concerned and. So this to be paid by a collected and bid by the site which is selling it to you because they may be able to meet Lea buying it from as it does from some buzz and was the supplier and the who is online. Say on mine does I don't see a bank side of God. R M is on giving that it really is meant or where hose except reference there. But it emitted responsibilities your since you are collecting that money is like that shop. So you have kept goods Mina fed to marry him and then you maybe agency but US elling it to the customer. So wet minute was a problem I remember one thing more than once it was really dot com. The eggs really I went on. That's a it's, I think sideways in us because the prices were in Donna's. But for the I mean facility sick game indoor liberty made plea at the end when the bill is there it would come into B.S. you have to be in the bees and you pay to credit card. So I was seeing some of these verdicts which will very cheap international brands. In comparison with the prize you get here and I think Joe's do. The product these are garments only or something and. But what happened when it came to payment and I hadn't

even even make rate card details that you may find that this. What you call them being duty and didn't being duty which was almost same as the prize it was so it came to almost double. So I mean it in the transaction there only that this is the get there were damned thing in that and didn't bring duty where Dick cetera one can. But the issues in this respect as was income tax is concerned. These are really very contentious issues. In view of and particularly in the context of section nine and when it comes to Roy to your fee for technical services etc and of course on D.S.T. and ret because that can also be awarded and O.E.C.D. in Baptists they have discussion and want to see him but there's no and gets additions so far on that. But we can end with a note that all these issues are going to arise in future and not distant future, but these are all that is started.

Many judgments of the tribunal are there many judgments, but there are very very few judgments of the High Court and hardly any judgment of the supreme court as of now, reason is there at that stage, so either from tribunal which has given many judgments on various issues, the cases are pending in the High Court and or maybe in a few cases where the high court has given the judgment cases are still pending in the Supreme Court so law may be clear in due course of time in next one or two years upto level of super high courts at least when the I mean judgments are given of the cases which are pending in the high court and it may take some more time when they land up in the Supreme Court and Supreme Court to give the gives the final pronouncements and that this is the legal position. So in that context I feel that this kind of exposure by us are for us when we can discuss all this here and how it is so important to understand the technology also. So if we do is we are talking offer digital economy we are talking of e-commerce etc and what was how it operates how it works, unless we understand that it is really difficult to then apply the principles. So if anybody has any question otherwise we can now go for lunch and that was also interesting with three and this was our Supreme Court judgement so and only this these visitations with him and I've requested all of them to give their email id so that you can post it to them there's no problem so you can just e-mail all these presentations, Thank you.

Dr. Geeta Oberoi: We have a group photograph of before you proceed for lunch please be there for photograph and can we have a bigger around of applause for Honorable Justice A. K. Sikri judge Supreme court of India and Mr. Milind K Shah also.

DAY 3
Session 9

Dr. Geeta Oberoi: Very good morning to all of you. If you have seen you have program schedule for today. With all of you. We are going. We are having all sessions continuously and then we are breaking for lunch and then we are going to sanchi please be ready for Sanchi by two forty five sharp because it closes at five o'clock. If you are interested of course it's not mandatory. If you're not interested. Then also fine with us. So now we begin the session first session is by Mr. Anand Desai. I have one more request to make to this house. What we will do let speaker each speaker complete his part of session say for forty minutes. And then in the remaining twenty minutes we do question answers. Is that acceptable to all. So sir Mr. Anand Desai you can introduce yourself and begin the session.

Mr. Anand Desai: Good morning. It's an honor to be here again. So. Thank you. So the first session is actually on the development of technology law Jurisprudence in India and what I've done is put in some background and then the way the law has involved in India. It's mainly focused as you will see on e-commerce the way the law is evolving and then Cybercrime got thrown into it by the two thousand and eight amendment to a large extent. What really the world has changed in terms of how we now communicate. It's a rare site a letter written and posted email has become very common. Photographs are exchanged on email Facebook social media sites customs barriers on electronic information is a problem because they come by email. They don't know come in physical form as they used to either in paper form or on floppy disks which had come in and one time. The other challenges that the Internet allows you to be anonymous. It's very easy to mask one's identity. So I just starting just saying that the way computer they've changed our lives in terms of communication and the law the way it's evolving very very quickly in don't know where we communicate, the way we share information the way we share photographs films. Social media allows us to give personal messages to each other to groups of people that evolution's may start through Twitter. Protests have started already in Flash mode as

they call it when the through Twitter people come to know of an event and participate. In Bombay VT station it had happened some months ago where people all came together and tried to demonstrate it has a positive demonstration it could also be negative sometimes. Also now we find more and more transactions happening through apps. So you book in more cities now and book ola cab, airline tickets online travel agents at offering services. In fact the latest issue is service tax on travel agents or allowing booking online. The demand has now come up a couple of days ago. Also we find less and less physical shops will be around. Because most people order online. And that's going to increase. So we enter method of behavior where the social interaction, personal interaction, commercial transactions are happening much much more and will happen much more on the Internet and through the phone. Also an element that comes up is copyrighted content can be shared so easily once it is put up. It's very difficult to pull down so mass communication I've already covered most is point with mass communication in terms of what I want to communicate is very easy the problem is I can also easily alter communications. If I understand how the Internet works I know how to intercept a message. I know how to send a message from the wrong so to speak address. Some of you may know this some in not know it. But on the net Internet it's easy to download a program which allows me to effectively send a message or make a phone call from any number I want. So if I know your number for example. I can use that number and when I phoned the other person. He'll believe the phone is coming from that number. He'll believe the message is coming from that number. Let's what he sees which can create a lot of problems as you can imagine. Especially when people do not have the right intention. We also see filing online. Tax filings that online passport application online. Courts, we keep hearing about e-courts I think that's going to increase much more than it already is so electronic filing and courts. Electronic communication by the courts. Two parties by the parties to each other etc is going to increase. We read about the Blackberry case when Blackberry almost got banned in India because the encrypted communication would not be intercepted by the police and the government said we must celebrate to intercept to prevent or help prevent terrorism. Help prevent other crime so that whole concept again is coming off interception which had to some extent got protected on telephone tapping and by the country has had said that's

again come back in a much much bigger way. People actually now getting married without even knowing who they are marrying not just in India across borders. And I actually met some people like this who found a website. Met. So to speak up or just an online. Left India and travel to United States to marry that person without ever seeing the person without knowing the antecedent so these kind of issues also took him up more and more. India does not still have a popular dating website. But it's coming. And I was speaking at an event a few days ago and a good analysis was given. If your name appears on matchmaking or matrimonial website for a long time. It means you're a lose because you can find spouse. But on a dating website if your name or profile remains what a longer time. It means you're doing very well because you're getting more and more dates. So it's a complete opposite end of the approach between the two websites. The other if I had more and more is reputation building and reputation breaking on the Internet. We've actually had client coming to us saying that people are posting. incorrect information. Simple example. A company employee left in a circumstance which was not happy with it. He put up what is called a blog. Blog is merely what I want to write on a public website. He put on that blog. That this employer it was a listed IT company was going bankrupt. While not paying employees. That's why he had left. Because that went up other employees started getting nervous and resigning. This actually happened. This company came to us and said how do we stop it because the longer it's out there and then the normal practice in a blog is somebody is right someone else will add to it somewhat less or agree with it so well because I believe it. It would become the whole conversation. But in the process that company their reputation can be completely ruined. If somebody is out to get it. In fact law firms are facing this also now there was one law firm that had issue in terms of young associate who had filed a false affidavit and the blog went down so deep. If people are reading it that law firm could have been finished. They managed to put a stop good fortunately. But otherwise it would have gone on on. So just a bit of background I thought to be interesting for those of you know I'm sorry it would be repetition but most of us think the internet came about very recently. The Internet actually came about from way back in the sixty's. But did not get popular. And what we have actually seen as us we saw the telegram, telex, fax all come and become obsolete. Very

quickly. In the last thirty forty years all these technology of come and gone. Its rare today to use very rare to use. Telegrams have almost disappeared. Even fax is rare. It's almost all e-mail now. And the reason I'm saying this is because I think a judge is and as a legislature. We're tending to be very focused on the current technology position. When we analyze what the law should be. But this law is changing so fast. It's becoming obsolete so fast that something to keep in mind. And the law itself as it evolves to technology information technology Act of two thousand as you note I made it in two thousand and eight. They're just eight years. It's like you get amended again. So how do you keep track of these things the something that's going to be a big question going forward. So concept of the Internet actually is that data moves from server to server freely. If I send an email to a person sitting just here It'll go to a series of computer networks before it actually goes there. So they'll work at the moment I press send my server starts looking for a free server. It's an almost instantaneous the message was there first it will keep looking of the server still it finds a free route here and all this almost instantaneous. The challenge is now this message has gone through a host of servers which could be in various jurisdictions. To actually trace the so to speak custody of the message through all these server and get proof of it is something that needs to again be examined. Is start point. End Point is clear. But what about all the so was it has gone through. India sent in certain cases letrogatory mainly to other jurisdictions saying please can you get back to us on the ownership of this sort of this server because we need to trace the entire sequence of passage of this email. What you know country and searchers the question then becomes can you draw a conclusion that yes this mail is gone from here it has gone that we can see the trail which can be seen in most cases by the receivers email and is that enough not to conclude that this mail was not intercepted or changed along the way. And actually the mail that left the outbox of the person who sent it is the same mail that has gone into the inbox of the recipient.Also just to explain all of this data captured in packages it does not go as typed text or the photograph it gets disintegrated and reintegrated before it reaches the end. Again just will explain the sequence of last forty years. From of personal computer that came in in the eighty's where it was used mainly for accounts etc. to the Internet in the ninety's and e-commerce starting to mobile phones which have become very

popular in 2000 now everybody has them. So wherever the offense is committed it could be tried by an Indian court. And indeed law enforcement agencies could therefore look into it again the challenge like I said is how do you actually implement it unless the other country allows you to extradite, participate, cooperate in that. This is being criticized so coming back to the sort of saying was that a lot of people criticize this to say that I may be sitting in a jurisdiction where what I'm doing is not an offense can another country's law make me liable if someone accesses what I'm doing in one country. And this is a question is going to come up more and more. I've given one example of the creator of a virus now some countries obviously say viruses are illegal but some countries do not have such a law. If somebody initiates a virus in a country. It comes to be your computer system makes a mess of it. It's an offense in India. Because it's. It's harmed a computer in India. The question is going to be how do you know enforced force that right. The law gives you an India across Jurisdictions in that country and as happened in that case the Philippines did not have any such law. So ultimately nothing could be done in that case. Electronic contracting is another increasing activity. And a lot of you're going to see situations where a contract is created by exchange of emails. The e-mails may contained the content the e-mails may have an attachment which is an unsigned contract. At some stage. It has become a contract or not become a contract will have to be determined. The bigger issue isn't what is called could have click wrap contract. I'm sure many of us have wonder website and seen pages and pages and pages of accept before you go for that. I don't know anybody reads all that. You just quickly scroll through go to the end say yes. Nobody The clue what they signed up to in that will lead amount to a contract in India not a question mark because somebody's judgment has he no that say I'm less a person is read and understood. He may not be bound. He may be negligent that's another matter but he may not be bound by these reams and reams of conditions that have been put in. So this is going to come up I think more and more because again. What we're seeing is we're pretty sure no one's going to be that on them conditions. So people put in all kinds of terms and conditions applicable in India and other people in the big leagues picked up from some U.S. precedent because U.S. likes to have long contracts and all the terms get accepted. We also have under the act legal recognition of electronic records Section sixty five B. has

been held to be mandated in all just breaks by the Supreme Court. So unless all the conditions set out of sixty five B are satisfied, the evidence will not be admissible in a court. This again results in a whole bunch of challenges because most people have no idea how to preserve electronic record. Many of the police have no idea how to extract that electronic record. I'll give another example. A public company had called us in a big four accounting firm was also called in because there were allegations that some employees had been fiddling with the system and that taken money out. Siphoned out money. The accounting firm are supposed to have the computer forensics experts. They came in and they were all set to start investigating into the main hard disk of the company, the server. What should be done and ultimately was done because you got an external expert in you have to mirror that hard disk and work on the mirror because the moment you started working on the hard disk itself you are going to start fiddling with what the data is on that. Anything you do want to hard disk gets recorded. Even if you access it it gets recorded when you get out and gets recorded you make a change it gets recorded you copied you it get recorded. So unless you mirror it and work on the mirror whatever you do is going to damage our temper with the evidence which may then not be admissible under sixty five B.. So again from the investigation point of view gathering of evidence point of view. Proving that evidence point of view. This is going to be a huge change in terms of how courts will look at it. And what question they're going to come up from time to time. In terms of can this or can this not be looked at. Is it admissible or can therefore the judgment we passed using it or the relying on it. I just put in some sections where there are common approaches us look at I'm in the I.P.C. and the IT act. What is stalking e-mails and stalking because in the physical word that are the defamation, fraud, spoofing, pornography, Data theft, Cheating. All have sections in both in the I.P.C. and the IT act and typically we see complaints using both. The other challenge we've got to run unfortunately for many of these offenses. In India as we know the police stations all have geographical jurisdiction limits. So a police station only can look into crimes in that geographical area. With the internet coming up credit cards coming up that's a huge problem. If somebody has spoofed an email. I have no idea where he's done it from. If somebody has bought a product. I have no idea where that purchases happened from until

the delivery place is given to me a delivery place may be different from the place of placing the order. A credit card fraud happens pretty much every day. Many of them in Bombay one of my own junior has had this problem about five years ago. She was or debit card in the machine to draw money. Today the smart crooks put a small camera to see what your pin is your PIN code. And they put us can not in the machine. So when you put your card in they get an image of your magnetic strip. So the other magnetic strip and they've got your pin with a camera. They clone the card and use it somewhere in the world. So this young associate's card got misused so she went to the police station where our offices is. This was about five six years ago. They said sorry you demonstrate to us this took place within our jurisdiction which he could not obviously. Then she tried at the place where our home was they said demonstrate to us we can do nothing. To get over that now we've got cyber cells our cyber police stations which do not have a jurisdiction limitation. So wherever the crime has taken place at least in India. You go to cyber cell they will register the FIR and they will investigate. They actually have been very effective at least in Bombay. And what happened in Bombay was Nasscom they help set up the lab. They have constant training programs in the police over there. And that's helped enormously. In terms of the understanding the ability to investigate collect evidence. And ultimately prove a crime is committed. So that's made a big progression in terms of jurisdiction change. These are specific. IT Act crimes because they relate to computers specifically so tempering with a sword scored hacking somebody's account violating somebody privacy cyber terrorism. So all intermediate is in India have to sign up to a license. The license contains conditions. Most of which are not actually implemented. But they are there. In case they need to be pulled up the. The main thing is that they are protected as long as they merely allow information to flow. And do not intercept alter etc so they are merely road so as to speak out of line of passage they are fine the moment they start trying to interfere with limiting receivers. Limiting information. Moving information around then they had also liable. The other challenge we faced in terms of liability. They said earlier the challenge on the Internet is one some information is all that it gets replicated almost instantly. If it's of any interest. So it goes across a host of websites. So take a film that's pirated a feature film comes out. This piracy it gets uploaded in the old days you have to

go and buy a set on a CD or D.V.D.. Now it's just put up over there. The courts have been granting orders which I referred to the US as John doer oerder and India's ashok kumar order where you can say the judge says wherever found it can be stopped. So we have an interesting situation where Delhi High Court granted an order like this to us and we decided to write to I think some seven hundred police stations which we thought of the event on the country. But a lot of the stuff was accessible. Again this award four years ago. The police received the letters and I got a host of phone calls from them look we've got the order. We've got a letter. What do we do I suppose one stop somebody or do I suppose to wait here for someone instructions on the court what happens. So again these are ever evolving situations but fortunately no with the directive being given to the Internet service providers. It can be stopped easier than just a policeman having to go somewhere to stop it. We also know the rules which have been put in force for security, Intermediately guidelines, Electronic service and cyber cafes....cybercafes as you know had a lot of anonymity in the way people go there not give the name sit at computer terminal and do whatever they it now that's not permissible is supposed to give their I.D. they're supposed to record it. And in case of a problem they can then be found. It's a bit like a C.C.T.V. camera having put in a building. The famous judgment of shreya singhal where 66A was struck down by the Supreme Court has now brought back into focus that I had a Freedom of Speech on the Internet the safety campaigns being now put out there E-mail policies being enforced. So all this happening really quickly. And as a talent is going to be to keep track of it, challenge is to keep consistency across countries. Consistency in India alone. I just put in some thoughts which we had in terms of the detection of crimes like I said it's getting easier. But it's already it easy. Identifying who the perpetrator of the crime is merely from the fact somebody put up a post on a website. Put up information which is damaging including sedation which another challenge now is people trying to attribute a lot of stuff to sedation which is not sedition just a crime. And who the complainant is and how does he effectively file a complaint that result in prosecution and result in a conviction. Anonymity is like a huge problem the volume of data itself a look a lot of problem. So the other time writing about fifteen years ago or twelve years ago when governments actually thought that the Internet service provider can keep storing all the

information. So they actually had a plan of that time that all mobile phone conversations, smses would be copied and stored. The volume just gone completely Haywire so those days are gone when that thought was there and that thought can be implemented. The awareness of the rights is another challenge it I personally experiences with the Bombay police at least. What we thought are significant crime to them but it's a cyber crime and answer look in our priority of things we understand Murder, rape, blood, Kidnapping. We understand accident only see it. We don't quite understand what the Cyber crime is again to education and many programs that is changed to a large extent. But it's still an exercise which has to keep on getting repeated pretty much on the country. We discuss sixty five B. of evidence act. The other big challenges data protection on the Internet. If a piece of data has put out. Like I said earlier it gets replicated so quickly. The chance of getting injunctive relief to stop using it is a huge challenge because who are you going to get the injunction against. How are you going to enforce injunction we know pretty much the whole world has access to it and how do you take it off every single website which is getting it. Jurisdiction again we discussed at is more a question of the law enforcement agencies than the courts but courts itself on the extraterritorial are going to have that rare set of challenges. Bank frauds - This may be a statistic that may shock all of you. But fairly authoritatively have been told that any bank payment gateway, Insurance companies is losing 2-3 % of top line on fraud. Nobody reporting it because they believe reporting it will kill their reputation as opposed to competition or 2-3 percent is like telling the growth of a piece of think lost in fraud today on payments. Be that simple situations where the security system of the bank computer system was broken because not everything is done through computers nobody actually does stuff on paper anymore and one of the dealers had understood how to remove the password required for certain transactions which otherwise it would have a recorded time of the transaction. Communication which is aimed at a certain section of society. It can actually brainwash without even one meeting without even one puzzle communication. They just make it look so committed in their minds passage to god etc etc. These are real problem you're going to see so when I said recruitment for unlawful activities that's an extreme case but there's so many unemployed youth today. Who are looking for some form of employment? They may not be or delays

it's illegal when it starts but it's easy to communicate to them no it's so easy to spread messages no we all get on wanted sms, unwanted whatsapp messages unwanted emails. If you look at them. It can be very enticing at times. And that's something I don't know how anyone's going to stop it is something to watch out for going forward. The next session on gambling so I want touch on that now. Cyber terrorism where again some of you may have read this the stronger was a newspaper reports of the Chinese government has hacked into every Indian government website and many others around the world and accessing data and even fiddling with some of them. Because once you are linked to the Internet. You are exposing ourselves to anybody coming it's a leaving your front door open and saying nobody come into my house. I just touched on these topics like I said to give some food for thought. I don't have clear answers. But the right to publicity when I want my name to be put out there when do I not want to be put out there. Intrusion of privacy copyright infringement we discussed even censorship now you know to release in a theater or on television you need a sensor certificate. To release on the internet I don't need a sensor certificate the feeling is gradually as we already have smart T.V.'s in our home. The smart T.V. picks up a wifi signal and what's on the Internet. I don't know many theater at home doing the same thing. If you allow someone to use your own computer however you are exposing yourself. That is something you will be liable for maybe an intermediary because now you have stepped into the shoes of no longer an actual user. So I guess liability would be there from that point of view. If you leave your wifi unsecured as happened that Americans case in fact that time nobody knew or very few people knew about securing wifi then there are a whole bunch of initiatives and I'll give you a it's interesting you know this may also address what you were asking what we did at that time was we actually went to colleges and said to college students understand how to seek your wifi because you are more adapted using all this technology and please teach your parents your parents' friends your parents companies. You know and it's been very fast and KPMG that time did a survey every week I think they were going around bombay and on your phone. When you access wifi you can see it secure or unsecure and they get making reports. A newspaper carried this for a month. But today in Bombay it almost anywhere you go is rare you find unsecured wifi so these cafe are problem I think these Coffee Starbucks and all that they

give you free Wi-Fi so they'll be technically level I guess. Because they don't ask you who you are like a cyber cafe....But as long as you are recording the device I don't see a problem/issue with Starbucks all they don't record the device as far as I know.

Question and Answer with Participants.

There are many in the same position that they bore the kinds of programs that are made. Programs available online also a lot of learning. You only have an order to access the internet will show you that they'll also show you which websites can help you train yourself. So you know the interaction need not be like a classroom. It's an initial interaction and then if your problems you can see queries and answers. And they're very efficient because that's a job they are very efficient because it is there job. More people are literate the more software they sell so they are very happy to do it. This allegation got raised actually that today actually it is at press a button system. You press a button is being recorded through a device. So we demonstrated actually not me or one of my friends who does this he demonstrated you can program that electronic voting machine. If you so wish irrespective of what the man presses the voter you can program or to say every third or fourth or fifth vote for example will go to so and so candidates. This a practical problem now to find that out you have to examine the machine immediately before anybody after you leave it for half an hour it can be re programmed.

Session 10

Mr. Anand Desai: Second topic. I was given was and I think it is a much shorter topic and I'm sure most of you have any familiar with this but the whole issue of game of chance and game of skill. And I just want to link it again to the apps and the online games that are less dealt with for the same reason that they are new. So just some background and I'll come to specific cases because of a very clearly defined cases in India on this except what has been thrown by justice lodha report which all these go to throw up somewhat new questions on gambling in sports. So gambling as we all know is an old ancient tradition. The challenge is is it a game of skill or a game of chance. The court seemed of held it is again a skill and you are betting that's fine but if it's a game of chance then it's prohibited so in India if we categorize it will be physical gaming that people are present, online gaming lotteries and the price competitions. That's a broad categories that we have and the public gambling act of 1867 is only one at least I've come across which is regulats it across the country. So it is a state subject and that's why probably does not done it a lot of Prize Competition Act and there are lotteries. Which again run by states so the state gaming legislation some of them are Assam, West Bengal, Sikkim, Delhi, Bombay and Meghalaya and they're not overly different in terms of the approach. So very broadly and this is something I think that will need to be tested on various of the games that you can find online. Apart from other aspects I will come to. Is that a game of skill as per the decisions is one where the outcome is mainly by mental or physical prowess rather than by chance. Mostly it is just merely swing or days or turning a wheel etc. So really the element of skill or prowess is what makes the distinction and that is probably the justice lodha report is saying the sports which are being played why should gambling therefore not be permitted because ultimately it's not pure chance. There is skill involved. So the Supreme Court way back in 1996 made the distinction as to what would be a game of skill in a game of chance and madras high court obviously said that depend on facts of each case the rummy was held to be a game of skill that you're right and teen patti as we call it atleast in bombay was a game of chance and now we just have more and more of all these kind of games which are coming up. So there's a broad distinction that was drawn by the Supreme Court. The Karnataka High

Court clarified in 2013 that most specific permission or license required for a game of poker if it played a game of skill. But I don't know to play poker myself my son plays poker and seems to be fairly good at it. But there seems to be cleared element from what I see of what he tells me that they can be a skilled poker player was an unskilled poker player. As opposed to a game of dice and or game of teen patti and in West Bengal poker has been specially excluded. And one can organize such games by obtaining appropriate license for the place where it's being played. Delhi high court is again examining this case currently and internationally is recognize a game of skill seems to be the position. So gaming hall or a casino would have a poker table but they'd also have the other tables where the spin the ring and all that kind of stuff goes on. So the question that really comes in is that when you run a gaming house or a gambling den if you want to call it that or casino. Would poker be permitted without punishment or would it not. Again the Supreme Court address this point in the same 68 judgment saying that extra charge for playing cards are less extravagant but that's a debate because going to five star hotel was a club would not show that it's a common gambling house. And therefore having a fee to be charged would not change the nature of it. We also come across strange situations where in a airport lounge places somebody is overcharged on a soft drink. For example so the M.R.P. obviously says what it says. But like a hotel they overcharged whether that could be also thrown into this is something that we are is at some stage in future. So Andhra Pradesh said that playing rummy for stakes is not an offense. The madras high court took a different view by saying that will be illegal if played for stakes. But then just set out that case because that describes to some extent the way the law at least currently in India. So premises of mahalakshmi cultural association were raided by the police on the ground they're gambling and a case was registered. The association filed a writ saying that that rummy is the game of skill and also saying that with or without stake should not therefore matter. And the court held in favor saying it's a skilled based game. This was challenged in a writ petition before the High Court where the position was overturned. Now Supreme Court allowed the withdrawal of the original petition but said the observations made by the court should not be surviving. So that is left that pollution a bit open so we go back I guess a sixty eight judgment for now in terms of a game of skill you can allow in a physical

location. You can allow the stakes to be put and betting to happen. So the original concept of 1867 again just to bring that in context was any place in which cards, dice, table or the instruments of gaming are kept or used in any manner for profit don't gain of the person. OK buying using or keeping such players such as qualify as a gaming house. The reason I raise the question online today you can visit websites which allow you to play with people around the world. It could be but it could be poker it could be whatever so I am physically here somewhere somebody somewhere else we all are playing. If I'm also on everything money that will become the gambling element and I want to come to one more point about Bitcoins which will will just come to but similarly there are apps what I can play against the website. I'm not like chess I can play against a machine I'm not playing against a person. Similarly I could play any other game against the website or program and not a person. And that website could be raising advertising revenue. It could be charging your feet with a website to play. It could be a fee per game etc. So this is also something I do it's going to come up at some stage. So the US in nevada and delaware where the gambling is legal. Signed the U.S. has first multi-state Internet gaming agreement which allowed players in both states to play online poker on a shared platform. We don't have that it across states all across countries. So that is the steps they've taken in the US recognizing that no brick and mortar rooms are not the only place you can play a game. I just put in some judgments on the people what is the place etc but he will know and so is not new but will a virtual platform be a place we need to determined at some stage. And whether the organizers of the website Host or the person who created the app make money on it and if so will that be in some way an offense. So while I'm sitting in Bombay today I can technically be playing a game in the United States under U.S. website in Nevada where it's legal. So I could log on to a Web site hosted there. I can play a game over there and I can say that I'm not playing it in India. And my friend is remitting the money in extreme examples I'm not even remitting the money. But because of the nature of the Internet these questions are going to arise more and more of the same thing again this is a game of skill vs game of chance. Now. Again. We've had the B.C.C. inquiry as to where the betting took place etc that would happen in any so-called game of skill which reduces the element of skill and brings in the element of fixing but that's aberration to the rule.Allows online

gaming and sports betting so to lead blackjack can be played against a license based in sikkim. In Goa as we know there are casinos which are located on those boards not on the shore. But that is permitted. So like I said earlier the jurisdiction question comes up. So there are four poker players desiring in four different jurisdictions and playing online with the server based in this example in Germany. There is a legal illegal in which jurisdiction which part is illegal, how do you enforce it, could be a question that comes up. I don't it's come up yet. I don't think games are that popular yet. In India but they're getting more popular now and disputes therefore have not yet come up. But could well come up in the near future. So again just some of the and it is a much shorter presentation but just some towards as to how this is going to evolve. Again share a couple of experiences which I found fascinating about six years ago when I was in the US speaking at a IBA function and very interesting topic was being discussed. There was a game put up by a game provider on the Internet of build your own city. So you could log in and you could build your city. It was an exercise you actually actually build it you had to build you know houses and hospitals and schools and you built the city and it was a game. Somebody actually offered in the real word in a newspaper he put an advertisement. I have built a shopping mall on this game. Would someone like to buy it? Everybody thought you know what rubbish is this who's going to buy an online game shopping mall by paying real money. Somebody bought it. Actually then that person who had bought it offered to sell shops in that mall to third parties in the real world again. So he made money on the shops in the mall. They actually happened in the US maybe it happened in US but actually happened. This then got extended in the city there were people so the game got more if I had a different game I can't remember where anybody was playing the game could create an avatar of himself and actually called it avatar it is on same time that film had come out AVATAR. So I could have my avatar playing all the other players could have their avatar playing. Life went on till somebody actually filed a case in a court in the US saying that your avatar has tried to intimidate and rape my avatar. This actually happened in the US and the court actually tried the case. Ultimately threw it out. But in that case. So the reason I'm basing this is that bitcoins is bitcoins currency today is not currency today but it's an electronic mode of payment. If you're playing. It's not today equal to currency but is not long time from now

when it is going to be equal to currency it is the way people perceive it. I am just throwing throwing out the light on question as to how gaming or games are translating from just being games to actually affecting human behavior and giving rights to people as happens in the US. So that is much shorter the presentation on the topic. Topic itself was shorter. So any question or any question or discussion on that.

Discussion with the participants.

Nothing goes. One thing on any device that again something that most people don't accept whatever is on your device will never go even if you press delete a backup is created not only on a device or not articles in whatever they call it I'm saying what mechanism is coming from committed. The way it will work is internet service provider don't keep on recording everything is not possible but the government authority whos been empowered can tell them from now to now record conversation from so and so phone. They will then tap that phone and start recording. They will do this through service provider. So if you have a vodafone they will make vodafone do it. Vodafone can keep the record as long as they want and hand it over to them. There's no ongoing requirement of recording is not physically possible there is too much data. I know what is not possible. Thank you.
Dr. Geeta Oberoi: We will take break and come back at 11.15 for our next session.

Session 11

Dr. Geeta Oberoi: Now we have our third speaker third session. I would ask Mr. Rahul Matthan to do some `self introduction little bit about himself. I know he's quite modest thats what he told me so and then begin this technical session. Thanks.

Mr. Rahul Matthan: So good morning! My name is rahul matthan and I am a partner with a law firm called Trilegal. We have offices in four cities in India we currently have about two hundred twenty lawyers who work for us across our offices. And I am in the Bangalore office of the firm and one of the founders of the firm about fifteen sixteen years ago. So the area of my practice tends to be technology law. I do everything to do with technology and the interface between technology and the law. And I think the sessions of today are very much on topic. The focus of my topic is privacy or data protection. And I don't know how many of you in the course of all the cases that you must have heard in your entire career have actually had to deal with privacy related matters anyone. Not the fundamental right of privacy. And so I'm going to go. Well there's an there's an overlap. But I think it's really important to understand the context of this and so I want to start with just going over some of the technicals in the basics and the first question I have is. Is there a need for privacy laws. And just to understand why. We really need this privacy law. So the fact of the matter is that today more and more of what we do is digital electronic. If you want to buy something. You buy it online. So we have e-commerce today which even if you don't actually buy online what you're doing is you atleast go to the website and see what the prices. Then you may actually Or you may do it the other way. You may go to the shop and see the T.V. that you like and go online to see if there's a better price. Or if there's a better way of doing things. And so particularly with the young people today most people buy things online. And it's not just products. It's services. So today a lot of the young people in my office don't maintain a proper kitchen. They have various websites that will give them breakfast lunch and dinner. Depending on what they want. And the purpose of telling you all of this is that our lives and maybe not us slightly older people but the lives of the younger generation is almost completely online. But even for us the other thing that is happening is e-governance and so the government is getting more and more

electronic. There's a lot more of our data that's being collected by the government electronically. Kept electronically a lot more government services are actually delivered electronically. So the companies entire companies registry is now online. And you can't do most things as far as filings are concerned unless you do it online. The other factor which is even more important than all of this is social media and the young of today communicate in a very different manner from what even I used to communicate. They use Facebook, Whatsapp they send messages. They published photographs about what they've done and where they are. They shared their current location I just came here. And there's an app called four square which allows you to check into places that you've gone to. And I just checked into the National Judicial Academy on Foursquare. Now. Last week I was at the National Law School I checked in there and so I've got a particular sticker with says that I check into lots of universities. And people play these games who is checks into more places the others but what is very interesting about all of this about Facebook. About all the forms of social media is that there are websites and organizations that are tracking various aspects about your life. So Foursquare right now knows that I am currently in Bhopal and that I was at a hotel yesterday and I am at the National Judicial Academy today. And also Facebook knows that yesterday my wife went out somewhere and she took a photograph with her friends having lunch. And all the other people who are connected to are also know that. And the reason for saying all of this is that our concepts of privacy. As the existing earlier on is very different from the concept of privacy that young people have today. Today it's a sharing culture. It's a culture where people want everyone else to know about everything in their lives and technology makes it easy for them to do that and so you share your photographs you share your activities you share everything that you do. And if this generation ask for privacy. I wonder what exactly they want because so much of their private life is currently public. Now very often young people don't know the harm that can happen with the things that they do. And it is for that sometimes that we need to have laws and we need to have structures in society to deal with this. And in the context of all of this that is one phenomenon that is happening which is quite scary. I mean it is called big data. Now I don't want to use too much jargon but I want to explain it to you in a way that will help you understand why there isn't issue and

what we can do about it as larger and larger amounts of data being collected. And as more and more powerful computers are being created. Our ability to analyze data has become very very significant. So today we've got I.B.M. has built a computer called Watson which can look into your where if you tell them what's in your refrigerator. It can give you a recipe out of whatever is in your refrigerator. And this recipe will be five star chef quality recipe. Just out of what's in your refrigerator. And it can do it in of an idea of different cuisines. And this is largely due to the power of computers being able to analyse vast amounts of data that is currently residing with them. One of the things that you would have seen yourself is smart suggestions. So if you go to a website and I go to Amazon to buy books a lot and I tend to like to read on a legal history it's one of the things that I'm fascinated by. So when I go there I will get a list of books but also would you be interested in reading such and such. How do they do that. They track all the books that I have bought they compare that with on other people who have bought similar books as I have. And this is all a very vast library. And then they check the books that someone else is what that I don't have and say why don't do that whether to use that book. So if you realize Google actually has an Amazon actually has a vast amount of data about me as a person. And they have a good picture of types of interest that I have. Another fascinating website was called Flu Trends and this was a Google Laboratories product project now you know Google is the world's number one Web site. Most visited web site and it also has the world's number one search engine. I don't know if you have ever used it this way but if you are feeling sick very often people just go to Google and type in their symptoms. They just say Noises running headache. And Google knows that knows that nose is running headache and you know whatever two or three other symptoms that are are symptoms of flu. And so Google in its laboratory actually didn't do anything clever they just picked up all the people who are asking the same questions about the same symptoms and mapped it on a chart on a on a map and by the search for symptoms they were able to predict where the incidence of flu was so this is not Hospital information. This is not information of actual patients. It is information coming from search engines which is maybe two or three days before people go to the hospital. Because you don't go to the doctor immediately you first you know you want to see what's the problem. They ran this project for three years

and in India they ran it on Dengue. Once again similar. Now of course they've made the technology open source so doctors and other people hospitals and institutes can use them. So there are a lot of benefits of data science I like the fact that Amazon can introduce me to new books that I would not have known other words. Because they have the ability to analyse my data and my shopping habits. And of course I would like early warning of a flu or dengue or something like that if I can see it on a map. But there are equally many dangers to data science and one of the dangers I mentioned is in relation to apps like....I don't practice in courts. So location tracking can be quite dangerous and from that perspective. They can be and they have been negative impacts of this aspect of modern technology. And I think the other big risk is whether concept called identity. Identity theft. But before I get into identity theft let me talk. And you give you a very disturbing example of something that happened in the U.S. of how algorithms that currently process data can get things terribly wrong. And I just tell you a story that happened in the U.S. and out of this is in the U.S. because the U.S. as we are more advanced has been using data and has almost surrender themselves to the many many years before we have. But it could well happen here. So one day a father was sitting at home and he got the promotional package from one of the stores that they visit is a big department store. And the proposed promotional package was for special gift vouchers for the baby that was about about to be born in your house. Now the man is quite old. He's got a fifteen year old daughter. So is unlikely that he's going to have a baby. And so he asked the department store he said you know what. What are you doing? Why are you sending me this information? The department store has a very smart algorithm which has tracked consumer behavior and has figured out that in the second trimester of pregnancy women change their shampoo to unscented champ and I don't know why. But that is what the data shows. This man's daughter had changed her shampoo to unscented champ and automatically they sent us. She did not that she is pregnant obviously father did not know she was pregnant and it was a big issue. But what's really amazing too for me is that no one in this ecosystem knew but the data got it right. And so in some ways data science which is extremely powerful can have quite serious repercussions in the societal context that we live in. Now this of course is inconvenient. The company was sued. You know they've been made changes. All of

that is OK. But the concept of identity theft in the U.S. is not so easy to issue it. Now in the U.S. your Social Security number is almost a guarantee of your identity. And with your social security number you can pretty much do anything. So much so if someone has used your social security number with your credit card. The system will trust the fact that that person is you more then you refusing that you are that it has been stolen. If someone can steal your personal information. They can actually run up huge amounts of Debt. They can run up huge amounts of repetitional challenges. As in they can commit crimes they can do various things that the system will believe you did. This is called Identity theft. And in the US Identity theft to recover from identity theft will take could take as much as two or three years. And in that two or three year period. It's very hard to get a job. It's very hard to take a loan. It's just. And in a in a debt driven society like the US it is actually very difficult to survive. So we need laws to actually strike the balance. Now why don't we have this problem in India. It's not as if India or indian government or even businesses don't collect data. We do. We've been collecting data the government's been collecting data for a decade and a half and has vast amounts of digital data. The difference in India is that data is in silos. So the L.P.G. consumer data is in one silo. The ration card data is another silo. Our insurance data isn't another silo. And there's nothing to connect all of these. In fact if you want to go out and get a service. You have to provide a piece two or three different proof of identity. You need your electricity bill. You need to have your passport or several other things to prove your identity. Because there is no one form of identity unlike in the U.S. where you've got the Social Security number and in many parts of Europe and the rest of the world where you have an identity number which is irrefutable. And so we are actually protected by the fact that it is so difficult to provide it identity because it is so difficult to prove identity. It is actually quite hard to steal identities and we have an inherent protection which is why we haven't seen so many examples of identity theft. But all that is about to change the aadhar number once it is rolled out everyone is the most effective and most irrreputable form of identity you disagree. And if you use the other in the way in which it is designed to be used which is with the biometrics can be duplicated. And so you only have the fingerprints of the iris that you have that cannot be duplicated. If you use it in that manner where in order to avail

a service you actually have to use your biometrics and not the number. Not the card. But that is not the design of the system and in fact a lot of the design behind the system was to make it difficult to record your information. But relatively easy to check it. And if it is implemented in that manner. Of course the card is just a card. And the card has nor safety features at all. It doesn't have any anything complicated it's just a card car piece of paper. Anyone can print it. But the biometrics are unique and nor where in the world has anyone been able to take this quantity of biometrics which is ten fingers in an iris. Is a very high level of biometric what they became very difficult to repudiate. So if it is used like that and I believe it will eventually be used like that because it will replace a lot of KYC requirements today. And if it is used like that it will be a very strong proof of identity. If that happens and if all the various databases start using aadhar then what you will have is you will have all the databases linked. Now along with all that information today a lot of services are being provided by private parties. Telecom for instance is provided by private parties. The question with all information coming out is pretty all the possible information can come up if the information that will come out is where you were yesterday at nine o'clock in the morning. The information could also be what you bought. When you went out somewhere. And these are things which we haven't matched to the expectation of privacy about. We don't know if there's an accident yes I believe the state has a very but there are many things that we do that are required to be kept private or at least we believe that we should be we should have a player. Now this is not always the case. So if you go through the origins of privacy. Concept of privacy is relatively new. Nature does not like privacy If you look at the earliest civilizations no one was private. Privacy is a lack of protection so that other people can protect you. The first instance of privacy was when Justice Brandeis 1890 discussed the right to privacy. And at that point in time all of the government in the US was opposed to privacy. They said we don't want such a thing for the same reasons that you're mentioning. We want the government to be able to catch wrongdoers we want that payment information to keep society alive. The time this changed was during the World World War one first and then World War two. And this is the record this is in the yard of a share market. This is the record of the Jews that were actually picked up and put in concentration camps and all those way there's things that

have said for the first time we realized the society realize what harm could come out of the use of government record. Records of very very big deal because they had in europe when it went into the wrong hands. And this roughly was the origin of the laws relating to privacy around the world and if you look today Europe is we advanced compared to the U.S. on privacy largely because of these concerns. So where what about privacy in India as you're aware we don't have a fundamental right to privacy. It's not written in the in the Constitution of India and it was surprising to me because when India got its independence or when the constitution was drafted. We had just come out of fairly oppressive colonial rule. And also at that time once again it's just after the World so the rest of the world was discussing this concept of personal privacy and how it should not be violated. So it was surprising to me that there is no mention of a fundamental right to privacy so I looked at the constituent assembly debates and very surprisingly that is almost no mention in the official record of the constituent assembly debates. We had to go in toB N Rao's collected works on the constituent assembly debate and they're there is a detailed discussion on the right to privacy. In fact the... there was a separate right to privacy there is separate articulated privacy. They didn't consider that the specific reason why they said no because it is a CRPC reason and Indian Evidence Act reason. They said....just look at the thinking and then if you look at all subsequent cases because the right to privacy is a fundamental right in 21 is well established now but it's very contrary to the framer of the constitution. The framer of the Constitution said that if if there is a privacy and correspondence. Then you are taking private correspondence to the level of communication of state where there's an immunity from criminal investigation. And so we should not allow privacy with this this the whole of matter was discussed thread bare and in fact the first draft actually carried a right to privacy the subsequent drafts to get out because of this challenge and they said look at the challenge of india today. If we need to collect evidence we can be waiting to go to a court and get the warrant and then come and collect evidence some we need some ability to actually collect it because our investigation it is he's are quite far apart. And if we give this kind of immunity to private communication or weeks a communication with people. That is private is exempt from interference or a review. We will find it very hard to enforce our laws. So the final constitution had no direct fundamental right on privacy. It

was actually removed. But thirteen years after the after we got our independence after the constitution was enacted. The first case on privacy came up. And in that case we only had a dissenting opinion by Subbarao which actually articulated that we should have right to privacy implicit in the rest of the fundamental rights and particularly twenty one. It was another twelve years. So gobind singh and kharag singh these are the two cases which actually started the law related to privacy. When it was actually articulated into any implicit fundamental right and since then we've had many many cases. We've had a huge number of cases talking on various sides of the debate. There's a reason the recent case which talks with you in which Ram Jethmalani actually tried to get the accounts of all those people who had Swiss bank accounts that was leaked. And in that context the court said we can't just take everyone's Swiss bank account. If it was illegitimate swiss bank account then we have to protect their privacy. But of course if you can prove and if there is evidence that there is some wrongdoing then yes of course. And so even in these kinds of cases where cross border element. The concept of privacy is well articulated and understood. I don't think keshavanand bharti talked about right of privacy but maneka gandhi talked about right of privacy in some detail. Yes. But the right to privacy there must be at least thirty five forty cases in variety in medical privacy, criminal privacy so there's the autoshankar case where his autobiography was to be printed and there's a criminal have. Yes. Yes. But right now of course the Supreme Court is going to consider the fundamental right to privacy once they've gone through to the larger bench and that will be an interesting case. And Sajan is here he may have some more information on that but to go through the development Indian statutes. It's not correct to say that we don't have the concept of privacy in our statute because we have many statutes in which the principles of privacy are articulated - our telecom statutes have it. A banking credit statutes have it. We have this concept of privacy where in certain specific vertical you are required to keep things confidential and private and it applies to private players not just to state players. But we never had and we still don't have in my view a consolidated law relating to privacy. We don't have a statute. But in two thousand and eight and amendment was suggested to the Information Technology Act two thousand that amendment introduced section forty three A and forty three A in its substantive part is the sum and substance of privacy law

today that with the rules that was enacted later. And so it's really important to understand what forty three A says forty three A introduce the concept of what is called sensitive personal information. I will come to the details in the definition of sensitive person information later because at this point in time. It was not considered. It is not defined at all in the statute. And it said that anyone who collects sensitive personal information is required to follow certain security procedures. And if the fail to do that and if there is any loss there discourse to anyone as a result of that that person is entitled to compensation by way of damages. That is the sum and substance of forty three A of the IT act. Now it was very ambiguous because we didn't know what tends to personal information meant. We didn't know what types of security practices and procedures were required to follow. And until 2011 when the rules were enacted. We had no idea as to how to interpret these provisions. But in two thousand and eleven the issue of the privacy rules and. When you look at the privacy rules. These actually form the backbone of what our current privacy jurisprudence is as I asked you Have any of you come across any case in which the section forty three A or the rules they're under have been invoked in my experience I don't know anyone who has. It would be if it would be fascinating if your could. But I haven't heard of anyone challenging this yet. And if I mean I will share with you which is not part of the presentation of you that I have that the provisions or the other rules have been enacted in excess of the competence of the executive. We can do that perhaps offline but the privacy rules are very simple. It rules and rules. One two three are actually fairly simple. They're just definitions. And in that there are only two significant definitions of importance. One is in the definitions section which is the definition of personal information that defines information that is capable of identifying you as an individual. And then rule three says that a category of personal information. Certain types of information and they say. Biometrics medical information medical history. Financial information like bank accounts credit card information etc. Passwords. These will be categorized as sensitive personal information. Now the interesting thing is forty three A doesn't talk about person information at all. You don't need talks about sensitive personal information. And so if you were to go into the latest of competence point that I had raised a minute ago. Rules enacted under forty three A should only be talking about sensitive personal information

and not about personal information. Because the rule making part of the executive cannot exceed the mother provision in the statute and to be to their credit again you lose or did what. What is personal information and what the sensitive personal information. So personal information is inclination that is capable of identifying you as an individual and there could be various examples of this. It's either that information alone or information along with many things so my name is rahul can't identify me as a person because there are many rahuls. Rahul Matthan as my second name is capable of identifying me a little better. But rahul matthan with mobile number such and such is definitely cable identifying me as an individual. Now. We don't have much jurisprudence as to what can or cannot be defined as personal information and so I'm relying on the way in which you are open the US deal with this. And they look to see whether you are people are being identified. So various types of data. Location data coupled with your age. So if there is a child who is living in a small remote part you could potentially say that that is capable of identifying that person as an individual. Sensitive Person information is a subset of personal information. And that is listed. So there is no definition about it if it is personal information. And it is listed in that list of items that are sense to personal information. And that is the way these two are defined. Rule 4 is the only rule which talks about personal information and not sense to personal information but it is an innocuous rule. And it says that anyone who collects personal information is required to publish a privacy policy. The privacy policy must talk about why why it is being collected what it is being done but it is essentially a notification requirement to have a website to have a privacy policy on the website. Rule 5 is really the meat of the privacy rules. And this rule talks about the collection of data. So anyone who collects data. Now in this if you can imagine ANY somebody that is providing any service today. If that service mistake an example of financial information which is a sensitive personal information if that service includes the collection of say your credit card number. In order to process a payment. That would amount to collection of sensitive person information. And any organization that is collecting sensitive personal information cannot do so without prior consent to means that you have to get the permission of the person to collect. You can only do so for a lawful purpose and when you collect it. You must give the person you're collecting it from

knowledge of the Purpose for which it is being collected. You must also give that person knowledge of who is the recipient of this information or people who collect personal sensitive information are only are required to only collected and keep it for as long as he's required to fulfill that purpose. So you can collect the information and just keep it forever. You may only use it for the specific purpose for which it was collected. Which means if you've collected. You must offer are the people from who you have collected the data. The right to review the data that you have collected and kept with you you were also required to offer them the opportunity to correct it if the data you collected was incorrect. When you're collecting it and it anytime during the course of providing the service or keeping the information you have to give them the right to opt out of the service and you have to give them back their data you are required to appoint a grievance officer. And you're supposed to mention the name of the grievance officer how he can be contacted for any violations under the privacy. Rule six talks about disclosure and it says that after you've collected the information you cannot disclose this information without prior consent. Disclose it with third party so you have collected it you cannot give it to a third party without prior consent. Rule seven talks about transfer and Rule seven says that this is largely to do with cross border transfers of data. And in Europe for instance there's a law which says you cannot transfer it to a company which is situated in a country which has less stringent laws as compared to Europe in that case. India has a very similar provision which is you cannot transfer it to any person who does not abide by rules which are at least as strict as we have and Rule eight talks about the security practices and procedures that you have to follow and this of everything is the most technical rule it talks about. You know ISO standards and things like that than stand as the government has prescribed. Now since the since the passing of the IT rules a high level Committee chaired by Justice AP shah. Shah committee actually issued a report and that report talked about is a proposed privacy legislation. A full blown privacy legislation. We've been involved in actually drafting that legislation and part of a first draft which is somewhere in the government I believe it is still with the law ministry. While the previous government was in force and it has been a little slow but I believe it's. It's still moving even within this government. The concept of the privacy law is that there will be nine national privacy principles. And these privacy principles will talk

about many of the things that are there in the privacy rule but in a slightly different manner and we talk about accountability for the data. For instance if you collect the data you need to be accountable for keeping it secure. And if it gets stolen or if it leaks out then you will be responsible for the consequences. And it must be interoperable and various other provisions like that the idea is that there will be an overarching set of principles. And the various laws that are currently in place will actually need to conform with those principles. And this is in accordance with AP shah committee report. We have no idea when this law is going to come into force or when it is going to move through the various departments of government. But until such time we are stuck with the privacy principles and so those are the principles that we will have to enforce when there is a violation of privacy. That was already prepared remarks I'm happy to have....So once again ninth So once again the privacy principles aren't yet law and so I have no idea whether it will come into law in that shape. But I tell you very briefly. The one is accountability. The other is interoperability. The requirement that your privacy code must be interoperable with so for instance medical information is protected in a particular manner which the Medical Research Council I.C.M.R will do. Similarly insurance will have another set of principles. But since insurance and medical need to work together there is a requirement for interoperability. It is consent based so the principles require that consent be obtained. Now the U.S. is not consent based. And so in a sense we are adopting the European model. And not the U.S. model. As far as privacy is concerned. And so there are I mean that the the challenge I have with this is there is a lot of pushback from the government from a security perspective. To ensure that the defense forces the investigative agencies have access to the database of information. And that's acceptable. And quite quite legitimate. The challenges really ensuring that whatever is collected is maintained in a secure manner. So regardless of who has access to it. People who don't have access to it should be able to get it. And those are some of the challenges that we've had in actually highlighting the legislation. Yes and the other other challenge is the new bankruptcy code that is coming out. Also requires this amount of information on the loans that you have....No one. No country in the world gives a right to privacy that will violate the law enforcement agencies right to actually apprehend a criminal. That is an exception in all statutes around the

world. The law enforcement exception is a standard exception. It can be other ways. Because we can give protection to criminals. The protection that is actually given is for people who are not criminals who are losing their privacy in advance and that's why we have to draw the balance. Because today to apprehend a criminal you may need to violate some want to privacy. But you can't violate all the privacy of you and me also in it while going after two and that is the balance that needs to be maintained. Today. We have what they call the internet of things where the Internet of Things and it is a reality. Whether you like it or not it is happening and it is happening right now and I'll tell you why this watch of mine. Every one minute it checks to see what my current heart rate is while I'm awake while I'm asleep. It has a history of everything that I have done. My phone will be able to tell you where I am. What I did out of your logic to it etc Very soon these devices will be talking to each other they will be sensors in the air conditioner. And the sensors and the air conditioner will talk to the sensors on all your phones and watches and will say that you know you like temperature twenty three you like it at eighteen. And it will find the optimum temperature for this room that keeps everyone comfortable. There are it's happening today. That's not believe that it is not. And that is the challenge in my area of law which is to find this balance that is a benefit in keeping the room comfortable without any thinking. But there is a risk and how we balance that is what this whole area of law is and you know you add to this the fact of the younger generation actually doesn't care about this the way we do. And they're happy to live in this new reality. All of Europe now have right to be forgotten. So after the Spanish judgement in the next....Not to my knowledge but the right to be forgotten a slightly different the right to be forgotten in the....case is there and you know that's a very interesting case where someone you know. He was bankrupt. Many years ago. And there was a newspaper the reporter that he was bankrupt and google search engines actually picked up the fact that he was only put it on the search. Now he said that he has a because long ago. You know a bankruptcy is over he is now back and he is productive members of society why should he be stigmatized by that coming up in a Google search and rankings. Very interesting we the court said that Google is not allowed to do this. But the original newspaper that published it can because that is reporting on fact. So they're actually reporting a fact at that point in time what made it bad

was a fact that it remained for ever in the google archives. And so it almost is like now that person is still a bankrupt given the fact that Google's search engine has put up some very old information.

We know exactly. But most of these people. Facebook Google. They try to push the boundaries saying that we want to dictate the we in which the new world needs to be regulated. And in many ways I would say it is good. What Uber has done and what...has done around the world has is actually fascinating. And this is the topic a whole different talk but it is called the sharing economy and the sharing economy allows unutilized assests to be utilized. And so every and is a beautiful example of people who have an extra room or an extra house. They give it up for rent and people come and stay or that borders on the hotel business and should be regulated. But equally it is allowing you to make some money out of something which is not being utilized allowing someone else to stay. They are pushing the boundaries on regulation of hotels on regulation of taxis under a collision of various other things and. There is to some extent it is good to some extent it is bad. And we as governments and countries need to stand up to what is good for us and what is not. And as far as privacy is concerned. We've got to draw our own lines as to where we have to go with this. I think the younger generation of probably have a different thought. Good. Thank you very much.

Dr. Geeta Oberoi: We have now our last session with Mr. Sajan Poovayya for session 4 then we break for lunch. Is that fine? After lunch we go to sanchi. We start from here at 2.30.

Session 12

Mr. Sajan Poovayya: Good afternoon everybody. I just wanted to tell Madam Oberoi that as a counsel I find it difficult to convince one judge at one time you're trying to convince twelve of them here in terms of it is it's not possible. My pleasure to be here. And very good afternoon to all of few just twenty seconds about myself I am sajan poovayya please call me sajan. I'm not here because I know anything more than anyone a few. I'm here simply because I think are the means of a kind of a little different and I tend to work a little more on the technology domain and therefore I'm here to share my experiences with you it doesn't provide any further insight into to law then what all if you have. My parent high court is karnataka I'm glad that I have one of the best jewel of our high court justice narender I'm really pleased to see him here. I spend my time between Delhi and Bangalore half my week in Delhi and rest in Bangalore. I continue to go back to Bangalore because of course I may be a little a myopic of self-centered when I say this I don't know but I go back to Bangalore in my experience of working across many many high courts in the country as a senior counsel. I found that the Bangalore High Court as possible be one of the most receptive High Court we had in terms of taking on newer of things and venturing into areas in which they have not done or considered matters before I do as I believe honesty to all of you sir that you have seen more of life than law and I have but I think we lawyers tend to get comfortable in terms of it repetitive work and when we do it a repetitive work the same kind of mind goes over and over again. We call it specialization. That's really not specialization if you look at it in the through technical sense of the term that is just repetitive work. And because it is a repetitive work we tend to do it with a with a sense of ease. And we call that sense of ease as mastery. That's really not mastery...master craftmanship is what him to do anything that is given to him however new it may be. But do it in a form and manner that the world would say wow. And therefore I think there is huge impetus needed in the law both in my very humble of you at the bench and bar for us to try newer things and to venture into newer areas of the law which we have not and therefore what I speak today juxtapose itself to little bit of social engineering a little bit of technology. And then possibly I throw it open far for a debate and I think the

essence of technology lawyering comes out in a debate rather than in the monologue. I have the benefit of a little more time then than what does I look at it to me because my friend rahul finished earlier. But I don't mean to extend it I was given an out of it when twelve forty five and one forty five. But it's twelve thirty and I was advised by the end it. One thirty unless anyone if you have any questions and please do of course stop me. In between I know that some of you have had questions in the earlier sessions on intermediary liability I believe he and whether that are settled cases I will come to that. But let me just pause what I'm saying from a from an economic and social context. For one. We believe that technology is abstract. And we believe that what we see in terms of computers etc is technology. But that I think in order the very understanding of our technologies because for my grandfather electricity was technology because the fact that you could put on a switch and there will be light was technology. And nobody can say electricity is not technology because it was technology it was new technology had some point in time. But for most of us in this room electricity is not technology because we possibly were born with it but for every one of us in this room mobile communication and mobile data inter change is technology because when we started our schooling we did not have computers. Why it's calling you and in college we did not have computers. We did not know what of the difference between the email and female we had no absolutely no idea. You know because you know the fact that there can be electronic mean....electronic data in the change all of us completely unknown to us except some facts in my dance mission and some tell it's mostly just. I started my career as a lawyer. You know with facts my transmission and telex messages with no internet. With some rudimentary form of the TCP/IP account and therefore far as electronic commerce is technology and there for us email is technology therefore social media is technology. But mind you sir for our children it is not because our children are born with that most of our children have been born after the telecommunications revolution most of our children are born after electronic commerce revolution for grandchildren the entire aspect of socio legal ramification of how about how technology interfaces with one's life what are his or her rights etc will not be technology because they are born with it. A simple example is when we started learning basic education. We learned from a book we learned from a good I mentioned a methodology of

at best a black and white picture on our books not the one color pictures and half of them are wrong. After their model of arcade etc Therefore in for as it was all about just seeing. And possibly hearing because our teacher taught us. But how our children learn today and please look at any one of us who have a grand nephew niece or grand children I don't know anything many of you in the room or enough to have grandchildren but as you mean you do. Please look at how little children work on on an i Pad today. Even And I said it I mused it is studied or examined from a perspective of the pinch the major extract the image they make it bigger they kind of examine every pixel in it didn't hear the music therefore it is touch and feel concept. Whole concept of intergenerational equally which you have and it comes to fixed assets of our environment etc also kind of in a farm applies to technology because indulge in the nation equally means that you'll need to apply. And interpret technology law from a perspective that the generations to come will not blame us to say that this was the myopic. And that's a very difficult situation. If what in that context. I would really not request your permission to possibility take you through a very one or two sections of the law and then a few cases in terms of how the law has been interpreted in other jurisdictions. And then possibility of those rare few examples in India and how things are going through. But before I do that when other social economic aspect. We tend to think that technology is not really all pervasive in our society as yet. Particularly from an economic perspective. We also tend to thing that technology has not really made such a social impact on an economic impact in the country. As compared to replenish the industries but let me give one or two examples. If you look at Steel nobody in this room can say that Steel has not really made a difference to this country. Because starting from Tata Steel to every other steel manufacturer has actually been the fulcrum of our industrialization. It has provided employment to thousands of families. You know that is somebody are they are that enough family who will always a legions to steal our railways and things like that. But today in our G.D.P. still constitutes two percent of our G.D.P. and see the impact that it has done to our society. Now in a matter of that nature if steel is impacting only two percent. National highways and shipping. We have seen how our roads have been formed in our generation. National Highways and shipping. The amount of impact it has actually had under scantly in terms of this country's propelling it to the

next level. National Highways and shipping that the surface transport and shipping put together. Constitute a new two percent of our G.D.P. and internet intermediary revolution which occurred in this country just about possible in less than a decade ago Internet intermediary. Financial aspect in this country has contributed to 1.33 percent of our G.D.P. in 2015. Is what it is as big if not bigger than many of our large industrial sectors which we think our country would do to our country. And if it is as big for a minute let's cunts consider do we actually provide the same mind share. As we provide to possibly a technology matter as we would provide for example for a national highway issue or a shipping issue or even a steel issue than amount of see this has that in that mean getting out and when you look at a matter of that nature. At least. You know in terms of inarticulate major promise of Cardozo inexactness in the back of I mean to say oh it's a big issue. Steel is a big issue railways is that we get to national highways is a big issue. But an intermediary liability of some Facebook or some are some twitter some flipkart which is a indian born company it's not a big issue. But it is it is as big as the other industries. And your last example in terms of again these are things which which pokes me as a lawyer. And I am a throughgate litigator and I do nothing more than litigating therefore you know I kind of put it in my mind saying if I as a litigator feel so your judges you are advantage positions you actually make the decision. And each of you Lord that decision because you that decision at least in each of your state there are 4-5 crore people. Why is that Facebook was not discovered or invented or whatever you may call it. Why was it not the home grown in India. Why was Google not home grown in India it is I want to technology minds which actually went and incubated them in California. Most of the minds in Facebook and Google and Twitter and possibly every other social networking platform is Indian minds no doubt about it. Yahoo Absolutely. Because that a little capital is needed to incubate this companies. We did not have the legal regime that facilitated goes into visions. And we lost out on that. Fortunately for us it was two thousand and now two thousand and ten the amendments which is now providing for intubation of ideas and home grown companies because as I said they cleared and our must have as they can model when to then a steel industry or a shipping industry one. They disseminate more or less than these larger players because in the steel industry shipping industry they'll be one family

which will keep developing and they're the biblical down. But you know technology and evolution it's the other way around it as well which is created at the bottom which trickles up to creating possibly that one family which controls and now therefore in an egalitarian social order that we want. I think technology oriented companies are the best for creating wealth in the country. And the only way we can create that wealth is by providing a legal regime. Yes. Statutorily that is a legal regime that is available. But I ask myself the question are we as a judiciary and I combine this because we are two wheels of the same chariot between the bat and the bench. Do we have the capacity actually and the understanding to interpret it in a manner. Not to decide one interstate dispute whatever that decision maybe but interpret the law in a manner that when it is applied to the larger economic sense. You'd provide that impetus for technology growth and my endeavor today. In the forty five minute to structurally possibly place that for each of you to consider and if I could even be a little bit of your imagination on that. I'm sure. I will find myself successful. You know we have twelve people in the room as judges I am speaking it's a wonderful opportunity for me I think this record is broken only in one instance in the Supreme Court when 13 judges sat for keshvanand bharti other than that there is no history in this country where 12 judges are listening to a lawyer. Now why that came up is why now what is an intermediary in very simple terms an intermediary somebody who participates in the process no doubt. But is only a passive participant. And he's even though some point of time that passive participation may take an active role in terms of being the impetus for the transaction. They don't become or transacting party themselves in other words. That's what I participate in the end that process but I'm not one of the transacting parties for the transaction is between X. Y. and Z. It gave me one too many. It is not what I wanted to one transaction and looked on ecommerce and social networking for example. You can be seeing it in two hundred fellows may hear it 200 fellow may it and you may hear it. So again you may need to run one too many out again we want to one in an email communication read it I would come in occasion. But in all of it I participate. But I'm not an active transaction participant. Now that was that was the genesis of intermediary liability. In the background of that intermediate a liability. Let's also Juxtapose one other fact and permit me to digress a little on the all of this what we're

talking use we're talking on a Web two point zero concept and I don't know how you know if you have heard of the web one point concept very briefly I would place it. Like rahul was talking of the Internet of Things which is again a very interesting phenomenon which is going on right under our noses and we're not realizing it. The web 1.0 was a static web one point of time when early participant in the web we would log on by at TCP/IP account and we would get some information there were static pages. At the best there was a banner advertisement on top. We could not interact with have any more than just receiving information that was there one point or the first generation maybe the second generation web of which we are all a part of now is a very interactive Internet where we had asking questions that answered in questions. Simple search engine and you will search for information. There after we will go from one to the other. There are enough third party websites giving you that information questions are asked answers that they can trade is conducted on the Internet contracts are executed goods are received therefore you did go to receive the for that is a very interactive process. That is very good point and we are interpreting the law in web 2.0 concept please remember that we are going towards web 3.0 concept by the time we know what the law is and interpret it be possible will be in web 3.0 what is web 3.0 Web 3.0 that's a third generation is really a web which has its own artificial intelligence for example it can be seen in poker games, chess games. Poker is a bad example because it always brushes with law. Chess a lot of chess player who play chess on the net now there isn't another player it is actually being player with other side which is artificial intelligence. Computer plays with you when you play chess with the computer and therefore that is artificial intelligence. Now if you can play chess with artificial intelligence. The next scenario is that artificial intelligence evolved to an extent that you would actually start dealing with that artificial intelligence as if it is a person. Therefore it is not just interactive between two human beings it is interaction with artificial intelligence which will become a World Wide Web which is a smart wise web then how does law look at it. Where does liabilities start where does the rights and all of those. Fortunately we have not gone to that stage. But today intermediaries look at from a Web two point zero concept which is an interactive website. Let me let me straight away skip page one and come to page two. Would you permit me to make a distinction between how

the law stood under section 79 and how the last stand today which is very important because that kind of gives the history of how technology has evolved. And professor of law once said it maybe a little politically incorrect or feminist very sexist to say so but I think you know but interaction like this I can say. He said law and technology are happily married. But unfortunately they're both Hindus. So the question is why...he says law and technology are happily married they are Hindus. Technology is the husband and law is the the wife. Technology is always seven steps ahead and that is exactly what it is. And the wife is always following seven steps behind and law continues to follow technology from an Indian context. Section 79 when it came in two thousand and so our swords technology said technology was faster unfortunately for us. at the lookout about on the that. Absolutely. The unserved therefore for the professor was completely. And the We are lucky to actually have a very very vibrant judiciary in this country. We have never found an instance where in our judicial scenario we have raised this issue of Section seventy nine and the judges have actually not met it. It is never a case saying let us wait to seeing what is happening in Europe and then let us follow it. There is an instance where I will come to that case law US the European Court of Justice was considering a particular aspect in the madras high court was considering it in parallel and who said Indian judiciary is slow. The madras high court gave its decision before the European Court of Justice. Of course the madras court decision was an interim order, European Court of Justice of the final order but European Court of Justice absolutely in all tenants agreed with the reasoning of the madras high court and thats the law in the world. Because European decision is now quoted in the US has acted so therefore our courts are not slow and when it comes to technology law. Those are all myths. Our courts may be over burdened true and our judiciary is not shying away from considering technology aspect. The only situation is ease our sense of social justice and sense of egalitarian, sense of history in terms of how we have evolved as a sovereign power. Is that impinging upon how liberal we can be in terms of interpreting technology like that's the only question. I'm reading 79 which is the middle of page no. 2 now the law which stood was in this form. Network service provider not to be held liable in certain cases. The word internet service provider was not there because at that point of time internet was not an issue and internet was not an evolved

concept but e-commerce networked platform was an evolved concept. He says removal of doubt it is hereby declared that no person providing any service as network service provider shall be liable under this act rules regulations made there under. So any third party information please note that third party information or data made available by him if he proves that the offence for contravention was committed without his knowledge or that he had exercised due diligence to prevent the commission of such and such offence or contravention. Therefore the obligation was on the intermediary to prove in a manner to the negative it would be extremely difficult to prove the negative but that is what it is because of this global emergence of internet etc the law changed not going to see the difference in terms of and I will read the section seventy nine in its entirety as to emphasising the change but before I read 79 the whole definition of an intermediary has also changed kindly see on the top of the page very first three lines of the page the old definition of intermediary and to and w was this. Intermediary to any particular message means. Any person who'll on behalf of another person receives, stores or transmit that message or provide any service with respect to that message very limited in its connotation. Akin to that of a postal service. That I am an intermediary if I have received some information I have stored that information and I transmitted that information akin to a postal Department which receive your letter, stores the letter transmit the letter to the recipient. So the mindset was to juxtapose what is in the physical domain to the electronic domain and that's why that limited definition. Kindly permit me to come out of the bottom quadrant of the page where the definition of Intermediary has changed and I will read that: 'Intermediary' has been defined very expansively under section 2(w) of the Act to mean, with respect to any electronic record, "any person who on behalf of another person receives, stores or transmits that record, or provides any service with respect to that record and includes telecom service providers, network service providers, Internet service providers, web hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes. Please permit me to take one example here if you are expecting a intermediary to be a passive participant does'nt it actually not...that the concept you say intermediary is an online payment site. In an online payment site the payment site is not a passive intermediary it knows how much money is coming in

it records the quantum of money it effectively does what a banker will do. Now when I go and deposit money in a bank is it the person at the teller is passive participant he knows how much money and whom it is coming which account it should go where it will stand what is the nature of that money. Therefore it is not a passive participant. It is certainly active and therefore by broadening the definition of an intermediary to include and active participant like for a example payment site or an online auction. It has to see who is the highest bidder, lowest bidder and freeze the auction at some point in time. It has to actually lower the hammer to say so and so has succeeded. How it is a passive participant. It is not. They may be active in the way in which the platform is being run. But they are not transaction participants themselves they are not involved in the transaction and will say that I will win and you will loose. You in an online payment gateway. They are not looking at who selling was buying there looking too much money has come in and therefore I have been be an active participant. But not a transaction participant. Now in this light look at what section 79 says now exemption from liability of intermediary in certain cases I will read very quickly.(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.

(2) The provisions of sub-section (1) shall apply if—

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or

(b) the intermediary does not—

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission;

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if—

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or othorise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation.—For the purposes of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary.

The function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; the intermediary does not initiate the transmission or select the receiver of the transmission and select or modify the information contained in the transmission; the intermediary observes due diligence while discharging his duties. As a result of this provision, social networking sites like Facebook, Twitter, Orkut etc. would be immune from liability as long as they satisfy the conditions provided under the section. Similarly, Internet Service Providers (ISP), blogging sites, etc. would also be exempt from liability. However, an intermediary would loose the immunity, if the intermediary has conspired or abetted or aided or induced whether by threats or promise or otherwise in the commission of the unlawful act. Sections 79 also introduced the concept of "notice and take down" provision as prevalent in many foreign jurisdictions. It provides that an intermediary would lose its immunity if upon receiving actual knowledge or on being notified that any information, data or communication link residing in or connected to a computer resource controlled by it is being used to commit an unlawful act and it fails to expeditiously remove or disable access to that material. Even though the intermediaries are given immunity under Section 79, they could still be held liable under Section 72A for disclosure of personal information of any person where such disclosure is without consent and is with intent to cause wrongful loss or wrongful gain or in breach of a lawful contract. The punishment for such disclosure is imprisonment extending upto three years or fine

extending to five lakh rupees or both. This provision introduced under IT Amendment Act, 2008, is aimed at protection of privacy and personal information of a person. The most controversial portion of the IT Amendment Act 2008 is the proviso that has been added to Section 81 which states that the provisions of the Act shall have overriding effect. The proviso states that nothing contained in the Act shall restrict any person from exercising any right conferred under the Copyright Act, 1957 and the Patents Act, 1970. This provision has created a lot of confusion as to the extent of immunity provided under section 79. Section 79 under IT Amendment Act, is purported to be a safe harbor provision modeled on the EU Directive 2000/31. However, Information Technology Amendment Act 2008 left a lot to be desired. Both EU and USA provide specific exclusion to internet service providers under the respective copyright legislations. In order to clarify the issue and put the controversy to rest, Indian legislators need to insert a similar provision proving immunity to ISP in the Copyright Act, 1957. It is interesting to note that even auction sites, search engines and cyber cafés fall within definition of intermediaries. There is no parallel legislation in the world which provides immunity to such a wide range of intermediaries. This can be reason behind addition of proviso to Section 81. Nevertheless, Information Technology Amendment Act 2008 makes a genuine effort to provide immunity to the intermediaries but has failed to achieve its objective due to loose drafting of few provisions. Indian Legislators need to plug in these gaps and provide indispensable immunity to the ISPs to enable them to operate in India without any fear and inhibitions. Section 79 is valid subject to Section 79(3)(b) being read down to mean that an intermediary upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency that unlawful acts relatable to Article 19(2) are going to be committed then fails to expeditiously remove or disable access to such material. Similarly, the Information Technology "Intermediary Guidelines" Rules, 2011 are valid subject to Rule 3 sub-rule (4) being read down in the same manner as indicated in the judgment. (Section 79(3)(b) has to be read down to mean that the intermediary upon receiving actual knowledge that a court order has been passed asking it to expeditiously remove or disable access to certain material must then fail to expeditiously remove or disable access to that material. This is for the reason that

otherwise it would be very difficult for intermediaries like Google, Facebook etc. to act when millions of requests are made and the intermediary is then to judge as to which of such requests are legitimate and which are not. We have been informed that in other countries worldwide this view has gained acceptance, Argentina being in the forefront. Also, the Court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject matters laid down in Article 19(2). Unlawful acts beyond what is laid down in Article 19(2) obviously cannot form any part of Section 79. With these two caveats, we refrain from striking down Section 79(3)(b).)If you look at the Digital Millennium Copyright Act in the US. As early as one thousand nine hundred two thousand. There is a formal procedure for notification and take down. If that is somebody's material which somebody has put up let us say on a platform. And I am a platform provided I am an internet intermediary and I am notified to say that this information is inside communal hatred, this information is pornographic or this information is defamatory. If I then don't pull it down. The safe harbor is lost.

Discussion with the Participants

This whole concept of intermediary liability may be new in the country today in terms of what has happening but close to one and half decades ago this question came up in the US and therefore I am staright away inviting your attention to page no 6. I am quoting from prodigy services which is a 1999 decision which from the court of appeals now this decision pertain to a blogging platform where on a bulletin board there were a lot of news articles put up and there were comments therefore it was a comment akin to this open notice board in the bar association for example when we all were lawyers. Bar association secretary actually owns the notice board but is open so body goes and pins up something which is defamatory about some other lawyer. Now cab you sue the bar association for it or should you identify who put it although his name is not there and sue him or atleast get a blanket order against anyone who is likely to have put and comply with it.

In *Anderson v New York Tel. Co.*, this Court was asked to determine whether a telephone company could be held liable as a publisher of a scurrilous message that a third party

recorded and made available to the public by inviting anyone interested to dial in and listen (35 NY2d 746). The Court adopted the opinion of Justice Witmer in his dissent at the Appellate Division, concluding that the telephone company could not be considered a publisher, because in "no sense has * * * [it] participated in preparing the message, exercised any discretion or control over its communication, or in any way assumed responsibility" (42 AD2d 151, 163). *Anderson* also holds that even if the telephone company could be counted as a publisher, it would be entitled to a qualified privilege subject to the common–law exception for malice or bad faith (42 AD2d, at 163–164).

Anderson emphasized the distinction between a telegraph company (in which publication may be said to have occurredthrough the direct participation of agents) and a telephone company, which, as far as content is concerned, plays only a passive role. The *Anderson* doctrine parallels the case before us. Prodigy's role in transmitting e–mail is akin to that of a telephone company, which one neither wants nor expects to superintend the content of its subscribers' conversations. In this respect, an ISP, like a telephone company, is merely a conduit. Thus, we conclude that under the decisional law of this State, Prodigy was not a publisher of the e–mail transmitted through its system by a third party.

Moreover, we are unwilling to deny Prodigy the common–law qualified privilege accorded to telephone and telegraph companies. The public would not be well served by compelling an ISP to examine and screen millions of e–mail communications, on pain of liability for defamation. Considering that in the case before us there is no basis upon which to defeat the qualified privilege, it should and does apply here.

The Appellate Division aptly concluded that even if Prodigy "exercised the power to exclude certain vulgarities from the text of certain [bulletin board] messages," this would not alter its passive character in "the millions of other messages in whose transmission it did not participate" (250 AD2d 230, 237), nor would this, in our opinion, compel it to guarantee the content of those myriad messages. We agree with the Appellate Division in its conclusion that, in this case, Prodigy was not a publisher of the electronic bulletin board messages. We see no occasion to hypothesize whether there may be other instances in which the role of an electronic bulletin board operator would qualify it as a publisher.

I will trouble you with one or two quick ramifications on whether the next decision Bunt v. Tilly is an interesting aspect and stop very quickly after that. Bunt v. Tilly examined whether to stop a internet service provider from decimating information are you treating him as a publisher or not. Now in a traditional context if I have written a particular writeup and that is been published by a news paper I am the author but the news paper is the publisher therefore you will sue both the author and the publisher and in common law you will get an injunction. But in the internet context if I am the service provider i.e google is providing a blogging platform and mr. x is writing on it the law now denotes the mr. x is the author no doubt but mr. x also becomes the publisher and therefore the author and publisher fuse into one and it is therefore not by default that you will sue google as a publisher. Google is not a publisher and now that proposition came up in Bunt v tilly 2006 please permit me to read one or two line of bunt v. tilly again kindly note this was ten years ago that this law came into being in europe.

When considering the internet, it is so often necessary to resort to analogies which, in the nature of things, are unlikely to be complete. That is because the internet is a new phenomenon. Nevertheless, an analogy has been drawn in this case with the postal services. That is to say, ISPs do not participate in the process of publication as such, but merely act as facilitators in a similar way to the postal services. They provide a means of transmitting communications without in any way participating in that process.

Publication is a question of fact, and it must depend on the circumstances of each case whether or not publication has taken place: see e.g. Byrne v Deane [1937] 1 KB 818, 837-838, per Greene LJ. The analogies that were held to be inappropriate in Godfrey v Demon Internet might yet be upheld where the facts do not disclose onward transmission with knowledge of the defamatory content. As Dr Collins observes, op. cit., at para 15.43: "Mere conduit intermediaries who carry particular Internet communications from one computer to another … are analogous to postal services and telephone carriers in the sense that they facilitate communications, without playing any part in the creation or preparation of their content, and almost always without actual knowledge of the content". Such an approach would tend to suggest that at common law such intermediaries should not be regarded as responsible for publication. Indeed, that is consistent with the approach in

Lunney where the New York Court of Appeals drew an analogy between an ISP and a telephone company "which one neither wants nor expects to superintend the content of his subscriber's conversations".

I have little doubt, however, that to impose legal responsibility upon anyone under the common law for the publication of words it is essential to demonstrate a degree of awareness or at least an assumption of general responsibility, such as has long been recognised in the context of editorial responsibility. As Lord Morris commented in McLeod v St. Aubyn [1899] AC 549,562: "A printer and publisher intends to publish, and so intending cannot plead as a justification that he did not know the contents. The appellant in this case never intended to publish." In that case the relevant publication consisted in handing over an unread copy of a newspaper for return the following day. It was held that there was no sufficient degree of awareness or intention to impose legal responsibility for that "publication".

Of course, to be liable for a defamatory publication it is not always necessary to be aware of the defamatory content, still less of its legal significance. Editors and publishers are often fixed with responsibility notwithstanding such lack of knowledge. On the other hand, for a person to be held responsible there must be knowing involvement in the process of publication of the relevant words. It is not enough that a person merely plays a passive instrumental role in the process. (See also in this context Emmens v Pottle (1885) 16 QBD 354, 357, Lord Esher MR.)

In all the circumstances I am quite prepared to hold that there is no realistic prospect of the Claimant being able to establish that any of the corporate Defendants, in any meaningful sense, knowingly participated in the relevant publications. His own pleaded case is defective in this respect in any event. More generally, I am also prepared to hold as a matter of law that an ISP which performs no more than a passive role in facilitating postings on the internet cannot be deemed to be a publisher at common law. I would not accept the Claimant's proposition that this issue "can only be settled by a trial", since it is a question of law which can be determined without resolving contested issues of fact.

I would not, in the absence of any binding authority, attribute liability at common law to a telephone company or other passive medium of communication, such as an ISP. It is not

analogous to someone in the position of a distributor, who might at common law need to prove the absence of negligence: see Gatley on Libel and Slander (10th edn) at para. 6-18. There a defence is needed because the person is regarded as having “published”. By contrast, persons who truly fulfil no more than the role of a passive medium for communication cannot be characterised as publishers: thus they do not need a defence.

Therefore I am thankful that you have given me a patient hearing and if you have any questions my email is that I do more than happy to not supply more material as and when you have time at leisure to read. Thank you very much. I'm so glad you gave me this opportunity thank you.

DAY 4
Session 13

Dr. Geeta Oberoi: So very good morning to all of you. We follow same procedure what we will do we will ask to speak for first forty minutes and then twenty minutes we keep for question answers. We start with our first speaker who will introduce a little bit about himself and then he'll start the session. But then what happens actually everyone is telling me that they know these are actually given suggestion about the judges that because of in between question answers they are not able to follow the whole presentation. Since Judges have complained me so I have followed this procedure. ok we do 40 minutes presentation and twenty minutes question answer. Actually in between questions breaks the flow so so therefore we...maybe we can jot down whatever yes or yes sir sir.

Mr. Yogesh Singh: Good morning! Can you hear me? I am yogesh singh I am a corporate M & A partner in Trilegal. I'm based in New Delhi. I was pass out of National Law School in Bhopal. I have practiced in Delhi as well as in London for a couple of years only focussed on corporate M & A issues and that's why the topic takeover code and M & A is something that's a bit of a bread and butter issues for me. Thank you so much for having me over here. Looking forward to the session. The session topic is the essentially takeover code the new takeover code 2011 whether its a new era or is it a damp squid and the reason I think the topic was chosen was because of a lot of expectations from 2011 takeover code. Before I get into the details of before I get into the details of the takeover code. It relates to companies actually only relates to listed companies in India. Yes. So I'll give you some background about what what are the key milestones in the evolution of the takeover code. So if you look at this slide and just wanted to mention it I'm not getting into or a lot of case law driven issues because of the analysis is basically on 2011 code. There have been some sad judgement which have come come through in the recent past while definitely walk you through those. But broadly it is more of an assessment of what's happening in the market what has but other key changes. Just a background about to takeover code before 1992 the takeover regulations were essentially imbedded as part of the listing agreement that companies enter into. So whenever a company has to list itself under Stock Exchange it

enters into a listing agreement which is a very critical document for the company to be compliant with and as part of that there were provisions regarding how the companies major share purchases should be carried out, how the minority shareholders interest should be protected. In 1992, SEBI was constituted and in 1994 India had its first takeover code regime. Subsequently very quickly the government realise that regime needed big overall. Justice Bhagwati lead a committee which was appointed to overview and assess what the requirements of the law. And in one thousand nine hundred seven we had a substantially key takeover code 1997 which is called a substantial acquisition of shares and takeover regulation 1997. There after again the market has been moving and what we have been seeing is that globally the takeover codes have very quickly been changed. The reason being that the law and M & A, the companies have been bought and sold has significant changed in the last few years itself and therefore this is a very evolving subject. You come up with a definition in the market starts behaving in a different way. As I will talk about some of the recent experiences that we saw on the Spice Jet deal. But after that in one ninety seven in two thousand justice bhagwati committee was reconstituted to review the code. There was a track committee which was appointed to look to assess to give recommendations under the chairmanship of C Ashutan and in two thousand and eleven over all takeover code was implemented. Subsequent to that there have been some key amendments like in December two thousand and fifteen there were some changes in January of this year there were some clarifications. And there have been some key developments but this is just broadly the legislative history behind where the take over code has been. That's talking about one key issue which I had I'm sure everybody wants to deal with what is the need for the takeover code. Why do we talk about takeover code so like I said take over code is limited in its application to listed companies and so for example I'm a M & A lawyer almost eighty percent of what I do is actually got nothing to do with the takeover code because I do companies but and sell sort of transactions but they are primarily private companies or unlisted public companies. But the public listed companies what it does is that there's a company which is going to the Stock Exchange raise money from the company in deposits from the public and therefore there is a need for a systematic framework for acquisition of stakes in such companies. The reason being that

when we you and I as an individual investor invest in these companies. We rely on the management. We rely on some key people having done something and if they are selling the company and exiting or if they are doing certain things with the company vision where the ownership pattern of the company's changing. Then I should also how do I protect myself I shouldn't be just a bystander who has got no rights. What the takeover code does is it provides for broadly two key concepts. I should say three key concepts one if people are acquiring any substantial stake in a company then they have to give an opportunity to exit to the public shareholders also. So public shareholders are given an open offer on the same terms as offer which thus of made majority shareholder is exhibiting their requirement regarding disclosure which is again very critical because as a public shareholder I am sitting in Bhopal I have no idea what the company is doing which may be listed on the Bombay Stock Exchange but actually operating in Chennai. And therefore the disclosure requirement ensure that gradually what are the key changes in share holding control related issue which are happening are being disclosed to the SEBI so that I get a copy of those disclosures. And the third is general compliances in terms of ensuring that different participants who are involved in the listed company are also playing their part so their part you could talk about market makers, brokers, managers of the funds. How they should be behaving should they be buying and selling stake in companies in a certain way. Now a lot of that is essentially covered in the insider trading regime. But even under a takeover code there are some specific compliances that need to be dealt. So like I said the intent is to protect interest of minority share share holders and show transparency in management. Provide for a fair and equitable treatment of public shareholders. Allow a mandatory exit in case there is a substantial change in ownership or control of the company and ensure that securities market operate in a fair and transparent manner. This for me is actually the key slide in terms of just understanding what the key issues and implications under the takeover code. What I've got over here is about seven definitions and one concept of acquisition. Direct and indirect. So this walk you through that. What is an acquirer? the takeover code provides like I said for Open Offer and disclosure so acquirer of a company's any person who buy shares, voting rights or takes over control in the Company. So that is the person whom whom we will call as an acquirer. Acquisition refers

to and it's a newly defined term under two thousand and eleven code refers to acquisition of shares, voting rights or control. It could be direct as well as in direct. And that's a very important thing to understand that what might happen is that because you have these mandatory exit opportunities and disclosure requirements. People may even structure transactions so that they don't do a direct acquisition but they buy one company which is above the listed company so there is a listed company sixty percent of shares of that company held by one to another company. And that company may be further to be sold only to avoid mandatory open offer related requirements. So therefore acquisition doesn't refer to clearly direct and indirect acquisitions aswell then persons acting in concert. This again is a very important concept essentially what the person's acting in concert means is that it is not just that individuals or companies are clearly buying in their own name. There may be that there are people operating with a common objective of buying a company or taking over control over a company. And therefore those people's acquisitions and stakes and control need to be clubbed together. There's a very interesting reference to G.L.L judgment it's called the guineas P.L.C. judgment. It's actually a judgment from the U.K. but it's very off quoted and it is useful to mention some people act so I just read out from this part from the judgement it provides that the nature of acting in concert requires that a definition be drawn in deliberately wide terms. This is necessary as such arrangements are often informal and understanding understanding may arise from hint. The understanding may be tacit and their definition covers situations where the parties can act on the basis of a nod or a wink as well. So essentially the key issue over here is that as long as people are operating with a common objective they should be captured as part of the definition of persons acting in concert. The definition is very very wide it talks about people who are deemed to be persons acting in concert for example my immediate relative, companies in which I have substantial stake or holding company subsidiary companies are automatically covered as part of that. But General theme is that there should be a common objective and many times what we've seen is that then it is very difficult to come with specific to be able to prove that somebody is acting in as a person acting in concert. Because it's impossible for us to find out whether there's a written agreement. And there may well be no written agreement at all. And that's why this reference. And the understanding will be tacit and in

fact even party acting on the basis of a nod or a wink could constitute as them acting as a person acting in concert with a very important concept to bear in mind because it is a wide range of impacts across the takeover code regime. Then the other the concept that I want to talk about it shares. Shares in this context has been defined as shares in the equity share capital of the target company carrying voting rights. So as long as there are Voting Rights attached to a share that acquisition itself will be captured under the takeover code regime. In fact even depository receipts which allowed voting rights to be exercised on them who are also captured as part of what would constitute as share what it does not include as share is Securities like non convertible debentures and other things which do not carry voting rights. Then the next one is controlled. Control is I think an issue that maybe we should spend a few minutes talking about because this is a very important aspect. One like I said is a concept of taking over Majority stake. A significant amount of stake in the company directly or indirectly but then there's also a reference to taking over control of the company. And the definition of control. In India is in particular fairly wide. But at the same time it allows different types of interpretations and we've had several judgments on what amounts to controlled and how a control should be interpreted. Essentially control in this context has been defined to say controlling include right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert directly or indirectly including by virtue of their shareholding or management rights or shareholder agreements. Now in this context the question has been that. When a private equity investor or good investor read when an investor takes over certain rights in a company. When do they actually start exercising control on the company because what you will what we see very regularly is anybody who's buying another ten twenty percent of stake they would insist on a certain type of rights where the company should not take as or undertake an activity without their specific written approval. So it is called the reserved matters which have been parked for a particular acquirer. The question then arises that if there is a reserved matter then is that allowing somebody to have control over the company isn't and this question there's a important case which because of the Supreme Court's observations does not have a lot of presidential value but it just shows a thought process that was involved. I like to talk about

this is the shubcome ventures case. In this case just to give you some broad facts shubcome holdings acquired a twenty four point two percent stake in M.S.K. projects terming it a financial investment. It announced an open offered under the previous regime under the previous regime even an acquisition of any any acquisition more than fifteen percent acquired an open offer whereas in the new regime there triggered has been increased to twenty five per cent. So they triggered under a particular regulation the question that came before the SEBI was that because of certain rights where they their consent was needed to undertake certain activities. Did they have control over the company. And therefore they should have gone were wider open offer over there. The SEBI view was that because they gave an example of a sort of a car where if you have a negative control and you stop you have a right to be able to dictate that a company will not do One two three things and essentially you have a given direction to the company and forcing it to take certain types of decisions so SEBI's view was that even negative control could amount to control in this sort of a situation. The matter went to SAT and very briefly what what SAT did was SAT mentioned that I would want to look at what amounts to control in the context of whether or not you have influence on day to day affairs of the company. And just having certain types of Rights does it necessarily give you control on the reserved matters their view was that because you had negative control you were able to dictate certain types of matters. Therefore you did have control. The matter went up to the Supreme Court but it reached an out of court settlement. But as part of the Supreme Court's order it specifically said that judgment of SAT does not have any presidential value. Now the question over here was really when you interpret control because thats the term which is which is going to be the relevant under 2011 code essentially just negative rights on day to day affairs is that a good enough or good rights over strategic matters is that something that we should be looking at that I mean certain other case laws also the matter remains relatively wide. SEBI continue to take a more wider interpretation of that. My view on that has been that control has to be looked at in the context of the particular facts and circumstance. Whether or not a company is actually able to dictate management or give direction to the companies a very very fact driven issue. For example in a particular type of company which is a lending company. If particular investor has the ability to stop the company from giving any loans or from any

enforcement proceedings then they are very much in control but there maybe another situation where there is a company which is into financial matters but the reserved matters that are essentially entering into new businesses that may not necessarily impact the operation of the company and therefore it is a term which I think continues to be a opened debate. My co-panelist would also have their views on this has been a very very wide engaging debate may be we can pick it as part of Q and A. So in this case there also been a case of...SEBI where the interpretation that SAT took in the shubhcome case was sort of refuted because the thinking was that in the SAT matter the thinking was that as long as you have control over day to day affairs that would constitute control whereas in this in in rodia essentially the courts argued that we should be looking at strategic and structural changes and control that should be there. Now what interesting you happened however was that on the facts in this particular matter the court ruled that there was no strategic control and therefore we will not get into the question of whether that's done. But there have been different ways of looking at it is a day to day affairs. For example you were asking me whether this is only related in the context of listed companies. It's actually even relevant outside takeover code though the definition can change sometimes but even in the context of the competition act this is a very important legis...term which is because of the shubhcome matter in particular has been open for all types of interpretation. And it's coming to the key concepts that apply. So like I said Open offers. Open offer essentially is an offer to the public to buy twenty six percent shares of the public in case of an acquirer exceeds share holding above twenty five percent directly or if he is already holding 25 % and has acquired more than 5% share in one financially year or can takes over control over the company. So that's when an open offer is triggered. Even in direct acquisition like we discussed or would also lead to an Open Office thats one key concept under the takeover code. Then there's a concept of disclosures at different stages of the of shareholding shareholders are required to make specific disclosures to the companies. So the and idea like I said was to make sure that the public shareholders that aware of what is happening who are the people who are in control over the company and so there are different triggers that which the disclosures are required. There are very specific exemptions which apply from open offers. I will Talk about them in a bit more detail and the idea is that even the

market makers and other advisors who get involved in the process they are also not allowed to trade in companies for certain periods of time during the open offer process. Just in terms of the types of open offers that can be made undertake the takeover code. So till now we essentially been talking about mandatory open offers. Because law requires you to make a mandatory open offer. But you...the new takeover code also allows a regime of voluntary open offer which essentially means that any person who holds more than twenty five percent shares in a company can make an voluntary open offer to acquire another ten percent in the company. The idea for this is that if anybody's already holding a significant stake they should have a regime where they can acquire further shares in the company. As long as the offer is made out there to the general public. The Sebi is also clarified that in case you hold less than twenty five percent shares. Even then you can make a voluntary open offer. But they are the in that case open offer will have to be made for minimum twenty six percent shares of the company. The competing offer regime is different this is when you get into classic M & A, hostile takeover situations. Essentially if somebody has made an open offer to the company. It could actually even be a voluntary open offer any person who wants to buy the company or the stake in the company can make a competing offer. And there are certain procedural requirements so for example this has to competing offer has to be made within fifteen days of the detailed public statement of the over an offer being made. There are also requirements regarding this being of at least twenty six percent or of the same percentage that the original offer that it is trying to compete of it was. The other party also has a further right to then again make another competing offer. As long as they make it with atleast three days before the start of the tender date. So these are some key concepts in addition to this one aspect that I would want to mention is that companies can also make conditional offers wherein what might happen is that a person is interested only in taking over fifty one percent shares of the company. And therefore they may strike in agreement with a promoter who on thirty percent or thirty percent shares. They may make a condition as part of the open offer that I will go ahead with the transaction only if I get fifty one percent so as part of my open of or at least twenty one percent shareholders agree to sell the shares to me. Then there are certain general exemptions as well as you can take exemptions from the SEBI as well. So what are

the key general exemptions that you have to deal. We are talking about exemptions where you will not be required to make an open offer. So exemptions are for interstate transfers amongst qualifying persons. Qualifying persons essentially refers to promoters people already in control or there holding or subsidiary companies. Acquisition in the ordinary course of business. Acquisition pursuant to our scheme. Now this in particular is a very interesting aspect. I know my Co-panelists have very strong views about this acquisition for us into a scheme but I'm going to devote a separate flight to it I'll just come back to this. Then there's also an exemption for acquisition pursuant to delisting regulations. So if somebody is making a de-listing offer directly. Acquisition by way of transmission succession of inheritance. Acquisition of voting rights or preferential share, shares caring voting rights. In certain cases and conversion of debt into into equity under the strategic that restructuring scheme. So these are general exemptions from regulations three and four. Now when I talk about regulation three and four. The regulation three talks about open offer which gets triggered when you buy certain shares in the company. The regulation talks about Open offers which which get triggered when you take over control over the company. So these are exemption which apply under both the situations.

This is a very hotly debated much talked about case law or not really case like to leave but a matter which has come about under 2011 code and essentially all the matters that I talked about which had come about under the 1997 code because not a lot of things have really gone up to the Supreme Court under 2011 code but this is definitely one matter. What would happened was Spice Jet which in the past had made open offers the same promoters had made open offer to the public to get up to nearly fifty eight percent shareholding in SpiceJet. They sold all the share all those shares to one Mr. Ajay Singh. Mr Ajay Singh acquired those shares what they argued effectively or the view that they took was that in the previous slide we talked about an exemption for exemption under the scheme. Now under the previous takeover code that used to very specifically refer to scheme of arrangement approved by courts in the under the new code it says scheme of arrangement approved my court or competent authority. Now because this was an airline company and Ministry of Civil Aviation has several consent rights they obviously had to take specific consent of the ministry of company affairs. But what they did was they on the basis of that they took a view that the ministry of company affairs approval is good enough for me to go

ahead and do go ahead with this transaction without making any open offer for the general public. So a promoter holding substantial stake which is maran brothers they exited from the company and sold their entire stake to another person. No open offer was made and the argument that it took was that because we have bought it under a scheme so to say it's a private scheme but it has been approved by the Ministry of company affairs which is a competent authority. The deal has happened sebi has not raised any issues yet that I am aware of. Everybody in the market took two sides essentially one argument is that how can a scheme which has just been approved by the Ministry of company affairs which you've taken just one consent can be interpreted to mean that this is the same or the equivalent of going to court because when you go to a court and seek approval you need shareholders approval. You need shareholder meeting requirements unless an overwhelming number of shareholders have a proven said we don't need to have a special a special shareholders meeting. So that entire process was short circuited. And they relied on the fact that this scheme had been approved. In fact in the context of the kingfisher airline. The Kingfisher Airlines and also sought to make a similar plea though I am not aware of the exact factual details may be lalit or som may have more details over the kingfisher matter. They also went to the sebi specifically saying that we should also be exempted because we are also getting approval from another ministry and sebi that time categorically said no. In this case they never approached Sebi and they went ahead and close the transaction it has been a while since that matter has been closed. It has become a more of an academy debate because everybody in the legal fraternity thought that this was a reacted with a lot of shop. And like I said there are two sides of one side essentially view was that intent if you look at the take over code intent or intent is to give an opportunity of exit to minority investors. And how can somebody have exit the company completely without triggering any open offer. When Ajay Singh took over spicejet they also looked at his networth and everything also. Also they specifically did not obviously because they have never gone into issues of public in shareholder interest never got into it. But then there isn't one and added I'll important fact and which is why a lot of people have argued this and our issues actually purile and the reason is not a single shareholder has raised an objection because this company was in and is going slow down that this was actually a scheme of revival so to say and the shareholders are very happy for somebody to exit. The third is that actually the spicejet promoters never approached sebi in the context of their compliance with the listed company requirement

Mr. Yogesh Singh: .I am conscious I am exceeding time so I am just going to very quickly rush through it. Any case these slides have a lot of reading on them but this is basically just about disclosure. This was just about the key differences between the code 1997 code and 2011 code. We've already talked about most of these. So again I don't propose to get into more detail on this. I think there are certain very open issues which over a period of time we may see as coming through for example whether PSE can make competing offers. Whether or not PSE will always remain a P.S.E. impact on reportings. The legislation also does not deal with what happens if in during the pendency of an open offer the convertible the security is convert into normally equity shares. What are the rights that will be there. Certain exemptions need further clarification for example this whole competent authority related matter. In terms of broad theme coming back to the main topic that I had whether or not this is a new era or a damn squib. I think this is definitely a positive code. It brings puts us right at the top of the global thought of takeover code regime. We do have our own peculiarities specially in the context of control in other things but it definitely a good legislation. The positives are there's a reduced cost of acquisition because the threshold from fifteen per cent was increased to twenty five per cent. And it was not just because of because if somebody felt like it there has been a study in terms of ownership of companies and how the ownership of the companies wouldn't really get impacted if somebody is holding up to twenty four point nine nine percent. This clarity on indirect acquisition which was much needed. There were a lot of matters under the previous nine hundred ninety seven. I was involved in one of the matters which went right up to the Supreme Court in the technique matter where there were two French companies which acquired shares over a period of time and one of them had hundred percent share of an Indian entity in the question of whether they'd like to control. Because there was only a twenty nine percent stake transferred in france, the Supreme Court's view was that you should be relying on the effective control as part of the legislation where their transfer has taken place. So these indirect transfer related clarifications are very helpful I think. The introduction of voluntary offer is also good because if somebody wants to raise their stake they have a regime where instead of looking for private transaction to just buying under stock exchange they can actually make a good voluntary offer and take over or increase the

stake. The damp squib parts are essentially have ambiguity in the control definition. The individual and collective triggers open offer are in administrative burden. The reason is that earlier it used to say that you have to act together as a P.S.E. to be looking at triggering open offer whereas under the new act what they have clarified is that supposed one individual is owning twenty three percent shares along with his persons acting in concert he's holding fifty three percent shares. And he acquires five percent more shares so individually he trigger the twenty five percent trigger. But as a P.S.E. they may not have so actually let's say you take an example where they have increased their stake by 4 % so as a P.S.E. they haven't triggered the five percent requirement because individually and as PSE they are above 25% and therefore the requirement is they are given a 5% exemption. But because as an individual is exceeding the twenty five per cent stake the view is that they will still have to make a open offer. Bifurcations in the exemption clauses but generally I would like to end these are now very positive note I think our take over code is right up there in terms of global takeover code regime. It's a good act and we would hope that clarification's and SEBI's involvement will continue to be positive. You obviously need to have one anchor seller who let you in or you may already be holding some basic amount of shareholding in the company and have discussions and that's when you look to launch as in it's almost unheard of somebody was the got no share holding in the company to actually launch a completely hostile takeover code. Look at partnering with one or two people who are looking to sell out and then along with them. We can take over code offer what is very interesting in India is that unlike so I'll talk about specifically my experience in the U.K.. When I was practicing there. In U.K. there was a big domestic lobby which said in U.K. takeover code is extremely poor It does not protect local industry especially after the cadbury transaction. Because essentially anybody could have come in and taken over the company and no interference rights are available to the board also like in the US there is a concept of board recommendation. There was no concept as such there so they have been trying to make certain changes over here in the Indian context if I was to apply. I would mechanically the way I look at this is get to a decent shareholding without getting into upon offers to the extent you can make to the trade of the stock market. You will start reporting at a very low threshold at five percent and people start keeping an eye out so therefore you may need a few people coming together and then launch and open offer which is for the hundred percent of the company in fact you may even look to go do a direct delisting offer as well. That's really the key bit in the current context we do not have

concepts like board recommendation that such in India though we will have been talking about what you call as poison pills. Essentially which will be like warrants or the ability of the company to issue an exceptionally high number of shares to a particular class or to the existing shareholders....So the idea is that if a hostile acquisition is taking over then the company what rights does the company have to stop it. So outside India there they have regimes like you issue a certain type of warrants to the promoters who in such a hostile takeover have the ability to step in or such a hostile takeover court cannot like in the US context could be done without the board's recommendation. But in the Indian context there's no such rule but the same time it is much more difficult to deal with because our investors are actually much more passive. At least till now they have been extremely passive. In U.K. if you're looking at having AGM you will see hoards of people turning up and actually participating whereas in in India it's more about making sure you get to a particular stadium in is there are a few companies that I don't want to name and get your samosa and pastry and you get some good announcements and that's what. I would like to end here sorry for the extended time. Thank you so much and I'm around if in case I can be of any help or discussion. Thank you. Som you will be taking over from here.

Mr. Somasekhar Sundaresan : Should be take a bio break of five minutes just wash room and thing...

Session 14

Mr. Somasekhar Sundaresan: Good morning everybody. It's always a pleasure to come back to the Judicial Academy and this time some faces already seen in the past so it's it's always fascinating I mean coming to this Academy and talking to judges about law can be a bit like carrying cold to a new cousin. So it's always with a degree of humility and reputation that have participated in these sessions. If there are questions feel free to interrupt as I progress so that we will make it an engagement. We may perhaps at some point follow a five minute rule if a certain question can be resolved in five to seven minutes we will park it and come back to it towards the end. But subject to that lets keep it as interactive as possible. Also one thought that was passing the mind is that for lawyers like us this the closes we can come to addressing a full bench of so many judges in one go. So please be kind to anything that I mean heard gasp in the way you may answered. What I've done with this light is essentially I just put this down more to navigate the subject rather than have them as substantive material on issues but these are more pointers to what we're going to talk about. So when we envisage the discussion on M & A and shareholder disputes and what sort of issues arise in dispute resolution. I thought it would be good to take a quick overview of what we talk about today. We'll talk a bit about disputes over shareholders agreements. We talked a little bit about shumcome ventures and control rights. So I'll I'll talk in depth what these agreements essentially contain and what are the areas or which disputes emerge. Disputes or alleged breach of company law being corporate in nature there's always an interplay between these agreements and company law. And most disputes point towards whether the a provision of contract is contrary to company law. We also have a session later today about the new era of investor protection under the new Companies Act. So some of these elements will be covered in that session as well. Then disputed with interplay of the to the takeover regulation we've just seen the Takeover code in some detail to some of it will be easy to cover. Disputes with interplay of delisting regulations just as takeover regulations deal with taking over a listed company. Delisting regulations deal with taking a listed company out of the stock market and taking it private. What are the areas where disputes can emerge under that body of law. Disputes

over share purchase agreements when parties intentions change when their parties to agreement but their disputes emerge over whether to enforce agreement on on what are the areas where one could assail an agreement as being contrary to law and therefore not worthy of being implemented. Disputes over corporate family settlements we've seen the reliance family settlement in the whole interplay it went all the way to the Supreme Court with some twenty one days of hearing in the Supreme Court where the question was can publicly listed companies be segregated and separated on commercial terms dictated by a family and of course there was an interplay of gas pricing policy and we talk a little bit about wherever possible wherever cases possible determined we'll take names wherever they're still pending I'll try to avoid names and I'll just speak about it conceptually because the pace at which things happen in this country you may well be in the Supreme Court when it comes up before you so I'll I'll quickly talk about concepts rather than actual names for every cases. Then disputes with regulators can also emerge in the arena of a M & A and shareholder disputes. Then of course, the disputes over jurisdiction which forum actually has actually jurisdiction to try a dispute of this nature. So if we take shareholders agreement essentially shareholder's agreements are agreements among substantial share holdersbroadly they cover how large shareholders get together to determine the manner in which they will run a company. You can have shareholders agreements over listed companies you can have shareholders agreements over un-listed companies. When it is un-listed the interplay of public listed law will be absent. But if it is listed you also have the complexity of dealing with the otherwise of applicable provisions of law that govern listed companies. So it be important to talk a little bit about what are the broad two broad heads of what Shareholders agreements contain. A shared transfer restrictions like provisions which govern how two parties were come together in an agreement made trade in shares. The other is governance related provisions. Who can participate in the governance of the company. So why share transfer restriction provisions important in shareholders agreement. Let's say to people come together to run a company. They want to be equal partners and let's say they collectively own 70% of a company. There thirty five percent each. Each may want to ensure that the other is one more than him in degree of control so you can have an agreement saying. Neither party will buy shares without the consent of

the other party. For example so that's the last bullet that I had. Covenant not to buy further shares when you come together. You could also have a right of first refusal which is basically one of the parties were to sell shares to an outsider he will first offered it to the other party. If the other party is willing to buy he will sell it to him and not to a third party you also have a right of last refusal where you can go and negotiate a shared transfer with a third party. That third party comes up with a price comes up with terms. You have to allow your partner for want of a better word your agreement counterparty to match the terms and say the third party is willing to pay hundred per share for a five percent stake. Are you willing to buy the same price. So if the other part of the party to the shareholder agreement is willing to offer the same price you are obliged to say to him and not to the third party. The idea being you conserve ownership and control over a company in known hand you come together to do business before you bring a third party give preferential treatment to the person you are in bed with the person you are participating in the business with. He gets a preemptive rights iver share ownership of a company. Then you have a concept called tagalong rights and these are more popular not in joint ventures but in investment agreements. If financial investor puts in money let's take you're reading a lot in the newspapers today about this E-commerce transactions. The new the new power sector of our economy's e-commerce. You know there was a time and everyone is getting the power sector. Now everyone is in e-commerce and lot of money is being raised. So an investor puts in money he backs and entrepreneur. He backs a certain person who's running the business. If that person himself sell shares then the investor says I should have a right to tag along on the same terms. So let's say Flipkart it's promoters Mr Bansal he wants to sell say five percent of his stake and monetize the person who has funded him to enable him to run the business will have a covenant to say if you exit allow us to exit on the same terms. It could be pro-rata it could be excelerated you could structured it as dis-investment to say that if you sell 5% you have to take investor out by 15% so its a dis-incentive that the entrepreneur does not exhibit while investor is still investing. It could be equitable if you sell five percent out of your twenty five allow me to sell a proportionate portion of my 20. So there are provisions and provisions that commercial reality can emerge. But that's a tagalong right. If in passing I may does mention that what the

takeover code we saw in the earlier session does is provide a statutory tagalong right for public shareholders been a substantial shareholder exits by more than twenty five percent ownership in a company. The takeover code basically says give the same terms to non substantive shareholders. So thats version of a statutory tagalong right. Then you have a drag along right this is very interesting right where let's say I put money into a company. My intent is to make this company grow bring it to a level where it can get listed. Eventually its shares are traded in the stock market. And then I make my exit. Infosys for example first did an IPO it actually didn't get fully subscribed. The underwriters had to put in money to take up the company but after it listed and it did well today all those guys who where at that time seen as losers their multi-millionaires because they were underwriting a transaction. Likewise when you invest in an unlisted company you have no visibility on an exit and exist can only happen when some other like minded person wants to now buy from you and take it from you. But the most clean exit would be to exit in the stock market. After the share gets listed because you can wake up one morning and sell your shares. No questions asked. So drag along right comes in where you back up business. And then you say we'll give you about three years five years seven years time to list this company. If over that frame of time the company is incapable of being listed I'm stuck in my investment. So if I find a buyer and that buyer says I will buy you provided you sell me a lot more than what you have. I should have a right to drag along the person I funded and sell not only my shares but also his shares as a block. So that I get an exhibit. This is again a very important provision from commercial realities point of view that the ability to get an exit in this typically kicks in when most other avenues are failed when you can't get a third party investor you can't get an unlisted transaction. You can't get a listing done. And a lot of time as transpired. Then you would have a drag along that in some sense you could call it a call option. The investor as a call option to take over the shares of the entrepreneur the he has funded and sell it as a block to an incoming third party who may say you are selling only twenty I will buy only fifty one. You may have twenty the promoter the entrepreneur your back has fifty you can add your 20 and sell and that's a drag along right. Then of course there's a contractual lock in of shares will have a this more a disincentive that you are funding somebody he himself sells out so you can have a

plain vanilla lock in. No tagalong or drag along you can simply say over the next six years. You will stay committed to the cause. You will work on the company. You will not exhibit. You could also say what I'm finding is a steel company don't make it a paper company. Stay locked into the business model stay locked into your shareholding. This is one of the provisions to deal with covenant not to buy further shares we already talked about. To give an example of a settled matter the malya chabria dispute dispute over herbert sons you will find on that and I'll talk about it. Had such a clause each of maly and chabria distrusted the other and said you should not buy more shares then what we have come together with. Each was blatantly buying underground. They were buying without reporting. It was cheating the other and we talk about it in some sense it's linked to the hostile takeover question. So I wanted to talk a little bit about how that transpired and that's a classic example of a covenant not to buy further shares to keep inter say ratio of control over a company at a pre-agreed constant. It's a bit like a confidence building measure across the border That you are in business but you trust you don't trust fully what you therefore write an agreement that no one will Upstage the other and that's a very important element of shareholders agreements. If you take the usual company law you can have a proportional representation or deviate from it. Most companies do not have proportionately but it's not as if you have ten percent you have one person on the board therefore hundred persons will have ten percent. So how do you get on the board what percentage shareholding knows your right to a book seat following. What happens to the person on the board. There was a brief reference to qorum right you can have a provision to say that unless my man is present at a board meeting there shall be no qorum in relation to certain matters so so so was it a fundamental matters that capital raising or changing the character of a company or issuing a dividend or issuing bonus shares which could impact the value of the shares that you hold. You could say that unless my man is present on the board you cannot have a valid quorum. So we talk in the next light about how does it interplays with company law and what are the issues where voilation of these agreement emerge. Typically when Yogesh mentioned reserved matters these are some certain fundamental matters that get listed commercially which whether they are day to day business decisions or they are fundamental and cconstitutive in nature is a question of fact.

So some contracts say that even signing a contract of above rupees X crores is a matter that needs an affirmative right. Some contracts say that whether you change the character of your business. Should be a matter of a fundamental right. This will always be a mis question of fact and law. So let's say you have a company which has only one hotel property. A say over the room tariff of that property would be a say over how the companies are run. So there it would cease to be influence it would actually be controlled. For that company has thirty hotel properties having a say over hotel room tariff in one of those study properties can never be controlled over that company to be would control or a part of the assets of the company but it won't be control over entire asset over the entire company so how these veto items is something that keeps coming up in dispute. Then of course funding obligations a lot of investors they invest in equity but they want risk free return. They pretend to be taking equity risk but they want a assured return in IRR terms they don't want to be diluted if the business needs more money than originally envisaged. So this often leads to trench and disputes about where the money should be brought into the company without diluting the investor or diluting only the promoter. Most times when promoters take money the merrly sign up to these clauses. When it's time to actually face the consequences of a dilution the ball can look at it so very often there is much that can be said on all sides and U.S. judges often deal with duality concept that being in the Indian philosophy have for a long time. There are not just two sides to a story there are seven or ten sides to every story. And all of these you will find when it comes to the shareholder agreement sort of disputes. Now how do these shareholder agreements play out in the interplay with company law? Very often a dispute over shareholder agreement is on the ground that it is in conflict with company law. Shares of a public limited company are they freely transferrable? AAA1 of old company law said shares of a public limited company shall be freely transferrable. Now question is if you say they shall be freely transferable. Does the person who does it confer a right on who does it impose an obligation on. If I am an owner of a share and I will write to throw it in the arabian sea. Do I have a right to agree not to sell that share for value? Somebody is willing to invest in my company can I covenant to him that I will not sell the share. What is a pledge? When you agree that you will not sell a share except with the consent of the lender or except with

the consent of a fellow shareholder question that emerges is have you conflicted with the legal provision that then was now of course the new company law enables such provisions and the controversies today dead. But you will face disputes that have emerged before the new law came in. And therefore can you rule that any fetter on transferability of shares is per se in conflict with company law and therefore an enforceable. This question keeps coming up time and again different benches have taken different view some benches have added the new ones of saying If it's in your articles of association then perhaps it's a contract that binds the community of shareholders at large and therefore and forcible are those of said no even if it's in the articles it would be repugnant to the scheme of company law and therefore the old section 9 and I don't know what is in new section four repugnancy with the law. If a provision of the articles is repugnant to the act. And the provision is ab initio an enforceable so this dispute is one of the most popular disputes on shareholders agreements. My last bullet on this slide is in amny sections of the act you have this phraseology saying unless the articles otherwise provide. There there can be no controversy because the law explicitly recognizes that the article could vary the nature of the rights conferred by the act. But where the act does not say so are we to assume that the intention of Parliament was that these are non-variable rights even though owner of a right cannot agree to varied so your property is the right. Can you do anything you choose with your property there is not contrary to public policy, the usual contract law principles that keeps coming up all the time. Then are voting rights transferrable standalone. Can you transfer voting power without transferring shares. So for example you continue to own beneficial interest in the shares but you transfer voting power to the power of attorney or take it on the converse you keep the voting power. But you shave off your shares of all the economic benefits and you agree with the swap. You would have heard this phrase p notes and the whole controversies in the stock market about foreign investors coming through participatory notes. Those are essentially instruments where the investor takes all the economic benefits that emerge from the ownership. Only the voting power remains with the shareholder. All the other rights are segregated detached and passed over so for dividend of ten percent is received that dividend is paid out to the counter party. If a bonus share is received the rights accruing on the bonus will start accruing to the financial

investors. Can those sort of arrangements at all to be done are they repugnant to the scheme of the act is a question that emerges from the already talked about. So a lot of the interaction between shareholders agreement and company low is where the arena of disputes in in this space takes place. The next question is really the interplay between a takeover regulations and M & A related transactions. Now there was this discussion about Spice Jet there was this discussion about Sharepurchase agreements and the agreements trigger mandatory open offer. But parties were not party to the agreement are beneficiaries to the rights conferred under the takeover regulation. The takeover regulation says if you buy more than twenty five percent in a listed company offer the same same terms to the others. So the others are recipients of the benefits of this obligation that they have a right to receive an open offer and very often they have issues with how the agreement has been couched or how the regulator is not interdicted in agreement. And these disputes essentially emerge around two issues. One is timing of the offer so let's say that the takeover regulation is the minute you sign the day you sign an agreement you have to make a public announcement within four days from that you're to actually announce your terms of your open offer to the public and the pricing that is determined for what the minimum offer price should be is linked to the date of your first public announcement. So if you have defaulted in announcing your transaction which should have been announce a year ago. Public shareholders would say you ought to have triggered open of your ago. You delayed it therefore I should get interest on the delay and they would go to SEBI with a complaint saying look at the fact pattern investigate it. This should have actually triggered an offer years ago. He chose to delay the offer and having delayed the offer you should not have the benefit of benefit of not paying the compensation for that this dispute has gone all the way to the Supreme Court the Supreme Court is in fact a upheld the imposition of interest were delayed open offer and that Sir leads me to the question you raised. Supposed you were to not comply with the obligation of an open offer when due does it render the title to the shares void ab-initio or is it curable. And this question again emerge in the Malaya shabriya dispute. The question really was that if an obligation to make an open offer was attracted and the person who acquired did not meet that obligation. Using transfer of property Act Can you say the title to the property itself is bad because the

attendant obligation was not met. The legal question therefore is would the open offer be mandatory provision or a directory provision if it's mandatory the consequences have to follow that it was mandatory at that point in time no other interpretation is possible you didn't do it you can cross it. It is held to be directory in nature the timing is also being held to be directory in nature. There is a decision of the SAT which went to the Supreme Court and did not get disturb the case of Hardy oil vs SEBI. This was a case where an international acquisition took place and the question before the SAT was that SEBI choose not to act on an agreement signed abroad for an indirect acquisition. At that point in time the open offer to have been made it was not made it was made subsequently when the original transaction was closed. And therefore invalidate the Indian acquisition and the SAT said no it is not a mandatory provision. It is not a condition precedent to a completion of a transaction. It is a condition in law and therefore directory. It's not it does not vitiate title to the securities that you acquire attracting an obligation to make an open offer. So that's a real issue and the timing is linked to pricing because the regulations also deal with what the minimum of a price should be and that the minimum offer price is linked to market price for the twenty six weeks prior to the date of the public announcement. So if you make a public announcement in a bare market. You get a lower price. You make a public announcement in a bull run. The immediate proceeding past of other persons traits eats into your open offer price and therefore very often shareholder disputes emerge around what was the precise timing and again at this juncture to take an example of a hostile takeover which went to litigation and actually got through this was the case of emani from Calcutta taking over the zandu of Bombay in a complete hostile manner also in corporate India. It's unstated clubby atmosphere that you don't do hostile takeover. There have been cases in the past where SEBI has said that even if you reach 90 we will not allow you to de-list because when you started you were already 80 that is academic today because the delisting regulation amended to say unless you are complaint with the public shareholding requirement of 25% you can't even start a de-listing. There was an inter regnum SEBI come interfere and say you started it eighty's you should do half of the balance you should do I mean 80 is easier example to people who'd be at 85 or 82 they would say ninety's not good enough. We want more and very often these would be without

backing off the law and not everybody fight SEBI. Not everybody runs to awrit court or runs to a SAT very often bad precedent get set in that manner. And there was of period of that in the de-listing space but....you can started listing process unless you already complying with the minimum public sharing requirement. Then the exemption provisions we talked about I mean most exemptions in takeover regulations are about shares changing from the right pocket to the left pocket. Like father to son husband to wife. These should not trigger an open offer if husband and wife are still together but one spouse transfers more than twenty five percent to the other spouse why should it trigger an open offer this is not a third party coming in to trigger a statutory tagalong right so very often it's easy even when husband and wife situation it's not so easy when it is to business partners who are parting ways. So for example you have so far been acting together but now we are parting ways. So the law prescribes tolerance level of a twenty five percent premium went to business partners who acted together for three years a parting ways if the premium for the price is higher than twenty five percent of that then prevailing market pricing then a formula for it I don't want to get bogged down in the detail. The laws assumes that it is a commercial trade and not a right pocket to left pocket transaction. Because price is the best barometer of whether that transaction at economic value or mean restructuring value. The next area of conflict in this space is share purchase agreement. Like willing buyer of willing seller sign a contract and then life changes. We often buy an asset come home and then feel we have paid too much for this pair of shoes or we have paid too much for this fridge. That's a buyer remorse. Likewise there is a seller remorse you sold and then if you could have got a better price things have changed. I sold the mind thinking mining is so difficult to do. So Supreme court judgment has now come mining is now easy. I did a wrong deal and therefore find a way to get out. And I had a very interesting learning very early in my career where we went to a very respectable very senior professional who had gone in a house into a large cooperate and it was a family dispute where two siblings who are related to this large corporate house fighting and therefore these senior management where them mediator who had done the and you just have to honor the contract and the guy said look if I don't advise. If I don't advise him how to breach this contract. There are those who will do him that advise and therefore I'm going to do it ofcourse it. It tells the story

about professionalism. But life is how it is we find reasons and justifications to say why something should not be done or why. Despite having signed with eyes opened you should today not honor it and that very often ends up in court. But as you know something that goes to arbitration doesn't remain an arbitration right from appointment of the arbitrator to the section thirty four challenge. It keeps coming back to the court of law the new ordinance now in fact even brings one more stream of supply from arbitration process to you if something is not completed within the timeframe you are going to sit in judgment and see where there's arbitrators fault or the other circumstances. The many sides to a story has just gotten yet another Sides to the story. So invariably being a common law country being equity minded legal arena one enters the factual circumstance and says OK what are the facts tell us something about the facts. And then it goes into it goes into dealing with facts aswel. So this is an area where I thought we should talk about. Very often when parties buyer or seller don't want to honor what are the grounds that they take. One of the ground used to be good this is a forward contact. You know forward contract as you agree today to do a transaction in future at the price agreed today. Forward contracts in securities are prohibited under SCRA (Securities contract regulation Act). So any share purchase agreement would typically be assailed saying this is a forward contract. How can you agree in two thousand and twelve that I would sell at a future day at 100 per share. I don't want to honor it so I would love to honor it but what do I do its contrary to law. I don't want to violate the law. Therefore a dispute emerges. Another area of dispute is this an option. Like you could have a Optionality. The government of India is guilty of this when it dis invested a public sector undertaking. It invited bids parties bid the whole globe bid. One bidder. One hand the government said today we will sell twenty six percent a year down the line you can call the remaining shares from us. Five years down the line we can put the remaining shares on you you know so the government didn't want to destroy all value upfront. It's say let the private party come create value at the new fair value I can put the shares or call or he can call my shares. When it was time to honor the contract when the private party said here is my call option give me rest of my shares then AG give an opinion saying no but this is an option. Option and securities are illegal. Now what does illegal under the SCRA was trading an options. If I agreed to sell a share at a certain price at a

certain point in time. You have you have the option to pick it up from me or country or contrary you have an option to sell to me if you have an option to sell to me you have a put option if you have an option to buy from me to call option. Now these options if they become tradeable they are them sell securities. And therefore the securities contract regulation Act was amended to say that Options and security shall not be illegal if they are listed on a stock exchange. This is when the F and O segment the futures and options segment in the capital markets was introduced. There was an amendment and there's a lot of dispute around options. People say it's an insurance contract. Therefore I will not honor options. People find reason as I said. You also say that this is contrary to public policy these Options which have been explicitly prohibited in the SCRA and you can't allow for trading in it so SCRA section 18A which said that listed option shall not be illegal is often quoted to say un-listed options shall be illegal which not the law. Global takeover sometimes are alleged to be oppressive. I'm doing a live matter so I will not name it. A Swiss company was taken over by an American company in Germany. That company has businesses all over the world. One of its business is a forty percent stake in a listed Indian company. There is a forty percent Indian promoter who's a JV partner in that company. He has gone to CLB to say this international deal is operation of my my my rights in the Company and therefore stop it and CLB gave a order basically saying we have no jurisdiction over a foreign transaction but we have jurisdiction over the domestic register of members. So please ensure that the register of members of the means untouched. I mean this helped nobody. Register members obviously remains untouched because the transaction was a foreign transaction it was being done abroad. But that dispute CLB stayed the Open Offer in India that open over as remain stayed for the last five years. And this is a live dispute this is an example of what sort of issues come up and most CLB fights...these companies can be rearranged on the basis of the settlements I'm not going to honor it because a single judge is again dealt with on equity because conduct of party shows that they were very much for together. They live in the same house or pretty much engaging in negotiation there isn't a scrap of paper to show that she actually provided the authority but there was nothing to show from a conduct that she was unaware or she had not authorize it all that she was taking decisions independently even historically. It always

husband taking the decisions even on her shares. But when it came time to honor the family settlement question was I have not authorize this at all and therefore you should not honor it. It's actually a negotiation at the expense of the Exchequer and which is why you know different sessions someday we should be the cost of doing this to the society and fees of the court or the or or vodafone dispute for example was a writ petition. Eleven thousand crore matter cost the party 250 fifty rupees. As far as the court was concerned the lawyers made a lot of money. The parties had a lot of money there are a lot of stake. The court system the legal system...interplay in schemes of enjoyment where it will it does have come in and said even to our all the regulatory requirements for schemes of opinion that I could supply. So under securities law the sebi wrote a circular saying you will not present a scheme of arrangement unless your scheme has been commented upon by the stock exchange and sebi. Now the circular has been elevated to a regulation. You know the listing regulations took effect on December one and therefore this is now subordinate legislation which says that you can't avail of your rights as a listed company to approach a high court under 391, 394 unless and untill you have filed with the stock exchange if you are a listed company the stock exchange gives it comment then sends it to sebi. Sebi gives its comment and you are obliged to highlight to company court what sebi's comments are. Looked at philosophically its bit like the RD's comment its bit like taxman's comment and this is why the scheme is advertised and anybody can comeup and raise objections but sebi has brought in the system saying we don't want to be looking out in the public domain come to us a priori unless we say unless you take whatever we have to say you can't approach the court.

Discussion with the Participants

So in this wife example her claim was that since I never authorized my husband to sign this family settlement. Arbitration clause in the contract does not bind me. So therefore the arbitrator has no jurisdiction and treat it as a preliminary issue. Let that be dealt with Let there be an award on it and then we'll see the parties of course went straight to the High Court and said we don't want to agitate this point we are submitting to the high court here

is a party which claims it is not got privity to the arbitration clause. Therefore it can be heard saying that high court does not have jurisdiction. We are submitting to the high court and the high court ruled on it so these complications do emerge. You know and I've got one bullet on that party conferring jurisdiction....in my view no. The ruling was entirely in the high court. OK the same sebi act was applicable the same section 20A the same section 15Y which ousted jurisdiction of civil courts on questions which can be determined by sebi or the tribunal was involved. The best of the bar all over the country was available on both sides.

Discussion with the Participants

There is another interesting dimension which learned judge points out. The scope of operation mismanagement provision is so widely drafted it become very difficult to say these a very precise special jurisdiction available only to the company law board. I think thats where the challenge is because what you can do under the oppression mis-management jurisdiction is so widely couched that then it is very difficult to scientifically say that this particular action can only happen under CLB and cannot else where. That's right and it's also against public policy but if there is a Supreme Court ruling saying they can actually run in parallel. That would be so I will look this up I was not really. It's also there's one other element I'd like to touch upon SEBI act the same provision which says which outsed the jurisdiction often comes up in international forums and will eventually find its way when it comes to recognition of foreign judgement. So in satyam this is a real example where the shareholders in America sued in New York against satyam and the auditor basically saying we need to be compensated this is a fraud. Obviously it is a forum not convenient arguments taken up as reply same as bhopal and we know the jurisprudence there and the question that emerged was does it do Indian courts at all have jurisdiction in view of Section 15Y and 20 A of sebi act which says that no civil court shall get into the question where sebi has jurisidction. The shareholders represented by lawyers who led evidence when one of the speakers tomorrow saying that this ousted jurisdiction of indian courts. Indian courts are un-available you can't have class action suits in india for fraud by

company so new york is the relevant forum. We led evidence to the contrary to say that what sebi can do is regulatory intervention. It can penalise, it can punish, but it can't its not a civil court cloth with powers to adjudge loss contributory negligence look at notice of breach by parties and assesses damages. Therefore we let the argument to say that indian courts are indeed available and look at the regulator they are infact funding class action suits etc. Ofcourse this issue never got resolved because the party settled and litigation in the US is so expensive that most things get settled and even regulators takes settlements rather than conduct actual punishments. But this is an issue that will come up and it does come up often on domestically also it did come up malya chabria dispute where both parties where happier that the bombay high court rules on their rights rather than SEBI. Bith parties had all of SEBI's files they knew exactly what had transpired. And both parties had adduced evidence on all of SEBI's files but both said we want the high court to rule and not sebi of course a single judge and then a division bench went on to do very detailed judgement on the Takeover regulations. The persons acting in concert...yes is so I was coming to that eventually but this was a classic case where...I would rather say unees bees our usual thing of by enlarge if it works Let it. Let it go on is what happened but the appeal to the Supreme Court was on the ground and I could not have conferred jurisdiction by affidavit. The ground on which the Supreme Court admitted the appeal from the division bench ruling was....but these are important question of law. How could the court have taken taken jurisdiction by parties conferring it by affidavit. Of course it got resolved because the parties settled. So I think that sort of sums up the extra time I've taken here was also a little conscious because the next session will not need so much time. So should take a short break and then reassemble so it's 11.44...12 whatever works out 12.05. ok. I guess 60-40 rule applies.

Session 15

Mr. Somasekhar Sundaresan : So welcome back, what I've done in the next session is again I've just got some slides in bullet point but this is more to talk through some trainees I mean it's not really jurisprudential, ni that sense but the overall theme of how doing business the arena in of business in economics in India has become an arena of criminal law and normally we can we think criminal law think I.P.C. but if we cut across various economic laws you'll find there almost every legislation on economic laws is also a criminal law and I thought we'll talk a little bit about some of these trends in themes. Basically I mean some of these are my theses, it's a theory I mean or have empirical basis to support around saying but some of it is also deliberately provocative, to provoke some talk in discussion because while we look at the enforcement issues or judicial determination of issues that get thrown at us, it's equally important to bear in mind the context and environment in which these laws operate and society operates. The first theory I'm making is that the Indian political economy will be the interplay between law politics and economics. It enters legislating virtue, we some of their it will just conduct in society can be achieved by legislation like the Ten Commandments or you shall not do you shall know what you do shall treat your customers with get a lot of financial sector regulatory requirements fall within this arena. So if you look at real examples of you take the new company law Section one sixty six, it leads in such expanse it reads like Board of Directors shall take into account interests of shareholders stakeholders, interest or society at large means that nice motherhood statements you have saying this is what you have to do. But if it translates into a provision the breach of which reached to a penalty, that's where the interplay comes as to why it gets so difficult to implement some of these provisions so we feel by legislation we can have virtuous conduct in society. Legislature disincentives are thought of solutions and again when we do that we do not really apply our mind to other sections of the causes them whether they are geared up to deal with it and that leads to an increasing emphasis on criminalizing conduct and let me actually take an example, when we say that check bunting is bad for business and commerce and we criminalize a bounce you have a check, correspondingly while legislating ideally you should think about for a

population for a scale of business even if point zero one percent of cheques issued get bounced do we have in of magistrates to handle those criminal prosecutions of a cheque bounce do we have enough jails to fill with those guys, we have the administrative capacity to handlethe implementation of such a law. This is something we do not apply a mind to reveal if the legislation stipulates a punishment or the legislation stipulates a requirement society will fall in line and this is seen across legislation not just economic laws I mean even if you take the post Nirbhaya sort of amendments by raising the bar to a death penalty, in fact the women's rights activists were frequently saying, don't bring in the dead and I did in fact worldwide evidence shows that it increases the prospect of the victim being also murdered because you don't live to tell a tail so you know the incentive that the law creates is actually up what was intended. So this often happens in our economic jurisprudence also if you if you think back about when did all the money that go abroad which is now subject matter of black money legislation, when did it go abroad it went abroad under FERA which said taking money abroad without permission is a criminal act, in fact it had provisions to say there will be a presumption of culpable mental state to deal with men's area the statute said, but most money went abroad during FERA. The other most engine Prevention of Corruption law and so much so that evidence of gratification is not necessary so long as a benefit has been conferred to a private party. You will circumstantially infer but have you actually addressed corruption, the answer is no. So this is a political reality, political economy reality that we need to bear in mind that we somehow feel criminalizing a misconduct will lead to what was conduct in society and that the question on whether it is real effective or do we need other solutions. State capacity constrained constrained not always factored in, we talked about it in the cheque bouncing example or about the tribunals example you create a Company Law Board but if it can be manned. What's the point in creating you do create a securities Appallent tribunal you can't stuff it would even basic members for months on end. You know, I have personally filed A P I, few years ago saying that the tribunal has just one judge and the law had been amended to make it a three member tribunal and they were sitting solo the den presiding officer he said I don't have to rejection for final relief I do into relief but I can't hear in months and months went by and the state capacity just doesn't match up to what we desire

to do. So today virtually every business law is a criminal law. Companies Act We're going to talk about it in some detail. SEBI Act of we'll talk about it in some detail. Provisions in some provisions of tax law, some provisions of FEMA for example was our civil radiation to FERA. In fact it was decriminalized and exchange controls broader no civil jurisdiction to make FERA. After last year's budget FEMA been the criminalised, sending of I said so broad in violation of families become a criminal offense when he should billets five years imprisonment and I think a site recommended that it should be made criminal again and very promptly be made it criminal again so the thought process to legislation I mean very often we are told that judges jump in and make measures without applying their mind to legislate to policy, I mean for example when you say a certain type of law he cannot endure unless you pay a certain fee into a city your god should not have certain control films because crime takes place inside cars, these are human reactions and these are not legislate a policy thought through provisions these are man made law, all laws man made produced without the process of law making but equal even the law making process has gone down that part of having a knee jerk reaction to starting to criminalise so virtually every business law every law that governs business is also criminal law and what are the implications we should debate about a little bit yet, criminal prosecution powers are seldom use and when asked to think about, why is this so and have a theory about it in a subsequent slide that regulators are good given this power still do not use it much I mean people often come and tell me, show me one man in India has gone to jail for insider trading, talking about Rajat Gupta has gone behind bars in India nobody goes behind bars and why is this so let's think about it a little more. Essentially, what this does is it gives political leverage over the, for the state over business. I mean these provisions is architecture in the framework to have a say to guys in business so while we have a huge private sector private businesses, essentially the balance of power or businesspersons is vested in the state by criminalizing which really every other know that governs doing business in India and we should we should ponder about this a little I mean when you see you know any A.T.M. being attacked or an employee going home facing an assault and magistrates call the entire board of directors to see health and safety is not been looked at and we're looking at criminalitng what the board failed to do this I'm done

moving away from the fundamental precept of penal provisions needing to be precise and clear for us to bring that intact principle is getting more and more eroded and we'll talk a little bit about Companies Act and also I think in the next session a little is going to speak about the new regime of investor protection. A lot of it is about confering more and more powers in the hands of the executive. Every scam leads to a clam of agree to powers whenever there is a scam and enforcement agencies and the media jump in and say powers I need to quit we need more money to take a pause and say our powers inadequate or the capacity to use the powers inadequate and do we need to do more capacity building, rather than make more and more provisions conferring powers because with great power comes great responsibility and very often that doesn't match up and it so it's a classic fit case for the to corruption I mean more and more you will of a case by case treatment of how doing business should be handled by a regulator, it leads to a suitcase by suitcase dispensation with the intervention the subjectivity is intervened it only if there is gratification. Then the lack of debate over how we make law viewed in Parliament albeit in public and salvation in a lot of this law in fact does get published and our form for public consultation, but as a society of you have not really had the culture of reacting to draft law and engaging with draft laws and amending it the Companies Act for example as being in the public domain from two thousand and twelve and our form and prior to that even twenty eight and not two thousand and eight when the committees were writing it but lo and behold when it came in in twenty thirteen, everyone was taken by surprise because nobody was really reading those drafts, nobody was really participating in it or even of the chambers of commerce or participating in those processes, they were focused on what they like to talk about for example cap on a number of boats seats for cap on number of audits which are not really substantive issues those where issues which dealt with individual professions and their ability to do business, those easy to talk about but a lot of the other provisions which really are hurting industry today in fact we already have one of the committee to rewrite this company's activity thirteen they're actively at work and I'm not sure when the report is too but sometime this year one expects a new draft Company law already, replacing that company not the just got made in twenty thousand because enormous provisions have been written in those in that act which are not easy to deal with. So

against this backdrop I thought to let me take securities laws as an example. I mean this is a Law and Order talk about, I have picked that up. But surely you can if you connect the dots, you'll find parallels in. Other legal and regulate the areas. There is a section twenty four in the SEBI Act which essentially says every contravention of every provision of this act or rules or regulations made there under is a criminal offense punishable with ten years imprisonment twenty five crore fine or both. So every single I mean it's absolutely disproportionate every single contravention is a criminal offense when we should deal with the same penalty now you therefore leave it completely open to the criminal justice system to deal with a given case and render justice about whether it's proportionate what needs to be done what sort of intervention is required also composition of offenses only those offenses which do not attract imprisonment can be compounded Section twenty was a real contravention attacks imprisonment, that's another dichotomy which which needs to be dealt with today, also this there's a parallel across all business laws and economic laws typically the complainant can only be the authority in questions. Reserve Bank alone can prosecute for running an N.B.F.C. without registration. SEBI alone can prosecute for running a booking form without a distraction. In the midst of the securities contract Regulation Act when it was amended to criminalize conduct and misconduct on the FERA adds the words it's a say Be Competent regulatory authority Stock Exchange all other person may file a complaint with a question as really emerged in the securities last piece is can a private party move the criminal justice system for a criminal offense namely a violation of the FERA so you have a listed company you have to make a disclosure under the listing regulation which is made under FERA the same be active head with and a company does not comply with it. Are you entitled to go to a criminal court and say I'm a beneficiary of this provision violation of this is a criminal offense and therefore I want to prosecute pretty much the two G approach correct that was a case of a solo prosecutor saying I want to prosecute The Telecon Ministry of India and give me permission and the prime minister's office didn't reply to him and that does this start of the spark that eventually led to a forest fire. So someday can somebody do this under this FERA. Every violation regardless of nature regardless of magnitude would render that remitting of money a criminal violation and that's the way the provision has come about maybe you

will have to see it in a real situation but I'm happy to actually have not carried the provision with me, but we will talk about this during lunch and put it out on the if you read Section four with thirteen and twenty seven, the net effect is today FEMA as well as outflow money is concerned is our it would be great if our judicial pronouncement comes in reading it down to say this is the focus and object of that act and we will therefore quash prosecution launched where a criminal intent is not found, so that's a larger problem frankly the lack of enforcement and the lack of capacity to enforce the quality of investigation despite having powers. They have your address the quality of Investigation obviating would investigate a powers. The answer the later view adding more and more investigative powers. Rather than working on capacity to use existing powers in a better manner and very often it's a self-fulfilling vicious cycle because when you can move powers and you end up lowering the bar on what is needed to get a conviction I mean if you see even the Companies Act provisions on fraud and we talk about it as we keep pushing the envelope and lowering the bar, the detection skill also comes down because if you, for example say be very actively argues that without intent. You can afford the securities fraud impact is enough intent is not required and I It beats me how the very concept of fraud in a civil law. You know in a common law country. Can you power you can have fraud without intent, but subordinate legislation to say, we talk about intent and that's I think and not everybody is going to run to writ court to record a stink the ballot if you're such a subordinate low and not writ court is just waiting for such predictions to come without facts showing that the person who's coming before it is seriously affected by by the provision as it is so it leads to a bit of slipping between the cracks made some of these provisions and sit on the statute book for years on end and eventually come up for challenge say after age of ten years of fifteen years and then the reluctance to disturb an entrenched provision is also very high and these are these are circumstances we can't ignore the realities and absolutely I mean I'm glad you're saying rather than we having to say I was really I was I was really walking on eggshells on how to make this point and I completely subscribe to what you said the person approaching a record immediately is a person who's in trouble with a lot over the law enforcer so it always wears on you saying oh am I helping a crook and it always wears on you saying how mouth far do I go and

therefore you gone conduct you try and admonish the regulator you had money sent for the same order doing clean it up come on give him inspection. It does not and that's a point I'm going to make in my next slide and I'm going to talk about divine economic laws it does not increase prosecution but increases leverage your society and that's a very interesting dynamic, so before I go to that and that's one of my issues where I'm going to talk about in the next slide but before that I just thought it's important also look at companies act and see the serious interventions that happen in the companies act very popular Lee the new company law is called the Satyam law and again the problem with the approach to legislation is when we see a problem we write a law for entire society addressing that one percent who creates a problem and the twenty thousand Act is a classic example of that in fact our two weeks ago I moderated a panel in the insurance company secretaries where transparently opening presentation or for that session by then she too was there to lead us to a case study of Satyam because a new act is essentially designed on learnings from Satyam and so it's a classic example of how we write a law for individual symptoms that we seen rather than test whether we have existing provision should deal with it. So here Company Law again prosecuting agency has to be the complainant which is basically the authorities under the act, but the stringent intervention, there are some new provisions that have come in the SFIO authorities are fully empowered to effect, anybody suspected of being guilty of a violation can be arrested by them. Bayless prohibited for persons accused of certain offenses there is an explicit provision saying, these will not be billable unless the public prosecutor has had an opportunity to oppose and unless the court is, the language is exactly from the provision from two into six, unless a quarter satisfied of reasonable grounds to believe that Doc used did not commit the offense I mean at that threshold when an arrest is being effected the court has to be satisfied that the person accused did not commit the of it I mean it's a it's not so dealing with a business in the form of a company is equal in to dealing with narcotics and psychotropic substances I mean that's the that's the that's the larger point that comes across if you take a step back and analyze the journey of the criminality in economic laws but will it really prevent is a question I ask myself that I am in my view unknown. If we take the view that legislation alone can result in what you the answer is yes. The person who provided to violate

regardless of legislation and therefore do we make life difficult for those who don't while and by raising in more and more it's a laid out in the in the criminal law amendment system also it genuinely played out. They had such a tragic neighbor situation. They really elevated the law to death penalty and we made it really really serious, but incidents continued were many cases in Bombay I mean ecause of our media mindset on what dailies like and were Bombay's like the Bombay incidence never they never took national stage but some really gruesome stuff took place in our backyard and moment merely legislating does not solve the problem but that is equally a symptom in the law governing business activity so there is also known action provision of what I think C.P.C. R.P.C. basically is not withstanding anything stated in CRPC bail shall not be granted unless a public prosecutor has been given a chance to oppose it does anyone say has been given a chance to state his mind because ultimately can a justice system also relies on the fairness of the prosecutor. The prosecutors not a private party to take the open and by surprise when there is a degree of responsibility that's presumed in the role of a public prosecutor if he finds this culprit reamer did you expect the public prosecutor to say there is a culprit in material in the firm not proceed but does the stance of the law is he should be given an opportunity to oppose and the courts should be satisfied that the accused has not committed the crime it's a bit off putting the cart before the horse what would be your conclusion again of the trial you should be satisfied of at the time bail is being argue there are also twenty one offenses which are non compoundable, the company it also goes with imprisonment was this find as a benchmark for what can be compounded and for the first time a minimum sentence is also been brought in. So when you say that again the provision is vague consider what is a provision for the minimum term. Say, if the offense accused of fraud or involving public interest, the minimum imprisonment will be three years now to my mind all fraud meanwhile public interest what is a for court that does not involve public interest so could you have said that all matters of fraud will a minimum. Punishment of for three years, then would a watcher being mistreated by a key managerial percentage. That would be a fraud under Companies Act It is even reportable never grew send a man to jail for three years as a minimum sentence. So all do you say it is not public interest, so if it is a place it then we should be prepared to do that even a while chummy

statement or a voucher or statement by an M.D. of a list Company should take him behind bars for three years. I mean it would have to be because it is a public interest. He's a C.E.O. of a listed company if you if you does cheating of hundred rupees on a voucher, you may bring a lot more on commercial contracts. But whether it attracts a minimum punishment of three years is are differentiable question either we say there is going to liberal or as you say, say that all fraud involves public interest and therefore all fraud has, let's just see this public interest but game goes inside of a case just the start of one person others also it can a court of law say that our explicit use of a phrase is simpler say there is little we did down this second the ordinary day by do you know we're going to look been this sort of ritual the yeah I'm just saying that immediately I know the resort reads it down I'm not sure, we may change all of you tomorrow after hearing loads, it's very practical because part of that because what happens when decisions come in the proceedings under the the court do not have power to strike down. It's they will have to be challenged even under good deeds is another as I pointed out a bit of normally by crooks which plays on the mind of the judge will be interpreting the provision that so the most of these privileges that remain as it is without a challenge but another question is that in countries like US which are so predictable is this a minimum terms like forty years fifty years, I will talk a bit about US or would you know, U.S. justice system is a little really strange actually when we look at it very closely, it's frankly, it's extraordinarily complicated, for example an offense like insider trading which are teasing are laws we have a definition and that is something to go by it's not even define whether you knew when you talk to a third party that the third party was going to trade is our factor to be determined in trial and yet you can throw him behind bars but what really happens in that system is the whole a justice system is engineered like the medical system to your capacity to pay for justice and your insurance. So typically you fight in the time or insurance enables you to do and then you settle so case does not acknowledge and which is why you also see that one percent of US adult population is actually in jail, it's one of the largest jail populations in the world. One percent of adults in US are in jail and I don't have exact statistics either of idly available, most of them are black, because they can't afford justice of the the business environment metaphors justice by fighting till the time the insurance permits and then they secure settlement economist

last year had a brilliant cover story on whether this is become an extortion system a good way extortion system where all you have to do is accuse and you get a settlement because the cost of taking a litigation from start to end in the US can be so quickly do they do basically say neither admit or deny a plea bargain. And you come back the regulator gets a headline, therefore even today after two hundred years of a republic so history, they are open issues are what is insider trading what is manipulation these open and like common law boards. Goods sell to set a standard on the basis of what is presented before them and then they even determine whether you go to jail or not a fifth drug there is everyday glittery authority can't initiate a prosecution. So like SEBI can walk into a sessions court and start a prosecution, In the US you got. You have to convince the Department of Justice and they internally act as a filter, this is it what our time is it really an offense. You may be offended as a government agency but we don't think this is criminal yet. So that could be, what we put out office that office actually is a feeder and you have to satisfy them that this is what the prosecuting agencies time and attention same with Australia, there is a Department of Public Prosecution called D.P.P. so those guys then decide what it's worth our time to take it to the criminal justice system. Here it's very easy you can simply file a private complaint and then leave it to the communal process and even that we talk about why it's not really happened. That's what about it that's what The Economist since it says for example sanctions against dealing with Iran and the very important commercial loss object in the United States so the New York regulator the state regulator of banking they have the also a very complicated system of state and the center regulating the same subject in your to comply with boards frankly very often we think the U.S. is utopia and you know everything is wrongly with us, but things can be pretty bad, even in the United States and which is why business is not done in the United States businesses owned in the United States, they set up businesses all over the world and all it from their factories and on the United States put a reason there, so if you look at if you look at it from that e nvironment, there is a fair degree of complexity in how the United States business and mine went is so steadily going at all banking prosecutes a bank for while letting sanctions against a dealing with Iran. It does nothing to do with a lot of New York. It's a bit like what we had in India it was a Kerala police which prosecuted the scientist in ISRO

for espionage, he was eventually acquitted, after losing twenty twenty five years of his life in the Supreme Court but it was a state police man who said I am really prosecuting on you know a nationalist unit is a scientist in ISRO, he's all over the place he's talking to foreigners. By the time a board justice, it is twenty twenty five years down the was exonerated fully fully acquitted not like what proved it was I think disproved from not mistaken, but it was an enormous expenditure on his time this is OK in an espionage situation but imagine it coming into doing business and in that sense we are moving closer to a status society like Russia like if you look tired old oligarchs you know what the symptoms of Chrony capitalism of doing well in business if you're close to the state and completely falling to the dumps the minute you fall out of it question with the speed of features of our state to society and that's something I thought I should leave behind we're very often is exactly they should add we keep it happening with you and as lawyers you have any judgment at the know when a client walks in I'm sure all of us have this little presumption that doing business means doing something with the other long term it's really embodied feeling that 'business wala hain to chorr hee to hoga You know that's a that's a very in grand mind said that your hand. When you're making is an hour and that feeds into the evolution of criminality even in the laws. So also just quickly to deal with the company that the two other important elements I wanted to see that the report filed by this a file by the SFIO is report of the police officer and the SFIO and SFIO investigation material can be freely shared with any other agency any other targeted under any of the law. These are two new developments in very often when you have one lapping provisions you know you have say be having powers to prosecute company that. SEBI has the powers to prosecute violation of SEBI and FERA for the same offense. These are issues that will come up over the next ten fifteen years I was just trying to think when I sat down with this presentation. What do we actually talk about shall we do a crystal ball and see make it futuristic and say what are the sort of issues that this room really deal with over the next ten fifteen years and I wanted to basically present it saying this is what I think would be happening, then of course we've talked briefly about a clamor for more but on this large I just want to see why a number of prosecutions as not shot up. So when you climb off of all you get it if you're a cut meat that happens, actually the car should make does possibly

to get powers I mean I don't know of all of your fully aware of the full history of Save me save your setup in nineteen eighty eight simply through a government resolution as a department which will look at statistics of Capital Markets. How many shoes scheme would is money how much money, so from the statistical analysts is organization and or time under World Bank I.M.F. pressure. It was felt that we needed a good leader and they were nudging us more and more towards having an employer and letting the market play to the C.C.I. earlier used to have her say on merits that an I.P.O. was of a quality that can be allowed are not allowed. So they are should meet a scam of ninety one actually knows the final push to say OK now we actually need a real regulator, IPC is not enough, we need a securities market regulator so SEBI came, then you had the vanishing company scam in ninety four ninety five that led to more powers that lead to civil penalties being brought in and in fact that's what led to the tribunals coming in then we had Ketan Parekh scam in two thousand two thousand and one that connect to the final act and it is becoming too and if I can open a six month imprisonment becoming ten year imprisonment and such incisional powers etc. So every time there's a scam and we can actually, somebody should do an econimic trick inter play study look at volumes as well of how these problems are actually been used. You would see that the Act was amended every two years and invariably preceded by a scam and every single time forced through an ordinance renewed and then to an act of parliament without debate, it's a classic reality I mean you can test this in your free time. You know regional act came as a security border and ordinance. You see the act, in the repeal this is the ordinances you're by the every move every step in this legislation has been through executive action of an ordinance followed by an amendment without debate. The last amendment again ordinals the ordinance brought in search and seizure even without a water and there was an enormous fight over this in fact I did post before the parliamentary standing committee and that sort of give give me a flavor of the quality of the debate because the learned parliamentarians wanted to know whether there should be certain seizure powers rather than debate whether the search and seizure of which already was that in the act and we were debating the man meant to remove the requirement for warrant and I went to whether there should be a watered down water. So if they had some quality of discourse before I do I know intimately you are at the mercy of

the executive in having the law that we have and eventually the law that came up was borrowed from the FSRC law that is their draft Indian financial core chaired by justice Shri Krishna it essentially said take warrant from the court where head office is situated because they are facing some real problems when they went to a look at a magistrate word was getting out that a raid would happen and therefore certain seizure was using nothing. So therefore and innovation was made single critical water and it went from a scored in Maharashtra to do a search in Calcutta and during Sharda that green valley they faced some issues about not being able to do a search and seizure, but more importantly is the use of sections Eleven B of the SEBI Act which essentially gives a B. the power to issue directions in the interests of the securities market that's all the provision says and the chip that the board may issue such directions as it deems fit in the interests of investors in the securities market and when I went back to research this identical provisions are found in the Banking Regulation Act as old as 1949, identical power was in the Insurance Act, identical powers in the P.F.R.D.A. now. The RBI never use this power creatively, but SEBI has made the most creative use of this power and I don't want to take away from tomorrows session and you're going to look at it but in a nutshell essentially the then AGS and even AG is Jian even age of us to be when argued in our court to see if we can say that sending a man to the moon is in the interests of the securities market being good have the power of the I mean the leading of their power is so expensive it has taken all shapes and forms saying don't deal in securities for any of us don't access to capital markets for fifteen years, don't sit on the board of a company. They tried to say don't audit a listed company we challenge it in a lead them back could say on this order has colluded and there is evidence of collusion and he's not participated in a floor, you cannot sit in judgment on the quality of the audit and said we stick with that an appeal to the Supreme Court that's pending in the Supreme Court, but what is their defense for doing this section and Section twenty four, this section can be used to write an order sitting in your own air conditioned room expired he added with no time frame unlike preventive detention where court. Court laid down a long lead to eventually legislation to say once you preventively, you know it has to man that has to be some process or a viewing that we need to continue etc. There is no legal provision to say once you do and expect a ban on dealing insecurities until further

orders, within what timeframe do need to review it. Within what timeframe should the liberty of doing business have to be revisited it's a bit like dail when you are less somebody, there is a time frame for going on to reviewing whether you can continue to need custody or not. No time frame in the law, no case law does lead now no constitutional court as they don't any guidelines on when you should be reviewed these are things that will come before courts in the next decay and increasingly you're also getting conflicting judgments it was one judgment of the Supreme Court I think it is Ashok Agarwal vs. SEBI, where the question arose for use of this power for a violation which was done when this section eleven in B was not there. As you know it's capital B means it was inserted lay down eighty five. So for pre ninety nine, actually this power is used as our emergency powers as it may deal measure that if something's going wrong pending investigation stall it or it's a bit like custody, but it is also used virtually like a punishment and in that judgment the Supreme Court in fact said eleven B but there are procedural powers and therefore can be retrospectively applies. But in the process the substandard sentence of the substandard action in that order was a seven year banned for a wrong done when the section was not in the statute book but it's been upheld, so it's a it's a power again where the court said more in trade what they're not of upholding the action and not wanting to be drawn into the reading of the provision and as you rightly said in an appellate process the court is not really looking at the legal validity of the section, so unless it's a lit challenging the provision you have to try and make meaning out of the provision whether its surplus age or it can be read down this is not the scope for rendering a legal interpretation is lower the school for enduring justice is higher so when the kids before you may do justice so there are a lot of judgments laying down interpretation in extreme and in the conclusion saying the facts of this case for that action is not warranted are using one forty two you can always intervene and say in that you want gays in the interest of full justice we think no more needs to be don, but that's a very happy and when I'm going to be in here we have none the wiser at the end of a full resolution, there's one other element I want to see that freezing of accounts the act excess and or must care to put a timeframe for how long an account can be frozen, when you freeze an account during an investigation, but using eleven B accounts have been frozen for years on end, saying don't don't touch

this account going to this, don't move the securities don't move cash and the person who's accused who's been directed to do it has such bad facts that he's afraid to approach a court in equity like the provision then becomes available for usage. So the usage of criminal power is very low while because you can if you are such significant power to inflict serious economic injury or to inflict economic debt without having to convince a third party judge and object to independent judge why would a usable for Section twenty four you have to go to the sessions court stand there, retrial, conduct proceedings convince the court beyond reasonable doubt and then secure connection. What joy does it give you maybe ten years later. Put the man behind bars for whatever the judge things is proportionate to the facts of the case. But if can really inflict extraordinary injury on a person without having to ever convince an independent quasi judicial body about it. you would do it because our judicial review was post facto it's an appeal, it's not it's not a priority to convince in the United States for example you countries an account, without satisfying a judge that this account needs to be frozen. It's a traditional doll that leads to the accounting but we don't have that only time members who are executive members of the SEBI Board, themselves have the power to inflict such injury and therefore you may criminalize and make it serious but you don't really use. So when you look back at this one scheme, then you want to have been lost our way completely in all respects it we need to criminalize having criminalized to really use it is very formally needed the other way on the civil interventions because again the civil intervention is not beyond reasonable doubt this reasonable suspicion. It's preponderance of probability an ex parte orders are seldom interfered with because X. party orders are typically done when investigation is still on and there is no time frame for completing the investigation. So, to take all that I say with a pinch of salt because as live near a defense lawyer. A lot of my prediction and my thought process is obviously colored by what I see from the other side but subject to that, is not something to think about and this environment of criminality that's come into economic law is something that I thought I should leave behind for the session and speak about how the law governing doing business is permanent say criminal law and that's a very unique situation in India like a breach of takeover violation in U.K. or US will never take you to jail, I mean you have a explicit every provision of securities law is criminal law and

therefore you said should be strictly controlled read down it's penal in nature, obviously no because these are regulatory provisions here to be possibly construed unlike fiscal statute, so that brings in another in dichotomy that for all civil purposes you got to read this widely expensive leap oppositely, but each of these provisions as provisions also double up as provisions of breach of which can put someone in jail think that's all I have for the session but there are specific comments questions, happy to continue. Actually of going to send is about, we are told from what I think it's East Timor and one other island country and we had a third and again on ease of doing business, we are gaining it, so if there are ten steps to form a company, we are making it five steps but collapsing the content of those ten into five. So I think Company not already has exchange control, SEBI it's listed at the minimum. Then if it's, you know depending on the industry it's in food in a resolution drawer or liberal or label or definitely tank sole choice which are egregious violation, factories law so there's a fair every every provision that deals with doing business is also a printer alone, as I said don't take this with a large dose of salt, but we have lost our way and it's not as if you know I mean shops an establishment act, we feel happy that OK we have a legal framework that works but how does it work is it really achieving the objective. It's the opinion many technical advances. Thank you.

Session 16

Mr. Lalit Kumar: Good afternoon and I know for the second time, last time I was in August and so was clear and I think so you were also there, I'm very glad to be here once again and feeling privileged to be addressing audience and participant and esteemed as you are and we had a very elaborate and a very nice session also by Som and Yogesh, you know enforce the post one session so I will try and explain certain concepts on the Companies Act which is the up in my view the most talked about provisions or Act. Arguably in the last one a half years ever since it's come, some of the provisions came into force in September two thousand thirteen and then other parts came from first of April two thousand and fourteen as you talk today the sixty percent of the provisions out of hundred seventy sections are in force the remaining forty percent provisions still are not in force. Primarily because of the reason that we are waiting for the national company law, NCLT to get established can set up because all of these provisions which are still to be more to fight with respect to the tribunal and in fact you know in the last one hundred years, whatever kind of questions that have you are facing the kind of problem they are facing the kind of interaction that we've had the Ministry of Corporate Affairs also on this issue. This law of this new act has drawn a lot of flak, lot of problems, both on the business side in terms of the concept which is why Som also mentioned that there is a committee which is trying to rewrite or not rewrite and repeal it but at least to make certain amendments to this Act So what I have done is now so first of all you could see that what was the need to write this act, broadly if you see the entire provisions of the new Companies Act, ninety hundred fifty six advocate or too many of these provisions, but it was fair to bat. It's an ordinal. It's been no did it and more that more than fifty or so it needed a complete restructuring or a complete new law to sort of provisions which one missing, when you go through there in by a provision of the act, I have doctored on which in my view looks to be the of the new law. It has often for says on no disclosures, lot of emphasis on shareholders right, shareholders democracy in activism and practically, also we are seeing that ever since this act has come into force the shareholders of the company have started taking serious, you know discussions and serious participation in the meetings of the shit hoarders they have

been declining resolutions proposed to them by the board and the related party transaction is one example many companies will be acting for even related party transactions provision to get modified to fight because under the company's Amendment Act which became effective on the ninth of May two thousand and fifteen, that it party transaction required the approval of seventy five percent share hoarders in terms of disinterested shit or does the promoters and the infrastructure will not allow to vote un with til May two thousand fifteen that was changed from a special resolution to ordinary resolution many companies which were waiting for their shareholders approval for that illiterate party transaction are not proposing those are Lucian because the threshold limit has gone down. So all of this is directed towards shareholders where does democracy and activism, equitable treatment of all shareholders as as leave you to the law new act that a lot of provisions which are there which give a right to the should or does and then were double treatment bases not only this. Even in this I mean for the first time close forty nine of the listing agreement of SEBI Which is no been made into a provision lays down the principles and says also that whenever any anything has to be in depicted in the listing regulations or the listing agreement, it will be seen from those principles and one of the principles laid down is the equitable treatment of the shareholders, regulatory oversight, which is mostly, you know more and more as a file which we'll discuss briefly about what does it is Fraud Investigation Office, so there was already that it is there even now but it has got more powers and more beat so that redressal mechanism so there are a lot of four provisions where we can whether shooter who knows, there's a concept of shit orders committee and shit or does a relationship Committee, so this is visual mechanism and corporate fraud, so this is one of the most important provisions of this and basically it's been, if you see as the mention that it can often also be called the set them back because the learning from the that there Mark whatever happened but that it was the role of the order to others and the auditors were questioned they could not do their audit or they did they had audit well but then still the things were not detected in the financials and then it was owned by the promoter. So all of those things that there is corporate fraud is reporting all of the corporate frost of the central government because that's how the provision order toes under section one forty three have to deport the four to the central government. Initially it was

our direct reporting of every fraud to central government. Now, there is an amendment which is that only material frauds will be reported and those material frauds will first go to the board of directors, so there is no direct reporting by the auditors to the to the central government which is the ministry of corporate affairs, so it will be first reported to the board so all of this has been done, you know to align with the with the laws for the increase in corporate governance but primarily the law seeks to otherwise. If you see the provisions, every provision eventually can lead to should hold those protection and investors protection. Nonetheless, there are certain provisions that I have listed here which I believe we are definitely even, you know in the in the reasoning given in the explanatory statement that the bill lays down that this is being done to protect the investors right and you know, so as I said Dr this act is often called the Satyam Act because a lot of the learning which were there from the start them act. Let's talk about even reporting in the financial statement. Let's talk about reporting in the border but it does report, all of this as a result of what happened in Satyam, now we see in hands disclosures in the financial statements in schedule three the balance sheet in the profit and loss account in the board of directors report whether it is to report the related party transaction and you know how other transactions happening with related entities. So this all the legal provisions which which are all the learnings which what their forms of them have been tried to put into the provisions of law. Few instances which I have covered is fraud Section four hundred forty seven, class action Section two hundred forty five deals with a class action, this provision is we can to force. National oak in seal to the N CLT, so once it comes in force or when it is established believe that the process of establishing in syrup is already going on and you know of that equipment once the N.C.L.T. reason please. You can have the kisses from the court seal be an by first of all get subsumed Body which is N.C.L.T. Duties of directors you know even Som also mentioned about, Section one sixty six see duties of the dictators which out there. In fact all of those provisions in my view what already there through judicial decisions the duty of care towards the shareholders to those the stakeholders in best interest of the company.

But what the new law has done is by specifically bringing section one sixty six, it has also gone and said that a duty towards the stakeholders, environment, community. So without

clear lead identifying and defining what would be, what would mean the in terms of the environment what we mean in terms of the community for example companies which you know the food food food companies and if you know things go wrong and it is and the cause it's a company whose products will be consumed by public at large anything wrong doing at the level of that company could be construed because what this community has not been clearly defined and it is not to be defined really. So it could mean the community even public at large. So therefore whether any incident by a company's product being consumed by any member of the public anywhere would also mean you know the come community at large and therefore section one sixty six can be triggered role of auditors, so all these are instances of new investor protection measures so let's take the first one fraud, so another nine hundred fifty six Act also if you go through the provisions. The provisions regarding For ordered or did exist it wasn't that there was no provision regarding fraud, there were provisions with respect to false statements false to financial statements or inducing somebody to invest in companies money in the investors. There were provisions and you know wrongfully siphoning off the company's properties or before even binding up this concept of fraudulent preference where you know before the winding up the properties of the company are transferred to the to the promoters to the disadvantaged, to the shareholders who would eventually share the proceeds on the company in winding up. All those provisions in the companies that carry the provisions of fraud, so the question is that what is or what was in there in the nine hundred fifty six Act which this Act 2013 wants to do, three things which in my view definitely the provision did not define under the old companies that the definition of fraud, Section four hundred forty seven now is a specific provision which are which is an inclusive definition and which specifically provides the act of mission concealment of any fact, abuse of position with an intent to deceive, so there is that concept of intend being there not what like Som was mentioning about intent is not important but impact is important I think here in Section forty seven ,it has to be the in going to be see whether or not there is a wrongful gain or wrongful loss unlike many sections of the Companies Act two thousand thirteen act, they have fixed responsibilities of sort and officers of the company. If you go through the sections various sections somewhere it will say the key many person of the company is responsibile,

somewhere it will say director is responsible sometimes it order that it was that responsible, some better to is all promoters are responsible, but for forty seven, if you go through it it uses the word any person, so which means that when any action or anything which falls within the definition of fraud takes place, it has nest not necessarily who with any company officer or any KMP because the school is very valued because it uses the word persons for example like in section one ninety five of the Companies Act which he's with insider trading there also it uses the word any person a lake section one ninety four which deals with forward dealing with it is a specific carved out of forward billing as an offense only by the who are time directors and the KMP, so the difference can be seen between those two sections with the intent what it wants to cover, so for forty seven, you have some other company, for example of a holding company is guilty of passing the resolution of the shareholders wrt which only one subsidary which is another person. So the company would be included in the definition of person for the purposes of full forty seven a but with respect to company you know eventually everything goes down to company's board of directors, because as a company that the decision making body is the board of directors t answer questions because I think the person's definition here would also mean Company but only for the respect to the monetary penalties, because that want to pretend it is as well as fine as well as imprisonment, so if ofcorse in that case had to be the company's directors who could be liabeled so the company here in this definition, so ssection for forty seven specifically starts by a clause but says that it is in addition to other binaries and other liabilities that stick for didn't dump a Section seventy five which deals with public deposits. Now in public deposits, it says that if a company is that is public deposit has failed to pay the principal or the interest. Then there is an obligation on the companies promoters and Directors repay that deposit, in addition not failure to repay their deposit. All sort and amount school for or under Section forty seven, because the way section Seventy five is written, it links that before to Section forty seven Section forty seven says that this this section will be in addition to all of the penalties so it would not mean that you would not need to repay their deposits which you have taken. So the section says that one is punishment of for fraud will be in addition to any of the liability for that action or inaction which is provided in the act, one of the examples I've taken is repayment

of our debt. So if you feel stupid deposit, so it will first have to plea their deposits related penalty, interest on the deposit, in addition to that there would be punishment under Section four forty seven. Unlike the nineteen fifty six act as I said, nineteen fifty six Act also had provisions for with frauds but every section depending upon board that offense was laid down the penalty so it ranged from imprisonment of two years to five years under the Companies Act one thousand nine hundred fifty six in the two thousand and thirteen act, what it clearly provides is same punishment with respect to all the kinds of and so it's not a five years or three years, so the punishment provided here is imprisonment from six months to ten years, as we were discussing in the earlier section also that fraud involving public interest has a minimum penalty punishment imprisoned for three years. So for example a company going for an I.P.O., a company which, because one of the things which amounts fraud is omission of material facts in the offing documents say the prospectus, so anything wrong in the prospectus in my view could mean, would definitely mean public interest is affected because public has been deceived, so this will fall in the category of public interest, as against, in a private deed a private equity investor invests in a company and it's a it's a private a transaction public is not more than a closely held company in a P investor R.G.B. part that is given false accounts, that would not mean there was public interest in my view, public interest involved because it was a private transaction so the remedy in such a situation of a drain been injured partner swing the other J.V. part of the company of the promoters to give you know the wrong and conceal or misleading information could fall in the category of offense which did not involve public interest, so otherwise, it's a minimum three years imprisonment for public interest and fine equal into so it's an and so this softens but also not be compoundable so it says and the fine print of the amount involved in fraud. For example the prospect of let's take the example of a prospect doesn't because of a wrong fact in the prospect of odd even in a private place and you don't we even go to public because there's a process of private discipline so that people up to two hundred people are approached by the company and they are given wrong financial statements. And as a result of which the amount which is invested I agree with you the amount which is which will be invested of will be given by these investors will involve because overly involved in the moment and that amount and determine in addition

to the imprisonment that how much fine will be imposed, so I think I agree with you that it should be should be a amount in word, Yes yes, because you know when this is a even even now I mean even under the existing other companies Act quantify because they have also you know the way you quantify compensation in damages raised by one of the parties. So that or be a question of you don't all of the facts at that point in time but there's no provision which says that this is how it can be quantified I'll draw your attention to what it says is that you know any act act on a mission which results, so here you know I mean you're right so that is whether or not there is any wrongful being order on full laws and there's a definition also given for wrongful gain or wrongful loss, so I think the intention to deceive is to be proved than the amount of loss right so, whether or not there is any suppose the investor for example let's take a case of an I.P.O. where the prospectus was given the wrong information and the shareholder actually invested in the company on the basis of that wrong information but the share price did not go down, so he actually did not suffer any laws but he still feels that as a shareholder that he was duped and his prospector's given to him was not wrong so the argument that there wasn't any loss to that investor because of that misleading and, you know false information in the prospectors, I think would still lead to fraud and would still make the complain promoter who you know, right, so what what it includes fraud. It says the prosection for this section for forty eight bits isn't somebody by definition it's is any misleading information any material omission in any of it on any report, any certificate, any financial statement, prospect or statement and other documents it means that any kind of document with the company has to will share with the stakeholders whether it creditors or bankers, if they carry a false statement in an intern with an intention to deceive would tend to moment to fraud so there are some instances which and that has seventeen instances given in the Companies Act two thousand which I link to section full forty seven I have listed some of them but that does not mean so one one in the petition or one view is that because only seventeen sections are listed to Section forty seven so that only those provisions will attract the provision of the action forty seven, think that's not correct because as I said Section forty seven is very covers any person was any event which would fall within the definition of fraud, but that has seventeen provisions in the company's act itself which link that any offense under those

sections will lead to fraud, so incorporation of company based on false and got it information, you know any untrue misleading statement in prospectors order to General mission of any person fraudulently inducing persons to invest money or you know, information which is which is not right, but punishment for acquisition of security means person like benami transactions of people who would be present at this is they are but actually they are not so they have that would also moment to for acceptance of deposit with an in print to this is what I was talking about sections of in the fight. Which is that you have accepted the deposit. No and in turn to get on it or who believe the interests of the principal. So that is a. You know with an intention to be for deposit does not it also covers. Ordered those been the order Ters late so collude and. In any fraud and they are. You know the average in commission of that fraud. So which is why order does. This is this is all happened because of the provisions that them so Order does. Are also under the law itself a clue he clearly says the duties and responsibilities of porticoes of any order to is proved to have a budget in the commission of that crime with the promoters the auditor. Itself will be liable and a section for forty seven. Of business being carried on for a fraudulent are not from purposes or with an intern could do for the creators. So these are those instances where I'm not listed all of them. There are a seventeen instances in the company's acts in which Dick Dick you do section forty seven but that does not mean that the idea that only provisions under which will trigger a full forty seven. The second thing. I believe that which is for investors. Protection enhanced industry protection because S.F. IOW even exists now. But that exists were government the guideline not a. Hello. But now there's a section which says Section two hundred eleven and wondered where it wondered where it was what song was also discussing that you know powers to the S.F. IO to investigate. And the report office if I will be treated as a police report so what what Section two hundred eleven says is as if I will be set up to investigate the fraud. And the complainant to be as if I hope would be that are just part of companies because that just part of company on his own inspection order when the documents are filed with the distraught of company comes to conclusion that there is something which or this some something which needs to be missed to get it in this company. So we could write could be as if I owe the first time. Even the shareholders. Section for whites that the shareholders

of they have passed a special resolution. They can write as if I owe and have the things the actors and prod investigated. The central government can move the as if I also this is what Section one hundred eleven provides. You know the people who will manage to file people of no great and extending from banking corporate affairs taxation of the capital markets security laws. Other two important provisions I like to highlight here is that when an S.F. IO investigation begins. All of the pending investigations by that it is of any of the regulator or that I'm being will have to be stopped and all the investigations. Safe IO has the power. All for or document and information so this. That bad little or investigation that that won't be happening so this I think you know especially because it is even the special resolution seventy five person should look and boss it is illusion. And if they believe that the affairs of the conduct company need to be conducted on their own applied to the as if I owe. This is another. In my view a provision that respect to this falls under the chapter operation and mismanagement. But this is the most talked about when the companies that came in again this is again a fallout of what happened in September. Section two forty five still Norton force primarily because in C.L. It is still not in place and the application from from members in deposit and because by even now Section three ninety seven three ninety eight. If you see Section twenty seven twenty eight for Operation mismanagement the same number of members can make that application so how is class action when two different because in class action one deposit quarter because the company has accepted deposit. They have also been brought into this. They have a right to make an application for a class action and even a single. You know member holding more then deposit. We're not holding more than ten percent of the debt of the company can make the application. So the kind off for damages a kind of compensation that can be a bordered is and there are certain grounds one one thing is that there are certain grounds in which application can be made for example. The shareholders believe that the company's not carrying out the object for which it was incorporated companies not doing the business for which what its objects are. So they can make an application to in C.L.P. and seek a class action. The coverage of in C.L. aboard the damage and compensation is bite it not only extends to the company and that it does not it does but even to advisors and surgeons. Example The question arises whether. So for example a lawyer was given an advice and

the company has acted on that advice which eventually turns out to be wrong for the from the company's perspective but a long legal opinion. See for example lawyers opinion of it is you know on the net. I spotted in the sector in the. The I is not permitted and. You know when the prosecution takes place again the come in the company's made libel. So in that situation. Whether an advisor or a concert or condone export would export is in the Quantic exporters are defined them. Because Excel exporters in the context of their probably coughing. So a person who gives an expert. Comment and. They are incorporated in the prospectors that is this book label. But that's what as advisers or consultants are concerned that films are not defined to the question is a lawyer advised what client on which the Company Act would be made libel. There is this still no clarity on this lake product because it's clear that you know if order to have given advise which is wrong could be made libel but. But by then consultant could be lawyers are covered in this but there is still not platypi in the section still not come into force in order to sort of stop. Frivolous applications be. Yes, or less than ten percent. Condition one is a hundred or more members or ten percent of the porter number or not less than ten percent of that who conditions. So you're right that if that condition often person does not matter then under the law section under protection to forty five cannot be taken to unseal and there are specific cases. It's not that the US the state five or six cases that industry grope you or leave any one of those events have taken place and your. You know the complainant other applicants say that this one of these activities of happen. And that to be in this to get it for the. As a class action. Only that can be taken so I just quickly taken to you don't do you so even if our shareholders or applicant meet the threshold limit but not. Not that acquired. End of the section then also class action will not lie. But not under section two forty four years. But yes. Well actually it's not knowing that start part of that story about it. The question would be end of what ground. So deal have to last action is look action. Obvious stuff a glass as a public and the like now. Indigo in dust of the one in one post an obvious choice of operation. Because done to slug. What we call it what you want it being that it could end up quote, criminalize who absolutely leading is that because I didn't we would be didn't mean for the operation and mismanagement itself unless you have some contractual are still there would be a question is what is that a media going to come here

because even the verge of into right and certainly even the forty five is are no operation this by them in the chapter but your career school is operation in mismanagement. I think in my view we even of these this provision wasn't going to do school. Still it was not back, it does not see because when September happen and then the foreign born tornadoes in the US go to they were leave to find a class action. In a law to this extent from Companies Act post victim were deficient. Before you took over really for now that's what you are suited to so this is a. It's not specify what order part of it. You see also that you have over but that's OK no I think you know I was a lot of order competition and I'm a just doesn't the poser. That's nothing more than that and also, it is only as I say I can get over it so it is only in thought and situation. That an application for class action can lie and the cases given here are in the company from committing an act which is are provided six. Charter documents. In the company is not doing so suppose it has borrowed funds. When it's Articles of Association said that it cannot borrow funds, beyond the some sort things like this. It's is a breach of any provisions of the same thing, history in the company in that it goes from acting on any such history in the company from being an actress contra to the provisions of this Act history in the company from taking action concrete we need a solution passed by the members. So the members for example ASADA solution for. You know a certain limit of investments. And who go and make the investment beyond X. to section one hundred six allows that when a company makes a certain list been more than its network. You have pictured or does appear within the shareholders get the approval of was certain amount. If that is not, you know a day or two when that is in excess of that then this claim in this discussion. Complaint under section two forty seven forty five can be made and the remedy that you'd ask for is the damages and the compensation and be awarded by tribunal. One of these acts of the company which for which the, but she told us or deposit court does, you know information which is which is not right, but punishment for acquisition of security means person like benami transactions of people who would be present at this is they are but actually they are not so they have, that would also moment to for acceptance of deposit with an in print to this is what I was talking about section seventy five, which is that you have accepted the deposit with no and in turn to get on it or you delay the interests of the principal, you know with an intention to defraud the depositors, it

also covers auditors. those been the auditors collide and in any fraud and they are, you know the average in commission of that fraud, so which is why auditor, this is this is all happened because of the provisions that them so auditor are also under the law itself a clue he clearly says the duties and responsibilities of auditors if any order to is proved to have abited in the commission of that crime with the promoters the auditor itself will be liable and a section four forty seven, business being carried on for a fraudulent are not from purposes or with an intent to defraud creditors, so these are those instances where I'm not listed all of them, there are a seventeen instances in the company's acts in which take you to section forty seven but that does not mean that the idea that only provisions under which will trigger a four forty seven. The second thing, I believe that which is for investors protection enhanced industry protection because S.F.I.O. even exists now, but that exists were government the guideline not but now there's a section which says Section two hundred eleven and two hundred where two hundred where it was what Som was also discussing that you know powers to the S.F.I.O. to investigate and the report office if I will be treated as a police report so what what Section two hundred eleven says is as if I will be set up to investigate the fraud and the complainant to the S.F.I.O. could be the registrar of companies because that just part of company on his own inspection order when the documents are filed with the registrar of company comes to conclusion that there is something which or this some something which needs to be investigated in this company, so we could write to the S.F.I.O. the first time even the shareholders, Section for whites that the shareholders of they have passed a special resolution, they can write to S.F.I.O. and have the things investigated. The central government can move the S.F.I.O. so this is what Section one hundred eleven provides. The two important provisions I like to highlight here is that when an S.F. IO investigation begins. All of the pending investigations by that it is of any other regulator or that time being will have to be stopped and all the investigations S.F.I.O. has the power, all for or document and information so this, investigation that that won't be happening so this I think you know especially because it is even the special resolution seventy five percent shareholders can pass a resolution and if they believe that the affairs of the conduct company need to be conducted, on their own applied to the S.F.I.O. This is another in my view a provision that respect to this falls under

the chapter operation and mismanagement, but this is the most talked about when the companies Act that came in again this is again a fallout of what happened in Satyam, Section two forty five is still not in force, primarily because in N.C.L.T. still not in place and the application from members in deposit holders and because by even now Section three ninety seven three ninety eight ,if you see Section twenty seven twenty eight for Operation mismanagement the same number of members can make that application so how is class action when two different because in class action one deposit quarter because the company has accepted deposit, they have also been brought into this, they have a right to make an application for a class action and even a single member holding more ten percent, holding more than ten percent of the debt of the company can make the application, so the kind of for damages or kind of compensation that can be a bordered is and there are certain grounds one one thing is that there are certain grounds in which application can be made for example, the shareholders believe that the company is not carrying out the object for which it was incorporated, companies not doing the business for which what its objects are, so they can make an application to N.C.L.T. and seek a class action. The coverage of N.C.L.T. to abort the damage and compensation is bite it not only extends to the company and auditors not it does but even to advisors and consultants. Example the question arises whether, so for example a lawyer was given an advice and the company has acted on that advice which eventually turns out to be wrong for the from the company's perspective but a long legal opinion say for example lawyers opinion of it is you know on FDI is permitted in the sector and FDI is not permitted and, you know when the prosecution takes place again the come in the company's made liable. So in that situation, whether an adviser or a consultants or export would export is a defined them, because export in the context of public offering, so a person who gives an expert comment and they are incorporated in the prospectors that is liable.

So if you see I mean my even if you look at it, forty one to forty four forty one two members, that's right because two for the for you, apart from members because it does the product of because it does so they need less of them as the case maybe I think there are two other distinction between a broadly, two four to forty four against whom you can take recourse actually a company and s salutary appointee, whereas in this case you can take a

leave against the company as well its auditors or any other experts also and I think the second one is in terms of the matters where you approach, so outside in the other with a class action is looked at is not just in terms of past and present activity, also do they stay in the company from doing future activities you could even stop them from undertaking a large acquisition also, whereas the operational mis-management is more reflecting the worst past and present and maybe you did leave the company couldn't do some things on recurring basis, but you generally don't get restrains regarding future course of action that the company may do. So that I think do that really to do additional point. I think aid should be applicable to all the members that's how they were you know all the public shareholders, but that's why I think while the orderly binding one or whatever but because there's a process to get compensation for all of them because I think the applicants hundred or one tent with it as applied seeking the remedy who could beat the competition in damages sort rather than companies because they were not party to this class action. There's a number to cover doesn't say that the only thing it is the order will be binding one or so because you are saying suit in a representative capacity because people we ho do not even join, company has one thousand trade or dozen only hundred going to a does what does been going we'll be getting the compensation right.

Mr. X :Just so that is what really at all on board and they're suddenly and what particularly and invention have been produced to be good but at last particular question, so we just saw a matter of strike evolving you want to design your foot in the US if you have not signed up to the class action suit you don't get to in general unless there is some major deposit that company is fraudulent management has been asked to deposit separately and for the shareholders in general, unless you sign up to a transaction suit you many times don't get a remedy, I was saying it because family says it binding on all the members. This section two four forty five come five has not into play, we have raising on hypothetical questions and you are answering a hypothetical answer not a good many immediately let me not your problem at all you said it is going to get thing all happened again questions knowing. Even SEBI has the passed, provides going into situations to give exit opportunity to the public shareholders are to sending should order in two situations, one is where the company raises funds through an IPO or prospectus and after raising the funds, the purpose and object the

funds were raised that publicists changed for example it was raised to for an e-commerce venture and the company grows and changes and makes a doesn't do e-commerce, does say brick and mortar retail stores. So in this situation the public was given funds to the company has been shareholders been given a right first the company can or trained object for which it has raised the point, that's one second is the prospect does contains list of or details of material contract substantial material contract of the company so of the terms of those contracts are changed, after taking funds from the public through an I.P.O. process those two things cannot be done unless and on the shareholders who have you know, seventy five percent of the shareholders public allow that change and the older does would not permit this change are given an exit opportunity because it's fair to be too big to be given the exact opportunity at a price which is as but the you said least equal work or so as recent as eleventh of January SEBI has cleared and the formal notification to him in the issue of capital and disclosure requirements ICDI regulations will come. So what briefly those regulations say that if the company has raised funds and changes the object for which it has raise public funds or the contract that were mentioned in the prospectus if the terms of material of those contracts I changed, then special resolution of shareholders and exit opportunity to the descending shareholders to be given the important conditions here are that at least they should be in percent shareholders who are dissenting and at least seventy five percent of the funds, if not list if less than seventy five percent of the fund has been deployed for that purpose so if the funds which are even been used more than seventy five percent for the purpose they were then there's a normal issue but if it is less than seventy five percent for the reason for they were raised, if that is not used for that purpose then exit opportunity at an exact price and exit price is the price which is which is as per the SEBI's takeover when open offer is made to the shareholders, same pricing norms have been provided so, criminal liability we've discussed this but just to impress upon this point again the criminal liability promoters for mistreatment in the prospectus, you know and this is this is gets linked to Section forty seven because this will be one of those instances where you know, but it punishment is a can for forty seven civil liability for promoters and missed statement in the prospectors, so here are a compensation if any misleading information in facts are omitted punishment for fraudulently inducing person to invest

money again this is linked to Section four forty seven. Then there's another new concept which has come as a private placement offered not the public at large part of a company raised funds under Section forty two to a private placement offer from less than one hundred post since in a financial year, you know it's a private off a letter and there are certain compliances a Under Section forty two for that and if those compliances are not meant that all are for for the benefit of the investors those if not met, and there is punishment for that as will Section seventy five which were discussing the compensation and damages to be paid if you defraud or before the raise money and were not written on the front of the deposit holders, a minority this is also one of the sections which is not into for Section thirty six. But this is an important provision. The language of this section is whether a provision lake squeeze out has been brought into, so what it says is that if any acquired acquires more than ninety percent of a company, he is an under an obligation to give in to the remaining ten percent and buy their share so that he can completely control hundred percent of the company or vice versa remaining ten percent should also have a right to all for their sheer schools are quite up to ninety percent acquirer at an exit price, so the section is not being brought into force yet again because this is all leading to NCLT but one important question which is even there under the existing companies act which we taught has gotten by section two thirty six but it isn't is can it be a force to squeeze out which means that is it an offer or once an acquired acquires more than ninety percent of a company, he can just give are forced exit means he can squeeze out and buy them by force and they will have the minority shareholder will have no option but to sell their shares. The language of two thirty six dosent suggests this and even this doesn't be the intention to have complicity squeeze out. So in short, the way the provision is written it says that exit price will be fixed and they'll be through a rule through or rule proof rule making provision for pricing mechanism the exit price may be, no but they have not but going by how it works is because provisions where they are not exact price for example for Section thirteen and twenty seven when we are talking about an I.P.O. process when the competes in his its object. There may be pricing will be go running price that's what the sections says here rules will come and then the rules the pricing will be determined how it will be given that exit prices are going by the logically exit prize will be market price for them up price of the

shares prevailing at the time of this acquisition has been made because the choir is already acquired on will already acquired ninety percent we are talking about the balance then people in present or ten percent, so the only provision in my view here is we believe that section six thirty six there's still no compulsory minority squeeze out, I think last two slides out on related party I think the most talked about Investor Protection measure is a related party transactions where it is the rule of the minority the majority of the minority, so what the party provisions see that transactions which take place between deliberate parties, related party will not vote, so for example if there is a transaction between a holding company and a subsidiary company, the holdings in the holding company in subsidiary company being a rigid party and other under the Companies Act, any agreement with the related but with that subsidiary company, the holding company will not be allowed to vote so for example, a holding company holding fifty one percent she is fifty one percent shareholder which is the holding company will be asked to be refrain from working for the people who will board will be there disinterested shareholders forty nine plus and so out of that majority of those disinterested shareholders, as I said earlier that this provision was a special resolution of the minority shareholders. The companies that got them and it now it is an orderly resolution which is fifty plus one person board and we are seeing still of approvals coming known because it's an easy way to get it but still the related party or the connected persons will still not be allowed to vote so this is a again an important provision for as far as minority shit or does that concerned and the last off this is the restriction on loans to directors and look this is not a new provision but this is become more stringent where the companies that it does either give loans to themselves or they give loans to people what connected to them so basically people who are connected to them will be there till it gives its classic case of siphoning off Companies funds in the name of fictitious companies where directly or indirectly those companies are either controlled by the as themselves or the management them self or by their relatives so there is a long list in the Section one eighty five which defines what really people who will be construed as connected to the directors, so the basically there are companies in which the themselves in the addict as are hoarding shares or are holding the board position. So those companies ought there are companies to which they can act according to the instructions of

the directors, according to the instructions of the company in which the directors are themselves on the board so those companies are connected company so there is a probation of giving loans to those companies so this is also a measure where that company's funds are not diverted, have more or less discussed about this. There is a specific section and of the directors duties towards the stock stakeholders, environment, community, everything is that he generally in a very generally and a very broad manner written is action one sixty six of schedule for in order to make independent directors specifically says there's a function for an independent function of independent director that while they are serving on the board, they will be bound to safeguard the interest of all the stakeholders and it uses the word particularly the minority shareholders. Then the concept of whistleblower means any employee of the company, any direct that employee of the company who believes that there is, you know something wrong happening so he has been given the legal right to blow the whistle and report to the audit Committee. So this provision was there in the listed company now this is been introduced under the company's Act, any time during the performance of the audit, if the order does believe that they have and there are two or three instances which be are also handling that the auditors have gone into with the government so earlier it was a direct reporting to the government, now this is the section one forty three. Which deals with this is that it will be you know first reported to the board and the board will explain to the auditors, if there is no satisfactory explanation by the board to the auditors, then in a confidential, you know reporting will be done to the central government and that would be a ground of starting action against action four forty seven and investigation into Section one hundred and twelve all of those would follow from this, one provision which are so this is the structure to us. So they will be stuck into the orders of the company and so they will be company ordered us who are appointed by the shareholders at the and region to meeting and who are bored to the shareholders, so that strikes or so earlier there was a direct route to the government to it was very harsh, that you don't board has not even got a chance to you know and so those questions. So auditors duty is supposed to report to the directors and I think we had four forty five days to get the comments, if the comments given by the board are not satisfactory, than there do people have to report to the central government. There is one new provision which has come is

called the entrenchment provision in the Articles of Association, I don't think with this be a shareholders or in this to protection measure at large but in private transactions this could come handy especially in joint venture situations or private equity transactions what this provision says is that generally the Articles of Association in law can be changed by seventy five percent vote, what this provision say that the shareholder the company can list articles within the articles of association which would need a higher vote could be eighty percent could be ninety percent or even unanimous to protect private investors, there could be clause we've started building this clause in our private agreement with article to say that generally the causes that we were talking about, so in order to change this particular article, it will not need us only a special resolution of seventy five percent but it could be judged on a must. So those reserved matters will always be protected because the articles cannot be even changed to that extent. So now there's a specific provision to provide such a clause in the articles which is called the infringement provision. e-voting is another measure to do the specific provision for the house and you know all eyes feel there is an enhanced disclosure requirements for those who read the border but it doesn't report or you read financial statement what used to be under the nine hundred fifty six Act It has completely enhanced a lot in disclosures and there's a lot of requirements on the companies websites also, so this is it and I'm happy to answer if there are any questions, I am happy to answer. Thank you.

DAY 5
Session 17

Dr. Geeta Oberoi: Very good morning to all of you. All of you actually have brought the winter to Bhopal. I must tell you there was no winter. We had given up. So also about many of you are making our demand for Bhojpur I think tomorrow we'll plan something. I just ask protocol officer at what time that place closes and let you know where we can go. Yes collectively. I'll make it official trip because then it is more comfortable for us. So let me try today for making it official trip and today we have four resource persons five infact all of them and I'm telling Mr Sandeep Parekh to do session moderation for all these session. Of course all or all our speakers as is the protocol will introduce a little bit about themselves and then start technical session. They'll speak somewhere around. You must close by forty forty five minutes so that there is ample time for question answers given to judges. And of course if there is anything very very important question in between only would you want to us then we can think about that also. So with this I asked my first speaker Mrs Dharmishta Raval to introduce something about herself to us and start her session.

Mrs. Dharmishta Raval: ...I would describe myself as....legislation was enacted in 1992 and I was with sebi till 2004 and saw sebi grow just like you see a child grow and I resigned from sebi and now I a practicing advocate at the high court I've seen sebi as regulator and I'm seeing say we where I can legitimately make money and be a litigant also and fight cases against sebi. And I hope I can give a balance view today. Before I came over here I was thinking actually what I should really present because at the end of the day it hasn't had to be said to be speed something which would be helpful and meaningful and It's like talking about sebi around twenty thirty minutes is like talking with constitution in twenty thirty minutes. So the approach which I have adopted today is just to give a holistic view of the powers which are available to sebi just run you through the legislation's which are avaiable to the sebi and then end up with some case laws and after the last case I would taking up is the subroto roy sahara case and then have question answers depending on which are the areas where I was not explicit enough. The...of course the topic that was

alloted to me of course sebi judge and the executioner. But I would like to expand it and say that sebi legislate, sebi is the investigator, sebi has police power, sebi is a quasi judicial authority. Sebi is an executioner. Is sebi all this where is a principle of principle of....power because our Constitution talks of separation of power talks of principles of constitutionalism and if sebi is all this how is it that this has been combined a one. And how has it been seen and perceived by a Supreme Court. The preamble of SEBI act is to protect the interest of investors, regulate the securities market, develop the securities market. I would call charging section of sebi act as section 11 and section 11 of the sebi act cast a duty to carry out the above three objectives by such measures as it thinks now any case law sebi act which one would refer to you will always find these three principles specified in that case law and charging section of sebi the section 11 to carry out the amendment, objective by such measures as you think this is one word which has been used by sebi to prevent frauds to prevent market manipulations by such measures and we will see some case laws on this but maximum amount of litigation will be on the word on such measures. What do you mean by the word measures? The jurisdiction of sebi ofcourse is section 2H of SCRA act define securities because talking about regulating securities market, shares, scripts, bond debentures or other marketable securities of alike nature in or of any incorporated body or other body corporate and instrument declared by the central government as securities. Now if you look at the first one : shares, scripts, bonds, debenture or other marketable securities in and off incorporate body or body incorporate that means any securities issued by the body corporate issued by a company within the regulator framework of sebi ofcourse mutual funds and government securities. Basically, government securities also regulate by reserve bank of India. For the reserve bank of India it is the banker to the government of India. So government securities transaction and trading is also to an extent RBI has jurisdiction. But sebi has also jurisdiction over it. If I may just take one minute if I were to compare sebi with any other body in India I would say sebi is comparable to reserve bank of India because just like the reserve bank of India is a regulator is the banker for the government sebi is a regulator for the securities market. Then we go to regulation of primary market, the sebi act section 11 empowers sebi to specify matters relating to issue of capital offer document advertisement, soliciting money

from public and transfer of securities so as far a primary market is concerned this is the only section which empowers sebi to regulate the securities market and issue of capital of a document so when you talk of IPO we talk of prospectuses these are all regulated under section standalone section of the sebi act it is through this section the sebi regulate the advertisement the IPOs, the right issues, the preferential allotments. The Sebi can also regulate primary market because some of the companies has section and we delegated it to sebi and the power administer the section of companies act relating to prospectus, allotment, refund, listing, buy back of securities, transfer of securities, debentures and dividend. Even in the companies Act 2013 this section is also delegated to SEBI. When we talk of prospectus allotment and listing. This is the whole IPO process, right issue process, buyback of securities and transfer of securities. This is extremely important because when we sometime want to understand the jurisdiction of sebi some entity like AOP or a trust. If it is not a company it would not be regulated by sebi. So sebi's jurisdiction would be to a listed company or a companies intending to get listed so first one is private companies it is not available to private companies but if a private company is intending to get listed at that point of time that private company gets covered by the first point. So once you want to become public, once you want share holders, once you want the investor to come in that is the point where the parliament has said the sebi must have jurisdiction. If there are investors, if there are shareholders, if there are public, it is that point of time that sebi's jurisdiction really starts. The SEBI also regulates market intermediaries like merchant bankers, banker to an issue, share transfer agents, registrar to issue, and debenture trustees. The regulation of intermediaries enables sebi to regulate securities market, ensure investor protection, frame market practices, due-diligence, true and fair disclosures. As far as regulation is concerned sebi has prescribed for capital adequacy of brokers there has to margins before you go and buy sell something you have to make payment of the margin. There is a state guarantee fund there is fully computerised system. The shortening of settlement cycles, there is surveillance transaction, transaction notified areas other than through stock exchange is illegal. So government of India has notified areas and in those areas you can buy and sell securities only through stock exchange. Otherwise for example bombay, delhi if you are transacting in securities and if you are doing it outside the stock

exchange there are called illegal and in securities market parlance nehal and sundaresan would be able to tell you more. You call it as dubba trading. Where a parallel trading going outside the stock exchange the trading going on the stock exchange but parallel but buying and selling outside the stock exchange so you do dubba trading is there and the ration that could be was on stock exchange the transaction are more regulated, they are more transparent. So final trading outside the stock market and dubba trading one person who would carry outside the stock exchange the broker was not giving the money he went to delhi high court filed a case also delhi high court said transaction outside the stock exchange are illegal so you may lost money we are sorry we can't help you it is a loss of money so as far investor are concern if they are transacting outside stock market....they are the ones who are loosers. The fully computerised system I think any investor in whole of the country when puts in a bid he can know at what price reliance bought for him or what price lets for tata steel sold for him. Each of the transaction of the stock exchanges are fully computerised and time date and ....also given in that but to my mind the listing agreement extremely important piece of agreement. It is a statutory agreement though called agreement is a statutory agreement which part of the regulation of the stock exchange. Sebi can do amendment of listing agreement and the agreement consist of continuous obligation of the listed company to stock exchange....public. For example disclosure regarding vote practices, corporate governance and information regarding the company. But this agreement gives the powers to sebi to ensure that the company is not making disclosure about the company there sells to public and shareholders at large so the statutory agreement cast and obligation on the companies which are listed on the stock exchange to make true disclosures and to comply with corporate governance practices as prescribed in the listing agreement. Even though it is called listing agreement is really statutory is binding is violation of there could be penal action which sebi could take because of violation of listing agreement. Now when you talk off sebi as investigator sebi is empowered to carry on investigation, transaction, securities are being dealt with if transaction and securities are being dealt with in a manner detrimental to the investor. Remember there is no violation they are not violated the law but they are transacting in a manner which is detrimental to the investors or when any intermediary or any person

associated with a security market has violated the provision of act, rules and regulation. It also has powers to search, seizure and impounding of documents etc.

Voice is not clear and very fast.

One common defence which all people take up with sebi...that this is the challenge in a court of law is I am a investor sebi has no jurisdiction on investor. I am a private company sebi has no jurisdiction on private company and therefore sebi actions is without jurisdiction. sebi can investigate any person associated with the securities market.

Question and Answers with the Participants

Participant voice not clear and audible.

Price manipulation and market...would take place over the phone. So getting the phone record are going to be very important for them but there is post facto hearing provided so after hearing recover monetary fines profit or losses avoided to recover my attachment of property moveable immovable bank accounts, sale of movable and immovable properties, appointment of receiver for management of movable and immovable property. Sebi works...legislate.....guidelines and circulars, regulations are substantive in nature, independence to judge and prescribe the policy to regulate the securities market that is legislative dependence. No prior approval of the government has to be obtained but the regulation are to be placed on the house of parliament. There is a transparent procedure for drafting regulations and sebi issue guidelines which are binding in nature. If you look at the sebi act, depository act and SCRA act none of them are more than section 35 in nature. But Sebi regulates through regulations and the last time when I counted when was last two years back they have notified 44 regulations. Sebi also issue guidelines, circulars and five years back the complain in the market was that the circular a day keeps the stock market away....just to illustrate that point whole of the sebi act section 12 prohibits any manipulative or deceptive device section 12A provides scheme of artifice defraud which

operates as fraud. On the basis of these two section 12 A, the sebi has notified the prohibition of fraudulent and unfair trade practices relating to securities market 1995 and repeal in 2003. So there is one section 12A which prohibits market manipulation, prohibits deceptive schemes, and prohibits frauds. There is no other section in whole of sebi act only sebi act says that sebi can frame regulations. On basis of this section 12A and the power to frame regulations, the sebi has drafted regulation defining what is fraud, defining what is manipulation, what is the procedure to be followed, what direction can be imposed. Ofcourse Mr. Sandeep Parekh will be talking to you alot on that but there is one section 12A and 13 is to power to sebi regulations and on these two sections sebi has brought into force into regulatory framework which prescribe what is manipulation device. So sebi actually regulates the market through regulations. Act is very simple the regulation which are there...I think regulations we as lawyers make the money. Ofcourse the appeal lies to SAT. Civil court jurisdiction is barred and appeal from SAT lies only to Supreme Court and not to high courts. It does not mean that 226 & 227 power are taken away. Statutory appeals lies to Supreme Court and not to high court. I think recently, I was told that there are some civil courts which are exercising jurisdiction sebi has been telling them look civil courts don't have jurisdiction please do not exercise any jurisdiction. The civil court is telling sebi is an interesting of law you like to examine it. The courts don't have jurisdiction they don't have jurisdiction but they say it is an interesting question of law when admitting the matter and passing orders and in the high courts...sometimes we are told we should also satisfy the conscious so many of the high courts...but the litigation was so much in the...so I will end up with some case laws and the first one is...just one gujarat judgement i have put in rest are IPR offences, separation of powers I just wanted to end up with last two sahara cases and the first one sir it is regarding payment of fees to stock exchanges and anytime the payment of fee to any regulator or government is challenged we see that this case law is always used because it was starting of laying down the principle which says that they did not be a quid pro quo sebi can levy fees. The fees could regulatory in nature. That time sebi said we have to put up a building we need money for putting up that building. So broker where asked to pay money for sebi's building supreme court said yes you can take money for capital expenditure also a quid pro quo is not

required as long as you have some regulatory activities you are carrying on in that case also you can levy fee. Sebi is financially independent, sebi doesn't have to pay income tax on income also. It does not get money from the CAG accounts. The first time sebi exercises its power under the act of issuing directions and please impound the money and the monies were impounded. Hon'ble single judge said penalty sebi has no power of issuing such punitive orders. Ofcourse the division bench said these are remedial in nature. The next one is sir AIR 10 2000 SC where in IPO false statements where made and because false statements where made once again sebi issued direction and then....false disclosure made to stock exchange. Once again sebi issued directions supreme court upheld the directions. The last is the sahara case which talks of the regulation of the primary market and says that as far as primary market is concerned sebi is the sole regulator if anyone who intends to make their securities public sebi has the jurisdiction to impose fines and penalty and ofcourse the last one is AIR 2014 SC 4321 where they said that supreme court held that contempt off the court's order where the supreme court observed there are false statements....judiciary is pressurised. This is one case where....when he gave a press conference he made a statement after his retirement last day that we judges are being pressurised. We have never seen or heard that it compelled to make a statement so in judgement also he says we judges are getting pressurised....investor that the lawyers and senior counsel adopting such practices which never seen before all this is there in this judgement where he comes on heavily on the company, he comes heavily on the lawyers and also on the pressures which he was facing but as we all know....the question now arises how long, how do you ultimately end the subroto roy case because the contempt of supreme court case...end to it but there are going to be issues which arise from this judgement also it may get diluted to some extent I don't know but sir thank you very much and it was a pleasure.....

Mr. Sandeep Parekh: We take a quick 10 min break. Thank you.

Session 18

Mr. Sandeep Parekh: A very dear friend of mine...so I will start with the story of a very distinguished gentleman. His name is Charles Ponzi. Italian Immigrated to the US. 19 early 1900s.So from 1920 to 1919 he did odd jobs like washing dishes etc till 1919 he came upon the he discovered the magic of perpetual money. So he started marketing notes on which he promised an interest of 45% in a month and 100 % in 2 months. So people asked him where you are making this money for you to give these kind of returns. He said you know. Again this is post world war 1 era. It was a time of great difficulty and governments used to make life easy for citizens by introducing various schemes. One of the schemes was like a post card which you could send across from the continent to America which was basically a postage stamp which you could exchange for money and the stamp cost 1 cent or the equivalent of 1 cent in Europe and it could be exchange for the equivalent of 6 cents. So he said I will do what I will make some money out of it. But I will buy at 1 cent and sell at 6 cents. 5 cent profit on every stamp I get. But I'm importing millions of stamps. The fact of course was that millions of stamps were not manufactured. Anyway he sold the dream and at the peak of 1919 there was a queue outside his house outside his office which went on for 3 kilometers. People wanted to give their life savings to the financial wizard. Till of course newspaper the local newspaper in Boston ran an article. The police commissioner got alerted and sent 2 constables to inspect the offices of Mr. Charles Ponzi. Out of the 2 police constables, one of them ended up investing in Ponzi's scheme. People didn't believe it. He was too brilliant to be wrong. Finally an article in the same paper kind of shook people a little bit more and there was some investigation by the local prosecutor etc and finally of course it was a bubble. He was paying the people were bring in the principle today he was paying the people who brought in the principle 30 days back. So he was robbing peter to pay Paul as you say. This scheme lasted for less than a year but the size was so spectacular 8 banks collapsed with Charles Ponzi. Millions of dollars at that time so probably billions of dollars today were lost by Charles Ponzi mainly by giving from X to Y plus of course leading a very very extravagant life. He was finally jailed. He learnt law in jail defended himself. Jumped bail ran away to Florida. This was of course

early 1920s you did not have communication facility so he ran to Florida where they did not know that he is facing conviction in Massachusetts and of course he was selling land underwater sight unseen 3 dollars an acre. He again kind of went to jail there without the Massachusetts state knowing about his conviction. Finally after many many years in 1933 1934 he was deported to Italy. We have seen financial frauds through the history of the world we have seen commercial frauds the most kind of big financial fraud of course has been the Satyam case and that has that always cycle of fraud followed by legislation and very often over regulation. As I talk about fraud I also want to talk a bit about bubble and these are important. Again this is just 100 years apart from sorry this is around 250 years before Charles Ponzi. This was Holland in the tulip mania. Again lasted for just over a year. But tulip bulbs you just could not go wrong with investment in tulips tulip bulbs in 1916. This is one of the most prized tulip bulb and costs an equivalent of half a crore rupees today. A person was captain a ship a large ship was carrying one and by mistake he forgot to lock a lock on the inside by which this particular tulip was sitting and somebody who was just passing by saw the open locker and thought it was an onion and he cut it and ate it. The value of that bulb was actually more than the whole ship. Again the bubble burst and millions of people there was no fraudster involved unlike Charles Ponzi millions of people are buying and selling tulip bulbs at lakhs often crores of rupees. People buying houses with the collateral of tulip bulbs and the madness had become extraordinary and again this is not the madness of 5 or 10 people this is the madness of millions of people. And we have of course seen in the year 2000 2001 the technology bubble which also burst rather less spectacularly but which did indeed burst. The reason I am talking about bubbles is also because bubbles are also often connected with frauds. In times of hectic the glory days of a bubble it very easy to hide your frauds inside the bubble. So what I am gonna talk about is I'll get a bit technical today but I think this knowledge will be useful even outside of the securities domain because when you talk of fraud it all kind of comes down from the common law fraud the tort of deceit as we call it. In the financial space the same contract is there but I will explain why securities fraud is different from product you know if you go to buy a horse for instance why is that different I will come to that. First the similarities. The four types of fraud which four categories of fraud one is contract fraud

you commit you get into an agreement you misrepresent something you are selling a horse which is about to die and of course don't disclose that the counter party can sue you under the contract. Here the tort of deceit which is which you are recently familiar with which is a common law right of not being deceived and anyone who you have deceived can sue you even without a contract. Then you have statutory fraud which is what we will talk about today which is both companies act and sebi act talk of statutory fraud and of course the detailed regulation which define fraud. And finally there is criminal fraud which again arises out of statutory fraud criminalizing several conducts. So here are couple of examples of financial sector frauds. One is the classic fraud that is of course misrepresentation we will come to specific ingredients in just a few minutes. Misrepresentation or lying as people commonly call it is the classic type of fraud. Manipulation is a special type of financial fraud which we will have a short slide on that. Churning is essentially if a broker is perpetually buying and selling securities on behalf of a client because he wants to make commission. So it doesn't really benefit the client but creates commission for the broker. Front running is something that again a very specific fraud in the securities market in which if you call up your broker and say I want to buy 5000 shares of Infosys and broker says this is a good opportunity to just before my client touches the shares let me put in 100 shares of my own order into the system which obviously disadvantages the client because as a broker I have a fiduciary duty to my client so front running is a specific kind of fraud. Another example again this is not an exhaustive category just couple of examples recommendation contrary to the interest of the client you are selling so called high risk financial products to so called widows and orphans. So if you are selling high risk products to persons whose risk profile does not match that kind of investment that is also increasing considered a kind of fraud. The rule called 10(b)(5) in the US law and I am going to be talking a lot about US today because the case law is extremely well developed. The reason you already know this rule 10(b)(5) because it is exactly identical with some small changes to the common law deceit tort of deceit. There is an explicit merger of the disclosures of anti-fraud rules because of nehal spoke a lot about what disclosures are required and which kind of goes back to the point of misrepresentation. If you disclose that you are going to commit something which is wrong in the horse example if you tell your counter party that

my horse is very very sick you can buy it at your own risk thats not fraud. Right. Similarly in the financial markets if you disclose that there is a big litigation pending I don't think I think it is completely petty. It is done by my rival to kind of reduce the share price. So long as you disclose it it can never amount to fraud. So its kind of I like to call it the merging of disclosure and the anti-fraud rule. So whenever there is disclosure the charge of fraud vanishes. There are lot of securities which are exempted under all the other laws all the other American securities laws but they are always covered by the law. So it's kind of the fraud rule covers exempt securities as … then of course consequences as in administrative rules under SCC action or SEBI action civil consequence as a court of law can pass an order and penal and criminal of course the actions will follow. So what are the common law ingredients? The first is mens rea intention. Clearly it has to be of a reasonably aggravated nature of intention at least rashness. Negligence typically would not amount to fraud. So intention or rash action by a person would certainly be would fulfill the ingredient of mens rea. Misrepresentation now misrepresentation can be of 2 types one is lying the other is keeping quiet. You can lie by keeping quiet. If you are in the horse example if you are … to sell a horse while being quiet about the sickness of the horse clearly I am indirectly lying. So when does omission amount to misrepresentation. It amounts to it when there is a duty to speak. So classic example is listing agreement. Whenever you have a material event you are to disclose it. If you keep quiet you can't say I didn't lie. Yes you did lie because the law says omission when you didn't speak amounts to misrepresentation. Materiality of the key event which is again there is a lot of case law around what is materiality. It's a very factual enquiry but at the same time lots of courts have decide how the test of magnitude and probability. So is the event is the litigation 1 crore of 5000crore company versus 2 crore company and what is the probability of it succeeding. So if a rival puts a winding up petition is it material or not maybe not. So again it's a factual enquiry but there are kind of legal methods in which to which give it an indication of how to calculate. I will come to Reliance and lost causation they are kind of more complicated concepts and in connection with purchase and sale of securities. So mens rea I have kind of discussed. Reckless or rash behavior typically would fulfill the criteria negligence typically would not. Obviously the standards of proof in a civil and in a

penal proceeding are different. Much higher standards for penal proceedings. Therefore for the same cause of action you can have different consequences we have seen that in actually couple of criminal cases for instance the very famous US criminal case in which a person was convicted was acquitted in a criminal case but was convicted in a civil case for the tort of murder which we are of course not very familiar with. But there in fact is a tort of murder and the person did not go to jail. Right OJ Simpson. They did pay an amount under the tort of murder. And there is a concept known as collateral estoppel which is...And of course there is another concept of collateral estoppel for example if you are convicted in the criminal case in the civil trial you can't say that I am not guilty. You are stopped from saying that. Misrepresentation I have discussed already. Omission … there is a duty to speak. Representation straight away becomes fraud there is typically a duty to correct which means you make a false statement which you did not know was false at that time and you made it there is a duty to correct. But there is no duty to update. If prices change and what representation you made becomes inaccurate the law imposes no obligation on you to update that statement which has now become false. This also we have discussed. Its question of fact in the context and totality and the standard used is not of a reasonable person its of a reasonable investor in this context. The difference is subtle but is there and probability and magnitude test. So these are 2 concepts they come from common law which is transactional causation and loss causation. Transactional causation is nothing but A caused B B caused C and C caused D. an important [art of transactional causation is reliance which is that you have to rely on the fraud rely on the misstatement. When you are selling a horse those are very straight forward transaction in which you can figure out there is reliance or not. In the financial markets it becomes extremely difficult to prove reliance because a person will have to prove that he read the 500 page prospectus on the IPO relied on the statement which is inaccurate and bought shares despite knowing the misrepresentation which is virtually an impossible standard. So again there are court rulings in the US which have short circuited this process and said when you rely on the price you rely on the misstatement. Because all statements misstatements get converted into price. So anything you put on the stock exchange website is always translated into price. If you say I have discovered a new patent which you which will be extremely

profitable it will translated into price within 5 minutes or 10 minutes. So every time there is reliance on the price there is reliance on the misstatement. And loss causation basically says loss should be caused as a consequence of your misstatement. Classic example is a person who sued the bank saying you lent me money which you could not have lent because it was in excess of the margin requirements then I put that money into securities which fell in value. So since you lent me money which you otherwise could not have lent me he must compensate me for the market loss which I faced by investing that money in the market. That loss is not caused by excess loan which is given. Your loss is a consequence of making foolish investments. So loss has to come from the misrepresentation not from a Third Source. Fraud on the market is a third concept I spoke about. Reliance is presumed and it is a rebuttable presumption which means it is there is a presumption that you relied on the misrepresentation. It can be rebutted by the company and not the person that in fact this person did rely on it and nonetheless he chose to invest in the securities which is also very difficult if not impossible standard. Types of liabilities. You have statutory liability under SEBI regulations and other Acts. You have tortuous liability which I will come to which are typically barred in the Indian context because there are 3 section in SEBI act and securities contract regulation act which prohibit a civil court from taking cognizance of any matter in which SEBI has powers and SEBI has such vast powers it's kind of its virtually impossible for a person to file a civil suit for damages in securities market action. Then you can of course sue based on contract the share purchase agreement you can sue under that and …. Liability which we spoke about. So before we go forward let me just quickly just mention couple of SEBI actions which they typically take when they find somebody has committed fraud or other violations there can be industry punishments you cannot you can no longer sit on the boards of companies you are debarred from sitting on boards of companies. There are penalty orders which have been discussed and in the next session we will also talk about it. You can get a cease and desist order which is like an injunction of a court. SEBI can ask for damages in theory. They have never done that till now. They have sought disgorgement which is taking away ill-gotten gains from the perpetrator of a fraud and given them to the victim. And they can levy penalty. There are cases in which voting rights have been frozen. Again this has been

specifically provided for in the Takeover Regulations. If you acquire shares in violation of the takeover regulation you can be debarred you can at least a temporary stay if not a permanent injunction stopping you from voting on the shares. So you can continue to receive dividends you can continue to sell those shares but you can't vote on them as long as you hold them. And we have several Bombay high court rulings which which give these kind of injunctions. Before we kind of go ahead I just want to get a sense of. You know I gave the example of a horse. Misrepresentation in selling a horse versus misrepresentation in securities market. The law seems to diverge in certain directions. Can anybody if anybody have a sense of why the laws are so different in terms of not the definition of fraud but the way they are applied. How securities market differs from markets for other products for these laws to have kind of developed so specifically and in detail. Perfect. So what is a share? It doesn't have value. In fact it is a piece of paper. It has no value. These days you don't even get the piece of paper. It's in Demat. It's just a bundle of rights. Right to get dividend if and when declared. Right to vote if and when called for. Right on liquidation etc. Basically a bundle of 45 or 10 rights which are contained in that contract. The piece of paper or the piece of bits a bytes derives its value from what a third party is doing. It is not the horse buyer and seller. It's a third party factor really. What the company does what the company discloses actually determines the price of this. So you have the company which can do funny business. You have a random third party who is manipulating the stock price up or down which can impact you. Third is I am a single manipulator in the horse example I can defraud one person here I am defrauding the entire other side of the market. It may be a small amount maybe only 3 paisa but I am defrauding the entire other side of the market. Other side is millions of investors. If I manipulate let's say 100 a million shares of Infosys I am not defrauding 1 person not the other side of the trade. I am defrauding millions of people both on the buy and the sell side. So it is a different market which requires different remedies because number 1 it is an invisible bundle of rights number 2 the source of the value comes number firstly from the value itself and secondly from other people who could be manipulating the stock. And finally which is the point of insider trading which we will talk about separately. There can be insiders who can be misusing the information they have which other people do not have. In

economics it is known as the agency problem. The management and the directors and the promoters have incentives very different from the best interest of the shareholders which causes them to profit at their cost. They always for example a pharma company director knows that we discovered invented a molecule which will result in huge profits for the company. Before disclosing that fact to the stock market through his wife or relative or friend he purchases huge amount of shares. Obviously it becomes a rigged market. People will not cross that market. And really all these things put together may not be so relevant in a horse kind of example because there is a public good attached to the securities market which it's not a casino. It's a place where you raise capital. It's a place where companies get to grow. So that why you kind of have very detailed sets of regulations by exchanges SEBI. Parliament passes so many laws very intrusive sort of enforcement which you do not see in other products. And of course the capacity is much larger much higher because the nature of the product is such it attracts people who want to do misdeeds. Any questions before we move forwards any points comments...one question we were talking about horse now coming to patents. Now what is the authority to determine that the share price is fair? Is there any authority because for example there are millions of patents in a plane. Maybe there are 10 patents in a toy the price of a plane and the price of a 10 rupee toy would be very different. Now as you said the company could also misrepresent the share price. Now is there any authority or an expert body which can say that the share price projected by them in the website is fair....Sir. Let me answer that with a very abstract statement. I will explain it. Very famous economist Keynes the very famous economist has said this that the stock market is not a weighing machine it is a voting machine. Voting machine. Now let's just grasp the enormity of that sentence. And the fact is there is no benchmark really which is why you see bubbles. Today as we speak you have the e-commerce bubble. Companies which have no expectation of ever making profits are being valued at 20 30 40 billion dollars. We have seen the e-commerce bubble in our own lifetime in Indian markets and we have seen various other bubbles in other markets. So there is no benchmark but there is kind of broad understanding of it may be completely fallacious but there is a broad understanding that this is how broadly this is the correct range for this. Assuming that the information which is coming from the company is accurate. The company lies you can

never price an asset but you can argue that for all asset classes. How do you value gold at whatever lakhs of rupees per ounce etc. there is no benchmark which says this is the right price it fluctuates widely not just intraday but over a period time so it's there is no perfect answer people have metrics of saying ok it should be what they call P ratio that if the earning is 100 the price should be 20 times that and again that depends on the industry. Pharma high growth industries will be pretty high. In e-commerce companies which have no earnings kind of very fanciful and abstruse number. No happy answer to that. But I think. So let me come back to your point. Let me give you another phrase which is very I don't know who said it but it is really beautiful. The job of a regulator is not to remove foolishness from the market only ignorance. And that captures the whole philosophy of pre 1988 period when in fact we used to do that actually that we used to say that the price is too high we will not allow the IPO reduce the price regulator's duty is to make aware the consumers as to what actual problem is there number 2 duty is at least the regulator must also control that what is the problems going on how our future is also weak. That you have to make aware the companies also. So regulator has various functions. Your point is well taken in the way the rules have been prescribed. What happens is that today if the market swings by 10 % which is a huge movement there is a cooling off. So the markets are halted and people are made to market is put on notice that market has swung either upside 10% or downside 10% within 1 hour but it resumes once again. Because the philosophy is that the market is supreme. Even where the regulator is concerned. So the market view on the pricing is superior than what the regulator thinks about that pricing. So what that regulator is just doing is that in case there is a swing which has happened suddenly I am halting let everybody know that the market has been halted. It is big news. Then you come back and price discover once again because the collective wisdom of the market or of all the entire country is far superior than what one regulator thinks whether the market is high or low. Exactly so there are 2 ways in which it is done. One is that there is a market halt and secondly there is a price band which exchanges impose on each stock. It does not say that the stock cannot go up or down but it will go in a graduated fashion. So I am not saying that a 10% increase is good or a 10% fall is bad but I am just saying that in a day the stock can only move by 10 % or 20% because I think that's a very high movement for that stock.

Next day again it can move up or down by 10% 20%. So I am not being judgmental as a regulator by saying that this is a good stock when the price doesn't move or it's a bad stock when the price moves. I am just saying it is in a graduated fashion. Finally the collective wisdom of the markets far superior than what a regulator thinks about it and that's what the philosophy which he is trying to portray....that's fine but at the same time the regulator has also got the duty to see that whether market is going up and what is the consequence of it. The regulator must have that...this is the heart of the issue. The measures Nehal described just now about the 10% stop etc. Certain economist say even that is bad law. They say how you can have in any State telling you 10% is good. Who decides 10% who decides 5 is good. There are other who say we will fix a price and ….. an indication like a safety net after an IPO if the market falls SEBI has to… idea saying promoter should buy at the IPO price to protect the investor. Equity is all about risk and running the risk in an informed manner. So SEBI's job is only to make the law clear as to how do you be compliant with making enough information available. More than that it's an adult's choice whether he thinks a pig is worth a horse's price or a horse is worth a pig's price. That's an adult choice...So at this point can I just I apologize I'll give 2 cases. There are 2 US cases which have been given to you. They were given quite late so I doubt if anybody has had the time to read them. I'll just very quickly talk about one of them which is basically Levinson which is a US Supreme Court case. Very interesting case. I have not given you the full one. The full one is quite long. The basic facts were that 2 companies were merging and the press obviously got the whiff of it and so they started asking the company do you have merger talks do you have merger talks do you have merger talks. The company said no we have no not having any merger talks. 3 times they lied. Lied simple as that. They were in fact having merger talks and the merger talks succeeded and at some point when the final merger occurred they disclosed it which is the correct thing to do. You are not supposed to disclose at negotiation stage. Shareholders of course sued this company saying you lied 2 months back that there were no negotiations. Had we known that we would have about these negotiation we would have bought the stock. I would not have sold the stock so. They got sued by shareholders and it went to the district court which basically said that as a matter of law negotiations is immaterial. The focus is on materiality. It was overturned in

the appellate court. The court of appeals which said that in other situations this may not be material but the fact that you lied about it made it material. So negotiation ordinarily may not necessarily be material but the lying caused the materiality to put it in succinct form. The Supreme Court overturned that and said that lying does not cause materiality it's an independent thing which you need to investigate. Materiality the probability and magnitude test is set out in this case. And they also spoke a lot about the economic theory which we have been discussing called the efficient capital market hypothesis which is not saying the price which the market shows is fair. Nobody can say that. No valuer in the world can say that thousand rupees for a Infosys is too low or too high. The market has to decide millions of people have to decide. But the market is sufficiently efficient for you not to be able to beat the market. And that has been statistically proved. You can't really beat the market except randomly which creates the fact that your reliance on the stock price is a reliance on the misrepresentation. So this shortcut was created by the Supreme Court in this case. Brilliant ruling. If you have even 10 minutes I think I will recommend reading this. So it talks of materiality what is materiality and the short cut which they have introduced. It was remanded back to be decided according to the efficient. They call it the fraud in the market theory. So using the shortcut that you don't have to show reliance. It was remanded back. And materiality I think they set up the law which is currently even today everybody uses it basically even in India it has been used in cases to show how to calculate materiality. So kind of coming back to the presentation private action I mentioned that its mainly barred. It falls outside the domain of SEBI. Companies Act if it falls there is there is provision for of course not only civil suits but class action suits. But broadly SEBI I can tell you since I … at SEBI. SEBI tried using this route once couple of times in fact but they said we don't have the power for instance to declare shares bogus shares which are issued. They wanted them to be annihilated because Demat shares unlike physical shares you can't really make out the difference between duplicate and real. In a physical shares you know it is a duplicate certificate. There are no distinctive number in the Demat format. So 1011 will look exactly like 1011. They are digital replicas of each other. So you cannot actually make out what is fraudulent share and an original share in the Demat world. So SEBI in fact tried to get a permanent injunction and getting those shares

declared void. Of course they lost it initially because civil courts had said what is SEBI's locus in this. It went up in appeal. I think it is still in appeal. That's an interesting test of the powers of civil courts. Criminal action Som mentioned it I will not talk about it. Section 24 of the SEBI and Securities Contract Regulation Act the SCRA which are the 2 parent acts talk about criminal penalty and it is a very generic statement any violation of anything including sneezing in the morning can actually technically amount to criminal violation. We have discussed parallel civil and criminal proceedings and of course all of you are familiar with the fact that double jeopardy is a criminal concept. So you can have parallel proceedings . you can have a SEBI civil proceeding you can have a criminal proceeding parallelly. There can also be a direction debarring them from sitting on boards etc. all 3 can run parallelly without being hit by the provisions of double jeopardy. In the constitution. So that's kind of the first presentation. I have got 2 other short presentations on manipulation and insider trading. They are basically.. ok so while it loads. So while it loads. Essentially manipulation is a species of fraud. Its special kind of a fraud. And all the jurisprudence actually comes everything we just discussed about common law fraud applies to manipulation with some insignificant differences. Let's talk about this. Now I don't expect you to read this. If you just look at the words in red. I will read them out you will get a sense of what prohibition against manipulation talks about. not intended to device with the object of inflating the pricing without intention without intention of . and you see so much of repetition of intention that is kind of the heart of manipulation. To give you a very simple example. I am a very large investor I'm a mutual fund let's say and I have 5000 crores which have come into my pocket today which I need to invest in the market by the end of the day. Now investing 5000 crores in the market let's say I know that will increase the price of the 20 stocks which I need to purchase. Is that manipulation obviously not. So just knowing that your sale or your purchase will increase or decrease the price does not cause manipulation. That is reasonably clear to people. The principle intention has to be you have to travel into the mind of the person who is accused of manipulation whether that person wanted to manipulate the market. And of course that is a difficult test. It is not an easy test to meet. Unlike insider trading which we will see is much easier to prove. So the crux of the matter is intention. again courts have found it

difficult to define manipulation. So they have kind of gone around and tried to define it. Here are couple of again these are US court definitions. Intention or willful conduct designed to deceive by controlling or artificially affecting the price or trade of securities. So broadly again if you club it into 2 very broad brackets you are trying to manipulate the stock price up or down or you have you want to increase or create the appearance of liquidity. So completely illiquid stock you want to show that it is very active stock you will be both on the buy and sell side. Another definition by court is any manipulation or intentional interference will the free forces of demand and supply. Except moving of surplus volume. One can interfere with demand and supply to bring price closer to value. I will come to the second case here which is very interesting. it is written by justice posner of the 7th circuit. Probably the most famous judge in America ahead of most of the Supreme Court judges. He is the pioneer in the field of law and economics. And this case essentially about a company which went bankrupt and it was in reorganization so all the debt holders were gonna get huge chunk of equity shares and existing shareholders would get virtually wiped out. How much time do we have? Depends on how hungry you are. Let's have a voting machine here. Ok I will wrap up in 10 minutes. Maybe 23 minutes more for questions. So the company was in bankruptcy the prices were kind of based on objective fair price. It should have been trading at 3 cents. It was flat trading at 30 cents. So a company called scattered which short sold shares which means you sell before you even have the even before the shares belong to you. So basically selling before buying without owning them and they short sold more shares than existed. This brilliant ruling of justice Posner goes into why selling more shares than existed is not manipulation. And it goes into the fact that objectively speaking these shares were in fact priced at 30 cents. True value was only 3 cents. So any intentional attempt to reduce the price from 30 to 3 was the first point which is it was a force to bring price closer to value and that is not manipulation that is the exact opposite of manipulation that is making the markets more efficient. Manipulation is making the markets less efficient. This is the exact opposite of that. And therefore scattered company had not manipulated the market...no sir, the way . I have over simplified it. The fact is that it was in bankruptcy so on the date they were short sold there were not enough shares to deliver but on the date the new shares were issued

there would be number 1 and number 2 short sellers never expect to deliver. They always expect the price to go down and sure that the counter party will settle it in cash. So this in fact all the shares were settled in cash in this case like most short selling. So price falls you get your gain and you kind of. It also helped in this case that the counter party was also a very sophisticated player who was betting that the price will temporarily go up. He was in fact on the board of the Chicago mercantile exchange. So it was a play between2 very large elephants and one elephant lost so he was suing the other elephant. So that kind of also helped scattered winning this case. And there was also. This goes back to the sentence there in the case which says a market participant has no obligation to educate the buyer in this case. There is no fiduciary duty between a buyer and a seller. So if the buyer is being foolish I can profit from that buyer., that's kind of the summary which again goes back to the point which we were discussing a few minutes back. This is the first point that I made that t knowledge that I made during ……. Does not amount to manipulation even though I know that your trade will make prices jump around. So this also I discussed price manipulation or volume manipulation. Actual or apparent activity. Actual activity is when you are buying and your brother is selling and apparent is again when you create similar appearance of liquidity. Issue of fake shares not only in physical form we have seen in the Demat form. 3 or 4 companies have in fact in traduced bogus Demat shares which I mentioned there are no distinctive numbers in India. so the fake looks exactly like the original...in misrepresentation he is taking advantage of the greed of the buyer...No it's also the fault of the person who has taken the money he is at fault in terms of the regulation. If it falls within a very broad …..of deposit taking companies act RBI and SEBI. So let's discuss it offline it's a interesting topic but the answer will be half an hour. Ok so let's quickly finish. I have 5 seconds to talk about insider trading. A very difficult subject the devil is in the detail and the origin of insider trading comes from a fiduciary duty. So every insider which is let's say director stock management of a company they are obliged in common law to put the interest of the company and the shareholders ahead of their own interest, if ever there is a conflict. Ideally there should not be too many conflicts. But if ever there is a conflict you put the interest of the company and the shareholders ahead of your own. An insider who always has better access to information. A pharma

company doing inventions and discovering a new patent. Discovering a new molecule which results in a new patent. Will always have superior information compared to the shareholders and which gives them an incentive to front run the shareholder by. You have favorable news you buy larger number of shares in the market. Or even better you want more money you buy leveraged product like futures and options in the market and then when the announcement is made the price will obviously go up and you sell. So the most certain way of making money and it is also the most certain way of committing a crime. But the origin is fiduciary duty which we have slowly moved away from I will explain why. So why the prohibition. It violates fair dealing shareholders besides the fiduciary duty of insiders nobody buys in a market which is rigged. This is creating a rigged market where people frequently do insider trading...no not at all. Dabba Trading is basically off exchange trading. Its more illegal than immoral. Dabba Trading. Let's discuss that offline. Violates fair dealing reduced faith in the markets fewer people will actually invest in the market and therefore capital formation gets impacted. There is a whole school the Chicago school as they call it. They are in favour of legalizing insider trading. It's a means of management compensation makes the market more efficient. Remember manipulation reduced the efficiency of the market. Insider trading also illegal actually increases the efficiency of the market. If you look at it from an economics perspective not a legal perspective. Your hunger trumps your questions. Okay let me quickly finish …. I have simplified the text of the regulations no insider shall trade or communicate on unpublished price sensitive information. So any person who is an insider. Again the definition of an insider is extremely broad. Anybody who is connected to an insider is also an insider. Who trades or communicates. Trade means either purchases shares or other products or communicates which means gives a tip to friend. Rajat gupta gave the tip to rajratnam for example. So tipping or giving information is also illegal. Which is unpublished price sensitive. Price sensitive is exactly the same definition as materiality. Anything that can impact the price is the gauge of price sensitive. Unpublished is obviously kind of its not yet put in the stock exchange website. US Law. We have deviated from the US law of fraud. US it falls within the prohibition of fraud. There is no US law prohibiting insider trading as opposed to us. We have drafted extensive regulation on what is insider trading. Who is an

insider, who is connected when he trades what is price sensitive etc. Definition which is an insider essentially anybody who has access to inside information. Typically directors top management relatives. Intermediary law firms like us. We have access to price sensitive information. Anybody who has access to price sensitive information which is not yet in public domain. The law also creates a deeming fiction of deemed insiders so it's a rebuttable presumption that you are an insider if you are in one of those relationships. For instance husband and wife wife trades there is an assumption presumption that the wife traded on the basis of the information and then she will have to disprove that she did not trade based on the information but it was because of other situations. What is price sensitive is what is material reasonable investor would find important when the information is published or it is very clear but there are some people who act very smart there are insiders who are sitting on their computer and as soon as the information is disclosed they punch in the buy trade. Again they have been hauled up by regulators both in India and abroad. You can't do that you have to wait for the information to seep into the market. Price sensitive I mentioned that already. Materiality standards. They are the same standards. There is a duty to disclose the basic rule is disclose or abstain rule. Which is either disclose the price sensitive information which you have access to but having that information itself is not a crime because there maybe business purposes. You have discovered a molecule you don't want the competitors to beat you to the market with that molecule so you will of course keep it within a small circle of people inside the company so it's either disclose if you have information if you want to trade or abstain which is don't speak and don't trade. I mentioned that selective disclosure is not okay. Companies would find this very important because they think they can selectively speak to 5 people analysts brokers etc. they cannot do that they have to put the information first in public domain in the exchanges website and then there is……. Make them disclose information to a selective group of people. I'm going to skip through the US theories of classical possession and misappropriation. This broad theme is classical is the fiduciary duty and insider breaches that duty in trades. Possession is anybody who has possession. Person comes across let's say you are a director of a company and you leave your papers behind somewhere you forget your papers. If I chance across them or if I am a taxi driver and you

leave your papers in my taxi I read the papers and I trade that's the possession theory. Anybody in possession of information which is not freely available would be guilty of insider trading. And the misappropriation theory I'm not getting into it's a bit it will take some time. So this is ill really end with this case. A very famous US supreme court case. Again there was a gentleman called Dirks. He was an analyst. And his job was to analyze companies. So discovered a big fraud at a blue chip company. So first thing he went to the wall street journal paper and he said massive fraud blue chip Company please publish on your front page. The Wall Street guys laughed at him and said you must be a crazy idiot. It's a blue chip company ala Satyam. He went twice to wall street journal they laughed him out of their offices. He went to the SEC. the SEC also laughed it off they said it's a blue chip company you must be crazy. So what he did was he was an analyst. He had client he had a newsletter which went to clients. In that he unraveled the fraud that was actually going on in the company. He did not trade. He just published this newsletter and his clients obviously sold the stock on a massive scale and the price fell. And of course when the price falls is when the regulator always wakes up. So the SEC did do investigation and indeed found the fraud but this is not that story. The parallel story was that SEC went after Dirks for insider trading. It's a little nuance so there is this committee of sebi which said that this law should apply to public servant, judges etc. But in the final regulation this is not been....so I will say qualified yes but it will depend on whether we use the possession theory or not. The classical definition is only insiders who tip the information here you have complete information from outsiders who not stealing but in a way mis appropriating information. It is not a clear yes but yes broadly yes. Broadly yes possession theory broad does apply to India so fiduciary duty gone out of the window. Anybody with access to information I am sweeper in a company and I discover some facts somebody torn papers but I have I am highly educated I piece it together and figure out and trade under the possession theory yes. Taxi driver possession theory yes. I'm an insider to back whether coming again. So the light expended a lot. I'm not very happy because if you wish to be very different concepts. One is of of course most pick pocketing. He's been placed on the simplest level possible find a hundred rupee note to send picks it up both are unfair. But one is illegal other is not. So I think the law become kind of too broad and...I personally

don't agree with it because in theory all of us should now body in the world should sleep hungry. It is unfair but everything which is unfair is not illegal. Very few very few in here. So let's take the conversation offline because I have been told that would take a break mandatory so....12.45.

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Session 19

Mr. Sandeep Parekh: So just a very quick introduction I mean both Nehal and Sundaresan will introduce themselves but very quick introduction. Sundaresan has been with SEBI with a very longtime so if you have any questions not just about his subject. I think he's one of the best persons. He spent almost nearly a decade in public offers capital raising etc. so he is one of the best qualified people in sebi to address the issues which...but he's not allowed to do trading. Nehal brings in the market perspective is the chief regulatory officer of B.S.E. again vast industry experience and again in an IPO context exchanges also very relevant role so the market and regulatory experience put together would be quite useful thank you.

Mr. V Sundaresan: Good afternoon all of you. I have all three ex colleagues with me. They all have worked with SEBI with me at one point of time and I am now still continuing in SEBI maybe I am un saleable commodity outside so probably I am still continuing in sebi. I have joined sebi in 1989 and I am married to a person who is working in sebi so the entire family is for me is sebi. So far I have not come across in my investigation and I hope the same relationship continues and there is no such thing which I find in...ok. The topic for me and nehal vora is basically on public issue of securities and initial public offer. Before doing that sebi celebrated its silver jubilee couple of years back and we made a video as to how the security market transformed over a period of 25 years since sebi has been formed and that video is for about 5 mins I would just begin with that I will play that video which will give an overview of what the market was in 1980s and what the market is in 2015.

Video was played.

Today what I am planning to cover is basically how the primary market functions and what the regulatory framework sebi has put in place and then basically the rules which are to be governed and followed by the companies to raised the money from the capital, to raise money from the public and recent reform that we have brought in public issue of securities.

What I am going to focus only on raising capital from public that's the focus area for this session. Basically the primary market is nothing but company which is in need of capital and once money from the you know they are not able to raise money from the institutions and bank go to the public and raise capital for that expansion so when a company comes and raises money for the first time in the securities market it is called an initial public offer. And once an initial public offer is made the company becomes eligible for listing on the stock exchange and once the listing takes place the securities of the company can be traded. A company is said to be called a listed company under the scra provided minimum number of equity shares how being offered to the public and subscribed by them. And minimum is as of now is 25% of the company's capital as to be offered but then if the company is of a large capital sebi has given relaxation that initially you can offer 10% but within 3 years minimum 25% of the capital has to be offered to the public and has to be and then it will be called as a listed company. So basically forms capital formation in economy takes place only when the company raises money from the public because it is not possible for companies to depend only on the institutional finance. Now what is the framework we have the types of opportunities available for a company to raise money from India as well as from abroad. In India we have as as a student of economics most of us will be aware that debt equity and hybrid product. So in India if somebody wants to raise these are the opportunities available to them and if you want to raise money for outside India it is ECB (External Commercial Borrowings) if it is a equity it is called ADR or GDR if it is hybrid product it is called Foreign Currency Convertible Bonds. Recently, we have new concept as been called masala bonds which means you can raise rupee denominator from outside India. So in masala bonds what happens is the currency risk is taken by the investor not by the company whereas in External Commercial Borrowing you borrow in terms of foreign currency so the currency risk is observed by the company whereas in a masala bond the currency risk is observed by the investor who is investing money in that company. Now, Sebi as what you call framed regulation for raising money in India. As far as the investor is in India it comes under the sebi's purview if the investor is based outside india and the money is raised from that source sebi jurisdiction does not prevail. However recently when one of the judgments on ADR GDR if pursuant to raising money abroad if

any manipulation is done in securities securities market by the same company then sebi jurisdiction is there. Otherwise sebi jurisdiction does not go beyond investors who are in India. Our border is very limited if the investor is in India and investing money then it comes under sebi's purview. So if a company wants to basically raise money this is the basic regulatory framework, architecture available in India. First of all the company has to be incorporated under the companies act then it becomes a unlisted company then it has to come out with a public issue. It becomes a listed companies then it has to go through various intermediaries to process them to the process the public issue. This is how the issue process take place. When a Company wants to raise capital as madam dharmishta raval said earlier they first have to approach a merchant banker, who is a registered intermediary of sebi in different parlance they are called investment banker in technical term they are called book ranking lead manager but ultimately is a registered intermediary of sebi which is called merchant banker. The merchant banker take through the project. He assess what is the amount of money to be raised, what type of timing to be chosen who are the other intermediary to be associated with that. All he does then he prepares one document which is called draft red herring prospectus. So this draft is first submitted to sebi, sebi put some disclosure requirements which I will take you through in the next few slides. Sebi gives observation on those documents whether the disclosures made are adequate for the investor to take an informed decision. Sebi does not certify the correctness of the information that responsibility is cast upon the investment banker who is called registered intermediary of sebi that is merchant banker. He submits a due diligence certificate that if the promoter has done Phd in mechanical engineering we dont know, he has to verify the records available with the company then he has to satisfy himself that the promoter has done Phd inb mechanical engineering. If the promoter has been to jail or not it is for the merchant banker to verify the available records and confirm and make a disclosure to that effect and it is the sole responsibility of the merchant banker whether disclosure is made, whether is adequate, whether it is correct, whether it is otherwise. SEBI does not certify correctness of the disclosure made in the offer document. Then the draft offer document is filed with SEBI then SEBI gives simultaneously they file with the stock exchange also where they want to list the securities of the company then SEBI gives observation on the document where

there is a deficiency we try them to improve and then final offer document is prepared submitted to ROC which is called final prospectus but at the time of filing these documents the price and the number of securities is not disclosed because the price discovery takes place subsequent to the issue and that is why there is a red dot put in those places that is why it is called red herring prospectus otherwise somebody will ask where from this name came. Whereever the blank is left that blank is put on a red dot so it is called re herring prospectus. Once the finalization of allotment is done the prospectus is filed with the ROC, a copy is filed with the sebi and all these documents were put on the sebi website from time to time. As and when document is submitted to sebi it is put on the sebi website so that the public at large is a position to know that a particular company is going to raise capital if you have any objection if you have grievance you are free to come and complaint to sebi. Infact the window is kept specifically opened for 21 days. Sebi does not give its final observations within 21 days. We wait for any investor's response, it can be investor, it can be bank, it can be any other stake holder in the securities market can inform sebi if they have any issue with the particular company and based on that sebi gives the final observation. These are all the various parties which are are associated with the public issue. Each one plays a particular role, each one has to collective effort of all this people by which a public issue is brought in. Only thing the major person who is accountable to sebi is merchant banker. But the merchant banker assign the job to each category of stakeholder in this and each one plays a role offset since January 01, 2016 the role of stock exchanges is considerably increased in public issue...because we are slowly replicating the secondary market infrastructure for primary market. Now basically as madam dharmishta said we have made regulations for everything under the sun. That's is when I started by career there was only one guideline today we have crossed almost half century for regulations. You name the objective there is a regulation. So this particular regulation is basically for raising of equity capital. We have a separate regulation for raising debt capital. We have a separate regulation for each intermediary. If you are a merchant banker there is a separate regulation for you to comply with, you are a debenture trustee there is a separate regulation. If you are a depository participant there is separate regulation. So this regulation basically talks about what type of compliance a company required to do if it

wants to raise capital from the public. Basically it talks about eligibility criteria, what is the minimum dilution of shares , how the allocation is done to the the investors when there is a over subscription what type of locking of shares we do because the promoters have to have...in the game and what type of disclosure to be made and on important aspect on pricing. Now very important aspect to know here is that as sandeep parekh told we have moved above from the merit based regime to disclosure based regime since 1992. This only talks about what is the disclosure to be made and you have to justify the disclosure. If as an investor I am not satisfied with the justification don't invest in that that is the principal under which it works. If somebody sells a share a 600 rupees as an IPO and if the investor feels that 600 rupees is more it should be more only 550 please don't subscribe. No body is going to compel you that this should be price this should be timing, this should be the number of shares you have to issue. Those days are gone and last 24 years we have moved completely away from that but to some extend not to be quoted anywhere I think we have moved to a completely other extreme that is why this pricing is creating some sort of problem when I come to a particular slide I will touch upon that. Now we have a eligibility norm, we are not allowing all companies to raise capital just like that we have certain profitability criteria mainly we have put that if you have a profitability criteria we want retail investors to participate in that. But if profitability criteria is not there still a company can raise capital but the focus of that raising capital should be from qualified institutional investors. We have three types of investors in the market - which you call segmented. One is called qualified institutional buyers, basically it is like banks or you know institutional investors who have the ability to assess on their own, the second category is called High net worth individuals, the third category is called retail individual investor. If a company is not having sufficient profits we don not want large number of retail individual investors to get exposed to that particular company. That is why when we say that if you are a profitable company then you can offer atleast certain minimum quantity to the public i.e is the retail individual investor. If you are not a profitability company you have to offer substantial portion only to the qualified institutional buyers. If the qualified institutional buyers do not subscribe the issue will fail. You just can't dump that share on the retail individual investor and make him to pay the price for that inefficiency. This how we got two broad categories

option 1 and option 2. If it is profitable company you have a particular root, if you are a non-profitable company if you have a another root. Now as I said in order to get eligibility for listing you have to offer minimum 400 crores of the share capital if it is going to be between 1600 to 4000 crores market capitalization of the company. Market capitalization is very simple, it is nothing but the no of shares multiply by the market price. That becomes the market capitalization of the company. If the market capitalization of the company if the market capitalization is expected to be less than 1600 crore if you have to offer minimum 25% to the public if it is between 1600 - 4000 crores you can offer that many number of shares which the issue size would be 400 crores. If market capitalization is going to be above 4000 crores you can offer 10% but in all these categories within 3 years you have to offer and raise the public quota to the extent of 25 % that is called minimum public share holding norms. So that there is sufficient liquidity...people do not try to manipulate the market because we do not want separate to be excused. If you comply with that then you become eligible for listing. These is very important depending upon the profitability or non-profitability of the company you have to offer minimum to the public. As I said if you are a profit making company then you have to offer minimum retail investor quota has to be 35% because if it is a profitable company we are comfortable with retail investor participating in that but if you are not a profitable company then only 10% has to be offered to the retail investor. 75% as to come from qualified institutional buyers. And if it does not come the issue will fail. Similarly in profitable company also minimum 35% has to be offered to retail investor, you can offer upto 50% to QIB but again we have recently we have put the condition that whatever % you are telling if that percentage does not come from QIB the issue will fail. We are totally dependent on the QIB assessment so that retail individual investor is taken for a ride because we feel as a regulator the institutional investor are in a better position to assess whether the quality of the issue is good or quality of issue is bad.

Discussion with Participant

Now what are the main disclosures to made in a offer document. First is on the risk factors if you take a prospectus offcourse nowadays it is running into 300 400 pages so many people are using it as a pillow. Nobody reads it. Basically we put on the very first page,

risk factors what is the risk associated with this investment. It talks about specific to the company, it talks about specific to the industry. Sometimes it talks about specific to product line. it depends upon the company, depend upon the industry, depends upon the general risk also. So we categorize them according to the materiality of the risk for example if it is pharma sector, everything will be subjected to the approval of USFDA if you are a export company or if you are a indian drug manufacturer if you have indian standard. Similarly for each industry we have a separate risk factor and this risk factor and this risk factor is upfront informed to the investor. Then we have a capital structure how the capital of the company has been formed over a period of time for example if you see business standard paper yesterday or today you can see the promoters over a period of time as acquired its shared at a price of 25 paise per share because he has been in the company for so many years but today he is doing a offer for sale at the price of 186 rupees. So it gives an integration to the investor that whether the issue is over priced or it is under price. If you ask me for that particular company it is over priced. It is my personal view. Because a promoter who has got 25 paise per share he today selling today at 180 rupees per share. That one rupee share's cost is now close to 720. So if you take 10 rupees as the face value the company share is worth 7200..says. Now how far it is reliable as an individual I will not. i will say that it is over priced. But I may be wrong because the market will ultimately decide when we do the book building what is the correct price for this company. Then we have objects of the issue. Very important point is what for this money is raised, how is the money is going to be used that has to be disclosed in the offer document and under the new companies act 2013 if the objects are changed subsequent to the public issue that dissenting shareholders how to be given an exit option. Earlier under 1956 companies act if the company wants to change the object they have to go back to shareholders they can pass a resolution and they can change. I have raised the money to make a cement plant but for some reason I want to sell chicken. No problem go the shareholder pass one resolution you can spend the money. But today rules of the game have changed. Under the new companies act if there is a change in object for which the money has been raised and If the shareholders have dissent they have to be provided exit. You just can't take them for granted. So object of the issue is very important. The company has to choose what for the

money is raised and how the money is going to be spent so that you just can't take the money and do whatever you want with that money. Now I move on to pricing which a very what do you call talked about in an IPO. As far as pricing is concerned as mr. sandeep parekh said sebi has no role to play in pricing. It is absolutely free pricing norm. Only thing there is a portion in the offer document which says you have to give justification for the offer price. On what basis you have arrived at this price and what is going to be the peer review that to compare any similar company which is same in the industry or which is making the similar product and what is the assessment of the merchant banker based on which this price is arrived at. So you are free to sell this what..this is I am manufacturing, my share is worth 1000 rupees. No questions asked. Another company says i am also manufacturing this product but I want to sell it at 2000 rupees. No question asked. It is absolutely free regime that is why i was telling this company where...when we asked about the company audit disclosures there is no company in India which manufactures identical product. So there is no peer review possible. So it is like more or less monopoly product. So whatever price he fixes that is the final whether you like it or not if you like it you subscribe if you don't like it don't subscribe. There is a company which wants to issue 10 lakh shares to the public so the merchant banker under the issue ...i.e is the promoter of the company decide what should be the indicative price. It is not that they get out one day in the morning and we will fix that 600 rupees. So in this they are thinking minimum price has to be 530 and max should be 620. This is called price band. They announce this price band five days before the issue opens. The price is going to be between 520 to 620. What sebi regulation says is your price band can be 20% plus or minus? So 530 upper band can be maximum 120 % or it can be 530 minus 20% less that is 80 %. So this is the band. Now when the band is opened the investor will apply. Anybody can indicate what is the price he wants to give. Somebody can say I will apply at 620, somebody can apply at 550 now the company wants to issue 10 lakh shares. If you see cumulative demand when it comes to 585 the cumulative demand goes beyond 10 lakhs. So the company will choose 585 as the cut of price. That is the price that they will choose. If for some reason the investors have not chosen a price above then the issue will fail. So at 585 the total cumulative demand available is actually more than 10 lakhs. So they chose 585 but the cumulative demand is

13 lakh 20 thousand shares. The shares available for allotment is 10 lakhs so they do a proportionate allotment. This is what exactly the stock exchange will do because all the bids will go the stock exchange. Now moving on to...I will skip this because of the lack of time. This was the market before sebi come into being. Over a period of time sebi has brought these changes in primary market it gives all in one place from 1992 to what it is in 2015. These are all the so many changes that we have brought over a period of time and because of that this primary market as become like this. But the only point to be noted is that this only bend not the end. Some more reforms need to be made we will be working on that. With this I finish my session now Mr. Nehal Vohra will take you how this public issue is done in primary market taking secondary market infrastructure to improve the efficiency because secondary market infrastructure is absolutely robust in India. Thank you very much.

Mr. Nehal Vohra: So I think before he just start getting I will just give a brief background I used to SEBI for 10 years after that in various positions right from surveillance, investigation to the development side the entire T+2 rolling settlement straight to processing these reform that derivative market I have been involved in that then I worked with D.S.P. Merrill Lynch I was heading their compliance for three years in India and since 2009 and have been with the Bombay Stock Exchange. We've kind of been pioneer in segregating the regulation from the commercial functionalities of the exchange so it is a vertical split. So I head all the regulatory functions of the exchange. So that's my brief background. So in terms of I think Mr. Sundaresan has given a very lucid presentation on what from a regulatory standpoint. But what I am going to cover it is more on the how it actually functions and what's the way forward from an exchange standpoint and this is...please feel free to ask any questions in between also. So its basically the overview of the securities market how the secondary market infrastructure in the countries far superior than the was far superior than the primary market. And how we are trying to...it's really the tail wagging the dog where the secondary market infrastructure is being super imposed on the primary market reforms and I'll explain to you how and why. There's something called the offer for sale acquisition window and some key statistics. So what is really an

exchange? You know conceptually it's like an exchange of ideas it's like a group of people meeting together and one has a particular viewpoint the other person the second viewpoint and it's really a common place where all the ideas get accumulated at one place. So that there is a kind of an exchange of ideas with day this week conceptually what the exchange looks like. So you have a buyer and a seller which have a meeting place in which the meetup. In terms of the purpose of a Stock Exchange, the securities contract of Regulation Act of 1956 prescribes and gives the recognition to an exchange. It basically has two fold purposes and exchanges for developing the primary market that is it allows the people who save money to invest into companies which need of money. Very conceptually a very commonsense approach and once the investors have invested. They need to have a place where they can transfer their ownership so a person was initially invested would like to sell that securities to somebody else is a common platform to wish which is called this secondary market. So the primary market is where companies come and access money from the people who want to save money to invest into their projects give a good valuation and then you have a secondary market where investors who have initially invested have a position to transfer their ownership seamlessly to another investors. This conceptually what an exchange looks like. So this is how a secondary market process looks like. This is just to give you a sense of flavor or why primary market needed to get the reforms of secondary market. So first we have a buyer and seller on both sides. They contact a broker, the buyer would like to buy shares so he gives money to the broker a seller wants to sell shares so this is transferred of shares from one investor to another. The broker now places the order to the electronic system on the exchange platform and it's important that it's electronic because A. There is time stamping of the orders to the microseconds. There is an audit trail. These are all reforms is what we are moved from the physical system to the electronic system and third it is non-temper-able but the most important fraud which used to occur in the 1990s was broker tempering with records. They would buy at the lowest price but tell the investor that have bought it at the highest price and make the difference in between that has completely disappeared in this world. The exchange the trade matches between the buyer and seller so it is a system which matches. It's not a human being which matches. It is based on predetermined rules. Even if a life insurance corporation is buying

or mr. nehal vohra is buying. Both will have the same rules of buying vis-a-vis a person who is selling. So there is no differential rules between a sophisticated investor and retail investor. That exchange transaction gets translated into something which is called a clearing corp. Now why do we need a clearing coperation. Conceptually, If I and you buy and sell we expose each other to are credit risk. Suppose if I default If I don't give him...If I'm a buyer and I don't give you the money. You have given the shares there could be a possible fraud which is occurring. But when you have a clearing coperation then the clearing cooperation becomes a counter party to each and every transaction. So as a buyer my counter parties are clearing operation. As a seller also my counter parties is the clear incorporation. The clear incorporation position get netted off. The advantage in doing this is that if I as a buyer have fulfilled my obligations of giving money. I will be given shares irrespective of whether the seller on honors his commitment or not. So it completely insulates an investor from the counter party risk. And therefore it's extremely important that clearing cooperation becomes a part. And there is something called the depository which is the dematerialization of shares so the depository maintains all the physical register of shares de materialized with it. It is just a book entry which happens. Now why a depository is required because in the physical era there was fake forth stolen certificates. They used to be mismatch of signatures there used to promoters printing fake certificates and I can actually spend an entire day day in the manipulation which is around fake and forged and stolen certificates. That has completely been eliminated so again it's a dispassionate institution which has no conflict of interest with that trading process which is segregated as a depository. The Depository is regulated by the SEBI. Then clearing cooperation connect itself with their Depository to ensure that the transfer of securities happens only and only if the payment has been made so if there is a proper sale which has happened. It has to move from the seller to the buyer. And the bank is instructed to move the fund from the selling bank to the buying bank. No broker is allowed to hold a directorship in any of these institutions or they may have shareholding. So it's very strict rules as compared to a normal company I mean the we are all companies and then the clearing cooperation gives that confirmation back to the broker which goes back to the selling and buying brokers who in turn tells the investors. This I will skip the clearing and

settlement purpose to determine is basically to counter those nor counter party risk and the settled through the exchanges robust settlement mechanism. Now the clearing and settlement process is also something which I'll just spend a minute on is that the exchange gives it to the clearing corporation for the institutional investors that's a sophisticated investors they're supposed to have something called another intermediary call a custodian. The broker himself becomes a custodian for those transactions and it's there are stories on the clearing member who connects with the clearing cooperation. And they connect with the bank and the depository. The bank and depository get that confirmation back to the clearing corporation that clearing corporation confirms it back to the Depository and clearing bank and then the depository gives that confirmation back to the custodian or clearing member. And the clearing bank also gives a confirmation to the custodian the clearing member and the entire transaction is completed. And you you were believe it's t plus 2 rolling settlements. In two working days after every transaction on rolling basis so this is just that timelines I leave my presentation due to lack of time. I just really kind of a breeze through this part. This is the overview of the regulatory framework. Again and I will not spend too much time on this because there's ordering covered by the other speakers. Now I move on to what the I.P.O. processes. Now this is where it's extremely important to understand that it was a paper based system. Despite the secondary market being completely an electronic market the primary market continued to be a paper based system. And therefore was fraught with all kinds of possible frauds and manipulations which was possible in a paper based secondary market system also that there was no time stamping, they could be manipulation by the intermediaries and therefore the process of reforms took place. So this is the all process of the initial offer which is date people a sixty day have used to be even higher than that but have started with sixty days and it is the bank, the investor will have to go to the bank then the bank through that will make an application through it will go to the registrar and transfer agent then they will place the bid in the exchange system. The exchange will confirm and draw the list of the alotee etc and inform back to the RTA. The alotee approval will be got from the company...will be given by the RTA to the company. The company will issue the shares. And a capital is transferred to the company's shares transferred to the investors along with the capital for an

allotted shares. Now as you can see there is no electronic trail it's all people based it's not system based. And this is a very conceptual paradigm shift which has happened in our markets. So then this moved into T plus 12 So it became a fifth one fifth of the time taken. So what happens the company now approaches a lead manager which is an investment banker or merchant banker. The merchant banker appoints something called a syndicate member and a grading agency to ensure that some IPO grading which used to be mandatory now it has been made optional. He also appoints a legal council so every I.P.O. needs to have a legal counsel. Then the lead manager approaches as SEBI as well as the exchanges with their draft red herring prospectus. And the company also appoint an escrow bank. Why an escrow bank earlier if you should be the company's bank account company used to as mrs raval has mentioned used to enjoy the floor now there is an escrow bank where the money the issue proceeds are kept separately and the interest is therefore identifiable. In terms of the exchange has a connection with the syndicate members. Now. till now it's all paper based so it moved from a completely paper based to a hybrid system where half was paper half was electronic. So the exchange onwards now everything moves on from a paper to an hybrid system where it's an electronic. So the syndicate members connected with the exchange through the that the electronic system. And also the clearing cooperation is connected again with the broker investor all that through the electronic system. The broker then puts the bid and a clearing cooperation also ensure that the funds have been deposited by the broker. And it connects with the R.T.A. The RTA then gets the confirmation from the exchanges on the allotment on the basis of a lot man which has been finalised. And that is then given back to the Depository. And to the escrow bank that these many investors have been allotted these have not been allotted based on that depository connects with the investor and deposits the shares in that the demat account of the investor and the escrow bank release is that amount of money to the company. I will just breeze through this now I will take a pause here and move to something which is call an offer for sale an offer for sale is basically using the secondary market mechanism for companies to comply with the twenty five percent public ownership rule. So a lot of P.S.U. especially and lot of companies did not comply there are certainly a minimum public shareholding criteria which came in and of the SCRR that twenty five percent had to be own which used

to be ten percent. For PSUs it was kept at ten percent which has now been made twenty five percent but this was suddenly how do you access because if you go by the prospectus route. It normally takes around 3-4 months. And suddenly there was a big demand. So this was a demand based requirement where we wanted to use the secondary market mechanism to use it to diversify the ownership to the public. So value is finally in the eyes of the person who is looking at it. Now today I as a valuer will price it at X. You as a by your will value it at Y. The intend in which the regulation has moved in is that lead the cumulative decision off all the people wanting to invest in the company determine the value of the company and exactly...Exactly so the point is to solve that issue rather than controlling price is to ensure that merchant bankers who are subscribing and bringing a new issue to the market. I have hard underwriting have a market making mechanism. These are the check and balances which will bring in accountability in the pricing rather than saying that this would be a formula based pricing which I'm going with. Absolutely. Absolutely without a doubt. Basically that regulators role is similar to an umpire in a match a cricket match and empire cannot say there are a three hundred a score of three hundred on this pitch is good enough or the bad enough. So empire has to disclose and umpire has to disclose. So anyway this has been the number of I.P.O.'s which have come on and since November two thousand and five. The amount raised also has a upto seventy eight thousand crores which have been totally done and you can see the number of debt IPOs is going up and that's kind of answering your question also that investors are punishing equity I.P.O.'s and moving to debt I.P.O.'s because that's a more risk free instrument as compared to an equity so this is kind of testimony of the fact which we were trying to say that the market will punish people who don't price it properly. So in terms of the small medium enterprise I just want to bring your notice that since in January two than sixteen this is a very successful B.S.E. had done it many times in the past had failed miserably but the last approach has been very successful and this was kind of testimony on how that other I.P.O.'s should be done that's were put in there. That one twenty SME companies listed the amount raised is close to one thousand crores. That has grown by eight pounds over the last two years. Number of market makers in 93 compulsory market making so there's any insurance build in there is hard underwriting for each merchant

banker and therefore the number average number of investors has gone to around 200 which was not expected to reach at least fifty or sixty is all that we had expected. So this is showing that as their trust goes up you will get more participation coming. The companies have to be between three crore and twenty five crores in terms of issuance. The mainboard most of them I think sixty to seventy percent are below the value. In terms of the offered for sale is again I will just breeze through this is just to show you that we have had a very successful offer for sale and therefore that becomes the genesis of the entire EIPO that today we have moved toward T plus six with SEBI has prescribed is completely electronic. But if handled well OFS is something it can move to t plus 2. These are some of the offer to buys which have been successfully done delisting and takeover. That's it. So thank you.

Mr. Sandeep Parekh: So we break for lunch and if you don't mind we will have slightly shorter break.

Session 20

Mr. Sandeep Parekh: So if we can start. Just to end the previous session I think I can summarize sebi's philosophy, sebi's role as they're not supposed to remove stupidity from the market, they are supposed to remove ignorance from the market. And that's kind of disclosure regime and I know it's not a perfect regime but it's better than all the others so it's like democracy. I'd like to introduce for the funds part, mutual funds and the other funds are Mr R K Nair who got very very diverse experiences. He's worked in a bank for many many years and then he became a regulator he was my colleague at sebi and he was handling these very portfolios. And then since then he went on to become a member of insurance regulator so he has vast experience in the entire financial sector and with that I'd like him too. Thanks.

Mr. R.K. Nair: Good afternoon friends. Afternoon session after lunch can be very many boring and very very drowsy so I'll try to make it a little interactive in a sense that share some experiences with you about this. In particular the market in the financial markets in general as Mr. Sandeep Parekh mentioned I was a career banker for 29 years I did banking but banking it self I handled foreign exchange and investment banking for some time so I have some ideas about the debt market side of banking from the financial market then I move to sebi for 5 years there offcourse I handled the corporate bond market along with these portfolios. We move to insurance sector which is completely a different sector if you look at the financial market but overall i was listening to the debates early morning question...very interesting because I have also you know these were questions that engage me for a long time and I find securities market to be different kettle of fish compared to the other two market I have worked, the banking market and the insurance market. You know if you look at the banking and the insurance market there philosophy of regulation is more prudential regulation. So you know you may engage a company or intermediaries make them bring capital and insure that they are fundamentally sound and solid. In their ability to meet their promises bank has to pay back depositors and insurance have pay claims when it comes. Whereas the securities market is completely different in a sense the philosophy is more disclosure based and therefore the entities which exist in the securities

market work under a different philosophy and we need to understand this. Why are securities different the question is? My basic thinking is that the word securities itself is you know you think it is insecurities because you need to be protected. Because securities create a feeling of insecurity. And that's why regulator tries to bring in a kind of a balance and what happens in a securities market why a security different from other commodities for instance when you buy a radio or television or whatever or any goods you know. There are rules and you know or you know say for instance microwave oven. You know what the product is or you buy any other product for consumption you consume the product. In a securities market peculiarly you are not buying a kind of a you know a promise made by the issuer of a security and then there is a underlying value in that which is based on the credibility of that guy. Basically there is no value in the security. It has no value because as I go along I'll tell you how in a distinctive from other financial products and also distinctive from other physical products and therefore the kind of regulatory framework which is required and having worked in sebi for five years I know it's very difficult to protect the investor on the one hand and to promote the market from the other hand. The the problem with Sebi is overall preamble is this ...they say that you have to protect the investor and you're to promote the market. Now how do you promote the market without creating a market. And therefore the market creation is also one part of sebi's job. And I think whatever the legislator might have done in their wisdom of putting both these roles normally around the globe you don't find regulators doing both jobs. They don't know market development. They know only pure regulation and sebi is supposed to be a pure regulator so on the one hand you find them doing very hard regulations they will come down heavily on some intermediaries or some institutions which violates the sebi act or securities act and then they take severe actions. You know you have this problem because unless you have institutions or you have intermediaries you cannot have a market. And you need an investor law so therefore their job is to promote the market also. And this kind of dichotomous philosophy legislative approach to sebi is a problem in my view because many times it's confusing. The role of sebi itself is confusing and to a judicial mind probably you'll be even more confused today why did they protect in fact they were listening to one of the hon'ble lordship asking how did the value of the security forum

thousand to ten rupees. It can happen in should not happen but it can happen and therefore should we go back to the order pricing regime which was when we had the system of the control of the capital issues an I.A.S. officer sitting in Delhi and deciding the price or should this free pricing regime continue it's a big debate or and we have seen as the nehal was presenting debt markets are now you know increasing equity in the primary issue are coming down. Probably there is a lack of confidence in the investors mind on the fact itself that whether I am getting a fair price so we will wait ok let the big fellow take their money the retailer investor wait. They're very clever. Not that you can full retail investor all the time and many times you find large issue not subscribed by retail investors. The institutional investors buy it like mutual funds or insurance companies and foreign investor then the fellow is waiting. The Unit Scheme, 1964 (US-64) published on May 30, 1964, in the Gazette of India. The transactions used to start in July every year after the UTI declared the sale and repurchase prices of its units. Since 1992, from a debt oriented scheme, the US-64 slowly became an equity oriented scheme. Due to the market volatility and after the dreamy phase of the 1992 boom was over, the net asset value (NAV) of the US-64 units constantly went down and finally turned negative in 1998. In September, 2002, The government issued an ordinance to restructure UTI which included repealing of the UTI Act and bifurcating the Trust into UTI-I and UTI-II. UTI-I to comprise US-64 and other assured return schemes with a total asset base of around Rs 25,000 crore. All NAV-based schemes with a total asset base in excess of Rs 17,000 crore to go under the umbrella of UTI-II. UTI-I was renamed as a Specified Undertaking of the Unit Trust of India (SUUTI) and UTI-II was renamed as UTI MF. In May 2003, Unit Trust of India (UTI) offered to buy back US-64 units at Rs 12 for those with holdings up to 5,000 units, and the remaining units at Rs 10. Alternatively, investors had the option of taking 6.75% tax-free bonds in lieu of their investments. These were the bonds which matured on May 31, 2008. US-64 bonds were not the only bonds that UTI issued. It also issued 6.6% tax-free bonds against the assured return schemes. These bonds matured on March 31, 2009. On May 31, 2008, the five-year US-64 tax-free bonds, issued to investors when the scheme ran into trouble, come up for redemption. Around Rs. 8000 Crores worth of US-64 bonds were redeemed as on 31st May, 2008. Evolution of Regulatory Framework for CIS: During the early nineties,

many Plantation/Agro based companies collected huge amounts of money from Indian Public through various plans/ schemes. GOI vide PR dated Nov 18, 1997 stated that issuance of the instruments such as agro bonds, plantation bonds, etc., would be treated as CIS activities under the purview of SEBI. SEBI vide PR dated November 26, 1997 and December 18, 1997 directed all existing schemes to comply with the provisions of Section 12(1B) of the SEBI Act and file the details of their schemes with SEBI. SEBI (Collective Investment Schemes) Regulations, 1999 were notified on October 15, 1999. As on date only one CIMC is registered with SEBI (Gift Collective Investment Management Company Limited), but no scheme launched. Under Section 11AA(2) of the SEBI Act, 1992, CIS is: Any scheme or arrangement made or offered by any company under which: Any contributions - pooled and utilized for the purpose of the scheme or arrangement; With a view to receive profits, income, etc. - whether movable or immovable; Contribution, investment - being managed on behalf of the investors; Investors - do not have day-to-day control over the management and operation of the scheme. In terms of the Securities Law (Amendments) Act, 2014, any pooling of funds under any scheme or arrangement, which is not registered with the Board or is not covered under exemption categories specified under the Act, and is not regulated by any other authority or otherwise banned under any prevailing law in the country, involving a corpus amount of one hundred crore rupees or more shall be deemed to be a collective investment scheme. Issues & Challenges related to CIS Regulations: Generic Sense – Any scheme or plan where money is collected from people for investment purpose. SEBI CIS sense - "Any scheme or arrangement made or offered by any person under which: Any contributions - pooled and utilized for the scheme or arrangement; With view to receive profits- whether movable or immovable; Contribution managed on behalf of the investors; Investors do not have day-to-day control" International Scenario – CIS includes other money pooling vehicles. For example in Australia CIS includes MFs, REITs, Hedge funds. SC has directed that CIS is not restricted to any particular commercial activity such as in a shop or any other commercial establishment or even agricultural operation or transportation or shipping or entertainment industry. Implications – Any activity which fulfills the conditions of CIS and is not prohibited or regulated by any other law is a CIS activity. Under the garb of real

estate: Rose Valley Real Estate, Saradha Reality India Ltd., PACL etc. Under the garb of time Share: Rose Valley Hotels and Entertainment, Royal Twinkle, Pancard Club Ltd., Citrus Check Inns Limited etc. Potato Farming: Sumangal Industries. Goat Farming: Samrudha Jeevan, Prosperity Agro. Plantation : MPS Greenery, Golden Forest. Art Fund: Osian Art Fund, Arohan Trustee Pvt. Ltd, Yatra Art Fund. Prize Chit – Defined in PCMCSB Act, 1978. Collection of money in lump sum or installments by operator and uses the money for investment or any other purpose. Distributing the proceeds to specified number of subscribers as determined by lot , draw or any other manner. Conventional Chit – Defined in Chit Fund Act, 1982. A specific no. of persons subscribe a certain sum of money periodically for a definite period and each subscriber, in his turn, as determined by lot or auction, is entitled to prize amount MLM /Pyramid marketing / Chain marketing, product is only a way to disguise intention, Compensation plans are designed to inevitably motivate the participants in the scheme to concentrate on recruiting more participants rather than on direct selling, Most of the sales occur only between people inside the pyramid structure. Direct marketing – Most of the sales will occur to consumers among general public. Ponzy Scheme – Where the operator pays to its existing investors by collecting money from new investors – " Robbing Peter to pay Paul". Money Circulation Scheme – defined in PCMCSB Act, 1978: Quick and Easy Money creation, Enrolment of members in the scheme. Judgment: Supreme Court Judgement in Kurian Chacko Vs State of Kerala (2008). Example: Gold Quest International Private Limited – Selling Gold coins over priced 5-6 times, people purchased the products to become sales representative. Speak Asia offering return of 373 % in one year. Prize Chits and Money Circulations (Banning) Act, 1978 is central act but administered by State Governments. The act bans promotion or conduct of any prize chit or money circulation scheme and provides for imprisonment and penalty in case of failure to comply with the provisions. The act bans any prize chit or money circulation scheme or enrolment or participation as members in those schemes or receiving or remitting money under those schemes. MLM activities are understood to fall under the purview of State Govts. under this Act. Protection of Interest of Depositors Act: •Many States have their respective laws for protection of investors' interest e.g. Madhya Pradesh Nikshepkon Ke Hiton Ka Sanrakshan Adhiniyam, 2000, Maharashtra Protection

of Interest of Depositors Act, 1999 and the Himachal Pradesh [Protection of Interests of Depositors (In Financial Establishments)] Act, 1999. As per Maharashtra Protection of Interest of Depositors (in Financial Establishments) Act, 1999, “Deposit” includes and shall be deemed always to have included any receipt of money or acceptance of any valuable commodity by any Financial Establishment to be returned after a specified period or otherwise, either in cash or in kind or in the form of interest, bonus, profit or in any other form, but does not include- Such as Advance received against goods or services (five category of exemptions). As on December 31, 2014, 22 States and Union Territories have enacted such acts. State Governments have powers to attach property of such entities, dispose them off under the orders of special courts & distribute the proceeds to depositors. Invoking PID Act when money is being collected: As per Maharashtra PID Act, State may attach the properties "where the Government has reason to believe that any Financial Establishment is acting in a calculated manner detrimental to the interest of the depositors with the intention to defraud them“. Therefore, even at the time of collection of deposit the PID Act can be invoked provided that the money being collected falls within the ambit of deposit. Emu Farming- Actions taken by Tamil Nadu State Govt. under the Tamil Nadu Protection of Interest of Depositors Act. M/s. Pearls Agrotech Corporation Ltd. (PACL): The main allegation against PACL was that the plans/ schemes operated by it were in the nature of CIS and that PACL is offering these schemes without obtaining registration from SEBI. PACL has 5.85 crore total customers. Details were not available. The total amount mobilized comes to a whooping of ₹49,100 crore. As on March 31, 2014, it had around 4.63 crore customers and an amount of ₹29,420.65 crore stands outstanding. The value of total lands in the form of 'stock-in-trade' as on March 31, 2014 is ₹11,706.96 crores which comprises of two categories: i.e. agricultural lands (₹7,322.11 crores) and commercial lands (₹4,384.84 crores). It came to the knowledge of SEBI that PACL Limited was running CIS and had failed to submit the information/details of its schemes with SEBI in terms of the press release dated November 26, 1997 and the public notice dated December 18, 1997. PACL in its first reply challenged the jurisdiction of SEBI, by stating that its transactions are in the nature of sale and purchase of agricultural land and thus outside the purview of the securities market. In the year 1998 a PIL was filed before the Hon'ble Delhi

High Court by one Mr. S.D. Bhattacharya against SEBI and Anrs. bringing into light, the activities of various agro-plantation companies who had duped the hard earned money of several investors and also filed an application for impleading 478 agro-plantation companies in the matter. The Hon'ble Delhi High Court vide an order dated October 07, 1998, inter alia directed all plantation companies, agro companies and companies running CIS to comply with SEBI directives and also directed to issue notices to such companies through publication in the newspaper. PACL was also in the list of 478 companies. PACL vide its application dated December 08, 1998, approached Hon'ble Delhi High court for deletion of its name from the list. Hon'ble Delhi High Court vide order dated May 26, 1999, had directed SEBI to appoint auditors for ascertaining the genuineness of the transactions executed by PACL. SEBI in its report dated February 22, 2000 submitted to Hon'ble Delhi Court, highlighting various deficiencies/ discrepancies such as the cost of the land was taken to be uniform irrespective of its location, huge commissions were being paid to agents by PACL out of the funds collected from the public, etc. Latter on the Hon'ble High Court of Delhi appointed Justice K. Swamidurai (Retd.) to physically verify the genuineness of the agreement to sell and the transactions entered into and also to supervise the registrations of the sale deeds. SEBI vide its various communications to PACL, had advised PACL to comply with the SEBI (CIS) Regulations. PACL vide its letter dated December 13, 1999, replied to SEBI which inter alia stated that SEBI has no jurisdiction to scrutinize its transactions. PACL had also challenged SEBI letters before the Hon'ble High Court of Judicature for Rajasthan at Jaipur by filing a Writ Petition, in December 1999, claiming therein inter alia that its scheme does not fall under the definition of CIS and also challenged the constitutional validity of the CIS Regulations. SEBI vide order dated June 24, 2002, held that the schemes floated by PACL fall squarely within the definition of CIS as defined under Section 11AA of the SEBI Act and advised PACL to comply with the provisions of the CIS Regulations subject to the directions of the Hon'ble High Court of Judicature for Rajasthan at Jaipur. On September 20, 2002, Justice K. Swamidurai submitted his final report stating therein that the transactions entered into by PACL with its customers were genuine. March 03, 2003, the Hon'ble High Court of Delhi modified its earlier orders in this matter and allowed PACL to execute the sale deed

in favour of the customers duly verified by Justice K. Swamidurai. SEBI filed an application for modification/ clarification of such order of Hon'ble High Court of Delhi. The Hon'ble High Court of Delhi vide order dated May 30, 2003 inter alia clarified that neither this Court held PACL India Limited to be a CIS company nor it was held that it is not a CIS company. This would be for SEBI to decide and our order discharging notice would not stand in the way of SEBI to so decide. Subsequently, the Hon'ble High Court of Judicature for Rajasthan at Jaipur vide its order dated November 28, 2003 inter alia held that the schemes of PACL were not CIS as they did not possess the characteristics of a CIS as defined under Section 11AA of the SEBI Act and quashed the letters issued to PACL by SEBI. SEBI preferred an appeal before the Hon'ble Supreme Court of India against the order of Hon'ble High Court. The Hon'ble Supreme Court of India vide order dated February 26, 2013, set aside the order of Hon'ble High Court and ordered that the proceedings dated November 30, 1999 and December 10, 1999 can themselves be treated as show cause notices apart from permitting the appellant to issue a comprehensive supplementary show cause notice to the first respondent Company within a period of three months after carrying out necessary inspection, investigation, inquiry and verification of the accounts and other records of the first respondent Company. After completion of its investigation, SEBI issued an SCN dated June 14, 2013 to PACL Limited and its directors namely Mr. Anand Gurwant Singh, Mr. Gurnam Singh, Mr. Tarlochan Singh, Mr. Sukhdev Singh, Mr. Nirmal Singh Bhangoo, Mr. Gurnam Singh, Mr. Uppal Devinder Kumar, Mr. Tyger Joginder, Mr. Gurmeet Singh and Mr. Subrata Bhattacharya. On sample verification of the documents of few customers, the following documents are observed: Application Form, Pre-printed Agreement, Registration Letter, Letter of Allotment of Plots, Receipt, Special Power of Attorney, etc., Two plans were offered, Cash Down Payment Plan (CDPP), Instalment Payment Plan (IPP). Observations: In certain cases, in the application form at the place of plan, FD/ RD is written, which gives an impression that the scheme operated by PACL were nothing but money mobilization schemes. PACL invites investment in terms of its rule book, under which one of the aims of PACL is to offer maximum return on investment and benefits to the customers. At the time of application, PACL had not disclosed the location of the land/ land availability. This indicated that

PACL pools the money from the customers for the purchase of the land. The registration letter states the expected value of the land, although the land is not allotted even at such stage and the location of the plot/ land remains undisclosed. As per the agreement, PACL reserves the right to change the location of the land even after allotment. PACL also admitted that there was only symbolic possession of the plots handed over to the customer, as the fragmentation of land/ plot into smaller sizes may not be practical or permissible under the applicable revenue laws. The right of maintenance, development and sale of produce are retained by PACL. The customer gets no right to claim for any produce out of the plot/ land for first six years of the agreement. As per the agreement, opting out facility was only available under CDPP, subject to deduction of 20% of the consideration paid. However, the facility of opting out was also provided under IPP and the amount repaid was almost exact amount of the expected value without any deduction. This showed that PACL seems to be eager in seeing a customer opting out and also appears that the repaid amount also includes some portion of interest also. The land allotted are located at places which are far off from the places where the customers are generally residing. Special Power of Attorney was taken from all customers and where sale deeds would be executed the same would be kept with the custodial services company of PACL. The rights in the land allotted are said to have been assigned by the customers to the prospective vendees, however, in the absence of any sale deeds, the fact remains that the customer gets neither the possession, nor the legal rights in the land to transfer the same to prospective vendee. Not a single applicant out of the 500 samples selected had registered a sale deed of the land. As per the admission by PACL, it had executed only 19,284 sale deeds (0.005%). In case of those executed sale deeds there were lots of discrepancies. The sale deed has not mentioned how the customers will access/ use such un-partitioned agricultural land. Huge pre-paid commission paid to agents. The % of direct holding of land by PACL is very negligible. PACL had made arrangements to purchase the land through its 250 associate companies, in order to circumvent the applicable laws of land ceilings. Any schemes in order to be called a CIS, has to satisfy the four conditions mentioned in Section 11AA(2) of the SEBI Act. First Condition: PACL collects the money from customers/ investors against the purported sale of a plot/ land. PACL pools in the money of customers for the

purposes of the scheme i.e., for procuring the land. Second Condition: The mere promise of expected value higher than amount invested makes it clear that contributions are made with a view of earning profits. Third Condition: The customer who invest their money with PACL are mandatorily required to give the right of development and maintenance in favour of PACL. The investor gets only an undivided interest in the stock of land and the same cannot be identified. The customer does not manage his investments in the scheme rather his investments are managed and utilized by PACL. Fourth Condition: PACL obtains the authority from its customers for development and maintenance of the plots of land. The customer does not have any claim over the common facilities provided by PACL, such as, irrigation pipelines, drainage systems and electrical lines etc. even after the execution of sale deeds. Liability of Directors: All directors are liable and responsible for the violations committed by PACL in running CISs without obtaining registration from SEBI as required under law. Directions: PACL Limited, its promoters and directors including Mr. Tarlochan Singh, Mr. Sukhdev Singh, Mr. Gurmeet Singh and Mr. Subrata Bhattacharya, Shall abstain from collecting any money from investors or launch or carry out any Collective Investment Schemes. Shall wind up all the existing Collective Investment Schemes of PACL Limited and refund the monies collected by the said company under its schemes with returns which are due to its investors as per the terms of offer. are also directed to immediately submit the complete and detailed inventory of the assets owned by PACL Limited. shall not alienate or dispose off or sell any of the assets of PACL Limited except for the purpose of making refunds to its investors as directed above. Advise SEBI to initiate appropriate proceedings under the SEBI Act and applicable Regulations against PACL Limited, its promoters and directors, including Mr. Tarlochan Singh, Mr. Sukhdev Singh, Mr. Gurmeet Singh, Mr. Subrata Bhattacharya, Mr. Nirmal Singh Bhangoo, Mr. Tyger Joginder, Mr. Gurnam Singh, Mr. Anand Gurwant Singh and Mr. Uppal Devinder Kumar. Portfolio Management Services (PMS): Portfolio Managers in India are required to register under the SEBI (Portfolio Managers) regulations, 1993. As on Dec 31 2015, there are 221 Portfolio Managers registered with SEBI. Investors are required to invest at least Rs. 25 lakhs to avail Portfolio Management Services. Portfolio Managers provide one or more of the following services: Discretionary PMS - where the

Portfolio Manager takes all the decisions on investments of the client. Non-discretionary PMS - where investor takes the final decision based on Portfolio Manager's advice and Portfolio Manager executes the same. Advisory PMS - where the Portfolio Manager provides only advice to the clients and the decision of investing as well as execution lies with the client. Major policy developments in recent past: Minimum net worth requirement for Portfolio Manager increased from Rs 50 lacs to Rs 2 crore excluding minimum Capital Adequacy/ Net worth requirement for any other activity (2008). Requirement of segregation of listed securities in individual client accounts. (2008). Performance fees, if charged, shall be mandatorily on the basis of high-water mark principle. (2010). Portfolio managers to accept first single lump-sum investment amount, as funds or securities from clients, of atleast Rs 5 lacs (2010). Disclosure Document to be placed on the website of Portfolio Manager to ensure that the clients have updated information (2010). Portfolio managers to keep the funds of all clients in a separate bank account maintained by the portfolio manager. Portfolio Managers not to organize investment portfolios as "Schemes" akin to Mutual Fund Schemes while marketing their services to clients (2010). Minimum investment per client increased from Rs 5 lacs to Rs 25 lacs (2012). Segregation of unlisted securities in individual client accounts (2012). Portfolio managers are required to submit a monthly report as per the prescribed format containing details such as no. of investors, AUM managed, performance etc. to SEBI only. Pursuant to CIC order dated January 17, 2013 SEBI has started putting these monthly reports on the SEBI website. So the cost is very high in bombay if buy and sell a property i don't know 6 % is the transaction cost, you pay stamp duty to the state government. In countries where real estate investment trust have actually prospered. They have been actually given exemption. So if a real estate investment trust gets a fiscal break there is no tax second there is no tax at the hand of the investor also. Now the government has to sit and make some structure be they have created a real estate investment trust I don't know the latest structure whether you're familiar that....tax issue being a state issue and it's not has been a stated there in competitive...ultimately you want real estate if you want to monitise you have to create lot of sales in transaction and then you have to for go some tax because then what it will create employment it will create jobs and automatically your fiscal income will grow. But here

you would be rightly you know you want to kill the goose which lays golden egg no right in the beginning. So it doesn't work. So I think there are work together to create a good structure for real estate investment trust to succeed even if they come out of the framework. I don't think it will work unless these issues are sort out. Thanks.

Mr. Sandeep Parekh: Unless there is any other question I think...we are already running one hour late so thank you for your patience and it's been...

DAY 6
Session 21 to 23

Geeta Oberoi: Actually, one announcement to make, Mr. Suman batra won't be joining us, he met with some accident so today we have only Mr. Amitabh Kumar with us and we will be dealing only with competition law aspect and merger under that so we will be what we do is as if you all agree we will have all these 3 sessions together, finish by 1, if all of you think so appropriate and then after, if you are interested, we can take you to the state museum, it's at shyamla hills, nearby, ya tribal museum is another part and state museum is different part, i think you will appreciate more state museum because it is really, they have collected something 8th century B.C. those artifacts and displaying over there and then if you i mean there is this music programme, if you are interested in the evening, i can put it on the, ok then you can go to Bhojpur, yes, no option, therefore, there is this two choices, either we go to state museum or we go to Bhojpur, ok, no no not at all, we stick to Bhojpur, everyone will go to Bhojpur, music is at 7 o'clock, yes after Bhojpur you can make it, there is this artist from all over India, different different artist are there in all different days so today is 21st Ustad bharuddeen dagar ka rudra veena vadan i mean if you, the office will be taking you, we will take you, we will arrange everything, at 7.30 it starts so you can go to bhojpur and so bhojpur and from bhojpur to that veena. is it all right for you also, ok, so enough of our logistics arrangements now we start with technical session, Mr. Amitabh will little bit introduce about himself but as the judge said they want more in a application context so if you can, yes, thanks, yes.

Mr. Amitabh Kumar: Good morning, everyone it is always good to stand and talk, well I am lawyer so if you do not mind i will keep moving a little, my presentation and i had just the opportunity of getting advised from one of the participants that it should not be just the repeat of what they reason the law and you will notice that when i will go through the presentation, there are no sections, i mean sections are not mentioned, i mean sections are mentioned but they are not copied there because that is all in the statute book, Dr. oberoi said i should introduce my self so my name is Amitabh Kumar, i am partner with a law

firm called J. Sagar associates but my association with the competition law goes back to 2004 when the commission was first established and i was then serving with the government and i was as they say on deputation forced to join the competition commission in January 2004 by then there was already a constitutional challenge to the competition Act which is called competition Act 2002 but actually it received the president accent in 2003 in 14 January but still it is called the 2002 Act, there was a constitutional challenge in the famous case of Brahmadatt v. Union of India, where certain provisions of the act were challenged to be unconstitutional and primarily one of them was that it is not going to be headed by a judge so how it can decide list between parties, while government gave an affidavit that it is going to be an expert body as it is around the world because no where a competition agency is headed by a judge but the judiciary does an interface in other manners for example the U.S. competition agency is only a prosecutor body so whatever decision it wants it has to go to the court, same is with department of justice because there are two competition agencies but in Europe it is something different where the investigator is also the judge in the matter and of course there is statutory appeal which go to the general court, those days it was called the court of first instance and from there appeal go to the European court of justice so the government gave an affidavit to the supreme court that there will be changes in the Act and that the apprehension of the judiciary will be kept in the mind so my first job was to working on the amendment bill of 2007 wherein we created an appellate tribunal which is headed by retired Supreme Court Judge or a retired High Court Chief Justice for the last 3 i mean including the incumbent they have all been from the Supreme Court and so it was also given to experts and the CCI, the competition commission of India was left with 7 members to decide in a collegiums and collegiums means decision by majority but it is not court like exactly, there is a table one side members sit and on the other side we sit and argue our matters, in 2010 then i quit government and then after a while i started practicing competition law because even at that point of time as it happens today, its not a very known law and there are very few experts who can actually say that they are experts and what is the reason for it is that competition law is largely based on economics and that too special branch of economics called the industrial organisation theory which although i am graduate from delhi school of

economics, i can say that unfortunately this subject is not taught there so we do not have industrial organisation theory being taught in Indian economic schools the law schools generally they tend to teach on the procedural aspects of the law and not so much on the substantive part of the law because it is very difficult to understand as we go through we will see why it is so difficult to understand because there are spaces because where you have to draw science of economics, if i can call it as science to understand and even punish an offender so it is not exactly based on the same rules of evidence that normally go with the judiciary, the history of this law can be traced back to 1889 when the first Canadian law, competition law was enacted but then it was never got implemented and therefore, mother of every competition law is suppose to be a american law called Sharman Act of 1889 and those were days in America when both the parties the party in power and party in opposition combined hands to have Anti-trust law and why it is called the Anti-trust law in America is because it was primarily meant against trust created by big industrialist who transfer all their wealth and control management to trust to evade taxes and those trust should control the entire america but those trust became so powerful that they could also control and manipulate the election systems because they have large funds there and so came the anti-trust law, till 1980s there were very few countries probably 25-35 countries in the world who had competition law and suddenly it exploded and the reasons are not that all countries wanted to have free market economies where the reason was that the industrialized countries of the west were forcing it down to every country since there, commercial inter-prizes were not able to compete in the trade with those countries, they were not getting the level playing field so if american company comes to India and suppose he want to sell a product which is controlled by monopolist in India, the monopolist will do everything to not let it come, i mean i am talking of legal aspect there, they can be illegal ways also of dining entry so in the and before that if you remember we use to have a law which is harsh, partly called the MRTP Act which is said to be sort of competition law although whole act does not mention competition more then twise, it was largely based on an older version of U.K. law and it went to curve monopoly rather look at the conduct of the monopolies and so India became one country where efficiency was being punished that the Bajaj scooter could not produce an additional scooter on its

existing system unless it took approval from the MRTP commission because it was MRTP undertaking and MRTP undertaking only if you cross 25 % of the market share, which market, the law was very silent about it so it worked for a while but 1991 when the government impart on the economic reforms in this country, they realized that MRTP Act is one of the single source of preventing free market and investments so they sort of did two things lot of provisions were deleted or made inactive and by 1999 the Singapore declaration came in, world trade conference and they said the competition should also be one of the issues that should be discussed, well the world forgot about the singapore declaration but India did not and we set up a high power committee called known as the Raghavan committee in 1999 they came up saying that the MRTP act is beyond repairs or amendments, it can not be converted in to a modern competition law and so they suggested a new law that gave birth to the competition act, now what is so new about it, new is that it is based on the same economic principles on which the sharman act evolved or evolved in the European union where there is no law but it is governed by treaty of Rome and therefore, very surprisingly both judges and lawyers must be having tough time there because the numbers of the clauses keeps changing every year when the treaty of Rome is again signed so it is to be 101, became 81 section 81 sorry article 81 then went back to hundred and one so that shifting always takes place so it is all governed by the treaty of Rome but the whole jurisprudence grew around that, the sharman act says that two substantive provisions are only in two sections and may be there must be 100-1000 pages written about those two sections and there must be at least 500 to 700 judicial decisions on those two sections but all these laws so the indian law also are totally derived from economic principles so lets go and see what are those economic principles.

so there are the three main elements that every modern competition law has that it prohibits agreements which are which harm competition because it is anti-competitive agreement, it prohibits abuse of dominant position, please mark the word abuse unlike the MRTP act which punished only the government position and it regulates combinations for getting together consolidating in the form of merger, amalgamation, acquisition so even though it has merger has to go 391 to 394, sections of the companies act through a high court but under the competition law they will still need an approval from the competition agency and

competition law says that if it does not approve of that merger then it can not take the cognizance of under any other law. There is a 4th dimension which is added to our law which is not prevalent in all the laws although all agencies around the world do it that is called competition advocacy that means it has two parts, in one part it educate the stake holder means the consumers, the industrialist, the producers, the government and every one, the other aspect is that if the government central government or state government asked for the opinion of the central competition commission on any issue related to competition or having influence on the market then the commission is duty bound to give it within 16 days but such opinion would be non-binding on the government which has made the reference so what are anti-competitive agreements, all contracts are restrained in trade so competition law does not says that all contracts are banned or should be prohibited or should undergo some kind of scrutiny, it is only those agreements or those contracts which harm competition need to be sanctioned by the competition law but before we enter into that field the sine que none is the existence of the agreement and this agreement under the competition law unlike many laws need not be in writing, it need not be formal so it can be oral, it can be informal and because by nature it is informal or it is oral it may not be even enforceable in law and yet it will be treated as an agreement under the competition act, now the wide meaning of the agreement has been recognised by the competition commission of India in two cases which i have cited here but basically it only says that if by your conduct on the market to give you an example, two petrol pumps situated side by side and in many cities you will see they across the road so they catch the traffic on the right side of the traffic and both of them collude, there is no written agreement, so the movement competition agencies finds that both the petrol pumps simultaneously increase the price or decrease the price then they can infer from them that there is an agreement because it defines logic that day after day, week after week, month after month, it will only happen by coincidence that one fellow says 43 rupees for petrol the other fellow also says 43 rupees and this wide meaning of agreement is widely recognised by all major jurisdictions in the world so we are not unique in giving wider meaning to the word agreement and we come to why it is so important to have such a wide meaning, now if you see the first sub bullet, it also includes any arrangement or understanding or action in

concert so it has been defined in a way to help the judiciary to come to a conclusion that there is an agreement even if you see action in the concert in the market there need not be any evidence in terms of statement recorded or in terms of evidence so whenever there is a challenge to an agreement as anti-competitive, the first question that the competition commission or the appellate tribunal will ask how do you say there is an agreement, it need not be as i say documentary evidence but there has to be some credible evidence or circumstantial evidence which can not be challenged very easily to suggest that there is an agreement and this agreement that the competition agency or the competition law is interested is not all sorts of agreement but only commercial agreements that is agreement which are for production, supply, storage, sale, purchase of goods or services, now in economics we call it product and a product includes goods as well as services and therefore, in the competition act you will find most of the reference to the product rather then to goods or services so what is the touch stone on which it will be set to be harmful to the competition and there is very long expression used in the act called appreciable adverse affect on competition so there has to be some effect on competition that should not be adverse to the competition and it should be appreciable like a small barber shop outside NJA imposes restriction on its customers in some way or to a neighboring barber shop may not have severe adverse impact, it may have adverse impact but not significance because you walk another 500 K.M. or may be you will find another two barber so they are not having appreciable adverse effect on the market, now i think i should have told you earlier , the word competition is itself is not defined and that is where the interplay of economy takes place, the word competition comes from the science of economics which is loosely treated as not defined but loosely treated as a rivalry between competitors to gain market shares, to gain customers or to gain profits or all of it so that is the meaning in economics which describe the competition and it is in that sense competition is used in our competition law, there is no strict definition about it, such agreements if the court tomorrow finds that there is an agreement appreciable adverse affect on competition are void that means they never existed so how does a competition agency or for that matter how will a court tomorrow come to a conclusion that an agreement has appreciable adverse effects so the law here unlike the laws in the west which are silent about it and have let the

courts evolve the jurisprudence taking advantage of the jurisprudence already evolved in the OECD countries are puts him 6 factors in the law itself and these 6 factors have to be considered to see whether there is any appreciable adverse effect in competition so the first is the creation of various new entrants to the market, now let me go back to the economics again, in economics perfect competition is defined to be a situation where there are large number of buyers and there are large numbers of sellers that there is free exit entry and free exit and third is that there is lot of information across buyers and sellers and why they are important because if the entry is restricted the incumbent players in the market will become monopolist or will have very large market shares and therefore, they can earn monopoly red or higher profits. In economics three conditions are must to have perfect competition which every one would say is Utopian, it does not exist in the real world but very close to that it can always exist.

In economics in free market prices are always determine by the interface of demand and supply so if the demand goes up and supply does not go up, the prices will increase, if the demands remains the constant but supplies reduced, again prices will increase and i think in our life times we have seen what was the concept of buying a two wheeler in India about 20 years back, there is so much short supply that parents use to book for their children when they were born so that they will get bajaj scooter at that point of time and if you have to marry your daughter so you give a dowry gift as a scooter so today if there is some way to control the supply, i can ensure that the price that i will get is very high and if i get at very much higher price then my cost of production my profit increases and i can have super profit but at the cost of the consumer and competition law any where in the world has its objective protecting the consumer welfare, the Americans have gone a step forward and they say that they follow a standard of total welfare which means they not only look at the consumer welfare but they also look at the producer welfare because there theory is that the producer has to co-exist with the consumers otherwise there will be no product in the market so they try to balance both but on the other side of Atlantic they still hold that it is the consumer welfare which is the prime objective that is what i think we have been always indirectly following the Europeans way so the next factor that is adverse factor is deriving existing competitor out of the market, it is very simple, i am a producer and i have

4 major distributor in 4 parts of the countries north, south, east, west and suddenly i find if i have only two i will be able to gain more profit because i will have to give less commission, i can bargain with them because there volume increase so i will at the behest of the north and south distributor, i terminate the licences of the east and west distributor, they are not my competitor but among them they are competitors and north and south prevailed upon me to say that i should terminate the distributorship of two so out of 4 only 2 remain.

that will bring a situation where you have helped in ousting the competitor in the market, these are the factors, see these factors has to be look in to holistically because in every situation all the 6 factors mentioned here do not apply so somewhere it will be a combination of 2, somewhere it can be 1, where ever you are able to establish by the known standard of preponderance of probabilities that this is more likely to happen then not happen so the standard of proof is the same that are applied to all civil litigation, what the act does it to help the courts in deciding the exactly which factors you should look in to but they need not, all factors need not be demonstrated to have been made all the time, it can be any combination, one or all 6. Foreclosure of competition, i mean this is more serious thing which happened all the time, i am a very large producer of cement, cement production depends upon lime stone, therefore, more cement producers are located in around lime stone queries because something which can not be transported economically or commercially to very large distances, long distances so there is another competitor who is setting up a factory next to me, i enter in to exclusive supply agreement with the lime stone query and say you shall only supply to me only when you have exhausted my quota to supply any one else so the market now is foreclosed to my competitor who is setting up a plant at such huge cost because there is no lime stone, i mean they get the lime stone from a very distant query then there cost of production will be much higher then mine and so therefore, either they will not be able to sell at a profit or they will be able to sell at best at much lower profit than what i am making so there is a foreclosure of market when you do something, which you enter into an agreement by which your competitor can not enter the market, it can happen the other way around, i have a very strong distribution network and that strong distribution network is essential for a consumer item say like soap,

detergents, shampoo, conditioner etc and a new party comes and i say you, i tell all my distributors and retailers you can not put my competitors products on your shelf, now the guy will have to create new distribution channel altogether may be and there have been instances like this, this happened in ireland where famous Unilever, which is called hindustan Unilever in India, Unilever use to supply ice cream, frozen ice-cream as they call it to some Irish retail outlets so they found out these all retailers had some limited floor area so they designed a super cool cabinet which are pretty large inside and they said to all the retailers i give it free to you, you please use my cooling cabinet but you cannot store my competitors ice cream in this that is my condition, now the competitors then challenged this agreement of Unilever with the retailer they said well they are foreclosing the market to us because there is no other way in which we can get it in store in a cold cabinet because retailers do not simply have the space to have multiple refrigerators and the competition agency hail this to be anti-competitive agreement because there was a foreclosure, a similar thing happened in Belgium where Belgium is the beer capital of the world so called best beer in the world are from Belgium but the Belgium people have the tendency to not having bottled beer. Pipelines have been made just like gas pipeline so if you go there you will get fresh beer from the tap, now the bigger manufacturer quickly went in and put their pipeline their taps in every part, the smaller ones left high and dry now how will they sell beer you need to have pipeline inside the pump to supply beer and so the question arose, are these agreement voluntary, with consent entered in to between producers and retailers harming competition, appreciably enough and the ruling was yes it does because you are foreclosing the market for other beer manufacturers, you lay pipeline, you have dependency in the pipeline so that it should be used as a common facility, a term which you might have come across while dealing with the gas sector where under the PNGRB Act, every gas pine has to have redundancy of 25% so that others can also use the pipeline so there are some of the adverse factors which will help courts in coming to a conclusion either taken singly or all three taken together to thrust an agreement against the touch stone of whether appreciable effect on competition is there or not due to the agreement but sometimes and as again interface of the economics, agreements are all so called for betterment of people, betterment of the consumers, better prices, better quality and

therefore, the next three factors are pro-competitive factors so now courts also required to go into whether because of this agreement, there is an approval of the benefits to customers, i need to have a big service after sell service and i am LG and tomorrow XYZ companies comes and XYZ does not have that kind of a after sell service centers and they enter into, i enter into an agreement with a LG that i will use your service center for my products as well now, obviously the third party comes will say well i should also be allow to use it but there is a capacity beyond those service centers can not service so now can it be says that the third person who comes should also be given the services of service centers and that the agreement between LG and the first player to enter into market is anti-competitive so we look at this factor, if supposing that agreement not there, the customer would have no choice but only by LG product because of that agreement a new party was able to enter into the market and supply a competing product and also provide after sell services so probably you will hold that this benefits customers and since such an agreement provides benefits to consumers, it may not be anti-competitive to start with then you see whether there is any improvement in the production or distribution of goods or provision of services, this can be because the two parties have technology which compliment each other, the two parties there is a very good party for packaging and there is a very good party for manufacturing and they come together so there can be various ways in which efficiency can be increased by theses agreements, then of course promote technical, scientific and economic development by means of production and distribution of provision of services so there can be technical efficiency, there can be economic efficiency, there can be economic of scale, there are various ways in which so mow what a court will do there are three anti-competitive factors, yes i am coming to you, what will the court do in case where all the 6 factors are seen and there are two negative factors working and there are two positive factors also so that is why it is in competition jurisprudence it is called a rule of reason, that the courts are now going to say that ok these two factors are adverse, these two factors are pro-competition but on a whole i feel the adverse factors are way more heavily then the pro-competition factors so there are two types of agreements, with this i will come to the cases, what i will do is competition law seems to be is more associated with monopolies so i will come back to these slides, let me go the abuse of

dominance because this is where the connect happen immediately, competition law means it has to against the monopolies, i will come back to the agreement in a while, i can flip the sections so dominance is not anti-competitive unlike the MRTP Act, it is the abuse and abuse basically means your conduct or behavior on the market, that is what is prescribed and not the dominance itself, you are allowed to become monopoly and in the U.S. where i said Sharman Act is the mother of all competition acts, as recently in 2007 in a case the U.S. supreme court famously said please do not frown upon any person who has become monopolist by virtue of his better and more efficient management, better product or just a luck, sometimes you become monopolist just by luck, 10 years back who would have used facebook and then the Indian prime minister goes and shakes hands with the Mark why? because they have 2 crore transaction every day so you can reach out to your electorate through facebook in a manner in which you like to do so the virtual monopolies in their own fields so dominance has to be of an enterprise and this is very important because this is one matter which is reaches the high court's more than any other matter, whether the competition agency has the jurisdiction to look in to the conduct of a party so the competition act says only an enterprise falls under the purview of competition act, and an enterprise has been defined as has been or is active in a commercial way so it just not look in to the future so if i set up a new establishment which has never been any commercial activity in the part is not an enterprise, even government department are not enterprise if they are not performing sovereign duties and although there is no strict definition of sovereign duties, perhaps you would agree with me, following the Bangalore water supply case, certain inalienable functions of the government alone can be held to be sovereign functions so i have had the privileged of contesting two cases before CCI and the Courts, in one we were against ministry of external affairs and said that ministry in procuring certain goods and services is a commercial enterprise not in granting visas, not in running embassy outside India but in procurement of goods and services, it is an enterprise because it procure the services and pays for it.

so the movement we file this case, affidavit says we are sovereign, this is sovereign function but CCI did not agree and ministry of external affairs did not challenge that this was an enterprise and this activity was not a sovereign function, it was not an inalienable

duty of a state to procure visa facilitation service, next time what happened was little more challenging, this time we challenge the indian railways and ministry of railways is an enterprise, why? because it lets me ride but charges for that and depending on how much i pay, i enter into a particular class and my facilities improve or deteriorate depending upon which class i am traveling so what is the difference between this and texi provider, the ministry of railways very vehemently protested saying no we are, it is my sovereign function because Indian railways is so huge, i am suppose to service even those areas where there are no passengers, i am suppose to provide services to the government in time of calamity, i provide services to the government of India in cases of war and all this for free so it is sovereign, at least up to the delhi High Court we lost because we could point out to the Delhi High Court to Supreme Court decisions where it had been held to be commercial enterprise so establishing, BCCI case before CCI exactly same thing happened, BCCI claimed before CCI that they are not enterprise, we are not into commerce here, we are only conduct and get conducted cricket matches and look after the sports and again we lost so the most important challenge in the word enterprise whether a party is enterprise or not enterprise but you are dominant, kindly see the next two bullets, if you have the ability to behave independent of competitive forces that means you are not bothered about who your competitor is you can choose your price, you can choose your product, you can choose your supply, quantity or supply without bothering or you can affect your competitors and consumers in your favor so if these two conditions are fulfilled then you are called a dominant player but it is getting more complex now, how do you really come across, i mean determine that it is dominant, you have to look into 13 factors given in section 19 (4) but before we go to that, there is another concept of prom the science of economics which i must explain to you, what is the, law says that you have to be dominant in the relevant market because MRTP days it was simply 25% of market share in which market but now it says it has to be in the relevant market so lets say we are discussing a case of bislery and bislery makes this processed water so will i say that i will look into processed water market alone to determine whether bislery is dominant ? why not bring in natural mineral water, does the consumers differentiate between the two or the consumers regard them as substitute. if you define the market very carefully the market

share of bislery keeps falling because the numeration being the same the denominators is increasing and more narrowly you will define the market if i have to define the market only as bislery water then bislery company will have 100% market share so it will become monopolist, if i define the market as too big then they will have very small market share and to tell you a very good story is coming from a court that is the European Court of justice that is way back in 1979, there was a case of which is very popularly known as the Banana Case, if you have noticed in the west, in the super markets there are bananas with some sticker on it called chikita, chikita is a brand name of united brands, which is basically a american company with its headquarters in Amsterdam, they are the largest suppliers of bananas in the world and there is huge supplies in Europe and then they terminated the dealership of denish distributor so the denish distributor challenged them with allegations of abuse of dominant position and story that united brands told the courts the European court of Justice, how can you say that i am dominant, banana is one fruit and if you look at the entire fruit market, my market share is just 6% at 6% you can not say that i am dominant then they said in any case even if you look only at banana, my market share is 46% so 54% is with somebody else so how can you hold me to be dominant, European court of justice came out with two very clear rulings, first it says to define the relevant product, you must look at substantively, in our laws it is actually defined as what two products in the same market is considered to be substitute by the consumers, following this case law so in the fruit market, banana is a unique fruit, unique fruit because it is in high in demand because it is high in demand by the toothless both old and young so banana has definitely some characteristics which distinguishes it from other fruits and therefore, the relevant product market is banana market and not fruit market then they went on to say that less then 50% or 51% market share can not be treated to be not in a position of not non-dominance because you have to see the strength of the player vis-a-vis other competitors but the most difficult part is in defining the market and that is pure economics, very little law and that is one problem, suppose there is a product called software product it provides communication and it is a live case, still going on, it provides communication between banking core software and the customer who is at ATM or at a point terminal in a super market, when you swipe your card they called a POS terminal and go to an ATM, today

you need not go to ATM of your own bank 3 times you are allowed free withdrawal from any bank so i am a SBI card holder and i walk into HDFC bank and take out money, now HDFC ATM machine has to send the signal to SBI and SBI core banking where my details are recorded will have to authenticate, yes i am the right customer, the pin number is right, credit is right and that i have the balance, will communicate to HDFC, HDFC ATM then will dispense the cash to me so this is the function of the software, now i have already explained that there are two ways in which you can withdraw cash, let's keep the example little simpler, we are only dealing with cash withdrawal at ATM, i can go to my bank and withdraw cash in that case my ATM needs to talk to only may bank software or i can go to another bank ATM and withdraw cash from there, when i go to the other ATM bank, it is called as interchange so one bank communicates to other bank, these are called switches for some odd reasons and then it go to the core banking of your bank and that is how the and it is all in real time so you won't even know about it, if you have noticed in the wherever you have used your credit card, maximum 30-40 seconds and please remember 90% of the cards issued in India are either master cards or visa cards and master cards and visa cards, nobody in the world knows where there serves are, the question is whether software should be treated as relevant product only for the own bank or you should also include in that market the interchange functionary because depending on these two factors the market share will change from less than 30% if interchange and banking software are suppose to be one, two something like 78% if you only restricted to the bank where the software sits, how do we decide it and based on this once you are not dominant there cannot be any abuse by the non-dominant player so all allegations fall flat, if you hold to be dominant then you get into next exercise whether all these conduct of the market has been abusive,

i tell you one example where you have 100% market share but still you are not dominant. is it possible? there have been cases and good reason is if i am monopolist but my buyer is another monopolist or is much larger then me then would you hold me to be dominant, no because there is in economics called countervailing buying power and if you typically look at Indian railways over the last 50-60 years they have developed very few vendors for their critical parts and lots of them will have very high market share but because they are

only selling to railways they can sell to no body else and therefore, there will be no question under competition law one can hold them to be dominant because of the countervailing buying power, this is best established by a case in the 80s against the European union, i am keep going to the European union because our law is very similar to their laws, we follow the same procedure more or less. so now let me explain the market structure because that was part of the title of the session, in economics you have 4 situations, on one extreme you have one situation where large numbers of buyers and sellers, you do not differentiate between one producer and the other producer, all goods are homogeneous, the other extreme is monopolist and by definition in economics, monopolist is one where there is a single supplier, now in between in the real world there are no perfect monopolies and no perfect competition so everything is somewhere in between, rearing either towards competition or wearing more towards monopoly so there is concept developed is called duopoly, instead of monopoly there are two players in the market who completely control the market and that would be called duopoly, in real world situation you will and duopoly exist today at least as far as wide body commercial jet aircraft are concerned, there are only two manufacturer in the world Boing and Airbus, they are good example of duopoly but in real world you will have more instances of a oligopoly, a oligopoly is defined as a situation where there are 4-5-6 maximum players who control 70% or 75% of the market, rest is dispersed among smaller players so how does pricing happen in a oligopoly and that is very important, lot of time it will happen that there is a market leader and the market leader would set the price and everyone will follow, because they know that he is the market leader but there can be a much better way and that better way is just pick up the phone and tell the guys hey this is the price i am going to set, you better dare not set any other price and collude in the market so oligopoly way where can be competitive where you are only reacting to some else behavior in the market or it can be collusive when they actually get together and set a price now the most recent challenge in the civil aviation sector in India which competition commission has already passed it, made its ruling, if there is a collusion between the civil airlines as far as cargo is concerned so there are hardly 4-5 players in the market, it is easy for them to get together and collude, you want to take a break, no i am ok, yes ok so let me know whenever you want to take a

break, just we can take 5 minutes break, ya i can take i do not mind doing both, please let me know if you need more stories, what i mean by stories is case laws, there are not many Indian cases so far, on merits there has not been a single case decided either by the Supreme Court or by the High Court, all the decisions of High Court are only on the procedures or procedural lapses, the first appeal a statutory appeal in Supreme Court has been just pending for an year so i do not expected to come in next 4-5 years so all the cases that i will have to tell you that is way i tell them stories because they are not from India so as it was said you know one of the reasons to have dominance in the market is definitely IPR but remember that although on the face of it there seems to a tension between IP laws and competition laws, in reality there is no such tension and IPR by nature is a statutory monopoly but as i said in the beginning having a monopoly is not a problem, you cannot abuse that monopoly and how will you abuse a monopoly is by overcharging by having royalty which have no connection with the economic value of what you are providing, charging may be royalty beyond the patented period all those things can happen, by refusing to license to somebody else and then the one of the last bullet if you see is dependence of consumers and since we have you here, i can say i do not know in Chandigarh what happens but in Delhi from the time that i have seen Delhi, there is only one Simco fixer forebears for all sardarji's, it is one company, yes, it may not have large turnover, its a kind of a gel who sets the beard, Simco, it has not changed, there is no entry in the market they are monopolist, there total turnover may not be 100 crores i am sure, so dependence on consumers when a child is growing up and he develop the beard father tells him beta simco bahut accha hai tere dadaji ne bhi lagaya tha, so dependence of the consumers also makes a product dominant, sir what about these airlines so far as standard base fare is concerned, not only that there are variations that it is not of uniform standards, then there is check in baggage also now we were coming yesterday, one airline allowed 15 kgs another allows 25 kg, that is competition, you are right, you can choose i will not fly by the airline which allows 15 kg but takes me on time, i will fly by airline which allows me 25 kg but never is on time. That is your choice.

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Mr. Rakesh Jain: State road transport organize would be a different thing. Each one is dealing separately. Then nomination basis is one of the greatest problem we are having. I will tell you example like ESICU, employment state issuance corporate, they in the issuance business they have got the medical colleges and medical hospitals everywhere. now, 2008 in one of the governing meeting the chairman of the ESIC said they are having lot of shortage of the doctors, so that can be solution from my side why don't we have medical collages with the hospital. board said good decision why don't you look into it, and decision was taken without looking into the act, whether the ESIC act, provides for setting of a medical college or not. They went ahead, they set up about 43 medical collages. The construction of building of medical collages they start giving all in lamination process. That's where the problem arises and then in 2014 they come up with the policy that, this is not there core areas and we cannot handle it, so we should start giving it to the state or to the other organization because we are not capable of it. at least about 25,000 crores which they have put in public district has gone down...and all these collages the construction has been given on nomination basis NBCC, UP state construction corporation or some of the companies saying we are not competent to handle it we pass it to the state. What happened in these cases? Once you have a...then you should not buy, you should go on nomination basis. You can also call for the same tender what the other organizations....you have got separate chief engineering department and many other things. Like in NTPC, you know NTPC is the largest company in the country generating power, coal is the most important requirement. They used to procure coal from NNTC and nomination basis. The question arose what NNTC is doing which you cannot do it? If you want to have this thing you set up, but NNTC cannot as a organization for procurement of coal, now result is an interesting case like; when we started this auctioning NTPC, said no, you cannot do it now. You have to set up your own cell and one of the cases is like when we call for the bid. The first bid came is where the coal was $140, and they said all we have got it and we have to place the order. he asked how the estimates have been prepared

this is the last time we have got it from NNTC, then they asked what is the international price of the coal because here the estimations has to be based on the international price, not the last time where you got it from. So they said that international price is $78, ok then cancel the bid. Call for another thing. Next time when the bid came it was $120, so said, that sir we got to get it now because our plants are running and there will be shortage of power. Now, in the power sector, it is such a complex sector, if you don't know you can by these technocrats. Power sector what happened? if you generate it power there has to be buyer for it because this power is not traded and if you are not taking the power you have to pay fixed cost of plant, now if the cost of power is more naturally if you are getting the coal at $120, against 60 or 70 of the domestic market your cost will go up. If your cost go up your order got down below, because the night order is the lowest one is at the top, so naturally estate discom, will consider purchasing, purchase from the lowest rather than yours. So, you may have a coal, you may have everything, but you may not generate anything. So, my point was at that time that even if you produce the coal, get a coal at this price. Whether, after generating whether you will get the order or not? That's the key point here. If you are not able to get order there is no point getting this coal as $120, there is no emergency in this thing. Emergency will be there when you will be able to produce power and sell it in the market. Selling is the most important thing, not by just getting the raw materials in the whole. so they sir, we will not be able to sell, you cancel the bid...and then they finally got it at $80, because the sort of cartel of they formed so as to keep telling that...one thing which is very clear as transparent but once you start going to the details then the things fall in places.

Participants: it is very common in our city, Mumbai and Municipal Corporation or government calls for tender, estimates are prepared and bidders are allowed to coat below the estimate amount. There is cartel that they had coat below 50%. This guidelines are followed where to avoid contract with the lowest bidder, but you know that this way you will not be able to complete the contract.

Mr. Rakesh Jain: you said it correctly, see what happens is, this happens in the...contract, where they do aggressive bidding....contracts and the bid thing pin and plant is loaded, so when, 90% of that,,

Participant: either quality is compromised or there are extra items created...

Mr. Rakesh Jain: scope of the work is again a major area of controversy, because you said it correctly it happens.

Participant: Mr. Jain! Therefore the question is, and one question which always crops up is Alvin secroscent?

Mr. Rakesh Jain: I will come to your point sir,

Participant: I will add just one thing we are talking about most advantageous bid, bidder, should the concept be not the most advantageous tender? because as we know it is and whole 80% of the problems in this country today in public procurement domain, have been because there have been row bids and have we ever done any imperial analysis of, in the last five years let us say one lakh crore of contract have been awarded, and how much money have been given in claims? In those contracts and what does ultimately that project cost?

Mr. Rakesh Jain: now, tell me, I will come to that when I get best practices cases, you just read the CVC guidelines. Every bid has got a two parts. One is a technical and another one is a financial tender. When you are studying the technical bid, all these factors one has to take into account. The capacity, the financial thing, the technical specification everything. The problem arises in our country because we don't do the technical assessment part properly. Once the technical assessment the parties are cleared, then the price bid is the only criteria. If you follow this concept religiously, then what is the other way around you tell me now,

Participant: I will give two cases, let's take lstorm and NTPC, in terms of technical expertise. You would find both of fantastic. Where two parties technically let's say lstorm and Simmons in power equipment cases they would be the most suited internationally, you cannot find any problem in their competence. Now, therefore ultimately it all boils to price. Whether, the tender workable at that price, is not workable at that price. now one of the I have an experience in brazil in one of the bids, it was mandatory for the bidder to procure a non- binding certificate from an auditor, that he has evaluated the bid and the return which he has contemplated in the basis of numbers year bid is workable. It may be non-binding. if he gets the award he stands the good chance of documents being bankable and project

finance happening.....and it may not necessary.... because if you don't get a certificate, your bid is not workable. These are some innovations, which I think we need to bring into the system.

Mr. Rakesh Jain: I will come to this point

Hon'ble Justice Sujata V. Manohar: you should allow him to speak and complete the...

Mr. Rakesh Jain: I will tell you, I am the person from the field and handle myself and deal with it.

All speaking at once...

Mr. Rakesh Jain: I will say that's what I am saying the last example is this example. I thought we could tell at the end...will tell you what happens when... I will tell you the reasons for it, we have seen most from the... And the other side. I will tell you... I am happy to answer your all questions.

Participant: guidelines provide....that is marketable these are the prices. As and when the bid is then they can compare minus-plus whatever is there. Now, I get there is another problem. Suppose there is... is there any emergency provision for the chairman?

Mr. Rakesh Jain: there is emergency provision. Emergency everything can take over. Anything just...

Participant: my question is if there is any emergency how you will determine the price? For that reason I say there should be a prior study within every department, that procurement, they are qualified persons, you appoint MBAs whatever you think.

Mr. Rakesh Jain: this is exactly we did when we went for the coal import, by the NTPC. You set up a cell, get the... I have no problem, even you spend 5 crores just file with us. That's exactly we did it. That's happens in good organizations, good PSUs. NTPC has the best procurement in the country.

Participant: tell me the department concerns, the central government...that they are doing, unless they will show the, that this is being done, you cannot do that.

Mr. Rakesh Jain: that's exactly the problem, the problem arises because we are not doing this job properly. All orders are there. That's what Iam saying. When I got the farewell from the power grade, the only thing they said is sir! You have taught us how to work in the system and get the result. And that's the best remark that anybody can get.

Mr. Rakesh Jain: you are doing procurement of 20,000 crores every year, where everyone in 2012 or 2013 was talking about Palaces, government and everything no one was taking any decision, we were going there and taking the decision, because the system work. If your system is transparent and anything we can do, there is no reason why we cannot do it. The problem arises when we carries some baggage on the back, may be because of political master or the individual. I tell you even the political masters, if you tell them this is workable and this is not workable, they will accept it.

Participant: I don't have a question but I have an input regarding relevance of this talk for us, because this is not only question of judicial review anymore and part of the computer committee in Bombay high court, last year for the first time in the history of India central government has directly sent the funds to the high court, so, we are procuring all the hardware for trust sake as an original authority, so we are all at...to find out take the original decision, how to go about tendering so it is not about judicial review anymore for us, but also for the first time the decision makers. So that is relevance talk for you is on twofold from henceforth.

Mr. Rakesh Jain: that's what Iam saying, the system, if the system is good there are provisions and we have to follow it and implement it out, that's all.

Participant: ...

Mr. Rakesh Jain: again they are reviewing it, thats what I have told in that procurement thing, defense procurement there large scale revision is going out, Defense procure I tell you is very complex and that is why the government is not thinking to comment to government, what price, how to determine the price and how you can cease the price.. These are the issues

Who will they make the payment? To the company or to the government? now, limited number supply and list of...and again this is rightly ADR because DST, they don't update the list of venders and the way the technology is changing you can't sit for the vendor list forget about for about two years you don't expand your specification part. I was other day talking to someone who is in the nuclear power. They are saying because of the set notions in our mind the technology is reserved. we have not expanded over the specification part, with the results we are getting very high bids, is said that sir I will expand the specification

this part and Iam sure we will get very good price for these bids, because nuclear power is very costly. If you set up a nuclear plant the cost of per MW cost is about 14 crores as against 5 crores in respect of thermal power plant. Now, two envelope system is idle system, but again there is issue about it, suppose you get two bid technical and the price bid and the gap between them is too large. That gives lot of opportunity to...and probably the price becomes irrelevant after a long gap is there, so you can have lot of cases in judiciary. The delay in tender processing and award... That is again too large in some of the cases. Some of them takes years to together. Some of them idly should be done from the date of putting a bid to the award maximum six months from the time we used to keep. Contract, you remember at the time of independence PWD used to be the important department in the government, state PWD or CPWD. They used to update the schedule rates every time. Now, they don't have any system at the moment to constantly update the thing now, the commodity pace is going down all over the world. see night which was 600 Rs. back now you are getting 250. Steel china is dumping, oil the prices have come down $25, now it might touch $10. So you have to update the list constantly scheduled rates have to be updated. That we don't do it. Negotiation is again a very grey area. So the weakness in the existence system which we got to get rid of it, now way forward. You got to have a public procurement law dedicated team under the department of ministry of finance. You have to standardize the procedure, tender documents and general conditions of contract. Quantities biding should be the norms of the document unless permitted justified in special cases. Evaluation criteria should be spilt out in the tender document. Evaluation as per the declared criteria, you can't change the...if you have changed anything again give a wide publicity, give adequate notice, public opening of tenders should be made mandatory. Introduce the deep briefing process, if bid is being rejected or something you put it on the website giving the reasons, why your bid has been rejected, what are the reasons for that. Results of tendering process again should be put in the public domain. Now, switch over to e-procurement regime. Now Korea is another country where assurance company guarantee the bid thing, the government and there the payment is made within two hours after the receipt of the things, the moment you have received the goods, you verify, you accepted it through hours the entire payment is made. In our country that's then again, crucial part the

payment part. The system there is no mandatory provision is there. The reforms in what procurement is major area, there is where the reforms are required. for all development works, project, the executing shall carry out a procurement planning first is the statutory clearances, land acquisition, availability law....what happen, what has happened with the power project, is an interesting story, because all these things, these likely were going for a aggressive thing acquisition, the target was 77,000 and they were doing the last plan. Lot of coal mines were allotted on letters of allotment. On the basis of this things, these mines people went to the bank also, for funding of the projects. After some time coal CIL realized they can't give so much coal, but banks did the financial closure part, they start and went ahead with the construction of project and the coal is there. There is district and...Where 26,000 MW capacity is coming up, with no sign of coal around and no sign of infrastructure. Now, in thermal power again water is a major problem. land is again a major problem, so unless 6 or 7 statutory conditions you tie up the project should not be started, thats we did NTPC, that we said we will not clear a project unless you have got a land, water availability, unless you have got a PPPA, with the state government, that this the price we are able to purchase the power. Coal is again the copper authority, is not that, if you have the coal available, you have got a taping mine allocation should be there. All these conditions are fulfilled only then we will give a signal, go ahead with the project, and the environmental clearance also. Railways, why so many projects are being extended because of this reasons. States also there is a similar problem. We announce the project, release the money, work starts and you find land is not there, environment clearance is not there. This is the major reason you will find everywhere, why the projects have been held up. Schedule of rates should be reviewed and revised, you cannot have the same schedule.... you have to constantly review it. Contract has past performance data should be maintained, this is the one thing again we are not doing. If the contractor has not done the project in the state or anywhere, if he has not done or completed the projects he should not be given the contract as simple as that. The capacity when you give the technical specification, technical assessment you say that the past performance was not done, not clear. again bid capacity, contracted to get the contract, they do aggressive biding may be their financial capacity is not there, to take on the few bids, then regular training programs

and performance is there, his capacity building also lacking now, the turnover the people is too high now a days, and people who are holding this job they are not trained properly, and the performance indicators how you administer any department should review the performance of any contract. This is public procurement bill. they department of government they would cover everyone, transparency, fair and equivalent treatment of bidders, maintaining integrity and public confidence or public procedure, basic features are these one, probably I will repeat everything, strong bidders and mechanism is there, that if any party is given there has to be one officer would be there to deal with it. 10 days are given to redress the things, if that is not redressed then there is another committee, which will be headed by the retired high court judge. now, I will come to the fodder scam, I will just run through it because will go to the last part of case studies, fodder scam is the thing which happened in 1997, Mr. lalu Prasad was the chief minister, is called fodder scam is because basically animal husbandry department was there. There you can see the estimates were 10.5 crores but the purchases was 279 crores were made. The two products groundnut and...Should have constitute 15%, it went Upto 80% the entire...and 147-155 times. The purchase committee again after 6 month after the issue of tender then the same pest was repeated, normally in the department what happens, sir! Last time we got this thing at disperse is ready to. Why don't we continue...this is normal thing which the normal files comes to us? But, that's the thing we have to call for the fresh bids, that's what I firmly of the believer, that the validity unless you have a strong grounds you should not extend the validity, even if he says he is ready to work on the same thing, because the prices may have gone down during that particular period. The chemical examination was not done, the payments were realized and the goods were transported in the scooters, motors and motorcycles. This same were in medicines

Participant: ...

Mr. Rakesh Jain: is a fodder scam kind of thing, the same thing they did with the procedural, they repeated the same thing, whatever they wanted, is the supply driven market not the demands driven market...hahahahah...want to favor some supplies, you create an artificial demand, give it to them. The tender committee approve for 22 medicine, allotment orders were issued for 170 medicines, some fake dealers were there, is an

interesting case, tonics and supplement...artificial incrimination were again the same old story was there. the interesting part when you come to the payment part, allotment was something, the releases was something more than that, like allotment figure is fixed every time by the treasury but, they keep changing the allotment figure depending upon the requirement of supplier thing. the bills, purchase orders were not attached with the bills, the bills were not signed by the DDOs, the bills were not in the format; the format it has to be, there were different forms so, all kind of things happened what you can imagine in the payment part happened and the bills were cleared. Then there is lack of control by the finance department also, when they were extreme that, the expenditure was exceeding the budget provision and it was brought to their notice also, but the action was not taken, the interesting part. These all about the chief secretaries, they were all knew. The RBI communicated to them every month that this is the expenditure and just they had to check the expenditure and the budget provision, when it exceeded. Now, I will tell you what happened. Now, this is a transparency international, there is requirement to implement the integrity tact, which you signed with the company, that in this particular contract if you get a contract, there will be no, bribery case, no collusion nothing, if it comes to the notice, then the bid would be cancelled, as a part of this they also conduct independent external monitor, which is appointed with consultation with the CVC. Which will monitor the entire bid process, any party affected can always oppose to the external monitor for redressal. now, power bid is a central transmission utility in the country, in 2006-2007, the...programme used to be 2000 crores, now when the generation increases, naturally the central transmission duty to carry out this power to the ultimate user, has to be increased. so, all of a sudden the capacity increased from 5000 to 10000 to 20,000 tons, so you can see the company, which has to show the this kind of experiential programme, so they have to build up the expertise, they have to build up a system to carry on these kind of bids and award the contract. I will tell you back to back there are the agreement with the power plant also, that if the transmission is not there it will not be able to. Power, so lot of problems could have come, if these target have not been achieved. The term lines were also important for, at that time. earlier they used to have a single stage, to envelope bidding process, earlier the single stage biding were both technical and the price were bid, were

there, now in this those cases, what used to happen if L1 is there and if is technically bid is not qualified then one could not place the order to them, so we used to reject the bid. Having effected by they will go to the court and there was lot of problems were there, we issued them directions that NO! You make a single stage, two envelope bids, first is the technical part and the second is the price part. First evaluate on the technical basis once the technical evaluation part is completed then you go to the price bid part. Who is technically qualified then bring into the price, now at the time of...just this is the last line mam....hahahahah. Now, technical part, one the technical part is over then whoever has got technically and the technical thing, the price bid then you have to take care on the L1 only, there is a fair kind of thing, then we started for the e-procurement part, e reverse auction is where we resorted to... suppose you get a very high, and the bid price, the L1 is quite, there is quite gap between the L1 and the estimates, suppose it is 25%, you require it, straight away the requirement is very large like emergency is there, anyway you have to place that order, now what is the way of? Either you go for this snap bid whoever, all those who are selected in the technical bid call for the bid again, that this is the base price, what is the best price you... or you can have an e- reverse auction. Keep biding, whoever is the lowest one will give the contract, so there is an e-reverse auction

Participant: what is e-reverse auction like?

Mr. Rakesh Jain: e-reverse auction like

Participant: one important question, this is all required to be adopted, one down year....

Mr. Rakesh Jain: first let me cover this point...now what happens in reverse auction, first fix the price, in this case like, you got...for bid. I am talking about what used to happen, suppose the L1 is 25% more than the estimates, naturally you cannot place the order to that because...either you cancel the bid go for the entire procedure now, when e platform was strong enough what we used to see that those who are technically qualified we used to call a concept called snap bidding, those who are technically qualified, you again said ok, this is what happened, now you tell us the best price what you can bid for this kind of bid, is the one way of going around, the second part in electronic platform, you say this is the price is the received, we have received the L1 price, now, you start biding, all of you, and you open the. Today is the...4p.m. you start, two days are there, and the price will keep

going down. all the bidders will be on platform, so you get a very competitive picture and get a very reasonable rate on this kind of system, because I have to decide about it, now, the conductor inventory, the large amount of conductor inventory that will decide, stop purchasing the conductors for you and they have got a very independent quality assurance inspections; which I told the CND that make thing reporting to you only, don't have intermediate face, because quality is the most important thing in these kind of cases.

Thankyou

Hon'ble Justice Sujata V. Manohar: thank you very much. there is lot to say and lot to discuss, but unfortunately we have only one hour and that hour is over, I would also like to ask him, how in this scheme you would allow for more price being paid for better quality, goods or services, and if you choose better quality and pay a little more, will it stand up to your scrutiny? because the technical bid does not take care of this, past performance is one way of, eliminating people who are on the whole, I mean you have new projects, new bidders, new companies coming in, how do allow for good quality work although it may be; any way that is something...I don't think we have time to discuss...tea time...unless you want to forgo your coffee break, which is only fifteen minutes

All speaking at once...

Hon'ble Justice Sujata V. Manohar: ok let us take then, and go ahead

Mr. Rakesh Jain: first let me take his question, what happened I keep saying transparency is the most important thing, in the tendering process because I have been on the other side, now I am doing the audit part also, certain things, I think can be easily done, but again it depends upon how honest your top man is? The things stop at that particular time if it is a fair kind, if he believes in the system, then everything can be done, if something is not in the private sector or the public sector, how strong is the board? These are the board supervised companies like as the member of the board, even we know, like the independent act, the government. The all kind of people are there and the contract system, mam to be very honest to you, you cannot trust anyone, your papers have to be strong, the papers will give you lot of exclaim, what is going wrong. that much I can tell you, when the documents comes to you, as the part of the committee, as the judge of the high court, then go through the papers, the papers will give you a lot of lead will give you. Where the

things are going wrong, how the things are being maneuvered because somewhere in between we will be sir! we have complied with all the procedures, tell us what are the procedures we follow, what is...we have to keep asking questions, and from the question answers, will come out where he is playing around., but basically like you got to be the top man...or the person who is in charge of the procurement part has to be very honest and the problem in our kind of organization arise, because of knowledge we don't change the staff. This is the another problem with the internal control structures... so over period of time organization thinks they are important but, in the interest of the organization, they shouldn't continue, because I think, the procurement part rotation has to be taken place.

Participant: …..

Mr. Rakesh Jain: market would try like the bid capacity. many companies, because we had a problem in china thing, is a new company which is participating, the first time it has come in the market, what do you do now? The best thing is, we used to do, you constitute a good office, that part you have to, and any organizations good officers are there, only thing you have to tell them, if something goes wrong we will be behind. I can trust you people are good even now, only thing you have to correct the right people. Once you tell them you go to china, and then you can see the, because we have seen in the documents, one of the Chinese company. I could see the document, there is something wrong. and there is a weakness in china, is lot of reading you have to do, to compare what is happening in the market, because you said it correctly, is a very dynamic, every day the things changes, suppose you have to acquire a team you got to know what is the latest maker, what are the specifications, what will be suitable for my organization? What should I have it of? And here along with the team the chief procurement officer will also have to do the reading himself.

Normally what happens, like Market Company would always see, what are the gaps are there in the procurement process. They will also look for the person who is weak in the system, I won't name the company, when the bid process, two envelope system, there is lot of gap is there, the chances are there, the price bid envelope would change, and it has happened in one of the bid, I won't like to name in this one.

Participant: we also had a problem, we have invited tenders to buy a computers, so the man who is L1 is fulfilling all the specifications, but we want to but dell, HP good brands and we are not able to place orders because L1 is a local dealer with a local factory, and fulfilling all requirements,

Mr. Rakesh Jain: that kind of problem, because this happens when...in your department also, when the computers we used to have our own thing. Now, in this kind of case, what you have to do; put the technical specifications and the capacity of the bidder, I know this happens in the computer thing,

Participant: and government of India says in the tender you can't put dell, HP...

Mr. Rakesh Jain: no, no that you can't... That you can say like a chip made Intel or something

Participant: so he is having it,

Mr. Rakesh Jain: like that detail you have to. And in that case what you should ask, what is his past orders,

Participant: past orders, somehow he was able to oblige state of M.P., Ok

if the person has fulfilled the basic criteria of technical qualification, then we are only concerned with the performance part of it, if it is performance part, because he lacks the brand name or the tag, which you are looking for, what is required to do is you increase the performance, guarantee system, insure the performance rather then prohibiting him and making him to...perform him to and thats becomes the certification for him to go for next and next. You are creating an entry barrier for the people by saying that you need to have a brand etc., in contract...when bidder is asked to have within 70 kms. The...the entire road is not of 70 kms....plant is something which cannot be moved every day, and there is three conditions for issuance of...obviously all these are done to eliminate people. Eliminate people, who do not have this capacity.

Mr. Rakesh Jain: the contracts are there like transmission, lands or new party has come. We used to send a party and then you can write; the party is to go there, check the system, how it is working, take a report from them and write it. That it is working well, it has been there for so many years, any person will be hesitate in giving in writing, and then you will

get the correct picture. On the basis of that reject him at the time of technical assessment. Technical assessment is most; covers both the financial part and the specification part

Participant: what is the transparency that you can bring in; in a technical assessment?

Mr. Rakesh Jain: all the bids you have to evaluate

Participant: I am saying why don't you say, this is 80%, 50% or 70%, therefore you make it, with that you go into the financial bid and say, this is better therefore I will take it, not necessary I will go there...

Mr. Rakesh Jain: what used to happen, there is a bid process, and they combine the technical. Combine together, this is where lot of. Take place, manipulation takes place that where the problem comes, I am very firm believer, technically you separate, bring them at the same par and go by the price factor, because the chances of manipulation increases much more, because are giving a 7,50,60 this has become a quite arbitrary, unless you have got a very strong team. Like a fair evaluation part

All speaking at once...

That's why we have got to do a lot of research work, before giving what exactly you want, and what price you want, what kind of competition you want.

Participant: see requirement of identification...

Mr. Rakesh Jain: mam, that's what I am saying...

All speaking at once...

Mr. Rakesh Jain: court is going for the future thing, basically like the CVC, they have got a technical wing which keeps looking to these problems and issuing the instructions from time to time, like nomination part, CVC instructs as of date 2006 order is rightly based on the supreme court decision, that nomination basis we cannot place any order. So very clear, because what used to happen sir! Left, right and center, used to place an order on nomination basis to PSUs and PSU act as a fund company for...but I don't know sir, wherever we have been insisting not on nomination basis even to the PSUs.

like CPWD, is a recognized body for us, so if you have thing, you give it to CPWD, but when the PSU is there like, why you are going to the PSU at the first place, if the PSU; it is not the code activity because PSU in turn going to place the order, so same work you can

also do by appointing a consultant or something. That's the whole point we are talking about.

Participant: this can be done in at least in some of the department, and the practice can be followed in some of the departments...

The actual problem is nobody is ready to take the burden because....this is the only problem

Hon'ble Justice Sujata V. Manohar: basically, there are different ways in which goods and services can be procured. What we have to see is whether we can have some kind of a statutory framework, where various steps which should be checked are all laid down. You can also give it discretion to depart, where the facts permit and leave it that. I mean you cannot have a water tight system, in that sense because facts of each situation are different.

We must thank Mr. Jain, for sparing so much...

Thankyou...

Mr. Rakesh Jain: like EPC contract....thats why I am saying that nature of contract, back to back, what you are talking is like a front company, and you get the contract I will do the entire thing process, this is again one way of bid rigging also...absolutely like a promoter thing or a private sector, you find all the EPC contract is done by the subsidiary and all the money is channeled through that, particular in power projects or infrastructure things.

Hon'ble Justice Sujata V. Manohar: well I think it is time, we pass on to the next topic which is...

Hon'ble Justice Sujata V. Manohar: so are we. Well I think it is time we pass on to the next topic which is probably of equal importance. We have Mr. Tejas Karia partner of an eminent firm of lawyers- amarchand mangaldas. And he is going to talk about judicial intervention in international commercial arbitration: implications and recent developments. Mr. Tejas Karia. We are happy that you are happy to spare some time to come here.

Mr. Tejas Karia: good morning everybody. Iam really honored and privileged to speak to all of you on a very interesting subject which covers all of us. So I will just introduce myself. I am specializing in arbitration and the better way to introduce is specializing in litigation relating to arbitration, where half of the time or more than half of the time we are in courts relating to the arbitration matters and that is where today's topic we will be touching upon is that how far the courts should intervene in the international arbitration process, because ultimately the process of arbitration the fundamental premise is that it's based on party autonomy and the parties have decided to choose a forum which is other than the normal duration of forum. specially in international context when the parties are from the different jurisdictions and the nationality of parties are different, then they don't want to submit to each other's jurisdiction and they would like to resolve their dispute in a more private and in a more structured way, then a court process. However, the courts cannot be ignored. courts have has a very important role to play in the entire process of arbitration and it's always a question of mindset of the users of arbitration and the users of the court process is how they present the case before the courts before and courts interpretation of various process of arbitration involved in the process, has led to a very kind of complex jurisprudence with regard to the intervention of court in international arbitration process. court has also to strike a balance between the justice and also the independence of the parties to handle their own disputes and sometimes it is necessary that the power of court is exercised sparingly just to ensure that the parties are able to resolve their dispute to the extent possible, and give a very supportive role rather than getting into the entireties of arbitration or controlling it beyond a point. So, there are no standard rules and every jurisdiction has a different style of handling this kind of issues with regard to the

intervention in arbitration process. There is a lot of debate and criticism with regard to the Indian courts but if we do a comparative analysis the other courts are also intervening in certain circumstances courts of other jurisdictions and that is also lead to a kind of requirement to amend our arbitration act to the extent possible. We will also touch upon those issues where we can discuss various issues which may arise while dealing with the arbitration process, and please free to stop me wherever you feel that you have any questions or concerns, and I would be happy to discuss.

So, basically arbitration has lot of aspects which has, India's arbitration act is based on model law and it has kind of, purpose is to reduce the judicial intervention as far as possible. if we see there are two parts, part 1 and part 2, as we know ad part 1 deals with the domestic arbitrations and international commercial arbitration having seat in India, and part 2 deals with enforcement of foreign awards, where the awards has been passed by the other jurisdiction. There is lot of jurisprudence with regard to the applicability of part 1, 2, the foreign international commercial arbitration having seat outside India. Started with Bhatia international over and taken forward in satyam ventures and then overruled by VALCO respectively. Now, with the amendment of arbitration act it has been settled that some portions of part 1 would apply to international commercial arbitration having seat outside India. Those are the aspects which need support of court when either for granting of interim relief or taking evidence or hearing the appeal against the grant or refusal of interim relief. so, now the situation is much clearer as regard with the applicability of part 1 to the international commercial arbitration having seat outside India, and also whether we are attracting international commercial arbitration in India is a big question, because of the existing provisions and amended provisions which we will discuss in sometime, is that is India a destination or a hub for international commercial arbitration. that is the question we have to ask ourselves, because of past judicial pronouncements as well as the proposed amendment which has now been a past, are we attracting enough international commercial arbitration to have seat in India because if the seat is in India part 1 would apply, and with lack of proper institution arbitration in India, whether we are providing a proper infrastructure in terms of the rules for governing the arbitration as well as the judicial supervision. As compared to India if we see Singapore and London. They have flourished

as a destination for arbitration for various reason, and one of the reason is that support of national courts which is given to the arbitration process is more pro-arbitration, and today when we need lot of investments in India, and India needs kind of business with various countries and India is having that kind of relationship. we are seeing most of the international contracts has seat of arbitration outside India, that we see from the time of drafting as well as from when the dispute arise is that the tend to see that why we are having the seat outside India and one of the reasons if we can say with respect is the role of courts in India and it's not that if we compare India, is a country whereas if you are comparing other jurisdiction there are either nation state or is city, London is a city and Singapore is a nation state, where you have proper destination, where there is a certainty that if matter arising out of an international commercial arbitration, would go to a particular court and they have the judges who are specialist in arbitration, who are dealing with this subjects. In India we have a vast jurisdiction and the difference between the jurisdictions is such that we have different pronouncement. every high court if we see the judgements on one point, every high court has a different view point, and supreme court has another view point, so that is creating a kind of a slowdown in the development of jurisprudence in India, so therefore we cannot have India as a destination for international commercial arbitration unless we have uniform thought process about how to deal with arbitration cases. The kind of hierarchy we have in India starting from district court Upto Supreme Court by the time we reach Upto the Supreme Court the arbitration only becomes like an only one peace in a puzzle where you have one civil court senior division has been removed by the tribunal consisting of formal Supreme Court judges. that is what bringing the entire process on its head where the top most judges who have retired have become like senior civil judge senior division judges and then there is a district judge who is supervising those former supreme court judges or chief justice of India and then there is high court and then the supreme court. So, thats the process which we need to look into it, there can be no more than one judicial review, yes judicial reviews necessary. we are not saying no for judicial review but at the same time how far a judicial review is necessary, is compared to London, you go to high court and thats, when we go to these courts, we had some of the cases where we were involved in Singapore is that first we have to deposit the

cost for the entire appeal process and then you are given a date to argue and if you, you have to finish within that three hours or four hours and....so, are we following that kind of a system thats the question.

Participants: .....

Mr. Tejas Karia: yes! I completely agree and I respect, yes we are one of the best, is how we use it is more, and we are trying to use the system to be best of the ability because we have the best brains available in India to decide this dispute and that is the whole purpose of commercial courts. I was coming to that point is that when we have...?

Participant: .....

Mr. Tejas Karia: correct, absolutely true. So, when we are having benefit of commercial courts when the commercial courts are, bill has been now passed and we have the specialized judges who would be dealing with this aspect of arbitration that is the next step forward for us to deal with the burden of judiciary when you have so many cases. We have specialized judges who would be dealing with this aspect and that is where we have changed the definition of court. Earlier the definition of court was there for handling the cases starting from district court for international commercial arbitration. Now, with the amendment I was fortunate to appear before the law commission on the aspect of the amendment and we had with great difficulty we could formulate a definition of court, for international commercial arbitration it would be the high court. So, the high court would have the original jurisdiction, even of those some high courts have appellate jurisdiction. it would be the high court in all cases for international commercial arbitration where we have the jurisdiction to deal with every aspect of arbitration that would reduce a kind of burden on the trial courts and it will remove one step from district court to high court and allow the high court judges who are more experience and trained in commercial matters would be able to handle their disputes more efficiently. Likewise as I said commercial court bill also give jurisdiction to the high court to handle this cases and there will be special courts which will be set up for handling the arbitration, so this would reduce the intervention and will be dealt in a more sophisticated and in a professional way. So, we deal with role of court before the arbitration there are various aspects of arbitration which requires court's intervention even before the initiation of arbitration. First and foremost is that can a court

grant an anti-suit or anti- arbitration injunction? These issues comes up in many cases where the court has to examine an aspect where you have initiated proceedings outside India, when you have agreed to go for arbitration. This intervention is welcomed because in this circumstances the court can stop the court abroad who is proceeding with the suit or matter where the parties have agreed into to go for an arbitration. if you have a matter which is filed within India then provisions of section 8 and 45 would be applicable but if it is outside India then the only option which is available to party is to go for anti-suit injunction and there are strict parameters which are been provided for anti-suit arbitration, similarly there is also a jurisdiction for anti-arbitration injunction where the parties are going in arbitration outside India where there is no either existence of arbitration agreement or the parties have not chosen or the entire arbitration proceedings vactious under the circumstances in exceptional cases Indian courts have also granted injunction against the parties of course not against the tribunal or the court, to restrain them from the proceedings with the arbitration or foreign proceedings. the cases are very limited in recent case we are arguing before Delhi high court in MC Donald's case also the court has granted injunction where the parties had agreed for an arbitration in London but the proceedings are pending before the company law board in India, and they had decided that the arbitration clause was very limited that the parties could go for arbitration only in case of termination. The contract was terminated to oust this company law board from the jurisdiction and invoke the arbitration. we have argued before the court that this entire conduct of the party otherwise would have been proper but, in facts and circumstances if the entire termination is with intention to take away the jurisdiction of Indian court and have the foreign arbitral tribunal jurisdiction by terminating the contract is vactious and that order has been granted and appeal is pending, the order is reserved in that, so, that would be another jurisprudence which is developing where the court's intervention other than in the normal circumstances can also be questioned as far as the foreign arbitral proceedings are concerned and the Indian courts can also restrain parties from proceeding with foreign courts, before the foreign courts for continuing with the foreign proceedings. so, this issue has come in mostly in international contracts where you have parties from different jurisdictions and the Indian courts in the cases of Modi entertainment and

Chatterjee petroleum have decided this issues and laid down the process as far as in MC Donald's and...They have granted an anti-arbitration injunction. These are rare cases but these issues are coming up more often and not now a days then you have different parties from different jurisdiction. The grounds are very specific it is to be oppressive vactious and abuse of law and forum convenient because if one forum is more convenient and parties have agreed to that forum and there is no point dragging some other parties to the different forum where the parties had no agreement at the time of entering the contract.

Participant: .....

Mr. Tejas Karia: these are only exceptional cases where either you have not entered to raise all the disputes in arbitration and some of the disputes can be raised in the national courts. those cases or the cases where there is no arbitration agreement despite that you have raised there taken the matter to arbitration and the courts in those jurisdiction is going to upheld that. As per Indian law there is no arbitration agreement, but as per English law or Singapore law the courts would not interfere and that's where you are dragging an Indian party to a foreign jurisdiction where clearly as per Indian law there is no arbitration agreement. So, those are the cases where the court can intervene and exercise the jurisdiction by injunction parties from proceeding with those case. the other hallmark of arbitration is competence, and that is where the parties, party autonomy and the power of tribunal to decide its own jurisdiction comes into picture and there is always a tussle between jurisdiction of a court to decide the existence and validity of arbitration and power of tribunal to decide the same issue and that is where all the provision starting from section 8, at the time of referring the matter to arbitration section 11, at the time of appointment of arbitration, and also at the time of granting injunction under section 9, court has to come to a prima facie decision whether there is an arbitration agreement or not, and whether that decision is binding on the tribunal actually is constituted or whether the court should only limit to an existence on not going to the question of validity. That is the dilemma always there before the court when the matter comes up for ancillary purpose for example when a suit is filed and somebody says that the matter should be referred to arbitration. A party says that it should be referred to arbitration under section 8. The court has to decide at least the prima facie decide the existence of arbitration agreement and going to the validity or of

whether the agreement is enforceable or not. those question should normally be left for the arbitral tribunal to decide, and if the tribunal says that I dont have jurisdiction than of course an appeal is possible, but if the tribunal wants to exercise its jurisdiction then that issue would again come up before the court at the time of 34, when the court is deciding the challenge against setting aside of the award. So, that is the scheme of the act, where the process is well defined and the court should not get into a detailed enquiry as regards to the existence and validity of arbitration agreement. therefore there has to be a balance with regard to the inherent power of the court because we don't want to undermine the power of the court and when the matter comes up before the court the court has to at least satisfy itself before granting an interim relief or directing a party to go for an arbitration or appointing an arbitrator. that the parties had agreed for an arbitration agreement and if there is no such agreement in existence then court is well within its power to refuse to exercise the jurisdiction or continue with the jurisdiction defending the case, which is in front of the court., so, therefore it is very important that at the time of deciding the reference to the arbitration, at the time of referring the parties to the arbitration. court has to decide, now, SVP and Patel engineering said that the court also has to get into the validity aspect, which has now been with the amendment has been over turned in that sense is that it says that irrespective of any judgement decision, decree of the court the matter has to be referred to arbitration, therefore the scope of enquiry now, in section 8 is quite narrow, it is only limited to prima facie validity of existence of arbitration, but there is also an issue which now would come before the court after the cases after the amendment where there is a certain cases where there are statutory bodies, for example, company law board or DRT or... the parties are taking remedy under the statutory provisions, whether the cases which have been pronounced for example, in Rakesh Malhotra's case Bombay high court said that unless the CLP petition is a dressed up petition you will refer the parties to arbitration so, you will not refer the parties to arbitration. the CLP has an inherent power which is a specialized body to deal with oppression and mismanagement in the shareholder's dispute, whether the amendment in the section 8, would override this, because the language used is that, irrespective of any judgement order or decree of the court and that would include, now even the specialized

bodies would also have to judicial authority, a quasi-judicial authority have to refer the parties to arbitration. so, that is unclear as of now, but what the intention is that is, to protect the powers of those judicial authorities to deal with the issues which are arising out of a specialist act, and not compel them to refer the parties to arbitration, because the word used is shall, in section 8, its compulsory for the judicial authority to refer the parties to arbitration if the conditions are fulfilled in the...and the only condition which is now been imposed is a prima facie existence of an arbitration agreement which would then compel the courts to refer the matter to arbitration.

Participant: .....sometimes question arises that, when there is arbitration agreement and the articles of association and 391 proceedings are fine, issue arises whether that issue can be referred to arbitration or not? section 8 application is not on the ground of arbitration agreement exist so, in lieu of the mandatory provision is refer parties to arbitration, then in that situation company law board decide only whether arbitration agreement exist or not, or the subject matter of the proceedings before company law board is not covered by arbitration agreement therefore jurisdiction continues to be vest with the company law board or that is can be decided by the arbitrator.

Mr. Tejas Karia: sir! that is what the issue arose in Rakesh Malhotra case, it was said that if you come to company law board, in a dressed up petition sounding like a oppression mismanagement but it is contractual dispute. then only, if that is not the case then company law board will have the jurisdiction, for a pure shareholders dispute or oppression the company law board would continue to have jurisdiction, so when we draft the petition before 397 when there is arbitration agreement specially when the arbitration agreement is incorporated in articles of association. Then we have to draw a distinction between a contractual dispute and an oppression and mismanagement dispute. so if it is arising out of, because of.....most of the time the entire shareholder's agreement has been incorporated in the articles and that is where the.....arises that which one would prevail, and that is the question still continuing before various courts and the latest authority was the Rakesh Malhotra’s case, where company law board's jurisdiction was protected by Hon’ble Bombay high court despite the existence of an arbitration agreement. so, only exception to that is a dressed up petition under 397, but with the amendment in the section 8, we are not

clear whether that judgement would still hold good, because the law is as it stand now, for the arbitration to be invoked after 23rd October 2015, the section 8 provision is mandatory, therefore in my view, in personal view without any precedent is that the, CLP may have to refer the matter to arbitration.

Participant: the company law board does have the power, not to pass order in favor of either of the party or it's the company.....

Mr. Tejas Karia: so, what we have been arguing before company law board is the power under 402, is much wider and so long as the prayers are beyond the scope of arbitral tribunal and the matters are not arbitrable, then definitely company law board would have the power. So, now the question before company law board would be that if the prayer brought before the company law board can be granted by the arbitral tribunal? And then if there is overlap and the arbitration agreement is forming part of the articles of association.

Participant: company law board can go beyond the prayer also

Mr. Tejas Karia: under 402 it has very wide powers but in certain circumstances we have to also go by the drafting of the petition and if there is no continuous act of oppression then it is only a pure and simple contractual dispute because both as oppression mismanagement petition. the in those circumstances the company law board will have to refer the matter to arbitration, but when company law board comes to conclusion that, it would do the complete justice with the parties and it can protect the interest of the company, if it can pass an order which is beyond the prayers and can protect for example, buy out, sell out which cannot be done by the arbitral tribunal by compulsory, mandatory order injunction, and also that would depend on the governing law which the parties have agreed; so if the governing law and seat of arbitration is outside India that would also be a factor which needs to be taken into consideration by the company law board. When the company law board can definitely grant, exercise jurisdiction because the companies registered in India then to protect the interest the company law board would have power, but if

Participant: .....

there is another aspect to it, now after Vodafone, which is a kind of substantially diluted the rangraj principle, what could be the situation, of course there are two distinct parts; part 1 is by agreement you can ask to jurisdiction; the second is..... Now the Supreme Court

recognizes that if there is no, you can have an agreement which be not be incorporated in the articles but, so long as it is inconsistent it will prevail, so I think.....

Mr. Tejas Karia: no! That is what the concept of the party autonomy is.....

Participant: .....

Mr. Tejas Karia: sir! there is very distinction to answer your question first is that, you have to leave the validity although the person can be non-legal person but, the parties have chosen him to be the arbitrator that the risk the party has taken, to do that, is that would be again available for judicial scrutiny at the time of setting aside of the award if at all it comes, so,

Participant: .....

Mr. Tejas Karia: that is what the jurisprudence is all over and we are moving towards that jurisprudence of reducing the intervention of the court only to the extent of existence of an arbitration agreement. Hahaha...

Participant: .....

Mr. Tejas Karia: this is more focused towards international arbitration, I see a point when you are talking about domestic arbitration and the two Indian parties going for an Indian arbitration and the court has a greater duty to supervise, we are only discussing how far Indian courts court could get into the netigrities of international commercial arbitration, when two parties from two different jurisdiction are....hahahahah

Participant: .....

Mr. Tejas Karia: that is true! And to answer the question; sir you have raised is, the parties by agreement outstaring the jurisdiction of a statutory body. now, the question is that again question comes of the arbitrability, if the disputes are arbitrable then, and it is a commercial dispute then it is obligatory on part of the court either under section 8 or 45, as the case may be, to refer the parties to arbitration so long as there is an arbitration agreement and the dispute can be arbitrable. if there are certain specific aspect for example, a tariff to be determined or dispute between a service provider and a telecom company, those for example, ... appellate tribunal, then electricity regulatory tribunals, company law board, debt recovery tribunal, those are the special jurisdiction which are given by the specific statutes, and therefore the question would come whether those, powers are there to

an arbitral tribunal. naturally those powers are not available to arbitral tribunal, so to the aspect of powers which are there for the tribunal can be referred to arbitration, but you cannot bifurcate the causes of action, so if there is cause of action which is a bundle of cause of action, which is arising out of it, then the court will not refer the matter to the arbitration, but

Participant: whether a statutory power can be exercised, i think that could be... if a contractual remedy can be... Allowed by the tribunal which is a private tribunal between the parties

when we go to section 8, one thing is that this arbitration agreement is there or not, if it is there then company law board is bound to refer arbitration, while doing that company law board goes into the issue whether the subject matter of dispute before company law board is arbitrable situation or not, whether that should be done by company law board or it should be left to the arbitrator under section 16 of the arbitration act, do you feel these are overlapping powers one which is decided by company law board and another which can be only exercised by arbitrator under 16. arbitrator may come to a conclusion that though he has jurisdiction to decide in lieu of the arbitration agreement but he has no jurisdiction to decide the subject matter, so what should be done by the company law whether, it should be decided by the company law board or it should be left to the arbitrator ?

Mr. Tejas Karia: see, as the law stands as amended it should be referred to arbitral tribunal but as I said there is not precedent or jurisprudence on this, so this issue would come...Ya! it is coming to force for arbitrations which are invoked after 23rd October 2015, so the arbitration which are already invoked by sending a notice for arbitration this will not apply, but in most of the cases where which will come up now very soon, this issue is bound to come so this I thought of highlighting this issue because this is the issue which will come either before any of your Lordships or before other Hon'ble court, where this question would definitely come is that what is the power of statutory authority, while in a new section 8 to refer the matter to arbitration whether it has to only simply decide the existence because in most of the cases the existence of arbitration agreement will not be in question. the only question would be the arbitrability of the disputes or a subject matter of

the dispute being capable of being decided by the arbitral tribunal, and that is where the entire discussion arises is that, what is the role of statutory authority because the powers of the statutory authorities are much wider and in a different sphere altogether which cannot be granted by the arbitral tribunal, are you defeating the purpose of the statute? in limited cases but yes, those limited cases are very important and that is where the jurisprudence comes is that; as and when there is overlap you have to see the intention of the parties but with the amendment of the section 8 that intention of the parties is also the scrutiny of that intention of parties has been taken away from the court or a quasi-judicial or a judicial authority.

Participant: .....the relevant date is 23rd October

Mr. Tejas Karia: the relevant date is 23rd October 2015, if on that date the notice of arbitration has not been issued if it is issued notice of arbitration under section 21 then new act would not apply.

Participant: when there is provision in the, as in the consumer act section 3, national seat... what will happen?

Mr. Tejas Karia: so those are the cases which has to be now redecided because there are cases for each of this, we have a consumer protection case, we have DRT case, we have CLP case, but all the cases now in the light of the amendment has to be decided so in an appropriate case it would be decided by the courts how to interpret section 8, is it mandatory or is it some jurisprudence would apply to that because as of now, section 8 as it stands for new arbitration it has to be decided by the tribunal and it would be counter protective because what would happen is that the tribunal would not be able to decide the court's jurisdiction, tribunal can decide its own jurisdiction, but whether the court has jurisdiction or not that only the court can decide.

Participant: all speaking at once

Mr. Tejas Karia: sir! Let’s wait for that case to come and we have lot of points to cover. Just to summarize the other jurisdiction in French law the national courts rule on the jurisdiction objections after decision of tribunal there are two exceptions, the court considers facie evidence of existence of arbitration agreement, an agreement not patently void. German law deviate from competence, competence doctrine and allows courts to

review jurisdiction objects. For example, prior to the constitution of tribunal court, court can determine on merits whether arbitration is admissible. New Zealand and Australia also court allow to full consideration rather than prima facie on most cases. so, it's not that only in India we have this restrictions in other case they go much beyond the existence, and the criticism about India to some extent is not well founded because if you see the other jurisdiction they also courts, also have the power to decide the arbitrability and also the validity of the arbitration agreement, because it's the futile exercise to let the matter go to arbitral tribunal and most of the cases they will decide that they have the jurisdiction but you are taking away court's power to decide certain very important issues, which would then the parties would be remedy less, to that extent when the tribunal cannot pass those orders. now, we come to the other point which is appointment of the arbitrator by the court, whether this power is judicial or administrative, now with the amendment again the same issues would come at the time of appointment of an arbitrator, there has to prima facie existence of an arbitration agreement. And if it is not for a court to come to a conclusion that the prima facie agreement exist then the court would refuse appointment of an arbitrator. before the amendment it was the chief justice or designate of chief justice who had the power now after the amendment it has been changed to the high court or supreme court, so it a judicial power. the debate before the law commission which we had was that how to promote institutional arbitration rather then high court appointing the judges sorry the judges appointing the arbitrators, can it be delegated to arbitral institutions who have proper data base of the professional who are specializing in arbitration, but the only difficulty which was faced is that; whether a court can delegate its judicial power because once you hold that is a judicial power and not an administrative power, so we found a legislative mechanism whereby we carved out an exception that a proviso saying that even though the power is delegated by the high court or supreme court to appoint an arbitrator that would not be treated as delegation of his judicial powers, and that is the suggestion which we discuss at the law commission and now it has been passed by the parliament. There is also a restriction on scope of judicial intervention it is now confined to the examination only to the existence of an arbitration agreement which is also consistent with section 8, but I would not repeat the same issues would arise at the time of the appointment

of arbitrator, at the time of referring the matter to the arbitration. so those are the issues which would be left open, there was lot of jurisprudence which was starting from SVP and various other cases, now, which is being changed by the amendment and we will have to see now, whether amendment is reducing the role of lawyers in arbitration. They are spending more time in courts or arbitration because what it seems is that the situation has not changed much after the amendment. Now, if come to the second part of the discussion is with regard to the role of court during and after the arbitration. During the arbitration the court has very vital role to play is for taking evidence and that is very important because the tribunal has no power to summon witnesses or call for documents, and that is by the leave of the tribunal or the parties can refer to the court. the only thing is that the problem which we face is that this process derails the arbitration to a some extent where the parties have to go to the court and then come back and the witness has to come so if he can have some kind of fast track process that would really help for this kind of cases because what happens is that the parties notices are issued and then it takes considerable time the arbitration comes to a stands a still. The other aspect which is again not tested and courts will have to play a very, very major role, is to extend the timeline.

Participant: ...so whatever is the...

Mr. Tejas Karia: true! But then the word, which has to be determined now, is prima facie...the

Participant: ... that level you are reducing the...reduce the. Such a..

Mr. Tejas Karia: that is not the real intention, the intention is that the court has not taken away to a mechanical...

Participant: that's what you just said...

Mr. Tejas Karia: NO! the word is prima facie now if the grant of interim relief of by court is also based on a prima facie case and when the court is exercising its power under prima facie case so if the prima facie existence of an arbitration agreement. It is a very powerful phrase in my respectful...

Participant: everything is clear, we are moving towards total capitalist society that's all....MNC culture...at the end of the day...

Mr. Tejas Karia: that is the whole...

Participant: that is involved in arbitration, what is the scope of an arbitration, only settlement of accounts, correct! What is the great hurry in other cases, the cases of convicts who are behind bars whose rights are being affected?

Mr. Tejas Karia: see the point is that there are lot of ongoing contractual relationships, they are investments which are there, so therefore

Participant: your conception is that India requires investments, investors are coming to India not because India requires them, and they require our market. They require our market for survival, otherwise the economy is world over is going down

Mr. Tejas Karia: that is true to some extent but,

Participant: so I think you can take away the misconception that India requires investments, investors require India

Mr. Tejas Karia: but, the whole mindset of the government is to attract investors and facilitate them

Participant: the thing is they want to give scope for investment, that's it

Mr. Tejas Karia: the judicial set up is very important for parties to come and invest in India and India has been criticized only because of not having

Participant: that is scope of judiciary...

Mr. Tejas Karia: but judiciary has not to. Sorry

Hon'ble Justice Sujata v. Manohar: You see the whole idea is not who needs whom, But if somebody comes to our country does he get proper justice? and if he has dispute will it be decided in the reasonable time, see that is the basic question which anybody who comes to deal with India asks and what answer do we have that is what we are examining here. see in the course of my career I haven't looked at the same issue from various points of view, as a lawyer, as a judge, as a member of human rights commission, and as an arbitrator, and you can get things in various ways, the idea is not to take away some jurisdiction from somewhere give it to somebody else. The idea is that looking to the extent of litigation that is not there just in our court but the other courts also, perhaps not with the same extent but they do have a similar problem. If arbitration is an alternative to litigation, it gives relief to the courts also and it gives relief to the parties also. Now the question is, do we have any alternative to litigation or do we have arbitration as also litigation? and the second thing

completely defeats the purpose of arbitration, so we have to examine our system in a way where we can have a fair adjudication per decision making, not necessarily adjudication because arbitration is not necessarily legal adjudication but it is a decision making, a decision which is acceptable to the parties they have chosen for their own forum for decision. Now are we having a system where you have a fair decision making process, or are we just prolonging disputes unnecessarily. So from this point of view we have to see how far intervention is required, how far it is unnecessary, and it is for our own interspection also. To make our own system. After all we are not short of work as judges have plenty of work. We have to see unfortunately our law making is a little... (LAUGH, unsatisfactory and leaves room for to many arguments and too many points, that is not court's failing, it is the failure on the part of legislature, so we have to see how far we can make... first of all we should I don't know how many were consulted before the new act was passed. I think there was very little consultation and we should have had a chance so that we can say please make the law clear. Disputes are well known, we had enough problems with 1996, act. So why those problems could not have been clearly dealt with? See it is not our fault but that is how the problem arise, so I think one should be open to, see ways and means of promoting the cause of proper disposal. Iam not emphasizing the word speedy, Iam emphasizing the word proper disposal of matters within a reasonable time. From that point of view we have to see, to what extent we can support what arbitration. I may tell you that some years ago I was invited to speak at 50th anniversary of the New York convention in Beijing. We had a world conference and everybody there was concerned with the extent of judicial intervention in India in arbitration disputes, and so we do have to bear in mind that may be if somewhere we need to be clear about where intervention is necessary and where it is not. I think from that point of view broadly we can look at all.

Participant: if more list is being decided and if they don't want a list to be decided, why this appointment process should be cast upon the court, it could be done by the government, they just want the seal of approval, the high court seal or the Supreme Court seal to legitimize whatever they are going to do.

Mr. Tejas Karia: now I completely agree with you because it's a job of institution. Arbitral institutions all jurisdictions the appointment is taken care of by the arbitral institution. This is partly because we don't have proper institutional arbitration.

Hon'ble Justice Sujata V. Manohar: I think lot of problems arise in fact, and being made good to that...

Participant: .....

Hon'ble Justice Sujata V. Manohar: in most cases I think parties decide their own arbitrators.

Mr. Tejas Karia: NO, no there are examples; for example Delhi high court has an arbitration center adjunct to it and its actually, you see the way mediation has worked, so there is a mediation center then there is an arbitration Centre and the way the loads of the court has been lessened by referring to mediation or arbitration which has institutionalized, the Centre which is attached to the high court. So, you know precisely contuse within which you are going to function. That institutionalization is something which is...and the second aspect which is that why should the court waste in time if the parties have agreed that your private dispute is handled through a mechanism. We have a system

All speaking at once,

that is a debate which I think is a very holistic debate, (LAUGH), and that is bound to be there because we should try and see that court's intervention is not there for this kind of issues for appointment because we have most of the ad hoc arbitration and again to bring that argument forward of yours sir!, now the court is imposed with more obligation to extend time which is again not a kind of a necessity because the way court is defined is high court will now have to decide whether who is at fault whether the arbitrator is at fault or the parties at fault for not completing the arbitration within 18 months. The situation would arise where the arbitrator will not be able to represent or the tribunal will not be able to represent before the court. They cannot come personally or engage lawyers, so those kinds of situation would start arising not less than 12 months from now, and the court will after one year the court will have additional burden on them. so, the whole purpose is to reduce burden as mam said to from the courts and with this amendment which was not even recommended by law commission, last minute insertion in the amendment which

would lead to lot of complications. the parties who don't want to pay up will try and delay the process and the court will have to examine who is at fault, then penalize the party, penalize the arbitral tribunal and that would take more than one year. In my experience there was one case of 1940 act. 1940 had this which used to take considerably long time to grant extensions and if you don't have extensions you start all over again in the court and by that time may be you have lost your limitation or not we don't know....mam you wanted to something?

Hon'ble Justice Sujata V. Manohar: in fact many good arbitrators today are not taking new matters under the new act, they say we don't want to go and they explain because it is not a fair thing to accept arbitrators to do all this. So you may drive out arbitration from the country instead of promoting it. These are some of the dangers but anyway I think there is enough of it to discuss....chuckles!!! The various issues which are there so let us have some response,

Participant: later difficulty arises.... we have been council for various corporation, companies and others, now then we can never be in arbitrating...hahaha...

Mr. Tejas Karia: and the other aspect of arbitration now is the disclosure which the arbitrators would have to make

Participant: even after 10 years down this side.....

Hon'ble Justice Sujata V. Manohar: no but I think in this process of focusing on mega disputes I think we are forgetting the role of small disputes settlements early. In old days we had trade organizations in trade rules, where two dealers say peace goods, if they had a dispute and the matter would be decided by the organization in two days or three days, today it takes five years if they go to court. Or not?

Participant: .....

Hon'ble Justice Sujata V. Manohar: so these all arbitrations also need to be supported and encouraged, also we used to have a lot of non-legal arbitrators will say for example construction disputes or disputes where specialized knowledge is required and we had people who were independent who could decide these matters independently. They may not be lawyers, that also have disappeared and I think is partly because of general climate of mistrust in, in everybody, so I think these are some of the other problems that we have

been...we need to involve more experts and non-professionals in the arbitration process, which we have been not able to do and the more technical legal disputes you have more problems in getting non legal persons to work as arbitrators, so I think that is also one of the...

Participant: no, I think one of the fundamental things in India particularly that our notion of justice is order in our favor and that is the problem, so even after selecting your judge if he doesn't pass an order in your favor they don't accept it as, they are not entitled to it, but it is an injustice, and thats how they carry on, thats the fundamental problem.

Hon'ble Justice Sujata V. Manohar: that is the basic attitudinal problem that they have.

Mr. Tejas Karia: and thats also depends on the advice which they get because sometimes when we go to other jurisdiction the lawyers there advice not to file an appeal, whereas in India invariably including us and we have to be blamed for that is that you always say that; there is a very good chance of success because the public policy the way it is defined has been interpreted very widely. so, an actual cost are also not imposed by the courts, so that is another aspect which we need to seriously think is that, when the court is investing so much of time in resolving the arbitration related matter and as we rightly say it as, it's a commercial matter and there is nothing special about it and party should bear the cost of the court and as well as the other side if the matter is completely frivolous, that would reduce lot of burden of the court and talking about that during the process also now, interim relief the amendment says that when the tribunal is constituted the interim relief would have to be decided by the tribunal, and the tribunal has the same power as the court and the orders of the tribunals would be enforced as if an order passed by the court and that would also reduce the burden of court from hearing the interim because section 9 petition used to take a huge roaster as far as the high courts are concerned which have has the original jurisdiction and that would reduce now because then intention is to refer the matter to tribunal when they are constituted. We also need to develop a concept of emergency arbitrator in place of the courts granting interim relief and those concepts are very successful in other jurisdiction, for example in Singapore we have the arbitrator appointed in less than 48 hours and the decision comes up and the tribunal comes up within 3-4 days.

that would take away time from the court also because when there is a clear arbitration agreement and there is no question about arbitrability or an existence of an arbitration agreement and neither party has an argument to that effect, the emergency arbitrator can definitely grant interim relief. There was the proposal in the law commission report, but that is not being kind of carried out in the...

Participant: ...

Mr. Tejas Karia: so now, as per amended section 17, that would be deemed as an order passed by the courts, so there will be the contempt proceeding against the parties. so, earlier during the process of arbitration also most of the time we used to come to 9 to enforce section 17 order or file fresh 9, on the same relief what we have filed under 17, so now that all goes... we have the order passed by the tribunal enforceable as if an order passed by the court so that is a very welcomed development in terms of reducing the burden from the...

Participant: ...

Court, the contempt court will punish, because it would be deemed as an order of the court. By deeming fiction the tribunals order has been...like we have for the award which was enforceable as a decree now the interim order also will be enforceable as an award. So, that will be neither an execution of award

Participant: .....all speaking at once...

Mr. Tejas Karia: 37, appeal is there, section 37 appeal is for possible so, like earlier also the appeal was possible under 9 and 17, now the same things remain. One more appeal under section 8 has been added by the amendment.

Participant: ..... section 9(2) (a) there is no contempt. ...

Mr. Tejas Karia: correct, but 39(2) (a) would be the court which grants 39 (1) and (2) that's an executable order yes! So it's an executable order as well as contempt both.

Participant: .....all speaking at once

Mr. Tejas Karia: no! That's a support, see whole thing is the word used is supervising court so the courts are...

Participant: ...

Participant: who will be the executing court in order 39 rule I?

Mr. Tejas Karia: court will be the definition of court, so if the definition of court will be the same as for all the purposes for 9, for execution court, as well as for challenge, the court would be the same. To answer your question which cannot rule out the court but we don't want the seal of the court. We want the blessings of the court, that is the right word to use because unless we have blessings of the court the arbitration proceeding...

All speaking at once

Hon'ble Justice Sujata V. Manohar: no! The whole idea is not to set up a separate executing machinery for private arbitrations, that is why the court machinery is utilized for that purpose because there is no other machinery which is available,

Participant: that is why the blessings of the court is required

Participant: award passed is treated as the decree of the court and they sent to the civil court for execution,

Participant: ..... there is no such provision in the arbitration

.....all speaking at once

Mr. Tejas Karia: yes! Yes! Sir, court will have jurisdiction but what section 9 says is. That court will not exercise the jurisdiction if the tribunal is constituted so that is the, jurisdiction is not taken away, it's a restriction put on the court jurisdiction is just to reduce the burden of the court to kind of

Participant: another question, if in terms of award whatever is done in terms of arbitration, ultimately is found incorrect at the time of calculation what will happen? If you execute that part, the award will decline,

Mr. Tejas Karia: invariably it will be challenged under 37 or 34. The Indian mindset is such that we will have to have challenge...sir you had a question!

Participant: orders passed by arbitrator under 17 are executable as if order of court, so for executing that order application for execution can be made directly before the court where the property is situated or the application will have to be first filed...for example, the subject matter of suit in high court where the arbitration proceedings were held. So application for execution will have to be first filed in the high court and then apply for transfer...

Mr. Tejas Karia: yes! The same issue would arise for the enforcement of award so this is a question where we will have to see that whether 42 would apply or not? 42 says that if court has exercised the jurisdiction for one aspect of the arbitration then these remaining all aspect would be decided before the court. so, if the execution comes up before a court for the first time Bombay high court has taken a view that it would be the court where the definition of court would be there and that court will transfer it to the executing court under as if CPC, for example CPC jurisdiction before Bombay high court and the execution will be in Calcutta so we have to file it before Bombay and Bombay high court will transfer, but Delhi high court has taken a different view. Delhi court says that you can straight away go to Calcutta high court enforce it there because that is also the court which has the jurisdiction over the subject matter of the property.

Participant: I think in one of my cases, the issue was the, there was the conciliation which the court has treated as an award that's a different question. So we filed, the property was situated in Gurgaon which is in Haryana. So, the court said as an award you just go and no need to transfer so 21, is technically is not attracted. It is a statutory award therefore, please enforce it as a decree in the executing court, which is actually under challenging the division bench.

Participant: ...

Mr. Tejas Karia: but, if we apply the principles of New York's convention, new convention says, as and when

Participant: ...

Mr. Tejas Karia: if there is a foreign award, and not an Indian award, see if we go to... when we are talking about an execution there are two kinds of execution, one is an award of Indian award and second is a foreign award. So, Indian court will also have to exercise the jurisdiction. Whenever we have foreign award as per New York convention what happens is; wherever the property is situated, that court can have jurisdiction, but if it is an Indian award we will have to first have to go to 42. 42 says that if you have any court has exercised jurisdiction, that would be the proper court

Participant: brother! Brother has given the judgement on this same issue in Punjab and Haryana high court...LAUGH

Mr. Tejas Karia: OK! OK! CHUCKLES! I am sure all of you have dealt with this issue at one point or some point of time, this issue have been dealt already.

Participant: all speaking at once... the issue of specific performance and the award has been frustrated, this was also issue, and number of issues were there in civil. This is DLF vs. collar generators, may be reported Iam not sure

Mr. Tejas Karia: I think the speaker here is not responsible for the creation of this law...LAUGH! But is only explaining the legislative policy. Hahaha....hahaha...so you can appreciate whatever the legislative policies are, and leave it that...

LAUGH!!!

Mr. Tejas Karia: hahaha....the point is to discuss it openly and come up with a kind of a brain storming session, rather than just telling what the law is because thats not the intention.

Participant: rather than coming to a conclusion

LAUGH!!!

Mr. Tejas Karia: Ya! the purpose is not to inform the law, because everyone of us has dealt with this issue it is just that brain storming we are discussing the issues which arise in front of us.so, the similar issues which has come and will come is removal of arbitrators and that is again imposed on the court, so all the things which are related to arbitration is at the end of the day court is the survivor for which we need to take the blessings from the father is the court, and at the end of the day if the arbitrator has de jure or de facto unable to perform his duty or it fails to perform without undue delay or he withdraws, the application can be made to the court. Now, again the phrases de jure and de facto are vague it's, not being defined. The court has come; various courts have come with various jurisprudence on this. The issue remains is, if the arbitral tribunal or the particular arbitrator, member of the tribunal has become in... either there is in ordinary delay or there is a kind of a impropriety committed by the tribunal or the member of the tribunal for example in one case; we had moved an application where the arbitral tribunal or member was having a one sided conversation with one party although there was nothing to prove but the question is,

is there a bias or reasonable apprehension of a bias in a mind of a common man that could be the test and the court depending on facts and circumstances have exercised in most of the cases have refused to exercise. Now, with this timeline being imposed and the time given to the court; arbitral tribunal to finish it one more ground would be available for removal of arbitral tribunal would be that they don't finish the case within 18 months. We see that those cases would be very often because in large commercial disputes it will be very difficult to finish the matter in 12 months and parties may unlikely to extension of six months. So, that is where the court's power would become very important and we will also have to see the court has now, high court has power to frame rules for deciding the keys for domestic arbitrations. See there is a case in Delhi high court where the tribunal was charging the excessive fees, the court removed the arbitrator. So, now that is also the court is wanting to monitor the fee aspect of the arbitration and the law is also moving towards the management of fees because the fees has become a very big issue in...

Participant: .....

Mr. Tejas Karia: the answer would lie in the institutional arbitration, because all the institutions have fees prescribed, to answer your question,

All speaking at once...

Hon'ble Justice Sujata V. Manohar: that is why the need for institutional arbitration, so the institution can decide fees according to its own norms, there is unfortunately nothing about controlling the fees of the advocates. We are just about 10 times what the arbitrators get. That is another problem

Mr. Tejas Karia: so that is a very valid point because law commission never suggested this that you keep it open ended, but then the law the way it stands schedule for, it becomes difficult to implement it so, the intention if good, but it would not be practicable for each high court to frame and how it will be binding on each of the arbitration because the court, again the definition of the court, the way it is it will not be depending on this so, that would only happen in exceptional cases where the high court is appointing the arbitrator that would be minuscule or one or two percent of the case is happening in that jurisdiction of that high court. So it is a very valid point and maybe it's a futile exercise also. If we quickly discuss in another five minutes or so, the role of after arbitration.

Role of court after arbitration is very crucial because after the arbitration the court can grant interim relief as well as challenge and set aside and enforce the award so setting the award, the concept of public policy has been very, very crucial to decide this aspect. Article 34 of the model law was allowed the challenge only on exceptional cases. New York convention also imposes a mandatory

rule requiring contracting states to recognize an enforce foreign awards say whether an exception of article 5 applies and grounds under article 5, is the same as article 34 of model law. Which are the grounds are very limited, which is consistent with international arbitral process and parties desire for a single forum for final and expeditious resolution of disputes. This is what the international framework and intention is, but in India we have kind of diluted it to a great extent by defining public policy in different modes, so the ground which is actually available to the parties to challenge the award is public policy. The public policy is a concept which is a kind of unveiling horse well, party's can kind of we can have a separate session on the public policy, but now if we see the model law in New York convention it refers to the public policy as a domestic public policy. Different countries have different concept of public policy to satisfy the arbitral award. There is an exception to this is the French code of civil procedure, has developed a concept of international public policy. So, there is a concept of international public policy rather than a public policy of India or a particular nation and this concept is quite vague but, it is helpful to an extent that it reduces the intervention of the court on the grounds of local requirements. So, if we are going to French court they will apply to a concept of international, so standards are quite high then you have a public policy of a particular nation state. 1940, there was no ground for public policy. It was introduced in 1996, because of the New York convention. that has been widely been started with Renu Sagar, then... ..., then phoolchand, then lalmahal and then DDA by justice Nariman, so I don't have to kind of repeat all of these, we are aware of that, but now with the amendment if we see Renu Sagar. And so on have defined the public policy in a various different ways, but as of now the way the law commission and the amended act has recommended the definition of public policy is a narrower concept. As far as public policy of India is concerned it says that it is in contravention with the fundamental policy of Indian law, or is

in conflict with the most basic question of morality. Now, western giko said that the fundamental policy of Indian law is a wider concept and it can include patent illegality. Now, an explanation has been added to the definition of public policy that would not entail, the court to reexamine the case on merits. So, re appreciate the evidence, so that is the restriction put on the court as far as the concept of fundamental policy of Indian law is concerned. Whether patent illegality has to be included or not was a great debate but

Participant: ...

Mr. Tejas Karia: so did say is that the fundamental policy of Indian law, not a case law or a law per se, but it has to go to the root of the case. So, the way the jurisprudence has developed that it should shake the con scions of a judge who is deciding this, so that has to be an exceptional case. Whereas what we have seen is it's like a replace with an appeal and especially when we have 34, and then there is an appeal under 37 and then there is 136 SLP available. the word used in the 37 is that there will not be a second appeal so in one of our cases where there is each high court has a different way to number the appeal arising out of 34 and some high courts number it as a first appeal and first appeal is under 96 so it goes for like 5 years, 6 years they don't hear the appeal because the word used under the 37 is, there will not be any second appeal. now, the second appeal does not mean that; the second appeal in CPC but it is only a numerical second appeal so that is what the concept is that. so, what we need to do is that 34 now it will go before the commercial court and whether it will go before commercial division of high court or the commercial court and there would be 37 before the division bench of the high court we need to expedite the process although the time limit is provided under 34 of one year, similar time limit is not there under 48 at the time of enforcing the foreign award, so that is missing in the amendment although the amendment now, imposes the time limit on court to decide the challenge against the award, that would expedite the process and even the commercial court act would help to a great extent.

Participant: .....commercial court act.....

Mr. Tejas Karia: but, for arbitration they have defined the commercial court as the high court so the commercial division of high court will have the, for matters above one crore

Participant: .....

Mr. Tejas Karia: yes! I will check that aspect but, if it is more than one crore then it would be before the high court as far as arbitration is concerned.

Participant: ...

Mr. Tejas Karia: yes! Correct, correct but, then it is for the high court to set up the commercial division in the high court, but what has happened in Delhi and all the original...

Participant: ...

Mr. Tejas Karia: but, then as per law the high court each state has to commence it and that's what we had also constituted court

Participant: ...

Mr. Tejas Karia: we will just check that but as far as...

Participant: high court, for example Delhi high court original side is not re designated.....

Sujata V. Manohar: you see many high courts also...

All speaking at once...

Hon'ble Justice Sujata V. Manohar: the problem is many high courts don't have much commercial litigation also. I mean look at Sikkim or Assam or something like that. They cannot afford to have separate commercial division, so you have to have some compromises whenever the commercial matters come in the district judge court the judge will decide. Some courts have only two or three judges how do you provide for all this, so it's a practical problem...

Participant: but the point here is.....

Mr. Tejas Karia: for international commercial arbitration, the high court having appellate jurisdiction would also have the original jurisdiction that is how the definition of the court has been changed, because that definition it took some time for us to draft it so, even though the high court is not having original jurisdiction for international commercial arbitration having seat in India or outside India, high court would be the court which would have the original jurisdiction.

Participant: .....

This is actually like Supreme Court you see, section 11, even the Supreme Court designated as original court for purpose of...

Even the original act was passed without any discussion so...LAUGH!!

Participant: sir one question arises, since you are defending the various corporations, and you have incorporated the definition of court in such a manner it may be benefited if bypassed the courts.

Mr. Tejas Karia: NO, NO, in fact it raises the bar of the court because what use to happen sir, infact was, all the arbitral award was getting challenged before district court now, we wanted to refer the high court so it raises the bar of at least the high court judges so it brings to a level where high court judges are experienced and having a good competence to deal with, because it was sometimes very insulting for us for a district judge to say write a letter to or summons to the supreme court judge saying send the records and proceedings so, it used to be quite embarrassing for us.

All speaking at once...

Mr. Tejas Karia: no, no, sir that is a different discussion altogether because that is true absolutely true infrastructure wise the high courts are not needs to be done in terms of appointment, in terms of allocation of different things

Hon'ble Justice Sujata V. Manohar: if I can deduct section 10 where the subject matter of an arbitration is a commercial dispute of a specified value and if such arbitration is an international commercial arbitration. all applications or appeals arising out of such arbitration under the provision of arbitration act, that have been filed in the high court shall be heard and disposed of by the commercial division where such commercial division has been constituted in such high court. if such arbitration is other than the international commercial arbitration all applications or appeals arising from such arbitration etc. that have been filed on the original side of the high court shall be heard and disposed of by commercial division where such commercial division has been constituted and three if such arbitration is other than international commercial arbitration all applications etc. that would ordinarily lie before any principle civil court of original jurisdiction in district, not being a high court, shall be filed in and heard and disposed of by the commercial court exercising territorial jurisdiction over such arbitration where such commercial court has been instituted and 11 notwithstanding anything contained in this act, but commercial court

or a commercial division shall not entertain decided suit or proceeding relating to any commercial dispute. These are the provisions

Participant: ...

Hon’ble Justice Sujata V. Manohar: I think we shall stop here...

Participant: I don't understand one of your statement that it’s humiliating for a Supreme Court judge to send record to a civil judge, or civil court, why it is humiliating? Why it is insulting? He opted to be in a...so it’s not insulting not at all...

Hon’ble Justice Sujata V. Manohar: you see unfortunately there is no provision to send the records to wherever, whichever is the court unless there is a litigation in respect of that award, now, under the old act, I think 1940 act all records were deposited in the high court now, it is also a big problem or how to...

All speaking at once...LAUGH!!!

Hon’ble Justice Sujata V Manohar: that’s why we hand over to the parties, what to do!!!

All speaking at once...

Hon’ble Justice Sujata V. Manohar: arbitrators are not required to keep the record. Hahaha... anyway

All speaking at once.....

Thankyou!

Session 27

Hon’ble Justice Sujata V. Manohar: So shall we start the next session, it’s on transparency and confidentiality of international arbitration proceedings? Actually this problem also arises in case of domestic arbitrations, because basically this is a private settlement of disputes and at least as far as I know if any third party ask for a copy of the award, we don't give it, nut that is a very limited view. so we would like to hear what Mr. Tejas Karia has to say about the practice prevailing in the case of international arbitrations, but then there are the international treaties, norms for this purpose and to what extent do we need to have openness about arbitration proceedings and but it would be counterproductive so, I think we will have to examine the pros and cons.

Mr. Tejas Karia: thank you, thank you so much. This is a very interesting topic where there is no jurisprudence as such in India on this subject, about transparency and confidentiality. The advantage of arbitration is, we know and when we are asking the difference between arbitration and the litigation is one of the foremost concerns, which parties have is the confidentiality. confidentiality comes up for various reasons, one is it is commercial in nature, so they want to have the hearing in public, they don't want to kind of, have the trade secrets or commercial confidential information to be disclosed because, invariably when we are arguing matters before the courts, all the figures or facts are pleaded or at least argued before the court for taking the interim relief or the evidence also happens. So anybody can watch and have also the pleadings taken out of the court officially or unofficially. so that is the disadvantage of the litigation process and the parties who want to have the disputes settled, they prefer confidentiality and that is one of the reasons why the parties choose arbitration over litigation, and confidentiality if we see a very famous case of UK court, where the court has decided that the concept of private arbitration, they write simply from the fact that the parties have agreed to submit to arbitration particular dispute arising between them and only between them. it is implicit in that, that the stranger shall be excluded from the hearing and conduct of the arbitration and that neither the tribunal nor any of the parties can insist, that the dispute shall be heard or determined concurrently with or even consonance with other dispute, however convenient that course

may be to the parties seeking it, and however closely associated with each other the dispute in question may be. So this case where they wanted to decide, two cases together because it was similar between two different parties. The court said that there is implicit understanding of confidentiality, when they go for arbitration process includes third party and those parties could be anybody. It could be a party to a similar dispute or the parties who want to intervene or parties who want to kind of understand the process. So there are advantages and disadvantages to this approach. Confidentiality has its own advantages as well as disadvantages. We will discuss all of them in greater detail when we go further…

So as I said there is need for confidentiality. what are the requirements of confidentiality, avoiding publicity of certain allegations so when you are making allegations for example public sector undertakings are involved or listed companies are involved there allegations, it has larger implication, so to avoid that freaking public because may be founded, unfounded, but in court we kind of make those allegations and then court has to decide the varsity of that. The risk of publicity of laws because then all the financial details becomes public, the loss suffered by the company in the process also become public, so that is another reason why parties prefer confidentiality. Taking positions for the purpose of private resolution of dispute without having to be bound by it in public, also is reason and need to protect confidential sensitive business information or trade secrets or know how. So these are the issues which can arise in terms of confidentiality. Generally privacy or proceedings can confidentiality of material is an important advantage for commercial people, as compared to litigation in court. So this is the reason why parties go for confidentiality. then we will also discuss the contra distinction with the transparency because legitimacy of arbitration or the arbitration process itself has to have transparency imbibed within it, so it cannot be that private can go in private and do whatever they want to do. They have to be accountable, the arbitrators are accountable and the parties are also accountable. Where do we strike the balance? That is the topic for discussion today. So who are the subjects of this confidentiality obligation? First and foremost is the arbitrators, parties and the third parties, like third parties who become party to the arbitration process for example expert or other witnesses. So internationally the norm is that the parties will keep the existence of arbitration confidential. The documents, pleadings confidential and

also the parties who get involved for example who get involved, the people who are working with an institution will also keep the thing... when we go for arbitrations in London, sometimes we have the interns or the assistant who are assisting the arbitral tribunal the members of the tribunal also attending. They take kind of first when before we start the hearing they say that so and so is so and so, he is attending, you have any objection? If you don't have any objection we will pass an order that he will be bound by the confidentiality obligation. similarly when there was arbitration going in London and a lawyer who had advised the client, who was not representing from other law firm, had advised the client in earlier hearing was present, so we took an objection saying that please explain the justification of his presence and then they had to admit that he would represent the participants, the persons who are not representing cannot just come and sit in the arbitration proceeding, that is the norm. Then there are certain institutional rules which we will discuss in detail which provide for those kind of confidentiality obligation and discuss, but arbitrators are bound by confidentiality and they normally don't disclose this. Is beneficial? Because as an arbitrator you have decided one issue, can you take advantage of that decision, in another arbitration where the same issue has arisen? As judges we do, we always use it as president, that an order passed in earlier case would it be treated as precedent for another case? So that you don't have to reinvent the will. you don't have to discuss everything all over again and you can simply rely by reference that this was held in so and so case and thats how it is binding, or it has at least a persuasive value, because if it is not binding, if the facts are similar, it can have a persuasive value, but in arbitration that is not possible because although we had a very good award which was not challenged in any court remain confidential forever and we could not use it for even as a firm we could not use that award for any other case and we have to kind of argue all over again and hoping that this another arbitral tribunal will take the same view and if they have deferred on that view also we cannot use the earlier award, which was passed on the very same issue and we had argued all the points but then we have to argue all over again and the tribunal is bound to take whatever view they like. Similarly the third party who has come as an expert, they know the entire arbitration process, they also become the part of the process because they are cross examining. they know entire pleading, can they use it when

they, for example a consulting firm who has the pleading for one party as in he was appointed, can they use it for another matter of theirs? For another client? The answer is NO, because you have strict obligations of confidentiality and those are the issues which are now changing slowly because the question comes what is the benefit? Is this the benefit? there out ways the confidentiality or transparency is more beneficial, and there is always a continuing debate about it whether to go for more transparency or we go for transparency which protects the confidential aspects of the process, but not the award per se, so if the decision if you can detect the name of the party, or figures in the award, the judicial process which has been followed or the decision which has been made can it not be used as precedent? That is what we can discuss and there are no set rules as of now in any domestic legislation or in institution's rules and there is no publication which publishes the award also other than some awards which gets published and there is yearbook of commercial arbitration published by ..... where they publish very selected awards where the parties are given consent, if the parties don't give consent again they cannot publish those awards, and those awards cannot be used as a precedent value. So as I said confidentiality obligation may extend to the existence of dispute or arbitration. It can also extend to the substance of the proceeding including the evidence produced during the arbitral process all or part of the award. However the content obligation may differ. To give an accurate exposition of confidentiality at large would require the much more wide ranging survey of law and practice then has been necessary for decision on a narrow issues raised by the appeal and cannot in my opinion safely be attempted in abstract. law Mustil opine that, because if you have an appeal arising out of an arbitration proceeding you don't have the complete arbitral record before you, and if the interim relief is there and it takes longer, because when you are hearing an appeal against interim relief granted by the tribunal, the arbitration is not state, arbitration continues, and then it becomes very difficult for the arbitral tribunal or court to kind of be on the same page because then the evidence has started and the appeal against interim order is still pending. So on certain circumstances whether the transparency matters because then whatever is happening before the tribunal unless the parties disclosed it is confidential. In one case we were arguing appeal before an Indian court, where the pleadings the parties have taken completely

contrary stand in the statement of claim, whereas in the section 9 petition they had taken a different stand. Now can we file statement before the appeal court, by the time the appeal comes up for hearing? Those are the questions, there are certain exceptions to the general rule of confidentiality also because if you are protecting your right, your legal right then you can disclose it. is it better to agree for confidentiality, because there is no kind of express provision under law to keep the arbitration process confidential, so therefore when we are drafting an arbitration clause we insert that particular agreement between the parties, that parties hereby agree to keep all the proceedings and the award confidential, but in Indian context which we will discuss later, invariably the mindset of Indian is to challenge each and every aspect of arbitration and we have not seen that then arbitration remain being confidential. Even though you have agreed that you will keep it confidential to challenge you have to disclose the contents of the pleadings filed before the arbitral tribunal and the order passed by the tribunal either at interim stage or a partial award or a final award. That way in India this concept is quite blurred because due to challenge excessive intervention and challenge by the parties, they themselves disclose it so this concept of confidentiality has not kind of played a very major role. It has to be decided on cases to case basis, having regard to surrounding circumstances in which the confidentiality agreement was made and the principles and purpose of the arbitration, so courts in England have also held that confidentiality is not an absolute kind of an obligation and it can be seen infact of each case. There are expressed provision in some jurisdictions one is in Sweden and in USA, there is express provision of confidentiality and other jurisdiction there is implied obligation of confidentiality because having selected a forum which is private in nature. It is understood that the parties have kept the, decided to keep the proceeding as well as the outcome of the proceeding confidential. there are institutional rules which also deal with it article 35 of SISC rules, article 22, article 30 of LCIA also deal with parties obligation to keep the things confidential. Of course there are several national legislations, but none of them provide for express provision for confidentiality. Largely it is institutional rules which provide for the concept of confidentiality. What is the concept of implied obligation of confidentiality? First is either it is necessary incident of definable category of contractual relationship, so the nature of

contract is such that you are either disclosing the technical knowhow or you are giving a commercially confidential information. in those circumstances it is inherent in the contract itself that the proceedings of arbitration will be kept confidential, or there is implied obligation arising out of the nature of the arbitration itself so if it is a private commercial arbitration, then the nature itself would require it to be kept confidential, or it is an essential corollary of the privacy of arbitration proceeding. So these are the different concepts which have been developed in various cases decided by the courts abroad where they have kind of carved out the concept of implied obligation of confidentiality, although in absence of express obligation it is very difficult to enforce it. Now, there is also a difference between privacy and confidentiality. Privacy is always seen as an individual's privacy, whereas confidentiality is seen as a confidentiality of proceeding. So privacy is concerned with the rights of persons other than the arbitrator parties and their necessary representatives and witnesses to attend the arbitration hearing and to know about the arbitration. Confidentiality by contrast is concerned with information relating to the contents of the proceeding, evidence and documents, addresses, transcripts of hearing and the award. Can somebody just come and watch the arbitration proceeding? The answer is NO, because this is a private affair, they don't to... this kind of hearing in camera. There are many cases in litigation also where the nature is such, that it is not held in public. similarly it is private thing and confidentiality most of the time is treated as the what is the product of that particular proceeding has to be kept confidential, but in Alish Shipping the court has construed the confidentially as a necessary corollary of privacy of arbitration, so both some courts have also treated confidentiality and privacy interchangeably, and they have come to a kind of similar conclusion, with regard to the privacy and confidentiality. Now how do you enforce the breach of obligation, if somebody has breached the obligation of confidentiality? There are only two ways, one by injunctive relief or by way of damages. injunctive relief once it is disclosed is of no meaning because, you lose the purpose for which it was there, so once it is disclosed the confidentiality obligation cannot be injected, but at the right stage there is an apprehension of breach or there is sufficient material available the court can definitely inject the parties from disclosing the confidential nature of this thing. Second is the damages, although the absence of damages to the

plaintiff is not a general barred to the relief there may be exceptional cases where the granting of the injunction would be so prejudicial to a dependent in causing such hardship that it would be unquestionable for the plaintiff to be given injunctive relief. in some cases the injunction was refused and the damages was state to be an adequate remedy, for breach of confidentiality obligations, but it's very difficult to prove what loss they have suffered so sometimes, mere fact that obligation of confidentiality was breached it was held to be sufficient to grant damages. There are various exceptions to the concept of confidentiality one of them is required by law or the court then the parties are bound to produce the document or the things. second is where the use of material is reasonable and necessary for exercising legal rights, so as I earlier said that if it is necessary for challenging an award or to bring out the contradiction between the parties but it is, can you use it for a corollary? For example, if there is one arbitration and you have another arbitration can you use it for another arbitration information which has come up? This issue would also come up for public sector undertakings and government when there are, government is the largest litigant in terms of arbitration is concerned. Whether Right to Information act would apply to them? If something has come up when there are certain exceptions to RTI also, which would if it is a commercial confidence then government can refuse disclosing that under the RTI as well. another exception is public interest and interest of justice, so if the exception, if parties have chosen to keep it confidential, but court fears that it is in the public interest to disclose certain aspect of the arbitration or the documents which are produced in the arbitration, then of course the parties are obliged to produce the confidentiality rule does not apply. interest of justice for example to prevent inconsistent witness statement also could be a ground for interest of justice, you are directed to produce the witness statement which are filed when you are contradicting or you are asking a false affidavits on oath, those are the cases where the confidentiality obligation would not arise and those are the exceptions on case to case basis the court has to decide because there is no general rule as such it has to be depending on facts of each case where the exception would apply. As I said Indian context there is no jurisprudence in relation to the implied obligation of confidentiality. In context of conciliation section 70 and 75 of arbitration act refers to confidential nature of material disclosed, but there is no express provision in

relation to confidentiality in arbitration proceedings. So as far as conciliation in part III is concerned they have the requirement of the confidentiality but the arbitration proceeding in part I or in enforcement of award part II there is no concept of confidentiality. it is inconsistent with international practice where most jurisdiction are silent on issue of confidentiality, so there is no difference between Indian jurisprudence and law and other jurisdictions because confidentiality is a subject where it is not kind of, there is no legislation as such it is left with the parties to agree and enforce the rights against each other, because there is no kind of requirement to codify such an obligation, however since the parties may choose to subject their arbitration to procedural rules of given institution, the confidentiality obligation may find source in such rules and in terms of section 19(2), where the parties are free to choose their own rules, applicable to the arbitration. the rules can get the incorporation by way of reference and if the rules contain confidentiality, then it can be treated as statutory obligation, because 19(2) allows parties to choose their own rules and rules provide confidentiality then indirectly the confidentiality obligation can be incorporated in the arbitral process. As far as transparency is concerned, transparency is also a much discussed topic because sometimes there is lot of debate about, how the arbitration proceeding should be open to everybody, and what is so great deal about keeping it confidential because, yes! Yes these all are private rights, but you are dealing with several aspects which relates to public then whether the government or the institutions can keep the arbitration confidential. There are various concept of transparency. one is institutional transparency, whether the institution who is dealing with the arbitration can keep it confidential, legislative transparency requires that in law making process in international law there has to be complete transparency and third is procedural transparency, whether the transparency in enforcement of legal norms in international courts and tribunal. In addition to transparency concerns may also arise in commercial contracts. We have a lot of investor's arbitration. we have bilateral investment treaties with various countries and the investors from those countries when they invest in India they are given protection as per the bilateral investment treaties, and if there is any breach of those protection they can either go under the bilateral investment treaties or also relied on the MOST FAVOURED NATION (MFN), clause and other investment treaty. whit industry is

one of the case is where India has suffered due to this bilateral investment treaty and the question comes up most of the time is that, whether people of India or the persons who are involved in kind of the tax payers whose money has been used for this commercial disputes, are they entitled to know the process? Are they entitled to participate in the process? Or there is concept of amicus juris who can help the arbitration process by giving an advice to the tribunal in such issues where the arbitral channel can come to a complete infirmed decision as far as the law, because quite possibly it is happening that the arbitrators are not trained in the jurisdiction where the law is applicable. sometimes we have seen that the Indian law govern arbitration are decided by arbitrators who are not even remotely converse with the Indian law and they are taking the evidence of Indian law as a question of fact whereas they are tribunal under Indian law and they are subject to supervision to Indian courts, despite that they are not aware of supreme court cases and sometimes it becomes very apparent when they ask questions when we are asking and when we are producing an order of a supreme court it is always signed by the court master. So they ask us question that is it not signed by the judges? so such kind of questions are asked, that this is not an order, where it is signed by the judges but it is signed by the court master.so, that shows their knowledge about Indian law and Indian procedure and can we take the chance of conducting an arbitration before such tribunal and making India a party or government of India a party, where the parties are involved, so those kind of cases, there are so many cases of transparency in the process. There may be a situation where there are large corporations who are having shareholders and shareholders are interested to know, what position their company is taking. There are various public sector undertakings which are listed and there are shareholders who are affected by the stand which they take, there are consumers who are affected by the decisions which has taken by the company and there is complete uncertainty, because most of the time the award is also not made public when it is compiled without enforcement. Those are the issues which come up, so there are possible benefit such as publication of reason award would lead to development in consistency in law of arbitration. Even without strict precedential value, publication may assist parties in avoid future dispute because they can, they will be able to learn from legal strategy of other party. Better transparency will

promote democratic principle because affected member of public, such as shareholders, publicly held corporation, consumers has an opportunity to observe and evaluate the outcome. Making public of award may lead to greater pressure to implement the award. So those are the advantages of making the arbitral process or the awards public. It can also lead to a kind of history or precedential value of arbitral award, an also can give mindset of the arbitrator because, when we go to foreign arbitrations we always see a bias towards multinational corporations. Indian are always suffering in international arbitration because they are not seen as genuine parties and it's not always true. When we go to foreign arbitration India suffers because of that bas towards Multinational Corporation, and if we make this arbitral process public, it would make it apparent and there is no imperial study because we don't know how many bilateral investment treaty arbitrations are pending against India. That is not public although the news comes up as and when there is something but we don't know, we cannot take part in that and we cannot defend the stand which India is taking. therefore there was ancetral working group to on arbitration and conciliation which was set up to discuss the substantive issue to consider in respect of possible content of legal standard on transparency and the points which they discussed is publicity regarding the initiation of arbitration proceeding, so when the arbitration proceeding is initiated it has to be made public so that people are aware of the pendency of that so they can take the decision whether to invest in this company or whether to buy the goods of this company, there can be long term relationship between the parties. Documents to be published such as pleading, procedural rules, supportive evidence, submissions by third parties, amicus curie in proceedings, publication of arbitral award, possible exception to the transparency rule and depository published information. So, we have a kind of transparency there would be the requirement to make it depository, for example AIR or SCC we have depository of cases of high court and Supreme Court. Similarly there is no publication which can be, even today we are using the court's decision in arbitration process. So, whatever courts are deciding are, we are still relying on the decisions of the court to substantiate the points in arbitration, we are not relying on any of the awards, passed in the previous arbitrations to substantiate the claims. Different arbitrations require different nature of transparency because transparency cannot be applied as same yardstick

to all kinds of arbitrations for example, international commercial arbitration is essentially a private affair between the parties, and therefore confidentially concerns are often override the need of transparency. So you need to have a confidentiality instead of transparency, so international commercial arbitration is if you see there is greater need for confidentiality than transparency. Then comes investors' state arbitration that is semipublic, rules often provide for confidentiality for example exit rules but growing need for transparency based on precedential value of arbitral award in international law. so, there is a debate where an investor state arbitration when an investor is a private party and state is a public entity whether you should disclose it because there is no as such a commercial contract between them because you are relying on bilateral investment treaty and you have an arbitration clause which is derived from that bilateral investment treaty where the investor of that country is given protection. There are certain kinds of disputes for example WTO disputes which are in essential nature of public and therefore there is clear movement towards the dissemination of information. So, most of these cases mostly public and there is clear discussion towards leading to the public this thing.

There is another concept of state to state arbitration so there is new concept of arbitration which is developed between two states, rather than going to ICJ they go to arbitration to resolve their dispute. In these cases the transparency epitomizes the prevailing more in our society and standing a political, moral and occasionally legal judgement of people's conduct. In contrast the opposite of transparency such as secrecy and confidentiality have a negative connotation. All other remain narrative in some other areas overall they are largely considered as manifestation of power and often it's abused. so what happens is that state to state arbitrations has to be made public, it cannot be kept confidential because if you are keeping it confidential then it shows that you are exercising power and may be in extend abuse of power of state. As far as investment arbitrations are concerned there are legitimacy concerns so, ancetral has commented on the rules of trans parenting treaty based investors state arbitration they have come up with the rules which have been adopted in December 2014 and now it is up for signature in march of 2015. Where it says transparency was also seen as an important step to respond to the increasing challenge regarding the legitimacy of international investment law in arbitration as such. Those

challenges were said to include among others and increase in number of treaty based investor state arbitration, including an increasing number of privlous claims. Increasing inconsistency of awards and concerned about lack of predictability and legal stability. It was said that legal standards on increase transparency would enhance public understanding of the process and overall credibility. Now, on a drop of hat investors wants to invoke arbitration against the state and state for force has to defend it. They have obligation to defend it because if they don't defend any and if they have award the challenge of that award becomes very difficult because that would be before the national court. Which national court? Is a question, because it would be where the seat is situated and seat is invariably not in the state where the state is a party? In that situation the problem comes is that, is it a process which needs to be made public so that altlest the participants or the stakeholders know what the things are going on. it will also reduce the privlous claims which are raised by the investor against the state, and state can also take help from people, but there are investment treaties which cast an obligation on the states to keep it confidential and therefore as far as USA and Canada is concerned they have drafted a new treaty where they have made it obvious that it would not be confidential. There are many states which would follow this, I will just finish this....Ya!

So again there is transparency in nature of dispute. there is an international commercial arbitration, then French arbitration law distinguishing between domestic in international arbitration and as far as various institutional rules are concerned they also allow redacted awards ICC rules allow parties to agree on third party consolidation of proceedings and society of maritime arbitration there is no confidentiality provision, therefore to conclude the confidentiality is a long term an important aspect of international arbitration. There is significant divergence on law prevailing in different jurisdiction in relation to confidentiality. Law in UK and Australia seems to imply in obligation of confidentiality. International commercial arbitration may benefit by lesser transparency concerning in favor of rigid system of confidentiality. In general party seeking confidentiality would be well advised to make an express provision but if there is no express provision then in very limited circumstances it is treated as an implied obligation. Since arbitration may be purely private, semi- private and public concerns of transparency need to be addressed at least for

later to transparency internally Seneca non to escribe consistency and aid predictability and legitimacy of process of arbitration in most cases confidentiality and transparency will be mutually exclusive. The balancing act has to take into account in terms of the nature of the dispute.

Thank you so much!

Participant: .....

Mr. Tejas Karia: correct! So long as the rules are very specific sir, and there is article which... I have not dealt with that because it was part of reading material, so all the rules are described there it only restricted to know how and confidential information. If a party has to disclose it under an obligation of law that particular information then only there can be an exception, otherwise they are bound by the rules. so, party has to justify that the confidential information the existence of dispute can be disclosed or a liability, potential liability can be disclosed, but for that you don't have to disclose the documents or an agreement between the parties which has the confidential information, for example formula of an intellectual property because mostly IP would have either a formula which is patented, patented becomes public but it is a formula which is more of a trade secret or a know how so, therefore that cannot be disclosed because if that is disclosed the whole purpose of the arbitration is defeated because when there is no dispute you will keep it confidential moment there is a dispute you will take out an exception to kind of disclose it, so that is not permissible.

Participant: .....

Mr. Tejas Karia: to that extent there is only an exception is that you are either protecting your legal right or the law mandatorily requires you to disclose it. If there is statutory obligation for me to disclose and if I don't disclose I would be liable. there in a companies act or under any other law if Iam liable to disclose it and if there is penalty which is there described under the law then it could be a valid ground to kind of disclosing, but only a limited information which is required by law.

Participant: in audible...

Mr. Tejas Karia: that depends because if it is required by rules then it is necessary to disclose so sometimes by consent parties can disclose certain things. So as a matter of

practice you do it but it is not obligatory on them to disclose it because it comes under exceptional of that. so even if the foreign party takes an action against them Indian party would be absolved from that action to the extent that they have complied with the law which is mandatorily required to do that, but most of the time when we have this obligation, confidentiary obligation either we write to the other side and ask for consent or justify to the party just to avoid that kind of thing to show bonafide to avoid any potential action from that party. More often we have got consent because if we have a party's agreement then we avoid another dispute arising out of the existing dispute, so that is the practice but there is no legal requirement.

Participant: .....

Mr. Tejas Karia: so award being precedent is that especially these are not courts of records so normally the precedents value is only when there is courts of record, and high court and supreme court being courts of record, but has happened sir is that internationally the jurisprudence has developed and each court is using judgements of other courts for example we are using UK, Australian cases to decide certain issues which are not decided by Indian courts. Similarly the arbitral tribunal is still date using supposed the governing law is contract in Indian law, then they would use the decision of that particular court to kind of do it, so there is no international jurisprudence of this thing

Participant: .....

Mr. Tejas Karia: so that has to be, there has to be depository of that award so some publication or some institution will have to publish the awards passed by that particular institution...

All speaking at once...

Participant: what if it is in public domain?

Mr. Tejas Karia: Ya! if it is in public domain what would happen is that the tribunal which is kind of bound by Indian law is deciding one dispute in a particular way if similar issue comes up before another tribunal that award if it is in public domain and if it is published with some kind of a citation, so we have yearbook of commercial arbitration, is a journal which comes where it publishes the arbitral awards, we use it as a very regular citation saying that look at volume so and so page, so and so yearbook of commercial arbitration

which has this award. so that would be used to persuade the tribunal in addition to the national cases, it will be kind of different set of rules or precedents which would be....especially when the tribunal is constituted of one Indian member and two foreign members, that is where...precedent may not be... that it may be persuasive value, but it cannot be precedent as such. It is not a binding precedent as such.

Participant: .....

Mr. Tejas Karia: not, in that strict sense, NO it cannot be used

Hon'ble Justice Sujata. V. Manohar: I think we must thank Mr. Karia for a very comprehensive presentation, CLAPPING SOUND, he has taken a lot of trouble to put various issues before us, so thank you very much, and I think we close the session, the next session will start at 2:30, in between this you have enough time for lunch I hope... chuckles...

Session 28

Dr. Geeta Oberoi: So second last day. I am sure you might be thinking god when this will be over. So you have economic regulation of airports which will be dealt by mr. Atul Sharma who is big infrastructure lawyer in the country so I hand over it to you.

Mr. Atul Sharma: Good afternoon. I have a rather difficult job of obviously because he topic itself is very...and I will still try to make it as interesting as I can but so therefore what I would try to do which deal with it in three parts. Firstly the general framework of economic regulation within the country which you know because I think that background may be relevant for the purposes of really understanding the nuances in the differences that the airport regulation would have with regulations. But I would not spend a lot of time on that but because it is economic regulation I would I have a certain view on you know how the economy has evolved. And what are the factors and how economic regulation has contributed to contributed to economic development. The second would be scheme of statute because this is a bit of amaze so far as airports are concerned and then I move on to the principles of the regulation which in fact I'll skip I'm not of very good person at powerpoint but I still try to adhere to the to the scheme but you'll pardon me for digressing. Time and again. When we talk of economic regulation obviously we are talking of economic return and we're talking of economic development from the development perspective I think we have always had this cliched statements coming that you know we or our development to 1990 reforms when we opened FDI and foreign investment. Well I have a slightly different view. Simply opening F.D.I. may not have been enough for the purpose of really promoting growth and re kindling that growth. If you look at what we did post nine hundred ninety was when we opened the telecom sector for private investment. That's where we brought in a regime we took away a large part of regulation from the politicians in the bureaucrats to quasi judicial bodies. So we came with the first we tried our hand with power and one was a big debate. Then we came to Telecom which actually caused such a growth and then we brought the Electricity Act of two thousand and three. Then we brought the regulation of ports to tamp and likewise insurance. So these are the development which If you look at it in a different perspective as compared to the

conventional perspective of how we have reached here which have actually led to the development. And the best part to components of this approach has been that if you look at the entire regulation in relation to each sector not to be standing there that it is private sector which is involved or government is involved, government bodies are involved and I'll explain in the context of airports how this all took over to the airport authority. So notwithstanding that both private and public sector were involved P.P.P. of course had by the time started. The the two common things which came to exist in our thought process was the regulations were handed over to independent bodies. The economic regulation. And one common thread running through the entire scheme of economic regulation was return on investment. So this is what actually you know. You know kind of really prompted the private sector to start investing. Notwithstanding the the problems that we have had. You know but but on paper. There's a fantastic regime. If you look at the P.P.P. regime. If you see all the countries across the world. India has the most progress if P.P.P. regime. And we started it with a presumption that there's nothing wrong in private sector investing and taking a return. Driver were different because government didn't have the money. And they they wanted to bring in private sector efficiencies in different sectors. So anyway whatever be the cause behind it. We developed a regime which was based on economics in long and shot. Having done that this second aspect the positive aspect was that whatever be the regulation, economic regulation provided for stakeholder considerations that each level. So whether it's state regulatory authorities under the section under the Electricity Act. All stakeholders had a say in the process. There's always this this debate going on....to private sector and milking it in their kind of doing taking money at the cost of exchequer. But that perception I can my personal view is completely misplaced because you have a mechanism which you have created for protection of all stakeholders and everything that is regulated today will it it doesn't come for getting that it done is justiciable right to the supreme court. I mean we know that in electricity to Supreme Court in number of times high court Supreme Court and we have had completely review of the process. It's a different thing that you know we have not had a very good set of regulators who have kind of not come up to the mark in terms of. But still it is amazing the kind of technology in economics that is evolved through this mechanism. Today you have experts

in electricity experts in the airport experts and insurance sitting in these bodies along with judges and such a great mixture of you know talent which has led to this development. So that is so far as my perception of the the particular to the development in this country. When we come to airports on unlike electricity which only has one act. I mean of course I believe you had electricity supply act not because of complex regime. But after the two thousand three get you have only one thing which is ultimately governing the determination of tariffs or return or maintenance of service standard. In the case of imports it is a big complex what what we did was Airports Authority was completely free under section 12 to carry out its functions on economic principles. There was no regulation because it was treated as a part of the government. So therefore there wasn't there was no need for that they were making profits and not making profit. But then when the private sector came in in Mumbai first hyderabad bangalore and then Mumbai delhi obviously the concerns are all there you know you're handing it these public asserts to private sector. I do really putting any fetters on their exploitation. That is when this whole regime came and Interestingly the the award of Bangalore hyderabad and Delhi Mumbai happened without there being any of economic integration. But what were the enabling laws. The enabling laws what the Airports Authority of India Act and first law...and the sectoral policy.

Discussion with Participants.

So technically speaking. The authority has a power to regulate that tariff of only major airports there is a five year Control period. So for each control period is five years so once a tariff is determined to do is determine. For example in the electricity is three years it just five years. But every year in public interest you can change the. Then the question arose. Now you know already given these contracts having given these contract what do you do with the issues that you have already kind of brought in in the concession agreement. Section 13 of the airport economic regulatory authority Act is Section thirteen lays down as to what is the role of the authority and in section 13 if I may read section thirteen therefore in fact came to recognize the existing concessions. And then thirteen says the authority shall perform the functions in respect of major airports namely A. To determine the tariff for aeronautical services taking into consideration. B. The capital expenditure incurred in timely investment improvement of airport facilities. Services provided it

provided its quality and other relevant factors, Cost of improving efficiency, Economic and viable operation of major airports, revenue received from services other than then aeronautical services. The concession offered by the government in any agreement on member in motion a standing order or otherwise so the concession which are already granted the principles of that were to be taken into account. To determine the amount of the development fee. Now here comes the development which I was saying it under Section twenty two capital A to determine the amount of passenger service fee which is again in the aircraft rules levied on the rule eighty eight of they had a good afternoon to monitor that and set the standard relating to quality continue to underlie ability to call for such information it may be necessary to perform such a bit of functions. So therefore this authority now constituted in two thousand and eleven one than each of the notified in two thousand and ten came out actually with a white paper on the regulatory philosophy and the regulatory philosophy which it came out with comprised of four or five major components. Now this is what I read is the is the factors to be taken into account for the purpose of determination of tariff....Now Internationally, there are four kinds of approaches which are available as the regulatory philosophy. One of them in the light touch which is prevalent mainly in Australia New Zealand where it is even not interfere we were let the operator fix the tariff. But only we will interfere when it becomes anti competition because one more fact which I forgot to say this is an industry which is kind of an oligopoly which is more in the nature of one or two airports only you have little option. It is not that you can have you know large amount of competition so therefore the regulations have to be seen in the context of a stricter regime. And then there is a single...in the single...concept everything is put in one till a till we know that in a shop is the where the machine is. That they want to spend they will spend if they don't want to spend they will not bring so light touch is essential me a concept of this regulation only. And we've seen light touch means the debate has been what you should regulate in what manner should be regulated. Single till is where you say all right we'll take them non aero revenue and aero revenue together and then we see your regulated I said to be as we had was how much money you have invested and then we say we take that and we say that you will get your return on a price cap regulation wherein we say that you know the price should not be more than this and

there is a slight if I may so this is singleton not single till here is that if you look at what we're doing is we're not talking of aeronautical yield per passenger. So what we take is a Cap Ex how much money you spent. That is your regulatory asset base. Then you take the entire revenue and then you arrive at a fair rate of return and return of regulated asset base plus depreciation plus opex and then you deduct non aero revenue. So what you're doing is you're taking all the revenues. But from where deducting the non-aero revenue and then you see what is the return that your are entitled to earn on that money. Depending on the regulatory model chosen, a regulator might wish to focus only the provision of aeronautical services or may also take into account all or a share of the profits from non-aeronautical services. A regulator is generally faced by a continuum of options along this spectrum. In practice, however, the regulatory models can be divided into two groups: single-till and dual-till. It is consider each in turn. On the face of it, it appears that the two approaches are very similar. In both cases non-aeronautical activities are excluded in some way to derive the regulated till. In the single-till approach, the regulatory till is determined by deducted non-aeronautical revenues from total airport costs, leaving the remainder to be recovered from aeronautical charges. In the dual-till approach it is nonaeronautical costs which are deducted. Considered at this conceptual level therefore, the difference between the two approaches is what happens to the profit from non-aeronautical services. In the case of single-till regulation this profit is deducted from the regulatory till and so reduces aeronautical charges, while in the case of dual-till regulation these profits (if there are any) are retained by the airport. We note that the above descriptions provide only a stylised view of the actual issues that a regulator would have when setting regulated charges. A key issue is that the definition of “profit” in the previous paragraph needs clarification, as the economist’s definition of profit differs from the commonly-used accounting sense of the word. Furthermore there are many practical issues that a regulator would need to address. For example, with regards to single-till, there is an obvious issue associated with deciding which non-aeronautical services should be included in the regulatory till. On the other hand, dual-till solutions require a thorough cost allocation to be carried out so that shared and common costs can be split between aeronautical and non-aeronautical activities. Failing to allocate costs properly could result in hidden cross subsidies between

aeronautical and non aeronautical activities. In turn this may lead to providing the regulated airport with misleading incentives. The regulator must address these practical issues when defining the regulatory framework. I believe that the high-level descriptions we have provided above are sufficient for the purpose of the discussion presented in this paper. I will, however, explore some practical issues with the application of airport charges regulation. India's prevailing airport regulatory model has yielded "poor returns" for investors, global airports body Airports Council International (ACI) said today and sought its review to attract investment to develop aviation infrastructure in the country. Asserting that transparent economic regulatory processes must be put in place in India, ACI Director General Angela Gittens said, "The current regulatory model has yielded poor returns for investors and this could stifle development of India's airports in the long run. It is outmoded to have a very prescriptive economic regulatory model," she said, giving the example of the United Kingdom which had "stepped away from such a system". The ACI chief said the private investors came in to invest in airport infrastructure with "one set of expectations but got something different". It gave the examples of Hyderabad and Bangalore airports where the investors expected 'dual till' to be the concept of revenue sharing but landed up with the 'single till' model. Under the single till principle airport activities - both aeronautical and commercial - are taken together to determine the level of airport charges. By contrast, only aeronautical activities are taken into consideration under the dual till principle. Hence, airport charges derived using the single till approach are generally lower than they would under a dual till because of the sharing of profits generated by commercial activities. Noting that a key challenge for Indian aviation was the development of airport infrastructure. The right incentives should be in place. All you have to do is downsize risks. So, what is needed is a predictable, reliable regulatory regime to encourance investments in airports. In reply to questions, she said during her discussions with aviation and other officials here, she had suggested the introduction of "the best practices in other countries and alerted them to the dangers of repeating what they did earlier. Other countries too have faced this dilemma and we will provide examples for the government to explore. Aviation was a key for socio-economic development and India should be one of the three largest aviation markets in the world. India was not currently

among the top ten countries in terms of airport passenger volume and stood at the 11th position. In order of passenger traffic, the top ten nations are the US, China, Japan, the UK, Brazil, Germany, Spain, France, Indonesia and Turkey. So this is broadly the economic regulation of airports. I noticed. I might have confused are some places but this was....What had happened was UDF was allowed by the regulator first and then the regulator withdrew it and he said during the tariff order. The last tariff order. Then they went to the court and the then that in fact they went to the government for it without a presentation. The government they said they should issue a direction under 42 of the AERA Act it would be done on a hybrid till because he heard....what allowed only a single bill. They went to high court that a direction mandamus to to government to issue a direction to the airport. They were sent back the government allowed that application that representation issue directions and then it was re-instated. So today it is the pre-order regime where UDF is being charged. It is charged on the passenger using the airport thats why it is the user development fee and it is for the development of the airport. Unlike UDF ADF which is under section 22 A is for the funding the construction by enlarge the investments to be made in the airport. There is a base fee there logic is we are paying to the government 46 rs out of every hundred we get. So it is a base license fee plus revenue share. So that extent....because it is viability and actually in the section 13 itself there is one requirement of a viable operation which is a statutory mandate. See airline is a different thing there are 6 7 8 10 so competition is already there. Airports can't be like that so therefore there is a logic of not regulating air fares because you still have a choice and you have options. But in airport you cant do anything you have to travel that airport only that is why they call it a oligopoly. It is a function of demand and supply so what they have is category A on today you can get for 100 rupees...you want to book tomorrow it is only category B which is available because they have sold those seats. So they have allocated number of seats. That is how they are operating. So they say plan in advance because then that's the model and do what is called the low cost carrier model is based on getting money in advance. It may be less money but get the money in advance. I mean this is a deal that all and you'll find everybody says it is all international practices. The nevitar, which is the software which operated runs the airline fares virtually every airlines using the same

software and Internationally also nlcc it has the same software. So far the airline is concerned but so far airport is concerned all stakeholders can make complaints in fact it is standard there are passenger bodies who will go and file objections. Yeah. But Airlines...they are un regulated if they are un regulated then there is no question of stakeholder concern there it is purely business. So I think broadly…

Mr. Sanmit Seth: Thank you sir.

DAY 8
Session 29

Dr. Geeta Oberoi: Very Good Morning to all of you. So we have today with us Mr. Richard Tan and Hon'ble Justice A.K Goel. He is taking breakfast he will be soon joining us meanwhile I introduce little bit about Richard Tan. We are grateful to ministry of finance actually for finding Mr. Richard Tan for us and giving us facilitating his visit over here. Mr. Tan as some of you have already interacted with him. He is associate professor at National University of Singapore. He is also chartered arbitrator with Chartered Institute of Arbitrators, UK. He has a long experience I mean his runs into pages. So more about himself he can...you can introduce something more about your subject specific specially WIPO Academy has also associated with WIPO Academy and therefore he is here today for taking FRAND royalty agreements and other case related to arbitration. So I think we should start or you prefer waiting for Justice Goel. We should to start.

Mr. Richard Tan: Thank you very much Ms. Oberoi for introducing me. My CV will bore you to tears. But let me tell you some salient points about my back ground. I am very privileged....So sorry to start it off introducing myself. Well. My personal background is as Dr Oberoi said I've been at adjunct professor at the King's College, Singapore University the program on MSE program or construction law and arbitration. Some people confuse get me confused with you. I do construction infrastructure projects why I am speaking on intellectual property. Well. That's my other hat I sit as a WIPO arbitrator my areas of experience would be in intellectual property where I was a senior partner at LEE & LEE. And I decided that I would retire. But five years ago as one of the senior partners and pursue a career in International Arbitration as an arbitrator so I've had the privilege of sitting in ICC arbitrations with former retired justices including from India. And that's my current position. I is you can see yeah I moved to international arbitration consultant with the Morgan Lewis. First session on domain name disputes. The general back ground to the world wide web that's the internet basically and the I remember back in 1995 my first presentation on the commercial and legal issues surrounding the internet.

In response to the growing concerns relating to intellectual property issues associated with domain names and the increasing number of abusive domain name registrations, a White Paper was produced by the United States Department of Commerce, which called on WIPO to conduct a study and make recommendations for a uniform approach to resolving trademark/domain name disputes involving cybersquatting (as opposed to conflicts between trademark holders with legitimate competing rights). In addition, the Internet Corporation for Assigned Names and Numbers, a non-profit California-based corporation was formed in 1998 for the purpose of, among other things, addressing the management of the domain name system.Negotiating a new international treaty was considered too involved a process, and relying on the development of national laws was seen as unlikely to result in an effective mechanism suited to the international nature of these disputes. To resolve domain name disputes, an internationally uniform and mandatory procedure to deal with what frequently developed into cross-border disputes in an efficient manner was needed. With the support of its Member States, WIPO, which is mandated to promote the protection of intellectual property worldwide, conducted extensive international consultations, resulting in the publication of a Report which addressed domain name issues and made recommendations for their resolution. The Final Report of the WIPO Internet Domain Name Process (First WIPO Report) recommended the creation of an online administrative dispute resolution procedure, which would have universal application for all .com, .net and .org registrations. The procedure would therefore apply to any name registered in those gTLDs, irrespective of the registrar through which the registration was made and irrespective of the date of registration. WIPO made the following recommendations: (a) Third parties should be able to challenge domain name registrations and the dispute should be decided by a panel of independent expert decision-makers. (b) The scope of the procedure should be limited to the abusive registration of trademarks as domain names. (c) The legal basis for the procedure should be the domain name registration agreement through which the registrant agrees to submit to the procedure. (d) The procedure should be administered by independent dispute resolution institutions, which would be responsible for the appointment of the panel of decision-makers and for the administration of the procedure. (e) The principal remedies available under the

procedure should be limited to the transfer or cancellation of the domain name registration (no monetary damages). (f) Registration authorities should be obliged to implement decisions made under the procedure ordering the transfer or cancellation of a domain name, without the need for a court to review or confirm such decisions. (g) The availability and conduct of the administrative procedure should not deny the parties to the dispute access to national court proceedings, either before, during or after the procedure. (h) The procedure should be quick, efficient, cost-effective and conducted to a large extent online.

After consideration and approval by the WIPO Member States, the First WIPO Report was submitted to ICANN for its review. In August 1999, ICANN resolved to adopt the Uniform Domain Name Dispute Resolution Policy,5 which, essentially, implements the above WIPO recommendations. ICANN also appointed dispute resolution service providers to administer disputes that are brought under the UDRP, the WIPO Arbitration and Mediation Center being the first such dispute resolution service provider.

The UDRP derives its application from ICANN's authority over the domain name system. ICANN requires all gTLD registrars to incorporate the UDRP into their domain name registration agreements as a condition of ICANN's registrar accreditation. Accordingly, all gTLD registrants, through their domain name registration agreement, agree to submit to the UDRP procedure. For example, a dispute clause could read as follows: "The Registrant agrees to be bound by ICANN's Uniform Domain Name Dispute Resolution Policy ("UDRP"). Any disputes regarding the right to use your Domain Name will be subject to the UDRP. We may modify the Dispute Policy in our sole discretion at any time in accordance with the ICANN Agreement or any ICANN/Registry Policy. Your continued use of our registration services after modification to the UDRP becomes effective constitutes your acceptance of those modifications. If you do not agree to such a modification, you may request that your SLD [second-level domain] name be cancelled or transferred to another registrar."

A domain name is a human-friendly form of an Internet address that is both easy to identify and to remember, such as or . The domain name system operates on the basis of a hierarchy of names. The top-level domains are divided into two categories: the generic top-level domains (gTLDs) and the country code top-level domains (ccTLDs). The gTLDs

.com, .net, .org and the subsequently introduced domains, such as .biz, .info and .mobi, are managed by registry operators acting under the authority of the Internet Corporation for Assigned Names and Numbers (ICANN). The ccTLDs are administered by the competent national registration authorities. There are over 250 ccTLDs, each bearing a two-letter country code, for example .fr for France, .jp for Japan or .mx for Mexico. As a result of the increased popularity and commercial use of the Internet, domain names have acquired the role of business identifiers and, in certain cases, even trademarks themselves, such as AMAZON.COM. By registering their marks and names as domain names, for instance , businesses attract customers to their web sites. While there is no standard format of Complaint prescribed by ICANN, the WIPO Center has prepared a model Complaint together with filing guidelines which parties may wish to use when filing a UDRP Complaint with the WIPO Center. The use of the model as a basis for the preparation of a party's Complaint does not preclude the possibility of that Complaint being found deficient following the WIPO Center's formalities compliance review, nor does reliance on the model guarantee a Complainant's success on the merits. The majority of WIPO Complainants use the WIPO model Complaint. Under the Rules, Complaints must be submitted in hardcopy and in electronic format. In order to facilitate electronic filing, the WIPO Center offers the option either to download and complete the WIPO model Complaint as a word document and submit it to the WIPO Center as an e-mail attachment or, to submit the Complaint directly online using the WIPO online filing facility. Hardcopies (original and four copies) of the Complaint including all annexes (for example, documentary or other evidence) should be sent by postal or courier service to the dispute resolution service provider. The original hardcopy must be signed by the Complainant or the Complainant's authorized representative. At the same time as the Complaint is submitted to the dispute resolution service provider, a copy of the Complaint should also be sent to the Respondent and, under the WIPO Supplemental Rules, to the concerned Registrar. The information that must be included in the Complaint is described in Paragraph 3 of the Rules. It is also itemized in the WIPO model Complaint. The formal requirements consist of procedural information, a description of the facts, and legal reasoning on the basis of the substantive decision criteria. As to these criteria, Paragraph 3

provides, inter alia, that the Complainant shall describe, in accordance with the UDRP, the grounds on which the Complaint is made including, in particular: (a) the manner in which the domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights; and (b) why the Respondent (domain-name holder) should be considered as having no rights to, or legitimate interests in respect of the domain name that is the subject of the Complaint; and (c) why the domain name should be considered as having been registered and being used in bad faith. The UDRP contains non exhaustive examples of scenarios which are normally considered to constitute such bad faith. Other information to be provided includes indications as to whether the Complainant elects to have the dispute decided by a single-member or a three member Panel and, in the event that the Complainant elects a three-member Panel, the names of three candidates to serve as one of the Panelists (these candidates may be drawn from any ICANN-accredited provider's list of Panelists). The WIPO Center also makes available on its web site an online legal Index of WIPO decisions rendered under the UDRP in order to assist parties in preparing their submissions. The dispute resolution service provider's role is to administer the proceedings, which includes verifying that the Complaint satisfies the formal requirements of the UDRP, the Rules and the concerned provider's supplemental rules, coordinating with the concerned registrar to verify that the named Respondent is the actual registrant of the domain name in issue, notifying the Complaint to the Respondent, sending out case-related communications, appointing the Administrative Panel and otherwise ensuring that the UDRP proceeding runs smoothly and expeditiously.The dispute resolution service provider is independent and impartial. It does not decide the dispute between the parties. As an administrative body, it can provide guidance on the procedural aspects of the UDRP, the Rules and the provider's supplemental rules, but cannot give any views about the strengths and weaknesses of a party's case. Cybersquatting is a particular type of domain name dispute which occurs when someone registers a domain name which is associated with a famous firm with the sole intention of selling it on to them at a higher price. Cybersquatting is the practice of registering a trademark as a domain name with the intent of profiting from it by selling it, usually to the trademark owner. As long as the cybersquatter owns the domain name, the trademark owner cannot register its own

trademark as a domain name. In this sense, the cybersquatter breaches the fundamental rights of the trademark owner to use its trademark. However, it is important to note that there is nothing wrong with the practice of reserving a domain name. Frequently, cybersquatters register words or phrases they hope will some day be sought after by new companies or new business divisions. A trademark is not infringed by a domain name unless the trademark existed at the time of domain name registration. This kind of cybersquatting is speculative and legitimate. John D. Mercer also identifies "innocent" cybersquatting, whereby the registrant does infringe a trademark "based on some unrelated interest in the word itself, without intending harm to a trademark owner" and "concurrent" cybersquatting, whereby the registrant uses the same trademark as another commercial entity, but not within a competing industry. However, the harmful kind of cybersquatting involves intentional bad faith trafficking in domain names that are the same as, or a dilution of, existing trademarks. Such domain name registrants are considered "modern day extortionists." An illegal cybersquatter, thus, is one who acquires a domain name for the sole purpose of obtaining money or other advantage from the trademark owner, with no intent or desire to use the domain name, except as an instrument toward this purpose. In addition to collecting „ransom“, a cybersquatter might want to register a well-known trademark as a domain name in order to affect Internet traffic. For example, using a well-known domain name might help improve search results for the registrant's own website or might help the cybersquatter attract Internet users initially seeking a legitimate brand to his or her site. An increasingly popular practice among cybersquatters has been to park domain names at websites that offer revenue programs whereby domain name holders who redirect Internet traffic to these websites become eligible for a referral fee. These parking websites usually contain links to other websites on a pay-per-click basis, and both the parking service and the registrant share in the revenue. The acknowledged arch-cybersquatter is Dennis Toeppen, who registered a host of well-known trademarks as domain names (including deltaairlines.com, neiman-marcus.com and numerous other famous marks),13 and who has been unsuccessful in defending his rights to them when sued by the trademark owners. Intermatic Inc. v. Toeppen and Panavision International v. Toeppen are considered the pivotal cybersquatting cases and have had a profound impact on the development of

cybersquatting case law, as well as on the drafting of the Anticybersquatting Consumer Protection Act, 1999 (hereinafter „ACPA"). Panavision illustrates some of the typical issues encountered in cybersquatting cases where trademark infringement is raised. Toeppen registered the domain name."panavision.com" and used the website to display pictures of the city of Pana, Illinois. He offered to sell the domain name to Panavision for $13,000. Panavision declined and brought an action under the Federal Trademark Dilution Act (FTDA). The FTDA required the plaintiff to show that the trademark in question is famous, that the defendant was using the mark in commerce, that the mark became famous before the defendant started using it, and that the "defendant's use of the mark dilutes the quality of the mark by diminishing the capacity of the mark to identify and distinguish goods and services." Toeppen argued that he was not making commercial use of the name, as he was merely displaying photographs on his web site. The court, however, decided that by having offered the domain name for sale, Toeppen had shown his intent to use the mark in commerce, which met the requirements for use in commerce test. The court further remarked on the fact that a domain name carried the reputation of a trademark. In Intermatic, the court conceded that Toeppen was not using the trademark in commerce, as he had merely registered it, but nevertheless found infringement through dilution. Importantly, the court in Intermatic recognized that if Toeppen were allowed to operate the web site intermatic.com, Intermatic's "name and reputation would be at Toeppen's mercy." The rulings in Panavision and Intermatic affirmed that "traditional" trademark and trademark dilution law applied in cyberspace. It is not only the "unadulterated" trademark that can be protected, but also any variation of it that is likely to confuse or deceive, or in some way dilute the "distinctive quality" of the mark. The Anticybersquatting Consumer Protection Act incorporates the dilution and tarnishment provisions of the FTDA, but without the FTDA's requirement for use in commerce. This significantly broadens the concept of trademark infringement. The threats that cybersquatters pose are significant and impact businesses in numerous ways. First, cybersquatters interfere with consumer behaviour. Cybersquatters have the effect of diverting the consumer's attention away from the intended brand. Thus, in the course of an electronic transaction, the potential consumer might either end up making an alternative purchase with a competitor or might forgo

making a purchase altogether in frustration. Second, cybersquatters may create ongoing battles for businesses. For some companies, the problem may not readily go away. For example, Mattel is often in battles against cybersquatters (amongst other types of brand abusers) who use its "Barbie" brand in relation to pornography and escort service websites. Third, cybersquatters cause loss of revenue. Not only is revenue lost as a result of consumers changing their buying behaviour, but also when the ability of a business to engage in online transactions is compromised. In India, there is no legislation which explicitly refers to dispute resolution in connection with cybersquatting or other domain name disputes. The Trade Marks Act, 1999 sought to be used for protecting use of trademarks in domain names is not extra-territorial, therefore, it does not allow for adequate protection of domain names. The Supreme Court has taken the view that domain names are to be legally protected to the extent possible under the laws relating passing off. In India, this law was evolved by judges and all the High Courts were of unanimous opinion, which has been culled out and endorsed by the Supreme Court. A look at the observations of courts as to various facets of the disputes involving domain names shall be useful. Some Important Decisions of the Indian High Courts regarding Cybersquatting Yahoo! Inc. v. Akash Arora & Anr.: In this case, a single judge of the Delhi High Court granted relief on Yahoo! Inc.‟s petition seeking injunctive relief against the defendants who were attempting to use the domain name „yahooindia.com‟ for Internet related services. Yahoo! Inc., which was the owner of the trademark „Yahoo!‟ as well as the domain name „yahoo.com‟, contended that, by adopting the deceptively similar domain name „yahooindia.com‟, the defendants had verbatim copied the format, contents, layout, colour scheme and source code of the plaintiff‟s prior created Regional Section on India at the plaintiff‟s website. The plaintiff had been using regional names after „yahoo‟ like „yahoo.ca‟ for Canada. Hence, „yahooindia.com‟ could be perceived as being another one in the series of „yahoo‟ sites. The Court rejected the argument of the defendants that the provisions of the Indian Trademark Act would not be attracted to the use of a domain trade name or domain name on the Internet. It was held that although service marks are not recognized in India, services rendered are to be recognized for actions of passing off. Therefore, the decision of the court treated the matter as one of „passing off‟. Relying on

the doctrine of passing off, combined with the analysis of the working of the Internet, the court concluded that even though the word "yahoo‟ was a dictionary word, it has achieved distinctiveness and is associated with the plaintiff company and hence is entitled to maximum protection. As a result, the Court granted an injunction restraining the defendants from dealing in service or goods on the Internet or otherwise under the domain name „yahooindia.com‟ or any other domain name that is identical to or deceptively similar to the plaintiff‟s trademark „yahoo‟. Rediff Communication Ltd. v. Cyberbooth and Anr.: The plaintiff in this case, the owner of the well-known portal and domain name „rediff.com‟, filed for injunction against the defendant, the registrant of the domain name „radiff.com‟, claiming that such domain name was deceptively similar to theirs. the plaintiff alleged that the defendants had adopted the word „radiff‟ as part of their trading style deliberately with a view to pass of their business services as that of the plaintiffs. The petitioner also contended that this was deliberately done by the Cybertooth to induce members of the public into believing that Cybertooth is associated with Rediffusion group, and thereby to illegally trade upon the reputation of the plaintiff. The court established that „rediff‟ was a coined name and at the same time the contention of the defendants that the word „radiff‟ was coined by taking the first three letters of the word „radical‟, the first letter of the word „information‟, the first letter of the word „future‟ and the first letter of the word „free‟, as making no sense. It held that there is every possibility of the internet user getting confused and deceived in believing that both domain names belong to one common source and connection although the two belong to two different persons. The court was satisfied that the defendants had adopted the domain name „radiff‟ with the intention to trade on the plaintiff‟s reputation and accordingly the court prohibited the defendant from using the same domain name. Acqua Minerals Ltd. v. Parmod Borse: In this case, the plaintiff, Acqua Minerals Ltd., had sought a decree for permanent injunction restraining the defendants from using the mark "bisleri‟ and/or „bisleri.com; as part of their domain name or in any other manner whatsoever for any products, goods or services which would result in passing off, infringement or copyright and directing them to transfer the domain name "bisleri.com‟ to the plaintiff. The court held that it is obvious and self-axiomatic that the domain name "bisleri.com‟ was used by the defendants with mala fide

and dishonest intention and as a blocking or squatting tactics. It was found that they were using the domain name in order to trade in it and to pressurize the plaintiff to part with huge sums of money for the same. The act of the defendant was held as not only constituting the infringement of the plaintiff‟s right but it also constitutes passing off act as it is likely to result in the dilution of the trade mark "bisleri‟ as the plaintiff had no control over the use of the said domain name inspite of the fact that the trademark "bisleri‟ is the exclusive trade mark of the plaintiff. Pen Books Pvt. Ltd. v. Padmaraj: The court in this case said that absence of registration of trade mark would not stand in the way of a claim for passing off in respect of "Penbooks‟. Though the two words „pen‟ and „books‟ are generic in nature, when combined as "Penbooks‟, they get an identity and distinctiveness attached to plaintiff‟s establishment for years. The High Court found a prima facie and balance of convenience in favour of the plaintiff and held that injunction is rightly granted by trial court, but the condition for deposit of a sum was held to be unwarranted and was deleted. Plaintiff were engaged in printing and publishing industry under the trade name "Penbooks‟ since 1997 and getting its website "penbooks.com‟ registered on the internet. The defendant registering the domain names "penbooks.com‟, in 1999 and attempting to launch a website but not started any publication in the said name, amounted- to "cyber squatting‟. Supreme Court decision in Satyam Infoway Ltd. v. Siffynet (P) Ltd. The Supreme Court of India has noted the proliferation of disputes resulting in litigation before different High Courts. The case of Satyam Infoway Ltd. v. Siffynet (P) Ltd. is the first one from the Court to deal with the legal protection of domain names and has given seal to the law laid down by the various High Courts that the domain names are entitled to legal protection equal to that of a trademark. The principle question raised in this case was whether internet domain names are subject to legal norms applicable to other intellectual properties such as trademarks. The appellant which was incorporated in 1995 registered several domain names like “www.sifynet.com”, “www.sifymall.com”, “www.sifyrealestate.com”, etc. In June 1999 with the internationally recognized Registrars, viz., the ICANN and the WIPO. The word 'Sify‟ is a coined word which the appellant claims to have invented by using elements of its corporate name, Satyam Infoway. The Respondent, on the other hand, started carrying on business of Internet

marketing under the domain names “www.siffynet.net‟ and “www.siffynet.com‟ from June 2001. After reiterating the principles of passing off, the Court observed that: “The use of the same or similar domain name may lead to a diversion of users which could result from such users mistakenly accessing one domain name instead of another. This may occur in ecommerce with its rapid progress and instant (and theoretically limitless) accessibility to users and potential customers and particularly so in areas of specific overlap. Ordinary consumers/users seeking to locate the functions available under one domain name may be confused if they accidentally arrived at a different but similar website which offers no such services. Such users could well conclude that the first domain name owner had misrepresented its goods and services through its promotional activities and the first domain owner would thereby lose their custom. It is apparent therefore that a domain name may have all the characteristics of a trade mark and could found an action for passing off.” The Court further held that “a domain name is accessible by all internet users and the need to maintain an exclusive symbol for such access is crucial… Therefore a deceptively similar domain name may not only lead to a confusion of the source but the receipt of unsought for services.” The court observed that “It may be difficult for the appellant to prove actual loss having regard to the nature of the service and the means of access but the possibility of loss in the form of diverted customers is more than reasonably probable.” Commenting on the issue of passing off, the court observed that “it is an action not only to preserve the reputation of the plaintiff but also to safeguard the public.” The court held that “the appellant is the prior user and has the right to debar the respondent from eating into the goodwill that it may have built up in connection with the name.” In view of the decisions of the various High Courts, it was held that the domain names are entitled to legal protection equal to that of a trademark. The Court held that the appellant had been able to establish the goodwill and reputation claimed by it in connection with the trade name „Sify‟. Apart from the close visual similarity between “Sify” and “Siffy”, the Court held that there was a phonetic similarity between the two names as well. The addition of “net” to “Siffy” did not detract this similarity. The Court concluded that in view of finding of prima facie dishonest adoption of the appellant‟s trade name by the respondent, the investments made b y the appellant in connection with the trade name, and the public

association of trade name “Sify” with the appellant, the appellant was entitled to the relief it claimed. Let say HUGO BOSS has registered HugoBoss trademark. It has also registered HUGO BOSS.com somebody decides to register HugoBoss.IN. Right. Physically it can be done. Now the Registrar Who is administering the registrants will have...agreement with ICANN and Nominated a dispute resolution body either WIPO or Indian Body for example. So HUGO BOSS can then make a complaint to this body overseeing the registrar registration agreement of Hugo Boss.IN by this cybersquatter. And the panelists will be appointed who then decide whether that Hugo Boss.IN the Cybersquatter's domain name should be cancelled or not and if it decides to be cancelled then the hearing is just the registrar has to comply and therefore cancel that registration and it can be used anymore. So the enforcement part is mechanical.

Hon'ble Justice A K Goel: There is another angle to your question. As far as domain name registration cancellation that is concern that may not be any jurisdictional will dispute. Difficulty. But supposing you are using it India a trademark registered in Singapore then there may be no violation of trademark law. Because trademark law is national. It is territorial. It is a tradename actually. Domain name is a technical word for use on internet because internet is accessible throughout india if you are doing internet trading there the name can be exclusive throughout the world can be enforced by this mechanism of deleting the name if you are violating somebody's right who is already registered.

Mr. Richard Tan: That is the beauty of UDRP. It's International and quiet straight forward. It can come to pass just by pure coincidence that two companies have registered trademark one in one country because it is territorial and another has registered trademark in another country both are nowhere of each other registration. Then it become very difficult and probably in that case the complainant says you are cybersquatter because you register. Your defense would be I did'nt know about you at all I have a genuine business and registered by domain name here and under those circumstances the complainant should loose his case.

Hon'ble Justice A K Goel: I think we have had many useful discussion on this subject. And we can perhaps switch on to the next subject. Next subject is the FRAND Licensing Disputes.

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Mr. Richard Tan: All right we'll move on to our next subject which is a rather complicated. Any of you here I P. judges or in the patent judges. Are you specialist in IP or patent? Do you have a patent court?

Hon'ble Justice A K Goel: We don't have. We have some these are all high court judges where matters come in one form or the other to the high court. Sometime I will give you a very very brief introduction of the position in india and the I think you can take over on the various concepts see we have our patent act 1970 which is slightly different from other patent laws in the world. Also we have the competition act 2002. We also have this trademark act and copyright act. These are intellectual property laws and even under our constitutional scheme there is slight difference. There is cultural even on though on freedom guarantee to citizens under various article particularly the right of equality, right to life and liberty which is a very wide right cover not only physical existence of life and physical liberty but also anything which makes life meaningless. All the freedom which are necessary for a human being's progress. And under Article nineteen we have some specific freedom right to speech and expression, right to assembly. That's it. This I think broadly is the subject matter.

Mr. Richard Tan: Yes that's the essence. You have summarized first four slides. I will just go through them anyway. This is an overview of this presentation. Role of Intellectual property in general what justice goel has mentioned. What are standard essential patents SEPs in the context of FRAND. What is standar setting organisation (SEOs). How SEPs are licensed. What are the issues relating to FRAND disputes. Mechanisms for Resolving FRAND Disputes. Courts, Arbitration and ADR and under WIPO arbitration. So I think justice goel has summarized it very well that in general the patents system is a monopoly. If you register a patent I am no expert in indian laws I am speaking on the basis of patent laws internationally and reason the rational for having patents and.... but in general terms the patent system is designed to promote innovation and economic growth. Why? because

it incentivises an inventor to protect his patent gives him exclusivity and monopoly so he can exploit it. If he does'nt have it incentive to invent to protect that then we are going to lead nowhere apprehend the R & D expense in order to invention which he then call...if other wise the case then everybody else would start copying his invention and he gets nothing from there. So that's how in gist the patent system evolved and same for copyright and trademark.

Hon'ble Justice A K Goel: Section 84 of the patent act act 38 of 2002 which says at time (1) At any time after the expiration of three years from the date of the grant of a patent, any person interested may make an application to the Controller for grant of compulsory licence on patent on any of the following grounds, namely:—(a) that the reasonable requirements of the public with respect to the patented invention have not been satisfied, or (b) that the patented invention is not available to the public at a reasonably affordable price, or (c) that the patented invention is not worked in the territory of India. (2) An application under this section may be made by any person notwithstanding that he is already the holder of a licence under the patent and no person shall be estopped from alleging that the reasonable requirements of the public with respect to the patented invention are not satisfied or that the patented invention is not worked in the territory of India or that the patented invention is not available to the public at a reasonably affordable price by reason of any admission made by him, whether in such a licence or otherwise or by reason of his having accepted such a licence. (3) Every application under sub-section (1) shall contain a statement setting out the nature of the applicant's interest together with such particulars as may be prescribed and the facts upon which the application is based. (4) The Controller, if satisfied that the reasonable requirements of the public with respect to the patented invention have not been satisfied or that the patented invention is not worked in the territory of India or that the patented invention is not available to the public at a reasonably affordable price, may grant a licence upon such terms as he may deem fit. (5) Where the Controller directs the patentee to grant a licence he may, as incidental thereto, exercise the powers set out in section 88. (6) In considering the application field under this section, the Controller shall take into account,—(i) the nature of the invention, the time

which has elapsed since the sealing of the patent and the measures already taken by the patentee or any licensee to make full use of the invention;(ii) the ability of the applicant to work the invention to the public advantage;(iii) the capacity of the applicant to undertake the risk in providing capital and working the invention, if the application were granted;(iv) as to whether the applicant has made efforts to obtain a licence from the patentee on reasonable terms and conditions and such efforts have not been successful within a reasonable period as the Controller may deem fit: Provided that this clause shall not be applicable in case of national emergency or other circumstances of extreme urgency or in case of public non-commercial use or on establishment of a ground of anti-competitive practices adopted by the patentee, but shall not be required to take into account matters subsequent to the making of the application.Explanation.—For the purposes of clause (iv), "reasonable period" shall be construed as a period not ordinarily exceeding a period of six months. (7) For the purposes of this Chapter, the reasonable requirements of the public shall be deemed not to have been satisfied— (a) if, by reason of the refusal of the patentee to grant a licence or licences on reasonable terms,—(i) an existing trade or industry or the development thereof or the establishment of any new trade or industry in India or the trade or industry of any person or class of persons trading or manufacturing in India is prejudiced; or (ii) the demand for the patented article has not been met to an adequate extent or on reasonable terms; or (iii) a market for export of the patented article manufactured in India is not being supplied or developed; or (iv) the establishment or development of commercial activities in India is prejudiced; or (b) if, by reason of conditions imposed by the patentee upon the grant of licences under the patent or upon the purchase, hire or use of the patented article or process, the manufacture, use or sale of materials not protected by the patent, or the establishment or development of any trade or industry in India, is prejudiced; or (c) if the patentee imposes a condition upon the grant of licences under the patent to provide exclusive grant back, prevention to challenges to the validity of patent or coercive package licensing; or (d) if the patented invention is not being worked in the territory of India on a commercial scale to an adequate extent or is not being so worked to the fullest extent that is reasonably practicable; or (e) if the working of the patented invention in the territory of India on a commercial scale is being prevented or

hindered by the importation from abroad of the patented article by—(i) the patentee or persons claiming under him; or (ii) persons directly or indirectly purchasing from him; or (iii) other persons against whom the patentee is not taking or has not taken proceedings for infringement.

Mr. Richard Tan: That's why big drug companies will patent everywhere in the world if possible at the same time. I suppose you can use the drug buy in India but you cannot export it for commercial purposes to a country in which the patent is protected. Now so one side of the coin is the need to protect the patent holder, the patent owner on the other side of the coin is as you all know anti-competitive behaviour which governments do not like because you have somebody in a dominant position who holds onto his IP rights and others cannot use it. So there is a tension between the two and this where it is harmful to innovation because any monopoly who holds on to his rights for his own commercial purposes does not allow a third party to to use and build on that and is bad consumer and public interest so finding the balance is the key. And this where we come to last ten years where litigation between motorola, google, apple, samsung all on smartphone wars and that's result of the developments in the telecommunications, mobile and info technology fields. Right. so we begin with discussion with so that story will become clear. So what FRAND licensing is and dispute has come up and is being resolved. So the first term SEPs standard esssential patents what is the that? Well basically you have a patented technology that is related to a certain standard and standard can be wifi there can be your mobile phone gsm wcdma I don't know how familiar you are with these terms but these are certain standards which different manufacturers the nokias, the errickson, the mobile phone companies try and use because if they don't use aa common standard then inter operability between will not work and people will left with limited choices you remember the old days of sony betamax against the VHS system. They were two different standards in the end one went down the drain. No body use beta they use the VHS. Now we have different standards different systems but it doesn't help consumers of the world trade.

A standard can be defined as 'a set of technical specifications that seeks to provide a common design for a product or process'. In other words, standards are norms that apply to a category of technology. Standards can be adopted at a worldwide scale, or only at a regional scale. It is usually the interest of industrial players on the market to create products that comply with standards. Products that use non-standardized technologies are generally commercial failures, because consumers want their devices to interact with those of other people.Thus those technologies which are required to establish the standards are more important. Such technologies are core technologies without any alternatives hence every product which is based on a standard requires a mandatory access over these technologies. Patent rights granted over such standard establishing technologies are called Standard Essential Patent.This patent right is not absolute like rest of the patent rights, Owner is restricted on its use on the ground of RAND (reasonable and nondiscriminatory) hence the owner of SEP is under an obligation to grant license to use the technology which sets a standard for the industry. He may be allowed to charge a nominal fee but that should be reasonable and justified otherwise Competition law shall intervene to avoid the monopoly. In the case of Microsoft v. Motorola, the Court defined SEP in this case as "A given patent is "essential" to a standard if use of the standard requires infringement of the patent, even if acceptable alternatives of that patent could have been written into the standard."Thus the base requirement for SEPs to be constructive is licensing under FRAND conditions. Without FRAND, SEPs can cause costly conflicts. FRAND is the acronym for fair, reasonable, and non-discriminatory. It's also known as RAND—reasonable and non-discriminatory. According to the principles of FRAND licensing, the patent owner must allow to take a license, the license terms must not be illegal or anti-competitive, and the cost of the license must not be too high. There are thousands of standards set by Standard Setting Organisation (SSOs) at least 1000 of them. Now do you remember the term ISO which was one of the earliest standard set by an organisation called International standard organisation based in geneva. As such, the SSOs are essentially membership organizations to which leaders of that particular industry belong.

For instance, the International Organization for Standardization (ISO) is the world's largest international standard development organization. Other independent standard setting organizations like the Institute of Electrical and Electronics Engineering (IEEE) and the Internet Engineering Task Force (IETF) publish standards and aim to foster "technological innovation and excellence for the benefit of humanity." Standards tend to harmonize various operational aspects of the industry, and thus create a broad, uniform platform to interact effectively. For example, when an industry in Timbuktu is certified by the ISO for accounting practices, it signifies conformance to certain practices that are the norm to the accounting industry in the rest of the world. In a globalized world, standards evolve into a language distinct to a particular industry and set a minimum bar. Thus, for industries located in different parts of the world, conformity to standards can be status defining, and thus help to create business opportunities. When SSOs set standards, they take the form of a set of technical specifications that provide, or attempt to provide, a common design for a product or process in a given sector. If a standard cannot be implemented without infringing on a particular patent, then that patent is said to be standards-essential. When the SSOs declare a standard, companies owning patents covering the standard should declare the patent, especially if they have participated in the standards setting process. Where the patent covers an essential aspect of that standard, the patent owner may enter into negotiations with the SSO to adopt the patent as a SEP. If it is designated a SEP, the patent owner can license it for free or for a reasonable royalty rate to implementers of the standard. Otherwise, the owner could refuse to license its SEPs forcing the SSO to design its standards around the patents. SSO's licensing terms greatly increase the market power of a standards-essential patent, which is appealing to patent owners in the standards-setting environment. Notably, outside the SSO framework, many of these standards essential patents will likely compete with one another. The SSO framework minimizes issues related to delay on product manufacturing that result from competition between patent owners. The SSO framework is also meant to function to minimize patent hold-up, a situation where the patent owner can delay the product development by demanding unreasonable or discriminatory royalties after a patent becomes a widely adopted standard. 19 The alternative for the patent owner failing to negotiate an agreement with the SSO, is to enter

into licensing agreements with interested licensees individually or not to license the patent at all. In negotiations that involve adopting a patent as an SEP, the rules of the SSO define the licensing terms. SSOs can sometimes require licensing assurances, or a disclaimer specifying that claims of an SEP will not be enforced against members. The SSO policies generally specify that SEPs must be licensed on "fair, reasonable and nondiscriminatory," or FRAND terms. For example, the European Telecommunications Standards Institute (ETSI) is a SSO for the telecommunications industry in Europe. The ETSI has an outlined procedure for adopting patents as standards. Where a patent owner believes itself to hold essential patents with regards to an ETSI standard, e.g. the 4G and 4G LTE cellular networks, the ETSI provides a licensing declaration form to be completed by the patent owner. The declaration form includes a general undertaking that the patent owner will license its patents under FRAND terms and conditions, so long as these patents are, or become, essential to a new or existing ETSI standard. Once the patent owner completes the licensing formalities, the patents become standards essential subject to other qualifying requirements. Consequently, the owner may either become an institute member or simply a third party affiliated to the ETSI, each entailing certain rights under the ETSI Policy. Essentially, the FRAND licensing mechanism enables users of an SEP to negotiate and pay a royalty to a patent owner who has already undertaken to be reasonable and fair to the SSO when the patent was designated an SEP At its core, FRAND licensing should offer the same or similar terms to all users or licensees (sometimes called "developers") on a given patent. This is meant to minimize or prevent licensing abuses and post-standardization hold-ups by the patent owner, such as refusing to license the patent or setting exorbitant royalty rates. Notably, while the general requirement is to be fair and reasonable, these terms are left undefined. Hence, one of the most difficult issues that pervades this area relates to the definitions of the FRAND terms. Generally, the term "fair" relates to the underlying licensing terms, and describes them as not being anti-competitive, and not unlawful. Similarly, the term "reasonable" relates to licensing rates that do not result in unreasonable aggregate rates. A negotiations for reasonable royalty rate, for instance, tends to be based on several factors most of which would be hypothetical at the point of negotiation and it ought to reflect consideration to factors such as the presence of

patents held by others, competition (ex ante), technological alternatives, ability of the industry to evolve newer alternatives, the need and ability of the technology to cater to product interoperability requirements and such. Thus, reasonableness is computed based on several factors including the value of the patent pre and post standardization. Nevertheless, negotiating a reasonable royalty rate will not only help the licensee but should also address to mitigate serious industry problems like royalty-stacking, which happens when a product potentially involves or infringes many patents, and hence, bears multiple royalty burdens. The reference to "non-discriminatory" terms also relate to the underlying licensing condition (rates and terms). This requirement is meant to ensure that new entrants to the market are free to enter into licensing relationship on the same basis as existing competitors, which will help to maintain a level playing field in the industry. In other words, a "non-discriminatory" clause should ensure that, a licensor's rates and terms must be the same for all licensees. In every case, it is the licensor's responsibility to ensure that every potential licensee receives the same FRAND contract. Additionally patent owners generally tend to grant users the rights to implement the standard of the SSO in their products along with other patents declared "essential" or "necessary" by the SSO. Importantly, patent owners who agree to make their patents SEPs and make them available on FRAND terms enjoy several benefits. For instance, they can influence the technological development of a standard. Members of the SSO, particularly those who are also patent owners, are positioned to influence not only the technical aspect of the standards but also strategic aspects such as identifying areas where standards will be created, the order of prioritization for standards creation, and the ends or markets that these standards will serve. This results in considerable authority over the development of the future standards and become influential in the industry. Other benefits from FRAND licensing include certification and branding for standards compliant products, which may further result in both shared costs and early access to information regarding a related but evolving standard. By agreeing to license its SEPs on FRAND terms, however, the patent owner forfeits certain rights. The patent owner cannot block implementation of a standard by licensing at exorbitant prices. Additionally, the owner cannot prevent noncompliant implementation of the standard. They are, however, able to sue and seek an injunction in the event of such

implementation. Similarly, restricted disagreements over the terms of the FRAND commitment cannot serve as an excuse for patent owners to refuse to license or to disclose the patents. Any refusal to license could be treated as a violation of the agreement with the SSO, constituting a breach of the patent owner's contract. And refusal by the patent owner to adhere to the negotiated terms with licensees or to disclose the patent will also be subject to contractual remedies.

Hon'ble Justice A K Goel: There is a statutory provision for fixing standards in India i.e section 90 in the patent act which says (1) In settling the terms and conditions of a licence under section 84, the Controller shall endeavour to secure— (i) that the royalty and other remuneration, if any, reserved to the patentee or other person beneficially entitled to the patent, is reasonable, having regard to the nature of the invention, the expenditure incurred by the patentee in making the invention or in developing it and obtaining a patent and keeping it in force and other relevant factors; (ii) that the patented invention is worked to the fullest extent by the person to whom the licence is granted and with reasonable profit to him;(iii) that the patented articles are made available to the public at reasonably affordable prices; (iv) that the licence granted is a non-exclusive licence;(v) that the right of the licensee is non-assignable; (vi) that the licence is for the balance term of the patent unless a shorter term is consistent with public interest;(vii) that the licence is granted with a predominant purpose of supply in the Indian market and that the licensee may also export the patented product if need be in accordance with the provisions of sub-clause (iii) of clause (a) of sub-section (7) of section 84; (viii) that in the case of semi-conductor technology, the licence granted is to work the invention for public non-commercial use; (ix) that in case the licence is granted to remedy a practice determined after judicial or administrative process to be anti-competitive, the licensee shall be permitted to export the patented product, if need be. (2) No licence granted by the Controller shall authorise the licensee to import the patented article or an article or substance made by a patented process from abroad where such importation would, but for such authorisation, constitute an infringement of the rights of the patentee. (3) Notwithstanding anything contained in sub-section (2), the Central Government may, if in its opinion it is necessary so to do, in the

public interest, direct the Controller at any time to authorise any licensee in respect of a patent to import the patented article or an article or substance made by a patented process from abroad (subject to such conditions as it considers necessary to impose relating among other matters to the royalty and other remuneration, if any, payable to the patentee, the quantum of import, the sale price of the imported article and the period of importation), and thereupon the Controller shall give effect to the directions.There are some decisions atleast 10-15 celebrated decisions in India on this subject. Section 84, section 90 of the patent act and section 31 of the copyright act, section 3, 5 and 4 of the competition act 2002 and the background in which these provisions. There are some expert committee reports which have resulted in these statutory provisions. That can provide you sufficient background for understanding or applying relief.

Mr. Richard Tan: Another point this evidenciary which the US court have taken to account is what royalty rate you have given you have charged in the past. All the evidence to be considered. Now just one....I may or arbitration over litigation is that if you have two companies fighting cases all over the world then lets say India and Indian Judge may give one set of royalty or damages based on his notion of fairness. In another court you may find it different differing way of calculating. So thats why many of these SSOs have world wide web policies where you go before singular tribunal to determine what these rates are. So I have to go through very quickly WIPO has a special FRAND disputes scheme where it will adjudicate the FRAND rated terms are and these Scheme is produced with the assistance of HC. So they are model of mission agreements for FRAND arbitrations with two options WIPO standard arbitration - standard type and another is WIPO expediated arbitration and there is another alternative proceeding for mediation and multi tier models are mission agreements which requires there WIPO mediation for followed by WIPO arbitration. I have given you the link to the website. I think thats just in time 11.30. We can go....feel free to drop me an email you want a bibliography of the cases. I will be happy to give you…Our next and last topic.

Session 31

Mr. Richard Tan: Our last session is on interim measures in international commercial arbitrations and new emergency arbitrators reliefs. I think you all are experts I don't have to tell you about interim measures too much. But I will speak from the perspective first of all from the arbitrator second - the interplay or role between the judges and arbitrators and whats happening in international circuit...now as we all know interim measures including injunctions but useful perhaps for judges to know is that in many under arbitration rules WIPO rules ICC rules they refer to interim measures or protection granted by arbitrators but there is no specific definition and many some rules where different interpretation with the result that there are some conflicts sometimes or some lack of commonality in international arbitration as to what constitute a interim measure. For Example in the UK if you ask for advanced payment payment of account is the legitimate interim measure. We all know about Mareva and freezing injunctions I think that quiet common so we...now security for cost some people not necessarily be caught ...as interim measures for protection. Now when would a party require interim measure? I dont have to tell you you are all expert. Examples of interim measures a party may need: restraining a breach of contract (e.g. call on a bond/guarantee), restraining a breach of confidentiality, preserving evidence, inspecting property, selling deteriorating cargo, taking samples, preserving assets out of which an award might be satisfied (freezing or Mareva injunctions), obtaining security, anti-suit injunction. Arbitral tribunals and the national courts may be empowered to grant interim measures (depending on the lex arbitri and the applicable arbitration rules/the arbitration agreement). Availability of such relief depends on: Legislative provisions for the extent to which arbitral tribunals and the courts are granted such powers. Arbitration rules which grant arbitral tribunals such powers. Not every arbitration law allows arbitrators to grant interim relief so China, Greece, Italy and Argentina are examples of some countries where those laws do not empower and arbitrator to grant interim measures. Then you have to go to the courts. Now if parties have entered to into an arbitration agreement can they go to the courts for interim relief? That depends on the national law. UNICITRAL model law allows parties to an arbitration agreement to go to

the court or national court to seek interim relief on the basis that just because you entered an arbitration agreement that is not compatible with your right to go to a national court for interim relief. Model Law Art 9: “It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.” Now, one may ask oneself why should a party have to a national court in a dispute which is subject to arbitration? Well first of all it takes time to constitute a arbitration tribunal. Even a one person tribunal may take weeks for parties to agree. The court center may have to appoint. Three member arbitrator will take months before it is appointed. So you need to go a court in those circumstances. Second the arbitral tribunal may have no powers or limited powers to grant interim measures, Third the orders of the arbitral tribunal can only bind parties to the arbitration; third parties may need to be restrained (e.g. Mareva or freezing injunctions) in which case a party may have to go to the court, Fourth, the orders of the arbitral tribunal may not be easily enforceable as an award under the New York Convention and Last may be a need for ex parte relief so that the other side is not warned. It would be appropriate to go to the arbitral tribunal first if it has been constituted. Factors against going to a national court: A distrust or dislike for certain national courts, Some national courts may have NO powers to grant interim measures in aid of an arbitration seated outside its jurisdiction, Powers of some national courts may be more restrictive than those of an arbitral tribunal, National courts may be unfamiliar if the matter involves certain foreign laws, Delays in the national court system and risk of parallel proceedings, Desire for confidentiality. Need not be the exact same tests as a court at the seat of the arbitration would apply in a case before that court. Tests may be laid down in the lex arbitri or the applicable arbitration rules.

Hon'ble Justice A K Goel: Arbitration and conciliation act provide for interim relief in national arbitration cases. But international arbitration cases I think section 9 I am not sure perhaps does not apply to International Arbitration. It has been recently amended but I think this aspect has not been touched.

Mr. Richard Tan: Well I think the original was discussed by BALCO. It doesn't say specifically that it can grant an interim measure, a protection id seat of arbitration is outside IndiaSo as you say it is only for domestic arbitrations. There was a point in BALCO...But question is can you apply to a High Court for interim relief in respect of an arbitration which is seated outside India. It doesn't say that. Anyway I don't know. Ok. If in case you are interested about the international seat, the revise model law on arbitration is that's the UNCITRAL Model Law on Arbitration is just I don't have to say too much about it. In Singapore we have adopted the 2006 amendment I think in the India you have not adopted the amendments either. But those amendments lay down the tests in quite clear terms which a party will have to satisfy the tribunal of the before he is entitle to interim measure. Those tests are the same tests which we are all familiar with. Harm or ....damages, balance of convenience so that's nothing really very new about that. Now so WIPO rules are are quite specific in relation to the powers of a tribunal to order interim measures. You can read it for your self if you like Article 48 : (a) At the request of a party, the Tribunal may issue any provisional orders or take other interim measures it deems necessary, including injunctions and measures for the conservation of goods which form part of the subject matter in dispute, such as an order for their deposit with a third person or for the sale of perishable goods. (b) At the request of a party, the Tribunal may, if it considers it to be required by exceptional circumstances, order the other party to provide security, in a form to be determined by the Tribunal, for the claim or counter-claim, as well as for costs referred to in Article 74. (c) Measures and orders contemplated under this Article may take the form of an interim award. (d) A request addressed by a party to a judicial authority for interim measures or for security for the claim or counter-claim, or for the implementation of any such measures or orders granted by the Tribunal, shall not be deemed incompatible with the Arbitration Agreement, or deemed to be a waiver of that Agreement. Now I like to talk about new emergency arbitrator relief. Now under most of the recent arbitration rules - ICC rules, american arbitration rules, singapore arbitration rules, hong kong rules, lcia rules. A new creature called the emergency arbitrator has been introduced that provision used with emergency arbitration allow the institution to point an emergency arbitrator to grant interim relief before the main tribunal is appointed. If you

remember I said it may take some time months so the green tribunal to be appointed well before there person is appointed or tribuna is appointed EA can be appointed within 24 hrs as a panel of emergency arbitrators who are specially listed who would be able to act. Offcourse they have to be selected by the institution and based on their availability and conflicts. So the key feature is 1 or 2 business days for a EA to be appointed if there is any challenges very short time periods. Again EA must give his reasons....here he may modified his own orders if he wants to or arbitral tribunal can modified....but the EA cannot act as arbitrator himself in the arbitration himself. Many other rules provides he must fix the cost of allocated cost of the EA proceedings most rules allow the tribunal subsequently to change his orders for costs or to fix costs at the end…

Hon'ble Justice A K Goel: Part one includes section nine, part one is upto section forty three, that why the definition is added in the definition of Court, is specifically added to sub section two which earlier said to the contrary, which said that this part shall apply where place of arbitration in India, now even if place of arbitration is outside India then also this part applies. But if there is no contrary provision, earlier also it could be provided by agreement but now of by default there will be jurisdiction. If there is no agreement, then section nine will apply. Not only agreement statute provided but by near agreement you can't.

Okay this slide just gives you indication of the arbitration institutions which have emergency arbitration provisions in their rules. Now, basic notions of fairness each part has given an opportunity to apply, the proceedings can be conducted by telephone conferences or written proceedings, this slide gives you the exact wording of the articles you can read this if you like, now enforcement of the emergency arbitrators award. Singapore and Hong Kong have specific legislation which confer that emergency arbitrator who is seated, i would say its an order, then interim order made by emergency arbitrator can be enforced in Singapore but not in many countries, however even if we don't have there, the big question is under the New York convention you would seek an award under emergency arbitrator.

Emergency arbitrator is statutory provision under sec nine, sec nine is nothing else but emergency arbitrator, the court gives an interim order.

I am talking about order by an emergency arbitrator

But there is no provision in sec nine, then only you need sec nine, otherwise sec nine takes care of emergency, before arbitrator commences the arbitration, sec nine is a source of power available to the court, for granting an interim order.

The question I posed however, is this, of an emergency arbitrator seated in Singapore were to make an arbitrator order granting interim relief against an Indian company, can the complainant take this emergency arbitrator to India and get it enforced in India? There is a provision, awards that is the point.

It will an award, it will be an interim award.

I just want your answer on this, in some of the institutional roles it will say, an interim emergency order form of an order or an award that the title does not make difference. I see arbitration rules do not permit the emergency arbitrator decisions in the form of an award, only orders. So I postulate the question, to you if an emergency arbitrator seated elsewhere, to make a decision, let's say in order or an award ad brings it to India will it enforced here that's a bi question mark.

I am aware of the case, HSBC case, yes, you decided that good for you because when you decide a case like that the reputation of India goes up, because they see that India is pro-arbitration.

Section fifty five, fifty eight provide for enforceability of.... and the definition of award includes interim award and that emergency order will be interim award. Order is section, made by the arbitrator. Sec thirty four deals with awards.

Fifty seven deals with foreign awards, similar corresponding deals with international awards.

An emergency provision which takes form even of an award is ...

It will be a type of award, if it is by arbitration if it is by court is order.

Thats one argument, another argument is that awards under the New York convention are meant to be final awards not interim awards which can be changed, but the law is still not clear in this area however looking into the future I think more and more courts will say an

interim decision s final in respect in the matter in which the arbitrator has to decide. So this is final and not interim that is the argument which is being used and accepted by the US court.

It cant be enforced then there is no idea of having any power.

If you hold there is a power to pass an interim order or award you have to assume that it can be enforced. Discussion is only academic, we are only discussing.

Whether the order under section nine would be interim order, does this have the power to interim award or not? One thing will be very important that such orders are passed at pre arbitral stage when question of passing order arises.

Whats orders can always be enforced by the courts, court always has power to enforce it.

Award cannot be enforced unless either its made a decree or statute treats it as a decree.

I think that is also a way that you are suggesting by an order passed by emergency arbitrator. You can secure an order under section nine an make it enforceable. I hope this discussion will be useful. I also found in this volume some articles and some material is included that will also be useful in this subject. Thank you very much.

And please visit Singapore and if you are allowed to make a call them let me know by your lunch or something, hahha...

Yes, we enjoyed our stay at NJA, ten days, yes yes.

Thank you so much first of all I thank Mr. Richard Tan, Honorable Justice A K Goel, Judge Supreme Court of India, I hope this is an experience in itself, to be very honest. I always used to wonder, Oh my God, seven days six days.

Practically it was nine days..

Actually to be very honest it was not framed by us. but by all your Chief Justice said that commercial program cannot be done in one and half days, we used to Saturday full day and Sunday half day with High Court Judges. Yes, No, No. I don't think so, we will take your feedback and say this is not possible maximum three or four days. We will do more shorter courses.

May be Mr Tan can be invited again and again so that we have benefit of the international benefit and expertise.

For that we are tieing up with Ministries.

I am aware Malaysian court have adopted even from the Trial court level to the Supreme court level. It's the online voice guided evidence recording. Its like, as evidence is being given the video recording as well as the audio recording is done and the same thing can also be viewed by the High court and Supreme Court. Its technology based and we are very much advance in technology today and it hardly costs anything. It helps in appellate court and also there will be more objective determination by the trial court. But I had occasion to see one of the thing with Malaysian lawyer, every aspect and if, and its just voice guided, he sits on the witness box camera turns on him, as the Judge speaks, camera turns on the Judge. As the council is putting a question, camera turns on him. It's automatic.

Its HD DV AV System, put in place now and they automatically, throws light on the person who is speaking..

In case of henious crimes, that is where many questions they reserve the orders or not, admissible or inadmissible.

May be Sir you can discuss in Supreme Court.

I am sure my lord will be able to take up this, as it has more progressive way of looking at the things.

After ten years from the appeal comes, what's happens part of that is record, we don't have the benefit of that.

We have to take, we then have to rely on the, summary prepared by the session's judge and that may not be the accurate portion.

So, Thank you all, Thank you very much.

Should Thank Sanmit also...