The Vth NLSIR Symposium on “Corporate Mergers and Acquisitions in India” – A Transcription

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Session I: The Competition Regime Governing Transaction of Business in Combinations

The opening session of the Symposium was moderated by Mr. Rahul Singh who proposed that the session be called “Merger Control”. The framework presentation for the session put the Competition Act, 2002 (hereinafter “the Act”) in context and applied it to Mergers and Acquisitions (hereinafter “M&A”). He also outlined the various issues which the panel would address. These included analysing the implications of the 180 days time period provided in the Act to secure the approval of the Competition Commission of India (CCI) on project timelines of corporations, the quick approval given in practice as reflecting the true purpose of the Act, the conformity of pre-merger consultations with international practices, and the purport and contours of the “appreciable adverse effect” and acts triggering the same.

The first panel speaker was Mr. Anurag Goel. He charted the evolution of the Act with reference to the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011. Initially, the Act only provided for voluntary disclosure of intended mergers to the CCI.
However, the Parliamentary Standing Committee proposed that this be amended to make disclosure mandatory, a recommendation Mr. Goel also supported. In 2002, the proposal was accepted and the Act was amended to make disclosure requirements mandatory. This gave a sense of certainty to firms dealing with these areas.

He then went on to talk about the advantages of M&A, highlighting that it was essential for economic growth since it augmented the capacity of products, markets and technology, improved economies of scale, expanded market power, ensured new technology and diversification of intellectual property, facilitated vertical integration etc. Strategic reasons to engage in an M&A include acquiring natural resources, securing grants and hedging risks within a geographic markets (for instance, although McDonalds first began in Canada with only six branches, its acquisition was soon followed by its expansion worldwide). However, its disadvantages are that increased power may be abused and cartelisation may occur. He then talked about what the CCI could do once a proposal is presented to it. It could approve the proposal, block/discard it, or approve it with certain modifications. The remedies in such situations are generally suggested by the parties themselves which the CCI usually follows.

When the Bill setting up the CCI was circulated, several companies voiced many legal concerns. These included apprehensions regarding the ambit of CCI’s powers and more significantly, the exercise and implementation of these powers. There was a deadlock between the drafters and corporations in this respect. Another important concern was regarding the CCI’s capacity to review M&A transactions. Mr. Goel believed that at the time these discussions were being conducted (in 2009), reviewing capacity was absent and a pressing need existed to build capacity.

One important aspect which was incorporated by the CCI upon a recommendation regarding time period calculation was that of ‘stopping the clock’. This meant that if a company fails or delays in supplying certain information to the CCI, this period would be disregarded. Thus, the provision for deemed approval (if the CCI does not respond within 180 days) is now subject to companies providing adequate information punctually.

After prolonged discussion and consultation with stakeholders, most concerns were addressed and a notification to bring sections 5 and 6 into effect by June 1, 2011 was issued.
Mr. Goel then drew our attention to the implementation of these provisions. A member of the CCI himself, he threw light on the several capacity building initiatives being undertaken. For instance, internal SoPs, timelines, procedures for notifications *inter alia* were in place. The process had been made user friendly and expeditious, with around forty five approvals having already been given.

Finally, Mr. Goel stated that the 2012 amendment which exempts wholly owned subsidiaries from notifying the CCI for their corporate restructuring was a positive move.

The second panel speaker was Mr. Dhanendra Kumar, who began by tracing the evolution of competition law in India. In short, he explained how the lack of adequate competition law had allowed the British to acquire more trading and commercial power than the Dutch companies which were already trading in India. This abuse of monopoly and economic dominance by the British prompted free India to follow a socialist regime. The Monopolies and Restrictive Trade Practices Act, 1969 was subsequently passed which substantially curtailed the market power of companies.

Liberalisation of the economy in 1991 necessitated some degree of relaxation to encourage private entrepreneurship. Further, the need for market regulators to prevent abuse of dominance, minimise cartelisation and ensure growth according to the rules of the market was also felt. This led to the establishment of many sectoral regulators, such as the Telecom Regulatory Authority of India (TRAI) and the Securities and Exchange Board of India (SEBI). However, following the Raghavan Committee Report on competition law in 2000 which recommended a complete overhaul in the competition law regime, the Competition Act, was passed. Phased notification of different provisions ensued. In 2009, sections 3 and 4 which deal with cartelisation and abuse of dominance were notified.

With regard to the notification of sections 5 and 6, Mr. Kumar differed from Mr. Goel. The latter believed the sections should have been notified immediately, subsequent to which concerns could be resolved. However, Mr. Kumar felt that the notification should not have been issued until the requisite capacity building had been achieved, thereby echoing the concerns of corporations that it would only paralyse growth and inculcate an ‘inspector raj’. Nonetheless, despite Mr. Kumar’s reservations, the notification was made immediately. Mr. Kumar personally engaged in discussions with many corporations to mitigate their concerns. Capacity building initiatives were undertaken and most of the companies changed their views regarding the role of the CCI in mergers and acquisitions.
Mr. Kumar explained that sections 3 and 4 were anticipatory moves which looked at the consequences of M&A. He then discussed the issue of mandatory notification to the CCI of a proposed M&A. He said that global experience indicated that making this procedure mandatory, rather than voluntary, was more beneficial for the economy as it would help anticipate foresee risks. The position in the U.S.A., where notification is voluntary and action is only taken after an allegation of distortion is made, adversely affects corporations as it becomes difficult to unscramble the M&A, which in turn is detrimental to the economy. Thus, the amendment making the procedure mandatory in India was the right move for this reason and also because it supplies certainty to the procedure.

Mr. Kumar also elaborated the CCI’s efforts to assess the potential ramifications of a proposed M&A on the dynamics of competition, i.e., whether the M&A would engender any appreciable adverse effects on competition. Although there are adequate safeguards under the Act to protect M&As which are not anti-competitive, the CCI has issued orders with a focus on promoting growth (the ‘file, smile and go’ policy). The timely and effective clearing of proposals by the CCI clearly indicated the desire of the CCI to function efficiently. This had also helped to change perceptions of corporations about filing requirements. In addition, the speedy processing and certification indicated that the CCI’s involvement would not interfere with project deadlines.

Mr. Kumar ended on a positive note, by appreciating the clarity, legal certainty and predictability prevalent in the M&A regime in India. He believed that the law was well drafted and its implementation was pragmatic as the CCI was cautious regarding the impact of a proposed M&A on the market as well as of the best interests of the consumers.

Prof. Paul Rogers, who was the third panel speaker, provided a telling insight into the American experience. He started by delineating the history of competition law and merger regulation in the U.S.A. The first law in this regard was the Sherman Act, 1890 which imposed restraints on trade and monopolisation. There was no specific statute on merger law however, abundant case law occupied the field. When Standard Oil sued for trust violations, the Supreme Court laid down the rule on competition concerns in mergers and acquisitions, reasoning that not every combination was illegal (i.e., not detrimental to commerce). Only unreasonable restraints were illegal. This case seemingly contradicted section 7 of the Sherman Act, which was an anti-merger provision (in pari materia with section 6 of the Indian Competition Act). The Court held that section 7 applied only to stock acquisitions where actual restraint should be shown and not just the probability of restraint.
It however allowed asset acquisition. This indicated a shift in the approach of the American regime. The Congress was also more open to the economic regulation of M&A by permitting market rules to regulate companies. This is because there was a growing realisation that the right to compete is important for independent businessmen and companies. There have been many additions and subtractions to the merger regime in the U.S.A ever since. Significantly, there has been a radical transition from anti-merger sentiment to minimal opposition to mergers. As of now, the HSR Act, 1976 stipulates a pre-merger notification of an intended merger to the Federal Trade Commission (FTC). The requirement of a pre-merger notification allows risk assessment and reduces chances of damage, since the merger is yet to be effected. However, this filing requirement is mandatory only for transactions whose value exceeds a certain threshold or is entered into between companies that exceed a certain threshold size.

Prof. Rogers then went through the procedural aspects of M&A in the U.S.A. Once the pre-merger filing is done, the FTC is given a period of thirty days to review. However, if certain information is not provided by the companies in question, the FTC asks for more information (called the ‘dreaded second request’). In doing so, the FTC speaks to every stakeholder. This slows things down tremendously. Generally, in such situations, a conditional approval is given.

Mr. M. M. Sharma, the next panel speaker, began by referring to the CCI’s power to define form and fee under the Act. In this regard, he found the CCI to be bold because its regulations went beyond the Act, but provided certainty, thereby keeping corporations happy. There may be many strategic reasons for an M&A, such as to gain entry into the market or to increase market share. He said that the CCI views M&As purporting to consolidate market power suspiciously; however, it only regulates, and does not prohibit, market control.

He then explained the rationale for merger regulations. He said that when companies enter into an M&A, the competition between them ceases to exist. This leads to an increase in price which is detrimental to consumers. Here, he exemplified using the example of Coca-Cola, which started acquiring companies like Thumbs Up. Although the impression of intra-brand competition was maintained, prices kept increasing due to the lack of actual competition. Noting the shift in the trend, he commented that traditional mergers of $A + B = C$ no longer take place since decisional control is much more coveted today.

Finally, Mr. Sharma expressed reservations about the exceedingly speedy clearances given by the CCI to M&A proposals. He questioned whether the
Mr. Rajat Sethi gave the session an overview of the developments since the notification of sections 5 and 6. A majority of the near fifty decisions given by various courts in India relate to jurisdictional issues. Thus, jurisprudentially, there has been a decent development in the area of M&A.

Procedurally, the CCI and other regulators control M&A. There is a dearth of actual interpretation of various provisions. To illustrate with a couple of examples, it is unclear as to whether joint ventures are covered under the 2011 Regulations or whether under the new regime, acquisition of shares includes acquisition of convertible debentures or not. Mr. Sethi opined that instead of embarking upon an ad hoc and case-to-case interpretation of various provisions, the CCI must release Guidance Notes answering the various grey areas. This will not only reduce the burden on the CCI but will also prevent unnecessary filings. He also highlighted the need for public dissemination of such information.

Another suggestion Mr. Sethi made was that training programs for the CCI personnel must include lawyers because this will improve capacity building as well as will be critically helpful in resolving interpretational problems. Although recent amendments have made the M&A regime more flexible with respect to subsidiaries, they did not answer the question of whether intra-group restructuring requires filings with the CCI. So far, the CCI has been faced with relatively uncontroversial cases. However, the gaps need to be plugged, especially to tackle more controversial cases which will arise in due course.

Mr. Sethi then directed his attention to four specific issues in the M&A regime. The first issue was regarding the definition of ‘shares’. The definition of shares in the Takeover Regulations, 2011 is not aligned with the definition in the Companies Act, 1956. According to the Companies Act, “entitlement to receive shares” also includes convertibles and options. However, the takeover regulations do not account for it. The second issue was with respect to the definition of ‘group’ by looking at the target company. The third issue was concerning the broad and subjective nature of the exemptions granted by the Ministry of Corporate Affairs. Finally, jurisdictional overlaps had resulted in the powers of other regulators like the TRAI and SEBI overlapping with the CCI. Ideally, the CCI should have authority over all sectors. The fourth issue was with respect to the definition of ‘control’. ‘Control’ has neither been defined in the Competition Act nor are any guidelines stipulated by the CCI in this regard. Although the CCI prefers to adopt a case by
case basis determination, since M&A in today's day and age is all about control, there is a pressing need to clarify the true meaning and purport of this term via guidelines to ensure an efficacious M&A regime.

The next panel speaker, Mr. Samir Gandhi, began by questioning the sudden control on mergers in India which is predicated on the basic principle that if any transaction is going to adversely affect the market, there is a need to be cautious. Since M&As started to be exploited to achieve what cartels could have achieved, the presence of a strict law against cartelisation lost all meaning. Hence, it was a logical progression that a law on M&A would soon emerge. The CCI regulations only come into play when either the consumers or competitors, the two constituents of the ‘market’, are affected by an M&A. To determine if a transaction would affect either of them, certain thresholds have been prescribed in the Act. Only transactions crossing these thresholds are deemed to require regulation as the assessment is done with a view to prevent adverse effects on the market. Every transaction which crosses the threshold has to be notified to the CCI unless it falls under the exemptions contained in Schedule I of the Act. However, while interpreting the exemptions, a purposive approach needs to be taken.

Mr. John Thaliath approached the subject as an in-house counsel and highlighted four perspectives – (1) World class market; (2) Inherent strength of corporations in India; (3) Business considerations in M&A; and (4) Simple and effective regulations. Mr. Thaliath believed that it was too early to regulate Indian companies so strictly when it came to M&A. He stated that a good company is one which has a good product, possesses the ability to manufacture the product cost effectively, and can sell the product. A perfect monopoly is a market structure having only one firm where no other firm is in a position to enter. Accordingly, Mr. Thaliath questioned whether Indian companies are firstly, good companies, and secondly, if they are on the verge of becoming monopolies to warrant so much regulation. He believed that the answer was in the negative for both.

He concluded by stating that procedural delays render M&A transactions redundant because possible incentives to combine are often lost in the transaction time.

In the panel discussion that followed, Mr. Kumar clarified the meaning of ‘enterprise’ by referring to the decision in Competition Commissioner v. SAIL, where the Supreme Court held that an ‘enterprise’ was any association engaged in economic activities. Mr. Singh elaborated on this further by first citing the minority decision in the Arun Kumar Tyagi case, where ‘enterprise’ was broadly interpreted to include any economic activity. The minority in this case held that even the High
Court was an ‘enterprise’ by this definition. The same position was taken in the *Karnataka Film Chambers Distribution* case, where the majority upheld the minority decision in the *Arun Kumar Tyagi* case, albeit without cross-referencing or citing it.

After this, the panelists discussed each other’s views. Prof. Rogers sought to differ from Mr. Thaliath on his belief that it was too early to stringently regulate M&A transactions in India. He said the Sherman Act was passed in 1890, which was very early in time, but American companies had done fairly well so far despite it. However, he did acknowledge that since Mr. Thaliath was speaking from an in-house counsel perspective, to him such strict regulation may appear to be too much too soon.

Mr. Kumar noted that even if sections 5 and 6 were not notified, they only confer anticipatory powers and the CCI would still retain the power under section 28 (which is already notified) to interfere if market dominance emerged. Mr. Sethi sought to raise one last issue about the overlap of sections 3 and 4 with sections 5 and 6. When an approval under sections 5 and 6 is required, combination agreements need to be submitted to the CCI. Therefore, does the CCI’s approval imply automatic approval of the documents for the purposes of sections 3 and 4? This was one other reason why he emphasised that the CCI must publish guidance notes and that lawyers must be involved in capacity building initiatives.

**SESSION II: TAKEOVER REGULATION IN INDIA – LIBERALISATION WITH CAUTION**

Mr. Arvindh Pandian, the first speaker, approached the subject from the point of view of public shareholders. He said directors owed a fiduciary duty to the company. However, this duty has not been defined in the Companies Act and has been elucidated in judicial decisions. Importantly, the erstwhile Takeover Code requires the Board of Directors to prepare in writing its reasoned recommendations on the open offer to shareholders of the target company. However, a drawback of this regulation is that the contents of the report are not specified and are no guidelines are prescribed in this regard.

The new Takeover Code has also done away with non-compete fees. In other words, it eliminates any form of special payment to promoters and puts shareholders on par with the former. The Code also provides for voluntary delisting. The SEBI has made it clear that such delisting can happen only under an arrangement wherein shareholders have the freedom to decide the price at which they sell their shares. This ensures liquidity for public shareholders. Another change
introduced in the Code is with respect to the mode of payment. It permits liquid securities to be given as consideration for an open offer. It requires the balance sheet to reflect qualifications of auditors. Another addition is the provision for volume weighted average market price to determine the open offer price. A significant change is that of buy-back exemptions. If a resolution under section 77A of the Companies Act is passed and the promoter has not voted, then an exemption is granted. This is probably the first time that the exercise of voting powers by a promoter has assumed significance. The Reserve Bank of India (RBI) regulations has also changed the threshold for restructuring schemes.

The second speaker was Mr. V. Umakanth who assessed the Takeover Code from the lens of corporate governance. He illustrated the symbiotic relationship and intersection between the two at different levels. The Code incentivises corporate governance because poor governance makes companies easy targets for takeovers. Thus: the greater the takeovers, the better the governance.

He proceeded to explain the concept of an ‘acquirer’. He stated that there are many economic and business drivers for a takeover. However, there are also distorted incentives in the form of Managerial/CEO hubris. The Board of Directors of the acquirer company evaluates the merits and demerits of the transaction. It provides strategic inputs, especially for the management of the company after the transaction. The Board of Directors also has a monitoring role to play. It looks at various issues such as due diligence, adequacy in transaction structure and valuation. There is also a requirement for independent valuation reports and independent directors on the Board of Directors and hence acquirers need independent directors on the Board of Directors. Independent directors generally approach transactions from the shareholders’ perspective. However, whether they are truly independent can be determined only on a case by case basis. Another player involved in a takeover are the ‘trusted advisors’. These are generally lawyers who advise the Board of Directors on various matters and even give inputs on the desirability and prudence of the takeover from the viewpoint of the acquirer company. Mr. Umakanth then looked at how shareholders can be made to participate in the process of a takeover. He suggested that this could possibly be done through collective action. However, in reality shareholders are generally seen to be apathetic to takeovers. Further, their votes can be easily procured by allowing proxy advisory firms, i.e., firms which advise shareholders about whether to vote and the procedure to do the same.

Mr. Umakanth then looked at the concept of a ‘target company’. Earlier, the acquirer would make a direct offer to shareholders, with the Board of Directors
of the target company having absolutely no role to play. However, the new Code prescribes certain guidelines on what the directors of the target company are expected to do. This reiterates how actors should not take governance issues for granted. The next issue which arises is whether directors of the target company can reject or modify a takeover if it is unacceptable to them. The Code does not give any power to the Board to take any frustrating action against a takeover. Thus, their powers in this regard are limited.

Mr. Rohitashwa Prasad looked at whether the new Code discouraged M&A. He was of the opinion that the increase in the threshold limit gives more leeway to investors not wanting to give an open offer. This improves equity financing. He concluded by saying that today most acquisitions are done through asset sale and not share sale in order to circumvent the SEBI and other takeover formalities. The new Code only encourages certain types of M&As.

Mr. Sandeep Bhagat, the third speaker, stated that even prior to 1994, takeover regulations used to be in listing agreements. The first issue with the new Code concerns its date of coming into force. The Act states the date of coming into force as the 30th day from the day of publication, which was September 23. There was a dispute regarding 22nd or 23rd of October being the date from which the regulations were to apply. The SEBI clarified this by saying that it comes into force on the 22nd.

Mr. Bhagat felt there were low open bids in M&As because of the interpretational challenges involved in the Takeover Code and inefficiencies in the economy (like tax, corruption etc.).

A hostile takeover is one which is hostile to the current owner or management. The Takeover Code still permits the launching of hostile tender offers. The tendering of offers becomes difficult only if one owns more than twenty five percent of the shareholding.

Mr. Bhagat opined that the definition of 'control' is unclear. He believed that even a shareholder holding one percent of the shares could be entrusted with a lot of control (of management and policies of a company). The issue was whether the definition of control should be supplied by the judiciary or regulators. Mr. Bhagat felt that it did not matter where it came from as long as it came from somewhere.
SESSION III: CROSS-BORDER MERGERS AND INDIA’S TAXATION REGIME

In the framework presentation the main takeaways of Vodafone were pointed out as follows:-

- Tax Avoidance is permissible and the judgment given in the Azadi Bachao Andolan case is good law but not the one given in the Mc Dowell case.
- Vodafone is not taxable under section 9 of the Income Tax Act, 1962
- Previously the sale of underlying assets was taxable only when they were connected to the jurisdiction which was taxing. However, the 2012 amendment to section 5(6) of the Direct Tax Code (DTC) saw this as a potential for evasion and made such assets taxable even if the shares were outside India. The General Anti Avoidance Rules (GAAR) seeks to use the mechanism of impermissible arrangements to prevent tax evasion.

The moderator of the session, Mr. V. Niranjan, began by reflecting on the series of events that occurred between the months of January and April which have redefined the law on domestic and international taxation. While the significance of the Vodafone decision can obviously not be undermined, he emphasised that it should not be seen as the culmination of developments in this area of law. He further spoke about the distinction between tax avoidance and tax evasion, the former being permissible and the latter not. He pointed out that not every instance of avoidance amounted to evasion and that there was a need for the legislature to acknowledge this. However, in its zeal to maximise revenue and prevent evasion, the legislature has failed to recognise legitimate avoidance mechanisms.

The first panel speaker was Mr. Mohan Parasaran. He elaborated on the ripples created in other areas by Vodafone and how it had also created a basis for taxing royalty which was not only restricted to section 9. Throwing light on the judicial approaches adopted, he drew attention to the fact that, Radhakrishnan J., on the challenge to the show-cause notice issued to Vodafone, held that the Income Tax Department had jurisdiction. The Supreme Court refused to entertain the Special Leave Petition and directed the Income Tax Department to first consider its own jurisdiction and permitted Vodafone to directly challenge the claim of the Income Tax Department in the Bombay High Court. Vodafone’s Hutch document surfaced only after the remarks made by the High Court. Thus, conceptually the approaches of the Bombay High Court and the Supreme Court were different.
The Bombay High Court held that the factual basis of the transaction were sections 9 and 195 of the Income Tax Act. It did not question the colourable nature of the transaction or the genuineness of the structure. As the Hutchinson details were not available at that time, the Bombay High Court could not undertake the same analysis as the Supreme Court. Owing to this the Bombay High Court could not rely on the question of structure and instead had to look at the statute to answer the questions raised/issues involved.

The Supreme Court followed a strict, conservative approach with respect to the transfer of shares and assets of a company. It held that a company is different from shareholders and cannot be brought under the ambit of section 9 of the Income Tax Act. It overturned the High Court ruling and said that as the company was not covered by section 9, it did not evade taxes.

The Authority for Advance Rulings had held that although there was tax evasion by Vodafone, the Indian legal regime did not recognise this nature of evasion. This was at variance with the High Court decision in Azadi Bachao Andolan, which recognised the difference between avoidance and evasion and upheld the former as legitimate. This was also affirmed by the Supreme Court in Vodafone.

On the retrospective amendment to section 9, Mr. Parasaran said that the amendment is not retrospective stricto sensu. The amendment instead seeks to clarify the purport of the provision and how it is to be interpreted. Further, it lends clarity as it amends the definition of ‘transfer’ to include transfers of the nature involved in Vodafone. He then referred to the Supreme Court’s ruling in GVK Industries, where, in construing taxing powers, the court relied on the reasonable nexus doctrine to bring the impugned transaction under section 9. The legislature termed its amendment as retrospective clarifications in order to justify this amendment which was otherwise retrospective in nature. Mr. Parasaran said that the legislature was seeking to clarify section 9. So, in a sense it was only retroactive and not retrospective, as section 9 always meant this according to the interpretation of the Supreme Court.

Mr. Parasaran said that in interpreting contracts one does not go into the details of a transaction but just looks at the text prima facie. The deed between Vodafone and Hutchinson indicates that future taxation had been anticipated. If there was any, what has been termed as, ‘Economic Terrorism’ the case would not have been before the courts.
The second panel speaker was Mr. N. Desai who said that all this controversy was happening in India due to the Income Tax Department's ingenuity. He said that there was a need to look at the language of the law and then take a decision as the only way in which a citizen could arrange finances was by looking at the taxation law.

Mr. Desai dwelt upon the manner in which the Income Tax Department had conducted its business as being a deterrent to international investments. Investors have been worried because of the kind of prosecution carried out and the massive penalties imposed under the Indian regime. These are not only acting as deterrents but are also making foreign companies wary of investing in India, thus driving them away to other friendlier destinations. To illustrate, a majority of the Foreign Institutional Investments (FIIs) are in the form of pension plans, mutual funds and endowments. Stocks constitute only a small percentage. These are exempted from tax in the U.S.A. as they are in India. So now, if they are made to pay tax in India, by the whim of the Income Tax Department, returns to pensioners would not come out, thus making these entities go to a friendlier destination, such as Mauritius. In order to deal with this problem, Mr. Desai suggested looking at the drafting of regulations. Rather than focussing on theory it was much more advantageous, in his opinion, to look at what actually happens in practice.

On the question of the introduction of the DTC, Mr. Desai opined that such a reform should not be hastened and should only be introduced after a proper consultation with all stakeholders by a parliamentary standing committee. With respect to the GAAR he said that such provisions were already in existence in Canada and South Africa and that before introducing them in India it was necessary to create the right environment. He warned that fiscal terrorism should not be perpetuated under the garb of these provisions. He also pointed out that in formulating the GAAR, India had adopted the language of the South African law but had systematically removed the safeguards to assessees.

Mr. Desai further stressed the need for certainty and consistency in tax laws and their interpretation and quoted some statistics to support his argument. He said that about eighty to ninety percent of the cases concerning corporate income tax go against the tax payer at the first level of redressal; however, at the High Court level the government loses a majority of the cases. This shows that had this majority of cases been decided properly at the preliminary level, taxpayers would not have had to approach the higher echelons of the judiciary. Mr. Niranjan also pointed out the role of the mindset of the income tax officer. He said that often the interests of the income tax officer clashed with those of the tax payer. He referred to
a letter by the Central Board of Direct Taxes that talked about tax collection as the basis of promotion. He mooted the point whether such a mindset was influencing the formulation of policy.

The next speaker was Mr. Vohra, who started by remarking that taxes and death are the only certainties in life. He echoed Mr. Desai’s call for certainty in tax regimes so that there is no ambiguity in the minds of tax payers regarding their tax obligations. The Chelliah Committee Reports on Tax Reforms in 1991-93 shows tax collection rising and stabilising but then at a later stage the case of the revenue falls flat to create a bell curve.

He then spoke about the ‘Look At’ principle, which implies the judicious assessment of what ultimately the tax payer is supposed to pay. Its aim is to remove the trust deficit. Income tax returns could be increased through bridging this trust deficit between the administration and the tax payers. This is necessary for a country which wanted to advance to an improved taxation regime.

Mr. Vohra also spoke about investment opportunities and their expansion in India. He believed that distribution of dividend and cases where there were mergers or amalgamations with Mauritius subsidies were helping this process. In the case of the latter, which included the income within the Indian economy, it was a perfectly legitimate pathway for foreign investors.

Mr. Vohra opined that the provisions of the DTC were highly biased to the revenue but also acknowledged that rewriting the entire Act would be futile. While some provisions of the DTC are draconian (such as the fact that if the Taxman comes across a favourable judgment, the Taxman can re-open the case and this cannot be decided by the court), a drastic change in law in unnecessary. It is more important to change the mind-set of the tax administration.

He also identified that section 79 of the Act as an impediment to genuine corporate restructuring, including Cross Border Mergers. In his opinion, the FIIs were sitting on the fence and in turn withholding investments. According to the rules under the Vienna Convention on the Law of Treaties, no unilateral change is allowed in bilateral treaties. He also pointed out that business sold using the Discounted Cash Flow method and not the Net Asset Value method since the latter produces ad hoc results. Using the NatWest Case as support, he opined that the economic substance theory needs to be demonstrated. In this case, NatWest Bank invested in India through a Mauritius based account. According to the India-Mauritius Double Taxation Treaty, a Mauritian investing in India will only be taxed
on the capital gains arising in Mauritius and not on those arising in India. Hence, the question raised in this case was whether dividend declared in India was taxable. The Authority for Advance Rulings ruled that the Mauritius enterprise was only a conduit. It was akin to a shell and bona fides was to be shown if NatWest Bank was to successfully defend itself against the claim of tax avoidance in India.

Mr. Niranjan added that in any merger or amalgamation, as in the aforementioned case, capital gains is a factor as was in the case of CIT v. Mrs. Grace Collis.

Mr. Anil Talreja, the next speaker, talked about Free Trade zones where no tax has to be paid for a period of fifty years or so. However, there is uncertainty as to whether no tax will be levied for a fixed period of time. He then dwelt upon the various factors in cross border mergers and acquisitions. The restriction on unilateral action was also discussed, with Singapore and its ban on such mergers being discussed specifically. He also explained the concept of leveraging with respect to Indian banking systems which had shielded India from the recent global economic crisis.

Regarding key legislative amendments, he spoke about how the rulings of other courts showed that the GAAR had matured; however, this was not the case regarding the applicability of GAAR in India in his opinion. He was also of the opinion that the (then) proposed move to permit hundred percent Foreign Direct Investment (FDI) in single brand retail and thirty percent JV reservation would further impact investment patterns in India.

Mr. Satwinder, who was the last speaker, pointed out the stamp duty implications in M&As or Corporate Debt Restructuring and spoke about the effective date for stamp duty and the significance of the appointed date. He also noted the Stamp Duty Implications in the case of Hero Motor Corporation.

**SESSION IV – THE COMPANIES BILL, 2011: INDIAN COMPANY LAW AT THE CROSS-ROADS**

The fourth session was moderated by Mr. V Umakanth. He commenced the session by giving a brief history of the 2011 Bill. He added that there was an overhaul of the Companies Act in the Companies Bill, 2008 which could not be passed because the Lok Sabha was dissolved that year. The Parliamentary Standing Committee on Finance then made additions to the 2008 Bill, which evolved into the present Companies Bill, 2011.
In the framework presentation, four major changes proposed in the Bill were highlighted:

1. Clause 234 of the Bill which allows Indian companies to merge with foreign companies (something which is not allowed under the present Act) and grants permission to both inbound and outbound mergers. However, there will be two limitations on this – first, that the merger can take place only with the prior approval of the RBI and second, that the foreign company must be from a country notified by the Central Government.

2. The Bill prohibits the holding of treasury shares by a company. There is no such provision in the present Act.

3. Court approval for certain M&As has been done away with. This will generally be applicable when the transaction is between two small companies, or between a subsidiary and a holding company, or when the government specifically allows certain companies to merge without court approval.

4. Clause 232(3)(h)(B) provides for reverse mergers with exit options for minority shareholders. The payment made in such exit options will be in accordance with a pre-determined price formula.

Mr. Umakanth then stated that the goal of the session would be to determine if the 2011 Bill is progressive or regressive.

Mr. Justice Ramasubramanian, the first speaker, began by tracing the evolution of the Bill and gave it some context. He stated that the provision for court approval was challenged in the Subhiksha case where the issue raised was whether a merger scheme could be opposed in a court of law, especially because the parties had already consented to it. He then moved on to say that commerce and crime were equally dangerous. Thus, the 2011 Bill had to take into account the various scams that had occurred in the recent past. Tracing the evolution of the present Act, he explained that the Bhaba Committee in 1950 had first provided the basic framework of the 1956 Act. Major amendments were then brought about in 1988 in pursuance of the recommendations of the Sachar Committee. In 1993 and 1997, attempts were made to overhaul the Act. In 1996, the concept of vanishing companies was created. Even LPOs were brought in as shareholders. The Irani Committee in 2005 also sought to overhaul the present Act and made many recommendations in a concept paper on company law.
With this context, he proceeded to analyse the 2011 Bill. He said there were sixty nine additional sections in the Bill as compared to the present Act. A criticism by the Institute of Chartered Accountants of India (ICAI) was that the expression “as may be prescribed” was used 308 times in the Bill. This indicated that much law making was left to rule making by the executive. Thus, we would have an Act, but no law. Another criticism was that auditors would be prohibited from rendering any service other than auditing to companies whereas in practice, they provide legal services as well. This, however, will no longer be possible given the scheme of the Bill.

Mr. Justice Ramasubramanian centred his discussion on two main aspects – one-man companies and Corporate Social Responsibility. With respect to one-man companies, he said that their origins can be traced to the landmark case of Solomon v. Solomon Ltd. The House of Lords decision first referred to the company that Aaron Solomon had created as a ‘one-man company’ which was valid in law. The 12th European Council Company Law Directive recognised single member private companies. A 2009 Directive of the European Union provides how such companies can be floated and run.

He pointed out that the 2011 Bill also makes a provision for Corporate Social Responsibility. clause 135 says that every company having a net worth of rupees five hundred crores or more, or turnover of rupees one thousand crore or more, or a net profit of rupees five crore or more during any financial year should constitute a Corporate Social Responsibility Committee (CSRC). Two percent of the profits of the past three years will have to be paid for social causes/ reasons. However, the powers and functions of the CSRC have not been clearly outlined in the Bill. Different checks and balances to ensure that the social payments are made for actual social reasons are not present. This discussion concluded on the note that this provision is relevant especially in light of the recent furor created by the Dove (which took over Union Carbide) sponsorship of the Olympics.

The next speaker, Mr. Uday Holla, opined that despite all efforts in the past, it seems almost impossible to get a new Companies Act. The 2011 Bill can be called an amalgamation of the present Companies Act, the Company Court Rules and judge-made law. However, it did not make too many changes to the M&A provisions.

He then went on to say that M&A is extremely important. This was especially so in the present global scenario where amalgamations of foreign and Indian companies occur constantly. (For e.g., the TATA takeover of Jaguar). He noted that Chapter 5 (sections 390-396A) of the present Act deals with M&A and that
there are no provisions regarding takeovers in the current regime. Chapter 15 (sections 230-240) deals with compromises, arrangements and amalgamations. In the present market, fifty to sixty percent of the transactions are amalgamations. However, recently, there has been an increasing trend of de-mergers taking place.

He moved on to discuss clause 230 of the Bill which was in pari materia with section 391 of the present Act. He explained that clause 230 provides what can be contained in an application to the Company Court. Presently, only rules and codes govern what can be contained in such applications. Further, Chapter 15 of the Bill provides for corporate debt restructuring (presently governed by RBI regulations).

The reorganisation of companies by the division of shares into different classes and allowing easy conversions of preference shares to equity has been specifically provided for in the explanation to clause 230. Though such practice has been engaged in previously, it has now been given statutory recognition.

He highlighted some other changes introduced by the Bill – it provides for e-commerce whereby any notice and document convening meetings etc. must be mandatorily published on every company’s website. By permitting postal ballot voting, the Bill also facilitates participatory decision making. The proviso to clause 230(4) provides that objections to a compromise or arrangement can be made to a person having not less than ten percent of the shareholding or not less than five percent of total outstanding debts. This is problematic because in most large companies, no shareholder has up to ten percent shareholding. So this would in effect allow promoters to proceed with M&As even if ninety five percent of the shareholders object to it. Now, since notice needs to be given to the CCI, even the CCI would become a player.

Additionally, he noted that the Bill provides for the M&A of Indian and foreign companies. Presently, for such mergers, the transferee has to mandatorily be an Indian company while the transferor can only be a foreign company and not vice-versa. The Bill allows Indian companies to either be transferors or transferees.

It also provides for the protection of classes of creditors and the exit offer to dissenting shareholders. Clause 235 allows the majority to acquire the shares of the minority or dissenting shareholders. He said that this is the only provision which deals with takeovers per se. However, no clear guidelines about how the takeover should be effected have been laid down.
Courts in India have held that a transferee company, as a result of a compromise, should not hold shares in its own name or through a trust. Since M&A leads to an increase in the authorised share capital, stamp duty must be set off due to the increased share capital. This judge-made principle has now been incorporated into the Bill.

The specific accounting standards present in the Bill which provide for checks and balances on the balance and profit/loss sheets were also discussed by the panelists. According to the Bill, it is mandatory for the auditor to certify in the M&A that the compromise meets the accounting standards as laid down in the Bill. An appointed date and an effective date have to be fixed by the participating companies. Statements have to be filed annually to the Registrar of Companies (ROC) when the scheme is completed.

Additionally, Mr. Holla noted the provision which avoids court approval for the M&A of certain companies. It also provides the procedure to be followed by such companies under clause 233.

One major drawback of the Bill is that it does away with the provision of interim orders. Under the Bill, only final orders might be passed for staying suits and proceedings. Mr. Holla opined that interim orders are very important. He explained that since the Bill does not provide for interim orders which can be passed under the present section 391, even the general principle used by courts (that the power to pronounce final orders includes the implied power to pass interim orders) will not apply.

Ms. Suryakumar, the third speaker, primarily sought to deal with the cross-border aspects of M&A with respect to small and medium enterprises.

She explained that prior to 1991 there was no global activity in India. However, since 1991, there was an expansion of Indian companies through M&A. For such cross-border M&A, different laws and regulations need to be complied with. Thus, there was a need for a single window clearance. Since 2011, there has been a significant drop in the number of global M&A in India primarily because compliance with all laws is time-consuming and renders the process of completing transactions cumbersome. The decline can also be attributed to the changing global economy.

The Bill deals with both inbound and outbound mergers. However, she highlighted two significant limitations, the first being the requirement of obtaining the prior approval of the RBI, and the second being that the foreign company had
to be from a country notified by the central government. However, presently the RBI itself was not sure about how these approvals are to be granted. She added that it was also time-consuming, which could deter foreign companies. She also stressed on the importance of time in an M&A transaction. Delay in the process due to various legal requirements and approvals leads to buyer or seller remorse and possible scrapping of the deal.

She then moved on to the topic of the prohibition of the holding of treasury shares by a company under the Bill. Treasury shares are generally used to raise funds. Closing this avenue of raising finances would be very harmful from corporations’ point of view.

She supported the provision removing court approval for M&As involving small companies as being beneficial for them since they no longer needed to comply with the stringent rules of reporting and filing.

Recognition of one-man companies was beneficial for individuals because presently, RBI regulations placed strict restrictions on individuals and partnerships/proprietary concerns investing abroad. One-man companies would help overcome these restrictions.

Other changes that were mentioned in passing reference were the doing away with the object clause in the memorandum of articles, the requirement of physical residency of one of the directors at the principal place of business (to ensure easy compliance with local laws) etc.

Once the speakers had finished speaking, the floor was thrown open for questions. Some skepticism was expressed at the doing away with the object clause. To this Ms. Suryakumar responded that from the point of view of companies, they take up projects which seem lucrative at a given point in time. So constraining them with the object clause was harmful for them. Mr. Holla added that doing away with the object clause was mostly beneficial for small companies.

Another member of the audience raised an issue about protection of small companies to which Mr. Justice Ramasubramanian responded that the 2011 Bill provided for class action suits which adequately protects small companies. Mr. Holla opined that the concept of a one-man company was not new. Even Limited Liability Partnerships are similar.

Mr. Umakanth then directed the attention of the panel to discuss the efficacy of the National Company Law Tribunal (NCLT) which, though purported to be a
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specialised body, was being vehemently opposed to. Mr. Holla responded by saying that the NCLT had both pros and cons. Though specialisation ensured familiarity, the caliber of the judges left much to be desired. Mr. Justice Ramasubramanian added that with respect to the different levels, there was not much difference in the present and the proposed scheme. Presently, the hierarchy is the Company Law Board, Division Bench of the Company Law Board and the Supreme Court. In the proposed scheme, it would be the NCLT, the Company Law Appellate Tribunal and the Supreme Court.

Mr. Umakanth observed that the provision requiring the central government to notify a list of countries whose companies can engage in M&A with Indian companies would mostly follow the principle of reciprocity.

Mr. Umakanth sought to end the session by asking each panel speaker whether the Bill was progressive or regressive. Mr. Holla opined that it was progressive in certain aspects, regressive in certain others. Certain amendments were needed according to changing circumstances. Mr. Justice Ramasubramanian added that there was rarely any useful discussion in the legislature and that there was a need to include the academia in the legislative process. Even though objections can be called for when a bill is drafted, this formal channel is rarely used to address objections. Nonetheless, all contingencies can be foreseen and agreeing with Mr. Holla, he stated that amendments needed to be made according to changing needs. Ms. Suryakumar said she believed that the Bill was the closest step towards globalisation.