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HOW INDIA HAVE FAILED TO OPEN ITS ECONOMY: AN INESCAPABLE REGULATIVE LABYRINTH

~ *Twinkle Kumari*

ABSTRACT

This article tries to elaborate on the understanding of the relationship between law and economics, at different levels of market transactions. Such as the flow of currency in the administration of commerce, at different economic frontiers, through the interaction of two nations with their incremental value, which have been acquired through constant regression toward technological development, and constant investment in innovation of an invention. Besides drawing an unequivocal relation of the regulative labyrinth as a disincentive for technological ingenuity. Then further inquiring upon the contrast of the economic model of China and India on regulations of intellectual property rights. Thus, looking into different public sector undertakings that are developing at diminishing marginal utility.

INTRODUCTION

The imperative economic history of India, always looked from either preceding or succeeding years of 1991. Due to the transitory change in the jurisprudence and nature of the term ‘sovereign’ ‘state’ respectively, leading to change in canons of interpretation, entail to perpetual growth due to foreign investment and globalization. There is extensive literature on how simply by transferring economic resources or altering ownership (privatizing) had conspicuous growth and development¹ which is consequential and have sustained evidently². By implication of liberal policies (LPG) and

¹ Estrin, Saul and Bennett, John and Urga, Giovanni and Maw, James W., Privatisation Methods and Economic Growth in Transition Economies (July 2004). FEEM Working Paper No. 105.04,

² Ravan V. Sanket “Impact of LPG on Indian Economy.” Prime International Research Journal, vol. Vol. I, no. Issue 4, 2014, PAGE 21-33.

private investment. While transferring economic resources (which is scarce) from Public Sector Undertaking to private enterprises.

The history of the trade war has long been prolonged between some emerging civilizations to capture different nations, like India was British colony other colonies were too ceasing the 'property rights' due to the imperialist nature of state expansion, leading to cultural conquest, a well-practiced policy among prevailing colony with the pursuit of commerce. Be it the Dutch, and Portugal, who moved east to the port of India, or the Spanish who moved westward and ended up discovering America. These trade and commerce endeavors have left it reminiscent of trade routes either by sea or land.

Comparative Advantage is relatively beneficial for countries, companies, and individuals. To produce a product with lower cost, either because of specialization or due to technological advancement resulting in efficiency. David Ricardo, a prominent economist in his book 'On the Principles of Political Economy and Taxation' has articulated the concept of comparative advantage, which talked about how countries can benefit from trade. Thereby every country has a comparative advantage which means they can produce at a relatively cheaper cost i.e. decreased opportunity cost, due to market efficiency, which is incidental to knowledge acquired over time, present in the market. While dispensing or allocating economic resources in such a way as to reach market equilibrium.³

The contemporary market works in parallel with the Ricardian theory of advantageous position proposition. This is presented by different Nations by their economic frontier for investors presenting investment opportunities, by either merger and acquisition (M&A) or greenfield investment where the whole new supply chain and logistics operations are built from scratch.⁴ Where due to licensing the technology is being shared among companies which they tend to bring back to the country where they are incorporated.

³ Ruffle, Roy J. "David Ricardo's Discovery of Comparative Advantage." History of Political Economy, Duke University Press, 2002, pp. 727-748. Google Scholar.
<<https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=3067f7dfb1453ffd2b436294c9727658e279b94>> accessed 2 June 2024.

⁴ Candra, Ade, D. S. Priyarsono, Nimmi Zulbainarni, and Roy Sembel. "Literature review on merger and acquisition (Theories and previous studies)." Studies of Applied Economics 39, no. 4 (2021).

The current case study of the above congestion can be seen in different companies, which due to licensing came into the market competition and acquired market share. For example, Radio Corporation of America (RCA) shares its knowledge and technology with the Japanese company Sony by formal transfer of intellectual property rights by formal consent of licensing.⁵

The technological transfer is a cyclical phenomena incidental to time, as the companies would always endeavor to keep changing with the market when price becomes static, with no profit margin is sustained, then a small bundle of innovation by licensed companies which have access to technology can easily enter into the market to compete.⁶

Thus, due to continuous and gradual agreements where both the parties have accommodated each other for scaling their own interest and profit. A strong legal right towards the companies would not just encourage them to share their technology rights against unreasonable coercion by the foreign state.

For example, China in 2010 when unraveled its fully- functional (EV) , some prominent contracts of joint venture between BYD Company Ltd. and Daimler AG were seen.⁷

Besides this the legislation for automotive industry policy adjustment, were made mandatory for pre-existing joint ventures to adopt and integrate Electric Vehicle, which would lead to sharing their technological knowledge with the local companies by revision of joint-venture, which jerked the foreign companies are their rights of intellectual property were infringed as both the parties would own the knowledge.⁸

However, over the period of time from giving partial ownership of 50%, China has been encouraging ‘special purpose vehicles’ and ‘new energy vehicles’ to enjoy complete ownership.

⁵ Soubra, Yehia. "Technological Change and International Competitiveness in Consumer Electronics: The Case of the Television Receiver Industry." *World Competition* 13(2) (1989): 05-20.

⁶ Hermosilla, Manuel, and Yufei Wu. "Market size and innovation: The intermediary role of technology licensing." *Research Policy* 47(5) (2018): 980-991

⁷ Jeff Shepard, ‘BYD and Daimler Sign Joint Venture Contract to Develop Electric Vehicles in China’

⁸ Stephan Bosshart, Thomas Luedi, and Emma Wang, ‘Past lessons for China’s new joint ventures’ (2010) ‘McKinsey & Company’ <<https://www.mckinsey.com/capabilities/strategy-and-corporate-finance/our-insights/past-lessons-for-chinas-new-joint-ventures#>> accessed on 13 June 2024.

Tesla who has started their fully owned operation in china.⁹

Law and Economics an Interdependent Sector

There is a constant interaction of individuals where both parties at some point in time, become a service renderer and the other party servitor (service provider). This may start at individual level but its discernment can be seen in ascending order which promotes commerce from small provincial state to national and then international level, this conjures to currency multiplier effect due to social contract.¹⁰

When a human interacts in a 'state of nature' regularly there is an emergence of custom form commerce, before the fiat system of currency these interaction or transaction cost was beared by barter system, and later by gold and silver coins. These customs help comprehend market trajectory and promote commerce, by apprehending rights which emerges for merchants.

When these merchants in their course of business indulge with individuals from different countries they approach to their national bank or treasury for reserved foreign currency in order to interact at the economic frontier or bear the transaction cost for supply(export) or demand(import) both at national and Individual level, dollar being the most influential reserve in the market.¹¹

Nevertheless, if a dispute arises between two sovereign nations or two autonomous individuals and companies it would be resolved by public and private international law respectively, the conflict of law and jurisdiction is affirmed in the contract.¹²

JURISPRUDENCE OF COMMERCE:

⁹Yueyuan Selina Xue, Wei Wei, Mark J. Greeven, 'China's automotive odyssey: From joint ventures to global EV dominant' (2024) IMD <<https://www.imd.org/ibyimd/innovation/chinas-automotive-odyssey-from-joint-ventures-to-global-ev-dominance/>> accessed 13 June 2024.

¹⁰ Domański, Bolesław and Gwosdz, Krzysztof. "Multiplier Effects in Local and Regional Development" *Quaestiones Geographicae*, vol.29, no.2, 2010, pp.27-37. <<https://doi.org/10.2478/v10117-010-0012-7>> accessed on 10 June 2024

¹¹ Anshu Siripurapu and Noah Berman, *The Dollar: The World's Reserve Currency* (2023), Council on foreign Relation <<https://www.cfr.org/backgrounder/dollar-worlds-reserve-currency>> accessed on 10 January 2024

¹² Maier, Harold G. "Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law." *American Journal of International Law* 76, no. 2 (1982): 280–320.

Statute of commerce

The interaction of people through trade becomes a substantial question of law, due to unanticipated accountability between state and center, however some outline for jurisprudence of commerce is given under 'Article 301-307 under Part-XIII Trade, Commerce and Intercourse Within The Territory of India' and some substantive questions of supply chain regulation. However India is a quasi-federal structure, which propagates division of power between state and center to regulate affairs given under the 'Seventh Schedule' of Indian Constitution.¹³

List-I Entry 36(currency tender) Entry 41(foreign import and export) and Entry 42(Inter-state trade and commerce)

List -II Entry 26, 27(that trade, and commerce and production supply and distribution respectively is subject to Entry 33 of list III)

List-III Entry 7(Formation of Contract, Partnership or Agency), Entry 21(Commercial and industrial monopolies, combines and trusts). Entry 33 Trade and commerce in, and the production, supply and distribution of—

(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest and imported goods of the same kind as such products.

(b) foodstuffs, including edible oilseeds and oils.

(c) cattle fodder, including oilcakes and other concentrates.

(d) raw cotton, whether ginned or unginned, and cotton seed; and (e) raw jute.]

The interpretation of law through precedent have developed from Attiabari case which sought the free transport was overturned in of GK Krishnan where the court held that compensatory tax does not violate interstate commerce by test of reasonableness.

¹³ Varshney, Ashutosh. "How has Indian federalism done?." Studies in Indian Politics 1, no. 1 (2013): 43-63.

Foreign Exchange Management Act of 1999 aims to facilitate trade by underlining some rights and liabilities for the investor indulging in trade (Transfer or Issue of Security by a Person Resident Outside India) that a non-residents can invest in equity, shares, debenture by either government route or automatic route by the help of 'Authorized Dealer' to manage flow of currency in form of capital and current. Department for Promotion of Industry and Internal Trade (DPIIT) under the Ministry of Commerce and Industry

Nevertheless, these are non-exhaustive laws and other intricacies are anticipated by guidelines and notifications which are changed from time to time by the Reserve Bank of India (RBI).

(i) Acquisition of immovable property which is regulated in terms of Section 6(3) (i) of Foreign Exchange Management Act, 1999 read with Notification.¹⁴

(ii) Establishment or Branch/Liaison Office in India, which is regulated in terms of Section 6(6) of Foreign Exchange Management Act, 1999 read with Notification.¹⁵

(iii) Investment in capital of partnership firms or proprietary concern which is regulated in terms of Section 2(h) of Section 47 of Foreign Exchange Management Act, 1999, read with Notification No. FEMA 24/2000-RB dated May 3, 2000.¹⁶

Most of the sectors in economy like: Manufacturing, Automobile, Chemicals, Construction Development (Townships, Housing, Built-up Infrastructure), E-commerce Activities, Food Processing, Information Technology (IT) and BPM, Pharmaceuticals (Greenfield), Renewable Energy, Single Brand Retail Trading have full ownership which is Department for Promotion of Industry and Internal Trade (DPIIT) under the Ministry of Commerce and Industry.

However, there are certain sectors which have given limited ownership for investing such as Defence (74%), Civil Aviation (49%) beyond would require government permission, Print Media (26%) and many more sectors which are partially closed.

¹⁴ Notification No. FEMA 21/ 2000-RB 2000;

¹⁵ Notification No. FEMA 22/ 2000-RB 2000;

¹⁶ Notification No. FEMA 24/2000-RB 2000.

Usually developing countries attract investment, but the question which i would like to reiterate is, what are the laws that give any country the edge of becoming a market target for investment, of an economic frontier where the laws are less stringent and well protected with administrative efficiency leading to less transactional cost while preventing spillovers.¹⁷

The companies while investing brings their technology¹⁸ of which contract is a consequence for which they need smart navigation in legal judiciary which is highly inefficient in dispensing judgment inability of patent office delay in grant and examination of application, and cultural difference at individual level due to insufficient knowledge as the government failed to administer by advertising innovation at local level.

India has a \$387 billion trade deficit with china, india imports risen to 30% and hence the dependency, of which more are the electronics (43%) and machinery (39%) which have technology of 'integrated circuits' worth \$ 4.56 Billion, as india neither have operational facility to make this machinery but also lacks know how of making one. Whereas China has a huge pool of patents to access from.¹⁹

CONCLUSION

India is far from transforming to a truly open economy due to different regulatory complicity and clarity, Bureaucratic Inefficiency as entrepreneur disincentive, Sectorial Restriction with protectionist tendency which does not allow FDI to retail insurance and e-commerce to realize their full potential.

Thus, India needs a rampant change in judicial, executive and legislative process for a steady growth and have a vision for investing in economic operation.

¹⁷ Karky, Ramesh, Intellectual Property Rights and Foreign Investment (2015) Perry, M. ed Intellectual Property Governance for the 21st Century: Global Evolution <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2702663> accessed 13 june 2024

¹⁸ Shivendra Nath Mishra, 'Transfer of Technology and Patent Rights' (2021) manupatra <<https://articles.manupatra.com/article-details/Transfer-of-Technology-and-Patent-Rights>> accessed 13 june 2024.

¹⁹ Ranking of the 20 national patent offices with the most patent grants(2022) 'Statista' <<https://www.statista.com/statistics/257152/ranking-of-the-20-countries-with-the-most-patent-grants/#:~:text=In%202022%2C%20China%20had%20the,granted%20patents%20the%20same%20year.>> accessed 13 june 2024