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India Before and After the Right of Passage *Case*

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Abstract
The *Right of Passage* case flagged off India's adversarial tryst with international law, in which Portugal had argued for the validity of a 1779 treaty signed with the Marathas. India had denied its existence and interpretation. Within the UN Charter, India's subsequent assimilation of Goa constituted illegal invasion, with which the Indian Supreme Court disagreed. Subsequently, Britain deployed its colonial *de jure* distinction by refusing to recognize India's control of Goa. However, for Nehru, Goa was "a symbol of decadent colonialism trying to hold on". The *Right of Passage* case profoundly shaped India's post-colonial foreign policy by coupling India's body politic with its judiciary. Since then, the *Lotus* case continues to enamour the Indian government. This paper considers the views of the Indian government, judiciary, and publicists to examine whether India has been able to advance a specific approach to international law.

I. INDIA BEFORE THE *RIGHT OF PASSAGE* CASE: COLONIALISM COUCHED WITHIN THE LAW OF NATIONS

The inbreeding of ideas creates weak opinions that do not withstand testing times. International law is no exception to this. The modern law of nations is a product of European public law.[1] However, after colonization first eclipsed monarchies in Asia,

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1. Henry WHEATON, *Elements of International Law* (Boston: Little, Brown, & Co., 1866) at 17–18; Ernest NYS, *Les Origines Du Droit International* (Paris: Hachette Livre, 1894) at 8–9; Thomas BATY, *The Canons of International Law* (London: John Murray, 1930); Arthur NUSSBAUM, *A Concise History of the Law of Nations* (New York: Macmillan, 1954) at 86; R.C. HINGORANI, *Modern International Law* (New York: Oceana, 1979).

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the United Nations Charter (UN Charter)[2] and the Security Council resolution on decolonization[3] have since endeavoured to include both old and new states in the family of nations.[4] The Asian approach to international law began, *inter alia*, with Asian commentators questioning whether the old and new states was a "misleading distinction" in that by calling decolonized states "new states", such states effectively become only the recipient of and not a contributor to the colonial law of nations.[5] Since their very inception, post-colonial states, such as India, for example, viewed international legal doctrines differently from such new states' publicists. However, the post-colonial judiciaries of such states often took a Western position on the established doctrines of international law, at least for some time.[6] Surprisingly, in the early years after independence, Indian High Courts were more open to international law than the Indian Supreme Court.[7] For instance, in *Kashani v. United Arab Republic*, the Supreme Court avoided any discussion on the "doctrine of sovereign immunity", holding instead that Section 86(1) of the Indian Civil Procedure Code contained the positive law on the subject. This was an appeal from the Calcutta High Court where the Court thought international law on diplomatic immunity to be the

2. *Charter of the United Nations*, 26 June 1945, online: UN 〈http://www.un.org/en/documents/charter/index.shtml〉 [*UN Charter*].

3. *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res. 1514 (XV) (1960), online: UN 〈http://www.un.org/en/decolonization/declaration.shtml〉.

4. C.H. ALEXANDROWICZ, *An Introduction to the History of The Law Of Nations in the East Indies: 16th, 17th and 18th Centuries* (Oxford: Clarendon Press, 1967); J.J.G. SYATAUW, *Some Newly Established Asian States and the Development of International Law* (The Hague: Martinus Nijhoff, 1961).

5. J.J.G. SYATAUW, "The Relationship Between the Newness of States and their Practices of International Law" in R.P. ANAND, ed., *Asian States and the Development of Universal International Law* (Delhi/London: Vikas Publications, 1972), 11.

6. Professor Agrawala wrote two of the earliest papers on this issue. See S.K. AGRAWALA, "Law of Nations as Interpreted and Applied by Indian Courts and Legislature" (1962) 2 Indian Journal of International Law 431; S.K. AGRAWALA, "India's Contribution to the Development of International Law—The Role of Indian Courts" in Anand, *supra* note 5 at 72. More recent scholarship includes B.S. CHIMNI, "International Law Scholarship in Post-Colonial India: Coping with Dualism" (2010) 23 Leiden Journal of International Law 23, and V.G. HEGDE, "Indian Courts and International Law" (2010) 23 Leiden Journal of International Law 53; Johanna KALB, "The Judicial Role in New Democracies: A Strategic Account of Comparative Citation" (2013) 38 Yale Journal of International Law 437; Adam M. SMITH, "Making Itself at Home—Understanding Foreign Law in Domestic Jurisprudence: The Indian Case" (2006) 24 Berkeley Journal of International Law 218.

7. In *Deep Chand v. State of U. P.*, A.I.R. 1959 S.C. 648, the Supreme Court ruled that art. 52 of the Indian Constitution that falls under the category of "Directive Principles" are non-justiciable. See *The Constitution of India*, online: Ministry of Law & Justice 〈http://lawmin.nic.in/olwing/coi/coi-english/coi-indexenglish.htm〉 [*Constitution*]. In *Ujjam Bai v. State of U.P.*, A.I.R. 1962 SC 1621, para. 50 [*Ujjam Bai*], the Supreme Court stated that art. 50 of the Constitution has enacted as one of the Directive Principles that the "State shall take steps to separate the judiciary from the executive in the public services of the State". Art. 51 of the *Constitution* is the Trojan horse of international law for India because it is the only Article that talks about public international law. As Anand, quoting the Law Secretary of the Government of India, explains, art. 51(d), i.e. "encourage settlement of international disputes by arbitration", of the Constitution was included in the draft "on the basis of a couple of statements made in the Constituent Assembly which did not display adequate understanding of the system of settlement of international disputes". R.P. ANAND, *Studies in International Law and History: An Asian Perspective* (Boston/Leiden: Martinus Nijhoff Publishers, 2004) at 11. Nonetheless, as art. 51 falls within the Directive Principles of state policy, the purist view derived from *Ujjam Bai* is that the judiciary is not part of the state, and thus should not pronounce on international law. However, the Kerala High Court in *S. N. Koya v. Administrator, Union Territory of Laccadive, Minicoy and Amindivi Islands, Kozhikode*, A.I.R. 1967 Ker 259, drawing support from American constitutional law, ruled that the "state" includes its judiciary.

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applicable law.[8] In interstate disputes, the Indian government has had to take a positivist approach to the treaties signed by and amongst the British, French, and Portuguese colonial governments. However, in 1955, India's first prime minister, Jawaharlal Nehru, representing the political mandate of the time, pointed to the absurdity of "ancient treaties", saying that "independent India" was "in no way bound by any old or modern treaty between other countries to which [India has] not subscribed".[9] Since 1947, while Indian commentators have argued for a post-colonial reformation, the Indian Supreme Court, still suffering from a colonial hangover in terms of legal structure and jurisprudence, debated the baggage of Privy Council precedent in independent India.[10]

The *Virendra Singh* case stood witness to the unease of the higher judiciaries in India.[11] It concerned the succession to certain grants of land made to the petitioners by the rulers of a former princely state before 26 January 1950. The Supreme Court observed that as a result of the coming into force of the Constitution on 26 January 1950, every Indian derived their rights of citizenship from the same source, i.e. the Constitution. The Court was of the view that the rulers making the grant, the petitioners receiving them, and those seeking to make the confiscation an act of state, all became Indian citizens by the same constitutional instrument. Thus the *Virendra Singh* case represented the post-colonial, socialist, and egalitarian India due to the Constitution and not because of the existing colonial doctrines of international law.[12]

The Indian Supreme Court subsequently overruled the *Virendra Singh* case in the *Mithibarwala* case.[13] Interestingly, in *Virendra Singh*, while the petitioners relied upon American cases, the state of Uttar Pradesh relied heavily on Privy Council decisions.[14] Justice Subba Rao, while dissenting in *Mithibarwala*, noted the importance of the ruling in *Virendra Singh* and candidly admitted his "inability to share" the views of Justice R. Ayyangar, stating that *Virendra Singh* "pleaded for a departure from imperialistic traditions and to adopt the American traditions, which are in consonance with the realities of the situation created by our Constitution".[15] This juristic forum shopping, though still structurally British within common-law traditions, represented the indelible mark India's decolonization had left on the minds of some judges. Justice Rao had noted counsel Tricumdass's submission that the Court should discard the theory of public international law that underlies the decisions of the Privy Council, and "accept and give effect to what might be termed

8. *Mirza Ali Akbar Kashani v. United Arab Republic*, A.I.R. 1966 SC 230. See *The Code of Civil Procedure, 1908*, online: Union Territory of Chandigarh State Legislative Authority 〈http://chdslsa.gov.in/right_menu/act/pdf/codecivil.pdf〉.

9. J. NEHRU, "Reply to Debate on Goa in Lok Sabha, July 26, 1955", in Jawaharlal NEHRU, *India's Foreign Policy: Selected Speeches, September 1946–April 1961* (New Delhi: The Publications Division, Ministry of Information and Broadcasting, Government of India, 1983), at 113.

10. Agrawala, *supra* note 6 at 75, 82–5.

11. *Virendra Singh v. State of U.P.*, A.I.R. 1954 SC 447.

12. T.T. POULOSE, *Succession in International Law: A Study of India, Pakistan, Ceylon, and Burma* (New Delhi: Orient Longman, 1974). Cf. Paras DIWAN, "India: Decisions on Public International Law" (1953) 2 International and Comparative Law Quarterly 639.

13. *State of Gujarat v. Vora Fiddali Badruddin Mithibarwala*, MANU/SC/0031/1964 [*Mithibarwala*].

14. Agrawala, *supra* note 6 at 83.

15. *Mithibarwala*, *supra* note 13 at para. 83.

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the American view".[16] In the 1960s, the Indian Supreme Court stood to choose between English colonial law and comparative American law for inspiration and persuasion. Be that as it may, while Professor B.S. Chimni has identified post-colonial elites as India's "Achilles heel", quite interestingly, however, Article 51 of the Indian Constitution has proven to be, as asserted by scores of cases decided by the Supreme Court, the Trojan horse of international law.[17]

Soon after decolonization, international disputes involving two Asian nations exposed the cleavage of opinions between post-colonial states and publicists.[18] In 1967, Keith argued that the acceptance of colonial treaties as sources of law to decide the *Preah Vihear* case exhibited a lack of the so-called "Asian attitude" to international law.[19] Yet such an argument is only a fig leaf that hides the truth even today, let alone in the 1960s when newborn states, fresh from colonization and in the middle of the Cold War, argued cases by hiring foreign counsel due to the lack of homegrown expertise.[20] This is true even in 2014; the less developed a state is, the greater the chances are that it will hire foreign experts in international disputes.[21] As such, foreign lawyers had determined the procedural and substantive arguments of, for instance, Cambodia in the *Preah Vihear* case. Even today in cases involving Asian States Parties, for example Bangladesh and India, have engaged Western counsel due to the lack of homegrown expertise.[22]

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16. *Ibid*., at para. 45.

17. Chimni, *supra* note 6 at 25. Art. 51 of the Constitution states (*Constitution*, *supra* note 7):

    The State shall endeavour to—

    (a) promote international peace and security;
    (b) maintain just and honourable relations between nations;
    (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and
    (d) encourage settlement of international disputes by arbitration.

18. *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962, [1962] I.C.J. Rep. 6 [*Preah Vihear*].

19. See K.J. KEITH, "Asian Attitudes to International Law" (1967) 3 Australian Yearbook of International Law 1 at 23. See similarly Anthony CARTY and Fozia NAZIR LONE, "Some New Haven International Law Reflections on China, India and their Various Territorial Disputes" (2012) 19 Asia Pacific Law Review 95, in which the authors maintain that both India and China have "persistently adopted a purely western style territorial sovereignty claim to superior title to the territories in question".

20. In *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, apart from Shankardass, foreign counsel in the case included Alain Pellet, Sir Michael Wood, and M. Reisman. Ironically, Bangladesh did not have even a single local counsel. See *Bay of Bengal Maritime Boundary Arbitration Between Bangladesh and India*, 8 October 2009, online: Permanent Court of Arbitration 〈http://www.pca-cpa.org/showpage.asp?pag_id=1376〉. A similar trend is seen in other cases between Bangladesh and Myanmar. Even junior counsels and advocates for these cases are doctoral candidates working under senior counsels, who are mostly Western nationals. Naturally, there is no development of the valuable expertise in developing counties. Developing countries continue to ignore the need to cultivate homegrown experts. See the list of counsels in the following cases; *Dispute Concerning Delimitation of The Maritime Boundary Between Bangladesh And Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, [2012] I.T.L.O.S. Rep. 1 at 5–8 [*Maritime Boundary*]; *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, Final Award, 20 December 2013, online: Permanent Court of Arbitration 〈http://www.pca-cpa.org/showpage.asp?pag_id=1392〉.

21. See Mihaela PAPA, "Emerging Powers in International Dispute Settlement: From Legal Capacity Building to a Level Playing Field?" (2013) 4 Journal of International Dispute Settlement 83.

22. However, the Indian Ministry of External Affairs conducts an internship programme; see online: Ministry of External Affairs, Government of India 〈http://www.mea.gov.in/internship-in-mea.htm〉.

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Nonetheless, whether the birth of new Asian nations and the disputes between them have exhibited an Asian attitude to international law remains an unsettled question.[23] In order to ascertain an Indian approach, this paper studies the interaction between the Europeans and the Mughals, which, interestingly enough, the British couched within the vocabulary of the law of nations.[24] As Professor Alexandrowicz contemplated in 1963: "Why study the History of the Law of Nations in Asia if there is no longer much interest in the History of International Law as such?"[25] For Alexandrowicz, the shift of attention of international lawyers to examining international tribunals and case-law "rarely saves them being peripheral in their activities", and, perhaps, distances the lawyers from "great questions of juridical significance".[26] Though one cannot doubt the value of studying the case-law of international tribunals given the emphasis on judicial decisions in Article 38(1)(d) International Court of Justice (ICJ) Statute,[27] the need to revisit India's history of international law and its rendezvous with international tribunals after World War II does raise "great questions of juridical significance".[28]

The difference between the formation of modern India in 1947 and the self-determination of the European nations before the Napoleonic Wars can hardly be overemphasized.[29] Similarly, the nature of self-determination in Western and Eastern Europe are distinct.[30] While in the case of the former, self-determination emerged from "popular sovereignty and representative government", as Musgrave opines, in the latter's case, it emerged from nationalism.[31] The mainstream view on

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What is notable is that even the two junior counsel representing India in *Bay of Bengal Maritime Boundary Arbitration Between Bangladesh and India* were not Indians. Thus, even today, the Indian government does not have, and is not training, a younger crop of local counsel for future international disputes. Thus, Keith had expected too much from countries like Cambodia and Thailand in the 1960s. It is a question of the lack of expertise and not of the deliberate decision to not choose local counsel; Keith, *supra* note 19 at 23. Similarly, the princely state of Hyderabad in 1949 appointed Clyde Eagleton, an American, to advise its representatives in the Security Council about Hyderabad's status within international law. See Clyde EAGLETON, "The Case of Hyderabad Before the Security Council" (1950) 44 American Journal of International Law 277 at 281, who advised that "whatever limitations may have existed upon the sovereignty of Hyderabad, they were limitations imposed by Britain, not by India; they were rights of Britain, not of India".

23. Sompong SUCHARITKUL, "Contribution of the Asian-African Legal Consultative Organization to the Codification and Progressive Development of International Law" in *Essays in International Law* (New Delhi: Asian African Legal Consultative Organization, 2007), 9–20. B.S. CHIMNI, "Asian Civilizations and International Law: Some Reflections" (2010) 1 Asian Journal of International Law 39–42.
24. See C.H. ALEXANDROWICZ, "Mogul Sovereignty and the Law of Nations" (1955) 4 Indian Yearbook of International Affairs 317.
25. C.H. ALEXANDROWICZ, "Some Problems of the History of the Law of Nations in Asia" (1963) 12 Indian Yearbook of International Affairs 3.
26. *Ibid.*
27. *Statute of the International Court of Justice*, 26 June 1945, 59 Stat. 1031 (entered into force on 24 October 1945), art. 38(1)(d) and art. 59.
28. Alexandrowicz, *supra* note 25.
29. P.S. RAO, "The Indian Position on some General Principles of International law" in Bimal N. PATEL, ed., *India and International Law* (Leiden/Boston: Martinus Nijhoff, 2005), 53.
30. Thomas D. MUSGRAVE, *Self-Determination and National Minorities* (Oxford: Clarendon Press, 1997) at 2.
31. *Ibid.*

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self-determination, however, ignores such a view as peripheral and often unworthy of recognition.[32]

India's sovereignty came from nationalism.[33] Nayar, writing three years before the ICJ ruling in the *Right of Passage* case,[34] was of the view that Indian foreign policy took shape in an all-pervasive atmosphere of nationalism, Jawaharlal Nehru's internationalism notwithstanding.[35] The Indian government's enduring adherence to the Permanent Court of International Justice's (PCIJ) statist *Lotus* position since then is understandable.[36] Thus, as Nayar wrote, if the Suez Crisis of 1956 represented the zenith of nationalistic feelings in Indian foreign policy due to Nehru's leadership of the Non-Aligned Movement (NAM), even the most ardent internationalists could not expect India to be apologetic, given the nature of surgical intervention by the colonial powers, namely the French and the British, in Egypt.[37] For a historical and doctrinal study of the history of the law of nations in India, we must, however, start from the time of Mughal sovereignty. Notably, while the Privy Council in the *Rajah Salig Ram* case had accepted the sovereignty of the Mughal, the ICJ in the *Right of Passage* case accepted Maratha sovereignty in that part of India.[38]

A. *The Mughal Rule Within the Law of Nations and the Arrival of the European Companies*

Commentators, both Indian and foreign, classic and contemporary, have argued for the presence of the law of nations in ancient India, which had Hindu and Buddhist influences.[39] It is also noteworthy that both Indian and Japanese commentators have traced the motivations behind Indian judge Radhabinod Pal's dissent at the International Military Tribunal for the Far East to Judge Pal's unmistakable belief in Hindu personal laws, as the history and philosophy of Hindu laws were the subject of

32. Kalana SENARATNE, "Internal Self-Determination in International Law: A Critical Third-World Perspective" (2013) 3 Asian Journal of International Law 305.

33. *Maganbhai Ishwarbhai Patel v. Union of India*, 9 January 1969, A.I.R. 1969 SC 783; *Aban Loyd Chiles Offshore Ltd. v. Union of India*, 11 April 2008, MANU/SC/2045/2008.

34. *Case Concerning Right of Passage over Indian Territory (Portugal v. India) (Merits)*, Judgment of 12 April 1960, [1960] I.C.J. Rep. 6 at 38 [*Right of Passage*].

35. N.P. NAYAR, "Nationalism as a Factor in India's Foreign Policy" (1957) 12 Indian Yearbook of International Affairs 433. Cf. B.S. CHIMNI, "Mapping Indian Foreign Economic Policy" (2010) 47 International Studies 163–87.

36. *The Case of S.S. "Lotus"*, Judgment of 7 September 1927, P.C.I.J. Series A, No. 10 (1927) at para. 19 [*Lotus*].

37. Nayar, *supra* note 35 at 452. R.P. ANAND, "Jawaharlal Nehru and International Law" (2002) 42 Indian Journal of International Law 5–29.

38. See Rahimuddin KEMAL, "The Evolution of British Sovereignty in India" (1957) 6 Indian Yearbook of International Affairs 146 at 168, citing *Rajah Salig Ram v. Secretary of State for India*, Privy Council, 27 August 1872, 119 Law Rep. Ind. App. Sup. 106.

39. Early writers were P. BANDYOPADHYAY, *International Law and Custom in Ancient India* (Calcutta: Calcutta University Press, 1920); W. RUBEN, "Inter-State Relations in Ancient India and Kautalya's Artashasta" (1955) 4 Indian Yearbook of International Affairs 137; and M.K. NAWAZ, "The Law of Nations in Ancient India" (1957) 6 Indian Yearbook of International Affairs 172. See further C.H. ALEXANDROWICZ, "International Law in India" (1952) 1 International and Comparative Law Quarterly 289 at 300; V.S. MANI, "An Indian Perspective on the Evolution of International Law on the Threshold of the Third Millennium" (2004) 9 Asian Yearbook of International Law 31; Rao, *supra* note 29 at 33–65.

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his doctoral dissertation and subsequent two Tagore lectures at Calcutta University.[40] Given the voluminous dissent authored by Judge Pal, it is reasonable to assert that Judge Pal began penning his dissent as soon as he arrived in Tokyo, just as the rest of the judges began administering victor's justice. Indeed, Judge Pal's dissent had strong anti-colonial sentiments which did not sit well with China. After Judge Sir Benegal Rau, India unsuccessfully nominated Judge Pal for the ICJ.[41] McWhinney found Pal's loss based on the procedural ruling of the President of the General Assembly questionable. Judge Pal had a majority but not an absolute one, as Israel, a country that was to vote for Pal, was absent on the voting day because of a Jewish holiday.[42] Furthermore, India subsequently accused Sir Zafrulla Khan, the Pakistani jurist who eventually got elected to the ICJ by defeating Judge Pal, of political speeches on the issue of Kashmir.[43]

The British first interacted with the Mughal Emperor based on the law of nations as expounded by Alberico Gentili.[44] In fact, the 1957 Barcelona Conference on the reception of Western law in India concluded that "the greatest single benefit" of British rule in India was the establishment of "the Rule of Law" through commercial, criminal, and procedural legislation, leaving aside personal laws.[45] Recently, the Indian Supreme Court in *Ashfaq v. Delhi* reminisced about Mughal history with a sense of post-colonial nationalism.[46] Nevertheless, ancient India's practices and rules during Mughal rule were practically not "law" for the purposes of understanding India's rendezvous with positive international law. Effectively, the colonial companies landed in Mughal India with their own understanding of law, on the basis of which they created legal instruments, determined the applicable law, and interpreted their relationship with the native rulers. For Professor Alexandrowicz, the embassy of Sir Thomas Roe to the Court of Agra evidenced the "legal nature of relations between India and the West".[47] Sir Thomas, who was admittedly influenced by Alberico Gentili, negotiated a treaty with the Mughal imperial court intending to

40. In Judge Pal's dissent, he authored an Asian understanding of World War II, its reasons and argued that "vindictive retaliation should not be invoked in the name of justice". See *The International Tribunal of the Far East*, *Dissenting Opinion of Justice Pal* (Tokyo: Kokushu-Kankokai, 1999) at 701; Ashis NANDY, "The Other Within: The Strange Case of Radhabinod Pal's Judgment on Culpability" (1992) 23 New Literary History 45 at 57–8. It is also notable that Judge Pal's works were *Sanskritic* in nature based primarily on the prior works of P.V. Kane and Sir Ganganath Jha, Vice-Chancellor of Allahabad (Prayag) University during 1923–32. See also Ushimura KEI, "Pal's 'Dissentient Judgment' Reconsidered: Some Notes on Postwar Japan's Responses to the Opinion" (2007) 19 Japan Review 215 at 221.

41. See Edward MCWHINNEY, "Law, Politics And 'Regionalism' in the Nomination and Election of World Court Judges" (1986) 13 Syracuse Journal of International Law and Commerce 1 at 14–15; Bimal N. PATEL, "International Court of Justice and India" in Patel, *supra* note 29 at 311.

42. Edward MCWHINNEY, *Judicial Settlement of Disputes: Jurisdiction, Justiciability, and Judicial Law-Making on the Contemporary International Court* (The Hague: Martinus Nijhoff, 1991) at 149.

43. B.S. MURTI, "India's Complaint to the World Court on Judge Zafrulla Khan's Political Speeches on Kashmir" (1968) 8 Indian Journal of International Law 547.

44. Alexandrowicz, *supra* note 24 at 318.

45. *The Reception of Western Law in Countries with a Different Social and Economic Background (India)*, Report of the Rapporteur-Général, International Conference of Comparative Law, Barcelona (1957) 6 Indian Yearbook of International Affairs 277 at 293. Cf. R.P. ANAND, "Role of the 'New' Asian-African Countries in the Present International Legal Order" (1962) 56 American Journal of International Law 383 at 399.

46. *Ashfaq v. State of NCT of Delhi*, MANU/SC/0919/2011 at para. 83.

47. Alexandrowicz, *supra* note 24 at 316.

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"normalize the position of the English East India Company in India".[48] The romance between the British and the Mughal Emperor and his vassal monarchies began when Emperor Jehangir issued a *firman* (letters patent) enabling the British East India Company "to develop trade under more favourable conditions".[49] A long period before the three Indian Presidencies had been established from colonial capture, the British merchants had established local courts to decide intra-British disputes.[50] The Royal Grant of 1651, as Kemal wrote, vested the power to issue commissions in the Company.[51] The establishment of factories in India followed the 1651 grant, alongside the power to punish for offences on land.[52]

A rendezvous that lasted for about three centuries facilitated the gradual but eventual capitulation of the Indian monarchies to the English, French, and Portuguese East India Companies. These companies had all established their territorial possessions based on *firmans* "received directly or indirectly from the Emperor".[53] The gradually disintegrating Mughal Empire had "participated in the struggle for the balance of power as the agency distributing legal titles".[54] For instance, the British East India Company garnered the *Diwanee* of Bihar, Bengal, and Orissa in 1765 from the Mughals who conceded this title to the British East India Company following Robert Clive's military achievements. This gave legal status to the Company in what would later become the Bengal Presidency.[55]

Notably, the idea of arbitration was introduced in India as early as 1772.[56] Moreover, the *Right of Passage* case, *inter alia*, evidences the existence and use of interstate treaties in India in the eighteenth century.[57] Treaties can only be made between sovereigns. Portugal claimed a right of passage over Indian territory, "invok[ing] a Treaty of 1779, of which India contest[ed] both the existence and the interpretation".[58]

The rival European corporations provided services to the Mughals and the Marathas, amongst others, on a contractual basis. The interaction between the native states and the European merchants left a paper trail. However, it did not take very long for the Europeans to realize that if they trampled upon the principle of *pacta sunt servanda*, the oft-quoted bedrock of international law, the Indian monarchs would not be able to fight back.[59] When Warren Hastings ceased paying the sum of 25 *lakh* rupees stipulated for the Indian Emperor, Major Morrison of the East India Company called it a "dishonourable

48. *Ibid.*, at 317.
49. *Ibid.*
50. *Aswini Kumar Ghosh v. Arabinda Bose*, 27 October 1952, A.I.R. 1952 SC 369 at para. 75.
51. Rahimuddin KEMAL, "The Evolution of British Sovereignty in India" (1957) 6 Indian Yearbook of International Affairs 146.
52. *Ibid.*
53. Alexandrowicz, *supra* note 24 at 321.
54. *Ibid.*
55. *Ibid.*
56. A.K. GANGULI, "International Commercial Arbitration and Enforcement of Foreign Awards in India" in Patel, *supra* note 29 at 319.
57. C.J. CHACKO, "The World Court's Judgment on Portugal's Request for Accesses to Dadra and Nagra Aveli" (1960) 1 Indian Journal of International Law 293.
58. *Right of Passage*, *supra* note 34 at 31.
59. *Nuclear Tests (New Zealand v. France)*, Judgment of 20 December 1974, [1974] I.C.J. Rep. 457 at 473.

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blow to the law of nations".[60] For Clive and Hastings, since India did not fall under the category of "civilized nations", contracts could be reneged on anytime with the threat of force. Indeed, during the trial of Warren Hastings, Edmund Burke also saw the breach of the treaty between the Mughal Emperor and the Company as a "dishonourable blow to the law of nations".[61] Later, Britain defeated France and gradually extended its power through conquest, as well as the making of treaties with the native princes.[62] By the middle of the nineteenth century, the whole of India was considered as part of the British Empire.[63] Ceylon (Sri Lanka) and Burma (Myanmar) were added subsequently.[64] During the colonial period, the European merchants invoked legal arguments involving debts to breach of contracts to gradually usurp the native kingdoms. The ICJ ruling in the *Right of Passage* case recognized this colonial usurpation:

> Whereas the negotiations of 1779 never resulted in an agreement and whereas the draft treaty in contemplation in any event involved no transfer of sovereignty; Whereas if it is true that sovereignty over the enclaves was subsequently usurped by Portugal, this could not give rise to any right of passage.[65]

From the subsequent colonial capture, the British carved out three major Presidencies: Bengal, Bombay, and Madras.[66] A positivistic legality in the Austinian sense clothed the colonial subversion of the native rulers. The execution of discriminating treaties characterized major transaction between the European Companies and the natives, providing the basis for a positive law to be invoked if a dispute arose subsequently.[67] Ironically, such legal instruments were to be invoked later to claim the ownership of colonial territories. It is no wonder that India in the proceedings in the *Right of Passage* case doubted the treaty of 1779 between the Portuguese and the Marathas in both fact and interpretation. In this way, India argued for a post-colonial view of treaties made during colonial times. India's early approach doubted even the legality of treaties, which the Western view regarded as the fundamental source of international law. The subsequent mutiny of 1857 occasioned the change of hands. Through the Government of India Act 1858, the British Crown took over India's affairs from the East India Company.[68]

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60. As quoted in Alexandrowicz, *supra* note 24 at 323. See Warren HASTINGS, *The Answer Of Warren Hastings Esquire: To the Articles Exhibited By the Knights, Citizens, and Burgesses in Parliament Assembled, in the Name Of Themselves, and of All the Commons of Great Britain, in Maintenance of Their Impeachment Against Him for High Crimes and Misdemeanours Supposed to Have Been By Him Committed*. (London: John Murray, 1788) at 46–9. For an insightful analysis of the trial of Warren Hastings, see Mithi MUKHERJEE, "Justice, War, and the Imperium: India and Britain in Edmund Burke's Prosecutorial Speeches in the Impeachment Trial of Warren Hastings" (2005) 23 Law and History Review 589 at 604; Mithi MUKHERJEE, *India in the Shadows of Empire: A Legal and Political History 1774–1950* (New Delhi: Oxford University Press, 2010).
61. Alexandrowicz, *supra* note 24 at 323.
62. Quincy WRIGHT, "Asian Experience and International Law" (1959) 1 International Studies 71 at 78.
63. *Ibid.*
64. *Ibid.* For a discussion on Ceylon and India, see the Privy Council case of *Tennekoon, Commissioner for Registration of Indian and Pakistani Residents v. Duraisamy* [1958] 2 W.L.R. 994.
65. *Right of Passage, supra* note 34 at 23.
66. Kemal, *supra* note 51 at 169.
67. Alexandrowicz, *infra* note 96.
68. *State of Karnataka v. Union of India*, 8 November 1977, A.I.R. 1978 SC 68 at para. 260.

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B. *The Birth of Democratic India*

Before 1947, however, as Rama Rao, Oppenheim, and Poulose, amongst others, have rightly noted, India's status within international law was an anomaly:[69]

> [India] became a member of the League of Nations; she was invited to the San Francisco Conference of the United Nations … She exercised the treaty-making power in her own right. However, so long as the control of her internal and external relations rested ultimately with the British Government and Parliament, she could not be regarded as a sovereign state and a normal subject of international law. In 1947, she became a fully self-governing Dominion and independent state.[70]

Rama Rao contradicted Westlake and Hyde by agreeing with Kelsen's arguments that the only reliable criterion of statehood in international law is that the laws of another state do not govern the state in question.[71] Rama Rao thus took a juristic position divorced from those who wrote in support of Mughal sovereignty.[72] British control over India evolved into two distinguishable but parallel processes.[73] One was its gradual development into a system of administration, with the rights and duties of all its component elements well defined, and the second was the gradual withering away of the power of the East India Company and its substitution by the power of the British Crown. The British Parliament enacted the Indian Independence Act 1947, which set up, with effect from 15 August 1947, two independent dominions, known as India and Pakistan.[74] Due to the Indian Independence Act 1947, all treaties between the British Crown and the princely states and persons holding authority in the tribal areas lapsed.[75] Thus, the British Crown's suzerainty ended and modern India was born.

At midnight on 14 August 1947, Nehru addressed India's Constituent Assembly saying: "We shall redeem our pledge, not wholly or in full measure, but very substantially."[76] As Chimni puts it, living a "dual life of international law", Indian writers and lawyers since 1947 have not "adequately addressed deep systemic structures that underlie contemporary international law".[77] As two new dominions, India and Pakistan were entangled in myriad conflicts as they also sought the support of the international community to justify their respective positions on disputes.

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69. T.S. RAMA RAO, "Some Problems of International Law in India" (1957) 6 Indian Yearbook of International Affairs 4.

70. Oppenheim, quoted in R.P. ANAND, "The Formation of International Organizations and India: A Historical Study" (2010) 23 Leiden Journal of International Law 5 at 9. See also T.T. POULOSE, "India as an Anomalous International Person" (1970) 44 British Yearbook International Law 212.

71. Rama Rao, *supra* note 69 at 3.

72. These were Alexandrowicz, *supra* note 24 and Kemal, *supra* note 51.

73. See *Rann of Kutch Case (India v. Pakistan)*, Permanent Court of Arbitration, 19 February 1968, 17 R.I.A.A., 1 at 51 for a revision of British India's history.

74. Indian Independence Act 1947, 10 and 11 GEO 6, c. 30 (Office of Public Sector Information, National Archives, United Kingdom), online: The National Archives 〈http://www.legislation.gov.uk/ukpga/Geo6/10-11/30〉 [*Indian Independence Act*]. See also *State of Saurashtra v. Jamadar Mohamad Abdulla*, Indian Supreme Court, A.I.R. 1962 SC 445, which discusses the Indian Independence Act.

75. *Indian Independence Act*, *supra* note 74, sections 7(a)–(b).

76. Nehru, *supra* note 9 at 13.

77. Chimni, *supra* note 6 at 23.

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On 1 January 1948, the government of India lodged a complaint to the UN against Pakistan's aggression in Kashmir.[78]

Much later, in 1972, the Indian scholar Rahmatullah Khan opined that instead of dealing with the Indian complaint of Pakistan's violation of international law and the charges of "aggression" against the latter, the Security Council had ignored the Indian complaint. The Security Council obfuscated the whole problem by raising irrelevant issues of the accession of Kashmir to the Indian Union, the so-called right of determination, and the exercise of this right through plebiscite.[79] As Khan rightly argued, plebiscites were not an essential or popular feature of international law. The continued brawl amongst Europeans to grab land and use newborn states as proxies during the Cold War betrays the UN's attempts at true decolonization. The invocation of a plebiscite instead of the Security Council addressing India's claims drew power, in Justice Guha Roy's words, from the "imaginative creation of some international jurists".[80] Later, China, one of the permanent members of the Security Council, supported the idea of a plebiscite in Kashmir. India therefore accused the UN of bias, arguing that its handling of the dispute between India and Pakistan had greatly prejudiced the status of the UN as an impartial body.[81]

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78. SCOR, 765th Meeting, 24 January 1957, p. 13. See *Sampat Prakash v. State of Jammu and Kashmir*, 10 October 1968, A.I.R. 1970 SC 1118 at para. 4(5).

79. Rahmatullah KHAN, "The United Nations Handling of the Kashmir Problem" in Anand, *supra* note 5 at 108, 113–14. China, as a permanent member of the Security Council, was a very vocal supporter of a plebiscite in 1948. Arguably, China had Tibet in mind, where a plebiscite, if conducted, would have led to a vote in favour of China, given that it had systematically resettled Han Chinese population to balance out the Tibetan people. Against Keith's belief that Asian states have not been successful in presenting new attitudes towards international law, China, with its "post-colonial theory" of self-determination in its written submission for the Kosovo Advisory Opinion, has enunciated new meanings and understandings of international law. See "Written Statement of the People's Republic of China to the International Court of Justice on the Issue of Kosovo" (16 April 2009), online: ICJ 〈http://www.icj-cij.org/docket/files/141/15611.pdf〉 at 4. Far removed from the Chinese position on Tibet, India's Kashmir policy allows the state of Jammu and Kashmir a deviation from the Indian Constitution. See *Constitution*, *supra* note 7, art. 370, "Temporary Provisions with Respect to the State of Jammu and Kashmir". See also *The Constitution of India*, online: Ministry of Law & Justice 〈http://lawmin.nic.in/olwing/coi/coi-english/Const.Pock%202Pg.Rom8Fsss(41).pdf〉, Appendix I—The Constitution (Application to Jammu and Kashmir) Order, 1954, Article 35A, which states:

> *Saving of laws with respect to permanent residents and their rights.*—Notwithstanding anything contained in this Constitution, no existing law in force in the State of Jammu and Kashmir, and no law hereafter enacted by the Legislature of the State,—
>
> (a) defining the classes of persons who are, or shall be, permanent residents of the State of Jammu and Kashmir; or
> (b) conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects—
>
> (i) employment under the State Government;
> (ii) acquisition of immovable property in the State;
> (iii) settlement in the State; …
>
> shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on the other citizens of India by any provision of this Part.

80. S.N. GUHA ROY, "Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?" (1961) 55 American Journal of International Law 863 at 879.

81. Taraknath DAS, "U.N. Decision Against India; Ruling in Kashmir Dispute Criticized as Hyderabad Issue Looms" *The New York Times* (6 July 1948) at 22.

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Indian courts have since ruled on the validity of international declarations. For example, in the *Ashoka Kumar Thakur* case, Justice Dalveer Bhandari, who is now a judge of the ICJ, has opined that while many states consider the Universal Declaration of Human Rights[82] to be an authoritative interpretation of the UN Charter, for India, "the Declaration is not a treaty and is not intended to be legally binding".[83] In the *Kuldip Nayar* case, the Indian Supreme Court clarified that, in cases of conflict, Indian laws would prevail.[84] As is well known in academia, much of traditional international legal scholarship is focused on formal law and normative prescription, with special attention paid to the decisions of the ICJ and the International Law Commission (ILC) Reports.[85] While former ICJ President Nagendra Singh has written on a variety of issues ranging from the role of the ICJ to the issue of the legality of nuclear weapons,[86] Professor Mani has argued on behalf of Nauru before the ICJ.[87] Publicists such as R.P. Anand, B.S. Chimni, Rahmatullah Khan, V.S. Mani, Bimal Patel, and P.C. Rao have all written extensively on the issue of the ICJ, the UN, and India.[88] Also, C.J. Chacko was the first to note India's reactions after the *Right of Passage* case.[89]

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82. *Universal Declaration of Human Rights*, GA Res. 217A (III), UN Doc. A/810 (1948).

83. *Ashoka Kumar Thakur v. Union of India*, 10 April 2008, MANU/SC/1397/2008 at para. 84. See Rahamatullah KHAN, "The Legal Status of the Resolutions of the UN General Assembly" (1979) 19 Indian Journal of International Law 552.

84. *Kuldip Nayar v. Union of India*, A.I.R. 2006 SC 3127 at para. 167.

85. S.P. JAGOTA, "The Role of the International Law Commission in the Development of International Law" (1976) 16 Indian Journal of International Law 459.

86. Nagendra SINGH, "Codification and Progressive Development of International Law: The Role of the International Court of Justice" (1978) 18 Indian Journal of International Law 1; Nagendra SINGH, *The Role and Record of the International Court of Justice* (Leiden: Martinus Nijhoff, 1989).

87. *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment of 26 June 1992, [1992] I.C.J. Rep. 240. In his Separate Opinion, Judge Shahabuddeen famously quoted Professor Mani's assertion: "Being a small democratic State, Nauru has firm faith in the rule of law in the affairs of nations." See *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Separate Opinion of Judge Shahabuddeen, [1992] I.C.J. Rep. 240 at 270.

88. R.K. DIXIT, "Access to the International Court" (1960) 1 Indian Journal of International Law 67; R.P. ANAND, "India and the World Court" (1960) 2 International Studies 80; P.C. RAO, "The Continental Shelf: The Practice and Policy of India" (1963) 3 Indian Journal of International Law 191; R.P. ANAND, "The International Court of Justice and the Development of International Law" (1965) 7 International Studies 228; Rahmatullah KHAN, "Collective Security Versus Preventive Diplomacy: The Role of the United Nations in the Maintenance of World Peace and Security" (1964) 4 Indian Journal of International Law 408; P.C. RAO, "South West Africa Cases: Inconsistent Judgments from the International Court of Justice" (1966) 6 Indian Journal of International Law 383; R.P. ANAND, "Sovereign Equality of States in the United Nations" (1967) 7 Indian Journal of International Law 185; Motilal C. SETALVAD, "The Role of the United Nations in the Maintenance of World Peace" (1968) 8 Indian Journal of International Law 585; T.S. RAMA RAO, "Review of the Functioning of the International Court of Justice—Some Considerations Relating to the Amendment of its Statute" (1971) 11 Indian Journal of International Law 20; V.S. MANI, "A Review of the Functioning of the International Court of Justice" (1971) 11 Indian Journal of International Law 27; Y.K. TYAGI, "The United Nations in the New World Order: A Critique of An Agenda for Peace" (1994) 31 International Studies 265; Rahmatullah KHAN, "50th Anniversary of the International Court of Justice" (1996) 36 Indian Journal of International Law 80. See Patel, *supra* note 29. See also Bimal N. PATEL, "Renaissance of the International Court of Justice: An Overview of the Judicial and Administrative Activities of the ICJ in 2000" (2001) 41 Indian Journal of International Law 2. See also Chimni, *supra* note 6 at 36–7.

89. Chacko, *supra* note 57 at 293. See also Patel, *supra* note 29 at 295–9.

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II. "PANCHSHEEL" BILATERALISM AND THE PARLIAMENTARY APPROVAL OF TREATIES IN INDIA

A. *"Panchsheel", India, and International Law: Asia Exhibits Higher Faith in International Adjudication*

The idea of *Panchsheel* came to the fore primarily due to Nehru's political leadership of the NAM.[90] India first expressed its understanding of *Panchsheel*, or the five principles of the Agreement on Trade and Intercourse between the Tibet Region of China and India signed at Peking on 29 April 1954.[91] These five principles are:

1. mutual respect for each other's territorial integrity and sovereignty;

2. mutual non-aggression;

3. mutual non-interference in each other's internal affairs;

4. equality and mutual benefit; and

5. peaceful co-existence.[92]

A term that owes its etymology to Sanskrit and which was picked up later by Buddhist literature due to its emphasis on non-violence, peaceful co-existence, and harmony with life and nature, the idea of *Panchsheel* became a natural bridge to reach out to East Asian states.[93] At the political level, *Panchsheel* symbolized the Buddhist idea of a life without disputes. However, since that is impossible, under the NAM principles *Panchsheel* evolved into a regional and bilateral approach to the resolution of interstate disputes.

The idea of *Panchsheel*, however, also epitomizes the desire of Indians to display India's antiquity and to assert, as Alexandrowicz has theorized, that colonization only eclipsed, rather than extinguished, the international legal personality of the colonized nations.[94] Nevertheless, Indian publicists have also warned against the danger of carrying the "intellectual decolonization" too far. Baxi, for instance, is of the view that to combat "idealizations of India's past" it is necessary to readjust perspectives aimed at relating "the ancient Indian traditions of statecraft either to

90. In the Lok Sabha Nehru explained "The Concept of Panchsheel". See J. NEHRU, "From Speech in Lok Sabha, September 17, 1955", in Nehru, *supra* note 9 at 99. Acharya Kriplani was a noted critique of Panchsheel idealism. Nehru addressed Kriplani's concerns saying "that some countries have not lived up to their protestations does not weaken the force of a correct policy like Panchsheel". See J. NEHRU, "A Basis for International Relationship", from "Reply to Debate on Foreign Affairs in Lok Sabha, August 20, 1958", in Nehru, *supra* note 9 at 105.

91. *Agreement on Trade and Intercourse Between Tibet Region of China and India*, 29 April 1954, 299 U.N.T.S. 57 at 70 (Registered by India on 28 April 1958).

92. *Ibid.*, Preamble.

93. C.J. CHACKO, "Peaceful Coexistence as a Doctrine of Current International Affairs" (1955) 4 Indian Yearbook of International Affairs 39.

94. Alexandrowicz, *supra* note 4. Professor Patel argues that the principles and practices of international law that were prevalent in ancient India disappeared during the colonial period, but subsequently, since Indian independence, these principles have slowly started resurfacing. See Bimal N. PATEL, "History of International Law in India between 1500–1945" in Bardo FASSBENDER *et al.*, eds., *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012), 514.

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contemporary international law and order or to the international behavior of the Republic of India in present times".[95]

The very idea of *Panchsheel* brings us to the debate on so-called Asian attitudes to international law. Indian scholars have had much to contribute to this debate. Inevitably, the Asian approach to international law begins with the history of the colonization of Asia. As Alexandrowicz has argued, the treaties that the European colonizers had signed with South Asian states had contained explicit discriminatory clauses.[96]

In a difference of opinion from Anand, Keith has concluded that there is no Asian approach to international law, but a variety of approaches that are not systemic but particularistic.[97] Though one would arguably not doubt Keith's observation that there are a variety of Asian approaches to international law, nothing could be further from the truth that there is an Asian attitude "towards particular areas of international law and not towards the system as a whole".[98] If Keith had not seen any Asian attitudes towards the system as a whole in 1967, it was only because, as Alexandrowicz pointed out, the period of colonization and the signing of discriminatory treaties between local rulers and almost all East India Companies had subverted international law by draining off the contents of natural law in them.[99] Indeed, the colonial powers projected, argued, and interpreted treaties as positive laws to impose responsibilities without recognizing the way the treaties had come into force.[100] Furthermore, in the *Right of Passage* case, Portugal had invoked the "elementary requirements of good faith".[101] In effect, Portugal invoked the principle of "good faith" to urge the ICJ to recognize a right that derived from colonial capture. Quite ironically, colonizers invoked "good faith" as a tool for treaty interpretation to justify colonialism.[102]

These arguments by Portugal serve as an example of the blatant positivism that had come to characterize the interpretation of international law involving

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95. Upendra BAXI, "Some Remarks on Eurocentrism and the Law of Nations" in Anand, *supra* note 5 at 6.

96. C.H. ALEXANDROWICZ, "The Discriminatory Clauses in South Asian Treaties in the Seventeenth and Eighteenth Centuries" (1957) 6 Indian Yearbook of International Affairs 126 at 135–40. It is interesting to note that Alexandrowicz, the year the ICJ ruled in the *Right of Passage* preliminary objection, discussed in detail the treaties signed by the Portuguese, the French, the Dutch, and the British. When the merits ruling came out in 1960, the Dissenting Opinion of Moreno Quintana had visible footprints of Alexandrowicz's arguments. Judge Quintana wrote: "We must not forget that India, as the territorial successor, was not acquiring the territory for the first time, but was recovering an independence lost long since." See *Right of Passage*, Dissenting Opinion of Moreno Quintana, *supra* note 34 at 95.

97. Keith, *supra* note 19 at 1.

98. *Ibid*.

99. See Alexandrowicz, *supra* note 25 at 10–11; Alexandrowicz, *supra* note 24 at 321. Naturalists also wrote in support of colonial conquests. Quincy Wright wrote that Vitoria's treatise was motivated by the need to examine the justifiability of the recent conquest of Mexico by Cortez. See Wright, *supra* note 62 at 76. See also Antony ANGHIE, "Francisco De Vitoria and the Colonial Origins of International Law" (1996) 5 Law & Social Inquiry 321, in which Anghie demonstrates Vitoria's justification of colonial conquests.

100. R.P. DHOKALIA, "Nullity or Invalidity of Treaties" (1969) 9 Indian Journal of International Law 177.

101. *Right of Passage*, *supra* note 34 at 11.

102. *Ibid*.

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colonial disputes. In fact, the Portuguese, the Dutch, and the British promoted positivism in colonial practice to subvert the authority of local sovereigns. M.K. Nawaz has, therefore, noted that the concept of "colony" has hardly, if ever, been defined in international law.[103] When Keith chose to discuss the *Preah Vihear* case to find a particular Asian view of international law, it is not hard to see why both Cambodia, which was colonized by France, and Thailand had found it preferable to argue based on existing positive international law, i.e. the treaties between France and Thailand. As both Cambodia and Thailand had chosen not to appoint any judge ad hoc, Keith believes that the *Preah Vihear* case demonstrated a lack of any Asian approach whatsoever.[104] This argument appears unpersuasive to this author. At the time of *Preah Vihear* dispute, the availability of homegrown expertise was doubtful. It was due to the lack of local expertise in international law and the unfamiliarity of such law to the disputant states that the case was both argued and adjudicated by non-Thai and non-Cambodian jurists. This was a case not of the absence of local voices, but of the lack of knowledge of the language of the law to speak in, and, therefore, the need for translators. Even today, as evidenced by the maritime disputes involving India, Bangladesh, and Myanmar, the lack of local counsel in developing countries is manifest.[105]

Nevertheless, the *Preah Vihear* case for Keith represented the willingness of two Asian states to place their trust in the judgment of foreign judges.[106] Moreover, Keith saw Thailand's preliminary objections as a routine practice in any contentious proceedings, as both countries had deposited instruments accepting the Court's compulsory jurisdiction.[107] Even then, for such states in the 1960s and still today, hired foreign experts generate *opinio juris*, which might not be the will of the states. Besides, to think that, fresh from colonization and in the middle of the Cold War, developing countries that fought legal battles on crutches provided by powerful states had actually exhibited *opinio juris* is untenable.[108] Moreover, Kittichaisaree, the Thai member to the ILC, speaking on the formation and evidence of customary international law, has said that it would be hard to prove the existence of consistent or virtually uniform state practice and *opinio juris* in a world comprising 193 sovereign states.[109] Furthermore, the New Delhi-based Asian-African Legal Consultative Organization has from time to time expressed its soft cleavage of opinion from the ILC on various issues.[110]

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103. M.K. NAWAZ, "Colonies, Self-Government and the United Nations" (1962) 11 Indian Yearbook of International Affairs 3 at 4.

104. *Preah Vihear*, *supra* note 18 at 6; Keith, *supra* note 19.

105. *Maritime Boundary*, *supra* note 20 at 5–8.

106. Keith, *supra* note 19 at 22–3.

107. *Ibid.*, at 23.

108. Christos THEODOROPOULOS, "Issues of Economic and Cultural Sovereignty in Post-Colonial Domestic and International Legal Order" (1979) 19 Indian Journal of International Law 472.

109. *International Law Commission Sixty-fifth Session (Second Part)*, Provisional Summary Record of the 3176th Meeting, UN Doc. A/CN.4/SR.3176 (2013) at 4.

110. However, S.P. JAGOTA, "A Review of the Work of the Asian-African Legal Consultative Committee" in Anand, *supra* note 5 at 44, 45–69 claims to produce no Asian approach while talking about the Asian-African Legal Consultative Organization.

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Arguments such as Keith's obliterate the role of power and colonial influences in the production and consumption of international rules and doctrines. For a long time, the legal instruments of the developing countries sometimes did not exhibit their *opinio juris*. Recently, in the *Pedra Branca* case between Singapore and Malaysia, both states chose foreign ad hoc judges.[111] In this case, Malaysia chose a South African, while Singapore chose an Indian.[112] Yet this alone does not prove that when Asian states do not choose one of their citizens as an ad hoc judge in their disputes, they do not exhibit an Asian approach to international law.[113] Perhaps the common colonial history and British rule for both India and Singapore might have been the reason behind Singapore's choice of an Indian judge ad hoc. Nonetheless, the faith exhibited by Malaysia and Singapore in the integrity of judges ad hoc from other countries in the *Pedra Branca* case epitomizes a typical Asian approach to international adjudication in line with the position taken by Cambodia and Thailand in the *Preah Vihear* case. This strong Asian approach becomes all the more evident when compared with the request of the two North American parties to the *Gulf of Maine* case.[114] Canada and the US "insisted on having a Chamber composed exclusively of Western judges".[115] In fact, the Acting President of the Court, in exercise of his powers under Article 31, paragraph 4, of the Statute of the Court, had requested Judge Ruda, an Argentinian, to "give place in due course to the judge ad hoc to be chosen by the Government of Canada".[116] Thus while the Asian approach to adjudication exhibited liberalism in even appointing non-national ad hoc judges, two of the protagonist states of international law showed distrust in non-Western judges. Besides, after achieving its independence in 1947, India considered itself bound by all the treaties concluded by the British Indian government with a few notable exceptions of, to use Nehru's phrase, "ancient treaties".[117]

Unfortunately, when Asian states did try to exhibit an Asian approach, for instance in the Declaration on the Granting of Independence to Colonial Countries

111. *Sovereignty over Pedra Branca / Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, [2008] I.C.J. Rep. 12.

112. Malaysia chose J. Dugard and Singapore chose P.S. Rao; *ibid.*, at 14.

113. S.K. CHATERJEE, "The Role of the Ad Hoc Judge in the International Court of Justice" (1979) 19 Indian Journal of International Law 372. In fact, Judge ad hoc Dugard dissented, saying that the ICJ decided the case not in accordance with international law but *ex aequo et bono*, something not authorized by the parties. See *Sovereignty over Pedra Branca / Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Dissenting Opinion of Judge Ad Hoc Dugard, [2008] I.C.J. Rep 12 at 133. See also B.G. RAMCHARAN, "Equity and Justice in International Law-Making" (1975) 15 Indian Journal of International Law 47. For an informed etymology of the case, see Kevin Y.L. TAN, "The Role of History in International Territorial Dispute Settlement: The *Pedra Branca Case* (Singapore v Malaysia)" in Jin-Hyun PAIK *et al.*, eds., *Asian Approaches to International Law and the Legacy of Colonialism* (Oxford / New York: Routledge, 2013), at 64

114. *Delimitation of the Maritime Boundary in the Gulf of Maine Area, (Canada/United States)*, Judgment, [1984] I.C.J. Rep. 246 [*Gulf of Maine*].

115. Georges ABI-SAAB, "The International Court as a World Court" in Vaughan LOWE and Malgosia FITZMAURICE, eds., *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (New York: Cambridge University Press, 1996), at 9.

116. *Gulf of Maine*, *supra* note 114 at 252.

117. R.P. ANAND, "Attitude of the Asian-African States Toward Certain Problems of International Law" (1966) 15 International & Comparative Law Quarterly 55 at 71.

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and Peoples,[118] some of the states that had abstained from voting, albeit expectedly, were Portugal, Spain, Belgium, France, and Britain.[119] Why did these states, most of which had colonized the world amongst them, cold-shoulder the resistance to colonialism by Asian and African states? It is not hard to tell. While Britain as the biggest colonizer did not recognize India's control of Goa *de jure* by citing the UN Charter, Portugal, a competing colonial power, had hesitated to accept that it had any non-self-governing territories despite the mandate of Article 73 of the UN Charter.[120] Incidentally, for India, both the British and Portuguese positions were important given that they had both colonized India. The attitudes of the Asian states to colonialism, a fact that rebuts Keith's proposition, in fact exhibited their approach as a whole to international law. Moreover, Indian jurists like Judges Pal and Guha Roy, both former judges of the Calcutta High Court, presented a blueprint of an Asian approach on international law as a whole.[121] Judge Guha Roy saw certain "legal fictions" as an "imaginative creation of some international jurists".[122] Therefore, to use the example of the *Preah Vihear* case to propose a lack of any Asian attitude to international law in the 1960s is a fallacy.

Quincy Wright was of the view that, within the sources of international law, while its principles are derived from natural law, the procedure adopted at the international Court emanated from positive law.[123] Although they had been colonized for centuries, substantive international law was quite alien to Asian states. Subsequently, after decolonization, positivism ruled the roost in treaty practice and interpretation. Portugal, which had joined the UN in 1956, had thought that despite the new law in Article 73 of the UN Charter, international law on non-self-governing territories had remained unchanged. Portugal at that time had maintained that it had no "non self-governing" territories, a statement which many UN Member States opposed, arguing that Portugal still had many colonies.[124]

B. *The Parliamentary Approval of Treaties in India: An Indian Approach?*

Thus, a post-colonial India in the *Right of Passage* case did not see even treaties as the strongest source of international law, as evidenced from India's denial of the 1779 treaty in both its existence and interpretation. Therefore, the issue of parliamentary approval of new treaties in India, now that India was neither a vassal nor a monarchy

118. *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res. 1514 (XV), UN Doc. A/4684 (1960).

119. Senaratne, *supra* note 32 at 315.

120. *UN Charter*, *supra* note 2.

121. Guha Roy, *supra* note 80 at 863. Notably, Lillich attacked Guha Roy's position, which garnered the support of Jessup, who critiqued Anand. See R.B. LILLICH, "The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law Under Attack" (1975) 69 American Journal of International Law 359; Phillip C. JESSUP, "Non-Universal International Law" (1973) 12 Columbia Journal of Transnational Law 415.

122. Guha Roy, *supra* note 80 at 879.

123. Wright, *supra* note at 76.

124. Nawaz, *supra* note 103 at 23. See P.C. RAO and R. LAKSHMANAN, "What is Wrong with the United Nations Charter" (1976) 16 Indian Journal of International Law 500.

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but a democratic state, was contested from the early days.[125] Early Indian publicists wrote that the government of India does not have unfettered power to sign treaties without parliamentary approval.[126] Articles 246(2), 73(1), and 53(1) and Entry 14 of List I of the seventh Schedule of the Indian Constitution are the relevant constitutional provisions that call for consideration.[127] Justice M. Hidayatullah, the former Chief Justice and acting President of India in 1968, expressed a similar opinion while disagreeing with leading British publicists in 1969, the year the Vienna Convention on the Law of the Treaties was adopted:[128]

> [Indian] representatives do not seem to be alive to the requirements of our Constitution. The suggestions of Brierly, Hersch Lauterpacht and Gerald Fitzmaurice do not serve to remove our difficulties but make them greater. The suggestion of Hersch Lauterpacht that there should be compulsory submission of the question of international Court of Justice cannot avail in India where Supreme Court will be moved to examine the legality of the consent.[129]

The Asian approach to international law emerges from such tensions. The issue is far from settled even today, even though India signed up for the compulsory jurisdiction of the ICJ in 1974 with appended reservations.[130] More recently, this issue arose during the discussion of India's signing and ratification of the Uruguay Round of Agreements leading to the birth of the Word Trade Organization (WTO). In 2001, in India, a National Commission came up with a Consultation Paper on Treaty-Making Power on the issue of the absence of consultation with Parliament on the matter of treaty-making.[131] The Draft Agreement on Trade Related Intellectual Property Rights (TRIPS), as part of the WTO agreements, the Consultation Paper noted, ran counter to almost each and every major premise of the background paper submitted by India to the Negotiating Committee on 27 July 1989.[132] Evidently, India was upset by the draft Agreement on TRIPS produced by the Uruguay Conference. The government appropriately brought the matter to the notice of the Standing Committee of Parliament that considered the Draft

125. K. NARAYANA RAO, "Parliamentary Approval of Treaties in India" (1960) 9/10 Indian Yearbook of International Affairs 22.

126. *Ibid*., at 23.

127. *Ibid*. See *Constitution, supra* note 7.

128. *1969 Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

129. M. HIDAYATULLAH, "Foreword" in S.K. AGRAWALA, ed., *Essays on the Law of Treaties: With Special Reference to India* (Mumbai: Orient Longman, 1969), vi. See C.G. RAGHAVAN, "Treaties Making Power Under The Constitution of India" in Agrawala, *ibid*., 217 at 218. However, in 1974 India signed up to the compulsory jurisdiction of the ICJ. See Bimal N. PATEL, "The International Court of Justice and India" in Patel, *supra* note 29 at 289–318.

130. Swaran SINGH, Minister of External Affairs, India, "Declarations Recognizing the Jurisdiction of the Court as Compulsory" (18 September 1974), online: ICJ 〈http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=IN〉.

131. National Commission to Review the Working of the Constitution, "A Consultation Paper on Treaty-Making Power Under Our Constitution" (January 2001), online: Ministry of Law & Justice 〈http://lawmin.nic.in/ncrwc/finalreport/v2b2-3.htm〉 at para. 45.

132. *Ibid*.

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Agreement and submitted a Report on 13 November 1993.[133] The 2001 Consultation Paper stated:

> What is relevant to mention however is that the Government of India signed the TRIPs agreement in 1994, practically in the same shape as the draft agreement, without again approaching the Parliamentary Committee or the Parliament. The question that arises in such a situation is what was the relevance of consulting the Standing Committee of Parliament and then signing the agreement in total disregard of the Report and recommendations of the Parliamentary Committee. It is obvious that had there been a law regulating the treaty-making power of the Government and if such law had provided for prior approval, ratification, consideration or discussion of the treaty before it comes into force, such a thing could not have happened.[134]

The Parliament, the Consultation Paper stated, was not consulted before the signing of WTO agreements that have serious repercussions upon the lives of Indian citizens.[135] It is, therefore, essential to consider subjecting the treaty-making power of the Indian government to appropriate checks and controls, as is sought to be done in several countries all over the world.[136] However, the Indian government overlooked the report of the Parliamentary Standing Committee while committing India to all the obligations under WTO agreements in 1994.[137]

In April 2013, as if taking note of the Parliamentary Standing Committee's view, the Supreme Court tried to re-empower India to grant or refuse patents in its *Novartis* Judgment, a case discussed later in greater detail.[138]

III. THE *RIGHT OF PASSAGE* CASE: INDIA AT THE ICJ

After Britain took control of India, the Portuguese continued the peaceful use of the passage to Goa until World War II. In the *Right of Passage* case, Portugal complained about the progressive restriction of its right of passage between October 1953 and July 1954. The ICJ held that "Portugal had in 1954 a right of passage over intervening Indian territory … to the extent necessary for the exercise of Portuguese sovereignty[139] … in respect of private persons, civil officials and goods in general".[140] By nine votes to six, the ICJ found that "India has not acted contrary to its obligations resulting from Portugal's right of passage in respect of private persons,

133. *Ibid.*
134. *Ibid.*
135. *Ibid.*, at para. 48.
136. *Ibid.*
137. *Ibid.*, at para. 45.
138. *Novartis AG v. Union of India*, MANU/SC/0281/2013 at para. 59 [*Novartis*]. See in detail Chimni, *supra* note 6 at 43. See also B.S. CHIMNI, "International Institutions Today: An Imperial Global State in the Making" (2004) 15 European Journal of International Law 1; B.S. CHIMNI, "Critical Theory and International Economic Law: A TWAIL Perspective" in John LINARELLI, ed., *Research Handbook on Global Justice and International Economic Law* (London: Edward Elgar, 2013), 251 at 255.
139. *Right of Passage*, *Merits*, *supra* note 34 at 45.
140. *Ibid.*, at 46

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civil officials and goods in general".[141] The case produced six dissenting opinions and a separate opinion.[142] While Portugal accused India of "committing an offence to the detriment of Portuguese sovereignty",[143] India, in turn, accused Portugal of not complying "with the rule of customary international law requiring her to undertake diplomatic negotiation" before starting the dispute.[144] Portugal replied by arguing that "international law does not make the institution of proceedings by means of a unilateral Application dependent on the prior exhaustion of diplomatic negotiations, in the absence of a treaty-provision stipulating such a condition".[145] Thus, while India used customary international law for its arguments on negotiations, Portugal defended its position based on the absence of a treaty stipulating that condition.

Historically speaking, with regard to the coupling of India's body politic with its judiciary, this paper contends that the role of the *Right of Passage* case is significant as it reawakened the Indian judiciary to the importance of territorial sovereignty in post-colonial states. The government of India had contended that the subject matter of the Portuguese claim was "too vague for the Court to be able to pass upon it by the application only of the legal rules enumerated in Article 38, paragraph 1, of the Statute", as the ICJ Statute enumerates, in a very Austinian way, the sources of international law.[146] The arguments from the Indian government before the ICJ had struck at the root of the traditional sources of international law, an argument that heralded a post-colonial perspective on the sources of international law. Quite notably, the ICJ, in observing that the enclaves under contention were "of negligible political and economic importance to India", propounded political ideas which went beyond the ICJ's legal mandate. The ICJ observed:

> [T]he Indian Government and people have doubtless never concealed their desire that the Goans should be allowed to join the Union of Independent India to which they are attached ethnically and culturally, whereas however the Indian Government has always said with equal force that that reunion must be achieved without violence; whereas it is difficult to see why any different attitude should have been adopted with regard to the enclaves which are of negligible political and economic importance to India.[147]

Such views on the "political and economic importance to India" serve as a smoking gun to the subsequent exposé registered in the diplomatic communiqué between London and Lisbon after the ruling. Sir Charles Stirling, the then ambassador of Britain to Lisbon, recorded the Portuguese Foreign Minister's conversation that Portugal did not get a completely favourable ruling from the ICJ "due only to the illness of the British Judge and the death of one of the Latin American Judges

141. *Ibid.*
142. *Ibid.*
143. *Case Concerning Right of Passage over Indian Territory (Portugal v. India) (Preliminary Objections)*, [1957] I.C.J. Rep.125 at 128.
144. *Ibid.*, at 130.
145. *Ibid.*, at 135.
146. *Right of Passage supra* note 34 at 12.
147. *Ibid.*, at 24.

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committed to the Portuguese cause".[148] Notably, the ICJ contemplated upon India's "annexationist designs".[149]

In the past, Maratha kings ruled this part of India and from time to time "the Portuguese were granted authority to put down revolt or rebellion in the assigned villages". Portugal cited this as "an indication that they were granted sovereignty over the villages".[150] The ICJ ruled:

> Whereas Portugal is equally unfounded in her reliance upon recognition of Portuguese sovereignty in the enclaves, either contained in a treaty of 1779 negotiated by Portugal with the *Maratha* Empire, or flowing from the attitude of the British or Indian Governments between 1818 and 1954; Whereas the negotiations of 1779 never resulted in an agreement and whereas the draft treaty in contemplation in any event involved no transfer of sovereignty.[151]

Alexandrowicz and Anand, and more recently Chimni, have all argued that the recognition of a treaty of 1779 entered into between the Portuguese and the Marathas in the *Right of Passage* case established conclusive proof of the fact that, far from being in a legal vacuum, the confrontation between the "two worlds" took place on a footing of equality in the ensuing commercial and political transactions.[152] The *Right of Passage* case was India's first case at the ICJ.[153] It was India's litmus test on which to stamp its newfound sovereignty.[154] India was seeking to put its foot down on the last attempt from a European nation to claim parts of the disputed territory based on colonialist arguments. The ICJ verdict worked both ways; it gave a sense of satisfaction to Portugal by stating that it still had the right of civil passage, and to India by stating that Portugal could not conduct an armed intervention into affairs which India claimed were internal in nature.[155]

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148. "Letter of Sir C. Stirling, on April 30, 1960, No. 51 (1012/5/60, Portuguese Rights of Passage Over Indian Territory: Judgement of the International Court at The Hague FO 371/152541" in *Foreign Office Files for India, Pakistan and Afghanistan 1947–64 documents* (1960), at para. 6. These letters were declassified in 1991. It then becomes important to look into the change in the constitution of the bench between 1958, the year of preliminary judgment and 1960 when the merits' judgment came out. The British member of the Court who sat in the preliminary rulings but who subsequently fell ill was Judge Lauterpacht. The Latin American judge implicated by the Portuguese Minister was José Gustavo Guerrero, a diplomat from El Salvador, who served as the last president of the PCIJ from 1937 to 1945 as well as the first president of the ICJ from 1946 to 1949. He remained a member of the Court until his death in 1958.

149. *Right of Passage*, *supra* note 34 at 25.

150. *Ibid.*, at 38.

151. *Ibid.*, at 23.

152. Professor Alexandrowicz in the past has maintained that an attempt was made in the *Right of Passage* proceedings to contest the validity of the treaty by our general notions of treaty law. The ICJ emphasized in its judgment that an eighteenth-century treaty must be interpreted on the basis of legal notions peculiar to both parties and in force at the time of its conclusion. See C.H. ALEXANDROWICZ, "Doctrinal Aspects of The Universality of the Law of Nations" (1961) 37 British Yearbook International Law 506 at 512. See also Anand, "Editor's Note", *supra* note 5 at xii; Anand, *supra* note 117 at 58; Chimni, *supra* note 6 at 34.

153. *Right of Passage*, *supra* note 34.

154. Patel, *supra* note 29 at 313.

155. See R.P. ANAND, "The International Court of Justice and the Development of International Law" (1965) 7 International Studies 228.

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A. *The Political Economy of the* Right of Passage

The *Right of Passage* ruling was delivered on 12 April 1960. Like any other nationalist upsurge, India won its freedom after a protracted struggle against the British Crown that involved civil disobedience as well as armed rebellion. Fortuitously, the *Right of Passage* case preceded most of the rulings that the Indian Supreme Court delivered where the Court had to rule on the reception of international law in the domestic legal order. The political economy of this case is rather important for understanding, to use Nehru's phrase, India's tryst with international law.[156]

In *Monterio v. State of Goa*, the Indian Supreme Court accepted that the Indian armed forces, following a short military action, did occupy Goa.[157] Goa came under Indian administration from 20 December 1961 and was governed under the Goa, Daman, and Diu (Administration) Ordinance 1962 promulgated by the President of India.[158] In *Monterio*, to the dismay of many Western commentators, Justice Hidayatullah ruled that "events after the Second World War have shown that transfer of title to territory by conquest is still recognised".[159] Given the attempts to divide Vietnam—yet another Asian country neighbouring Cambodia and Thailand—by France and the US post-1945, Justice Hidayatullah was not entirely wrong.[160] Similarly, while discussing the "Goa incident", Professor Quincy Wright wrote that the "military take-over of Goa by India" was of legal importance, primarily because it indicated "a major difference between the East and the West in the interpretation" of UN law.[161]

While Keith expected the Asian disputes to create Asian approaches to law, he did not take into account the realities on the ground. It is not difficult to see that the presence of the US and France in the region had influenced the litigation in the *Temple of Preah Vihear* case. The language of international law is all too often used either to conveniently hide the ugly truth or to make up the deficit of the language of law to assess a situation that can only be expressed in the vocabulary of politics.

The *Right of Passage* case is relevant to India in many ways. It brought to attention an issue of political importance to developing countries that achieved their independence after the end of colonization. It is remarkable that, in the late 1950s, Portugal was still trying to extend its sovereignty to Goa, a former Portuguese colony, based on colonial arguments. Nonetheless, the case attracted the concern of Indian courts about the doctrine of territorial sovereignty. It is in this sense that the *Right of Passage* case was a watershed moment central to the coupling of India's

156. Nehru, *supra* note 9.

157. *Remedios Monterio v. State of Goa*, 26 March 1969, A.I.R. 1970 SC 329 at para. 3.

158. *Ibid*.

159. *Ibid*., at para. 25.

160. Richard A. FALK, "International Law and the United States Role in the Viet Nam War" (1966) 75 Yale Law Journal 1122; B.S. CHIMNI, "Towards a Third World Approach to Non-Intervention: Through the Labyrinth of Western Doctrine" (1980) 20 Indian Journal of International Law 243.

161. Quincy WRIGHT, "The Goa Incident" (1962) 56 American Journal of International Law 617. See Georges DUBE, "Le Rapport Entre la Politique et le Droit dans l'Ordre International" (1963) 5 Cahiers de Droit 47.

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body politic with its judiciary, at least in the decade that followed. The Security Council subsequently debated the issue of self-determination and the use of force in relation to Goa.[162] In 1956, Portugal had refused to agree that it had any self-governing territories.[163] However, due to arguments from the Soviet Union and Ceylon (now Sri Lanka), Goa was seen as a non-self-governing territory, which refuted the Portuguese arguments.[164] In the 987th meeting, C.S. Jha, the representative of India, stated that the Portuguese had invented a "legal fiction" by putting before the Council a question of a colonial nature.[165] Therefore, a question of aggression did not arise. Though Keith thought that India's arguments on Goa were motivated by self-interest, which is hardly an irony given that erstwhile colonized countries had to pull together disparate territories to create a nation and claim sovereign status, India's practice found support in the so-called "salt-water" theory of self-determination.[166]

Indian sovereignty, a species of post-colonial sovereignty, stood hostage to British and Portuguese diplomacy for a long time after its independence. Naturally, India was quick to act politically and finally annexed Goa and other former Portuguese enclaves in 1961 into the Union of India.[167] The archives of the British Foreign Office are replete with diplomatic exchanges about how even after the ICJ Judgment, British ships did not seek diplomatic clearance, a sovereign matter, before entering India.[168] J.H. Fawcett, from the Office of the British Deputy High Commissioner, Bombay, in his letter to London, wrote a brief note on Hindu-Catholic relations after the new Indian takeover in Goa. The Portuguese, he said, "cannot for example have been pleased to see a large and ugly statue of Mahatma Gandhi erected at one end of the main square of Old Goa", which is "surrounded by the great monuments of Catholic Portugal".[169]

B. De Facto *and* De Jure *Distinction: The Spectre of Colonialism Still Alive?*

Dyment's letter of 27 May 1968, on the question of Goa's recognition, stated that Goa had "*de facto* been incorporated into India", but Her Majesty's Government (HMG) had "not recognised this *de jure*".[170] Though acquisition by conquest was

162. UNGA, Complaint by Portugal (Goa), Decisions of 18 December 1961, 987th meeting and 998th meeting (S/5030), paras. 2–10, 98, 128–9.

163. Nawaz, *supra* note 103 at 23.

164. Keith, *supra* note 19 at 17.

165. U.N.S.C.O.R., 16th Session, 987th mtg., para. 40, U.N. Doc. No., S/PV. 987 (1961). Such accusations were supported by Indian judges like Guha Roy, *supra* note 80 at 879, who stated: "What again does Brierly mean by saying that the theory does not introduce any fiction of law?"

166. Keith, *supra* note 19 at 17. As late as 1974, Sinha had asked whether self-determination had indeed become an established principle of international law. See S. Prakash SINHA, "Has Self-Determination Become a Principle of International Law Today?" (1974) 14 Indian Journal of International Law 332.

167. See "Internal Political Affairs of Goa, Daman and Diu" in *FCO 37/266, Foreign Office Files India, Pakistan and Afghanistan: 1965–1971* (1967–1968). Portugal has been concerned about the self-determination of its former colonies. Another example of such a concern is *Case Concerning East Timor (Portugal v. Australia)*, [1995] I.C.J. Rep. 90.

168. "Letter of W.P. Mumford, 3rd October, 1968", *ibid.*, at 4.

169. "Letter of J.H. Fawcett of 27 June 1968", *ibid.*, at para. 2.

170. "C.W. Dyment's Letter of May 27, 1968", *ibid.*, at para. 2.

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recognized at that time, British officers quoted that since the signing into force of the UN Charter, such a conquest was not recognized within international law. If India, Sir Francis Vallat said, should request that Britain recognizes Goa as *de jure* a part of India and the Indian government as the *de jure* government, the British government "should be guided by the principles of international law regarding the acquisition of territory rather than those relating to recognition of governments".[171] Vallat discussed a diplomatic stance on how to deal with India on this question. He stated: "we should be reluctant to quote them in public as having the full approbation of" HMG.[172] "In talking to the Indians" he suggested that HMG "should act on the principle that the Indian acquisition of Goa by force was contrary to the United Nations Charter and unlawful".[173] What is notable, though, is the fact that during the time of colonization, the British conflated the *de facto* and *de jure* distinction to substantiate legal arguments to justify the colonial capture.[174] Yet, after the coming into force of the UN Charter, they flipped the old principle to suit themselves in the changed circumstances of the decolonization and the creation of new states.

Much later, Higgins, before becoming an ICJ judge, found India's reservations in relation to self-determination very problematic in terms of the test of compatibility with the object and purpose of the International Covenant on Civil and Political Rights (ICCPR).[175] She agreed with France, Germany, and the Netherlands in objecting to India on the grounds that India's reservation "attaches a condition not provided for by the UN Charter to the exercise of the right of self-determination".[176] However, as Chimni has pointed out, it was the Janata Party government that ratified both the ICCPR and the International Covenant on Economic, Social, and Cultural Rights.[177] The ICCPR was ratified by India, but not before battling two years of the National Emergency. Professor Higgins, as she was then, further questioned whether India's treatment of Sikkim was compatible with self-determination, which, she believed, "had been overrun by force and incorporated within India".[178] Both Sikkim and Goa, with the benefit of hindsight, appear to be watershed moments in the approach of the Security Council and the General Assembly towards the use of force against colonies, given the lack of doctrinal clarity which has divided developing and developed Western countries on the meaning, scope, and use of self-determination.[179] It is notable that providing *opinio juris* on the issues of international law is a recent

171. "F.A. Vallat's Letter of May 6, 1968", *ibid.*, para. 2.
172. *Ibid.*
173. *Ibid.*
174. Alexandrowicz, *supra* note 25 at 7–8.
175. Rosalyn HIGGINS, "Human Rights: Some Questions of Integrity" (1989) 15 Commonwealth Law Bulletin 598 at 608. Indian jurist Nariman also agreed that "[t]he sovereignty of the State, as opposed to the concept of the comity of nations, continues to be the single gravest threat to the human right". See Fali NARIMAN, "International Human Rights and Sovereignty of States: Role and Responsibility of Lawyers" (1997) 21 Fordham International Law Journal 541 at 547.
176. Higgins, *supra* note 175.
177. Chimni, *supra* note 6 at 41.
178. Higgins, *supra* note 175 at 608.
179. A. Rigo SUREDA, *The Evolution of the Right of Self-Determination* (Leiden: A. W. Sijthoff, 1973) at 330.

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trend among developing countries.[180] To expect Asian countries to have done what they had actually wished to do in the 1950s and 1960s is to disregard the history of colonization.

IV. INDIA AFTER THE *RIGHT OF PASSAGE* CASE

Two years before the ruling on preliminary objections in the *Right of Passage* case,[181] the Indian Supreme Court had ruled that the activities carried out "with the object of causing further deterioration in the relations between the Portuguese Government and the Indian Government over the question of Goan National Movement, are prejudicial to the security of India and to the relations of India with Portugal".[182] A year after the *Right of Passage* decision, in *Sahib v. Chief Commissioner*, a decision about a French colony, the Indian Supreme Court ruled that "Pondicherry not being within the territory of India we hold that this Court has no jurisdiction to entertain the appeals".[183] The Court, however, also pointed out "that the situation created by the French establishments not being part of the territory of India is somewhat anomalous",[184] much like what publicists had said about India before 1947. Nevertheless, taking into account the political tension related to this issue, the Supreme Court was careful enough to point out that the Indian government had "enough power" even at the stage of the "de facto transfer to remedy the situation".[185] Much later, in *Sengupta*, a case dealing with a claim arising from the birth of Bangladesh, the Court recalled the *Right of Passage* case, stating that the ICJ "allowed a latitude of discretion to India which narrowed down, in some respects almost to vanishing point, the admitted right of access".[186]

Subsequent to the *Right of Passage* case, Professor Misra came up with the position that the distinction between a *de facto* and *de jure* recognition was invented by the British "in order to find a way out of the difficulties of the situation and in view of the claims of Spain and Portugal in its diplomatic practice".[187] Britain invoked it in relation to India's annexation of Goa. An exacting application of the same legal principles to states with unequal power—as unequal as that of the colonizer and the colonized—prioritizes diplomacy over international law. Yet sometimes international adjudication clothes injustices to states with a vocabulary of

180. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, Advisory Opinion of 22 July 2010, [2010] I.C.J. Rep. 403 at 408.

181. *Right of Passage (Preliminary Objections)*, *supra* note 143 at 125.

182. *Joseph D'Souza v. State of Bombay*, MANU/SC/0007/1956 at para. 6.

183. *Masthan Sahib v. Chief Commissioner, Pondicherry*, A.I.R. 1962 SC 797 at para. 44.

184. *Ibid*., at para. 45.

185. *Ibid*. From a juristic point of view, a rigid reading of *Masthan Sahib v. Chief Commissioner* led to the ratio in *Electronics Corporation of India Ltd. v. Commissioner of Income* Tax, MANU/SC/0331/1989, which suggests that Parliament's powers to legislate refers only to the competence to enact laws with respect to aspects or causes that occur, arise, or exist, or may be expected to do so, solely within India.

186. *Union of India v. Sukumar Sengupta*, MANU/SC/0300/1990 at para. 16.

187. K.P. MISRA, *India's Policy of Recognition of States and Government* (London: Allied Publishers, 1966) at 186.

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the rule of law. Nevertheless, Lauterpacht's seminal book of 1947, according to Professor Misra, "cemented this dual distinction for once and all".[188]

Having used force in Goa, the India-Pakistan conflict partly contributed to the formation of Bangladesh.[189] Bangladesh's Proclamation of Independence accused Pakistan of genocide, while the latter accused India of training and supporting the *Mukti Bahini*, an armed group of the Bangladesh Liberation War. Though interfering in Pakistan's sovereignty, India justified its actions on the grounds of self-defence. Since then, Indian publicists have rejected the comparison of the intervention in Kosovo with Indian action in Bangladesh.[190] On 17 April 1973, India and Pakistan, setting aside the political problem of the recognition of Bangladesh, jointly proposed that the problem of the detained and stranded persons should be resolved on humanitarian considerations through simultaneous repatriation of all such persons "except those Pakistani prisoners of war who might be required by the Government of Bangladesh for trial on certain charges".[191] While, for India, Bangladesh was a matter of self-defence, for the Bengali people the creation of Bangladesh was a matter of self-determination.[192]

Notably, in its written opinion to the ICJ on the issue of Kosovo, with perhaps the issue of Tibet in mind, China stated that "[a]though the principle of self-determination is a recognized principle in international law, it applies within specific limits, primarily restricted to situations of colonial rule of foreign occupation".[193] China, with these words, enunciated a post-colonial theory of self-determination in the age of globalization when the idea of "foreign" within international law might become an issue of debate. While India's approach to the Portuguese occupation of Goa as "foreign" was quite clear, its approach to Pakistan and the creation of Bangladesh were occasioned by linguistic and cultural differences. India, however, clothed its intervention in the vocabulary of self-defence. Ironically, the same Indian government, led by Indira Gandhi, Nehru's prodigal daughter, imposed a National Emergency in 1975, domesticating even the Supreme Court.[194]

A. *The Indian Government, Courts, and International Law: India's* Lotus *Position*

Two cases before the Indian Supreme Court in 2013 are noteworthy for the extent to which the disputes involved matters of international law and India's commitment to public international law, as well as international economic law. These cases also act

188. *Ibid.*, at 187.

189. *The Bangladesh Proclamation of Independence of April 10, 1971; The Indian Prime Minister's Statement Recognizing the Government of the People's Republic of Bangladesh; The Texts of U.N. Security Council Resolutions 303 (1971) and 307 (1971); The Text of U.N. General Assembly Resolution*, 2793 (XXVI) (1972) 11 I.L.M. 119.

190. Chimni, *supra* note 6 at 45.

191. *Agreement on the Repatriation of Prisoners of War and Civilian Internees*, April 9, 1974, New Delhi (1974) 13 I.L.M. 501 at 502.

192. While the birth of Pakistan led to *In Re: The Berubari Union and Exchange of Enclaves*, A.I.R. 1960 SC 845, the birth of Bangladesh led to the *Sukumar Sengupta* case, *supra* note 186; the case was even called *Berubari II*.

193. "Written Statement of the People's Republic of China", *supra* note 79 at 4.

194. *Additional District Magistrate, Jabalpur v. Shivakant Shukla*, AIR 1976 SC 1207.

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as a lens to gauge the extent and strength of the coupling of the government with the judiciary. The Indian Supreme Court in the *Kesavananda* ruling enunciated the un-amendable basic structure of the Constitution while drawing attention to Article 51, the Trojan horse of international law within the Indian legal order.[195] The Indian Supreme Court in the *Kesavananda* ruling stated that:

> [I]n view of Article 51 of the directive principles, this Court must interpret language of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and the solemn declaration subscribed to by India.[196]

The Indian government seemingly adheres to the statist *Lotus* position of the PCIJ. In cases dealing with public international law, while the judiciary has been far less statist, in matters of international economic law the government and the judiciary appear statist.

B. *The Republic of Italy v. the Union of India*

Most recently, in the *Republic of Italy* case before the Indian Supreme Court, the diplomatic immunity of two Italian naval soldiers was at question. The government of India invoked the PCIJ's *Lotus* case to support its arguments.[197] In the *Lotus* case, the PCIJ, far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property, and acts outside their territory, stated that international law leaves states a wide measure of discretion to do so.[198] However, the ICJ has scarcely accepted the *Lotus* position, but its appeal to domestic courts continues. The *Lotus* presumption ignores that a particular act, not expressly prohibited, may yield consequences forbidden by law if a state authors a particular act.

Justice Kabir, in the *Republic of Italy* case, was of the view that the principles enunciated in the *Lotus* case have, to some extent, been watered down by Article 97 of the United Nations Convention on the Law of the Sea (UNCLOS) 1982.[199] It is important to understand the Indian Court's reception of the UNCLOS given that India is a party to it. Counsel for Italy, Harish Salve, contended that the provisions of the domestic law, here the Maritime Zones Act 1976, should be read in harmony with the UNCLOS to which India is a party. In anticipation of the submissions on behalf of India, Salve urged that the *Lotus* Judgment continued to be good law, save to the extent that Article 97 of the UNCLOS had overridden it.[200] Articles 91, 92, 94, and 97 of the UNCLOS, Salve argued, have rejected any concurrent jurisdiction that

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195. *Kesavananda Bharati v. State of Kerala*, MANU/SC/0445/1973 [*Kesavananda*]. See Veronika FIKFAK, "International Law Before English and Asian Courts: Finding the Judicial Role in the Separation of Powers" (2013) 3 Asian Journal of International Law 271 at 288.

196. *Kesavananda*, *supra* note 195 at para. 164.

197. *The Republic of Italy thr. Ambassador v. Union of India*, MANU/SC/0059/2013 at para. 33. See Duncan HOLLIS, "The Case of Enrica Lexie: Lotus Redux?" *Opinio Juris* (17 June 2012), online: Opinio Juris 〈http://opiniojuris.org/2012/06/17/the-case-of-enrica-lexie-lotus-redux/〉.

198. *Lotus*, *supra* note 36 at para. 19.

199. *Republic of Italy*, *supra* note 197, at para. 98.

200. *Ibid*., at para. 33.

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international law previously allowed. Italy claimed sovereign immunity on the basis of international law.[201] It urged that:

> [I]n earlier matters … [the Indian Supreme] Court had ruled that although Conventions, such as these, have not been adopted by legislation, the principles incorporated therein, are themselves derived from the common law of nations as embodying the felt necessities of international trade and are, therefore, a part of the common law of India and applicable for the enforcement of maritime claims against foreign ships.[202]

The arguments advanced by the government of India are rather notable. Representing India, Gourab Banerji noted that the UN Convention on Juridical Immunities of States and Their Property 2004, which Italy had referred to, had not come into force.[203] Thus, India argued that it could not accept Italy's contention that the said Convention reflected customary international law. The Indian Supreme Court, however, disagreed with the government of India's submission to adjudge that certain international exchanges had to be conducted only at the level of the federal or central government, and that the provincial government of Kerala could not initiate the subject matter of a proceeding.[204] Justice Chelameswar asserted rather clearly that "the two marines are not amenable to the jurisdiction of India".[205] The Court finally directed India:

> to set up a Special Court to try this case and to dispose of the same in accordance with the provisions of the Maritime Zones Act, 1976, the Indian Penal Code, the Code of Criminal Procedure and most importantly, the provisions of UNCLOS 1982.[206]

However, Mani thinks that a special court is unnecessary.[207] The rise of nationalist fervour during the *Republic of Italy* case is notable. Nevertheless, the Indian Supreme Court's handling of the matter was creditworthy.

C. *Novartis AG v. Union of India*

> Indian legislature … while harmonizing the patent law in the country with the provisions of the TRIPS Agreement, strove to balance its obligations under the international treaty and its commitment to protect and promote public health considerations, not only of its own people but in many other parts of the world (particularly in the Developing … and the Least Developed Countries).[208]

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201. *Ibid*., at para. 42.
202. *Ibid*.
203. *Ibid*., at para. 69.
204. *Ibid*., at para. 100. See, however, C.H. ALEXANDROWICZ, "Is India a Federation?" (1954) 3 International & Comparative Law Quarterly 393.
205. *Ibid*., at para. 105 (1).
206. *Ibid*., at para. 101.
207. V.S. MANI, "It's Our Boat, Our Courts" *The Hindu* (23 March 2013) at para. 13, online: 〈http://www.thehindu.com/opinion/lead/its-our-boat-our-courts/article4538854.ece〉.
208. *Novartis*, *supra* note 138 at para. 66. See Prabhakar SINGH, "Mercantile Metaconstitutionalism: Interpretations of the WTO Treaty and the Developing Countries" (2012) 55 German Yearbook of International Law 465 at 482.

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The April 2013 *Novartis* Decision of the Indian Supreme Court is notable in that it sent a message to the world about balancing human rights and intellectual property enshrined in international conventions.[209] The World Health Organization (WHO) and Médecins Sans Frontières both wrote to the Indian government pointing out the seriousness of the matter.[210] In *Novartis*, the Indian Court was, no doubt, swayed by the submissions of *amicus curie* by various international organizations such as the WHO in viewing India as "the pharmacy of the world".[211] The Court was urged to strike a balance between the need to promote research and development in science and technology and to keep private monopoly at a minimum.[212] The ruling is noteworthy because it concerns the drug "Gleevec"—a highly effective treatment for leukemia—and the fact that India is the world's largest supplier of generic medicines, with the result that its policies potentially affect billions of people around the globe.[213] Arguments were made about India's obligation to faithfully comply with its commitments under international treaties such as the TRIPS, and counter-arguments were made to protect India's status as "the pharmacy of the world".[214] The Court was reminded of its duty:

> to uphold the rights granted by the statute, and the Court was also reminded that an error of judgment by it will put life-saving drugs beyond the reach of the multitude of ailing humanity not only in this country but in many developing and under-developed countries, dependent on generic drugs from India.[215]

When India changed its patent rules in 2005, it decided to prevent drug companies from getting monopoly protection on updated drugs that did not represent a major advance over previous versions—a practice often referred to as "evergreening". The *Novartis* ruling took note of the Doha Declaration on the TRIPS Agreement and Public Health.[216] The Court eventually ruled against the evergreening of patents that could help poor patients get drugs at prices they can afford, while preserving an incentive for true innovation. For the Court, the Doha Declaration reflects and addresses the deep disquiet of the developing and the least-developed countries regarding their obligation under the TRIPS. These obligations relate to granting

209. *Novartis*, *supra* note 138 at para. 65. This battle has been raging for a long time. See Peter OLLIER, "India's Patent Law Faces New Scrutiny" (2008) 177 Managing Intellectual Property 22; A. JAYAGOVINDA, "The International Patent System and Developing Countries" (1980) 20 Indian Journal of International Law 47.

210. *Novartis*, *supra* note 138 at para. 80.

211. Jim Yong KIM, Director, Department of HIV/AIDS of the WHO wrote a letter on 17 December 2004 to the Minister of Health and Family Welfare Government of India, stating that he is (*ibid.*, at para. 76):

> hop[ing] that the Indian government will take the necessary steps to continue to account for the needs of the poorest nations that urgently need access to antiretrovirals, without adopting unnecessary restrictions that are not required under the TRIPS Agreement and that would impede access to medicines.

212. *Ibid.*, at para. 4.

213. "India's Novartis Decision", *The New York Times* (5 April 2013) at A22.

214. *Novartis*, *supra* note 138 at para. 4.

215. *Ibid.*

216. *Ibid.*, at para. 64.

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patent protection for pharmaceutical and agricultural chemical products, and the likelihood of its highly adverse consequences on public health.[217]

Since patents fall within the definition of "investment" in India's bilateral investment treaties (BITs), subjecting them to compulsory licensing by the Indian government or revocation based on the Court's *Novartis* ruling might trigger the expropriation provisions in the treaties.[218] Moreover, as the exhaustion of local remedies is no longer required under certain BITs, rulings by the Indian Supreme Court might precipitate situations where private international tribunals might rule on the issues that remain within India's sovereign discretion.[219]

The parliamentary approval of treaties and agreements is, therefore, an issue that needs to be settled to ascertain India's approach to international law. It is even more necessary since India, amongst other third-world countries, has again become the backyard in which to experiment with untested nuclear products.[220] Today, whether the Indian government should go to the parliament before signing BITs and other treaties in relation to civil nuclear deals has become a moot issue, with the opposition parties blaming the Ministry of External Affairs for capitulation, and at the same time ignoring the Bhopal gas disaster and the Fukushima nuclear tragedy. Indeed, the Indian government stands being accused of lowering the legal threshold for multinational companies, exposing humans and the environment to nuclear risks. Ironically, the Indian government's apologetic stand on untested nuclear products is unfolding at a time when the Indian Supreme Court, in its *Novartis* ruling, has extended protection to poor cancer patients in developing and the least-developed countries such as "Bangladesh, Cambodia, China, Indonesia, Nairobi [Kenya], Korea, Laos, Thailand, [and] Vietnam".[221] One can see the tension today that undercuts the relationship between the Indian government and the courts on the question of international law.

V. CONCLUSION

The footprint of the *Right of Passage* case on India's post-colonial foreign policy is acutely clear. Nehru astutely linked the question of Goa in particular and colonial possessions in general to his NAM ideals, goals, and leadership. Admittedly, for Nehru, Goa had "become an acid test by which we can judge of the policies of other countries".[222] Just like the idea of the *Panchsheel*, Nehru pitched the opposition to

217. *Ibid.*

218. Prabhash RANJAN and Deepak RAJU, "Losing Ground to Big Pharma Bit by BIT" *The Hindu* (6 September 2013) at para. 8, online 〈http://www.thehindu.com/opinion/op-ed/losing-ground-to-big-pharma-bit-by-bit/article5097623.ece〉.

219. *Ibid.*, A.A. Cançado TRINIDADE, "Domestic Jurisdiction and Exhaustion of Local Remedies: A Comparative Analysis" (1976) 16 Indian Journal of International Law 187.

220. Suvrat RAJU and M.V. RAMANA, "Nuclear Extravagance in Washington" *The Hindu* (26 September 2013) at paras. 1, 15–16, online: 〈http://www.thehindu.com/opinion/lead/nuclear-extravagance-in-washington/article5168341.ece〉.

221. *Novartis*, *supra* note 138 at para. 65.

222. J. NEHRU, "No Change on Basic Policies", from "Speech in Lok Sabha, 17 September 1955", *supra* note 9 at 120.

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the Portuguese colonial possessions in Asia as the tool to construct a post-colonial vision of international law and diplomacy. For instance, about the "bits of Portuguese-dominated territory in China and in Indonesia", Nehru did not find China "get[ting] terribly excited about Macao being Portuguese".[223]

Notwithstanding its ancient history of interstate rules, has India contributed to the Asian perspective, if any, on international law? Such an expectation to ascertain a singular Indian approach is fuelled by an assumption that states are made up of symmetric components. However, to distil the *opinio juris* of a state like India, it has to be unpacked into its three components: the Indian government, the Indian courts, and its publicists. The Indian government is of the view that international law primarily governs relations only between states.[224] This explains India's continued fidelity to the PCIJ's *Lotus* position exhibited in the *Republic of Italy* case. Moreover, on 8 October 2013, India's External Affairs Ministry denied any move for an out-of-court settlement of the case against the two Italian marines in the *Republic of Italy* case.[225] The Ministry maintained that the issue would be sorted out "within the four corners of our legal process and nothing beyond that".[226] Evidently, states supply arguments in support of a position and do not propound a theory of law.

While publicists theorize, states defend a position taken based on the positive text of international law. The Indian government, the Indian courts, and its publicists, have displayed a cleavage of opinion. For instance, in the *Right of Passage* case, India recognized that the principles of the UN Charter "can be regarded as ethical principles", but "not as legal principles".[227] At the same time, India sought "to disregard, in so far as these principles are concerned, the provisions of Article 38, paragraph 1, of the Statute of the Court".[228] However, since the very start, the Indian Supreme Court has invoked Article 38(1) of the ICJ Statute, and even Article 38(1)(d), in its rulings involving questions of international law. Nonetheless, while the judiciary has been liberal in borrowing from international conventions, it has been mindful of the primary role the government plays in international law-making. Furthermore, since its independence in 1947 until today, the Indian government has dutifully stuck to the *Lotus* position.

The Indian government, its judiciary, and its publicists have been far more united on the issue of international economic law. In relation to the WTO, the National Food Security Bill 2013, passed by the Indian government, potentially violated India's commitment under the WTO's Agreement on Agriculture.[229] However, in the

223. *Ibid.* 121.

224. Reply to E.M. Sudarsana Natchiappan, "Rajya Sabha, Starred Question No. 273, Parliament Q&A", online: Ministry of External Affairs, India 〈http://www.meaindia.nic.in/mystart.php?id=220120074〉.

225. Sandeep DIKSHIT, "No Move to Settle Italian Marines Case" *The Hindu* (8 October 2013), online: 〈http://www.thehindu.com/news/national/no-move-to-settle-italian-marines-case/article5211427.ece〉.

226. Quoted in *ibid.*

227. *Right of Passage*, *supra* note 34 at 16.

228. *Ibid.*

229. M.K. VENU, "At WTO, India Will Face Price Catch" *The Hindu* (23 July 2013), online: 〈http://www.thehindu.com/business/Economy/at-wto-india-will-face-price-catch/article4942468.ece〉; Amiti SEN, "Food Security Bill Could Violate India's Subsidy Pledge at WTO" *Business Line*

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WTO Ministerial Conference in December 2013, India has been allowed an exception as the WTO moved ahead on Doha goals.[230] Besides, there are still possibilities of India's violation of TRIPS with the *Novartis* ruling. Be that as it may, while the government has stuck to the *Lotus* position, the Indian Supreme Court sees itself having to take on a larger role when it recently took into account in the *Novartis* case the concerns of "Developing … and the Least Developed Countries" in its decision.[231] From time to time, and to the extent of political advantage, the Indian government has supported the Indian judiciary's meta-constitutional concern of human rights for other poor countries as "India prides itself in standing shoulder to shoulder with the" least developed countries.[232]

Even though there is a clear separation of powers between the Indian state and the judiciary, a difference of understanding on international norms animates them. While the Supreme Court sees itself as the guardian of the rights of not just Indians but those on whom the Indian government's decisions might impact, the Indian government continues to prefer diplomacy and the *Lotus* position as the way to make international law, even though individual ministers sometimes defend the decisions of the Supreme Court.[233] Furthermore, the approach taken by the Indian External Affairs Ministry on the issue of snooping by the American National Security Agency (NSA) on Indian consulates has been pacifist, unlike Brazil's stern position.[234] The Indian government today has truly moved away from the Nehruvian legacy of the NAM. Perhaps India's gradual rise as a world power has realigned its position with China and the US as it sees that its interests have more in common with such countries than with developing and the least-developed countries.

The Indian position on international disputes is less about the views of Indian publicists and more about the views of its courts, the bureaucrats from the law and external affairs ministry, and, ironically, hired foreign publicists. In the recent

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(7 May 2013), online: 〈http://www.thehindubusinessline.com/economy/food-security-bill-could-violate-indias-subsidy-pledge-at-wto/article4693057.ece〉.

230. "Public Stockholding for Food Security Purposes—Ministerial Decision of 7 December 2013", Ministerial Conference Ninth Session, Bali, 3–6 December 2013, WT/MIN(13)/38 WT/L/913, online: WTO 〈https://mc9.wto.org/draft-bali-ministerial-declaration〉.

231. *Novartis*, *supra* note 138 at para. 59. The Court has also been unnecessarily active in certain matters. In *Bhatia International*, the Supreme Court actively ruled that Indian courts have the power to order interim measures for arbitration conducted outside India. *Bhatia International v. Bulk Trading*, 2002, 2 S.C.C. 105. The Court, however, overruled *Bhatia* in *Bharat Aluminium Co. v. Kaiser Aluminium*, 2012, 9 S.C.C. 552.

232. "Statement by External Affairs Minister at the General Debate of the 4th United Nations Conference on the Least Developed Countries, Istanbul, May 12, 2011" in Avtar Singh BHASIN, ed., *India's Foreign Relations—2011 Documents* (New Delhi: Geetika Publishers, 2011), 1847.

233. For instance, speaking during a visit to the World Intellectual Property Organization in Geneva, the Indian Minister for Commerce and Industry, Anand Sharma, defended the *Novartis* ruling, saying that the court decision was "absolutely justified" under the TRIPS Agreement. See "India Reserves Right to Act on Patents After Novartis Case: Anand Sharma" *The Indian Express* (9 April 2013), online: 〈http://archive.indianexpress.com/news/india-reserves-right-to-act-on-patents-after-novartis-case-anand-sharma/1099727/〉.

234. See United Nations, "Statement By H.E. Dilma Rousseff, President of the Federative Republic of Brazil, at the Opening of the General Debate of the 68th Session of the United Nations General Assembly" (24 September 2013), online: UN 〈http://gadebate.un.org/sites/default/files/gastatements/68/BR_en.pdf〉.

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GVK Industries case, India's Attorney General, Goolam Vahanvati, argued that Indian courts "cannot set aside the legislation passed by a Sovereign Legislature on the ground that … it would offend some principle of international law".[235] The Supreme Court, with reference to Article 51 of the Constitution, truly the Trojan horse, rejected the Attorney General's opinion in favour of international law.

Nonetheless, experts maintain that India's Civil Liability for Nuclear Damages Act 2010,[236] has enunciated an Indian approach to international nuclear liability jurisprudence because of the unique way in which it deals with supplier liability.[237] However, pressure from the American government and American corporations, as gleaned from the Attorney General's advice to the government in relation to the Act that a foreign operator is free to choose not to incorporate liability in its contract with the supplier, has largely watered down India's unique approach to the international law of civil liability.[238] It is difficult to sustain an Indian approach to civil nuclear liability jurisprudence while succumbing to terms proposed by foreign corporations at a time when Germany has announced the complete closure of nuclear plants after the Fukushima accident. India is losing its place as the leader of the developing and least-developed countries not only because of its capitulations before super powers, but also because of internal corruption and the receding quality of political will. Considering becoming a State Party to the Rome Statute might perhaps present India with an opportunity to reposition itself in the global order of states.[239]

235. *G.V.K. Industries Ltd. v. Income Tax Officer*, MANU/SC/0163/2011 at para. 20(5).

236. *The Civil Liability for Nuclear Damage Act, 2010*, 21 September 2010, online: Ministry of Law and Justice 〈http://lawmin.nic.in/ld/regionallanguages/THE%20CIVIL%20LIABILITY%20OF%20NUCLEAR%20DAMAGE%20ACT,2010.%20(38%20OF2010).pdf〉.

237. Mohit ABRAHAM and M.P. RAM MOHAN, "Don't Waver Now on Nuclear Liability" *The Hindu* (20 September 2013), online: 〈http://www.thehindu.com/opinion/lead/dont-waver-now-on-nuclear-liability/article5147177.ece〉.

238. Government of India, Department of Atomic Energy, "Answer by the Minister of State For Personnel, Public Grievances & Pensions And Prime Minister's Office to Rajya Sabha Unstarred Question No: 2174", online: Government of India, Department of Atomic Energy 〈http://www.dae.nic.in/writereaddata/rsus2174.pdf〉 at para. (c).

239. *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 90 (entered into force 1 July 2002) art. 112.

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