Vidhi
Centre For Legal Policy
BETTER LAWS. BETTER GOVERNANCE

STATE OF THE NATION'S TRIBUNALS

INTRODUCTION

AND

PART 2: INTELLECTUAL PROPERTY APPELLATE BOARD

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I. INTRODUCTION: STATE OF THE NATION'S TRIBUNALS

A. Problems with the Tribunalisation of Justice

Ever since the first tribunal, the Income Tax Appellate Tribunal ("ITAT"), was set up in 1941[1] to decide Income Tax cases under the Income Tax Act, 1922, the process of tribunalisation of the justice system has slowly, but inexorably, grown to cover more and more areas of dispute resolution. This is true of both the Centre and the States. In 1996, Professor S.P. Sathe counted about 197 tribunals and agencies set up by the State and Central Governments.[2] Sathe enumerated 95 (ninety five) tribunals under 88 (eighty eight) central legislations, of which 78 (seventy eight) have been set up by the Central Government and 17 (seventeen) set up by State Governments. However, between 1996 and July 2013, at least 690 Bills, including Constitutional Amendments and Appropriation bills, have been passed by Parliament,[3] and at least 18 (eighteen) new tribunals have been set up by the Central Government. In light of this expansion, a new study must therefore be carried out.

The reasons for rapid tribunalisation are evident. The process of tribunalisation of justice picked up pace since the 1990s because of two factors, the first being the litigation explosion and the consequent inability of the regular court system to handle the docket. The second factor was the judgment of a Constitution Bench of seven Judges of the Supreme Court of India in *L Chandra Kumar v. Union of India*,[4] which upheld the power of Parliament to set up tribunals and vest in them the power to decide cases on any subject matter.

In addition, whereas the ITAT was under the administrative control and supervision of the Ministry of Law and Justice, most other tribunals have subsequently been set up by different ministries, with little coordination or coherence in the manner in which such tribunals are administered and supervised. Indeed, when efforts were made to bring all the tribunals under the Ministry of Law and Justice in the Inter-Ministerial Group, there was strong opposition from all the Ministries, who preferred to keep each tribunal under their own administrative control and supervision.[5] In spite of the directions of the Supreme Court of India and the Punjab and Haryana High Court, in *Union of India v Madras Bar Association*[6] ("*Madras Bar Association*") and *Navdeep Singh v. Union of India*[7] respectively, to bring the National Company Law Tribunal ("NCLT"), the National Company Law

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[1] Website of the Income Tax Appellate Tribunal <http://www.itatonline.in:8080/itat/site/AboutITAT.htm> (accessed 20 May 2014).

[2] Noor Mohammad Bilal, *Dynamism of Judicial Control and Administrative Action* (Deep and Deep Publications, New Delhi 2004); SP Sathe, *The Tribunal System in India* (NM Tripathi, 1996).

[3] Full list of Lok Sabha government Bills as on 20 July, 2013 <http://data.gov.in/resources/lok-sabha-government-bills-20th-july-2013/download> (accessed 13 June 2014).

[4] *L Chandra Kumar v. Union of India*, (1997) 3 SCC 261 ("*L Chandra Kumar*").

[5] Affidavit of Mr. RK Pandey on behalf of the Union of India in Unnumbered Interlocutory Application seeking Modification of Judgment in Civil Appeal 3067 of 2004, *Union of India v. R Gandhi, President, Madras Bar Association*, paras 9-11 ("Affidavit in *R Gandhi*").

[6] *Union of India v. Madras Bar Association*, (2010) 11 SCC 1 ("*Madras Bar Association*").

[7] *Navdeep Singh v. Union of India*, CWP No. 10751 of 2012 (P&H H.C.) (20 November 2012) (Unreported).

Appellate Tribunal ("NCLAT") and the Armed Forces Tribunal ("AFT") under the control and supervision of the Ministry of Law and Justice, no steps have been taken to implement either the High Court or Supreme Court order by the Central Government. Although an appeal in the *Navdeep Singh* case[8] is pending in the Supreme Court, the High Court's directions still stand as of now. Till date, however, both judgments have not been complied with.

At the same time, concerns have been raised about the manner and functioning of tribunals across the board. Apart from the concerns in the aforementioned cases, stakeholders have also expressed the view that the tribunals have not really functioned as they were intended to, and have in fact served the contrary purpose for which they were set up.[9] In interactions with us, some stakeholders, mainly Senior Advocates and advocates who have practiced before the tribunals, even suggested the drastic measure of winding up all the tribunals and re-vesting the appropriate civil court or high court with their jurisdiction.[10]

Three complaints are generally raised by stakeholders in the functioning of the tribunals:

(1) Tribunals are perceived as acting favourably towards the Ministries and Government departments which are the appointing authorities for the members of the tribunals. This is so for two reasons: the tribunals themselves are composed of members who are part of the ministry, and the tribunals are entirely dependent on the administrative ministries for their daily functioning including staffing and financing.

(2) Though tribunals were supposed to address the issue of delays and pendency in the existing judicial system, they seem to be bogged down in the same problems. Although there is no mandate for tribunals to follow the procedure laid down in the Code of Civil Procedure, or to be bound by the provisions of the Evidence Act, it seems as though tribunals follow them nonetheless, leading to delays and inefficiency. Further, staffing inadequacies mean that cases are not disposed of in time.

(3) While tribunals are supposed to provide an effective dispute resolution mechanism to litigants, the quality of judges is not satisfactory, as reflected in the quality of the judgments delivered by the tribunals, which are often challenged and set aside by superior courts. This has to do with the fact that the 'expert members' who are appointed to these tribunals are often not suitably qualified.

This project has therefore been undertaken both to address macro level issues with the functioning of tribunals and tribunalisation *per se*, and also to analyse the concerns raised by stakeholders and suggest reform where necessary. The Report on the State of the Nation's Tribunals will be released as a series of reports, each focussing on one tribunal, and will try to understand the issues and problems with each tribunal through a common analytical framework. We hope to be able to draw

[8] *Union of India v. Navdeep Singh*, SLP (C) CC No. 11647 of 2013.

[9] Ajay Sura, 'High Court sets aside majority of the orders of the Armed Forces Tribunal' (*The Times of India*, Chandigarh, 13 June 2014) <http://timesofindia.indiatimes.com/city/chandigarh/High-court-sets-aside-majority-of-orders-passed-by-Armed-Forces-Tribunals/articleshow/36476213.cms> (accessed 17 June 2014).

[10] Interview at 6 pm on 9 May 2014 with Senior Advocate who practices regularly at the TDSAT and did not wish to be named.

broader conclusions on the issues affecting tribunals at large, and to narrowly suggest reform measures to tackle specific problems individual tribunals face at present, as we have discussed.

B. Research Method

1. Aims and Objectives

This report was envisioned with the following aims and objectives:

(1) to identify and prepare a comprehensive list of tribunals set up by the Central Government;
(2) to analyse the legal framework in which tribunals operate, and its strengths and weaknesses; and
(3) to analyse the functioning of selected tribunals, and recommend necessary statutory and administrative reform in their functioning.

2. Methodology

This report has been prepared on the basis of both doctrinal and empirical research. We have looked at statutes passed by Parliaments, and judgments of the Supreme Court of India and other judicial bodies to examine the legal framework within which tribunals operate. This analysis will be used to determine the normative independence of the tribunal in question. What we mean by normative independence, and what we use as parameters to determine whether a tribunal is 'independent', will be explained in the next chapter.

Empirical research has been carried out to analyse the actual manner of functioning of tribunals. Data on the filing and disposal of cases has been obtained from the website of the tribunal in question where possible. Where such data has not been put out in the public domain, applications under the Right to Information ("RTI") Act, 2005 have been filed to obtain such data. In response to such RTI applications, some tribunals have provided the relevant data, whereas others have replied that the data is not maintained in the format asked for, or that such records are not kept. We have noted these responses accordingly.

Apart from collecting such data, we also interviewed key stakeholders in the functioning of tribunals, such as retired and serving Chairpersons and members, advocates who practice regularly before tribunals and government officials from concerned Ministries, in order to obtain their views on the functioning of tribunals and their insights into how best to improve the same.

3. Chapters

The project will analyse individual tribunals on the basis of certain metrics applicable to all tribunals. Each individual tribunal will be dealt with in a separate report. Each of these reports will contain two Sections.

The first Section will introduce the project broadly. In this Section, the first chapter will introduce the topic and outline the research method used. The second chapter will outline the scope of the project, focusing on defining tribunals and which tribunals we are concerned with. The third chapter will focus on the metrics by which we hope to measure the functioning of the tribunals.

The second Section of each report will contain an analysis of the individual Tribunal in question. In the present report, the second Section comprises an analysis of the Intellectual Property Appellate Board ("IPAB"), on the basis of the metrics set out in the first Section of this report. This second Section on the IPAB is divided into three chapters. The first chapter provides an introduction to the Tribunal, describing its structure, jurisdiction and powers. The second chapter analyses the independence, efficiency and efficacy of the tribunal, based on the metrics described earlier. We also briefly discuss the Tribunals, Appellate Tribunals and Other Authorities Bill of 2014 ("Tribunals Bill"), and the effect it is likely to have on the functioning of the IPAB. Finally, in the third chapter, we draw our conclusions from the above analysis and provide certain specific recommendations on the functioning of the IPAB.

4. Limitations

The empirical part of research for this project obviously depends on the quality of the data maintained by the tribunal in question. This, in turn, depends on the proper maintenance of files by the tribunal and the compilation of statistics by the registry of the tribunal. The quality of data available has thus restricted our choice of tribunals. We have limited our analysis to tribunals which maintain data properly, in order to be able to advance substantive recommendations fairly.

C. Definitional Scope

Articles 323A and 323B of the Constitution of India empower the Legislature to set up administrative and other tribunals respectively, and describe the powers and functions that may be vested in such tribunals. The Legislature has the power to take away the jurisdiction of all courts except that of the Supreme Court of India under Article 136 (as stated in sub-clause (d) of clause (2) of Article 323A and sub-clause (d) of clause (3) of Article 323B). However, applying the basic structure doctrine, the Supreme Court clarified in *L Chandra Kumar* that the said clauses would be unconstitutional, insofar as they seek to empower the Central and State Legislatures to exclude the jurisdiction of the High Court under Article 226, and that of the Supreme Court under Article 32.[11] The position of the law, as it stands therefore, is that while the legislatures can take away the jurisdiction of any court, they cannot seek to replace the High Court and Supreme Court jurisdictions, under Article 226 and Article 32 respectively. Tribunals may, at best, supplement the jurisdiction of the High Courts and the Supreme Court in these matters.

However, neither Article 323A nor 323B of the Constitution, nor any other article, defines what a 'tribunal' is for the purposes of the Constitution. No law currently in force defines what a 'tribunal' is either. The recent Tribunals Bill introduced by the Union Government in the Rajya Sabha, does not provide a comprehensive legal definition of 'tribunal' but seeks to define the term by enumeration in sub-clause (i) of clause 2, by referring to the tribunals in the First Schedule to the Tribunals Bill. However, the First Schedule does not contain an exhaustive list of all tribunals set up by the Central Government.[12] The First Schedule to the Bill lists only twenty six such bodies,

[11] *L Chandra Kumar* (n 4), para 99.

[12] See The Tribunals, Appellate Tribunals and Other Authorities (Conditions of Service) Bill, 2014 (the "Tribunals Bill"), First Schedule <http://164.100.47.4/BillsTexts/RSBillTexts/asintroduced/Tribnul-E.pdf> (accessed 28 February 2014).

including the Coastal Aquaculture Authority, Press Council of India and the National Industrial Tribunal, all three of which, strictly speaking, are not 'tribunals'.[13] At the same time, the list also excludes certain key tribunals, which we shall discuss presently.[14]

The approach of the Tribunals Bill seems similar to that of the UK Tribunals, Courts and Enforcement Act, 2007, where 'tribunals' are not defined exhaustively, but only defined by way of enumerating five categories of Tribunals, namely, First-Tier Tribunals, Upper Tribunals, Employment Tribunals, the Employment Appeal Tribunal and the Asylum and Immigration Tribunal. Broadly, First Tier Tribunals and Upper Tribunals seem analogous to trial courts and appellate courts, which have supervisory jurisdiction over the trial courts. In addition, Upper Tribunals also exercise the power of judicial review in their respective subject-matter jurisdictions.

In order to get a grip on the term 'tribunals', we must therefore turn to the law laid down by the Supreme Court and other judicial bodies.

It is trite to say that all courts are tribunals but not all tribunals are courts. Judgments have tried to define what a 'court' is and what a 'tribunal' is, and the circumstances under which a tribunal is not a court.[15] In *Harinagar Sugar Mills v. Shyam Sunder Jhunjhunwala*[16], Justice Hidayatullah, in his concurring judgment, held:

> "The word "courts" is used to designate those tribunals which are set up in an organised State for the administration of justice. By administration of justice [it] is meant the exercise of judicial power of the State to maintain and uphold rights and to punish "wrongs". Whenever there is an infringement of a right or an injury, the courts are there to restore the *vinculum juris*, which is disturbed." [17]

In contradistinction, a tribunal was defined in the same judgment as follows:

> "With the growth of civilisation and the problems of modern life, a large number of Administrative Tribunals have come into existence. These tribunals have the authority of law to pronounce upon valuable rights; they act in a judicial manner and even on evidence on oath, but they are not part of the ordinary courts of civil judicature. They share the exercise of the judicial power of the State, but they are brought into existence to implement some administrative policy or to determine controversies arising out of some administrative law. They are very similar to courts, but are not courts." [18]

The judgment did recognise that it is not always easy to separate the two strictly, and in the facts of that case, it found that the decision of the Central Government was taken in the capacity of that of a 'tribunal', and was therefore amenable to appeal in the Supreme Court of India under Article 136 of the Constitution.

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[13] See below pp 8-9.

[14] See below p 10.

[15] See the concurring judgment of Hidayatullah J (as he was then) in *Harinagar Sugar Mills v. Shyam Sunder Jhunjhunwala*, (1962) 2 SCR 339 ("*Harinagar*"), paras 29-33.

[16] *Harinagar* (n 15).

[17] *Harinagar* (n 15), para 29.

[18] *Harinagar* (n 15), para 31.

Likewise, in *Durga Shankar Mehta v. Raghuraj Singh*,[19] *All India Hill Leaders Conference, Shillong v. Captain WA Sangma*[20] and *CIT v. BN Bhattacharjee*,[21] the very wide definition of tribunal, as essentially any body which exercises a dispute resolution function, is not helpful in understanding the tribunal system in India and the problem of tribunalisation of justice in India. This definition of a tribunal as any body which performs quasi-judicial functions, while valid for the purposes of Article 136, also does not help us in this respect. Applying this definition, there is no basis for the 'independence' of tribunals if they can be conflated with the Central Government.

A slightly more specific definition of a 'tribunal' was proposed and adopted by the Supreme Court of India in *Kihoto Hollohon v. Zachillhu*,[22] where the Court held that:

> "Where there is a *lis* — an affirmation by one party and denial by another — and the dispute necessarily involves a decision on the rights and obligations of the parties to it and the authority is called upon to decide it, there is an exercise of judicial power. That authority is called a Tribunal, if it does not have all the trappings of a Court."[23]

To appreciate the problems of the system, a focussed definition therefore needs to be adopted that helps us address the issues facing tribunals and their functioning rather than focus on the larger justice delivery system. The best definition may therefore be found in those cases which deal specifically with the issue of tribunalisation.

A more instrumental definition was adopted by the Supreme Court of India in *Madras Bar Association* where it was distinguished from a Court as follows:

> "Though both courts and tribunals exercise judicial power and discharge similar functions, there are certain well-recognised differences between courts and tribunals. They are:
>
> (*i*) Courts are established by the State and are entrusted with the State's inherent judicial power for administration of justice in general. Tribunals are established under a statute to adjudicate upon disputes arising under the said statute, or disputes of a specified nature. Therefore, all courts are tribunals. But all tribunals are not courts.
>
> (*ii*) Courts are exclusively manned by Judges. Tribunals can have a Judge as the sole member, or can have a combination of a judicial member and a technical member who is an "expert" in the field to which the tribunal relates. Some highly specialised fact-finding tribunals may have only technical members, but they are rare and are exceptions.
>
> (*iii*) While courts are governed by detailed statutory procedural rules, in particular the Code of Civil Procedure and the Evidence Act, requiring an elaborate procedure in decision making, tribunals generally regulate their own procedure applying the provisions of the Code of Civil Procedure only where it is required, and without being restricted by the strict rules of the Evidence Act."[24]

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[19] *Durga Shankar Mehta v. Raghuraj Singh*, (1955) 1 SCR 267.

[20] *All India Hill Leaders Conference, Shillong v. Captain WA Sangma*, (1977) 4 SCC 161.

[21] *CIT v. BN Bhattacharjee*, (1979) 4 SCC 121.

[22] *Kihoto Hollohon v. Zachillhu*, 1992 Supp (2) SCC 651 ("*Kihoto*").

[23] *Kihoto* (n 22), p. 707, para 99.

[24] *Madras Bar Association* (n 6), p. 35, para 45.

Keeping in mind the pitfalls of an overbroad definition and the need for a working, instrumental definition, for the purposes of this paper, a definition has been adopted as follows — a tribunal is a permanent and independent body set up by the Legislature, to solely decide a *lis* between parties in the context of specific jurisdiction vested upon it by statute, and which is not part of the regular judiciary.

The definition of a tribunal can therefore be split up into six criteria, which collectively are necessary and sufficient to designate a body as a tribunal. These are:

(1) Permanency;
(2) Independence from the Executive;
(3) Set up by or under law made by Parliament;
(4) To solely decide a *lis* between parties;
(5) Specific jurisdiction vested by statute;
(6) Not part of the regular judiciary.

This definition is in line with the instrumental definition adopted by the Supreme Court in *Madras Bar Association*, where it examined the constitution of tribunals which have been vested with jurisdiction that would otherwise vest in Courts. It also follows the distinction between 'tribunals' and 'quasi-judicial authorities' as recently explained by the Supreme Court in *State of Gujarat v Gujarat Revenue Tribunal Bar Association*, where it held that:

> "**18.** …Where there is a *lis* between two contesting parties and a statutory authority is required to decide such dispute between them, such an authority may be called as a quasi-judicial authority i.e. a situation where, (*a*) a statutory authority is empowered under a statute to do any act; (*b*) the order of such authority would adversely affect the subject; and (*c*) although there is no *lis* or two contending parties, and the contest is between the authority and the subject; and (*d*) the statutory authority is required to act judicially under the statute, the decision of the said authority is a quasi-judicial decision. An authority may be described as a quasi-judicial authority when it possesses certain attributes or trappings of a "court", but not all. In case certain powers under CPC or CrPC have been conferred upon an authority, but it has not been entrusted with the judicial powers of State, it cannot be held to be a court."[25]

In addition, this definition expressly excludes those courts which are 'designated' tribunals under certain statutes, such as High Courts and district courts. These are sometimes designated 'Company Courts', 'Election Tribunals' or 'National Industrial Tribunals', and are not 'tribunals' simply because they continue to be part of the regular judiciary under the Constitution, but only exercise certain additional jurisdictions under specific legislation.

Based on this definition, and on an examination of all current Central legislation for current and extant tribunals, the following final and exhaustive list of tribunals was arrived at:

(1) Appellate Authority for Industrial and Financial Reconstruction
(2) Airports Economic Regulatory Authority Appellate Tribunal
(3) Appellate Tribunal for Electricity
(4) Appellate Tribunal for Foreign Exchange
(5) Appellate Tribunal for Forfeited Property

[25] *State of Gujarat v. Gujarat Revenue Tribunal Bar Assn*, (2012) 10 SCC 353, p. 365 para 18.

(6) Appellate Tribunal for Forfeiture of Property
(7) Appellate Tribunal for Prevention of Money Laundering
(8) Armed Forces Tribunal
(9) Authority for Advance Rulings (Income Tax)
(10) Authority for Advance Rulings (Central Excise, Customs and Service Tax)
(11) Board for Industrial and Financial Reconstruction
(12) Central Administrative Tribunal
(13) Central Excise Service Tax Appellate Tribunal ("CESTAT")
(14) Central Sales Tax Appellate Authority
(15) Company Law Board
(16) Competition Appellate Tribunal ("COMPAT")
(17) Cyber Appellate Tribunal
(18) Debts Recovery Appellate Tribunal
(19) Debts Recovery Tribunal
(20) Employees' Provident Fund Appellate Tribunal
(21) Film Certification Appellate Tribunal
(22) Income Tax Appellate Tribunal
(23) Intellectual Property Appellate Board
(24) National Consumer Disputes Redressal Commission
(25) National Green Tribunal
(26) National Highways Tribunal
(27) Railway Claims Tribunal
(28) Securities Appellate Tribunal
(29) Telecom Disputes Settlement and Appellate Tribunal

Of the twenty nine tribunals listed above, it must be noted that there are at least three instances of one tribunal exercising the jurisdiction and performing the functions of two or more tribunals. These are the Authority for Advance Rulings (for Income Tax, Central Excise, Customs and Service Tax cases, and for Central Sales Tax cases, separately), Appellate Tribunal for Forfeited Property (for Narcotic Drugs and Psychotropic Substances Act, 1985 and Seizure and Attachment of Property of Foreign Exchange Manipulators Act, 1976 cases, separately) and the COMPAT (which also acts as the Airports Economic Regulatory Authority Appellate Tribunal, separately). These should not be confused with tribunals which deal with cases under multiple legislations, such as the CESTAT (Central Excise Act, 1944, Customs Act, 1962, and the Finance Act, 1994) and the ITAT (Income Tax Act, 1961 and the Wealth Tax Act, 1957). The three instances referred to here are actually cases where despite legislation providing for separate tribunals with separate jurisdictions, both the jurisdictions are being exercised by one tribunal alone as chosen by the Central Government.

The ambit of this report is limited only to Central Government tribunals set up under Central legislation. We are not focussing on tribunals set up by the State Governments under State legislation. We are also not looking at tribunals set up by State Governments under a Central statute, such as the State and District Consumer Forums or the State Administrative Tribunals.

Broadly, four categories of bodies created and administered by the Central Government that might otherwise have some trappings of a court, or exercise some sort of quasi-judicial function, have been excluded from this list, primarily for not meeting one of the criteria listed out above.

a. Inter-State Water Dispute Tribunals, which are ad hoc tribunals governed specifically under the Inter-State Water Disputes Act, 1956, and are specific to each dispute that they are resolving. In essence, they are best described as Arbitral Tribunals for Inter-State Water Disputes, and become *functus officio* once the Report under section 5(2) of the ISWDA is given. At present, five inter-state water dispute tribunals are functional. These are:

   (i) Ravi & Beas Water Disputes Tribunal
   (ii) Cauvery Water Disputes Tribunal
   (iii) Krishna Water Disputes Tribunal – II
   (iv) Mahadayi Water Disputes Tribunal
   (v) Vansadhara Water Disputes Tribunal

b. Commissions of Inquiry set up under the Commissions of Inquiry Act, 1952 by the Central Government, since they neither decide a *lis* between parties despite having the trappings of a Court, nor are they permanent bodies, being set up only to inquire into specific disputes.

c. Statutory, sectoral regulators such as the Securities Exchange Board of India, the Competition Commission of India, and others who may have some quasi-judicial functions in passing and enforcing orders, but cannot be considered to be deciding any *lis* between parties. Indeed, in the case of *Brahm Dutt v Union of India*,[26] the Supreme Court observed that it would be in the interests of the separation of powers if the Government provided for an appellate body exercising judicial functions over an expert body such as the Competition Commission of India. Therefore, while the regulator may have to act in a quasi-judicial manner in some instances, this would not, by itself turn the regulator into a 'tribunal'. Likewise, even though the National Human Rights Commission and the Railways Rates Tribunal set up under section 33 of the Railways Act, 1989 do perform some quasi-judicial functions, they also perform regulatory and other statutory functions as well. Consequently, they do not fall within the definition outlined above.

d. Statutory authorities, such as the Coastal Aquaculture Authority, the Law Commission of India, National Minorities Commission et al., which have retired Supreme Court and High Court judges as members/chairpersons, have also been excluded from this particular report. This is because such statutory authorities do not exercise judicial power in deciding any *lis* between parties. Some such authorities have been brought under the Tribunals Bill simply due to the fact that their Chairpersons are retired Supreme Court judges, and the Bill was introduced because of a pending PIL relating to appointment of Supreme Court judges to certain bodies.[27]

Applying the aforementioned criteria, we find that the Tribunals Bill erroneously includes the Press Council of India, the National Industrial Tribunal and the Coastal Aquaculture Authority. These are not tribunals — the Press Council of India performs other regulatory functions as well; the National Industrial Tribunal is a designated court and the Coastal Aquaculture Authority, under the Coastal Aquaculture Authority Act, 2005, does not perform any quasi-judicial functions. However, these three bodies may be designated 'other authorities', a term that is not used in the body of the Tribunals Bill, though it is mentioned in its title.

[26] *Brahm Dutt v. Union of India*, (2005) 2 SCC 431.

[27] Affidavit in *R Gandhi* (n 5), pp. 6-7, para 6.

At the same time, we find that six tribunals have been excluded, for no evident reason, from the First Schedule to the Tribunals Bill. These are:

(1) The Employees Provident Fund Appellate Tribunal
(2) Appellate Tribunal for Forfeited Property
(3) Appellate Tribunal for Forfeiture of Property
(4) Debts Recovery Tribunal
(5) Central Sales Tax Appellate Authority
(6) Authority for Advance Rulings (Central Excise, Customs and Service Tax)

Even assuming that the Authority of Advance Rulings is covered, insofar as it exercises Income Tax jurisdiction, the Act leaves too much scope for confusion in the absence of a clear indication that separate legislation provides for different tribunals whose functions are, in fact, being performed by one.

Tribunals may be further classified on the basis of the number of benches and the kind of jurisdiction that they exercise. The classification on the basis of benches is keeping in mind that the issues faced by larger tribunals may not necessarily be the same as those faced by smaller tribunals. In classifying tribunals based on jurisdiction, one can sub-classify them on the basis of whether the tribunals exercise original or appellate functions or both, and whether the tribunals adjudicate disputes between citizens, between citizens and the State or both kinds of disputes. The nature of the tribunal's jurisdiction will also affect the independence of the tribunal from the Executive, and will help us assess whether the delay is due to the nature of the cases being handled by the tribunal and their complexity.

The chart below describes the classification of the tribunals:

TABLE 1

	TRIBUNAL	BENCHES	JURISDICTION	NATURE OF DISPUTES
1.	Appellate Authority for Industrial and Financial Reconstruction	Single	Appellate	Citizen-Citizen
2.	Airports Economic Regulatory Authority Appellate Tribunal	Single	Appellate	Citizen-State
3.	Appellate Tribunal for Electricity	Single	Appellate	Both
4.	Appellate Tribunal for Foreign Exchange	Single	Appellate	Citizen-State
5.	Appellate Tribunal for Forfeited Property	Single	Appellate	Citizen-State
6.	Appellate Tribunal for Forfeiture of Property	Single	Appellate	Citizen-State
7.	Appellate Tribunal for Prevention of Money Laundering	Single	Appellate	Citizen-State
8.	Armed Forces Tribunal	Multiple	Both	Citizen-State
9.	Authority for Advance Rulings (Income Tax)	Single	Original	Citizen-State
10.	Authority for Advance Rulings (Central Excise, Customs and Service Tax)	Single	Original	Citizen-State

11.	Board for Industrial and Financial Reconstruction	Multiple	Original	Citizen-Citizen
12.	Central Administrative Tribunal	Multiple	Both	Citizen-State
13.	Central Excise Service Tax Appellate Tribunal	Multiple	Appellate	Citizen-State
14.	Central Sales Tax Appellate Authority	Single	Appellate	Citizen-State
15.	Company Law Board	Multiple	Original	Citizen-Citizen
16.	Competition Appellate Tribunal	Single	Appellate	Citizen-State
17.	Cyber Appellate Tribunal	Single	Appellate	Citizen-State
18.	Debts Recovery Appellate Tribunal	Multiple	Appellate	Citizen-Citizen
19.	Debts Recovery Tribunal	Multiple	Original	Citizen-Citizen
20.	Employees' Provident Fund Appellate Tribunal	Single	Appellate	Citizen-State
21.	Film Certification Appellate Tribunal	Single	Appellate	Citizen-State
22.	Income Tax Appellate Tribunal	Multiple	Appellate	Citizen-State
23.	Intellectual Property Appellate Board	Single	Appellate	Both
24.	National Consumer Disputes Redressal Commission	Multiple	Appellate	Citizen-Citizen
25.	National Green Tribunal	Multiple	Appellate	Citizen-State
26.	National Highway Tribunal	Multiple	Appellate	Citizen-State
27.	Railway Claims Tribunal	Multiple	Original	Citizen-State
28.	Securities Appellate Tribunal	Single	Appellate	Citizen-State
29.	Telecom Disputes Settlement and Appellate Tribunal	Single	Both	Both

D. Parameters of Analysis

To assess whether the criticism of tribunals in India found in Chapter A of this Section is valid, the tribunal in question will be examined under these three metrics:

1. Independence

This metric will first examine whether the tribunal enjoys normative autonomy, that is to say, whether the appointment and removal criteria of its chairpersons and members, which are provided in the Act, are designed to provide for independent adjudication of disputes. Second, we will examine whether the tribunal enjoys functional autonomy, that is, whether it is free to make appointments to posts within itself (obviously excluding appointments of members), finance its functioning, decide its budget and spend accordingly.

Normative autonomy here means that the legislation establishing the tribunal in question meets the constitutional standard of independence of judiciary that is applicable to the forum(s) that the tribunal is supposed to replace or supplement. This standard of independence has in fact been laid down by the Supreme Court of India in *Madras Bar Association*, where it held:

> "The legislature is presumed not to legislate contrary to the rule of law and therefore know that where disputes are to be adjudicated by a judicial body other than courts, its standards should approximately be the same as to what is expected of mainstream judiciary. The rule of law can be meaningful only if there is an independent and impartial judiciary to render justice. An independent judiciary can exist only when persons with competence, ability and independence with impeccable character man the judicial institutions. When the legislature proposes to substitute a tribunal in place of the High Court to exercise the jurisdiction which the High Court is exercising, it goes without saying that the standards expected from the judicial members of the Tribunal and standards applied for appointing such members, should be as nearly as possible as applicable to the High Court Judges, which are apart from a basic degree in Law, rich experience in the practice of law, independent outlook, integrity, character and good reputation. It is also implied that only men of standing who have special expertise in the field to which the Tribunal relates, will be eligible for appointment as technical members. Therefore, only persons with a judicial background, that is, those who have been or are Judges of the High Court and lawyers with the prescribed experience, who are eligible for appointment as High Court Judges, can be considered for appointment as judicial members."[28]

For a tribunal to be considered 'independent', therefore, it should approximately meet the same standards as the 'mainstream judiciary', or as the Court clarifies, the forum it seeks to replace. What this means for tribunals is that the legislation providing for tribunals should provide for qualifications that are the same as, if not higher than, the qualifications required to be a High Court judge in India. This also implies that the procedure for appointment of tribunal members should be as close as possible to the appointment of judges in the forum the tribunal is supposed to replace or supplement.

(a) Formal Independence

The formal independence of a tribunal may be assessed on the basis of the appointment of judges (*i*), their terms and conditions of service (*ii*), as well as grounds of removal and suspension (*iii*).

(i) Appointments

The qualifications for High Court judges are prescribed in clause (2) of Article 217 of the Constitution of India. In order to be eligible for appointment as a High Court judge, a person must be:

(1) A citizen of India; and
(2) Have ten years of practice as an advocate of a High Court or two such High Courts in succession; or have held a judicial post in India for at least ten years.

It is worthwhile to note that sub-clause (aa) of the Explanation to clause (2) of Article 217 clarifies that holding the post of a tribunal is counted towards 'practice' as an advocate, and not towards holding a 'judicial post', for the purposes of the ten year eligibility criterion.

In addition to these criteria, the Supreme Court has evolved a third criterion concerning appointments to tribunals, in light of the fact that members need not be persons who have training in the law. In the *Madras Bar Association* case, the Supreme Court held that a provision in the then Companies Bill, which permitted the appointment of a Joint Secretary level officer to the NCLT, would be unconstitutional, because a Joint Secretary level officer did not enjoy the same rank as that of a High Court judge. Since the NCLT was supposed to replace the jurisdiction of High Courts,

[28] *Madras Bar Association* (n 6), p. 58, para 108.

it was held that persons who are appointed members of such a tribunal must have the same rank and status as that of a High Court judge, in order to preserve their independence and integrity. The Court held:

> "As far as technical members are concerned, the officer should be of at least Secretary level officer with known competence and integrity. Reducing the standards, or qualifications for appointment will result in loss of confidence in the tribunals. We hasten to add that our intention is not to say that the persons of Joint Secretary level are not competent. Even persons of Under-Secretary level may be competent to discharge the functions. There may be brilliant and competent people even working as Section Officers or Upper Division Clerks but that does not mean that they can be appointed as members. Competence is different from experience, maturity and status required for the post. As, for example, for the post of a Judge of the High Court, 10 years' practice as an advocate is prescribed. There may be advocates who even with 4 or 5 years' experience, may be more brilliant than advocates with 10 years' standing. Still, it is not competence alone but various other factors which make a person suitable. Therefore, when the legislature substitutes the Judges of the High Court with the Members of the Tribunal, the standards applicable should be as nearly as equal in the case of High Court Judges. That means only Secretary level officers (that is those who were Secretaries or Additional Secretaries) with specialised knowledge and skills can be appointed as technical members of the tribunal."[29]

Therefore, where the Tribunal is taking over the functions of the High Court or supplementing it, the statute and rules have to state that expert members must be officers at the level of Additional Secretary or higher. In other cases, it may be acceptable to appoint a lower ranking officer as an 'expert member' of the tribunal.

As far as the procedure for appointment of a Judge to the High Court is concerned, appointment of a judge is made by the President of India, in 'consultation' with the Chief Justice of India, the Governor of the State, and the Chief Justice of that High Court.[30] Of course, when a judge is being appointed as the Chief Justice of that High Court, there is no consultation with the sitting Chief Justice of the High Court.

When it comes to consultation with the Chief Justice of India, the Supreme Court has interpreted this to mean concurrence.[31] The Chief Justice of India essentially exercises a veto over the appointment of judges, but this veto is not exercised solely by him or her. The 'consultation' with the Chief Justice of India means consultation with a collegium of judges comprising the Chief Justice of India and the four senior-most judges of the Supreme Court.[32] Similarly, 'consultation' with the Chief Justice of the High Court means concurrence of the Chief Justice of the High Court, along with the two senior most judges of that High Court.[33]

The underlying rationale for such an elaborate procedure of appointment is the importance of the function of the High Court in ensuring that executive and legislative actions are in accordance with

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[29] *Madras Bar Association* (n 6), p. 59, para 111.

[30] Constitution of India, Article 218(1).

[31] See *Supreme Court Advocates on Record Association v. Union of India*, (1993) 4 SCC 441 ("*SCARA*"); *Special Reference No. 1 of 1998, Re*, (1998) 7 SCC 739 ("*Spl Ref 1 of 1998*").

[32] *Spl Ref 1 of 1998* (n 31), p. 763, para 15.

[33] *Spl Ref 1 of 1998* (n 31), p. 763, para 15.

the Indian Constitution, in exercise of its jurisdiction under Article 226.[34] Given that Article 226 is part of the basic structure and can never be supplanted through ordinary legislation, any tribunal which exercises a supplemental function need not have the identical set of procedural safeguards when it comes to appointments. However, the constitutional provisions themselves can provide a useful guide in determining what would constitute independence.

Where tribunals have been vested with the power of reviewing or overseeing appeals from the actions of the Executive, the requirement of independence is far greater than, say, in the case of a tribunal which decides only private disputes. This is not to say that tribunals which decide private disputes need not be independent, but tribunals reviewing executive actions must meet a higher standard of independence than those dealing with purely private matters.

Tribunals which do not have the power of review, and which replace regular civil courts, should at least have the level of independence that civil courts enjoy in the Constitutional framework. Under the Constitution, appointments to posts of district judges are made by the Governor in 'consultation' with the High Court.[35] In contrast with the appointment of High Court judges, the appointment of district court judges requires consultation with the High Court and not just the Chief Justice of the High Court. This has been interpreted to mean that it is not just an 'empty formality',[36] but should be 'real, full and effective consultation'[37]. In effect, State Governments have given primacy to the opinion of the High Court in the selection of district judges, since the High Court is the best placed to determine whether a candidate is suitable for the post of a district judge in the State.

Therefore, what we propose to examine in the context of appointments to a tribunal can be broken down into the following tests:

(1) Is the Executive required to consult with the Judiciary in the appointment of members to the tribunal?

(2) If the tribunal is required to review the decisions of the Executive, does such 'consultation' also mean concurrence?

(3) Are the qualifications of the expert member with government service sufficient to ensure independence of the tribunal?

A clarification is required at this stage. While some tribunals exercise review functions, they need not necessarily review decisions of the Executive. By 'Executive' decisions, we mean those taken by the Ministries or Departments of the Central Government, and not those by other statutory authorities such as the Competition Commission of India, Securities Exchange Board of India or the Telecom Regulatory Authority of India. The reason for this distinction is that these bodies, while performing some executive functions, do not have the power to appoint or even have a say in the appointment process. Therefore, when dealing with the question of independence from the Executive, we are focusing on the independence of the tribunal from the political Executive alone.

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[34] *SCARA* (n 31), p. 702, para 408.

[35] Constitution of India, Article 233(1).

[36] *Chief Justice of AP v. LVA Dixitulu*, (1979) 2 SCC 3.

[37] *State of Kerala v. A Lakshmikutty*, (1986) 4 SCC 632, p. 647 para 22.

Appointments are merely one aspect of the independence of tribunals. Service conditions and the procedure for removal of members is equally relevant and here, again, we can draw guidance from the Constitution.

(ii) Terms and conditions of service

The service conditions of judges of the High Court are determined by the Parliament and not the State Government, and cannot be varied to the disadvantage of the judge after appointment.[38] In the case of district judges, the High Court of the State controls all district and subordinate courts, and has jurisdiction over all matters related to posting, promotion, leave, et al.[39]

Although there are basic differences between tribunals, and the High Court and district courts, the relevant point here is that the conditions of service of judges are not determined by the Executive, and are fixed by the law made by Parliament or by the High Court through appropriate Rules. Tribunals, therefore, must also be similarly insulated from the Executive, under the statute.

Therefore, we will examine whether the provisions of the parent statute provide sufficient protection from Executive interference in the terms and conditions of service of tribunal members, and whether there is any protection from unfair variation to the disadvantage of a member.

(iii) Removal and suspension

A judge of a High Court, like a judge of the Supreme Court, can only be removed by the President after a motion of impeachment is passed by both Houses of Parliament, with a two thirds majority on grounds of proven misbehaviour or incapacity.[40] In the context of district judges, removal is considered part of the 'conditions of service', i.e., the High Court is the only body which has the power to conduct relevant enquiries and order the removal of district judges.[41]

The method of removal of a tribunal Chairperson and member must be akin to those of High Court judges, and must be clearly distinct from the removal procedures of other government employees, where the person who appoints usually has the power to remove as well.[42]

As far as the removal of High Court and Supreme Court judges is concerned, the Judges (Inquiry) Act, 1968 lays down the procedure by which the inquiry into the judge's conduct takes place. Under this legislation, upon notice of an impeachment motion being given by the appropriate number of Members of Parliament in either house, the Speaker or Chairman constitutes a Committee to inquire into and send a report on the charges of impeachment against the judge.[43]

This is in contrast with the procedure for the removal of government servants by the Executive. Although the applicable civil service rules, such as the Central Civil Services (Classification, Control

[38] Constitution of India, Article 221.

[39] Constitution of India, Article 235.

[40] Constitution of India, Article 217(1)(b) read with Article 124 (4).

[41] *Rajendra Singh Verma v. Lt Governor (NCT of Delhi)*, (2011) 10 SCC 1.

[42] See General Clauses Act, 1896, s. 16.

[43] Judges (Inquiry) Act, 1968, ss. 3, 4.

& Appeal) Rules, 1965, ['CCS (CCA) Rules'], mandate the carrying out of an enquiry while imposing disciplinary punishment against civil servants, they also empower the Central Government to suspend the charged officer pending disciplinary proceedings.[44] While the rationale for suspension pending disciplinary proceedings relates to the loss of confidence of an employer in his employee,[45] and is also constitutionally provided for in the context of Public Service Commission Members,[46] this line of reasoning would not be applicable in the context of a High Court or Supreme Court judge. This is because the judge is not an 'employee' of the Executive, and because the Constitution does not provide for the suspension of a judge pending impeachment.

This issue was also examined, albeit somewhat cursorily, by the Supreme Court in *Madras Bar Association*. Though it did not strike down the relevant provision providing for suspension of the tribunal member, it did direct that suspension take place only with the concurrence of the Chief Justice of India, and that the provision be amended suitably.[47]

Two requirements are therefore common and obvious — the necessity of a fair hearing before removal and the elimination of unfettered Executive powers concerning removal or suspension of tribunal members. This would be in accord with the removal procedures of district and High Court judges, which the Executive does not control. As described earlier, the legislature has the *de facto* power to remove a High Court judge, and the High Court has the power to remove district judges.

In the context of this report, therefore, we will examine Acts setting up tribunals to assess if there are sufficient procedural safeguards ensuring that the removal or suspension of tribunal members is not at the sole discretion of the Executive.

(b) Functional Independence

While the normative autonomy of a tribunal can be examined purely with reference to legislation, our project will also assess the day to day functioning of the Tribunal, and whether the Tribunal has sufficient autonomy to operate independent of the Executive. Some of this analysis will relate to the legislation setting up the tribunal, since some legislation does deal with this, but we will also examine the functioning of the tribunal itself.

High Courts enjoy functional autonomy under the Constitution to the extent that it is the High Court's Chief Justice who has the power to appoint other officers and persons to the High Court, and administrative expenses are charged to the Consolidated Fund of the State, including the salaries, allowances and pensions payable to the officers and servants of the High Court.[48] While the conditions of service of such officers are subject to the laws made by the legislature, the High Court also has the power to make Rules for the same. District courts are under the control of the High Court.

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[44] CCS (CCA) Rules, Rule 10.

[45] See for instance *Ram Kumar Kashyap v. Union of India*, (2009) 9 SCC 378, p. 382, para 12.

[46] Constitution of India, Article 317(2).

[47] *Madras Bar Association* (n 6), p. 66, direction (xi).

[48] Constitution of India, Article 229.

The underlying principle, as with the provisions relating to removal of judges, is to ensure that the Judiciary is not under the control of the Executive in its functioning.[49] It is also to prevent the Executive from controlling the judiciary financially.

In our report, therefore, we will examine the following issues:

(1) Does the tribunal have the power to hire and fire its own staff?
(2) Is the tribunal entirely dependent on the Executive for its funds?
(3) Does the tribunal function more efficiently than the court it was supposed to replace or supplement?

2. Efficiency

This metric will evaluate the number of cases that have been filed in and disposed by the tribunal in any given year. We will be looking at all the cases filed and disposed of in each year, either for the last ten years or since the tribunal started, whichever is earlier. This is to provide insight into whether the tribunal, at its given strength, is able to handle its case load. We have thus sought data from tribunals on:

(1) The number of cases filed in a given year;
(2) The number of cases disposed of in a given year; and
(3) The number of cases pending, and the length of time for which they have been pending.

We have also sought to correlate these with the given strength of the tribunal at any given time, to see if its strength had any bearing on the rates at which cases were disposed. We shall compare this with the publicly available figures of disposal in High Courts, to assess if tribunals are doing a better or worse job than them in disposing of cases. Likewise, in cases where a tribunal is taking over the jurisdiction or ousting the jurisdiction of a civil court, the purpose of the analysis will be to see if it functions more efficiently than the average district court in India.

While publicly available figures indicate how many cases were filed and disposed in a given year, they do not indicate how many of the cases were disposed in the same year they were filed. However, solely to assess how courts manage their workload and pendency, comparing figures for filing and disposal of cases would be sufficient, to see if any progress is being made on the pendency front. In any time frame where disposal is greater than filing, pendency has obviously reduced.

Even though we may not be able to ascertain how long a case has been pending for on the basis of this data alone, we can use the number of cases disposed per judge monthly as a metric of efficiency, based on the public figures available. An analysis of these figures shows that, at the High Court level, a judge manages to dispose about 220 cases in a given month, whereas, at the subordinate court level, a judge manages to dispose about 103 cases per month. The reason for this large discrepancy requires further research, but it can *inter alia* be attributed to the larger workload of subordinate judges, the different kinds of cases which are heard by High Court judges and subordinate judges, and differences in infrastructure between the two kinds of courts.

At the same time, this metric of cases decided by a judge per month should not be considered in isolation. It is possible that in fora where the number of cases is much lower than in others, a judge

[49] See *M. Gurumoorthy v. Accountant General, Assam (Nagaland)*, (1971) 2 SCC 137.

may dispose all of them and yet have a lower number of cases disposed per month. For instance, in the initial few years of the TDSAT, the number of cases filed in the TDSAT in a given year did not rise above 200, and there was no case pending beyond one year for the first six years of its existence.[50] For the purposes of assessing the efficiency of a tribunal, especially one which sits *en banc* and not in separate benches, it may thus make more sense to examine the ratio of cases filed to cases disposed.

Based on publicly available figures,[51] between 1 January 2005 and 31 June 2013, all High Courts in India managed to dispose of 90.50 percent of the cases filed before them, whereas Subordinate Courts managed to dispose of 97.96 percent of the cases filed before them. While this may seem quite impressive, it must be remembered that, in light of the pendency problem already extant in India's courts, it means that the pendency has increased by 9.5 percent of the cases filed in this period in the High Courts, and by 2.04 percent of the cases filed in this period in the subordinate courts.

However, all tribunals are unlikely to have both civil and criminal cases, so it may be more meaningful to compare the tribunals' figures with those of the civil cases disposed by the High Courts and subordinate courts. Concerning the civil cases disposed, the data reveals that the rate of disposal does not change substantially. In the period examined, we find that High Courts managed to dispose of 90.14 percent of the civil cases filed before them and subordinate courts, 96.82 percent of the civil cases filed. As with High Courts and subordinate courts, tribunals usually have a backlog of transferred cases from the High Courts or civil courts when they are set up. While this is no means ideal, the above figures at least provide a benchmark, however low it may be, to assess whether a tribunal has served its purpose of faster disposal of cases than the court that it was supposed to replace or supplement.

Therefore, with this metric, we will hope to answer the question as to whether the Tribunal has functioned more efficiently than the Court it was supposed to replace.

3. Efficacy

This metric will analyse (i) a representative sample of judgments and orders of the tribunal and (ii) the judgments of the superior courts reviewing or in appeal from the judgments and orders of the Tribunal. The first is to assess whether the tribunal's decisions meet the standards of judicious decision making, in proper appreciation of the law and the facts of the case. This analysis will be relevant to see if the 'specialised' nature of the dispute settlement ostensibly provided by tribunals is in fact being taking place, or whether the tribunal is merely carrying out purely general legal functions. In addition, this will also assess whether the judgments themselves are correct on the law and in no way inferior to the standard expected of any court.

The assessment of judgments of relevant superior courts is to see if they have largely agreed, or have found reason to disagree, with the tribunal on legal and factual questions. We will look at all the judgments of superior courts that examine the correctness of the tribunals' judgments in detail,

[50] Statement of Institution, Disposal and Pendency of Cases as on 23 May 2014 <http://www.tdsat.nic.in/Statement_of_Disposal.htm> (accessed 9 Jun 2014).

[51] Court News, Vol I, Issue No. 1 – Vol VIII, Issue No. 3 <http://sci.nic.in/courtnews.htm> (accessed 17 June 2014).

whether in exercise of their writ jurisdiction under Article 226 or appeals jurisdiction under relevant statutes.

This approach, however, has certain limitations. At present, there is no data maintained by the Supreme Court, which is usually the first and final appellate body from many tribunals, on how many appeals have been lodged by parties against tribunals' judgments. Such data will have to be collated from the actual appeal files themselves, which are not always preserved by the Supreme Court registry. Therefore, pending cases and cases where the Supreme Court dismissed the appeal *in limine* are unavailable for analysis. In any case, neither of these are likely to shed any light on how the superior court assessed the judgment of the tribunal. Therefore, the restriction of the analysis to those cases where arguments have been heard in detail and judgments delivered is not a substantive drawback.

We will examine the following:

(1) Do the judgments of the tribunal reflect sound reasoning and the proper application of the law to the facts?
(2) How do the superior courts deal with the findings of law and fact made by the tribunal in appeal or in review?

4. Summary of Metrics

In conclusion, we will be examining the following questions in assessing each tribunal:

(1) Is the Executive required to consult with the Judiciary in the appointment of members to the tribunal?
(2) If the tribunal is required to review the decisions of the Executive, does such 'consultation' also mean concurrence?
(3) Are the qualifications of the expert member with government service sufficient to ensure independence of the tribunal?
(4) Do the provisions of the parent statute provide sufficient protection from Executive interference in the terms and conditions of service of tribunal members?
(5) Is there any protection from unfair variation to the disadvantage of a member?
(6) Are there sufficient procedural safeguards to ensure that the removal or suspension of tribunal members is not at the sole discretion of the Executive?
(7) Does the tribunal have the power to hire and fire its own staff?
(8) Is the tribunal entirely dependent on the Executive for its funds?
(9) Does the tribunal function more efficiently than the court it was supposed to replace or supplement?
(10) Do the judgments of the tribunal reflect sound reasoning and the proper application of the law to the facts?
(11) How do the superior courts deal with the findings of law and fact made by the tribunal in appeal or in review?

The answers to these questions will indicate whether the tribunal is working as intended, and whether it requires major changes to its functioning. They will shed insight into whether it is an independent and efficient forum for the adjudication of disputes, whether specialised or for general legal disputes, and whether it produces quality adjudication that receives the approval of the superior courts.

II. INTELLECTUAL PROPERTY APPELLATE BOARD

The second in the series of tribunals analysed is the Intellectual Property Appellate Board ("IPAB"). After providing a brief background to the establishment, structure and powers of this tribunal (*A*), we analyse its functioning based on the methodology described in the introductory Section above (*B*). Finally, we conclude with our findings based on this analysis and specific recommendations (*C*).

A. Background

Before embarking on an analysis of the mode of functioning of the IPAB, it is useful to have a brief overview of the background to this tribunal's establishment (*1*), its structure and composition (*2*), as well as its jurisdiction and powers (*3*).

1. History and Rationale

The Intellectual Property Appellate Board ("IPAB") was set up under the Trade Marks ("TM") Act, 1999. The then Trade and Merchandise Marks Act, 1958 was thoroughly revisited when India joined the World Trade Organisation ("WTO") and became a signatory to the Trade Related Intellectual Property Rights[1] ("TRIPS") agreement in 1994. Since an alternative efficient and speedy mechanism for resolution of disputes relating to intellectual property rights was essential to have an effective Intellectual Property Rights ("IPR") regime, the IPAB was set up transferring the jurisdiction of the High Courts in specific matters relating to adjudication of intellectual property rights for speedy disposal. The IPAB hears appeals from the orders and decisions of the Registrars of Trademarks, Geographical Indications and Patents. The IPAB is thus vested with the jurisdiction earlier exercised by the High Courts and supplements the functioning of the High Court in this respect.[2]

Though the office of the IPAB was set up on 24.1.2003, it was officially notified and started functioning nine months later on 15.9.2003.[3]

2. Structure and Composition

As per the TM Act, the IPAB consists of the Chairman, Vice-Chairman, and such number of other Members as the Central Government may deem fit.[4] The IPAB is composed of one Chairman, one Vice-Chairman and three Technical Members. Among the Technical Members, one is for Patent and two are for Trademarks. Currently the position of Member (Trademark) is vacant.[5] A Bench is

[1] The Agreement on Trade Related Aspects of Intellectual Property Rights.

[2] Report of the Chairman, Intellectual Property Appellate Board, submitted to the Hon'ble Madras High Court as per the orders of the Hon'ble Court, dated 06.06.2011, para 3. ("Chairman's report").

[3] Information obtained under the Right to Information Act, 2005 vide application – A-C-30016/4/2005-IPAB/RTI, dated 25.03.2014, filed at the Intellectual Property Appellate Board, Chennai on behalf of Vidhi Centre for Legal Policy.

[4] Trade Marks ("TM") Act, 1999, Section 84(1).

[5] Telephonic conversation with the Deputy Registrar, IPAB; also available on the IPAB website, at http://www.ipabindia.in/composition.aspx (accessed on 27 May, 2014)

composed of one Judicial Member and one Technical Member.[6] The IPAB has its headquarters at Chennai and has circuit bench sittings at Mumbai, Delhi, Kolkata and Ahmedabad.[7]

(a) Qualifications for appointment of Chairman and member

The Chairman of the IPAB has to be a sitting or retired Judge of a High Court, or one who has, for at least two years, held the office of Vice-Chairman.[8]

The Vice-Chairman of the IPAB should have, for at least two years, held the office of a Judicial Member or a Technical Member or have been a member of the Indian Legal Service holding a post of Grade I or higher for at least five years.[9]

The minimum qualification for appointment of a Judicial Member of the IPAB under the TM Act is that the appointee should have been a member of the Indian Legal Service and have held a post of Grade I or higher for at least three years, or have held a civil judicial office for at least ten years.[10] Under the TM Act, the Technical Member should have exercised functions of a tribunal under the TM Act for at least ten years or have been an advocate of a proven specialised experience in trade mark law for at least ten years.[11]

(b) Procedure of appointment of Chairman and members

For the appointment of the Chairman, the Chief Justice of India recommends a suitable person or panel of names for the post. The appointment is then made by the Central Government with the concurrence of the Appointment Committee of Cabinet ("ACC").[12]

The appointment of the Vice-Chairman, IPAB comes under the purview of the ACC. The process involves calling of nominations of suitable and eligible candidates from the Chairman, IPAB and the Department of Legal Affairs. The selection of a suitable candidate is made by a Search-cum-Selection Committee. This Search-cum-Selection Committee was constituted in accordance with O.M. dated 30th July, 2007 issued by the Department of Personnel and Training. This appointment is also approved by the ACC.[13]

The appointment of Technical Members of the IPAB also comes under the purview of the ACC. The process involves calling of applications from interested and eligible candidates through advertising of vacancies circulars in Employment News and other Daily Newspapers and by hosting the vacancy circular on the official website of DIPP and DoP&T, setting up of and convening of Search-cum-

[6] TM Act, s. 84(2).

[7] As available on the IPAB website, at <http://www.ipabindia.in/jurisdiction.aspx> (last accessed on 27 May, 2014).

[8] TM Act, s. 85(1).

[9] TM Act, s. 85(2).

[10] TM Act, s. 85(3).

[11] TM Act, s. 85(4)

[12] Report of the Chairman, (n 2).

[13] Report of the Chairman, (n 2).

Selection Committees in accordance with the aforementioned O.M. of DoP&T. Final approval is taken from the ACC.[14]

(c) Term of office

The term of office of the Chairman and Members of IPAB expires after five years from the date of entering office, subject to maximum age limit of sixty five years for the Chairperson and Vice-Chairman and sixty two years for other Members.[15] Additionally, The Chairman, Vice-Chairman or any other Member cannot be removed from his office except by an order made by the President of India on the ground of proved misbehaviour or incapacity after an inquiry made by a Judge of the Supreme Court in which the Chairman, Vice-Chairman or other Member had been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.[16] So far no Chairman, Vice-Chairman or Member has been removed from his or her post in the IPAB through this procedure

3. Jurisdiction and Powers

The TM Act gives the IPAB jurisdiction to hear all appeals from an order or a decision of the Registrar of Trade Marks and all cases pertaining to rectification of the register of Trade Marks. All such cases which were then pending before any High Court also stood transferred to the IPAB[17].

In addition, the Patents (Amendment) Act 2002 was enacted to bring India's patent regime in line with the TRIPS agreement. The IPAB was conferred by this Act with the jurisdiction to hear all cases against any order or decision of the Controller General of Patents, Designs and Trademarks, all cases pertaining to revocation of patent other than on a counter claim in a suit for infringement and rectification of registers. All such cases which were pending before the High Courts also stood transferred to the IPAB.[18]

The Geographical Indications of Goods (Registration and Protection) Act 1999, which was enacted to provide for the registration and better protection of geographical indications relating to goods, also provided appellate remedy before the IPAB from a decision of the Registrar of Geographical Indications.[19]

The IPAB essentially exercises the power of an appellate Court from the orders of the Registrar of Trademarks, Geographical Indications and Patents. It exercises all the powers of the appellate Court to go into the facts and the law in any given case and has the power to grant interim orders at the application and appeal stage, provided that the Court first explored the possibility of deciding the main matter expeditiously and had heard the other party on the matter.[20] It also has the power to

[14] Report of the Chairman, (n 2).

[15] TM Act, s. 86.

[16] TM Act, s. 89(2).

[17] TM Act, s. 100.

[18] Patents (Amendment) Act, 2002 s.117-G.

[19] Geographical Indications of Goods (Registration and Protection) Act 1999, s. 31(1).

[20] *Shreedhar Milk Foods Pvt. Ltd.* v. *Vikas Tyagi.*, 2013 (55) PTC 247 (IPAB).

review not only procedural errors, but also substantive errors. However this power would not extend to rehearing of the matter since it was an appeal.[21]

The manner in which the IPAB has exercised its jurisdiction and a discussion of cases decided by it can be found below.[22]

B. Analysis

In this Chapter, we assess the functioning of the IPAB specifically with respect to its independence (*1*), efficiency (*2*) and efficacy (*3*), based on parameters mentioned earlier.[23]

1. Independence

(a) Formal Independence

The IPAB seems to be somewhat misleadingly called a "Board" unlike other tribunals. This may lead to some questions as to whether it is in fact supposed to be a tribunal or a statutory "Board" in the same manner as the Central Board of Direct Taxes or a State level Labour Welfare Board which exercise rule making and regulatory functions. A cursory examination of the provisions of the Act we have discussed would be sufficient to clarify the position that it is in fact a tribunal as per the definition we have evolved. Moreover, while addressing questions on the importance of independence of tribunals in *Union of India v. R Gandhi, President, Madras Bar Association,*[24] the Supreme Court clearly stated that whenever the existing jurisdiction of High Courts is transferred to a tribunal, it is a judicial tribunal. The fact that the IPAB is called a "Board" does not make it less than a tribunal. It has clearly been vested with the functions that would otherwise have been exercised by the High Courts. We must therefore analyse the formal independence of the IPAB in this light.

(i) Appointments

On the question of appointments to the IPAB, we find that though the appointment of the Chairman is made after consultation with the Chief Justice of India[25], it is not so for the other members of the Tribunal including the Vice-Chairman. Given that the IPAB exercises a power akin to judicial review of the decisions of the Executive in matters relating to patents and trade marks, ideally such "consultation" should be "concurrence" under the Ac and should also apply in the context of appointment of the Vice Chairman and other Members of the IPAB. However, in practice such consultation does indeed seem to be "concurrence" since the recommendation emanates from the Chief Justice of India with no instance of a name being rejected by the Government. With no judgment having interpreted "consultation" for the purposes of the TM Act and the IPAB, applying

[21] *Aachi Masala Foods Pvt. Ltd.* v. *S.D. Murali,* 2013 (55) PTC 315 (IPAB).

[22] See below, page 40-46.

[23] See Section I(C).

[24] (2010) 11 SCC 1.

[25] TM Act, s. 85(6).

the reasoning of the Supreme Court of India in *State of Gujarat v. RA Mehta*[26] where in the context of the Gujarat Lokayukta in Gujarat, the Supreme Court interpreted the term "consultation" to mean "concurrence" keeping in mind the primacy the legislation afforded the opinion of the Chief Justice of the Gujarat High Court,[27] legally it would seem that the term "consultation" will have to, willy-nilly be interpreted as concurrence in the present case. However, given that the test itself calls for a case-to-case analysis of each legislation, there is room for doubt as to whether the consultation envisaged in the TM Act is "concurrence" with the view of the CJI.

In contrast to the consultation with the CJI in reference to the Chairman's appointment, no similar provision seems to exist for the appointment of the Vice-Chairman or the Member. Though appointed by the President of India, the implication here seems to be that the appointment of the Members and the Vice-Chairman is left solely to the discretion of the Central Government.

As far as qualifications of expert members are concerned, a person is deemed to be qualified to serve as an expert member even if such person had held the post of a "Joint Registrar" under the TM Act. No specific qualifications have been prescribed for a person holding the post of a Joint Registrar under the TM Act. Although the post of the Joint Registrar is considered a "Group A" post within the Central Government, there is no material to suggest that it is equal to the rank of at least Additional Secretary to the Government of India as required by the Supreme Court's judgment in *Madras Bar Association*.[28] The qualifications to be appointed as a Joint Registrar, as evident from a circular calling for applications to the post,[29] do not seem to put the post on the same level as an Additional Secretary to the Government of India. From a comparison of the pay scales, it seems that the Joint Registrar is of the same rank as that of Director to the Government of India, which is below the rank of someone who is a Joint Secretary to the Government of India.[30] This raises questions as to whether an expert member, whose qualifications are based on length of service in the government, can be considered to be sufficiently "independent" in light of the law laid down by the Supreme Court.

To answer the questions we have raised therefore:

(1) Is the Executive required to consult with the Judiciary in the appointment of members to the IPAB?

Ans: **While the appointment of the Chairman is made in consultation with the Chief Justice of India, the appointment of other members of the Tribunal does not require consultation with the Chief Justice of India.**

(2) Since the IPAB is required to review the decisions of the Executive, does such "consultation" also mean concurrence?

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[26] (2013) 3 SCC 1.

[27] *RA Mehta* (n 27), p 28 para 32.

[28] See above Section I(C)(a)(i).

[29] Filling up posts in on Deputation Basis in trademark Registry, available at <http://www.ipindia.nic.in/vacancy/vacancy_28April2009.pdf> (last accessed on 11.06.2014).

[30] See IAS (Pay) Second Amendment Rules, 2008, Table.

Ans: Applying judicial precedent in similar cases, it may be argued that consultation should mean concurrence in the present case though the position in law is not fully settled, but in practice it seems that consultation has been treated as concurrence.

(3) Are the qualifications of the expert member to the IPAB with government service sufficient to ensure independence of the IPAB?

Ans: No, the qualifications prescribed are not concomitant with the jurisdiction being exercised by the Tribunal. While the qualifications for a person who has not been a government servant are similar to that of a High Court judge, a Member who has been in government service may be appointed to the IPAB even if he does not enjoy the rank of an Additional Secretary.

(ii) Terms and Conditions of Service

The salaries, allowances and other terms and conditions of service for the Chairman and members of the IPAB are determined by rules made by the Central Government under Section 88 of the TM Act. The pay and terms and conditions may therefore be found in the Intellectual Property Appellate Board (Salaries and Allowances Payable to and other Terms and Conditions of service of the Chairman, Vice Chairman and Members) Rules, 2003. This has been amended in 2012 with retrospective effect from 1 January 2006.[31] This amendment increases the pay of the Chairman of the IPAB to Rupees ninety thousand a month, the Vice Chairman to Rupees Eighty Thousand a month and the Members to the Higher Administrative Grade pay bracket with pay between Rupees sixty seven thousand and sixty nine thousand. This amendment brings the pay of the Chairman of the IPAB at par with the pay of a High Court judge.

Under sub-section (4) of Section 157 of the TM Act, rules made under the Act have to be placed before Parliament which may then proceed to modify or nullify this rule. This follows the model of "legislative veto" of Parliamentary oversight of delegated legislation which is also seen in multiple legislation. While it would have been ideal to have the salaries and emoluments fixed in the legislation itself, as it is for High Court judges, the aim of protecting the tribunals from Executive interference will also equally be served if there was sufficient Parliamentary oversight over Executive action built into the law. The present scheme of the Act therefore seems to suggest that there is sufficient legislative oversight over the Executive's powers to determine the terms and conditions of service of the Chairman, Vice- Chairman and Members of the IPAB.

The issue of whether or not terms and conditions of service can be varied to the disadvantage of the members is more important than *who* actually determines the salaries and emoluments.

However, no provision exists in the TM Act to prevent the variation in the terms and conditions of service of the Chairman or the Members to their disadvantage after appointment. It ought to be noted that there has been no instance of such a disadvantageous variation in the terms and conditions of service.

To answer the questions therefore:

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[31] Amendment notification available at <http://www.thinklegal.co.in/viewexternalfile20092010/NotifMinCommDIPP20062012.pdf> (last accessed on 11 June 2014).

(1) Do the provisions of the parent statute provide sufficient protection from Executive interference in the terms and conditions of service in the course of engagement as a Member of the IPAB?

Ans: Yes, the Rules providing for salaries and emoluments are subject to Parliamentary oversight.

(2) Is there any protection from unfair variation to disadvantage of a member?

Ans: No, there are no protections against unfair variation to the disadvantage of a member.

(iii) Removal and suspension

As pointed out earlier, the Chairman or member of the IPAB may be removed by the President for proved misbehaviour or incapacity after an inquiry in this regard is made by a Judge of the Supreme Court of India.[32] However, neither the President nor the Central Government have the power to suspend the member pending investigation.

The answers to the questions are therefore:

(1) Are there sufficient procedural safeguards in ensuring that the removal or suspension is not within the sole discretion of the Executive?

Ans: **Yes, there are sufficient safeguards in ensuring that the removal of a member is not within the sole discretion of the Executive as a reference must be made to the Supreme Court. The Executive also does not have the power to suspend the Member.**

(b) Functional Independence

In so far as the staff of the IPAB is concerned, it is entirely dependent on the Central Government to provide the appropriate staff necessary to run the IPAB.[33] Although the staff work under the superintendence of the Chairman of the IPAB,[34] the salaries, allowances and the conditions of service of such staff are exclusively within the purview of the Central government to determine through rules.

As far as funding is concerned, the IPAB is entirely dependent on its administrative ministry, the Ministry of Commerce and Industry for its funds. As per budget for the Financial Year 2013-14, a sum of Rs. 3.05 crores was allocated to the IPAB out of the budget of the Ministry of Commerce and Industry.[35] In the previous financial year, i.e., 2012-13 the allotment was Rs. 3.06 crores which was only revised from an initial budget of Rs. 2.20 crores. The funds earmarked for the IPAB compare very poorly even among other tribunals of similar scale and size, such as the TDSAT which received

[32] TM Act, s. 89(2).

[33] TM Act, s. 90(1).

[34] TM Act, s. 90(3).

[35] Notes on Demands for Grants, 2013-14 Demand No. 12 available at <http://indiabudget.nic.in/ub2013-14/eb/sbe12.pdf> (last accessed on 11 Jun 2014).

a "grant" of Rs. 13.01 crores in budget 2013-14.[36] Therefore, not only does the IPAB remain completely dependent on the parent ministry for its funds, unlike a High Court, it also seems to receive a much smaller amount when compared to a similarly sized tribunal such as the TDSAT. This issue was highlighted in the Chairman's Report as well.[37]

(1) Does the IPAB have the power to hire and fire its own staff?

Ans: **No, the IPAB does not have the power to hire staff on its own, though the staff work under the superintendence of the Chairperson and may be removed by him.**

(2) Is the IPAB entirely dependent on the Executive for its funds?

Ans: **Yes, the IPAB is entirely dependent on the Executive for its funding.**

2. Efficiency

Based on the figures collected from an RTI Application, we have attempted in this chapter to assess the efficiency with which the IPAB has been able to dispose of the cases filed before it. The figures relate to the first year in which the IPAB started functioning to the last year for which figures are available, that is, 2013.

(a) Annualized break up of disposal

The following table provides an annual break-up of the number of cases filed before the IPAB, the number of cases disposed and the yearly pendency, until the end of 2013.

Table 1: Total Number of cases filed, disposed and pending in each year in the IPAB.[38]

Year	Filed	Disposed	Cumulative Pendency	Disposal Rate
2004	695	270	425	38.85%
2005	201	113	513	56.22%
2006	243	115	641	47.33%
2007	306	128	819	41.83%
2008	416	123	1112	29.57%
2009	492	149	1455	30.28%
2010	387	167	1675	43.15%
2011	353	273	1755	77.34%
2012	479	353	1881	73.70%
2013	522	356	2047	68.20%

[36] Notes on Demands for Grants, 2013-14, No. 14 Department of Telecommunications, available at <http://indiabudget.nic.in/ub2013-14/eb/sbe14.pdf> (last accessed 10 June 2014).

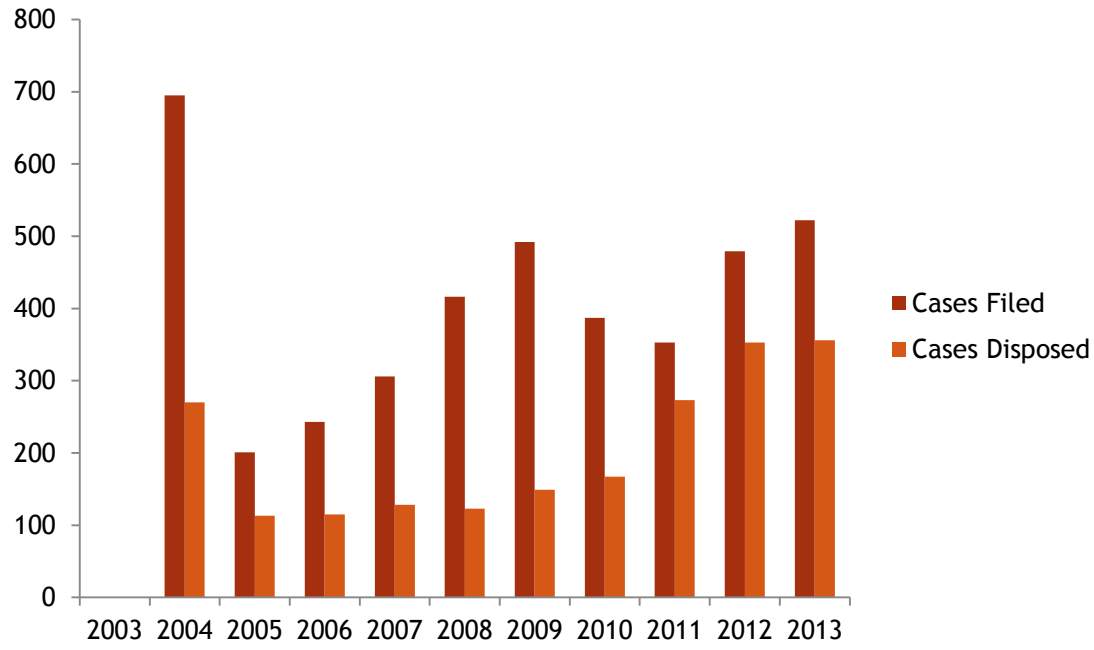
[37] Chairman's Report, (n 2), paras 9 and 10.

[38] Data on filing and disposal sourced from RTI application – A-C-30016/4/2005-IPAB/RTI, dated 25.03.2014, filed at the IPAB by Alok Prasanna Kumar

As the numbers show, there has been a large gap almost every year since the start between the number of cases filed and the number of cases disposed of by the IPAB. It has an overall disposal rate of exactly 50% with 2047 cases pending disposal as of the end of 2013. In no year has the disposal rate exceeded eighty percent of the cases filed and the large backlog of cases transferred from the High Court right from the start has only added to the problems. The IPAB's disposal rate also compares unfavourably to the disposal rate of the High Courts over the same period which, as we pointed out earlier, was close to 90 per cent. However, it must be noted that despite the infrastructural and personnel problems, there has been a significant improvement in the efficiency of the Tribunal in terms of the disposal of cases.

While we had sought the data on the period for which the cases have been pending, such data is not maintained by the IPAB and could not therefore be accessed by us. Be that as it may, it would seem that the rate of disposal being far less than 100% in each year, has inevitably led to delays in disposal of cases.

Graph 1: Comparison of Filing and Disposal in each year

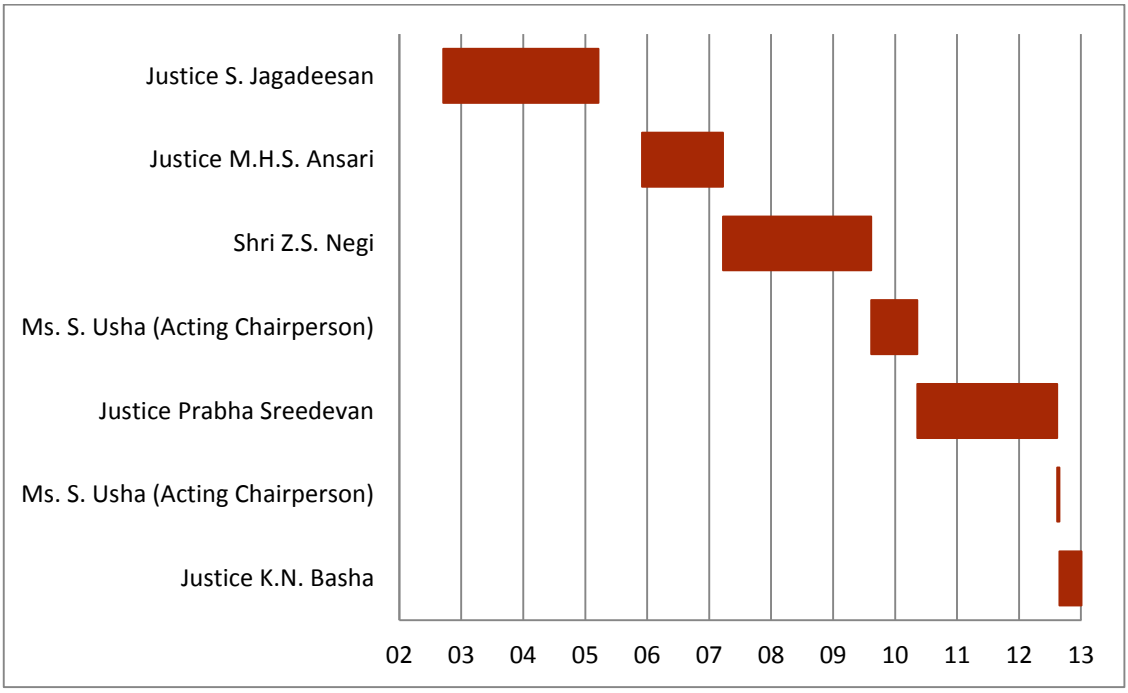


If we examine the trend over time however, it seems as though the rate of disposals is improving but it will need to be significantly over 100% of the cases filed in a year if the IPAB has to make any impact on the large number of cases pending currently. With the jurisdiction of the tribunal being widened in recent years, the number of filings has increased, despite the large backlog, and disposal will have to be increased to keep pace with this. The increase in efficiency in the last three years suggests that this is possible and can be achieved.

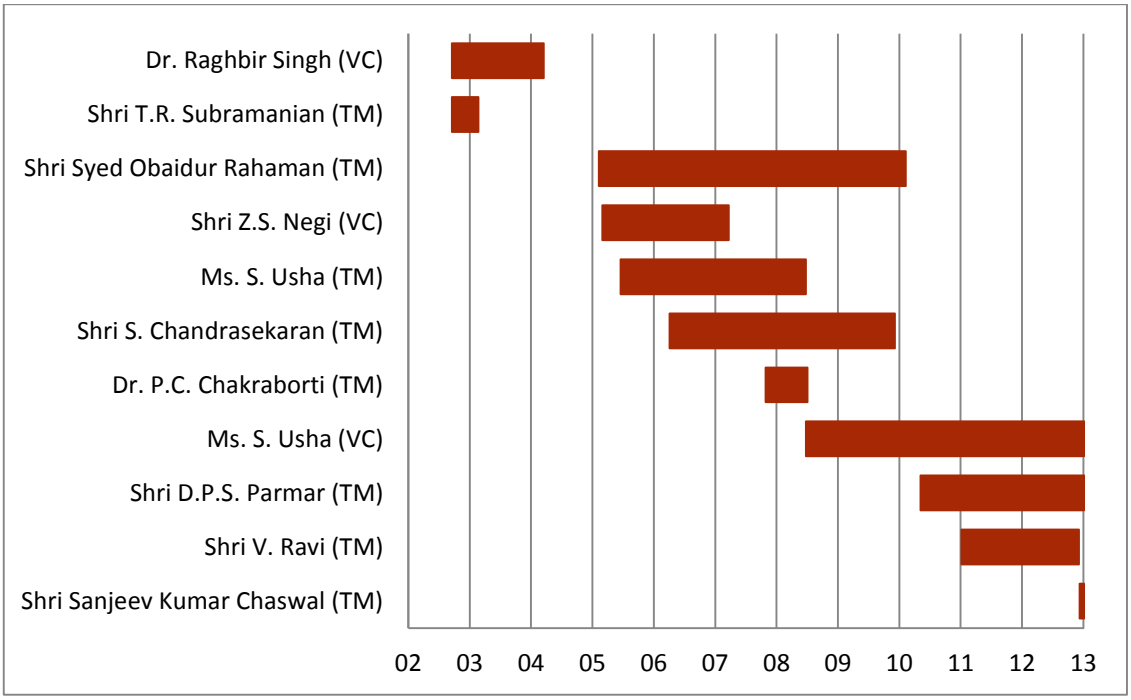
As the charts below show, there have been significant periods of time when the Tribunal has not been at full strength. For instance, in the period between 2010-11, the IPAB was down to just three members with two vacancies being unfilled, and only one of which was filled. In 2005 and up to 2006, we also find that no Chairman was appointed to the IPAB and the post lay vacant for the better

part of the year. It is self-evident that the rate of disposal of the IPAB would undoubtedly improve if the vacancies were filled up as soon as they appeared.

GRAPH 2



GRAPH 3



(b) Infrastructural issues

The IPAB is one of the few tribunals in India which is under both national and international scrutiny. Matters before the IPAB often have far-reaching implications on international trade and commerce, especially in the pharmaceutical industry. As such, it is of paramount importance that the smooth functioning of the IPAB is not hindered by poor infrastructural facilities. However, in our research, the evidence we came across suggests exactly this unfortunate reality.

Due to the pan-India jurisdiction of the Board, the volume of cases being handled by the IPAB has considerably increased since inception. On an average, the IPAB office has to maintain about 5000 case files at any given time.[39] Given the workload, it is pertinent to point out that the Government failed to conduct a 'judicial impact assessment' to assess the resources required by the IPAB and has always allocated insufficient funds for the smooth functioning of the IPAB, even when compared to other tribunals of a similar case load and size.[40]

(i) Space constraints

As Justice (Retd) Prabha Sridevan noted in her report to the Madras High Court, the space required for the smooth functioning of the IPAB is at least 22,330 sq. ft. whereas the space available to the tribunal is a meagre 5000 sq. ft. Library facilities are absent and the record rooms are inadequate.[41] It is only recently that new facilities have been sanctioned by the Ministry of Commerce which should hopefully satisfy the current needs of the IPAB.[42] Justice K.N. Basha, the current Chairman noted that the process of upgrading infrastructure is underway and that the Ministry for Commerce and Industry has been responsive in addressing the Board's concerns. However, he was of the opinion that if the Board was given more financial autonomy, it would be able to sort out such issues on its own in an expeditious manner.[43]

(ii) Lack of human resources

There is a severe shortage of administrative and support staff at the IPAB. The phenomenal growth of the workload since inception has not been complemented by way of creation of additional posts. Despite the complete utilization of the human resources available, the progress of the Board has been hampered due to the shortage of staff.[44]

Considering the workload, it is quite evident that the insufficiency of funds is having an adverse impact on the functioning of the IPAB. Resources such as libraries, subscription to research portals,

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[39] Chairman's Report, (n 2), Annexure A.

[40] *Ibid.*

[41] *Ibid.*

[42] Foundation stone laid for Intellectual Property Appellate Board building in Chennai, available at <http://timesofindia.indiatimes.com/city/chennai/Foundation-stone-laid-for-Intellectual-Property-Appellate-Board-building-in-Chennai/articleshow/31424747.cms> (accessed on 30 May 2014).

[43] Interview with Justice K.N. Basha, Chairman, IPAB on 30 April, 2014.

[44] *Ibid.*

and administrative staff are the fundamental requirements for any tribunal to function in a smooth manner. The IPAB, being a tribunal of international importance, should be provided with sufficient funding and financial autonomy for making use of its budget as it sees fit.

In our conversation with present Chairman Justice (Retd) K.N. Basha, he maintained the opinion of his predecessors that the staff at the IPAB is severely inadequate compared to the workload. Sanctioned posts are very few and posts such as office attendants have to be appointed on contract basis. He felt that the IPAB can handle the workload, provided all vacancies, including support staff are appointed.[45]

To answer the question that we had raised:

Does the IPAB function more efficiently than the High Courts it was supposed to replace?

Ans: **No, the IPAB functions less efficiently than the High Courts it was supposed to replace in terms of the rate of disposal. This can be attributed both to delays in appointment as also the absence of adequate infrastructure.**

3. Efficacy

Efficacy of the IPAB has been analysed on the basis of (a) an assessment of select judgments of the tribunal and (b) the rate of success of appeals from its orders and judgments.

(a) Assessment of select judgments

In this section, we have briefly analysed a few select judgments delivered by the IPAB, with the objective of assessing the legal reasoning adopted in IPAB decisions and whether the orders and judgments of the IPAB apply the proper reasoning to the facts of the case.

(i) Novartis v. Union of India & Others[46]

This judgment, rendered by a two judge bench (one Chairman and one Member) of the IPAB rejected the patent application filed by Novartis to patent the anti-cancer drug Glivec in India. The appellant filed an application for patent on 17th July, 1998 claiming Switzerland priority date of 18th July, 1997 for an invention titled "Crystal Modification of a n-phenyl-2-pyrìmidineamine derivative, processes for its manufacture and its use". Thereupon several petitioners filed representations by way of oppositions to the patent application under Section 25(1) of the Patents Act. 1970. The Assistant Controller of Patents and Designs rejected the patent application on the ground that the invention was anticipated by prior publication[47], that the invention claimed by the appellant was obvious to a person skilled in the art and the patentability of the invention was disallowed by Section 3(d) of the Act. The appellant challenged this order of the Controller through a writ petition in the

[45] Interview with Justice K.N. Basha, Chairman, IPAB (n 43).

[46] AIR 2013 SC 1311.

[47] In patent law, anticipation refers to the prior invention or disclosure of the claimed invention by another, or the inventor's own disclosure of the claimed invention by publication, sale, or offer to sell prior to the inventor's application for a patent.

High Court of Madras, which was then transferred to the IPAB after the TM Act was brought into force.

The Court held that for determining patentability of pharmaceutical substances, in addition to the invention being new, useful and non-obvious to a person skilled in the art, it has to satisfy the additional requirement of Section 3(d) of the Act which says that new salt forms, polymorphs etc. or derivatives of a known substance are not patentable unless this form demonstrates significant enhancement of properties with regard to therapeutic efficacy. The Board held that the drug failed the test of enhanced therapeutic efficacy under Section 3(d) of the Act and was not patentable.

The case went to the Supreme Court, where it held that the substance that Novartis sought to patent was indeed a modification of a known drug and that Novartis had failed to furnish evidence highlighting the difference in the therapeutic efficacy between the final form of Glivec and the raw form of the drug.

The law laid down by the IPAB and upheld by the Supreme Court seems to have set the domestic standard of patentability of pharmaceutical chemicals and is possibly the first of its kind decided by any forum in the world, putting an end to the practice of "ever-greening", i.e., where a patent's validity is sought to be extended by adding an inventive step to the process without necessarily increasing its efficacy.[48] The reasoning of the IPAB was sound, keeping in mind not only the interpretation of the law, but also the larger policy that IP law in India is supposed to further, such as access to life- saving medicines. The IPAB has gone in depth into not just the legal aspect but also the technical minutiae relating to the formulation of new drugs and the basis for which patents are awarded to such technological advances. The judgment has taken into account the full conspectus of the facts and is carefully reasoned, with the Supreme Court agreeing on all major findings in appeal.

While the judgement was lauded in India, many in the international community have claimed that the additional requirement of Section 3(d) goes beyond the standard of patentability mandated in the TRIPS agreement. India has maintained that its patent laws are in accordance with TRIPS, and Section 3(d) of the Patents Act is valid under the Doha Declaration on the TRIPS Agreement and Public Health.[49]

(ii) Bayer Corporation v. Natco Pharma Ltd.[50]

This judgment was delivered by the IPAB by a bench comprising the Chairman and one Member. Bayer Corporation, which is an internationally renowned manufacturer of innovative drugs, held the rights to a patent for a kidney cancer drug, "Sorafenib Tosylate", otherwise marketed as "Nexavar". The Patentee (Bayer) first applied for Patent in the United States and later entered into international

[48] See Shamnad Basheer, "Patent with a Purpose", The Indian Express, 03 April, 2013, available at <http://archive.indianexpress.com/news/patent-with-a-purpose/1096741/0> (last accessed on 12 June 2014).

[49] Doha Declaration on the TRIPS Agreement and Public Health was adopted by the WTO Ministerial Conference of 2001 in Doha on November 14, 2001. It reaffirmed flexibility of TRIPS member states in circumventing patent rights for better access to essential medicines.

[50] MIPR 2013 (2) 97.

filing on 12th January, 2000. A Patent was granted to Bayer on the drug "Nexavar" by the Indian Patent Office on 3rd March, 2008. Natco Pharma, a reputed Indian generic drug manufacturer, approached Bayer for a voluntary license, which was denied. Natco Pharma then filed an application before the Controller of Patents seeking a compulsory license for Nexavar and the Controller granted the licence by order. Bayer appealed to the IPAB against this order.

The Board confirmed the grant of compulsory licence agreeing with the decision of the Controller and modified the impugned order only to the extent of rate of royalty to be paid to the patentee. There were three main reasons behind this decision. First, Bayer could only supply its drugs to 2 per cent of India's patient population and did not meet the reasonable public criteria requirement. Second, considering the per capita income of India, the drug's prices were not affordable, and third, the drug was not manufactured in India and was imported. Bayer in fact did not import the drug at all in 2008 and imported very few quantities of the drug in 2009 and 2010 which made it impossible for the company to satisfy the needs of India's patient population.

The Board observed, *"Therefore, when we look at section 84 of the Act, having regard to section 83, as we are directed by that section, it is clear that it is the duty of patentee to show that the patentee by its own supply has satisfied the reasonable requirement of the public and by its supply, the drug is made available at a reasonably affordable price. The appellant cannot ride piggyback on CIPLA's sale, particularly when the appellant is fighting CIPLA before another forum regarding the same invention and the same drug."*

Further, the Board held that, *"the right of access to affordable medicine is as much a matter of right to dignity of the patients and to grant stay at this juncture would really affect them and further, it would in effect amount to deciding the main petition itself. Though this is not a reason why we are not granting stay, yet this is an additional factor."*

As with the *Novartis* judgement, this judgement too was criticised in the international community, especially by foreign pharmaceutical companies, but the reasoning given by Justice Prabha Sridevan has been appreciated in India. Although ostensibly the IPAB is limited in its function as a statutory tribunal, it has nevertheless approached the issue as any court would, seeking to appreciate and further the underlying policy of India's patent law. This was the first major case in which the issue of compulsory licensing of life saving drugs was involved and the judgment of the IPAB, while following the dictates of the policy, also sticks closely to well- established canons of legal construction and reasoning.

(iii) ITC Ltd. v. Cadbury Schweppes Overseas Ltd.[51]

This judgement was delivered by a bench comprising the Vice-Chairman and one Member. The applicant had been continuously and extensively using the trade mark "*Éclairs*" in conjunction with its famous trade mark "*Candyman*" which was well recognized by the customers. The trade mark "*Cadbury Eclair*" was adopted by the respondent's predecessors several decades ago and used as a product under the name *Cadbury Chocolate Eclairs/Eclair* in the year 1972 in India. On 05.04.2005, the applicants received an order of exparte injunction passed by the City Civil Court Judge, Ahmedabad dated 01.04.2005 restraining the applicant from using the trade mark *"Eclairs"* or any other deceptively similar trade mark. The said order was in a suit filed by the registered

[51] MIPR 2013 (3) 285.

proprietor/respondent. The applicants approached the Hon'ble High Court of Gujarat and the High Court of Gujarat passed a modified order dated 15.4.2005 stating that the applicants could manufacture and sell their éclairs products as *Candyman Choco eclairs*.

The applicants filed rectification applications before the IPAB. The applicant submitted in this case that the trade mark Éclairs is liable to be removed as it has not been used since the year 1994. Secondly, the Registrar ought to have imposed a disclaimer condition in respect of the word éclair. The impugned trade mark was wrongly registered violating Sections 9, 11 & 18 (1) of the Trademarks Act, 1999. The impugned trade mark is not distinctive of the registered proprietor at the time of filing of the present petition. The respondents stated that the application for rectification is liable to be dismissed as the affidavit which is the requirement of Rule 8 (1) (1) of the IPAB (Procedure) Rules was not filed. This application for rectification is a counter blast to the civil suit filed by the respondents. The ground of non-user is not maintainable as the respondents have been using the trade mark continuously and extensively without any interruption. The onus to prove non-user has not been discharged by the applicant. The word éclair only forms part of the mark and does not constitute the whole mark against which the applicant has filed the application for rectification.

The Board stuck to the view that the ground of non-user does not hold good. On perusal of the records i.e., the counter statement and the documents, the Board concluded that the respondents have filed only the registration certificates obtained in various countries but there was no evidence to show or prove their user. The Board allowed the rectification applications and directed the Registrar to remove the corresponding trademarks in the applications.

This reasoning employed by the bench was consistent with prevailing precedent that if the respondent does not rebut the ground of non-use, the tribunal may conclude that the respondent has not used the mark and accordingly cancel the mark. The decision also clarified the rule that the initial onus to prove is on the applicant and once discharged, shifts to the respondent.

(iv) Subhash Jewellery v. Payyannur Pavithra Ring Artisans and Development Society.[52]

This judgment was delivered by a two Member bench of the IPAB consisting of the Chairman and Vice-Chairman. This judgment is on an appeal against an order passed in opposition proceedings granting Geographical Indication (G.I.) registration of Payyannur Pavithra Ring in the name of respondent Payyannur Pavithra Ring Artisans & Development Society (herein 'Society') which claimed to represent the interest of the producers of the ring. The appellant, Subhash Jewellery submitted stay of the registration proceedings but the Board directed publication of the ongoing registration procedure in the local newspaper. Several affidavits were received thereafter and an Intervening Petition was also filed by Shri C.P.K. Raghavan, who claimed to be the Secretary of Sree Choovatta Valappil Tharavad Dharmadaiva Paripalana Trust formed by the Members of the Tharavad. According to him, the G.I. registration ought not to have been given to the respondent society who has no connection with the artisans of Payyannur Pavithra Ring or the Choovatta Valappil Tharavad and also alleged that the society obtained the G.I. registration by suppression and fabrication of documents which in turn seriously affects the effective livelihood of the artisans.

The Board held that the respondent had failed to furnish crucial particulars like evidence to show that the association represented the interest of the producers. The Board held that in IPR related

[52] 2013 (55) PTC 197 (IPAB).

matters, be it G.I., Patents or Trademarks the dispute is really not inter-parties alone, there is always the issue of public interest which should be protected. The Board ordered removal of the name of the respondent from G.I. registry. The Board further directed the Trade Mark registry to send notice to all the parties concerned including those mentioned in para 10 of the judgment who have filed their affidavits.

The Board held that *"the main object of the Geographical Indications of Goods (Registration & Protection) Act is to protect those persons who are directly engaged in creating or making or manufacturing the goods. When these creators or makers complain that the application has been made behind their back, we cannot allow the registration to remain."* A landmark decision of the IPAB, it sent the message that public interest always comes first in India's IP regime.`

(v) Electronic Navigation Research Institute v. Controller General of Patents & Design.[53]

The order was delivered by a two member bench, consisting of the Chairman and a Technical Member. The appellant's patent application titled "a Chaos Theoretical Exponent Value Calculation system" was concerning a system for analysing a time series signal based on Chaos Theory and for calculating the chaos theoretical exponential value thereof. The Controller held that the functions of the so-called system are based on a mathematical method for solving mathematical equations, and declined to accept the 'technical effect theory' followed under European Patent law, as he was of the opinion that Indian law does not allow patents for mathematical methods which have a technical effect. The invention was rejected as not patentable under S.3(k) of the Patents Act 1970.

Before the IPAB, the appellant alleged that the Deputy Controller had not substantiated the objection under Section 3(k) till the date of hearing. The IPAB stated that it was unable to understand the allegation. It further stated that it is for the Controller to raise the objection and for the applicant to substantiate his case. The IPAB, therefore, did not allow the appeal on this ground; however, it stated it is always better if the Controller explains his objections clearly.

The appellant also argued that the Deputy Controller had wrongly negated the 'technical effect" and had incorrectly held that Indian patent law did not follow the European Patent Convention. The IPAB referred to the previous landmark case on the patentability of business methods - *Yahoo v. Rediff*, wherein a similar ground was raised. The IPAB restated its previous stand and held that the "inventive step", which is a technical advance compared to the existing knowledge, should be associated with a feature which is not a part of the excluded subject matter itself. The IPAB further stated that the applicant, by citing economic significance or technical advance in relation to any of the excluded subjects, cannot insist upon grant of patent thereto.

Thus it was held that the invention, which was a technical advance was nothing more than a "mathematical method" for solving mathematical claims. The identifiable subject matter itself was excluded subject matter under Section 3(k) and thus, could not overcome a rejection under that section. Accordingly, the Controller's decision was upheld and the appeal was dismissed by the IPAB.

The analysis of the claim was key in this case as the subject matter was highly technical but by carefully and scientifically analysing the subject matter in this case, the Bench rightly came to the

[53] MIPR 2013 (3) 67.

conclusion that it was a "mathematical method" and the application would thus be rejected under Section 3(k).

The above cases are some of the most important decisions of the IPAB in the field of patents, trademarks and geographical indications. As mentioned earlier, such decisions often have an impact across India's borders through trade implications. In this context, with limited resources, the IPAB has repeatedly stood up to the challenge of upholding India's IP regime in a global community of stakeholders which has often been critical of India's IP standards. The quality of judgments delivered is carefully reasoned, not applying the tools of interpretation to the laws at hand but also drawing upon international experience, technical inputs and examining the underlying policy goals of the legislative provisions. We see this most clearly in the context of patents for drugs especially in the *Novartis* and the *Bayer* cases discussed above.

(b) Success of Appeals

An assessment of the efficacy of IPAB judgments is also possible by a review of the success of appeals made to higher Courts from this tribunal. The TM Act does not provide for an appellate procedure for an order of the IPAB. In the absence of any statutory provision for appeal, parties are forced to approach the concerned High Court under Art. 226 of the Constitution of India.

The IPAB has its permanent sitting at Chennai and holds its sittings in Circuit at Delhi, Mumbai, Kolkata and Ahmedabad. The orders of the IPAB are subject to the High Court's power of judicial review. The High Court which exercises this judicial superintendence is that High court within whose territorial jurisdiction the IPAB sits while issuing its order. Therefore, if an order is passed by the IPAB while sitting in Delhi, the aggrieved party applies to the Hon'ble Delhi High Court to correct the order and so on.[54]

In the case of *Shamshad Ahmad v. Tilak Raj Bajaj*[55], the Supreme Court, while taking into consideration various judgements on the power of the High Court under Article 226 and 227, held that the powers are very wide and extend over all subordinate Courts and Tribunals, but the power should not be exercised as a Court of Appeal and should not review or re-appraise the evidence. The Court made it clear that ordinarily, interference should be limited to cases where there is a grave miscarriage of justice or flagrant violation of law.

The High Courts have undoubtedly been conscious of the scope of their powers under Article 226 and 227 as defined by the Supreme Court while considering petitions challenging orders of the IPAB. In *Glaxo Group Ltd. v. Union of India & Ors.*[56] the Court observed:

> *"That brings up the point concerning the extent of judicial review of the IPAB's order that is permissible to be undertaken in proceedings under Article 226 of the Constitution. The IPAB is a specialised tribunal set up exclusively for IPR cases. The appeal before it is both*

[54] *Pravin Kumar Singhal v. Jeet Biri Manufacturing Company Private Ltd.*, M.P.NO.200/2008 IN ORA/147/2008/TM/DEL, M.P.NO.192/2008 IN ORA/153/2008/TM/DEL and M.P.NO.108/2010 IN ORA/277/2009/TM/DEL.

[55] (2008) 9 SCC 1.

[56] 2010 (42) PTC 507 (Del).

> *on facts and on law just as a first appeal against the judgment of a civil court. The IPAB is therefore expected to analyse the evidence on record intensively and determine the issues arising before it. This Court finds that the impugned order does not bring out any analysis of the available evidence on the above lines. Even the questions of law, viz., whether Section 12(3) of the TM act 1958 is an exception to Section 12(1) and 11(a) thereof has not been formulated, much less addressed by it. In the above circumstances where the IPAB has failed to consider the materials before it and address the legal issues, a case has been made out for interference by this Court under Article 226 of the Constitution. The appeal requires to be restored to the file of the IPAB to be considered afresh by it on merits."*

In another review petition before the Delhi High Court, the Court discussed the scope of power of review as under:

> *"This brings me to the question of maintainability of the writ petition. It has been argued on behalf of the respondent No. 2 that the matters and the issues involved in the present petition are not to be gone into in exercise of this court's power under Articles 226/227 of the Constitution of India. It is correct that this court is not sitting as a court of appeal and cannot re-appreciate evidence and examine factual matters. But, what I find in the present case is that the Appellate Board has not even broached the subject of distinctiveness and has been overly concerned with establishing the user of the respondent No. 2 from the date it claimed in its application for registration. This is not a case of re-appreciation of evidence. It is a case where the Appellate Board has not examined any material at all with regard to distinctiveness. In fact, it has not returned any finding with regard to distinctiveness. A writ petition in such a situation would definitely be maintainable. It would, however, not be appropriate for this court to examine and determine the factual issues of distinctiveness. That is best left to the Appellate Board."*[57]

Since there are no provisions providing for a statutory appeal from the decisions of the IPAB, the High Courts and the Supreme Court of India have exercised general powers of judicial review under Article 226 and special leave appeal under Article 136 when invoked by parties. The width of analysis under an appeal is much wider than the width of the analysis under judicial review and therefore the two must be examined separately. A detailed table listing all 38 cases decided in the High Courts and in the Supreme Court, arising out of orders of the IPAB are contained in the Annexure to this report.

Our analysis found 34 decided cases in the High Courts and 4 decided cases in the Supreme Court which relate to orders of the IPAB. Of the four Supreme Court cases, two cases were remanded back to the IPAB for fresh consideration and in the other two, the orders of the IPAB were upheld. Given the small number of cases decided by the Supreme Court, we cannot say categorically one way or another whether the Supreme Court has tended to uphold the finding of the IPAB or not.

Of the High Court cases, we find that the High Court upheld the finding of the IPAB in a small majority of cases (19) and allowed the appeals against the findings of the IPAB in 15. An analysis of all petitions before the High Courts of Bombay, Calcutta, Gujarat, Delhi and Madras challenging decisions of the IPAB therefore seems to suggest that in terms of numbers, the High Courts have a slight preference towards upholding the order of the IPAB which is a positive sign for the effectiveness of the tribunal.

To answer the questions we had raised in this context therefore:

[57] *Rajinder Kumar Aggarwal v. Union of India,* 2007(35) PTC 616 (Del).

(1) Do the judgments of the IPAB reflect sound reasoning and proper application of law to the facts?

Ans: **Yes, an analysis of representative judgments of the IPAB seem to suggest that the judgments are well reasoned and go in depth into the complex technical facts which are involved in patent law disputes.**

(2) How do the superior courts deal with findings of law and fact made by IPAB in appeal or in review?

Ans: **While very few judgments appealed directly to the Supreme Court, of the few which were appealed, the Supreme Court has upheld the judgment of the IPAB in one of these cases and remanded the case to the IPAB in two others. However, in those cases where the final orders of the IPAB are challenged by way of Article 226 petitions, we find that a majority the orders of the IPAB are upheld by the High Court in question.**

4. Analysis of Tribunals, Appellate Tribunals and Other Authorities Bill, 2014 in context of the IPAB

The Tribunals Bill was introduced in the Rajya Sabha on 17 February 2014. The Bill seeks to provide for uniform service conditions with regard to retirement age, tenure of appointment, accommodation for members and Chairpersons of tribunals, appellate tribunals and authorities performing quasi-judicial functions. The Bill seeks to include the IPAB within its purview, as specified in the First Schedule to the Bill.[58]

The only major change this will bring in the functioning of IPAB is in the appointment of Chairperson and Members. For a Chairperson or other Member who has been a Judge of the Supreme Court, the age of retirement is seventy years, whereas for those who have been a Chief Justice or Judge of a High Court, the corresponding age is sixty seven years, and for all other Chairpersons or Members, the retirement age is sixty five years.[59] However, the Bill is silent about the appointments, term and others aspects regarding the Vice-Chairman. Therefore the provisions pertaining to Members will also apply to the Vice-Chairman. Most provisions of the Bill are concerned with allowances and medical benefits, pension and conditions for suspension of pension, conditions for grant of leave, prohibition of arbitration or practice, and the like. None of these provisions are addressed in the TM Act, and are merely subordinate legislation at present. This Bill will thus not substantially affect the functioning of the IPAB.

[58] Tribunals Bill, n. 8, First Schedule, Entry 21.

[59] *Ibid.*

C. Summary of Conclusions and Specific Recommendations

To summarize the conclusions on the eleven questions we had posed earlier, in the specific context of the IPAB:

(1) Is the Executive required to consult with the Judiciary in the appointment of members to the IPAB?

Ans: **While the appointment of the Chairman is made in consultation with the Chief Justice of India, the appointment of other members of the Tribunal does not require consultation with the Chief Justice of India.**

(2) Since the IPAB is required to review the decisions of the Executive, does such "consultation" also mean concurrence?

Ans: Applying judicial precedent in similar cases, it may be argued that consultation should mean concurrence in the present case, but in practice it seems that consultation has been treated as concurrence.

(3) Are the qualifications of the expert member to the tribunal concomitant with the jurisdiction and powers of the tribunal?

Ans: No, the qualifications prescribed are not concomitant with the jurisdiction being exercised by the Tribunal. While the qualifications for a person who has not been a government servant are similar to that of a High Court judge, a Member who has been in government service may be appointed to the IPAB even if he does not enjoy the rank of an Additional Secretary.

(4) Do the provisions of the parent statute provide sufficient protection from Executive interference in the terms and conditions of service in the course of engagement as a Member of the IPAB?

Ans: Yes, the Rules providing for salaries and emoluments are subject to Parliamentary oversight.

(5) Is there any protection from unfair variation to the disadvantage of a member?

Ans: No, there are no protections against unfair variation to the disadvantage of a member.

(6) Are there sufficient procedural safeguards in ensuring that the removal or suspension is not within the sole discretion of the Executive?

Ans: **Yes, there are sufficient safeguards in ensuring that the removal of a member is not within the sole discretion of the Executive. The Executive also does not have the power to suspend the Member.**

(7) Does the IPAB have the power to hire and fire its own staff?

No, the IPAB does not have the power to hire staff on its own, though the staff work under the superintendence of the Chairperson and may be removed by him.

(8) Is the IPAB entirely dependent on the Executive for its funds?

Ans: **Yes, the IPAB is entirely dependent on the Executive for its funding and also does not have independent infrastructure of its own.**

(9) Does the IPAB function more efficiently than the High Courts it was supposed to replace?

Ans: **No, the IPAB functions less efficiently than the High Courts it was supposed to replace in terms of the rate of disposal. This can be attributed both to delays in appointment as also the absence of infrastructure.**

(10) Do the judgments of the IPAB reflect sound reasoning and proper application of law to the facts?

Ans: **Yes, an analysis of representative judgments of the IPAB seem to suggest that the judgments are well reasoned and go in depth into the complex technical facts which are involved in patent law disputes.**

(11)How do the superior courts deal with findings of law and fact made by tribunal in appeal or in review?

Ans: **While very few judgments appealed directly to the Supreme Court, of the few which are appealed, the Supreme Court has upheld the judgment of the IPAB in all these cases and remanded the case to the IPAB in two others. However, in those cases where the final orders of the IPAB are challenged by way of Article 226 petitions, we find that a majority of the orders of the IPAB are upheld by the High Court in question.**

In terms of normative independence of the IPAB, we have identified three areas of concern in the TM Act which affect the independence of the IPAB namely:

a. Absence of consultation with the Chief Justice in the appointment of Members
b. Qualifications of persons who can be appointed as Expert Members to the IPAB not commensurate to the jurisdiction and powers of the IPAB.
c. No protection against unfair variation in the terms and conditions of service once a Member of the Tribunal has been appointed.

To remedy this therefore, three major legislative changes are needed to ensure that its independence is adequately safeguarded. These are:

1. Introduce a clause which makes consultation with the Chief Justice of India mandatory for the appointment of Vice Chairman and Members of the IPAB as well.
2. Change the qualifications to ensure that no person below the rank of Additional Secretary to the Government of India is appointed as an Expert Member of the Tribunal.
3. Introduce a clause which prohibits any variations in the terms and conditions of a Member to the disadvantage of such Member during the course of his tenure.

As far as its functional independence is concerned, we see that the IPAB is entirely dependent on the administrative Ministry, the Ministry of Commerce and Industry for its funding and staffing. While the problem of independent infrastructure is being addressed, to address the funding and staffing problems, the TM Act should be amended to permit the IPAB to hire its own staff and also raise its own funds through court fees and such measures where appropriate.

The absence of funding and staffing is also reflected in the poor disposal rate of the IPAB and the high pendency of cases. In addition, the lack of sufficient sittings and delays in the appointments have also resulted in a low disposal rate of cases. While ideally there should be no gaps between the appointment of the Chairman and Members in practice, to ensure that the functioning of the IPAB is not affected, it is recommended that a clause be introduced which allows a retiring Chairman or

Member to serve for an additional period of three months or until a new Chairman or Member is appointed in her stead. This will ensure that the smooth functioning of the IPAB is not affected.

As we have pointed out, the actual orders and judgments of the IPAB, despite the constraints in which it operates, have been well reasoned and detailed, applying the law to the facts where necessary. Some of the IPAB's orders are also path-breaking and lay down the law on important policy issues surrounding IPR.

With these changes, we feel that the IPAB should be able to function as an independent, efficient and efficacious tribunal for the adjudication of intellectual property disputes.

ANNEX I

PETITIONS FILED IN THE SUPREME COURT AND HIGH COURTS CHALLENGING IPAB DECISIONS

	Date of Judgment	Name of Case	Outcome
		A. IN THE HIGH COURT OF BOMBAY	
1	03 April, 2012	*Medical Technologies Limited v. Neon Laboratories Limited & others* W.P. No.2669 of 2011	Held, the finding recorded by the IPAB clearly demonstrated that the Petitioner was held to be "person aggrieved" for the purpose of invoking the provisions of Section 47 of the TM Act. Therefore, the orders passed by the IPAB were just, proper and sustainable in law. Petition was dismissed.
2	29 October, 2012	*M/s. Lakh Enterprises and Anr. v. M/s. Agar Distributors (India) and Ors.* Review Petition Lodging No. 74 of 2012 with Notice of Motion No. 364 of 2012 in Writ Petition No. 364 of 2011	Rule 636 of the Bombay High Court Original Side Rules, 1980 makes it clear that any petition against the order passed by the IPAB under the TM Act is not provided in sub-rule (1) (a). Therefore, a Division Bench would hear such writ petition, not a Single Judge Bench. Petition was allowed.
3	26 October, 2010	*Sudhir Bhatia Trading as V. Bhatia International v. The Central Government of India, through Ministry, The Registrar of Trade Marks, Trade Marks Registry and Midas Hygiene Industries Pvt. Ltd.* W.P. Nos. 8116, 8119, 8121 and 8139 of 2010)	Held, IPAB has to allow production of additional evidence, if the party seeking permission to produce additional evidence establishes that such evidence could not, after exercise of due diligence, be produced by him at the time when the decree appealed against was passed. Petitions were partly allowed.
4	29 April, 2011	*Agar Distributors and Shri Siraj Amirali Soorani v. Intellectural Property Appellate Board, Lakh Enterprises and Juzer M. Lakhwala* W.P. No. 364 of 2011	Held, under the TM Act, 1999, the IPAB is empowered to take additional documents on record as contemplated under Order 41 Rule 27 of the CPC as substantial and procedural laws are required to be followed even by statutory Tribunal. Petition was allowed.
		B. IN THE HIGH COURT OF CALCUTTA	
5	17 May, 2013	*N.V. Sumatra Tobacco Trading Co. v. Registrar of Trade Marks* W.P. No. 11743 (W) of 2012	Held, the IPAB ought not to have interfered with the exercise of discretion by the Registrar in refusing registration as prayed for by the respondent. The order of the IPAB was set aside and the writ petition was allowed.

6	6 June, 2012	*M/s. Stadmed Private Limited & Anr. v. The Intellectual Property Appellate Board & Anr.* *Hon'ble Judges/Coram* W.P. No. 8015 (W) of 2007	W.P. against the order of the circuit sitting at Mumbai. Held, the service and receipt of order at a place within territories in relation to which this Court exercised jurisdiction under Art. 226 had nothing to do with cause of action, and thus, this Court had no jurisdiction. Petition was dismissed.
7	24 July, 2013	*Stadmed Private Ltd. v. Intellectual Property Appellate Board* *F.M.A. No. 860 of 2013 and C.A.N. No. 6796 of 2012*	Held, no petition could be filed at Calcutta High Court when orders were sought to be questioned which were passed within territorial jurisdiction of High Court at Mumbai. Merely its communication at Calcutta, would not constitute part of cause of action to question it at High Court at Calcutta. Petition was dismissed.
8	15 Nov, 2011	*United Spirits Limited and Anr. v. The Intellectual Property Appellate Board and Ors.* W.P. No. 16938(W) of 2011	Held, exercising of power under Art. 226 is not an appellate power; and hence the Court is supposed to substitute its prima facie opinions on any question for that of the IPAB. The petition was dismissed.

C. IN THE HIGH COURT OF GUJARAT

9	08 November, 2012	*Karia District Co-Operative Milk Producers Union Ltd. v. General Mills Inc.* Special Civil Application No. 13455 of 2012	Held, no error could be said to have been committed by the IPAB circuit sitting at Ahmedabad in passing the challenged order. The petition was dismissed.
10	1 July, 2009	*Pathiath Babu Rajendran (since deceased) Gowari Rajendran and Anr. v. Asst. Registrar of Trade Marks and Ors.* Special Civil Application Nos. 10329 of 2007 and 1922, 1923 and 1927 of 2008	Held, the orders passed by the IPAB do not call for any interference by this Court while exercising its writ jurisdiction under Article 226 or 227. Petition was dismissed.
11	20 January, 2012	*Shantikumar Ratilal v. Mahendra Kaur & Ors.* Special Civil Application No. 7411 of 2010	Held, the Petitioner had miserably failed to substantiate its claim that application was erroneously or inadvertently filed in the wrong name. The order passed by the IPAB was correct. Petition dismissed.

D. IN THE HIGH COURT OF DELHI

12	5 January, 2012	*Gilead Sciences Inc. v. Intellectual Property Appellate Board through the Dy Registrar and Ors.* W.P.(C) 7640/2011 & C.M. No. 17304/2011	The Court held that the IPAB is empowered to condone delay in cases disclosing sufficient cause. Petition was dismissed.

13	4 July, 2011	*United Biotech Pvt. Ltd. v. Orchid Chemicals and Pharmaceuticals Ltd. and Ors* W.P. (C) No. 8198/2008 and CM 15758/2008	Held, the IPAB's impugned order cannot be held to be invalid only because it did not advert to, much less follow, the decision of the High Court at the stage of interim injunction. Petition was dismissed.
14	14 July, 2009	*Naresh Kumar Jain v. Union of India (UOI) and Ors.* W.P. (C) 18925/2006	Held, the errors pointed out in the order of the IPAB are relevant and relate to the decision making process by which the final conclusion has been arrived at. Order of the IPAB set aside. The petition was allowed.
15	19 January, 2010	*Dinesh Chandra Vaghani and Ors. v. Union of India (UOI) and Ors.* W.P.(C) No. 10633 of 2009	The IPAB was directed to consider the application as well as the Original Rectification Application again and to take into account the decision, if any, by the Registrar of Trade Marks on Form submitted by the Petitioner. The petition was allowed.
16	28 July, 2006	*Safari International and Anr. v. Subhash Gupta and Ors.* WP(C) Nos. 11946-47/2006	Held, in the totality of facts and circumstances, there is no error or illegality in the order of the IPAB and there are no grounds to interfere with the same. The petition was dismissed.
17	06 February, 2008	*Safari International and Anr. v. Subhash Gupta and Ors.* LPA Nos. 1961-1962/2006	Held, for establishing the allegation of fraud, the Appellant should have placed on record sufficient and cogent evidence. The views of the IPAB and the Single Judge of the HC were upheld. The appeal against the judgement of the Single Judge was dismissed.
18	15 July, 2009	*Classic Equipments (P) Ltd. v. Johnson Enterprises and Ors.* W.P. (C) No. 2157/2008	Held, the power of the High Court under Articles 226 and 227 are very wide and extensive over all Courts and Tribunals, the same are to be exercised not as a Court of Appeal and can neither review nor re-apprise the evidence, but ordinarily should interfere where there is grave miscarriage of justice or flagrant violation of law. Court found no infirmity in the order passed by the IPAB. Petition was dismissed.
19	12 August, 2010	*Takkar (India) Tea Company v. Soongachi Tea Industries Pvt. Ltd.* W.P. (C) No. 3451 of 2007	Held, the conclusion of the IPAB that registration of Petitioner TITC's mark 'GOLD LEAF' was hit by Section 9(1) of the TM Act on the ground of deceptive similarity was not proper and hence was set aside. Petition was allowed.
20	28 April, 2010	*Jolen Inc. v. Shobanlal Jain and Ors.* W.P. (C) Nos. 1210 and 1213 of 2005	Held, both the Assistant Registrar and the IPAB have ignored the settled principles of law by failing to appreciate the evidence placed on record and have rendered decisions that have resulted in manifest injustice to the Petitioner. Petition was allowed.
21	03, August, 2012	*Costa and Company Pvt. Ltd. v. UOI and Ors.* W.P. (C) 8694/2011 & C.M. No. 19662/2011	Held, proceedings before the IPAB were deemed to be judicial proceedings and it was not bound by procedure prescribed in the CPC. Therefore no specific procedure was required to be followed by

			the IPAB, so long as it was fair and complied with principles of natural justice. Petition was dismissed.
22	19 May, 2011	*Champagne Moet and Chandon v. Union of India (UOI) and Ors.* W.P. (C) 9778 of 2006	Held, the Court is not exercising appellate powers. Further, the concurrent determination on facts by the Deputy Registrar and the IPAB has not been shown to be perverse or contrary to the evidence on record. The petition was dismissed.
23	05 February, 2010	*Glaxo Group Ltd. v. Union of India (UOI) and Ors.* W.P. (C) 9478/2006 and CM 7072/2006	Held, the IPAB has failed to consider the materials before it and address the legal issues and a case has been made out for interference by this Court under Article 226 of the Constitution. Petition was allowed.
24	25 September, 2009	*Kunj Aluminium Private Limited v. Koninklijke Philips Electronics NV* W.P. (C) No. 8973 of 2008	Held, keeping in view the nature and extent of goodwill of the respondents, consumers of products and manner and mode in which goods are marketed and sold, order of the IPAB does not seem to suffer from illegality, irrationality or procedural impropriety while cancelling the registration of the petitioner. The petition was dismissed.
25	9 July, 2007	*Rajinder Kumar Aggarwal v. Union of India (UOI) and Anr.* W.P. (C) No. 19678/2004	Held, the IPAB has not examined any material at all with regard to distinctiveness, thus, the petition is maintainable. However, the court shall not examine and determine the factual issues of distinctiveness. The IPAB order was set aside and the matter was remanded to the IPAB.
26	31 November, 2010	*Jain Electronics v. Cobra Cables P. Ltd. and Ors.* W.P. (C) No. 12694 of 2005	The Court concluded that no ground is made out to interfere with the impugned order dated 10th March 2005 of the IPAB. Petition was dismissed.
27	22 April, 2010	*Super Cassettes Industries Ltd. v. Union of India (UOI) and Ors.* W.P. (C) 1263/2005	The court held that there was no occasion for the IPAB to modify the order of the Deputy Registrar by directing Super Cassettes to remove a circle surrounding the letter 'T'. Petition was allowed.

E. In the High Court of Madras

28	27 October, 2006	*B.Mohamed Yousuff v. Prabha Singh & Ors.* W.A. No.863 of 2006 & W.P.No.25372 of 2006 and W.P.No.28352 of 2004; & C.R.P.Nos.800, 808, 809 and 810 of 2006 W.A.No.863 of 2004	There were 2 writ petitions and 4 civil writ petitions in the case. Two of the civil writ petitions and one writ petition were dismissed, while the rest were allowed.
29	1 September, 2009	*Allied Blenders and Distillers Pvt. Ltd. v. Intellectual Property Appellate Board & Ors.*	The Madras High Court upheld the order of the IPAB and the petition was dismissed.

		AIR 2009 Mad 196	
30	29 July, 2010	*Yahoo! Inc (Formerly 'Overture Service Inc.') United States of America v. Intellectual Property Appellate Board* W.P.NO.4462 OF 2010	The writ petition was allowed by setting aside the order of the IPAB and consequentially a direction was issued to the IPAB to number the appeal and decide the same on merits and in accordance with law, within a period of three months from the date of receipt of a copy of this order
31	16 April, 2010	*A. Habeebur Raliman Sons, S. Beedi Factory v. Rajendar & Sons* 2010 (43) PTC 578 (Mad)	The vacate-injunction application is allowed and the interim order of injunction already granted, was vacated. The injunction application was dismissed.
32	30 June, 011	*Eco Lean Research and Development v. Intellectual Property Appellate Board & Ors.* (2011) 7MLJ 427	The writ petition was allowed, the orders passed by the IPAB were set aside and the matter was remitted to the Assistant Registrar of Trademarks for fresh consideration.
33	16 February, 2012	*Rhizome Distilleries Pvt. Ltd. v. Union of India* Writ Petition No. 8681 of 2011	The writ petition was allowed and the order of the IPAB was set aside.
34	23 March, 2013	*Ammini Karnan v. Intellectual Property Appellate Board & Ors.* (2013) 4 MLJ 227	The writ petition along with miscellaneous petitions was dismissed.

F. IN THE SUPREME COURT

35	9 November, 2010	*Infosys Technologies Ltd v. Jupiter Infosys Ltd. & Anr* (2011) 1 SCC 125	The appeals were allowed in part and the impugned order dated September 9, 2004 was set aside. The applications being TRA Nos. 25 to 27 of 2003 (OP Nos. 764 to 766 of 2001) were restored to the file of the IPAB, Chennai for hearing and disposal afresh in accordance with law.
36	18 December, 2008	*Thukral Mechanical Works v. P.M. Diesels Pvt. Ltd. & Anr* AIR 2009 SC 1443	The court set aside the impugned order but permitted the IPAB to proceed to determine afresh the application filed by the first respondent in the light of the legal principles discussed in the case.
37	1 April, 2013	*Novartis AG v.UOI and Ors* AIR 2013 SC 1311	Special Leave Petition against the order of the IPAB was dismissed.
38	27 November, 2013	*Lakha Ram Sharma v. Balar Marketing Private Limited and Ors* AIR 2014 SC 518	The Supreme Court set aside the order of the Delhi High Court and the IPAB.

Centre For Legal Policy

BETTER LAWS. BETTER GOVERNANCE

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