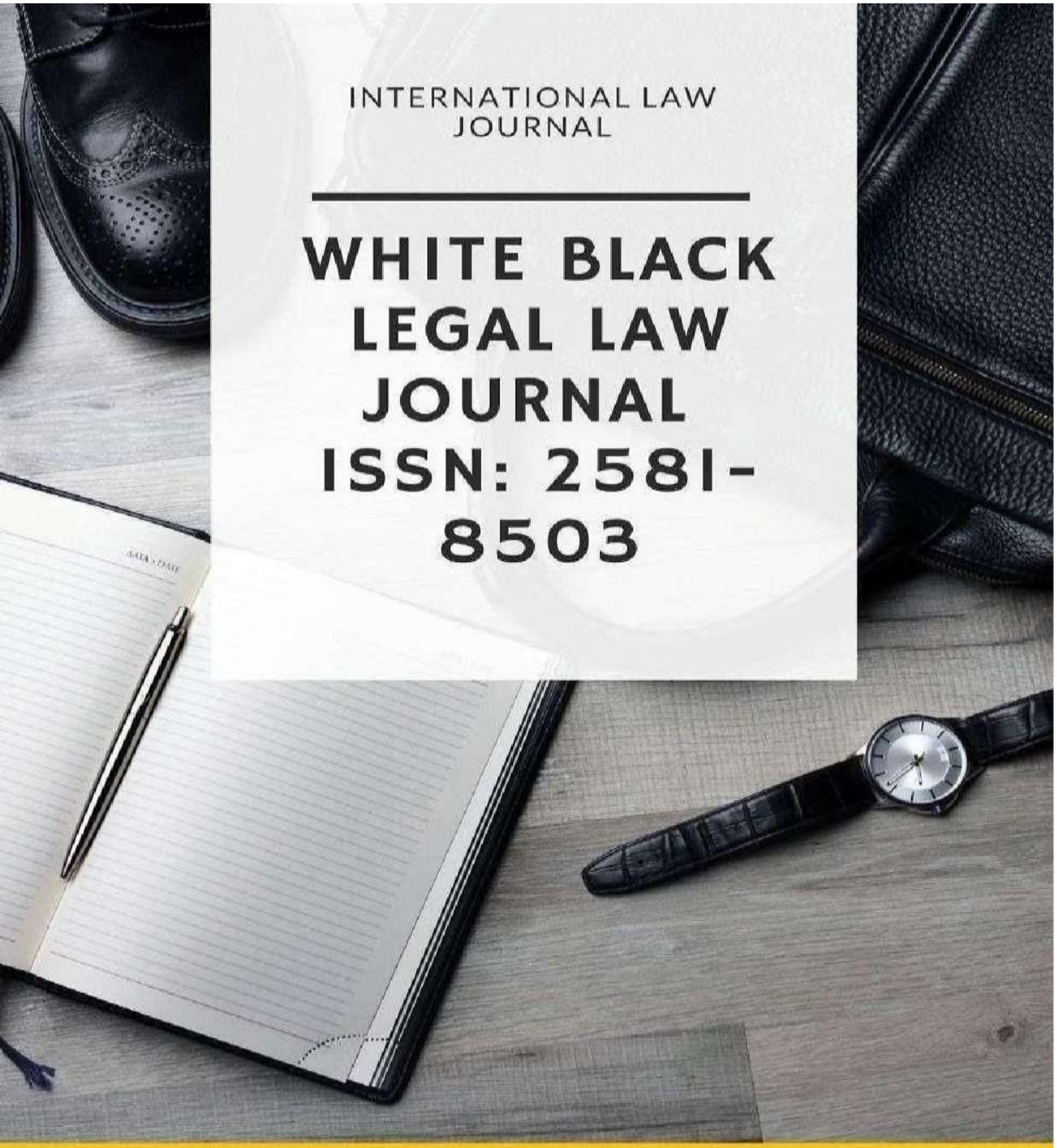

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FROM TAX TREATIES TO INSOLVENCY COOPERATION: WHY INDIA'S CROSS-BORDER INSOLVENCY FRAMEWORK WILL REMAIN CEREMONIAL WITHOUT INTER-REGULATORY COORDINATION AND A BILATERAL TREATY ARCHITECTURE

AUTHORED BY - SHASHWAT BAJAJ
B.Com LL.B,
Amity Law School, Noida, Amity University, Uttar Pradesh

CO-AUTHOR - MS. ARCHANA AGGARWAL

ABSTRACT

The adoption by India of the UNCITRAL Model Law on Cross-Border Insolvency 1997 has been frequently described in the academic literature as the only, and an adequate, cure for the cross-border insolvency problems that currently plague the Indian economy. I offer two novel arguments to question this assessment. First, by using a comparative political economy analysis, using an analogy with Double Taxation Avoidance Agreements (DTAA), I demonstrate that while India has been able to conclude over ninety Double Taxation Avoidance Agreements since the coming of the Code in 2016, it has been unable to conclude a single insolvency treaty under Section 234 IBC. Four distinct differences account for this: misaligned interests between the negotiating parties; the non-existence of any institutional template for negotiations; an enforcement asymmetry which makes DTAAs fully operative while insolvency treaties need judicial assistance; and the involvement of multiple stakeholders in the latter as compared to the former. This difference indicates that the diplomatic infrastructure needed to facilitate cross-border cooperation in insolvency could not be created merely by the legislative enactment of the Model Law. Second, I note that the existence of multiple regulatory authorities, IBBI, RBI, SEBI, CCI and MCA, exercising concurrent but uncoordinated jurisdiction over cross-border insolvency-merger transactions in India is a fundamental disqualifier which means that even a well-drafted Model Law is likely to be ineffectual in addressing distressed cross-border merger scenarios. This is because, under the current statutory scheme, the moratorium under Section 14(1)(b) IBC, which restricts transfer of corporate debtor's assets, is in structural conflict with the Companies Act 2013 framework for

cross-border merger approvals under Section 234, read with Rule 25A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, in the only scenarios where the law is of practical use: that of cross-border mergers in the context of insolvency. I suggest three immediate, specific reforms that, if adopted, would constitute the minimal, but adequate, complement of the Model Law in the Indian context: (i) the creation of a Cross-Border Insolvency Regulatory Coordination Committee (CIRCC) that would ensure single-window clearance by multiple regulatory authorities; (ii) inclusion in the IBC, by way of an amended Section 14(4) IBC, of an express exception to the IBC moratorium in relation to merger-based resolution plans; and (iii) a programme of bilateral insolvency treaties based on a model agreement. The unique contribution of this paper lies in the adoption of an analogical framework based on DTAAs, both as an explanatory device and as a template for future legislative reforms. As far as I am aware, no Indian or international study has hitherto explored the DTAAs and insolvency treaties by way of analogy.

Keywords: Cross-border insolvency; UNCITRAL Model Law; IBC 2016; DTAA analogy; regulatory fragmentation; Section 14 moratorium; cross-border mergers; CIRCC; bilateral insolvency agreements; Centre of Main Interests; India; comparative insolvency law.

I. INTRODUCTION

Eight years after the Insolvency and Bankruptcy Code, 2016 (IBC) took effect, the government's promise of a cross-border framework in India remains unfulfilled, but has not receded. In its announcement on the IBC, the Central Government promised that it would enact cross-border insolvency rules based on the UNCITRAL Model Law on Cross-Border Insolvency 1997 (Model Law). The IBC's existing cross-border provisions, sections 234 and 235, however, have remained ineffective throughout the life of the Code. Section 234 permits the creation of bilateral insolvency arrangements with foreign countries; yet in eight years, not a single such arrangement has been entered into. Section 235 authorises issuing of letters rogatory to the Courts of those countries with which there is a bilateral insolvency arrangement in force; with no such agreement having been concluded with any country, no such letter rogatory has been issued. India's adoption of the Model Law will finally provide a recognition regime to fill this void. 6 The leading academic response and recommendation of the Insolvency Law Committee's 2018 Report was to adopt the Model Law in order to remedy these deficiencies. We argue that while such a remedy may be analytically necessary, it is far

from adequate and, as a matter of prescription, dangerously close to perpetuating the very failure which the present paper seeks to expose.

This paper makes two original arguments, which, to the authors' knowledge, do not appear anywhere else in the literature on Indian and comparative cross-border insolvency law. The first argument relies on an analogy to India's Double Taxation Avoidance Agreements (DTAA), which have been concluded with over ninety countries and are effectively operational. A bilateral insolvency cooperation regime between India and another country has not been negotiated or operationalised, despite the statutory basis in s.234 IBC permitting the Executive to enter into such agreements. The analogy serves two functions:

(i) it serves as a diagnostic tool to highlight four characteristics of the cross-border insolvency cooperation regime which are unique and make its negotiation more difficult than that of a tax treaty (ii) it serves as a prescriptive model for constructing a bilateral cooperation regime which is effective and operational.

The second argument concerns the problem of regulatory fragmentation. Indian law on cross-border insolvency/ mergers is administered by five distinct authorities in a concurrent manner: the IBBI under IBC; the RBI under FEMA (Foreign Exchange Management Act) (23) and the Foreign Exchange Management (Cross Border Merger) Regulations 2018; the SEBI (Securities and Exchange Board of India) under LODR (Listing Obligations and Disclosure Requirements Regulations 2015); ICDR (Issue of Capital and Disclosure Requirements) Regulations 2018; and SAST (Substantial Acquisition of Shares and Takeovers) Regulations 2011; the CCI (Competition Commission of India) under the Competition Act, 2002 (amended by the Finance Act, 2023); and the MCA (Ministry of Corporate Affairs) under the Companies Act, 2013, s.234 and Company (Cross Border Mergers) Rules 2017, r.25A. No mechanism or process exists whereby any of these authorities consult each other while exercising powers under their respective statutes. There is neither a formal, shared information portal, nor any formalised protocol for the sequencing of approvals and clearances required from these different authorities to achieve cross-border insolvency/mergers. The Model Law, which operates solely at the level of inter-court recognition and cooperation between states, introduces a sixth institutional participant into this patchwork, the NCLT, acting as the Model Law's "competent court", while failing to coordinate with any of the existing five. The most striking manifestation of this disjunction is the structural incompatibility between the IBC moratorium under Section 14(1)(b) and the Companies Act's cross-border merger approval mechanism; an incompatibility which yields regulatory stalemate in cases of distressed cross-border mergers, for which the existing scholarship has provided no detailed scholarly examination, and which

demands a discrete legislative solution, the substance of which is provided in draft law form here.

The structure of this paper is as follows. Section II reviews the existing literature and its central thesis, and identifies the three holes in analysis that this paper seeks to fill. Section III discusses the DTAA analogy fully, including the success of India's tax treaties, the failure of bilateral insolvency cooperation (exemplified by the Jet Airways insolvency of 2019 to 2020) and the four structural discrepancies between the two which explain the divergence. Section IV considers the problem of regulatory fragmentation, the Section 14 moratorium's incompatibility with Section 234 Companies Act, the precedents which do not remedy it, and why the enactment of the Model Law alone will not cure it. Section V details three discrete reforms which are offered as a minimum, necessary counterpart to Model Law adoption. Section VI summarizes and concludes.

II. THE EXISTING LITERATURE AND ITS DOMINANT ASSUMPTION

A. The "Model Law as Primary Remedy" Position

There exists a central and essentially uncontested proposition in the academic scholarship on India's cross-border insolvency regime: that the Model Law is the primary and in all but essential fix for India's cross-border insolvency defects. Das (2020) says of the Model Law that "it may be used as a very useful guide for drafting India's cross-border insolvency regime", and that the bilateral agreement process provided in Section 234 is "virtually impossible in practice." Sharma (2021), taking a rather more elaborate approach, contends that the enactment of the Model Law would "radically reform India's cross-border insolvency regime" and that the recognition provisions of Articles 15 to 24 of the Model Law would render the Indian CIRP recognisable in in excess of 50 foreign jurisdictions without any bilateral negotiation. Godwin (2023), the most analytically rigorous treatment of the topic in the global literature, poses the question whether the common law of India and the international comity jurisprudence afford an autonomous basis upon which Indian courts may recognise foreign insolvency proceedings either in addition to or before the coming into force of the Model Law.

Godwin's work is instructive in showing that common law recognition does not amount to a substitute for a statutory regime; that the NCLT, as a purely statutory body lacking inherent jurisdiction, does not carry common law powers of recognition like those possessed by the superior courts of Hong Kong, England and Singapore.

The Indian Law Review (2026) comes nearest to this paper's proposition that bilateral insolvency agreements and the JIN Guidelines must be enacted in conjunction with the Model Law for the development of an effective cross-border insolvency system in India. Yet, even this nearest attempt still fails to articulate a systematic explanation of why bilateral insolvency cooperation agreements remain so challenging to implement within any political economy lens, it does not flag the five-regulator fragmentation as a structural, rather than a solely procedural, disqualifier, and it does not analyze the tension between Section 14 IBC and Section 234 Companies Act with the statutory and precedential acuity that can form a basis for tangible reform proposals.

B. Three Analytical Gaps in the Existing Literature

Three analytical gaps combine to frame the ground where this paper's contributions can be situated.

First, no political economy framework currently exists for why India has failed in bilateral insolvency cooperation. Every paper admits that Section 234 IBC has yet to generate agreements; none offer any reasons why by means of a comparative investigation of how bilateral insolvency cooperation differs from other types of international legal cooperation that India has managed to conclude in the past. India's double-taxation avoidance agreements is the most revealing analogy available under the Indian circumstances. But the existing body of scholarly work on Indian insolvency entirely overlooks the DTAA question. This is a major void, since this analogy does not simply demonstrate that India has failed diplomatically, but also that the nature of the problem of international cooperation for insolvency is structurally distinct from that of the problem of international cooperation for tax in ways that matter for the design of the reform agenda.

Second, no scholarly work currently offers any structural explanation of why India's multi-regulator fragmentation acts as a disqualifying condition for cross-border insolvency. Multiple regulatory bodies' complexity is mentioned only fleetingly, and no one treats the problem of concurrent jurisdiction of IBBI+RBI+SEBI+CCI+MCA as a structural and not only procedural obstacle, which could make an otherwise well-drafted Model Law ineffective in a distressed cross-border merger context, and no one proposes any mechanism for coordination at the statutory level which contains the level of granularity – specifying the conditions for activation, body makeup, time-lines, the single window process and conflict resolution pathways – necessary for this mechanism to operate within the IBC's time-bound CIRP regime.

Third, there has been no doctrinal engagement with the structural tension between the

Section 14 IBC moratorium and Section 234 Companies Act. The tension has been mentioned in practitioner handbooks as a practical impediment, 'the moratorium may prevent the merger from being effectuated,' but not treated in any paper published so far in terms of the relevant provisions, conflicting provisions and prevailing precedent, including Embassy Property Developments and Gujarat Urja Vikas Nigam, together with any draft legislation. The current paper constitutes the first such analysis.

III. THE DTAA ANALOGY: A POLITICAL ECONOMY ANALYSIS OF INDIA'S TREATY COOPERATION ASYMMETRY

A. India's DTAA Success: The Institutional Architecture Behind It

India is among the countries with the largest number of bilateral tax treaties in existence. With 94 countries as of 2024, India's DTAA programme is one of the largest comprehensive DTAA networks in the world. These treaties are negotiated based on the OECD Model Tax Convention (and, in the case of agreements with developing countries, the UN Model Tax Convention). The purpose of these treaties is to create a bilateral structure that allows the states involved to mutually allocate taxing powers, avoid double taxation, mutually exchange tax-related information, and provide mutual assistance in the collection of tax claims. And the DTAA network works. Tax assessments are conducted with reference to the network every day, the network is argued before the Supreme Court (in Vodafone International Holdings BV v Union of India (2012) 6 SCC 613, for example, the India-Netherlands DTAA was held to be directly applicable), and the network is relied on by overseas investors as a credible, predictable, and legally enforceable source of rights.

Three aspects of the DTAA programme explain why this scheme works; we will measure the failure of the insolvency cooperation initiative against these baseline points:

The first is the alignment of the symmetrical interests of states. Both of the contracting states have a direct, calculable and generally symmetrical financial interest in DTAA cooperation. Double taxation, where both states tax the same cross-border income, inhibits cross-border economic activity, reduces bilateral flows of investment and also reduces the tax revenue collected by both states as an aggregate. Under a DTAA, one state cedes some rights to unilateral tax collection but gains greater confidence over what it is entitled to, higher investment flows (and the tax revenue they produce), and improved reputation for being a cooperative member of the international tax system. The gain on cooperation is measurable ex ante by both states; the distribution of costs and benefits is generally symmetrical; and both

states have an ongoing long term interest in ensuring the continued reputation of the treaty.

The second is the OECD institutional blueprint. The OECD Model Tax Convention (along with over 700 pages of the OECD's official Commentary to the Model and Transfer Pricing Guidelines) acts as an accepted international standard and a tested framework for all bilateral tax treaty negotiations around the world. The OECD Model has been adopted with variations in over 3,000 bilateral tax treaties across the globe. The India DTAA negotiations always begin from this OECD template: certain articles are negotiated to deviate from an understood position, rather than being framed from first principles. The transaction costs of individual DTAA negotiations are thus finite – the negotiations involve agreeing on particular deviations from the baseline, as opposed to creating a legal edifice from scratch.

The third is enforcement that is automatic in most circumstances. DTAAs are to a large extent self-executing. In almost all cases of tax collection, the tax department of each contracting state applies the terms of the treaty in its own collection proceedings. Thus, in no instance is a case heard and argued with reference to the DTAA before the other state's courts. In the case of a UK resident receiving dividends from an Indian subsidiary, for instance, the Indian tax authorities simply apply the withholding rate prescribed by the India-UK DTAA to the payment of dividends – an essentially mechanical application of a set rule without the need to engage in any transaction-specific dialogue with UK tax authorities. The obligations of the DTAA are thus not dependent on any ongoing judicial intervention; they operate through the everyday administrative practice of the tax department of each contracting state.

B. India's Bilateral Insolvency Cooperation Failure: Eight Years of Section 234 IBC

The opposite is true for India's bilateral insolvency cooperation under Section 234 IBC, which was implemented in May 2016. In 8 years, there have been 0 successful bilateral agreements executed under Section 234. Thus, Section 235 which provides for letters rogatory to courts of states which have entered into Section 234 agreements remains completely unenforceable as there are no Section 234 states, and there are no countries to send letters rogatory to. The system is a vicious circle. The Insolvency Law Committee in its 2018 Report explained the cause of this: "We find that bilateral negotiations under [Section 234 IBC] are practically infeasible given the negotiations that would be required on a country-by-country basis and the uncertainty about whether such agreements could be concluded within a reasonable period of time."

The Committee recommended adoption of the Model Law as a superior solution. That has not been done either and hence India continues to have neither effective bilateral

agreements nor adoption of the Model Law.

The impact of the failure on both fronts is clear in the case law. The case of Jet Airways is paradigmatic of the failure. In June 2019, when NCLT Mumbai admitted the CIRP application of Jet Airways and stayed all proceedings against the corporate debtor, Dutch creditors had already, prior to the admission order, secured the appointment of a Dutch administrator over Jet Airways' European assets from the Noord-Holland District Court. While the Section 14 moratorium stayed proceedings against the corporate debtor over all of its assets worldwide, and thus the Indian Resolution Professional had theoretical authority under Section 25(2)(a) IBC over "all assets of the corporate debtor", including the European aircraft, route rights, and airport slots, in reality this power was useless because orders of NCLT did not have an extraterritorial effect, and Section 14 did not bind foreign courts in the exercise of their territorial jurisdiction, and neither was there a bilateral agreement between India and Netherlands nor was there recognition of an Indian resolution professional under the Model Law or common law principles. The NCLAT's September 2019 order, which observed that it "hoped and trusted" that the Dutch administrator and the Indian RP would cooperate, did not result in any cooperative framework nor were either of them obliged to do anything. Ultimately the case remained split into parallel insolvency proceedings that added at least two years to the timeline of Jet Airways insolvency and proved in the most unambiguous fashion the high cost of inaction on cross border insolvency cooperation.

C. The Four Structural Differences That Explain the Asymmetry

1. State Interest Misalignment

In the case of DTAA, the interest of states is in cooperation and the interest is clearly identifiable. It is in the revenue of the two signatory governments, since elimination of double taxation increases the bilateral trade flows. Thus the state interest in bilateral cooperation under a tax treaty is a public interest but in this case the state's revenue is the public interest and that is a very powerful combination. Thus the state's interest in tax cooperation is a revenue interest. But even more importantly there is a constituency of taxpayers, i.e. multinationals and outbound investors, on both sides which benefits from the tax cooperation.

The tax administration in both countries and the multinational companies on both sides are strong and organized interests and they align in wanting tax cooperation. Now contrast this interest structure with interest alignment in the context of a bilateral treaty on corporate insolvency: Private creditors – namely banks, bondholders and trade creditors, who recover more via coordinated insolvency proceedings than via parallel uncoordinated ones – would

primarily gain from an effective cross-border insolvency framework. The state's benefit is indirect: an effective insolvency framework leads to higher investor confidence, lower interest-rate premiums for Indian borrowers, and in turn, higher economic growth in the long run. However, this long-run benefit is diffuse, cumulative, and not easily associated with any particular bilateral insolvency framework. The cost to the state is more immediate, direct: by agreeing to give effect to foreign insolvency proceedings, the state displaces its insolvency law with regard to its territory's assets and this may be at the cost of domestic financial creditors.

Given this particular political economy, India, in particular, is not favourably placed to pursue such an agreement. The dominant domestic constituency with respect to insolvency law reform is the domestic banking system, specifically the public sector banks, for which NPAs are a recurrent political headache, and for whom resolution lies in the domestic insolvency law of the IBC working to their benefit. No such organized domestic constituency pushes for insolvency cooperation arrangements that would displace domestic rules in favour of foreign creditors. The regulator for the banking sector, the RBI, and which may be a major actor in a bilateral insolvency treaty negotiation under its FEMA regulations, has a primary mandate to promote financial stability and to protect the interests of the banking system. It is, at the least, not an explicit mandate to promote cross-border insolvency arrangements, which would primarily benefit the financial system abroad.

2. The Absence of an Institutional Negotiating Template

The OECD Model Tax Convention removes the principal transaction cost in the negotiation of any specific DTAA, that is the cost of structuring the legal architecture from scratch. Each provision of a DTAA corresponds to a provision of the OECD Model, along with an accompanying commentary to reflect the accumulated interpretive wisdom of decades of negotiations and disputes. Negotiation of a DTAA starts with an already-agreed structure; only the margin needs to be negotiated. There is no comparable template available for bilateral insolvency cooperation agreements. The UNCITRAL Model Law is a model domestic law for the recognition of foreign insolvency proceedings and cross-border cooperation. It does not constitute a model insolvency agreement. It does not provide for cross-border cooperation in a bilateral agreement but it provides that each jurisdiction will adopt rules on the recognition of foreign proceedings and cross-border cooperation in their own legislation. The UNCITRAL Legislative Guide on Insolvency Law gives guidance on implementing insolvency legislation domestically. However it does not speak directly to bilateral agreements between nations on the scope, timing, and enforcement of cooperation, and creditor priority rules.

The JIN Guidelines are not an OECD of insolvency, they are guidance on how judges

can communicate with each other during cross-border insolvencies, not the substance of the bilateral cooperation agreement. There is no OECD of cross-border insolvency which maintains an inter-governmental insolvency cooperation template, provides technical assistance for negotiations, monitors adherence to these templates and facilitates the development of interpretive precedents.

Every negotiation for a bilateral insolvency agreement, thus, is a unique one. Each needs to develop provisions covering the scope (what kinds of insolvency proceedings would the treaty be for?), trigger for recognition (how does a court determine when a proceeding commenced elsewhere is to be treated as foreign?), grounds for non-recognition (does the public interest exception apply?), priority rules (how will competing creditor priority rules for parallel proceedings be sorted?), mechanisms for coordination (how will administrators during the parallel proceedings need to coordinate?), and dispute resolution mechanism between the two governments. The high transaction costs associated with DTAAs, combined with the lack of specialized skills within both the Ministry of Corporate Affairs and the Ministry of External Affairs, mean that the necessary political capital to maintain such a lengthy and intricate agreement is seldom in stock. Such an agreement would not necessarily generate fiscal revenue for the government but would largely serve the interests of private creditors. Hence, the lack of a ready model is not a question that can be resolved by sheer political resolve – it is an inherent feature of the current scenario of international insolvency cooperation, thus requiring a customised mechanism.

3. Enforcement Asymmetry: Self-Execution Versus Ongoing Judicial Cooperation

A DTAA is a self-executing convention; thus, its enforcement does not require continuous cooperative efforts by the signatory states on a case by case basis. DTAAs are applied unilaterally by each state's revenue authority during their respective tax assessments, without requiring any form of direct engagement with each other's authorities in the course of normal operation. The agreement will become operational if a taxpayer approaches the respective court claiming the treaty's application and/or its implementation. In some instances, mutual agreement procedures might be utilized if the other state contests the other's interpretation of the treaty, but these measures are not needed on a continuous basis in day to day operations.

Bilateral insolvency cooperation agreements, on the other hand, involve different types of obligations. Such an agreement mandates active participation from each respective jurisdiction's court system in every case that may be subject to it. This would mean the foreign court has to recognize the CIRP being conducted in India; issue an automatic injunction

regarding the assets of the corporate debtor that are located within its jurisdiction; participate in the management of the cross-border estate; and coordinate with respect to the admission of the creditors' claims and subsequent distribution of the assets of the corporate debtor, all within the context of an active, unique, time-bound and highly complex insolvency proceeding.

This is far from the standard operationalization of the law – it is active judicial intervention of the most strenuous order. In effect, the implementation of a bilateral insolvency cooperation agreement depends on the individual courts' willingness to fulfill the agreement's stipulation of mutual cooperation; the readiness of their jurisdiction's pool of professionals to understand and work within both the domestic and the cross-border insolvency law framework; and the operational efficiency of each jurisdiction's legal apparatus to deal with the two proceedings in tandem. Any one of these three aspects might be weak – and, even if only one is weak, the agreement will be rendered dysfunctional in operation, regardless of the content of its language.

4. Stakeholder Multiplicity

There are only two broad groups of domestic stakeholders that DTAs concern: the revenue authority, responsible for negotiating and administering such a treaty, and the taxpayers with foreign source income, who are its beneficiaries. Both of these groups are fairly well-defined, organized, and capable of effectively articulating their own interests; the former possesses the relevant legal expertise, an established mandate, as well as institutional structures and procedures with which it has long experience.

A bilateral insolvency cooperation agreement, by contrast, impinges on a far broader and more fragmented group of stakeholders: domestic financial creditors, most of them being the state-owned or public sector undertaking (PSU) banks whose large non-performing assets constitute a systemic risk and who may lose out in the event of a foreign law displacing their priorities; foreign financial creditors, who are well served by the granting of recognition yet have little influence in domestic policy making; domestic courts, which face a direct expansion or contraction of their jurisdiction and their workload depending upon the obligations granted to foreign insolvency proceedings; insolvency professionals, whose mandates may expand or contract depending on the recognition regime; the regulatory bodies, the IBBI, the RBI, the SEBI, the CCI, the Ministry of Corporate Affairs (MCA), and others who could have a different set of regulatory interests at stake depending on the extent of the cooperation that the agreement covers; the employees of the corporate debtor, whose pension and wage claims may be disadvantaged in cross-border coordination under a more generous priority structure in the foreign jurisdiction in a concurrent insolvency proceeding; and the wider citizenry that is

potentially affected by the outcome of an insolvency resolution process that concerns systemically important companies. The coordination of such diverse and often competing interests on behalf of a bilateral agreement, in the absence of a ready institutional template and the lack of a specialized inter-ministerial negotiating committee, is a political and administrative challenge that is orders of magnitude different from the challenges associated with negotiating a DTAA.

D. Three Lessons for India's Reform Agenda

The analogy with DTAA is not only a way to explain the current state of affairs but is also a template for future course of action. I suggest three lessons from the preceding structural analysis.

First, the adoption of the Model Law provides the institutional template to which bilateral negotiations on insolvency cooperation can refer. Just as the OECD Model Convention sets the baseline from which DTAA negotiations can proceed efficiently, the adoption of the UNCITRAL Model Law by India sets out the standard principles of recognition, cooperation, public policy exception, and hotchpot provisions, on which bilateral supplements can be built efficiently in a structured way, and in a way that can be compared against and added to an understood status quo. India’s enactment of the Model Law is therefore a diplomatic pre-requisite for an effective bilateral insolvency cooperation programme and not an alternative to it, the treaty programme and the Model Law are complementary and not substitutive.

Second, there must be a design of the cooperation framework that facilitates the alignment of state interests. The template for the bilateral treaty suggested in Section V(C) of this Article achieves this by creating inbuilt creditor protections the public policy exception, the hotchpot rule, and express provisions regarding the treatment of domestic priority claims within the insolvency proceedings taking place concurrently which ensure that domestic financial institutions are protected from adverse foreign insolvency outcomes. The template, by including the protection of domestic creditors within its terms, also makes a domestic lobby in favour of an agreement on international cooperation possible.

Third, there must be institutional infrastructure that supports the legal texts. India’s DTAA regime can be credited to the OECD template, but to the greater degree, to the infrastructure that was developed within the Ministry of Finance and Central Board of Direct Taxes over decades: the creation of a cadre of economists, lawyers and diplomats with expertise in the field of international tax law, as well as a history of engagement with the OECD as a forum to formulate tax standards, and an organizational culture that places emphasis on treaty

compliance as an institutional priority. India too must have the institutional infrastructure needed for the coordination and execution of its cross-border insolvency cooperation within MCA, IBBI and the Ministry of External Affairs, an infrastructure that does not yet exist, and which cannot be created by simply enacting the Model Law. The institutional mechanism proposed in Section V(A) to facilitate the cross-departmental coordination between regulatory authorities and departments of the Government of India is the first step in developing such institutional infrastructure.

IV. THE REGULATORY FRAGMENTATION PROBLEM: FIVE AUTHORITIES, NO COORDINATOR, AND A MORATORIUM THAT STOPS AT THE BORDER

A. The Five-Regulator Landscape in Cross-Border Insolvency-Merger Transactions

A foreign resolution applicant looking to acquire a listed Indian corporate debtor via a cross-border merger the most commercially relevant and analytically difficult scenario in Indian cross-border insolvency jurisprudence would need to simultaneously secure five separate regulatory approvals, from five distinct authorities, at their own independent pace, without any mechanism to coordinate or share information, and without any protocol on the sequencing or simultaneous nature of approvals.

The IBBI administers the CIRP under the IBC, including the NCLT's confirmation of the resolution plan under Section 31; the CIRP has a mandatory 330-day outer time limit (including extensions and time spent in litigation) from the start of insolvency. At the same time, the RBI oversees two aspects of the transaction: the cross-border merger approval under the Foreign Exchange Management (Cross Border Merger) Regulations 2018 (where the proposed merger structure does not match the standard template and the RBI's review has no statutory time limit); and the FDI compliance dimension under the Foreign Exchange Management (Non-Debt Instruments) Rules 2019 (where the corporate debtor operates in a regulated sector).

SEBI's jurisdiction applies through three regulatory provisions at once: (1) the LODR Regulations 2015 mandating contemporaneous disclosure of material events including CIRP admissions and resolution plan approvals creating a conflict with the resolution professional's interest in confidentiality during the bidding process; (2) the ICDR Regulations 2018 mandating pricing floors and lock-in requirements on preferential allotment of shares to the resolution applicant, which are fundamentally incompatible with distressed-rate insolvency-

driven acquisitions; and (3) the SAST Regulations 2011 mandating a mandatory open offer upon acquisition of 25% or more of the corporate debtor's shares, with a discretionary exemption for IBC-driven acquisitions under Regulation 3(2).

The CCI is empowered to conduct a combination review under the Competition Act 2002 (as amended in 2023). CCI review can take up to 240 working days in a Phase II investigation a period which, in cases requiring detailed competition analysis, may independently exceed the IBC's 330-day outer limit for a CIRP. There is currently no MoU or information-sharing arrangement between the IBBI and the CCI to coordinate the resolution of a competition review with CIRP outer timelines. The MCA as the administrative ministry for the Companies Act 2013 oversees the NCLT's sanction of the merger scheme under Section 232 and the cross-border merger approval under Section 234 and Rule 25A, powers and duties that are entirely independent of the NCLT's role as the insolvency adjudicating authority under the IBC.

Consequently, as there are five independent regulatory regimes with no binding timelines calibrated to the CIRP outer limit, it is virtually impossible to achieve the structural completion of a cross-border merger resolution plan within the CIRP timeline. Adding the recognition proceedings under the Model Law in the relevant jurisdictions would require further filings and court hearings and would not reduce any of the existing five-regulator burden.

B. The Section 14 IBC Moratorium -- Section 234 Companies Act Structural Conflict

1. The Statutory Provisions and the Conflict They Generate

This particular regulatory incompatibility is perhaps the most acute statutory conflict between the IBC and any other domestic legislation. It is not adequately discussed in the existing policy and academic literature surrounding cross-border insolvency in India, and hence warrants a more in-depth analysis.

Section 14(1)(b) of the IBC provides that the NCLT, after the admission of an application for initiation of insolvency resolution proceedings, by an order shall prohibit the transfer, encumbrance, alienation or disposal of any of the assets of the corporate debtor or any legal right or beneficial interest therein. The moratorium is automatic and covers all transfers without providing any clear exceptions for the purposes of implementing an NCLT-approved resolution plan. The phrase "transfer" is undefined under both Section 14 and Section 3 of the IBC when it comes to the moratorium.

Under Section 234 of the Companies Act 2013, there is provision for foreign companies

to merge with Indian companies (inbound merger) and for Indian companies to merge with foreign companies (outbound merger) with the prior approval of the RBI. Rule 25A of the Companies (Compromises, Arrangements and Amalgamations) Rules 2016 sets out the procedure for such mergers. Section 232(3)(i) of the Companies Act states that upon such sanction, all the property or liabilities of the transferor company shall become property or liabilities of the transferee company meaning that the vesting of assets is mandated to occur upon NCLT sanction as a matter of law.

This raises an issue where an Indian corporate debtor under CIRP is involved in a transaction in which a foreign resolution applicant proposes to acquire the corporate debtor through a cross-border merger, whether outbound or inbound. The resolution plan is approved by a CoC majority of not less than sixty-six percent, and the case then proceeds to the NCLT for approval under Section 31 IBC. Simultaneously, the plan involves a scheme of merger requiring NCLT sanction under Section 232 and RBI approval under Section 234. There would inevitably be a period following CoC approval and before the merger is sanctioned given that the RBI CBM Regulation approval has no prescribed timeline and may take months during which the Section 14 moratorium applies. Does the automatic vesting of assets under Section 232(3)(i) amount to a "transfer" within Section 14(1)(b) of the IBC, which the moratorium prohibits? If so, does the moratorium render the merger ineffective even following NCLT approval of a resolution plan? If not, how can the merger proceed when the statute provides no explicit basis and there is room for challenges by dissenting creditors or other authorities?

2. The Case Law Does Not Resolve the Conflict

This conflict remains unresolved by the Supreme Court's IBC jurisprudence. The case most directly on point is Embassy Property Developments Pvt Ltd v State of Karnataka (2020) 13 SCC 308, in which the Supreme Court observed that as a statutory tribunal, the NCLT has no power to take cognizance of or waive any other statute in the process of approving the resolution plan. This holding raises a direct question: if the NCLT's confirmation under Section 31 does not empower the corporate debtor to violate any statutory bar, then Section 31 confirmation by itself cannot authorise a transfer of assets by way of merger that is otherwise prohibited under Section 14(1)(b). Embassy Property therefore implies that the moratorium conflict cannot be resolved within the resolution plan confirmation process itself.

In Gujarat Urja Vikas Nigam Ltd v Mr Amit Gupta (2021) SCC OnLine SC 194, the Court held that NCLT confirmation of a resolution plan under Section 31 is able to supersede contractual terms of the CIRP that would otherwise prevent the resolution plan from being implemented. This holding is distinguishable from the moratorium conflict on two grounds.

First, the Court's holding only addressed contractual rights GUVNL's termination right under its Power Purchase Agreement and did not address whether the NCLT's resolution plan confirmation could overcome statutory prohibitions, which is the key issue in this moratorium conflict. Second, the Section 14 moratorium is part of the IBC itself; it is not a separate statute overridden by Section 238, but an internal IBC provision that must be reconciled with Section 31 through intra-statutory interpretation. Section 238's overriding effect references "any other law" not the Code itself and cannot be mechanically extended to resolve an intra-IBC conflict. Reconciling Sections 14 and 31 in the context of a cross-border merger therefore requires either judicial construction or legislative clarification, as proposed in the draft amendment in Section V(B) of this paper.

C. Why Model Law Adoption Does Not Address This Conflict

The UNCITRAL Model Law operates entirely at the level of inter-court recognition and cooperation between the courts of different sovereign states. Article 20 of the Model Law provides that upon recognition of a foreign main proceeding, there is an automatic stay of proceedings concerning the debtor's assets in the recognising state. Articles 25 to 27 require courts and insolvency representatives from various jurisdictions to work together. The Model Law is silent regarding how a state's insolvency regime interacts with its corporate merger law, offering no guidance on whether a domestic insolvency stay covers a domestic statutory transfer in a cross-border merger, and failing to provide a mechanism to settle conflicts between a state's own statutes.

Even after adopting the Model Law, India will still face the existing deadlock between the Section 14(1)(b) moratorium and the Section 232 Companies Act statutory transfer. Model Law adoption might introduce recognition proceedings in countries like the Netherlands, Singapore, or the US for an Indian CIRP, but it cannot determine if an overseas bidder may lawfully obtain the debtor's assets via a court-approved merger while the moratorium remains active. That issue is addressed solely under Indian domestic law and requires the domestic legislative amendments outlined in Section V(B) of this paper.

In addition, Model Law adoption introduces a sixth regulatory layer the NCLT's authority to grant recognition under the Model Law to an existing five-regulator environment that is already creating a chain of sequential approvals clashing with the CIRP time limit. In a cross-border merger-insolvency deal following Model Law adoption, the resolution applicant will confront five separate domestic regulatory procedures (NCLT/IBBI, RBI, SEBI, CCI, MCA), each with its own schedule and no coordination, plus Model Law recognition steps in

every foreign jurisdiction where the corporate debtor owns assets. Far from streamlining the situation, Model Law adoption makes the regulatory environment significantly more complex.

V. THREE TARGETED REFORMS: THE MINIMUM ADEQUATE COMPLEMENT TO MODEL LAW ADOPTION

Sections III and IV jointly reach a single actionable recommendation: although Model Law adoption is essential, it also needs three immediate, specific domestic reforms in order to function successfully. Each reform targets a unique structural gap which Model Law adoption will not fix on its own. Collectively, these constitute the bare minimum supplementary changes needed to make Model Law adoption a reality rather than just symbolic legislation.

A. Reform One: The Cross-Border Insolvency Regulatory Coordination Committee (CIRCC)

The first reform would be the establishment of the Cross-Border Insolvency Regulatory Coordination Committee (CIRCC), a permanent body comprising regulators that would replace the current five-authority sequential approval model with a single-window simultaneous approval procedure that has mandatory deadlines aligned with the IBC's outer limit for CIRP.

Institutional Design

The CIRCC should be created via a notification by the Ministry of Corporate Affairs, with a corresponding amendment to Section 240 of the IBC granting the IBBI the authority to create mechanisms for inter-regulator coordination in cross-border insolvency proceedings. The CIRCC should be composed as follows: the Chairperson of the IBBI (Chair); one Deputy Governor of the RBI (nominated by the RBI Governor) representing FEMA and CBM Regulations jurisdiction; one Whole-Time Member of SEBI (nominated by the SEBI Chairman) representing LODR, ICDR, and SAST jurisdiction; one Member of the CCI (nominated by the CCI Chairperson) representing combination review jurisdiction; one Joint Secretary of the Ministry of Corporate Affairs representing Companies Act provisions and Rule 25A; and the Chairperson of the NCLT (ex officio) representing the adjudicating authority. The secretariat of the CIRCC should be embedded within the IBBI.

The CIRCC needs to be triggered automatically without any application from the RP or the resolution applicant once the NCLT admits a CIRP application in respect of a corporate debtor who: (a) has assets located in a foreign jurisdiction; (b) has creditors whose claims are governed by foreign law or whose principal place of business is outside India; (c) is a subsidiary

or associate of a foreign-incorporated entity; or (d) has a pending cross-border merger under Section 234 of the Companies Act. The NCLT's admission order must contain a standardised clause identifying the cross-border element and triggering the CIRCC.

Once the CoC has approved a resolution plan with a foreign resolution applicant or cross-border merger structure, the resolution applicant files a single consolidated application containing all information required by each of the five regulatory authorities to the CIRCC. The CIRCC secretariat will split the consolidated application into its constituent portions and transmit it to all five regulators concurrently. All five regulators will then process their applications simultaneously and communicate their decision to the CIRCC secretariat (approved, approved with conditions, or rejected with written reasons). The secretariat would consolidate these decisions into a regulatory package presented to the NCLT at the Section 31 confirmation hearing.

A binding coordination timeline of 120 days from the date of the CoC's resolution plan approval to the compilation of all regulatory approvals shall apply to all CIRCC-managed processes. Where any authority cannot complete its review within this period, it must escalate the delay to the CIRCC Chair within 72 hours, and the Chair must convene a meeting within 5 working days to identify and resolve the impediment. Where the impediment requires ministerial-level resolution, the Chair escalates to the Ministry of Finance and the Ministry of Corporate Affairs simultaneously.

CCI-Specific Reforms Within the CIRCC Framework

Perhaps the most structural feature to be reformed within the CIRCC framework is the CCI's combination review process. We propose that for IBC-related combinations processed through the CIRCC, the CCI adopt a structured failing firm safe harbour: a rebuttable presumption that any combination resulting from a CIRP resolution plan does not have an appreciable adverse effect on competition (AAEC) where the resolution applicant has neither the same kind of business nor an overlapping geographic market with the corporate debtor in India.

If such a presumption is not rebutted by the CCI or by complainants within 30 working days from the date of receiving the complete application from the CIRCC, the combination shall be deemed approved. Where the presumption is rebutted, the CCI must complete its Phase II investigation within 90 working days, instead of the currently applicable 210 working days, owing to the CIRP time constraint.

B. Reform Two: The Section 14(4) IBC Moratorium Carve-Out

The second proposed reform is a specific amendment to the IBC, inserting a new sub-section (4) in Section 14 IBC to resolve the conflict between the Section 14 moratorium and the cross-border merger approval regime in the Companies Act. Based on the analysis in Section IV(B), the proposed draft text is as follows:

> *"Notwithstanding anything contained in sub-sections (1) and (2), the moratorium imposed under this section shall not operate to prevent the transfer of assets of the corporate debtor pursuant to a cross-border merger scheme that forms part of a resolution plan confirmed by the Adjudicating Authority under Section 31, provided that -- (a) all regulatory approvals required under applicable law for the merger have been obtained, or are subject to binding undertakings by the resolution applicant to obtain them within a period specified in the order of the Adjudicating Authority; and (b) the Adjudicating Authority is satisfied, on the basis of the regulatory approvals or undertakings, that the cross-border merger scheme will be effected in a manner consistent with the interests of all creditors of the corporate debtor."*[1]

Three features of this draft require explanation.

This draft has three features that require explanation. First, the carve-out is conditional on Section 31 confirmation, meaning that the transfer of assets may not occur until after the NCLT has confirmed the resolution plan. This ensures that both the CoC, with its sixty-six percent majority approval requirement, and the NCLT have approved the merger arrangement before the moratorium ceases its operation on the relevant assets. This conditionality keeps intact the main creditor-protection function of the moratorium: no assets are transferred prior to the resolution plan's overall legal and commercial structure having been vetted and cleared by both the CoC and the NCLT.

Second, the carve-out allows for regulatory approvals to remain pending at the time of Section 31 confirmation, subject to binding undertakings by the resolution applicant. This mirrors the CIRCC-mediated concurrent approval process. Some regulatory approvals will be in place prior to the Section 31 hearing, e.g., an open offer exemption from SEBI; others, such as the CBM Regulation approval from the RBI, may still be pending. Requiring all regulatory

[1]The approach in 11 USC s 1141(c) of the US Bankruptcy Code is instructive: "Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor free and clear of any claim or interest of any creditor." The confirmation order, in US practice, expressly authorises asset transfers contemplated by the plan, providing the specific legislative basis that Indian law currently lacks.

approvals prior to Section 31 confirmation would recreate the sequential bottleneck that the CIRCC is designed to eliminate and could render Section 31 confirmation infeasible where the CIRP outer time limit is fast approaching.

Third, the carve-out is limited to cross-border merger schemes that form part of confirmed resolution plans. It in no way impinges on the moratorium's application to general asset disposal, preferential transactions, sales at below-market value, or any transfer outside the resolution plan process. The Section 14 moratorium continues in full force for all other purposes.

A corresponding amendment to Section 234 of the Companies Act 2013 should also be made, inserting a new sub-section (3) stating that where an application for approval of a cross-border merger scheme involves an Indian company that is a corporate debtor undergoing CIRP, the NCLT shall not sanction the scheme under Section 232 unless a resolution plan incorporating the merger has already been confirmed under Section 31 IBC. This companion amendment creates the formal legislative sequencing between the Companies Act merger process and the IBC insolvency process.

C. Reform Three: A Bilateral Treaty Programme With a Model Agreement Template

The third reform informed by the lessons drawn from the DTAA analogy in Section III(D) is a step-by-step programme for bilateral insolvency cooperation treaties with five priority jurisdictions, anchored by a model agreement template that provides the institutional template whose absence the DTAA analogy identifies as the primary negotiation obstacle.

Priority Jurisdictions

The five priority jurisdictions were identified based on the size of India's cross-border corporate exposure, the particular nature of the bilateral insolvency relationship, and the ease with which a treaty could be negotiated.

The United Kingdom was identified as the first priority. It has the deepest legal and institutional relationship with India a shared common-law legal system, the largest volume of Indian corporate debt governed by English law, and the Gibbs Rule, which creates a significant impediment for Indian insolvency cases to discharge English-law obligations. The UK implemented the Model Law via the Cross-Border Insolvency Regulations 2006, so Model Law recognition will be available upon India's enactment; however, the Gibbs Rule still requires a bilateral treaty to ensure an Indian CIRP can discharge English-law governed debt.

The UAE was identified as the second priority. It has the largest bilateral commercial

trading relationship with India by volume, and the commercial exposure of the Indian diaspora in the UAE creates significant potential bilateral insolvency risk. The DIFC's adoption of a Model Law-based framework provides partial coverage; mainland UAE proceedings remain outside the Model Law network and require bilateral treaty recognition.

The Netherlands was identified as the third priority the country of the Dutch Administrator in the Jet Airways case, the paradigm illustration of a coordination failure that the proposed treaty regime would prevent. The Netherlands implemented the Model Law under the Cross-Border Insolvency Act 2008, making it a Model Law country with mutual recognition available upon India's adoption; a treaty would supplement this mutual recognition with specific coordination protocols joint administrator cooperation, concurrent NCLT-Dutch court communication, and asset pooling provisions that would have changed the outcome in Jet Airways.

Singapore was identified as the fourth priority the leading centre for cross-border insolvency in the Asia-Pacific region, which has implemented the Model Law via the IRDA 2018, is a founding member of the JIN, is the preferred offshore holding jurisdiction for many Indian corporate groups, and whose courts have expressed a willingness to restrict the scope of the Gibbs Rule in a cross-border insolvency context. A bilateral treaty with Singapore, coupled with a bilateral court protocol between the CBIB and the High Court of Singapore, would provide the most sophisticated bilateral arrangement available to India in the region.

The United States was identified as the fifth priority. Chapter 15 of the Bankruptcy Code provides the Model Law baseline for US-India recognition upon India's implementation. A bilateral agreement would supplement this with provisions on enhanced judicial cooperation, COMI determination coordination for Indian corporate groups with US operations, and avoidance action enforcement addressing specific gaps identified in In re Ocean Rig UDW Inc 570 BR 687 (Bankr SDNY 2017).

Model Agreement Template: Key Clauses

A model bilateral insolvency cooperation agreement should contain eight core provisions that address the structural elements identified in the DTAA analogy analysis as prerequisites for effective cooperation:

(1) Scope: The agreement applies to collective insolvency proceedings related to corporate debtors with assets, creditors, and/or operations in both contracting states. (2) Recognition: Each contracting state is to recognise insolvency proceedings of the other in line with the Model Law as enacted in its domestic law, subject to the public policy exception in

Article 7. (3) Enhanced Cooperation: Mandatory information sharing within 5 business days of request; mandatory 90-day suspension of individual creditor enforcement upon recognition, pending development of a coordination protocol. (4) Priority Rules: Assets located in each state's territory are to be distributed in accordance with that state's insolvency priority laws, subject to the hotchpot rule (akin to Article 31 of the Model Law), so as to prevent double recovery. (5) Cross-Border Merger Coordination: The competent authorities of each contracting state shall cooperate in coordinating their respective merger and insolvency approvals within the timeframe provided under the applicable insolvency resolution framework. (6) Group Insolvency: Where group entities in both states are simultaneously in insolvency, insolvency practitioners shall jointly appoint a group coordinator within 60 days of recognition and develop a Group Coordination Plan. (7) Public Policy Exception: Recognition or cooperation may be refused only where manifestly contrary to fundamental public policy; written reasons must be provided within 15 days. (8) Dispute Resolution: Disputes between contracting states shall be resolved through diplomatic consultations in the first instance and, if unresolved within 90 days, through binding arbitration under the PCA Optional Rules.

Sequencing the Negotiations

The negotiations should be sequenced so as to progressively build upon and establish a template precedent: Singapore first (achievable within 6 months of Model Law enactment, given the existing JIN relationship and Singapore practitioners' familiarity with Indian corporate structures); then UAE (given the trade-volume imperative); Netherlands (following the Jet Airways lesson); UK (addressing the Gibbs Rule); and the US (addressing Chapter 15 gaps). With each completed agreement, the transaction cost of the subsequent one is reduced, as the template evolves from a starting document to an established precedent and India's treaty negotiation capacity grows with each iteration. This mirrors the DTAA programme's own evolution from the first set of bilateral treaties in the 1980s to the comprehensive network of 90-plus agreements that exists today.

VI. SYNTHESIS AND CONCLUSION

A. The Minimum Adequate Reform Package

The three reforms outlined in Section V are not substitutes for each other they are complements, each filling the gap which the others do not. Adoption of the Model Law is required as the foundation of recognition and cooperation, without which no other reform can create a viable

cross-border insolvency system that is credible internationally. The CIRCC transforms that legal possibility into legal reality by removing the sequential multi-regulator impediment which makes cross-border merger resolution plans structurally difficult to deliver within CIRP time limits. The Section 14(4) carve-out removes the domestic legislative conflict that would otherwise prevent approved merger-based resolution plans from being implemented, giving the necessary statutory certainty to practitioners, courts, and investors who rely on the resolution plan framework. The bilateral treaty programme builds the diplomatic architecture that extends the framework beyond the fifty-plus Model Law network states, provides enforceable bilateral commitments going beyond the Model Law's cooperative baseline, and addresses the specific bilateral insolvency relationships India-UK, India-Netherlands, India-UAE where the Model Law network alone is insufficient.

This is the minimum required package, not the optimum. The institutional reforms that a fully developed cross-border insolvency framework would require the creation of a dedicated Cross-Border Insolvency Bench (CBIB) within the NCLT; a Cross-Border Insolvency Specialists register within the IBBI; India's accession to the JIN; and judicial cross-training programmes with the insolvency courts of priority jurisdictions are desirable and should follow as phase II of India's reform programme. But the three targeted reforms in Section V are the minimum without which even a well-worded Model Law statute will remain, as Sections 234-235 IBC have remained for eight years: ceremonially present and operationally irrelevant.

B. The COMI and Foreign Creditor Dimensions

Two further dimensions of the cross-border insolvency problem merit mention. First, the treatment of foreign creditors in Indian insolvency proceedings where these creditors are structurally placed at a disadvantage in the CoC process due to information asymmetry, difficulties of process participation, and claim characterisation disputes under foreign-law governed facilities creates a divergence from the Model Law's equitable treatment principle in Article 13 that the CIRCC and bilateral treaty programme must address through specific foreign creditor participation provisions. The Essar Steel decision's affirmation of CoC supremacy in distribution decisions was correct as a matter of Indian domestic insolvency law, but is out of line with the international cooperation framework of the Model Law and will require statutory or regulatory remedies.

Second, Indian law does not statutorily define COMI, yet In re Ocean Rig UDW Inc 570 BR 687 (Bankr SDNY 2017) illustrated the dangers of COMI manipulation in a cross-border insolvency case. India's Model Law implementation statute should therefore include: a three-

month look-back period modelled on Article 3(1) of the EU Insolvency Regulation (Recast) 2015; a statutory COMI definition incorporating the third-party ascertainability requirement established by Eurofood IFSC Ltd (Case C-341/04) [2006] ECR I-3813; and specific provisions addressing the COMI of offshore holding companies with Indian operational substance. These COMI provisions are components of the Model Law implementing legislation itself but their inclusion is essential for the recognition framework to function as intended.

C. The Central Lesson of the DTAA Analogy

The crucial takeaway from the DTAA analogy is that successful international legal cooperation requires three conditions simultaneously: an international legal text (the OECD Model Convention / the UNCITRAL Model Law); institutional machinery to negotiate, implement, and administer the text (the CBDT's tax treaty apparatus / the IBBI-MCA-MEA cross-border insolvency apparatus proposed in this paper); and aligned state interests that create a political constituency for the cooperation (revenue symmetry in the DTAA case / the engineered interest alignment through creditor protection provisions in the bilateral agreement template). Remove any one of these three conditions, and the legal text becomes ornamental only.

India's DTAA programme has all three conditions that is why it works. The Section 234 bilateral insolvency cooperation programme has had the legal text for eight years and none of the other two conditions. The result is a legal authorisation with no practical implementation possible. Model Law adoption provides the better legal text. The CIRCC provides the institutional infrastructure for domestic inter-regulatory coordination. The bilateral treaty programme, anchored in the model agreement template, provides the engineered interest alignment through the agreement's creditor protection provisions and begins building the treaty negotiation capacity needed to actually engage in bilateral insolvency diplomacy. All three conditions must exist simultaneously for the cooperation framework to function in practice.

D. Conclusion

The Jet Airways insolvency of 2019-2020 was not an exceptional event. It was a preview the first clear, public, documented preview of every significant cross-border insolvency in which India will become involved as the nation's internationalisation deepens. The fragmented, uncooperative, and value-destructive proceedings in Jet Airways were not the result of judicial error or regulatory bad faith. They were the product of a law that gave the NCLT no power to cooperate with the Dutch court; gave the Indian Resolution Professional no standing before the Dutch administrator; gave Indian creditors no mechanism to coordinate their claims in Dutch

proceedings; and gave no protection to Dutch-sourced assets against the territorial limitation of the Section 14 moratorium. All of these were failures of legislation, not of implementation. Model Law adoption will address the most obvious of these legislative failures the absence of a judicial recognition framework but it will not resolve the Section 14 moratorium conflict that generates legal uncertainty over the validity of merger-based resolution plans; it will not resolve the five-regulator impasse that makes cross-border merger resolution structurally impossible to complete within CIRP time limits; and it will not resolve the diplomatic isolation of India from the bilateral insolvency cooperation network that its cross-border corporate exposure requires.

The recommendation in this paper is not against adoption of the Model Law. It is for Model Law adoption plus the establishment of the CIRCC, plus the Section 14(4) carve-out, plus the bilateral treaty programme. Together, these constitute the minimum adequate package the difference between an India with a cross-border insolvency framework that functions and an India with a cross-border insolvency statute that repeats, in a different legislative form, the eight-year record of Sections 234-235 IBC: enacted, aspirational, and functionally impotent.

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