

# Special Issue

## March (Week 3)

### Contents

All about the legal considerations of blockchain gaming in India.....	2
All about Russia-Ukraine conflict & ICJ's provisional measures on military operations.....	6





## **All about the legal considerations of blockchain gaming in India**

(Source: [Indian Express](#) )

**Context:** *Several Indian companies have commenced their foray into blockchain game development. Prominent amongst them are Avisa Ventures and NODWIN Gaming.*

### **What is blockchain?**

- Blockchain is a decentralised database that stores information. It relies on technology that allows for the storage of identical copies of this information on multiple computers in a network.

### **What are blockchain games?**

- **NFTs**
  - NFTs represent in-game virtual assets that can be owned by players, such as maps, armor or land.
  - These NFTs act as asset tags, identifying ownership of the in-game assets, and are stored on the blockchain.
  - Being on the blockchain allows the player to have a secure record of ownership of the in-game assets and also gives the assets the ability to outlive the game itself.
  - Based on the manner in which the games are designed, it also allows for the in-game assets to be transferred from one game to another. It also creates transparency, since ownership records can independently be verified by any third party as well.
  - In doing so, it makes in-game assets marketable and creates a decentralized market, where they can be bought and sold by people.
- **Cryptocurrency**
  - Cryptocurrency, such as tokens based on the Ethereum blockchain, may be used for the purchase of in-game assets.
  - These in-game purchases usually enable gamers to buy items like extra lives, coins and so on directly from the game.
- **Gaming coins**
  - Gaming coins, such as Axie Infinity (ACS) and Enjin Coin (ENJ), are in-game cryptocurrency which may be acquired and then used for the purchase of in-game assets.
  - These gaming coins may be purchased from crypto exchanges (and eventually be traded on these crypto exchanges as well) or, in certain cases, be acquired as winnings in games that have adopted the 'play-to-earn' model.
  - In such games, gamers are rewarded for dedicating their time and skill to play the game with gaming coins and in-game assets (and, in certain cases, with cryptocurrency as well).

### **Are blockchain games legal in India?**

- To revisit our definition of blockchain games: they are *online video games* that are developed *integrating blockchain technology* into them.
- Since blockchain is merely the underlying technology, there is no express regulation of it in India.
- This renders any questions over its legality moot. It would, however, be pertinent to explore the legality of the games from the lens of existing Indian gaming regulation.

### **Games of skill vs. games of chance**



- Most Indian states regulate gaming on the basis of a distinction in law between ‘games of skill’ and ‘games of chance’.
- While staking money or property on the outcome of a ‘game of chance’ is prohibited and subjects the guilty parties to criminal sanctions, placing any stakes on the outcome of a ‘game of skill’ is not illegal per se and may be permissible.
- As per two seminal judgments of the Supreme Court on this aspect, the Supreme Court recognized that no game is purely a ‘game of skill’ and almost all games have an element of chance.
- As such, a ‘dominant element’ test is to be utilized to determine whether chance or skill is the dominating element in determining the result of the game. This ‘dominant element’ may be determined by examining whether factors such as superior knowledge, training, experience, expertise or attention of a player have a material impact on the outcome of the game.
- While the outcomes of any ‘games of skill’ are affected by these factors, outcomes of ‘games of chance’ are premised on luck and are largely independent of the skills of the players involved.

### **Common gaming house**

- A second concept common to the gaming law in most states is the idea of a ‘common gaming house’. Owning, keeping, or having charge of a common gaming house or being present for the purpose of gaming in any such common gaming house is ordinarily prohibited in terms of these state gaming laws.
- A common gaming house is defined as *“any house, walled enclosure, room or place in which... instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, enclosure, room or place, whether by way of charge for the use of the instruments of gaming, or of the house, enclosure, room or place, or otherwise howsoever”*.
- The legality of offering, or engaging, in gaming in terms of such state gaming laws, therefore, hinges on whether it is being offered for the profit or gain of any person organizing the game.
- Pertinently, courts have clarified in the past that the mere charging of an extra fee to facilitate playing the game and / or to maintain the facilities may not necessarily be seen as making a profit or gain.

### **Where does blockchain gaming lie within this framework?**

- It is important to note that most of the gaming laws were brought into effect prior to the internet era and, therefore, only contemplate regulation of gaming activities taking place in physical premises.
- Other than states such as Sikkim, Nagaland, and Telangana, which recognize online gaming, in most Indian states and union territories, there is currently a lacuna in gaming law and there are lingering question marks on its interpretation and applicability to online gaming.
- That being said, as the law currently stands, each blockchain game must first pass muster as a ‘game of skill’, as against a ‘game of chance’, to legally be made available in most Indian states.
- It is also relevant to note that in the past, the Supreme Court has rejected the notion of video games being ‘games of skill’, holding that the outcomes of these games could be manipulated by tampering with the machines used to play and, therefore, the element of skill of players could not be a dominant factor of the game.
- Further, by making in-game assets available for purchase, developers and publishers stand to earn revenue from the sale of such assets. They may also embed certain rules when implementing the code for in-game assets such that a fee is paid to them every time a certain action is taken, including when an item is transferred from one player to another.
- A Delhi District Court has, in the past, held that a gaming portal would be covered within the definition of a ‘common gaming house’, if it were to take commission / earn revenue from the game offered. This is because such portals merely seek to replace the brick and mortar common gaming houses that Indian law currently envisages and has outlawed.
- Since developers and publishers of blockchain games are likely to earn revenue / charge fee for offering such games, it does raise questions over whether they may be seen as playing a role analogous to that played by common gaming houses under Indian law.



### Legality of blockchain games that rely on cryptocurrency

- The Finance Ministry of the Government of India had announced in late-2021 that The Cryptocurrency and Regulation of Official Digital Currency Bill, 2021, was to be tabled in the Parliament soon and would seek to prohibit all private cryptocurrencies.
- If the legislature does indeed successfully place a ban on private cryptocurrencies, then, to the extent that existing blockchain games rely on cryptocurrencies, they would be considered illegal in India.
- Independent of this, the Minister of Finance, in her budget speech for 2022-2023, announced that the income from the transfer of any ‘virtual digital assets’ (which include cryptocurrency and non-fungible tokens) would be subject to income tax at the rate of 30%. Interestingly, those who have received any such virtual digital assets by way of a gift shall be taxed at the rate of 30%.
- Policy pronouncements of this nature would need to be carefully considered by publishers of blockchain games while designing their pricing models.

### What intellectual property protections may be available to blockchain games?

- **Patents**
  - For a blockchain game or any of its elements to be patented in India, it will need satisfy the patentability requirements of:
    - being a new product or process, i.e., having *novelty*;
    - involving an inventive step, i.e., having a feature that involves *technical advancement* as compared to the existing knowledge or having *economic significance* or both and that makes the invention *not obvious* to a person skilled in the art); and
    - being capable of industrial application, i.e., capability of being made or used in an industry
    - being a new product or process, i.e., having *novelty*;
    - involving an inventive step, i.e., having a feature that involves *technical advancement* as compared to the existing knowledge or having *economic significance* or both and that makes the invention *not obvious* to a person skilled in the art); and
    - being capable of industrial application, i.e., capability of being made or used in an industry.
  - In terms of Section 3(k) of the Patent Act, 1970, computer programs are *per se* not inventions and hence, cannot be patented.
    - However, judicial pronouncements in the past have clarified that if an invention has a *technical contribution or a technical effect* and is not merely a computer program per se, then it would be patentable. The Office of the Controller General of Patents, Designs and Trade Marks has also issued the Guidelines for Examination of Computer Related Inventions (“**CRI Guidelines**”), stating that ‘databases’ would be considered computer programs and are, therefore, not patentable.
  - Thus, a patent for a blockchain game may be sought if it meets the requirements of novelty, involving an inventive step, and industrial application.
    - While we do not believe that a game, as a whole, would be patentable, game developers or publishers may seek patent protection for any element of the game (such as its game play method) which has led to technological advancement.
    - For instance, in the US, we note that patents have been granted for specific elements of blockchain games, such as ‘wagering gaming systems for utilizing bitcoins and bitcoin fractions’, ‘game data offloading to a blockchain’, and a ‘system and method for digital token exchange and delivery.
  - As for the CRI Guidelines, since neither are they legally binding, nor are developers or publishers likely to seek patent protection for the entirety of the blockchain, we believe that these are unlikely to act as an impediment to seeking patent protection.
- **Trademarks**



- A trademark is used as an identifying mark to determine the source of a particular good or service, and is obtained to protect the goodwill and reputation of the brand.
- Any distinguishing mark in a blockchain game or NFT that would allow consumers to identify the source of that particular game or NFT may be trademarked.
- In India, certain underlying aspects of the blockchain game may be trademarked, including the name of the game, a tag line attached to it, the logo of the game, the character names in the game, and the name of the in-game currency (similar to the trademark held by Stiftung Ethereum for the name 'ETHEREUM' in the United States), as they would be considered as a trademark.
- In the case of an NFT, if the inventor of an NFT decides to give proprietary names to their own tokens, then such names may be protected as trademarks. It is important to clarify that trademark protection, if any, can be sought for underlying identifiers of the game / NFT, such as the name and tag line, not for the overall game / NFT itself.

- **Copyrights**

- In India, artistic work, musical work, cinematographic films, dramatic works, sound recordings and computer software are capable of being protected under copyright law.
- Although there is no specific provision in the Copyright Act that deals with video games, copyright protection of video games may be sought under the category of 'multimedia products'.
- Similar to the position with trademarks, the process of obtaining a copyright for a blockchain game would be the same as any other online video game.
- Certain aspects of blockchain games, such as the artwork and sounds used in the game as audiovisual work along with the underlying source code as a literary work can be copyrighted. For example, the user manual for the game, characters in the game, the background music and source codes for the digital games can be protected under copyrights.

### **Steps forward**

- The use of blockchain technology for online games is likely to be beneficial for game developers, publishers, and players.
- However, key to their growth is regulation which ensures that it is permissible to offer such games in the Indian territory and also offers protection in the form of intellectual property rights.
- Other concerns, such as privacy and cyber security, along with how financial regulations would apply to blockchain games, would also need to be addressed.
- Most recently, the Advertising Standards Council of India ("ASCI") has introduced guidelines for advertising of virtual digital assets and linked services, requiring, among others, that disclaimers be included in such advertisements and that terms such as 'currency' not be used in them.
- As a larger number of game developers and publishers prepare to step foot in this as yet uncertain/unknown legal landscape, we recommend:
  - seeking legal counsel on whether their game is likely to be identified as a 'game of skill' and whether they are likely to be identified as a 'common gaming house', if they were to be subject to judicial scrutiny;
  - scrutinizing their games to understand which elements, if any, can be modified such that superior knowledge, training, experience, expertise or attention of players becomes the dominant element of such games;
  - consider / re-consider their use of cryptocurrency in providing their games, or seek out alternatives to the use of cryptocurrency, in view of the possible ban on them pursuant to the introduction of The Cryptocurrency and Regulation of Official Digital Currency Bill, 2021;
  - factoring the recently introduced tax on virtual digital assets into their pricing model;
  - seeking requisite intellectual property protection for elements of their games that are capable of such protection; and
  - ensuring that any advertising be compliant with the ASCI's Guidelines for Advertising of Virtual Digital Assets and Linked Services.



## **All about Russia-Ukraine conflict & ICJ's provisional measures on military operations**

(Source: [The Hindu](#) )

**Context:** *The ongoing conflict between Ukraine and Russia has entered its fourth week. It has led to one of the most severe humanitarian crises in Europe since World War II. Russia has sought to justify its “special military operation” as a response to the alleged act of genocide of the Russian speaking people in the territories of Donetsk and Luhansk. Ukraine on February 26 approached the International Court of Justice (ICJ), the principal judicial organ of the United Nations (UN), requesting the ICJ among other things, to hold that no acts of genocide defined under the Genocide Convention 1948 and as claimed by Russia have been committed by Ukraine in Donetsk and Luhansk. Additionally, Ukraine also requested the court to indicate certain provisional measures, such as directing the Russian Federation to “immediately suspend military operations” in Ukraine, and to ensure that Russia will not aggravate or extend the dispute. The ICJ on March 16, rendered its order directing the Russian federation inter alia to immediately suspend all military operations in Ukraine.*

### **Where does the ICJ's jurisdiction lie?**

- Article 36(1) of the Statute of the ICJ provides that the ICJ shall have jurisdiction in all matters relating to the UN Charter, or other treaties or conventions in force.
- The Genocide Convention 1948 under Article IX provides that disputes between states relating to the interpretation, application or fulfilment of the Genocide Convention, as well as those relating to the responsibility of a state for genocide shall be submitted to the ICJ at the request of any of the parties to the dispute. Russia and Ukraine are both parties to the Genocide Convention.
- The ICJ held that there exists a prima facie dispute between Ukraine and Russia over the question of whether the acts of genocide have been committed in Ukraine, and accordingly it has the jurisdiction.

### **What do the ICJ's powers to indicate provisional measures entail?**

- The Statute of the International Court of Justice, under Article 41 empowers the ICJ to indicate provisional measures in any case before it in order to preserve the rights of the parties involved. When the ICJ indicates such provisional measures, the parties to the dispute and the UN Security Council have to be notified.
- Until 2001, there was uncertainty as to whether the provisional measures indicated by the ICJ were binding.
- However, in the LaGrand (2001) case between Germany and the U.S. relating to the denial of consular access to a German national in the U.S., the ICJ made it clear that provisional measures are binding in character and create international legal obligations.
- Further, provisional measures may be indicated by the ICJ either on the request of a state party or proprio motu i.e., on its own motion.
- The ICJ has also held in the Tehran Hostages Case (1980) that the non-appearance of one of the parties concerned cannot itself be an obstacle to indication of provisional measures.
- In the present case, the Russian Federation chose not appear in the oral proceedings before the court. Notwithstanding, the ICJ proceeded to decide the case.

### **Under what conditions can the ICJ's powers be exercised?**

- The power to indicate provisional measures is subject to certain conditions.
- In the Gambia v. Myanmar (2020) case dealing with genocide of Rohingyas in Myanmar, the ICJ held that it may exercise the power to indicate provisional measures only if it is satisfied that rights which are being asserted by the party which is requesting provisional measures is “at least plausible”.



- The ICJ in the present case held that Ukraine indeed has a plausible “right of not being subjected to military operations by the Russian Federation for the purpose of punishing and preventing alleged acts of genocide.”
- The ICJ expressed doubt regarding the use of unilateral military force against another state for preventing and punishing genocide, as a means under the Genocide Convention 1948.
- It highlighted that the Genocide Convention provides for other means such as resort to other UN organs under Article VIII, and for peaceful dispute settlement by ICJ under Article IX. It is important to note here that the ICJ at the stage of provisional measures does not engage in a definitive analysis of whether rights which are claimed by the applicant actually exist. That analysis is for the merits phase.
- Second, there must exist a link between the provisional measure which has been requested and the plausible right that is to be preserved by such measure.
- Third, there must be “real and imminent risk” of “irreparable prejudice” to the rights claimed before the ICJ. The court observed that the mounting loss of human lives, harm to environment, and the refugee crisis are all instances of irreparable harm and prejudice justifying the indication of provisional measures.

### **What lies ahead?**

- The provisional measures indicated by the ICJ are binding, and non-compliance certainly entails the breach of an international legal obligation.
- However, the ICJ does not have the means or mechanism to secure the enforcement of the judgment itself. Indeed, the UN Charter under Article 94(2) provides that if any state fails to perform obligations pursuant to an ICJ decision, the UN Security Council (UNSC) may take measures necessary to give effect to the judgment. However, the possibility in the present case is bleak given that Russia has veto power in the UNSC.
- Additionally, if there is an impasse in the Security Council, the UN General Assembly (UNGA) is empowered under Article 14 of the UN Charter to recommend measures for the peaceful adjustment of any situation “which it deems likely to impair the general welfare or friendly relations among nations.”
- In *Nicaragua v U.S.* (1984) when the U.S. refused to comply with the ICJ decision, and the Security Council was deadlocked, the UNGA adopted several resolutions deploring the behaviour of the U.S..
- Further, the Uniting for Peace Resolution adopted in 1950 by the UNGA in the context of the Korean War, authorises the UNGA to consider any matter which may threaten international peace and security, and to make appropriate recommendations to the members for collective measures, including the use of armed force.
- The power of the UNGA to ‘recommend measures for peaceful adjustment’ has been affirmed by the ICJ in several cases including the *Certain Expenses Advisory Opinion* (1962), and *Wall Advisory Opinion* (2004). Russia’s non-participation in the oral proceedings has already reflected its disrespect for international law and international institutions.
- If Russia does not comply with the provisional measures of the ICJ, the reputational harm to its regime will only be compounded. Moreover, non-compliance with provisional measures will legitimise and justify counter-measures against Russia. Interestingly enough, Russia has been kicked out of the Council of Europe with immediate effect on the same day as ICJ’s provisional measures were indicated.