Goods and Services Tax Regimes: The GST Council Procedure

SYNOPSIS

According to Article 279A, law making by Parliament and State Legislatures to levy goods and services taxes would have to rely on the recommendations to be made from time to time by a formal constitutional body christened "Goods and Services Tax Council" (GST Council). The GST Council would have to devise a procedure for arriving at its recommendations as stipulated in various clauses of that Article. The Council is constrained by the Constitution to be guided by the substantive principle of "harmony" in arriving at its recommendations. This paper proceeds to identify the aspects of the procedure which would enable the GST Council to fulfill its constitutional mandate substantively.

1. CONSTITUTIONAL MANDATE OF THE GST COUNCIL IN CONTEXT

India being a Union of States, legislative competences to make law relating to well-defined "matters" have been specified in the Constitution enacted by the People and have been allocated by them vide Article 246 by a "either...or" formula which leads to such allocation either-

(i) to the Union and to the States mutually exclusively; or
(ii) to the Union and to the States "concurrently".

In so far as lawmaking for the levy of any tax however, overlap of legislative competences of the Union and the States is avoided by listing entries relating to levy of specific taxes only in the Union List or in the State List and not listing entry relating to levy of any tax as such in the Concurrent List referred to in Article 246. Avoidance of such overlap is designed to enable compliance with the accountability requirements enacted in Article 266 which-

(a) provide for a Consolidated Fund of India for the credit, subject to "assignment" to States, of moneys collected as tax revenues by the Government of India; and a Consolidated Fund for every State for the credit of moneys collected as tax revenues by the respective State Government or assigned to that State by the Union; and
(b) do not provide for a Concurrent Consolidated Fund or for assignment of state tax revenues from the States to the Union.

For the first time in the Republic, the Constitution as amended by the Constitution (101st Amendment) Act, 2016 has provided in a complex "both...and" formula for allocation of legislative competences to levy a tax defined in clause (12A) of Article 366 as "goods and services tax" both-

(i) exclusively to the Union vide clause (2) of Article 246A, if the "supply" of goods and/or services referred to in that definition is "in the course of inter-state trade or
commerce" as determined in accordance with law made as provided in Article 269A or "outside a State" or "in the course of import into India" or "in the course of export out of India" as determined in accordance with the law made as provided in article 286, and (ii) **concurrently** to the Union **and** to the States vide clause (1) of Article 246A, otherwise.

Also for the first time the "matter" of levy of goods and services tax (as defined in Article 366) is not listed as an entry in the Union List or the State List in the Seventh Schedule referred to in Article 246; Nor is the matter of levy of goods and services tax listed as an entry in the Concurrent List. Most importantly, the legislative competence of the Union provided in Article 248 in levying a tax that is not listed as an entry in the State List or Concurrent List (e.g., a cess such as the GST Compensation Cess) is subject to the provisions enacted in Article 246A which arguably **does not provide for the imposition of any levy other than goods and services tax**. To claim that provision of legislative competence exclusively to the Union to impose any cess earmarked to enable it to meet the expenditure on making payments by way of "compensation" to any State is envisaged in Article 246A which constrains Article 248, would be difficult.

This shift in the Peoples' legislative-competence-allocation formula in the Constitution from "**Either** Union or State" to "**Both** Union and State" in case of "goods and services tax"(GST) thus leads to concerns as to **constitutional accountability for GST revenues** which accrue according to law **to be made** since the Constitution does not provide for a Concurrent Consolidated Fund even after the latest amendment. Such revenues would accrue according to law yet to be made and moneys by way of GST and related dues (e.g., interest and penalties) would then be either-

1) paid in compliance with law; or
2) collected in response to demands raised by GST authorities according to law; or
3) recovered from GST defaulters by resort to coercive process protocols (which would include recovery as "arrears of land revenue") according to law.

The Constitution as amended by the 101st Amendment Act therefore provides in Article 269A for a protocol designated "**apportionment**" of GST revenues which accrue according to law to be enacted by Parliament to levy GST on supplies made "in the course of inter-state trade or commerce". Article 269A also stipulates that such apportionment would be in accordance with the recommendations on the principles of such apportionment to be made vide sub-clause (c) of
clause (4) of Article 279A by the Goods and Services Tax Council (GST Council) constituted by the President. Such apportionment *according to law* would be different from assignment of post-apportionment central tax revenues *in accordance with Article 270 of the Constitution*.

Thus the most crucial recommendation of the GST Council relating to accountability of the institution of the Bureaucracy to the Constitution through the respective Heads of the Executive (President or Governor) would pertain to the apportionment of revenues which accrue by way of levy of GST by law on such goods and/or services which would be relatable to "supply" in the course of inter-state trade or commerce. Such tax is expected to be christened *"Integrated Goods and Services Tax"* (IGST). Such apportionment would *be made presumably by an appropriate legal authority continuously and digitally* in accordance with law and in coordination with-

(i) the expected acts of taxable entities paying GST either in lump sum or by availing *in periodical returns*, credit of GST paid on supplies received by them; and

(ii) the related decisions of central and state GST authorities on the *accuracy* of the payments of GST due and payable according to law by every such entity, and subsequent collections in response to demands and recoveries from defaulters if any

The GST Council has been constituted by the President on 16 September 2016. The terms of reference of the Council may be discerned from the following provisions of Article 279A enacted in Chapter I on "Finance" in Part XII (which Part does not relate *prima facie* to *"Relations between the Union and the States"*, the subject-matter of Part XI but to *"Finance, Property, Contracts and Suits"*):

279A. (1) The President shall, within sixty days from the date of commencement of the Constitution (One Hundred and First Amendment) Act, 2016, by order, constitute a Council to be called the Goods and Services Tax Council.

(2) The Goods and Services Tax Council shall consist of the following members, namely:—

(a) the Union Finance Minister......................... Chairperson;

(b) the Union Minister of State in charge of Revenue or Finance............... Member;

(c) the Minister in charge of Finance or Taxation or any other Minister nominated by each State Government.................. Members.

(3) The Members of the Goods and Services Tax Council referred to in sub-clause (c) of clause (2) shall, as soon as may be, choose one amongst themselves to be the Vice-Chairperson of the Council for such period as they may decide.

(4) The Goods and Services Tax Council shall make recommendations to the Union and the States on—

(a) the taxes, cesses and surcharges levied by the Union, the States and the local bodies which may be subsumed in the goods and services tax;
(b) the goods and services that may be subjected to, or exempted from the goods and services tax;

(c) model Goods and Services Tax Laws, principles of levy, apportionment of Goods and Services Tax levied on supplies in the course of inter-State trade or commerce under article 269A and the principles that govern the place of supply;

(d) the threshold limit of turnover below which goods and services may be exempted from goods and services tax;

(e) the rates including floor rates with bands of goods and services tax;

(f) any special rate or rates for a specified period, to raise additional resources during any natural calamity or disaster;

(g) special provision with respect to the States of Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand; and

(h) any other matter relating to the goods and services tax, as the Council may decide.

(5) The Goods and Services Tax Council shall recommend the date on which the goods and services tax be levied on petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel.

(6) While discharging the functions conferred by this article, the Goods and Services Tax Council shall be guided by the need for a harmonised structure of goods and services tax and for the development of a harmonised national market for goods and services.

(7) One-half of the total number of Members of the Goods and Services Tax Council shall constitute the quorum at its meetings.


(9) Every decision of the Goods and Services Tax Council shall be taken at a meeting, by a majority of not less than three-fourths of the weighted votes of the members present and voting, in accordance with the following principles, namely:

(a) the vote of the Central Government shall have a weightage of one third of the total votes cast, and

(b) the votes of all the State Governments taken together shall have a weightage of two-thirds of the total votes cast, in that meeting.

(10) No act or proceedings of the Goods and Services Tax Council shall be invalid merely by reason of—

(a) any vacancy in, or any defect in, the constitution of the Council; or

(b) any defect in the appointment of a person as a Member of the Council; or

(c) any procedural irregularity of the Council not affecting the merits of the case.

(11) The Goods and Services Tax Council shall establish a mechanism to adjudicate any dispute —

(a) between the Government of India and one or more States; or

(b) between the Government of India and any State or States on one side and one or more other States on the other side; or

(c) between two or more States, arising out of the recommendations of the Council or implementation thereof. (italics and emphasis added)

Though it may be argued that options by which simpler GST Regimes that would serve the public interests better may be considered by the GST Council without relying on the untried (though innovative) instrument of IGST, this paper would not consider those options. It would
take the mandate of the GST Council as provided in the Constitution as given and limit the consideration to enabling the GST Council to fulfill that mandate. It would take the unamended provisions of the Constitution (including Article 37) and every other provision of the Constitution as it stands amended after the commencement of the Constitution (101st Amendment) Act, 2016 as the basis for the deliberations in the GST Council. Most significantly, the basis would include the fact that the Constitution as amended by that Act provides that the term "supply" be construed by giving it the meaning as commonly attributed to it by market-participants by deliberately omitting to provide therein any other specific definition of the term "supply" used in clause (2) of Article 246A, in Articles 269A, 279A and 286 and in defining "goods and services tax" in clause (12A) of Article 366.

Clause (12A) of Article 366 provides that "goods and services tax" means any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption. Of the three words "goods", "services" and "supply" used in that clause, the word "goods" and the word "services" have been defined in clauses (12) and (26A) of the same Article. The word "supply" used in clause (12A) of Article 366 has however been deliberately left undefined. "Supply" as a taxable event is different from "removal (from a place of production)" in case of supply of goods. It is also different from "provision and distribution" in case of supply of services. Unlike 'removal' or 'provision', 'supply' implies a "destination" and a "recipient" related to it and a bilateral act in which a supplier and a corresponding recipient take part, instead of just an unilateral act of a producer or service-provider "removing" goods from a place of production or "providing and distributing" services from his/its place of business. The term "supply" is likely to be understood by market-participants as not applying to bailment (and return) of goods and as implying a supplier and a recipient related either by a common intent or by multiplicity of places of business of the supplier or his/its agent/principal, which common intent would help identify a "place of supply" at which value would have been added to goods and/or services prior to supply and a "destination" at which the recipient would receive valuable goods and/or services for purposes of subsequent use in adding more values or for purposes of consumption. Clause (1) of Article 367 provides as under:-

"Unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under article 372, apply for the interpretation of this Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India." (italics and emphasis added)
Section 20 of the General Clauses Act, 1897 referred to above provides as under:

"Where, by any Central Act or Regulation, a power to issue any notification, order, scheme, rule, form, or bye-law is conferred, then expressions used in the notification, order, scheme, rule, form or bye-law, if it is made after the commencement of this Act, shall, unless there is anything repugnant in the subject or context, have the same respective meaning as in the Act or Regulation conferring the power." (italics and emphasis added)

As such, in view of the provisions enacted in Article 367 read with section 20 of the General Clauses Act, 1897, the term "supply" cannot be defined in any manner in GST statutes by which it is given any meaning other than as the meaning commonly attributed to it by market-participants in the absence of any definition of the term "supply" in the Constitution, since the statutes would be enacted only by invoking the power conferred by the Constitution.

It would thus be noted that the Constitution does not provide any legislative competence to Parliament to define the term "supply" in any specific provision after the commencement of the Constitution (101st Amendment) Act, 2016 or to extend the scope of the term "supply" to acts, transactions or events which would not be commonly construed as "supply" without such extension, or to restrict the scope of the term in any way. It would also have to be noted that since "supply" of the kind referred to in clause (2) of Article 246A constrains the legislative competence of every State to levy GST by invoking clause (1) of that Article, if Parliament were to be constitutionally empowered to extend or restrict the scope of the term "supply", the term would have to be formally defined in the Constitution and the extension of the scope or restriction of the scope of the term would have to be by law made by Parliament after securing a recommendation of the President formally. This would be consistent with the constitutional practice provided for in Article 274 in respect of the definition of the expression "agricultural income".

The rest of this paper is organized thus: Section 2 would recount the legislative history leading to the constitution of the GST Council whose recommendations to the Union and State Executive Branches would not be a one-time act on its part (such as recommending a rule of the road by choosing one of the options "keep-to-the-left" or "keep-to-the-right" for all time to come) but would have to be made and/or revised from time to time. Section 3 would discuss the implications of the terms of reference for drafting formal Rules for the Transaction of Business in the GST Council, in which unlike in legislative chambers provided in the Constitution for the Union and the States, no member would be expected to act as if he/she "belongs to" any political
party included in either a "ruling" side or "opposition" side and no member would face any potential "disqualification" under the Tenth Schedule. Section 4 would identify aspects of the terms of reference, decisions on which would have to be facilitated by appropriate Rules for the Transaction of Business in the GST Council so as to lead to recommendations on matters falling within its mandate and consistent with the principle of harmony stipulated in clause (6) of Article 279A. Section 5 would draw conclusions on the appropriate procedural protocols by which the GST Council may enable itself to fulfill its constitutional mandate as a public authority, being embedded in the institution of 'the State' as recognized by the People vide Articles 12 and 36, to facilitate the reformulation of policy on the mode of levy of taxes on the supplies of goods and/or services from time to time by securing credible commitments on behalf of the Government of India and every State Government to such reformulation.

2. LEGISLATIVE HISTORY LEADING TO THE CONSTITUTION OF THE GST COUNCIL

A recommendation was made to the Government of India in 2004 by the Kelkar Committee to initiate a "Grand Bargain" with the State Governments to transit from the regimes for the levy at the "origin"s of buoyancy-deficient central excise duties and central service taxes to the regimes for the levy at the "destination"s of central and state "goods and service taxes" (GSTs). The recommendation was made in the context of maintaining appropriate budget-balance as stipulated in the law relating to fiscal responsibility and budget management. An informal Empowered Committee of State Finance Ministers (ECSFM) had been constituted in 2000 by the Government of India as recommended by an earlier Chief Ministers' Conference to enable the States to transit to regimes for the collection of state sales taxes on a value-added basis. Its deliberations led to state-level regimes for collection of state sales taxes on value-added basis from 2005. Instead of the Inter-States Council which had been set up in 1990- a decade before the ECSFM- in pursuance of the Sarkaria Commission Recommendations on Centre-States relations and has been functioning since then, the ECSFM was requested to help the Government of India in the Grand Bargain suggested by the Kelkar Committee.

The ECSFM presumably considered the suggestion as to a new instrument designated Viable Integrated Value-Added Tax (VIVAT) made by Keen et al. for adoption by the European Commission; and brought out a "First" Discussion Paper in November 2009. The solution
suggested in that paper was based on the introduction of a new instrument presumably modeled on a modified version of VIVAT. It was designated by the ECSFM as "Integrated Goods and Services Tax" (IGST).

Francis Bennion compares lawmaking (and interpretation) to finding a path through a maze. In "Understanding Common Law Legislation: Drafting and Interpretation" he observes as under:

‘Milton (Paradise Lost, book ii, line 555) spoke of “poor mankind in wandering maze lost”. Alexander Pope (An Essay on Man, epistle i, line 1) suggested the clue. “…all this scene of man: A mighty Maze! but not without a plan”. Discover the plan and you are on way to finding a path through the maze’

Any scout who attempts to "solve" a maze knows that the solution would require the working out of a plan by keeping in mind both the destination and the possible alternative paths. It follows that lawmaking on any new matter of legislative competence, which may prima facie require redefinition of the respective legislative competences of the Union and the States would have to be in two steps, viz.,

Step1. Working out a plan politically acceptable to lawmakers serving the Union and the States, of lawmaking for a common purpose aimed at serving the public interests;

and

Step2. redefining to the extent required, legislative competences of the Union and the States to make law according to the plan worked out in step 1.

Serving the public interests includes ensuring that the ownership and control of the material resources of the community are so distributed as best to subserve the common good and the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment as stipulated in Article 39. Avoidance of such detriment logically implies avoidance of detriment to national income and to the wealth of the nation. If the Union and the States have a common purpose to pursue such avoidance of detriment to national income and to the wealth of the nation in serving the public interests, there would be no justification for the Union to compensate any State for ceding political space in favour of the Union or for any State to assign part of its tax revenues to the Union. To conceive somehow of monetary compensation to be paid by any entity embedded in the institution of 'the State' to any other entity embedded in the same institution for acting in unison in accordance with the
Constitution is *prima facie* contrary to the principles of the Republic functioning in accordance with a Constitution. Even the privy purses provided for the erstwhile native Princes who ceded political space to the Republic have been done away with as repugnant to the principles of the Republic. Offer and acceptance of a *quid-pro-quo* for ceding political space by way of monetary compensation for potential "loss" of revenues by some entities embedded in 'the State' in transition ignores the priority to be given by 'the State' to avoidance of "common" detriment to national income and the wealth of the nation and abandons the common purpose of the reform.

It follows that before step 2 referred to above is taken, step 1 would have to be completed in accordance with the *treaty-like* recommendations, based on *credible political commitments* made on behalf of the Union and every State *sans any need for "compensation"*, of a Union-States Council established by invoking Article 263 to serve the public interests. Such step would have helped to ascertain-

(a) if redefinition of legislative competences is at all necessary for coordination of policy and action focused on an appropriate *socially relevant* "subject" relating to the *political economy* (e.g., "securing and protecting a *fair choice architecture* for market-participants" or *"minimizing transaction costs* for the actual and potential market-participants") ; and

(b) if so how such redefinition would have to be provided for in the Constitution so that central and state statutes may be *validly* enacted duly providing appropriate protocols-

(i) for ensuring coordination of policy and (legislative and executive) action focused on the chosen "subject" and

(ii) for the accountability to the Constitution of the institution of 'the Bureaucracy', in which officials subordinate to the respective Head of the Executive (i.e., President or a Governor) are embedded.

This would provide for whatever is politically acceptable for lawmaking relating to levy of indirect taxes *and to other relevant matters including levy of taxes on incomes* in step1. The secretariat of the Inter-State Council could have provided the requisite secretarial support to the Union-States Council since 2005 after ECSFM had concluded their act leading to transition to regimes for the collection of state sales taxes on a value-added basis. The secretariat of the Inter-States Council is still functioning even after the constitution of the GST Council, but a separate secretariat has been established to serve the GST Council somehow without reference to Article
263, which contains the only provision in the Constitution which refers to "action", legislative and executive; and to coordination of policy and action.

Without working out a plan for lawmaking (including the provisions of the central and state statutes for the levy of GSTs by relying on the instrument of IGST) acceptable politically in common to the lawmakers serving the Union and the States as step 1 however, the Government of India went ahead to take step 2 and moved the Constitution (115th Amendment) Bill, 2011 in May 2011. The 115th Amendment Bill lapsed with the dissolution of the Lok Sabha in 2014. Once again however the new Government of India decided to continue step 2 by mimicking the 115th Amendment Bill and moved the Constitution (122nd Amendment) Bill, 2014, in December 2014 without completing step 1 above. The 122nd Amendment Bill has led to the enactment of the Constitution (101st Amendment) Act, 2016 which provided inter alia for the constitution of the GST Council to make recommendations to the Union and the States on the matters referred to in Article 279A (supra). The constitution of the GST Council is presumably not in lieu of but in addition to such Council or Councils which may be established by invoking Article 263 if so would serve the public interests.

3.LINKING THE MANDATE OF THE GST COUNCIL TO RULES OF ITS PROCEDURE

The ECSFM functioned informally as a sounding board for the Ministry of Finance. The Government of India was not represented in it at the political level. It ceased to produce any meaningful output after 2009, even though it functioned for many years thereafter in studying best practices elsewhere in the world, excluding the United States where for various reasons the structure for the levy and collection of similar taxes is different. Eventually it lost its relevance to the Government of India thereby forfeiting the possibility of a vote of thanks, for its suggestions of 2009, in the Statements of Objects and Reasons made by the Ministers of Finance in the Government of India in support of the Bills in 2011 and 2014 to amend the Constitution. Those Ministers were left with no options except to rely on the instrument of "IGST" which the ECSFM suggested by readily agreeing, without any debate or discussion, with a committee of the members of the Bureaucracy in its First Discussion Paper. The suggestion based on the instrument designated IGST was not improved by the ECSFM in spite of its study of best practices in other countries. More importantly, the Finance Ministers of the Government of India
failed to get the ECSFM to help complete Step 1 referred to above by working out the particulars of a plan to draft the requisite GST statutes before rushing to take Step 2 and to get the redefinition of legislative competences done first by amending the Constitution.

Part XI of the Constitution on "the Relations between the Union and the States" has two chapters. Chapter 1 deals with legislative relations and Chapter 2 deals with administrative relations. Chapter 1 refers to "matters" of legislative competences of the Union and the States. Article 263 in Chapter 2 on the other hand refers to "subjects" implicitly of social relevance without reference to any specific matter or matters of legislative competence and to coordination of policy and action focused on such subject in serving the public interests. Policy referred to in Article 263 is what the title of Part IV refers to as 'State' Policy. Action includes legislative action of lawmaking as well as executive action of governance according to the Constitution and the rule of law. Articles 256 to 263 enacted in Chapter 2 of Part XI add on to the provisions enacted in Articles 73 and 162 which envisage that the extents of the legislative and executive functions of every Entity (i.e., the Union or a State) constituting India would have to be coterminous but subject to the provisions in the Constitution. Such provisions include Articles 258 and 258A relating to entrustment of duties and functions and of conferment of power across the Union-State divide of legislative competence. Articles 258 and 258A would apply notwithstanding anything in the Constitution. Articles 258 and 258A supplement Articles 53 and 154 which enable the subordinate officers of the respective Head of the Executive (i.e., President or a Governor) to function either "in the name of" the Head of the Executive (in accordance with the Constitution) or in accordance with law in the respective legal jurisdiction, which may be "central", "state" or "central-cum-state" as stipulated in law.

If in its functioning, the GST Council avoids the informality of the ECSFM it would be able to command the requisite political commitments, shared on behalf of the Union and every State, to coordinate policy and action focused on meaningful "subjects" which are socially relevant. This would be possible if it functions somewhat similar to how the Constituent Assembly functioned during 1946 and 1949, in a business-like manner according to formal rules regulating the transaction of the business in the Assembly. It is important to note that-

(i) reforms relating to central indirect taxes since 1986 and relating to state sales taxes since 2005 had significantly, though separately at the Union and State levels, addressed the problems of cascading of central excises and central service taxes in the levy and
collection of such central taxes and the problem of cascading of the incidence of state sales taxes in the levy and collection of the state sales taxes; and
(ii) the avoidance of the cascading of the incidence of central indirect taxes in the levy and collection of the state indirect taxes to the extent it has remained untouched by the earlier reforms and is referred to in the Statement of Objects and Reasons in support of the Constitution (122nd Amendment) Bill, 2014, is only partially relevant socially in minimizing all the transaction costs faced by market-participants in India; and cascading could be addressed without having to constitute the GST Council at all and without relying on the new untried instrument of IGST but subject only to a minor amendment of the Constitution.

The first formal act of the GST Council would have to be to make a preliminary recommendation to amend the Constitution (101st Amendment) Act, 2016 so that section 19 of the Act is omitted. Section 19 of that Act as enacted provides as under:-

"Notwithstanding anything in this Act, any provision of any law relating to tax on goods or services or on both in force in any State immediately before the commencement of this Act, which is inconsistent with the provisions of the Constitution as amended by this Act shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until expiration of one year from such commencement, whichever is earlier."

(italics and emphasis added)

What is a "law relating to tax on goods or services or both in force in any State" referred to in the above provision? It is undefined and unspecifiable. It seems to exclude law levying cenvat. In fact "the taxes, cesses and surcharges levied by the Union, the States and the local bodies which may be subsumed in the goods and services tax" are required to be identified by the GST Council in making its recommendations vide sub-clause (a) of clause (4) of Article 279A. As such the provisions of the law referred to in section 19 were unidentified when the Constitution (101st Amendment) Act, 2016 commenced. How about law relating to levy of central and state pre-GST taxes on "petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel" referred to in clause (5) of Article 279A which would have to continue till the date for levy of GST on supplies of those goods to be recommended by the GST Council- which date may be after the expiration of one year from the commencement of the Constitution (101st Amendment) Act, 2016? At any rate the Constitution as amended by the Constitution (101st Amendment) Act, 2016 does not provide for
"discontinuation" of any identifiable law. Section 19 above has been enacted by Parliament otherwise than by invoking the "constituent power" referred to in Article 368 and the applicability of the provision to discontinuation of state statutes even if they can be identified for "discontinuation" is not evident. The Constitution (101st Amendment) Act, 2016 is not a tax statute which repeals any earlier tax statutes.

Next comes the preliminary question of constitutionality of GST statutes. Article 265 stipulates: "No tax shall be levied or collected except by authority of law". As for lawmaking, Article 245 provides as under:

"245. (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.
(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation." (italics added)

It thus follows that lawmaking has to conform to the provisions in the Constitution and that payment of tax due (including interest and penalties) owed and collection and/or recovery of tax revenues would have to rely on an accurate interpretation of the law by which the tax is taken to be levied. It is easy to see that the simpler the provisions of the law are, the easier it would be to interpret them without any error for purposes of compliance or of administration.

To proceed further, it is assumed-

(i) that the proposals of the Government of India for consideration and recommendation of the GST Council based upon the draft statutes for the levy of CGST, IGST, central GST Compensation Cess and SGSTs put out by the Ministry of Finance in the public realm in November 2016 imply the conclusion, thanks to ECSFM, of Step 1 referred to above; and

(ii) that credible commitments to the provisions presumably in the service of the public interests proposed in the drafts referred to at (i) above on behalf of the Union and every State, though not obtained by way of commitments to the recommendations of a Union-States Council established by invoking Article 263, would be available to the forthcoming recommendations of the GST Council to adopt the drafts in (i) above for enacting the requisite central and state GST statutes.

A method of ensuring compliance of lawmaking to levy CGST, IGST, GST Compensation Cess and the SGSTs with the stipulation made in Article 245 (supra) would be to enact further

The provisions enacted in Articles 269A and 270 in Part XII refer -
(i) to "use" of input GST credits without supporting provisions in Article 246A in Part XI;
(ii) to "apportionment" without supporting provisions stipulating accountability in Articles 266 and 283 in Part XII itself; and
(iii) to "supply" without any basic definition enacted in the Constitution, of the term "supply" used in clause (12A) of Article 366 and in Articles 246A, 269A, 279A and 286; and without specific legislative competence being allocated to Parliament to extend or restrict the scope of the term subject to restraint by the judgmental action of the President under Article 274 similar to requirements for amending the definition of the expression "agricultural income" enacted in Article 366.

If Articles 269A and 270 are read with the provisions in Articles 246A, 266, 270, 274, 279A, 283, 286 and 366 appropriately amended as suggested above, litigation is likely to be minimized. Proceeding without further amendments to the Constitution would prima facie imply uncertainties in realizing revenues by levy of GSTs owing to likely proliferation of litigation arising out of inadequate constitutional basis for the GST statutes. Such uncertainties would commence at the commencement of the GST Regimes and would linger, thus producing more litigation and considerably less revenues (including, crucially, less revenues by way of levy of GST Compensation cess).

Thirdly, as brought out in the first section of this paper, the most important function of the GST Council would be to recommend a formula or principle for the apportionment of the moneys paid/colleced/recovered by way of levy of IGST and related dues (e.g., interest for IGST that is overdue and penalty for non-compliance with IGST statute). Since compensation (payable by the Union to the loss-making States when other States would implicitly be allowed to retain the gains made by them in transiting to GST Regimes) logically implies disharmony, the rules for the transaction of business in the GST Council would have to facilitate the
minimization of the amount of such compensation after ensuring that Constitution does provide for lawmaking relating to payment of such compensation.

Since it is inevitable in transiting to the GST regimes that some States may gain and some others may lose "own" revenues which would have accrued but for the transition. Some such States which may lose revenues and would need special provisions have been listed in sub-clause (g) of clause (4) of Article 279A. The principles of apportionment to be recommended by the GST Council ought to favour those Article 279A (4) (g)- listed States as against other unlisted States by specifying a higher ratio than the ratio specified for unlisted States. It may even be possible to tweak the ratios State-wise so as to minimize the burden of compensation which the Government of India may have to pay. At any rate, the GST Council would have to avoid recommending any action relating to GST Compensation cess and leave action about the levy of GST compensation to Parliament since the following provisions enacted in section 18 of the Constitution (101st Amendment) Act, 2016 do not amend the Constitution and as such the mandate of the GST Council specified in Article 279A does not extend to the Council making any recommendation relating to GST Compensation cess, unless the Constitution is amended further appropriately:

"Parliament shall, by law, on the recommendation of the Goods and Services Tax Council, provide for compensation to the States for loss of revenue arising on account of implementation of the goods and services tax for a period of five years."

The structure of the formal rules for the transaction of business in the GST Council would have to be worked out in such a manner that the new protocol of "apportionment"-

(i) becomes a legal-cum-constitutional protocol instead of remaining merely as a legal protocol without any link to the accountability provisions enacted in Articles 266 and 283; and

(ii) is effective in serving the public interests of developing a harmonized national market by means of the levy and collection of GSTs included a harmonized structure (i.e., without any disharmony).

This would lead to better accountability of the tax administrators to the Constitution than has been provided in the Constitution as amended in 2016.

The formal rules should enable every Member of every Committee of the GST Council who owes allegiance to the Constitution to participate in the debates on every item of the agenda by using the fairness of the apportionment formula as his "Ransberger Pivot" in convincing
his/her colleagues in the Council about his/her approach to the item on the agenda. The optimality of the approach advocated by any member would depend on whether it helps to minimize the gross amount of the burden of compensation to be paid by the Government of India. It goes without saying that the GST Council would have to consider alternative options of lawmaking proposed by members in the light of expert estimates of revenues for the Union and every State projected in case of every alternative option considered. To begin with, the GST Council would have to have before it complete and well-audited particulars of the amounts of revenues actually realized by way of levy and collection of every central and state indirect tax which is a candidate for being "subsumed" in the GST levies for one financial year as reference (say, the year 2015-16) acceptable to all members of the GST Council; and complete particulars of the estimated amounts of such pre-GST revenues which were in dispute before tax authorities or Courts at the close of that year (say, on the 31st March, 2016).

Fourthly, it is time-tested practice to provide in tax statutes for primary and post-primary tax jurisdictions in the bureaucratic hierarchy which is created to administer the law enacted in the tax statutes. Primary jurisdictions would have to be territoral and post-primary jurisdictions to ensure accuracy by correcting errors in decision-making would have to be functional (e.g., revision jurisdictions, appeal jurisdictions etc.). The transition of the legislative-competences-allocation formula to "Both the Union and the States" as noted above, logically implies that the administration of the GST regimes would have to be through a hierarchy of bureaucrats who would have to be entrusted functions, imposed duties and conferred powers cutting across the formal Union-States divide. Fortunately, the potential population of GST assesseees are used to the functioning of central-cum-state sales tax jurisdictions in every State. The same jurisdictions may be appropriately built up on by creatively invoking Articles 258 and 258A which provide as under:

258. (1) Notwithstanding anything in this Constitution, the President may, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends.
(2) A law made by Parliament which applies in any State, notwithstanding that it relates to a matter with respect to which the Legislature of the State has no power to make laws, confer powers and impose duties, or authorise the conferring of powers and the imposition of duties, upon the State or officers and authorities thereof.
(3) Where by virtue of this article powers and duties have been conferred or imposed upon a State or officers or authorities thereof, there shall be paid by the Government of India to the
State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of any extra costs of administration incurred by the State in connection with the exercise of those powers and duties.

258A. Notwithstanding anything in this Constitution, the Governor of a State may, with the consent of the Government of India, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the State extends.(italics added)

The GST Council may also recommend the creation of a service of direct and indirect tax administrators common to the Union and the States if the institution of 'the Bureaucracy' is to function as an institution of national life in harmony with the institution of 'the State' and the institution of 'the Market' for purposes of applying the principle stipulated in Article 38 as under:

"The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life." (italics and emphasis added)

The emphasis on the development of a "national" market is consistent with the principle enacted in Article 38, which would involve the functioning of the institution of 'the Market' as an institution of "national life". *It would be impossible to promote the goal of "welfare" envisaged in Article 38 unless the institution of 'the Market' can function in harmony with other institutions of national life including the institution of 'the State' and the institution of 'the Bureaucracy' which also would have to function as institutions of national (and not merely central or state) life.* The "national interest" referred to in Article 312 in creating a service of tax bureaucrats common to the Union and the States is thus self evident if 'the State' is to apply the Directive Principle stipulated in Article 38 stipulating the goal of welfare of the People in making law.

Fifthly, from the point of view of avoiding detriment to the national income, it would be appropriate to provide in a statute to be enacted by Parliament-

(i) for a common procedure (including common formats of supply vouchers recognizable in every state as evidence of the supply vouched therein) for the administration of, and compliance with, the central and state GST statutes applicable generally in every State in the same manner in which lawmaking relating to criminal procedure and civil procedure has been provided for in the Concurrent List; and
(ii) for a unique National Authority (say, a National Board of Taxes) to oversee all the requisite empirical and cognitive aspects (including "advance rulings") of the levy by the Union and by the States of GSTs and of other taxes including taxes levied on agricultural and other incomes of individuals and Corporations.

The Attorney-General appointed under Article 76 and the Advocates-General appointed under Article 165 may have important roles to play in efficiently avoiding detriment to national income and to the wealth of the nation caused by evasion of direct and indirect taxes within the country and by base erosion and profit sharing by cross-border entities. For this purpose the GST Council may even recommend an appropriate amendment of the Constitution.

Sixthly, and most importantly, it would ideally be appropriate for the GST Council, being a collective body populated by Ministers serving the Executive Branches of the Union and every State, to *refrain from making any recommendation as to the specification of the exact rate or rates of CGST and SGST*; and leave such specification to Parliament and to the respective State Legislatures, after spelling out the ratios from time to time at which IGST revenues would have to be apportioned to the Union and to every State which is either listed in sub-clause (g) of clause (4) of Article 279A or not so listed. The overall Union-States ratio of apportionment of revenues accruing as IGST would have to be the ratio of the rate of CGST and the *floor rate of SGST below which no State may specify SGST rate* in case of non-retail supplies. The overall apportionment ratio of IGST may have to be either commensurate with the ratio of the voting weightage to the Union and the States as acceptable to the Union *vide* the Illustration referred to in the Statement of Objects and Reasons in support of the Constitution (101st Amendment) Bill, 2014 or as may be negotiated and agreed to collectively in the GST Council from time to time. This would imply that a *unique ad valorem rate of IGST would have to apply to every "supply" in the course of inter-state trade or commerce irrespective of the nomenclature of the goods or the description of the services involved in the supply*. Lawmaking by Parliament and by State Legislatures would have to provide for the *direct transfer of the benefits of lower rates (or zero rating)* if any of CGST and SGST in case of supply of specific goods or services which they may specify for reasons of policy or in the service of the public interests. *Enforcement of adherence by the States to the floor rate of levy of SGST would have to rely either on a further amendment of Article 286 or on the resolutions of every State Legislature as stipulated in
Article 252 empowering Parliament to specify such floor rate of SGST by law applicable in common in every State.

4. RULES OF PROCEDURE TO ADHERE TO THE PRINCIPLE OF "HARMONY"

As noted earlier, such elaborate amendment of the Constitution as enacted in the Constitution (101st Amendment) Act, 2016 including the provision for constituting the GST Council would have been unnecessary if as stated in the Statement of Objects and Reasons in support of the Constitution (122nd Amendment) Bill, 2014, the aim of the intended reform is merely to avoid cascading of the incidence of indirect taxes. After the various reforms at the central and state levels from 1986 to 2005, only the problem of cascading of the incidence of cenvat in the levy of state sales taxes has remained. Apart from the provisions enacted in state sales tax statutes in compliance with section 15 of the Central Sales Tax Act, 1956, the following provision enacted in section 8A of the Central Sales Tax Act, 1956 helped avoid cascading of the incidence of prior-stage taxes in levying central sales taxes:

"In determining the turnover of a dealer for the purposes of this Act, the following deductions shall be made from the aggregate of the sale prices, namely:
(a) the amount arrived at by applying the following formula-

\[
\frac{\text{rate of tax} \times \text{aggregate of sale prices}}{100 + \text{rate of tax}}
\]

Provided that no deduction on the basis of the above formula shall be made if the amount by way of tax collected by a registered dealer, in accordance with the provisions of this Act, has been otherwise deducted from the aggregate of sale prices.
Explanation - Where the turnover of a dealer is taxable at different rates, the aforesaid formula shall be applied separately in respect of each part of the turnover liable to a different rate of tax"

If the Constitution is suitably amended to provide for stipulations as to the computation of the turnover similarly for purposes of the levy of state sales taxes on the cenvat-inclusive consideration payable by a dealer who is not a cenvat assessee to a dealer who is a cenvat assessee, there would be no levy of state sales tax on the cenvat component of the consideration payable. Such an amendment of the Constitution could have helped in avoiding cascading of the incidence of cenvat on the levy of state sales taxes without any need for any other amendment. The country would have lost only the novelty of the designation of the set of multiple post-reform taxes in the singular as "goods and services tax". It would have taken care of avoidance of
cascading of the central and state taxes of significant revenue importance, without levy of central GST Compensation cess. The levy of GST Compensation cess would continue cascading unless the turnover on which SGST would be leviable is suitably defined by recourse to a formula similar to the one provided in section 8A of the Central Sales Tax Act, 1956 referred to above.

The stipulation in clause (6) of Article 279A regarding development of a harmonized market and meeting the need for a harmonized structure of GSTs however goes beyond the requirement of avoiding cascading of the incidence of central indirect taxes. It is also important to relate the principle of "harmony" stipulated in clause (6) of Article 279A to guide the GST Council to the Directive Principles of State Policy stipulated in the unamended Article 37 to be applied by the institution of 'the State' in lawmaking. If not so related, the restraint on the Courts stipulated in Article 37 on enforcing the Directive Principles of State Policy would not apply to enforcing the requirement of harmony since the new principle of "harmony" does not occur in Part IV of the Constitution but occurs in Part XII. This fact creates a huge potential for litigation as to whether the levy and collection of GST in accordance with any statute enacted in accordance with the recommendations of the GST Council complies with the principle of harmony stipulated in Article 279A in the myriad facts and circumstances brought before the Courts. Such disputes would be initiated not only by entities liable to pay GST but also by others including the consumers who would pay GST only "indirectly" as part of the consideration for supplies. Levy of GST compensation cess would in particular risk significant litigation starting at the very commencement of the GST Regimes.

It is possible to interpret "harmony" without reference to the Directive Principles of State Policy. One possible interpretation would relate the principle to the Harmonized Classification of Goods referred to in treaty-law relating to international trade. Another possibility is to relate it to harmony in securing and protecting budget-balances at the levels of the Union and every State. There may be other possible interpretations unrelated to the Directive Principles of State Policy. But it is important to realize that such an elaborate amendment of the Constitution which provides for serious deliberations among Ministers serving the Union and every State as members of a formal constitutional body cannot ignore the fundamental stipulations as to lawmaking and governance made by the People in Article 37. The principles referred to in Article 37 elaborate the stipulations relate to 'the State' serving (whatever is ubiquitously referred to as) "the public interests" and include the stipulation made in clause (1) of Article 38.
The stipulation in Article 38 is closely related to the Resolution of the People of India stated in the Preamble to the Constitution which led to the creation of the Republic. The most important resolution of the People relates to "national life" of the fraternal community of Indians to be lived/experienced without detriment to the unity and integrity of the nation on the one hand and to the dignity of every individual on the other. Article 38 therefore underscores the need for harmony in the functioning of institutions of national life in securing and protecting a "just" social order as a pre-condition for reducing uncertainties in promoting welfare. In so far as production and consumption of goods and/or services are concerned, a "just" social order translates to a fair choice architecture for market-participants to source their supplies according to their respective preferences at appropriate unit prices and of appropriate quality. The Constituent Assembly has been prescient in noting that institutions help reduce uncertainties- a thesis which many years later earned Douglass North his Nobel Prize. In the context of the proposed reform it is important for the GST Council to note that Article 38 stipulates harmony in the functioning of the institutions of 'the Market', 'the Bureaucracy' and 'the State'; and to guide its deliberations and decision-making accordingly. This will comply with Article 37 which stipulates that the courts would not enforce the directive principles of state policy. The potential for litigation would reduce considerably.

5. THE WAY FORWARD FOR THE GST COUNCIL TO ACT TO FULFILL ITS MANDATE

The GST Council has been constituted by invoking Article 279A in Chapter I of Part XII of the Constitution mainly to apportion the IGST revenues between the Union on the one hand and the States (whether listed in sub-clause (g) of clause (4) of that Article or not) on the other. It is not a Department of the Government of India. It is also not a Legislature. It is however an Public Forum embedded in the institution of 'the State' recognized by the People vide Articles 12 and 36 and constituted to formulate recommendations relevant to its mandate from time to time on the basis of credible commitments made by its Members to coordinate policy and action as recommended. Vide sub-clause (h) of clause (4) ,the mandate of the GST Council would have to cover "other" matters of relevance to the matters explicitly listed in various clauses of Article 279A. Such other matters would have include principles for the levy and collection of the taxes on the incomes of the suppliers of goods and/or services, formats of supply vouchers which would have to be issued as evidence of supplies vouched therein acceptable in every State and
incentives to be provided to domestic consumers to demand the issue of true supply vouchers from their suppliers along with a formal declaration therein stating that in case the consideration stated therein does not indicate separately the amounts of IGST and central GST Compensation Cess (or, as the case may be, CGST, central GST Compensation Cess, SGST and State surcharge on SGST), it includes the incidence of all those levies.

As noted in section 1 of this paper, the deliberations and decisions of the GST Council must be seen in the context of the shift in the constitutional scheme of allocation of legislative competences to the Union and the States for the first time since the commencement of the Republic, from the "either-the-Union-or-the-States"-formula to "Both-the-Union-and-the-States"-formula in case of lawmaking to levy "goods and services tax" (GST). The GST Council is thus at the threshold of having to stipulate for itself rules of procedure in the same manner the Constituent Assembly found itself at a similar threshold in 1946, though for a much larger purpose. It was because of the rules for the transaction of its business adopted by itself that the Constituent Assembly was able to function in an orderly manner in spite of many serious transition problems during the three year period 1946 to 1949 and to enact the Constitution of India originally in the name of the People of India. This stands in contrast with the decade old period of indecision on transition to GST Regimes for want of formal rules of a formal forum.

There is a paradigmatic change in the constitutional scheme of allocation of legislative competences to the Union and the States in Chapter 1 relating to legislative relations of Part XI of the Constitution on the relations between the Union and the States. The social disorder (which may be described as unreasonable transaction costs faced by market-participants) that led to such change in the constitutional scheme is not being addressed by establishing a Union-States Council with a broad focus on an appropriate subject of social relevance by-

(i) invoking Article 263 in Chapter2 of that Part relating to administrative relations (between the Union and the States); and

(ii) acting according to its recommendations for coordination of policy and action.

Instead of that lawmaking is expected to be in accordance with the recommendations to be made by the GST Council constituted with an acute focus on a new protocol designated "apportionment". The GST Council has been constituted by invoking Article 279A in Chapter I relating to finance in Part XII which stipulates provisions to ensure accountability of moneys received by way of tax revenues by governments and appropriated by them for purposes and in
the manner provided in the Constitution. However, to the extent the recommendations of the GST Council would affect legislative relations between the Union and the States as redefined in Article 246A enacted in Part XI, the focus of the GST Council cannot but be broader.

**Such breadth of focus of the deliberations of the GST Council is implied by the principle of harmony stipulated in clause (6) of Article 279A.** This paper seeks to relate the principle of harmony to the Directive Principles of State Policy. The stipulation to develop a harmonized national market and the stipulation to provide for a harmonized structure of GST levies would require the GST Council to function formally as a mini Constituent Assembly. However, while the Constituent Assembly enabled a process to amend the Constitution drafted by it and ceased to be, the GST Council would never cease to be as long as Article 279A continues in the Constitution.

For considering options aimed at harmony as interpreted in this paper, the GST Council would have to consider in its plenary sessions the reports made to it by various Committees of its members. Every one of the Members though representing the People of India, owing allegiance to the Constitution and seeking to serve the public interests, may for purposes of securing the tax revenues accruing to the constituent part of "India" (a Union of States) he/she happens to serve, represent the point of view of the Union or of one of the States listed in sub-clause (g) of clause (4) of Article 279A or of one of the other States. From the issues likely to arise, it would appear *prima facie* that the following Committees would have to be formed to consider options for lawmaking and governance subject to coordination of policy and action focused primarily on minimizing all transaction costs for market-participants, but also on minimizing the burden of compensation payable by the Government of India to such States if any as may lose "own" revenues in transiting to the GST Regimes:

1) Committee on Constitutionality (to ensure constitutional support for lawmaking)
2) Committee on Rules of Procedure (including procedure for adjudication of disputes)
3) Committee on Order of Business (or a Steering Committee)
4) Committee on Drafting Law of Procedure (for Compliance and Administration of **all** GST levies)
5) Committee on Estimates of Projected Revenues (for every Candidate Option)
6) Committee on Transition from Pre-GST Levies (Repeals and Savings)
7) Committee on Policies relating to Apportionment of IGST revenues (including All-India floor rate of SGST and minimizing GST Compensation Cess)

Since the GST Council has to continue to function from time to time, the various Committees would have to be Standing Committees. It would be best democratic practice if unelected bureaucrats and experts are co-opted by the GST Council only in the deliberations of the Committee on Estimates. It would be for the GST Council Secretariat to brief the press on the day-to-day deliberations of the GST Council after obtaining the approval of the Chairman. It may also be appropriate to televise the proceedings and telecast the same live.

It is important to reiterate that the recommendations of the GST Council would not be a one-time act. The GST Council would have to act from time to time to revise its recommendations so that the institution of 'the State' is able to apply the Directive Principles of State Policy in lawmaking relating to the matters specified in Article 246A without being listed in the Union List and the State List in the Seventh Schedule. The records of the proceedings in every meeting of the GST Council and its Standing Committees would have to be archivable public records of its collective acts. The records would provide evidence of the application of the Directive Principles of State Policy in formulating its recommendations to ensure harmony in the functioning of the institutions of 'the State', 'the Bureaucracy' and 'the Market' for purposes of compliance with Article 38. Such evidence would enable the democratically elected Parliament and the State Legislatures to reformulate 'State' Policy on the mode of levy and collection of indirect taxes from time to time independent of the Judicial Branch of 'the State'.

REFERENCES


