

INVESTOR-STATE ARBITRATION IS DEAD: LONG LIVE INVESTOR-STATE ARBITRATION IN INDIA

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Abstract

*Investor-State arbitration has been presented as an undesirable consequence of bilateral investment treaties [“BIT”], and States have gone to the extent of terminating their BITs to escape from it. India is no exception to this phenomenon – having terminated the bulk of its BITs after the award passed in *White Industries Australia Ltd. v. Republic of India* [“*White Industries*”]. These terminated treaties have been sought to be replaced by a new generation of BITs, which are to be signed on the basis of a new Model Indian BIT released in 2015. This article seeks to evaluate whether the termination of these BITs has been a favourable development, and how successful India has been in its aim to replace them. The article also suggests pathways to deal with potential claims that may arise from the sunset clauses of terminated BITs and alternatives to ensure continued investor-protection in the absence of BITs, with an aim to promote foreign investment.*

I. Introduction

“The carrying trade is the natural effect and symptom of great national wealth”.¹ The free movement of goods and capital permits the market to determine the direction of international investment flows and seeks to insulate the market from politics.² A State maximises its productivity through the economies of specialisation and scale through investment.

BITs are seen as commitments to liberal economic policies which are aimed at increasing prosperity through foreign investment.³ To avoid ambiguities over the protection of foreign investments under international law, a typical BIT aims at the creation of credible commitments for investment by nationals and companies of one State-party in the territory of the other. There is an expectation of economic development in both States and improvement of commercial relations between the two parties.⁴ Deficiencies of customary international law on foreign investment triggered countries to enter into BITs.⁵

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¹ ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 630 (1776).

² JEFFREY A. FRIEDEN & DAVID A. LAKE, THE INTERNATIONAL POLITICAL ECONOMY: PERSPECTIVES ON GLOBAL POWER AND WEALTH 8 (4th ed. 2014).

³ Kenneth J. Vandeveld, *The Political Economy of a Bilateral Investment Treaty*, 92 AM. J. INT'L L. 621, 627 (1998).

⁴ J. BONNITHCA, L. PAULSEN & M. WAIBEL, THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME 314 (2017).

⁵ JESWALD SALACUSE, THE LAW OF INVESTMENT TREATIES 85 (2015).

India started signing BITs in the early 1990s as a part of its overall strategy of economic liberalisation adopted in 1991, and had a clear goal of inviting and facilitating foreign investments.⁶ India has signed 86 bilateral investment agreements from 1994 to 2020.⁷

Facilitation of foreign direct investment is one of India's policy objectives and to achieve this objective and ensure certainty, guidelines were laid down to widen the scope of investment activities under bilateral agreements.⁸ This process of India's integration with the global economy through BITs made India vulnerable to investor claims of more than 80 countries. The threat turned into reality due to the actions of the Indian executive, judiciary and legislature which did not align with the policy objective of increasing the scope of investment activities under bilateral agreements.⁹

The nation received several arbitration notices and investor treaty claims, which resulted in a critical backlash against investor-State arbitration and India ultimately reviewing its BIT regime.¹⁰ In this background, India's new treaty-making process and dispute resolution approach merits a comment.

In Part I, the article seeks to examine India's mixed experience with investor-State arbitration. Part II explores the perceived unpredictability of investor-State arbitrations, along with largely ignored positives of the system. In Part III, the article seeks to explore the steps taken by the Government of India [**"Government"**] to resolve the concerns related to investor-State arbitration. Part IV seeks to evaluate the potential effects of the steps taken by the Government on the country's investment regime and Indian investors investing abroad. Further, it seeks to compare the global and Indian approaches towards the backlash against investor-State arbitration. Finally, the article, in Part V, attempts to suggest steps to balance India's interest to regulate with investment protection.

II. India's mixed experience with investor-State arbitration

India's first-ever known experience with investor-State arbitration was related to the Dabhol Power Company [**"DPC"**] (*Bechtel Enterprises Holdings, Inc & GE Structured Finance (GESF) v. Government of India* (2003)), which was a joint venture of three American multinational companies.¹¹ The first case in this saga was filed in 2003.¹² Eight other cases followed in 2004.¹³ Dabhol Power

⁶ P. Ranjan, *India and Bilateral Investment Treaties – A Changing Landscape*, 29(2) ICSID REV.: FOREIGN INV. L. J. 419, 429 (2014).

⁷ *International Investment Agreements Navigator: India*, UNCTAD: INV. POL'Y HUB, available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india?type=bits>.

⁸ Niti Bhasin & Rinku Manocha, *Do Bilateral Investment Treaties Promote FDI Inflows? Evidence from India*, 41(4) VIKALPA: THE JOURNAL FOR DECISION MAKERS 275–287 (2016).

⁹ PRABHASH RANJAN, *INDIA AND BILATERAL INVESTMENT TREATIES: REFUSAL, ACCEPTANCE, BACKLASH*, 223 (2019) [*hereinafter* "RANJAN"]; see also *Ctr. for P.I.L. v. Union of India*, (2013) 10 SCC 270 (India); Finance Act, No. 23 of 2012, § 4 (India).

¹⁰ Saurabh Garg, Ishita G. Tripathy & Sudhanshu Roy, *The Indian Model Bilateral Investment Treaty: Continuity and Change, in* RETHINKING BILATERAL INVESTMENT TREATIES – CRITICAL ISSUES AND POLICY CHOICES 69 (Kavaljit Singh & Burghard Ilge eds., 2016).

¹¹ Rajendra Beniwal & Kumar Sumit, *Bilateral Investment Treaty and Investment Arbitration: A Critique from India Perspective*, SCC ONLINE BLOG (June 26, 2020), available at <https://www.sconline.com/blog/post/2020/06/26/bilateral-investment-treaty-and-investment-arbitration-a-critique-from-india-perspective>.

¹² *Bechtel Enters. Holdings, Inc. & GE Structured Fin. (GESF) v. Gov't of India*, Award (2003).

¹³ *International Investment Agreements Navigator: India*, UNCTAD: INV. POL'Y HUB, available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india?type=bits>; Premila

Project [“**DPP**”] was formed to build a power station in Maharashtra by signing a power purchase agreement with the Maharashtra State Electricity Board. However, the contract was later cancelled by the electricity board due to alleged irregularities, political opposition, and the high cost of power.¹⁴

DPC initiated arbitration proceedings but faced an anti-arbitration injunction issued by the Delhi High Court.¹⁵ Thereafter, the investors invoked the India-Mauritius BIT to file India’s first-ever investment treaty arbitration on the grounds of expropriation. Eight other cases were filed using BITs with the United Kingdom [“**U.K.**”], Netherlands, Austria, Switzerland, and France, United Arab Emirates and the Russian Federation.¹⁶ Meanwhile, the majority shareholder in DPC, GE, and Bechtel claimed the insurance pay out under political risk insurance cover from the Overseas Private Investment Corporation, United States of America [“**U.S.**”] for the loss of investment in the project.¹⁷ After paying the insurance amount, the U.S. government filed an international inter-State arbitration against India under the terms of the 1997 U.S.-India Investment Incentive Agreement in an effort to recover the sums paid out.¹⁸

After several rounds of litigation, commercial, investor-State, and State-to-State arbitration, a settlement was finally negotiated by the Indian government in 2005.¹⁹ A case study on the Dabhol Power Project stated that the Government of India, through its judiciary,²⁰ thwarted international arbitration panels from proceeding, and also refused to commit the resources to solve the problems raised through the project’s failure. Additionally, the Government also contributed to the failure of four-year-long negotiations by not only sending representatives without sufficient negotiating authority, but also frequently replacing them with new representatives, who similarly lacked negotiating authority. Further, the State government also failed to constructively participate in arbitrations and litigations or put in efforts to work out a solution for the project.²¹

The investor-State dispute settlement [“**ISDS**”] claims, which arose out of the DPP, did not get the requisite attention and did not receive adequate analysis from government functionaries, which could have promoted learnings from the experience. It took the *White Industries* case²² to mainstream the discussion around BITs and ISDS claims in India. In a contractual dispute between

Nazareth Satyanand, *Once BITten, Forever Shy: Explaining India’s Rethink of Its Bilateral Investment Treaty Provisions*, 16(1) AIB INSIGHTS 17, 20 (2016), available at https://documents.aib.msu.edu/publications/insights/v16n1/v16n1_Article5.pdf.

¹⁴ Won Kidane, *China’s and India’s Differing Investment Treaty and Dispute Settlement Experiences and Implications for Africa*, 49 LOY. UNI. C.L.J. 405, 434–38 (2017); Louis T. Wells Jr., *Enron Development Corp.: The Dabhol Power Project in Maharashtra, India (B) (Abridged)*, HARV. BUS. SCH.: CASE STUDY COLLECTION 797 (1997).

¹⁵ Union of India v. Dabhol Power Co., 2004 SCC OnLine Del 1298 (India) [*hereinafter* “Dabhol”].

¹⁶ *International Investment Agreements Navigator: India – Cases as Respondent State*, UNCTAD: INV. POL’Y HUB, available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india>.

¹⁷ Gus van Harten, *TWAIL and the Dabhol Arbitration*, 3(1) TRADE L. & DEV. 133, 143–44 (2011).

¹⁸ Gov’t of the United States of America v. Gov’t of India, Request for Arbitration under the Incentive Agreement between the Gov’t of the U.S.A. and the Gov’t of India, Nov. 19, 1997 (Nov. 4, 2004), available at <https://www.dfc.gov/sites/default/files/2019-08/GOI110804.pdf>.

¹⁹ JESWALD SALACUSE, *THE THREE LAWS OF INTERNATIONAL INVESTMENT: NATIONAL, CONTRACTUAL, AND INTERNATIONAL FRAMEWORKS FOR FOREIGN CAPITAL* 293 (2013).

²⁰ ENRON’s *Dabhol Power Project*, INDIAN POWER SECTOR, available at <http://indianpowersector.com/home/about/case-study>.

²¹ *Id.*

²² White Indus. Austl. Ltd. v. Republic of India, Final Award (UNCITRAL Arb. Nov. 30, 2011) [*hereinafter* “White Industries”].

White Industries and *Coal India*, an International Chamber of Commerce [“**ICC**”] tribunal ruled in favour of *White Industries* and awarded it AUD 4.8 million.²³ Coal India applied to the Calcutta High Court to set aside the Award without informing White Industries.²⁴ Coal India sought the enforcement of the Award in the Delhi High Court.²⁵ Both proceedings experienced substantial delays.²⁶ The enforcement proceedings were stayed pending the decision of the set-aside proceedings at the Calcutta High Court.²⁷ The matter was then appealed to the Supreme Court of India where it remained pending.²⁸

With the enforcement and set-aside proceedings pending since 2002, White Industries invoked the India-Australia BIT and filed an investor-State arbitration claim against India in 2010. The Tribunal found that India had violated its obligation to provide the investor with “‘*effective means*’ of asserting claims and enforcing rights”, a provision borrowed from the India-Kuwait BIT, by way of a Most-Favoured Nation [“**MFN**”] clause present in the India-Australia BIT.²⁹ According to the Tribunal, “‘*the Indian judicial system’s inability to deal with the investor’s jurisdictional claim in over nine years and the Supreme Court of India’s inability to hear the appeal for over five years amounted to undue delay and constituted a breach of India’s voluntarily assumed obligation under the treaty*”.³⁰

In various cases, particularly in early 2000s, courts were unwilling to accept jurisdiction of arbitral tribunals situated outside India and granted anti arbitration injunctions.³¹ India had not yet attuned itself to a modern international arbitration system, or the rules of international commercial arbitration, despite its membership to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards [“**New York Convention**”] and the provisions adopted in the Indian Arbitration and Conciliation Act, 1996 [“**Arbitration Act**”]. This, however, was not an isolated situation in India, but was a reflection of the condition of a lot of other developing countries.³² The realisation of the far-reaching nature and the enforceability of the obligations enshrined in the BITs did not dawn upon India until the *White Industries* decision.

The next year, in 2012, two investment treaty arbitration claims were filed by telecom license-holder investors against India after the Supreme Court of India held that the grant of 2G spectrum licenses to telecom companies by the Indian government was arbitrary and unconstitutional, and hence all the licenses were illegal.³³ In 2008, these telecom licenses were not auctioned, but were granted by the Government on a first-come-first-serve basis. Foreign investment by the telecom companies had been jeopardised on account of the arbitrariness of the Government in the first place.³⁴

²³ *Id.* ¶ 16.1.1(b).

²⁴ *Id.* ¶¶ 3.2.35, 3.2.39–40.

²⁵ *Id.* ¶ 3.2.43.

²⁶ *Id.* ¶¶ 10.4.12, 10.4.19, 14.2.57–65.

²⁷ *Id.* ¶ 3.2.60.

²⁸ *Id.* ¶¶ 10.4.19, 10.4.21.

²⁹ Agreement on the Promotion and Protection of Investments, Austl.-India, Feb. 26, 1999, 2116 U.N.T.S. 145; *White Industries*, Final Award, ¶¶ 4.4.2, 11.2.1–11.2.9, 11.2.3.

³⁰ *White Industries*, Final Award, ¶ 11.4.19.

³¹ Ronald J Bettauer, *India and International Arbitration: The Dabhol Experience*, 41(2) GEO. WASH. INT’L L. REV. 381, 386 (2009).

³² Joseph T. McLaughlin, *Arbitration and Developing Countries*, 13 INT’L L. 211, 215 *et seq.* (1979).

³³ *Ctr. For Pub. Int Litig v. Union of India*, (2012) 3 SCC 104 (India).

³⁴ *Id.*

Two other cases were brought against India for cancellation of the agreement to lease capacity in the S-Band, which formed part of the electromagnetic spectrum available in satellites for providing multimedia services to mobile users across India.³⁵ These licenses were cancelled after the Cabinet Committee on Security [“CCS”] announced that due to an increased demand for allocation of the spectrum for national and social needs and the country’s strategic requirements, the Government will not be able to provide slots in the S-band for commercial activities.³⁶

India argued before the Permanent Court of Arbitration that the agreement was annulled keeping in mind the essential security interests of the State. Arbitrator David R. Haigh noted that even three and a half years after the CCS took the decision to withdraw the spectrum, no decision was taken as to whether the spectrum would be used for either defence purposes or social needs.³⁷ This indicates a situation where decisions may have been taken in retaliation without adequate plans to deal with the consequences.

Three investment arbitration claims have also been brought against India due to imposition of taxes retrospectively.³⁸ The Government amended tax laws and clarified that offshore transactions are taxable for capital gains and have a retrospective application.³⁹ The amendment differed from the law laid down by the Supreme Court in *Vodafone International Holdings BV v. Union of India*.⁴⁰ As a consequence, affected investors took recourse to investor-State arbitration, and in a keenly awaited award (*Vodafone International Holdings BV v. Republic of India*), the amendments were considered to be in violation of the fair and equitable treatment standard of the Netherlands-India BIT.⁴¹ In another dispute related to the same issue, *Cairn Energy PLC & Cairn UK Holdings Ltd. v. Republic of India*, India argued that the BIT does not provide for arbitration of taxation matters and thus refused to appoint an arbitrator.⁴² Consequently, Cairn was forced to request the President of the International Court of Justice [“ICJ”] to intervene. India named its arbitrator only after intervention from the ICJ.⁴³

Additionally, two other investment arbitrations were brought against India due to the actions of its State governments.⁴⁴ The CEO of one of the investor companies escalated the issue to the Prime Minister of India in 2016 and claimed that there was a violation of the fair and equitable treatment [“FET”] standard due to non-payment of incentives which were promised by a State

³⁵ CC/Devas (Mauritius) Ltd., Devas Emp. Mauritius Pvt. Ltd. & Telcom Devas Mauritius Ltd. v. Republic of India, Case No. 2013-09 (Perm. Ct. Arb. 2013) [*hereinafter* “Devas”]; Deutsche Telekom AG v. Republic of India, Case No. 2014-10 (Perm. Ct. Arb. 2014).

³⁶ Press Release, Press Information Bureau, Gov’t of India, CCS decides to annul Antrix-Devas Deal (Feb. 17, 2011) (on file with the authors).

³⁷ Devas, Case No. 2013-09, Dissenting Opinion of David R. Haigh to Award on Jurisdiction, ¶¶ 92, 98 (Perm. Ct. Arb. July 25, 2016).

³⁸ Vodafone Int’l Holdings BV v. Gov’t of India, Case No. 2016-35 (Perm. Ct. Arb. 2016) [*hereinafter* “Vodafone Int’l Holdings”]; Cairn Energy PLC & Cairn UK Holdings Ltd. (CUHL) v. Republic of India, Case No. 2016-7 (Perm. Ct. Arb. 2016) [*hereinafter* “Cairn”]; Vedanta Res. plc v. Gov’t of India, Case No. 2016-05 (Perm. Ct. Arb. 2016).

³⁹ Finance Act, No. 23 of 2012, §§ 4, 77 (India) (amending the Income-tax Act, No. 43 of 1961, §§ 9, 195 (India)).

⁴⁰ Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613 (India).

⁴¹ Vodafone Int’l Holdings, Case No. 2016-35, Award, ¶ 363 (Perm. Ct. Arb. Sept. 25, 2020).

⁴² Cairn, Case No. 2016-7, Procedural Order No. 3, ¶ 47 (Perm. Ct. Arb. Mar. 31, 2017).

⁴³ Sanjeev Choudhary, *Cairn wants India to appoint arbitrator by November 11 in Rs. 10,247 tax dispute*, ECON. TIMES, Nov. 9, 2015, available at <https://economictimes.indiatimes.com/industry/energy/oil-gas/cairn-wants-india-to-appoint-arbitrator-by-november-11-in-rs-10247-tax-dispute/articleshow/49709467.cms?from=mdr>.

⁴⁴ Ras Al Khaimah Inv. Auth. v. Republic of India (2016) (UNCITRAL); Nissan Motor Co., Ltd. v. Republic of India, Case No. 2017-37 (Perm. Ct. Arb. Apr. 29, 2019) [*hereinafter* “Nissan”].

government under its ‘investment incentives scheme’. However, appropriate actions by the Government to manage the claims were still missing.⁴⁵

The history of cases discussed above indicates that India has been the subject of claims because the Indian judiciary moved too slowly, the executive failed to act in good faith and efficiently, or because the legislative actions of the Government were problematic for investors. This, however, does not provide a complete picture. There may be instances where the investors might have abused ISDS and investor-State arbitration in particular.⁴⁶ However, it would still be incorrect to say that each time an investor uses the ISDS mechanism, it is to encroach the host State’s right to regulate.⁴⁷ Nevertheless, following the global backlash against ISDS, India responded by reviewing its BIT regime.⁴⁸

This response, due to the slew of investor-State arbitration notices, is consistent with the reactionary approach of several other States that continued to ignore the risk posed by BITs until they were hit by numerous ISDS claims.⁴⁹

India lost the *White Industries* case, but it must be noted that it is the *only* investor-State arbitration lost by India. While some investor-State arbitrations ended up in a settlement, there are instances of India winning some treaty claims such as in *Tenoch Holdings v. Republic of India*,⁵⁰ and *Louis Dreyfus Armateurs SAS v. Republic of India*.⁵¹ These facts, which are the actual results of the investor claims raised after *White Industries* Award, are the antithesis of the dominant narrative that India has suffered due to the ISDS mechanism. Thus, it can be argued that India has had a mixed experience with its previous ISDS mechanism.

III. The debate about investor-State arbitration: Is it the culprit?

The termination of Indian BITs is often attributed to the investor-State arbitration proceedings commenced against the country and the perceived unpredictability of the investor-State arbitration awards.⁵² Considering the shrill debate on the issue, it becomes crucial to sieve the chaff from the grain and determine whether investor-State arbitration is the real problem or there is a bigger one lurking in the shadows.

The disquiet amongst government policymakers regarding the existence of BITs originates from the mixed experience of the Indian government while dealing with investor-State arbitration based

⁴⁵ Nissan, Case No. 2017-37, Decision on Jurisdiction, ¶¶ 309, 310 (Perm. Ct. Arb. Apr. 29, 2019).

⁴⁶ Utku Topcan, *Abuse of the Right to Access ICSID Arbitration*, 29(3) ICSID REVIEW 627, 629 (2014); Emmanuel Gaillard, *Abuse of Process in International Arbitration*, 32(1) ICSID REVIEW 17, 19 (2017).

⁴⁷ RANJAN, *supra* note 9, at 265; Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon, ICSID Case No. ARB/15/18, Award, ¶ 366 (June 22, 2017).

⁴⁸ James J. Nedumpara and Akshaya Venkataraman, *FDI In India: A Bird’s Eye View* 11 (Centre for Trade and Investment Law, Discussion Paper No. 8, 2020), available at https://ctil.org.in/cms/docs/Papers/Discussion/Discussion%20Paper%20on%20FDI%20in%20India_Final%20Draft%2004-03-2020.pdf.

⁴⁹ Lauge N.S. Poulsen & Emma Aisbett, *When the claims hit: Bilateral Investment Treaties and Bounded rational Learning*, 65(2) WORLD POL. 273, 276 (2013).

⁵⁰ Press Release, Press Information Bureau, Ministry of Finance, BIT claims against India dismissed (Jan. 20, 2020), available at <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1599905>.

⁵¹ Louis Dreyfus Armateurs SAS (Fr.) v. Republic of India, Case No. 2014-26, Final Award, ¶ 452 (Perm. Ct. Arb. Sept. 11, 2018).

⁵² Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India 100 (July 30, 2017) (India) [*hereinafter* “HLC Report”].

on the old BITs, which followed a neo-liberal model focusing on liberalizing global trade and cross border investments.⁵³ It has, however, become key that we focus on identifying the origin of these problems, rather than looking at investor-State arbitration as the sole pain point, since dispute resolution proceedings commence only after a ‘dispute’ has emerged in the first place.

Preliminary scrutiny reveals that a large share of investor-State arbitration disputes originated from inaction or delayed action by governmental authorities, which may or may not have resulted from a lack of adequate knowledge about India’s international obligations.⁵⁴ Key stakeholders in India have already realised that it is essential that a structure is developed to deal with investor-State arbitration disputes as and when they arise (dispute management), supported by dispute prevention schemes.⁵⁵ They have also suggested that India should also disseminate information about its obligations under international agreements to all departments and levels of the Government as a part of dispute prevention strategies.⁵⁶ This becomes essential considering that when investor-State arbitration proceedings commence, defending them can be very expensive.⁵⁷

The recent debate on investor-State arbitration has largely ignored the positives of the system, which is now the preferred mode of dispute resolution for investment disputes. ISDS, including investor-State arbitration, may have contributed to investment flows into India in the past.⁵⁸ The Queen Mary and White & Case survey stated that 97 per cent of respondents indicated that international arbitration is their preferred method of dispute resolution owing to the attributes of arbitration such as party autonomy, confidentiality, transparency, cost and time efficiency.⁵⁹ While underlining the need to reform the system, it must also be understood that States have won more disputes than they have lost in investor-State arbitration.⁶⁰

As indicated by the Government, the problem originates from the broad provisions in the old BITs, and not from investor-State arbitrations itself.⁶¹ The report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India [“**HLC Report**”] also raises the issue by asking for a reconsideration of whether a complete move away from investor-State

⁵³ Paul Robert Gilbert, *Sovereignty and tragedy in contemporary critiques of investor state dispute settlement*, 6(2) LOND. REV. INT. L. 211, 216 (2018); M. Sornarajah, *A law for need or a law for greed?: Restoring the lost law in the international law of foreign investment*, 6 INT’L ENVTL. AGREEMENTS: POLITICS, L. & ECON. 329, 335 (2006); Prabhash Ranjan, *Building confidence, BIT by BIT*, THE HINDU, June 19, 2019, available at <https://www.thehindu.com/opinion/op-ed/building-confidence-bit-by-bit/article28067297.ece> [hereinafter “Ranjan”].

⁵⁴ *Id.*

⁵⁵ HLC Report, *supra* note 52, at 101.

⁵⁶ *Id.* at 111.

⁵⁷ *Id.* at 101.

⁵⁸ Prabhash Ranjan, Harsha Vardhana Singh, Kevin James & Ramandeep Singh, *India’s Model Bilateral Investment Treaty: Is India too Risk Averse?* 38, 39 (Brookings India IMPACT Series No. 082018, Aug. 2018), available at <https://www.brookings.edu/wp-content/uploads/2018/08/India’s-Model-Bilateral-Investment-Treaty-2018.pdf> [hereinafter “Ranjan et al.”]; Rashmi Banga, *Impact of Government Policies and Investment Agreements on FDI Inflows* (ICRIER Working Paper No. 116, 2003).

⁵⁹ White & Case & School of Int’l Arb., Queen Mary Univ. of London, *2018 International Arbitration Survey: The Evolution of International Arbitration* 5 (2018), available at [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF).

⁶⁰ *Investment Dispute Settlement Navigator*, UNCTAD: INV. POL’Y HUB, available at <https://investmentpolicy.unctad.org/investment-dispute-settlement?status=1>.

⁶¹ Lok Sabha, Unstarred Question No.169: Bilateral Investment Treaties, Answered by the Minister of State (Independent Charge) of the Ministry of Commerce & Industry (Shrimati Nirmala Sitharaman) (July 17, 2017), available at <http://164.100.24.220/loksabhaquestions/qhindi/12/AU169.pdf> [hereinafter “Answer No. 169 on BITs”].

arbitration is required.⁶² This indicates that a broader reform may be required rather than using investor-State arbitration as the scapegoat for all issues in question.

IV. Exorcising the demons of *White Industries*

The Indian government woke up to the possible dire consequences of investor-State arbitration based on the old BITs after the *White Industries* award and the slew of cases which followed. This led it to terminate its existing BITs and attempt to renegotiate new BITs on the basis of a new model.⁶³ The Government in 2016 also formed a High Level Committee under the Chairmanship of Mr Justice B N Srikrishna, Retired Judge, Supreme Court of India [“HLC”] to “review the institutionalisation of arbitration mechanism in India”.⁶⁴ In this Part, we discuss whether these and other steps taken by the Indian government have worked to resolve the concerns related to investor-State arbitration.

A. A fresh start for BITs

The Indian government considered that “India’s earlier BITs contained many provisions which could be subjected to broad and ambiguous interpretations” and thus moved ahead to terminate more than 58 out of 83 BITs which existed in 2015 as a step to deal with investor-State arbitration.⁶⁵ This was followed by the release of a new Model BIT in 2015,⁶⁶ which, as per the Government, “balances the investor’s rights and obligations and is likely to reduce the possibility of broad interpretations in the context of any investment disputes under the treaty”.⁶⁷ The new Model BIT has particularly modified the standards of protection, and has also included detailed provisions on investor-State arbitration. These steps have been taken to fulfil two key objectives: *first* to provide protection to foreign investors,⁶⁸ and *second* to reduce the discretion of arbitral tribunals over treaty interpretation.⁶⁹

The HLC also recommended adoption of alternatives to investor-State arbitration such as mediation and State-to-State arbitration, and incorporation of an appellate mechanism. These

⁶² HLC Report, *supra* note 52, at 106–07.

⁶³ HLC Report, *supra* note 52, at 100; Law Commission of India, Report No. 260 – Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty, ¶ 1.7 (2015), available at <http://lawcommissionofindia.nic.in/reports/Report260.pdf> [*hereinafter* “Report No. 260”].

⁶⁴ HLC Report, *supra* note 52.

⁶⁵ Answer No. 169 on BITs, *supra* note 61; Tim R. Samples, *Winning and Losing in Investor – State Dispute Settlement*, 56(1) AM. BUS. L.J. 115, 147 (2019).

⁶⁶ For the purposes of clarity, it is stated that the text of the ‘Model Indian BIT 2015’ is taken from the document available at https://dea.gov.in/sites/default/files/ModelTextIndia_BIT_0.pdf [*hereinafter* “Model Indian BIT 2015”]. There was a ‘Draft Model Indian BIT, 2015’ which was released earlier in the same year and is available at https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf [*hereinafter* “Draft Model Indian BIT 2015”].

⁶⁷ Answer No. 169 on BITs, *supra* note 61.

⁶⁸ Lok Sabha, Unstarred Question No.1290: Bilateral Investment Treaties, Answered by the Minister of State (Independent Charge) of the Ministry of Commerce & Industry (Shrimati Nirmala Sitharaman) (July 25, 2016), available at <https://dipp.gov.in/sites/default/files/lu1290.pdf>; Model Indian BIT 2015, *supra* note 66, art. 3.2 mentions the FPS standard.

⁶⁹ Prabhash Ranjan & Pushkar Anand, *The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction*, 38(1) NW. J. INT’L L. & BUS. 1, 8 (2017) [*hereinafter* “Ranjan & Anand”]; Department of Economic Affairs, Ministry of Finance, Government of India, *Transforming the International Investment Agreement Regime: The Indian Experience* (2015), available at https://worldinvestmentforum.unctad.org/wp-content/uploads/2015/03/India_side-event-Wednesday_model-agreements.pdf; Model Indian BIT 2015, *supra* note 66, arts. 3.1, 5.4, 13.2, 13.3, 13.5, 26.1.

measures have been seen in the new BITs signed in recent years with Belarus, Taiwan, and the Kyrgyz Republic after the release of the Model BIT, 2015.⁷⁰

B. Inclusion of a new format for investor-State arbitration

Detailed provisions on investor-State arbitration have been included in the recent BITs signed by India. The BIT with Belarus signed in September 2018 included detailed provisions which covered a requirement to exhaust domestic remedies for a time period of five years (i.e. a strict time period within which disputes should be filed), and a requirement of conduct of consultation, negotiation, or other third party procedures for a period of six months before pursuing investor-State arbitration.⁷¹ Similar requirements are also seen in the Indian Taipei Association-Taipei Economic and Cultural Center in India Bilateral Investment Agreement, albeit with variations in the time periods for completion of pre-arbitration proceedings.⁷² These provisions are, in turn, supported by detailed provisions on transparency, qualification of arbitrators, rules on conflict of interest, and the possibility of submission of joint interpretations.⁷³

The provisions on investor-State arbitration included in these recent BITs are modified versions of the provisions seen in the Draft Model Indian BIT 2015, and some remove controversial issues, such as the requirement of consent for investor-State arbitration for a second time.⁷⁴ The new BITs still continue with the exclusion of umbrella clauses and restriction on review of domestic judicial decisions.⁷⁵ Combined with the large number of qualifications discussed above, the investor-State arbitration provision in the new Model BIT and the latest BITs signed by India are considered to be favourable to the host State, which may not be a much desired outcome since the ultimate aim was a balance of powers between the investor and the host State.⁷⁶ In any case, the inclusion of investor-State arbitration in the recent BITs indicates that India has not given up on investor-State arbitration, and still sees it as a viable model for dispute resolution, albeit with modification of the mechanism.

C. Promotion of State-to-State arbitration as an alternative to investor-State arbitration

The India-Brazil Investment Cooperation and Facilitation Treaty, 2020 [**India-Brazil ICFT**]⁷⁷ went a step further than the dilution of investor-State arbitration in the Model Indian BIT 2015 by eliminating it altogether. State-to-State arbitration has been included as the sole mode of binding dispute resolution, with the mandate and power of such tribunal also being highly restricted.⁷⁷ This step may have been shaped by a combination of two key factors.

⁷⁰ HLC Report, *supra* note 52, at 106–11 *et seq.*

⁷¹ Treaty on Investments, Belr.-India, art. 15, Sept. 24, 2018.

⁷² India-Taiwan Bilateral Investment Agreement, art. 15, 2018.

⁷³ *Id.* arts. 21, 17, 18, 23.

⁷⁴ Draft Model Indian BIT 2015, *supra* note 66, art. 14.4 (ii); Report No. 260, *supra* note 63, ¶ 5.5.2; A requirement for a second consent (besides the treaty itself) would have meant that the State would be able to slow down the recourse of the investor to investor-State arbitration by withholding the consent to arbitration thereby reducing the effectiveness of protection under the treaty.

⁷⁵ An umbrella clause can bring contractual commitments by a State under the protection of an investment treaty. *See* Grant Hanessian & Kabir Duggal, *The 2015 Indian Model BIT: Is This Change the World Wishes to See?*, 30(3) ICSID REVIEW 729, 736 (2015).

⁷⁶ Ranjan & Anand, *supra* note 69, at 51.

⁷⁷ Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, Br.-India, art. 19, Jan. 25, 2020, available at <https://dea.gov.in/sites/default/files/Investment%20Cooperation%20and%20Facilitation%20Treaty%20with%20>

First, the Brazilian Cooperation and Facilitation Investment Agreements, which had been signed prior to this India-Brazil ICFIT, also contained State-to-State arbitration as the sole mode of third-party dispute resolution. This has also been explained in an official release by the Brazilian government.⁷⁸

Second, the inclusion of a tiered dispute resolution model with State-to-State arbitration as the final tier as an alternative to investor-State arbitration, had been suggested by the HLC in its report. This may have been an attempt by the Government to adopt that suggestion.⁷⁹

D. Unilateral and joint interpretative statements

India has chosen to issue joint interpretative statements on the meaning of a few important terms included in the new BITs. Bangladesh and Colombia have chosen to enter into agreements to accept this joint interpretative statement.⁸⁰ Before this step, India, on February 8, 2016, had made a unilateral interpretative statement, while requesting the 25 States mentioned in the statement to come forward for joint interpretative statements if they wanted their BITs to continue to remain in force.⁸¹ Keeping in view that most States (except two) preferred their BITs to expire rather than entering into a joint interpretative statement with India, it prima facie appears that the aim has not been completely fulfilled.⁸² In the absence of consent from the opposite State, the value of the unilateral interpretative statements would be determined by any future arbitral tribunal which may have to deal with disputes based on sunset clauses under these now expired treaties.⁸³ In any case, under international law, the tribunals have to consider these interpretative statements (whether unilateral or joint) while making a decision.⁸⁴

V. Analysis of India's approach in the new Model BIT

The aforementioned steps taken by India including approaching the courts to impede ongoing investor-State arbitrations and terminating existing BITs in favour of entering into fresh

Brazil%20-%20English_0.pdf. State-to-State arbitration is a means for dispute resolution between the parties to a treaty and normally deal with disputes regarding interpretation or application of the treaty. A recourse to State-to-State arbitration is possible under most investment treaties based on the clause providing for resolution of disputes between the parties to the treaty. *See* ANGSHUMAN HAZARIKA, STATE-TO-STATE ARBITRATION BASED ON INTERNATIONAL INVESTMENT AGREEMENTS 19 (2020).

⁷⁸ Prior to this, Brazil had entered into Cooperation and Facilitation Investment Agreements with Mozambique, Angola, Malawi Mexico, Colombia, and Chile. *See* Ministry of Development, Industry and Foreign Trade (MDIC), Gov't of Brazil, *The Cooperation and Facilitation Investment Agreement*, MDIC, available at <http://www.mdic.gov.br/arquivos/CFIA-Presentation-EN.pdf>.

⁷⁹ HLC Report, *supra* note 52, at 106–07.

⁸⁰ Joint Interpretative Declaration between the Republic of India and the Republic of Colombia regarding the Agreement for the promotion and protection of investments, India-Colom., (2018) available at <https://dea.gov.in/sites/default/files/JID%20with%20Colombia.pdf>; Joint Interpretative Notes on the Agreement between the Government of the Republic of India and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investment, India-Bangl.,(2017) available at <https://dea.gov.in/sites/default/files/Signed%20Copy%20of%20JIN.pdf>.

⁸¹ Ministry of Fin., Dep't of Econ. Aff., Gov't of India, *IC Office Memorandum — Regarding Issuing Joint Interpretative Statements for Indian Bilateral Investment Treaties*, Off. Memo. F.No. 26/07/2013 (Feb. 8, 2016) (on file with the authors).

⁸² *International Investment Agreements Navigator: India – Bilateral Investment Treaties*, UNCTAD: INV. POLY HUB, available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india>.

⁸³ HLC Report, *supra* note 52, at 112; Geoffrey Gertz & Taylor St John, *State interpretations of investment treaties: Feasible strategies for developing countries* (Policy Brief, Global Economic Governance Programme, Balavatnik School of Gov't, Univ. of Oxford, June 2015), available at https://www.geg.ox.ac.uk/sites/geg.bsg.ox.ac.uk/files/GEG%20Gertz%20and%20St%20John%20June2015_A.pdf.

⁸⁴ HLC Report, *supra* note 52, at 111, 112.

agreements with States have wide consequences. It thus becomes important to evaluate whether these steps have worked in India's favour, or hurt her prospects.

A. Potential effects of India's new investment 'protection' regime

An actual analysis of the impact of the termination of BITs with respect to FDI inflows or business has not been undertaken. However, in practice, the termination of BITs has definitely led to a difference in perception between the Government's goal to attract more foreign investment and the message that goes out to the investors regarding India's desire to protect investors.⁸⁵ Evidence shows that BITs have helped to attract foreign investment to India.⁸⁶ Additionally, many countries insist on investment treaty protection for their investors as a precondition for providing political risk insurance for their investments.⁸⁷ In such a situation, termination of BITs at one go is an issue which at least merits a careful cost-benefit analysis by an appropriate government authority.

Authors have stressed that the new Model Indian BIT may not be completely suitable for replacing the old BITs for several reasons.⁸⁸ First, the replacement of the FET standard with a new standard sought to be linked to customary international law, brings about a high level of uncertainty and possibility of wide interpretation by a tribunal, thereby creating a problem which India sought to avoid in the first place.⁸⁹ This unique standard, called 'treatment of investments', is distinct from customary international law and contains four specific instances when violations can be considered.⁹⁰ These four instances are denial of justice, fundamental breach of due process, targeted discrimination on manifestly unjustified grounds linked to 'gender', 'race', or 'religion' and manifestly abusive treatment. A reference to customary international law here opens the Pandora's box on what is the exact standard in customary international law and since the tribunals are dealing with a completely new 'autonomous' standard, without any prior guidance, they may exercise their discretion to come to a wide interpretation.⁹¹

Further, globally prevalent standards, such as MFN – which are seen in almost all trade and investment agreements till date – have been removed, therefore creating further confusion about the exact scope of protection which would be provided in the absence of known standards of protection.⁹² In view of this situation, the new Model BIT, which removes the MFN standard, brings uncertain standards, and provides wide-ranging regulatory power, may not be attractive to

⁸⁵ RANJAN, *supra* note 9, at 355; Pragya Srivastava, *What new Bilateral Investment Treaty is, and what it does*, FIN. EXPRESS, Aug. 2, 2018, available at <https://www.financialexpress.com/economy/india-scaring-away-foreign-investors-what-new-bilateral-investment-treaty-is-and-what-it-does/1267124>.

⁸⁶ *Id.*; Nilanjan Sen & Amarendu Nandy, *What ails India's Model BIT?*, THE HINDU: BUS. LINE, June 28, 2020, available at <https://www.thehindubusinessline.com/opinion/what-ails-indias-model-bit/article31939413.ece>.

⁸⁷ James J. Waters, *A Comparative Analysis of Public and Private Political Risk Insurance Policies with Strategic Applications for Risk Mitigation*, 25 DUKE U. J. COMP & INT. LAW 360, 370 (2015); Aditya Goyal, *Fixing the Broken Legs of Investor-State Arbitration*, 1 HNLU STUDENT BAR J. 17, 19 (2016) [hereinafter "Goyal"].

⁸⁸ Jarrod Hepburn & Ridhi Kabra, *India's new model investment treaty: fit for purpose?*, 1(2) INDIAN L. REV. 95, 112 (2017) [hereinafter "Hepburn & Kabra"]; Anujay Shrivastava & Kaustabh Kapoor, *Significance of International Investment Arbitration in India's Efforts towards instituting a robust regulatory regime*, 9 INDIAN J. INT'L ECON. L. 82, 97 (2019).

⁸⁹ Manu Thadikkaran, *Model text for the Indian Bilateral Investment Treaty: An Analysis*, 8 NUJS L. REV. 31, 37 (2015).

⁹⁰ Model Indian BIT 2015, *supra* note 66, art. 3.1; Hanessian & Duggal, *supra* note 75, at 736; Prabhash Ranjan, *Investment Protection and Host State's Right to Regulate in the Indian Model Bilateral Investment Treaty: Lessons for Asian Countries*, in ASIA'S CHANGING INTERNATIONAL INVESTMENT REGIME 47, 57 (Julien Chaisse, Tomoko Ishikawa & Sufian Jusoh eds., 2017).

⁹¹ Ranjan et al., *supra* note 58, at 27; Thadikkaran, *supra* note 89; Saurabh Garg et al., *supra* note 10.

⁹² Priti Patnaik, *Deconstructing India's Model Bilateral Investment Treaty*, THE WIRE (Sept. 16, 2016), available at <https://thewire.in/economy/deconstructing-indias-model-bilateral-investment-treaty>.

an investor.⁹³ Key issues which may be of concern to investors are the exclusion of measures by local governments and taxation measures, power of issuance and revocation of compulsory licenses, and inclusion of the new standard to replace FET as discussed above.⁹⁴

The Law Commission of India [**“Law Commission”**] had flagged out a number of provisions on investor-State dispute settlement in the Draft Model Indian BIT for modification or removal.⁹⁵ Key clauses which had been flagged out for removal were:

The purpose clause at Article 14.1, which has been described as vague and potentially unacceptable to other countries on the negotiating table.⁹⁶ While including the clause, no explanation was provided on what would be considered as a situation where an investor is using or threatening to use investor-State arbitration to compel a host State to act or refrain from acting. In the absence of an explanation, a host State could use this provision in case of any dispute to argue that it was an attempt to threaten the host State.

The clause restricting the power of an investor-State arbitral tribunal in Article 14.2(ii)(a), which is considered to render ‘the entire BIT unworkable’.⁹⁷ This assessment may have been made based on the fact that while a domestic judicial authority may have made a decision based on the prevailing local laws, an investor-State arbitral tribunal evaluates the issue on the basis of the standards of protection present in the treaty and/or international law (based on the applicable law provisions in the treaty). With a blanket prohibition on consideration of a dispute by a tribunal after it has been dealt with by a domestic forum, obtaining protection under the investment treaty standards would not have been possible for an investor.

Article 14.8(iv), which allowed a non-disputing State party to make submissions regarding treaty interpretation, has been found to be potentially in conflict with the State-to-State dispute resolution provision.⁹⁸ The objection on this issue was related to the fact that the ‘State-to-State’ arbitral provision in the treaty is already present for resolution of disputes regarding the interpretation of the treaty between the State parties. If the non-disputing party is allowed to make submissions on interpretation directly to the investor-State tribunal here without specifying what would be the scope of the submission (whether it is optional for the tribunal for the consider or not), and there is a difference between the opinion of the State parties, it may mean that the investor-State tribunal is in practice resolving an inter-State dispute.

⁹³ Sen & Nandy, *supra* note 86; Model Indian BIT 2015, *supra* note 66, arts. 2.4, 6.4.

⁹⁴ Model Indian BIT 2015, *supra* note 66, arts. 2.4, 3.1.

⁹⁵ Report No. 260, *supra* note 63, at 40 *et seq.*

⁹⁶ Draft Model Indian BIT 2015, *supra* note 66, art. 14.1 (“Without prejudice to the rights and obligations of the Parties under Article 15, this Article establishes a mechanism for the settlement of Investment Disputes. An Investor shall not use or threaten to use this Article in order to obtain money, property, or any other thing of value from the Host State, or otherwise compel the Host State to act or refrain from acting.”). This provision was not included in the final Model Indian BIT 2015, *supra* note 66.

⁹⁷ *Id.* art. 14.2(ii)(a) (“In addition to other limits on its jurisdiction, a tribunal constituted under this Article shall not have the jurisdiction to: a. re-examine any legal issue which has been finally settled by any judicial authority of the Host State between the Investor party to the Investment Dispute (the “Disputing Investor”) and the Party to the Investment Dispute (“Respondent Party”), or between the Disputing Investor, Investment or any other natural/legal person having a common right or interest in the Investment and a Respondent Party or a third party.”).

⁹⁸ *Id.* art. 14.8 (iv) (“The Non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Treaty.”).

India's trade and investment partners have also disagreed with the new model, and negotiations with the U.S., the European Union ["EU"] and Canada have stagnated over this issue.⁹⁹ Combined with the tendency of the Government of India to change policies at short intervals, it is unlikely that any partner will be willing to agree to a model which provides a great deal of power to the State (it is a pro-State model).¹⁰⁰ This can be seen from the current status of negotiations under the new model (after 2016), wherein only four agreements (Taiwan Economic and Cultural Center-2018, Kyrgyz Republic-2019, Belarus-2018, and Brazil-2020) have been signed and two (Taiwan and Belarus) are in force.¹⁰¹ As discussed above, in the prior paragraph, the Law Commission had already flagged out this possibility for disagreement between negotiating partners in a number of provisions of the Draft Model Indian BIT, and hence this does not come as a surprise.¹⁰²

Considering that India needs to attract more investment at the earliest, owing to the slowdown in the economy in the background of the COVID-19 crisis and the rise of protectionism which preceded it, a relook at its BIT strategy is crucial. Emphasis may be laid on refraining from radical deviation in treaty texts, which may prolong negotiations. India may have already missed many investors who have left for China in recent years owing to the termination of BITs with prominent capital-exporting countries such as Germany, the Netherlands, France, and the U.K.¹⁰³ Destinations such as Vietnam, Singapore, and Cambodia already have BITs with these countries or have even moved ahead to sign new investment agreements with the EU itself (Singapore and Vietnam).¹⁰⁴ India, on the other hand, does not have any investment protection agreements in force with the EU and has only two remaining BITs in force with two of the smallest EU economies.¹⁰⁵

B. Impact on Indian investors investing abroad

It is useful to understand that while India was traditionally a capital importing country, in recent years a number of Indian companies have emerged as multinationals with significant investments abroad.¹⁰⁶ Investor-State arbitration has been used extensively by Indian investors in the past, with at least nine known disputes at various stages of dispute resolution.¹⁰⁷ The Indian investors have also repeatedly obtained benefits of the Indian BIT program, with a network of BITs which at a

⁹⁹ RANJAN, *supra* note 9, at 356.

¹⁰⁰ Ranjan & Anand, *supra* note 69 at 55.

¹⁰¹ Sen & Nandy, *supra* note 86; RANJAN, *supra* note 9; Thadikaran, *supra* note 89, at 42.

¹⁰² Report No. 260, *supra* note 63, ¶¶ 5.2.1, 5.5.3.

¹⁰³ The status of Indian BITs is available at <https://dea.gov.in/bipa>.

¹⁰⁴ *International Investment Agreements Navigator: EU - Viet Nam Investment Protection Agreement (2019)*, UNCTAD: INV. POLY HUB, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3616/eu--viet-nam-investment-protection-agreement-2019>; *International Investment Agreements Navigator: EU - Singapore Investment Protection Agreement (2018)*, UNCTAD: INV. POLY HUB, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3545/eu--singapore-investment-protection-agreement-2018>.

¹⁰⁵ BITs between the following two EU Member States and India were in force as on Aug. 21, 2020: Latvia and Lithuania. Official information about GDP of EU Member States, see *Which Member States have the largest share of EU's GDP?*, EUROSTAT, available at <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20180511-1?inheritRedirect=true>.

¹⁰⁶ Ranjan et al., *supra* note 58, at 39.

¹⁰⁷ *Investment Dispute Settlement Navigator: India – Cases as Home State of Claimant*, UNCTAD: INV. POLY HUB, available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india>; *Indian company invokes Dutch BIT – rather than Indian treaty – in new arbitration over withdrawn subsidies in Uzbekistan*, IA REPORTER (Sept. 30, 2013), available at <https://www.iareporter.com/articles/indian-company-invokes-dutch-bit-rather-than-indian-treaty-in-new-arbitration-over-withdrawn-subsidies-in-uzbekistan>.

time were more than 89 in number, rather than BITs being only an option for a foreign investor in India. India has also emerged as a country with major FDI outflows and ranked 23rd in the world in this regard.¹⁰⁸ This has meant that the Indian investors may need BIT protection, particularly while dealing with more politically volatile regions of the world.

Indian investors have invested in different countries of the world, including developing countries and historically politically unstable regions such as the African continent.¹⁰⁹ These investments may give rise to disputes, and past experience, based on the list of cases where Indian investors have sought the benefit of investment treaty protection, includes some countries which are considered highly politically unstable. Out of the nine known cases, based on investment treaties, raised by Indian investors,¹¹⁰ four of them were against countries which were rated below India (ranked 63rd) in the latest Ease of Doing Business Rankings.¹¹¹ This indicates that they were operating in countries which may have tougher business environments than what they faced at home.¹¹² In light of this situation, the availability of investment treaty protection may be of significant importance to these investors.

The wide net of Indian investment treaty partners includes developing countries, which do not typically have such BITs with a large number of other countries; for example, Djibouti (with eight other countries), Trinidad and Tobago (with 12 other countries), Myanmar (with ten other countries), and Seychelles (four other countries).¹¹³ This provides Indian investors with an extra layer of protection as compared to investors from other countries while investing in these countries. With the current world order, where countries are competing to secure a foothold in new destinations through investments, and where Indian investors are being encouraged to invest in new places, reducing the level of protection for them by terminating BITs may be counterproductive.

If the new Indian Model BIT, which provides an impression that it has been drafted from the perspective of a capital importing nation is implemented, it may significantly hurt the interests of Indian businesses overseas.¹¹⁴ The narrow interpretation of the term ‘investment’, which requires formation of a local enterprise and providing a list of exceptions, which includes popular financial investments, is particularly going to hurt Indian investors, since a broad range of their investments

¹⁰⁸ *Foreign direct investment, net outflows (BoP, current US\$)*, WORLD BANK, available at https://data.worldbank.org/indicator/BM.KLT.DINV.CD.WD?most_recent_value_desc=true.

¹⁰⁹ Harsh Vardhan Singla, *Why the India Africa bond matters*, HINDUSTAN TIMES, Feb. 13, 2020, available at <https://www.hindustantimes.com/analysis/why-the-india-africa-bond-matters/story-P59WWjGjfguAeNYBYKmcBO.html>.

¹¹⁰ The known cases in this list are: *Khadamat Integrated Solutions Pvt. Ltd. v. Kingdom of Saudi Arabia*, Case No. 2019-24 (Perm. Ct. Arb. 2019); *Spentex Neth., B.V. v. Republic of Uzb.*, ICSID Case No. ARB/13/26, Award (Dec. 27, 2016); *Simplex Projects Ltd. v. Libya* (2018); *Naveen Aggarwal, Neete Gupta & Usha Indus., Inc. v. Bosn. & Herz.*, Case No. 2018-03 (Perm. Ct. Arb.); *Binani v. N. Maced.*, Case No. 2018-38 (Perm. Ct. Arb. 2017); *Indian Metals & Ferro Alloys Ltd (IMFA) v. Republic of Indon.*, Case No. 2015-40, Award (Perm. Ct. Arb. Mar. 29, 2019); *Fleming DutyFree Shop. Pvt. Ltd. v. Republic of Pol.*, Case No. 2014-11 (Perm. Ct. Arb. Jan. 6, 2014); *Ashok Sancheti v. United Kingdom* (1976); *Ashok Sancheti v. Germany* (2000).

¹¹¹ *Ease of doing business rankings*, THE WORLD BANK, available at <https://www.doingbusiness.org/en/rankings>; Disputes against Uzbekistan, Libya, Bosnia and Herzegovina and Indonesia.

¹¹² *Id.*

¹¹³ *International Investment Agreements Navigator: India – Bilateral Investment Treaties*, UNCTAD: INV. POL’Y HUB, available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india>.

¹¹⁴ Ranjan et al., *supra* note 58, at 18; Thadikkaran, *supra* note 89, at 32.

may no longer be protected.¹¹⁵ As such, a balanced BIT model may also be helpful to protect Indian investments abroad.¹¹⁶

C. Comparison between the global and the Indian approach

There is an accepted global backlash against investor-State arbitration, which arises primarily from the broad language of the BITs.¹¹⁷ The Indian approach of terminating BITs, without having an alternative mechanism in hand, is, however, in stark contrast to the efforts by other countries to resolve concerns regarding old BITs.¹¹⁸ States have chosen to amend BITs, issue joint interpretative statements, withdraw from the ICSID or even repudiate the investor-State arbitration mechanism, but very rarely have they decided to terminate an entire bundle of BITs at one go.¹¹⁹ Some have also signed alternative agreements, brought about specific domestic legislation, or have joined new systems of providing investor protection at an international level,¹²⁰ with an aim to continue with at least some method of protection under international law for the investors.¹²¹

Based on the alternatives followed by other nations, India's step to terminate a number of BITs in one go could seem extreme.¹²² India could have certainly chosen a middle path of negotiating new BITs which took care of its concerns, whilst keeping the old BITs in force for the time being.¹²³ It could have also chosen to adopt some less radical recommendations of the HLC, such as the appointment of an International Law Adviser and undertaking dispute prevention strategies through awareness creation and better cooperation with different branches of the Government on investment law issues.¹²⁴ The Model BIT, which has been brought to the table for negotiation as a replacement for the terminated treaties, was aimed at reducing the possibility of discretionary interpretation.¹²⁵ However, it still contains a number of provisions, *inter alia*, the new standard of 'treatment of investment', the issue of 'manifest legal merit' of a dispute, applicable law for disputes, the issue of disclosure of documents based on domestic law, and scope of enforcement of investor obligations laid under the provision on 'compliance with laws' and 'corporate social

¹¹⁵ Thadikaran, *supra* note 89, at 33.

¹¹⁶ Report No. 260, *supra* note 63, ¶¶ 1.12, 7.2.4.

¹¹⁷ Ranjan et al., *supra* note 58, at 6.

¹¹⁸ An exception here relates to intra-EU BITs which are being terminated by EU Member States, but that is because of the need for compliance with instructions of the European Commission and the Achmea judgment of the Court of Justice of the European Union (*Slowakische Republik v Achmea BV*, ECLI:EU:C:2018:158).

¹¹⁹ Ranjan et al., *supra* note 58, at 6. The exception is South Africa which terminated a number of its investment treaties at one go. For details, see Tarcisio Gazzini, *Travelling the National Route: South Africa's Protection of Investment Act 2015*, 26(2) AF. J. INT'L & COMP. L. 242–63 (2018).

¹²⁰ An example of a new system is the UNASUR which was formed as an alternative for resolution of investment disputes in Latin America. For details, see Kendall Grant, *ICSID's Reinforcement?: UNASUR and the Rise of a Hybrid Regime for International Investment Arbitration*, 52(3) OSGOOD HALL L. J. 1115, 1138–49 (2015).

¹²¹ Makane Moise Mbengue, *Africa's Voice in the Formation, Shaping and Redesign of International Investment Law*, 34(2) ICSID REV. 455, 463 (2019); Ranjan & Anand, *supra* note 69, at 4 *et seq.*

¹²² Ranjan et al., *supra* note 58, at 7.

¹²³ Ranjan, *supra* note 53.

¹²⁴ HLC Report, *supra* note 52, at 114. The suggested role of the International Law Adviser is to advise the Government and coordinate dispute resolution strategy for the Government in disputes arising out of its international law obligations and BITs and to train the regular staff of the Ministry of External Affairs to transfer the knowledge and skills to deal with Investment disputes. Ministry of External Affairs, *Advertisement for Engagement of a Consultant (Legal)*, available at https://mea.gov.in/Images/amb1/DPA_III_Consultant_final.pdf.

¹²⁵ Rajya Sabha, Unstarred Question No.1290: Investment Agreements with Foreign Countries, Answered by the Minister of State (Independent Charge) of the Ministry of Commerce & Industry (Shrimati Nirmala Sitharaman) (July 26, 2017), available at https://dipp.gov.in/sites/default/files/ru1122_0.pdf; Ranjan & Anand, *supra* note 69, at 17.

responsibility', which may be subject to wide interpretation.¹²⁶ Additionally, the ISDS provision in the Model BIT contains a complicated model for investor-State arbitration, based on a requirement for exhaustion of domestic remedies and waiting for five years which has made access to this mode of dispute resolution an extremely long drawn out process for investors.¹²⁷ As earlier mentioned, the common investment protection standards (FET & MFN) have been removed or have broad exceptions,¹²⁸ making them almost irrelevant for investors.¹²⁹ Due to all these limitations, instead of facilitating negotiations, the Model BIT has been considered as a barrier to further negotiations.¹³⁰ Ultimately, the Model BIT seems to have failed in its aim to balance investor and State interests and does not fully protect the interests of either party.¹³¹

VI. Balancing India's interest to regulate with investor protection

With the termination of BITs, the position of investment promotion and investor protection is currently in a vacuum.¹³² In response, India needs to recreate an alternative regime, re-engage with the system, introduce and strengthen policies to promote investment, prevent investor-State disputes from emerging and escalating, and manage investor-State dispute settlements more effectively to balance India's right to regulate with the need for investor protection. The following approaches are suggested as a way forward.

A. Development of a mechanism to fill the current investor protection vacuum.

The Indian legal system does not have a good reputation for rapid resolution of disputes.¹³³ With that in mind, even with the debate about the true benefits of investor-State arbitration and the shortcomings of the system, investor-State arbitration remains the preferred mode for resolution of investor disputes.¹³⁴ Among the factors which promote the attractiveness of investor-State arbitration are its key features: access to arbitration as an alternative to adjudication; party autonomy; ability to appoint qualified arbitrators; pre-declared standards of protection; and the seat of arbitration at a neutral site (commonly).¹³⁵

It is proposed that an alternative to a treaty-based arbitration mechanism – which is urgently required in the absence of BITs for investors in India – can be developed without signing fresh BITs as well. The foundation for such a mechanism shall depend on the Government's commitment to adhere to certain standards of protection, which shall be clear with no ambiguity, and the inclusion of arbitration as a trusted dispute resolution mechanism. The mechanism to

¹²⁶ Model Indian BIT 2015, *supra* note 66, arts. 3.1, 11, 12, 21.1, 23.3, 20.3.

¹²⁷ *Id.* arts. 15.1, 15.2; Ranjan & Anand, *supra* note 69, at 51.

¹²⁸ See Model Indian BIT 2015, *supra* note 66, arts. 2.4, 6.3.

¹²⁹ Ranjan & Anand, *supra* note 69, at 51.

¹³⁰ Hepburn & Kabra, *supra* note 88, at 112.

¹³¹ Leila Choukroune, *Indian International Investment Agreements and 'Non Investment Concerns': Time for a right(s) approach*, 7(2) JINDAL GLOB. L. REV. 157, 162 (2016).

¹³² Ranjan, *supra* note 53.

¹³³ Upmanyu Trivedi & Ruth Carson, *What a 38-year-old turmeric scandal says about business in India*, ECON. TIMES, Aug. 19, 2020, available at <https://economictimes.indiatimes.com/news/economy/indicators/what-a-38-year-old-turmeric-scandal-says-about-business-in-india/articleshow/77603984.cms?from=mdr>.

¹³⁴ Belen Olmos Giupponi, *Investment Mediation and Regional Economic Integration Organizations: The European Union and the Central American Integration System in Comparative Perspective*, 34(2) CONFLICT RESOL. Q. 119 (2016).

¹³⁵ Stephan Schill, *The Virtues of Investor-State Arbitration*, EJIL: TALK! (Nov. 19, 2013), available at <https://www.ejiltalk.org/the-virtues-of-investor-state-arbitration/>.

bring about these commitments into action can be undertaken as a two-part process, as discussed below.

i. Agreement between investors and the Central Government

Foreign investment contracts, which are also popularly referred to as investor-State contracts, have been a key part of investment protection regimes till date. They have been defined as:

“[...] agreements between a foreign investor (or a local subsidiary of a foreign investor) and a state (or a state-owned entity). They set the terms and conditions for an investment project in the territory of that state.”¹³⁶

While the definition itself is quite wide and may potentially include investments in all forms and structures, they have largely been limited to public services such as road or rail infrastructure, power generation, oil and gas exploration and the like.¹³⁷ Further, these contracts have generally involved the payment of a certain sum of money or providing other benefits to the Government or a Government-owned entity for the exploration rights of a mineral resource, or for permits to provide the public service.¹³⁸ Traditionally, these contracts have taken the form of concession agreements or production sharing contracts for raw material extraction, profit/revenue sharing arrangements for public services, and build-operate-and-transfer agreements for roads, railways and similar infrastructure projects.¹³⁹ A major part of the criticism for these agreements was the lack of transparency and different standards for investors based on their negotiating ability.¹⁴⁰

The criticism mentioned above does not mean that investor-State contracts are a failed system. A modified mechanism based on such investor-State contracts is proposed, which would be available to investors in all sectors notified by the Government, and not merely to investors signing an agreement for public service or resource extraction with the Government or a Government agency. Under this mechanism, investors who desire investment protection may sign an agreement directly with the Government for the protection of their investments if they desire to be covered under the regime. This agreement can give expanded rights to the investor vis-à-vis the Government while protecting the interests of the Government, as well.¹⁴¹ Additional provisions which may be included in such an agreement but are currently excluded from the Model BIT 2015 are, *inter alia*, guarantees on tax breaks, grant of subsidies, exemption from compliance with certain labour laws, and guarantees for special treatment by sub-national (State) governments.¹⁴²

Under this mechanism, the Government may release certain sector-specific investment promotion regimes (schemes) which would contain commitments from the Government for protection of investment from foreign investors. These commitments may cover specific risks, obligations, and other terms in consonance with the aims and objectives of both the investor and the State. As with

¹³⁶ Lorenzo Cotula, Foreign Investment Contracts 1 (International Institute for Environment and Development, Sustainable Markets Investment Briefing No. 4, 2007), available at <https://pubs.iied.org/pdfs/17015IIED.pdf>.

¹³⁷ Lise Johnson & Oleksandr Volkov, *Investor-state Contracts, Host-State “Commitments” and the myth of stability in International Law*, 24(3) AM. REV. INT’L ARB. 361, 362 (2013).

¹³⁸ *Id.* at 363.

¹³⁹ Cotula, *supra* note 136.

¹⁴⁰ *Id.*

¹⁴¹ Sam Halabi, *Efficient Contracting Between Foreign Investors and Host States: Evidence from Stabilization Clauses*, 31 NW. J. INT’L L. & BUS. 261, 268 (2011).

¹⁴² See also Model Indian BIT 2015, *supra* note 66, arts. 2.4, 4.2, 6.3.

the current practice for such schemes, the Government would sign an agreement with any investor who agrees to make an investment in that particular sector, in adherence with the scheme. These commitments may be added in the existing investment promotion schemes of the Government as well. For instance, if it is included in the much-publicised Production Linked Incentive Scheme for Large Scale Electronics Manufacturing notified by the Ministry of Electronics and Information Technology,¹⁴³ a foreign investor willing to invest through the scheme will also benefit from the investment protection commitments.

This proposed mechanism of inclusion of the possibility for special investor-specific commitments within the investment promotion schemes resolves the problem of lack of transparency associated with investor-State contracts as the commitments which will be provided will be known to all beforehand, and no wide discretionary amendments would be possible. A limited leeway may be provided, in a transparent manner, for specific commitments in the agreement which may vary from investor to investor, depending upon the complexity of the investment. Such exemptions could include, *inter alia*, a coverage of subsidy commitments, tax holidays, exemption from local content requirements etc. Under the proposed scheme, investments which require a shorter time commitment and fewer resources may have simpler contracts with adequate compensation and an easy exit as a primary remedy for the investors. On the other hand, an investment that requires a significant commitment of time and resources will demonstrate more complex arrangements addressing specific risks.¹⁴⁴

The proposed schemes will likely include contractual provisions governing the States' ability to regulate or change the law in a way that balances investment protection. Investors can mitigate political risk through inbuilt early termination rights, open-ended exploration and development commitments, and balancing of clarity and vagueness with respect to obligations undertaken by the State and duties of the State to ensure compliance with those obligations.¹⁴⁵ Examples of such situations could include a promise of tax breaks which are provided by a government or special laws or rules framed by States to facilitate investments. There is a risk that such commitments are withdrawn with a change of governments. A balance could be obtained by inclusion of these commitments also as a part of the contract with the investor and linking them with compensation guarantees and possibility for dispute resolution in a mutually agreeable mode (or forum) in case those terms are violated. Thus, investors and the State can both benefit from a regime of law that balances State obligations with investor expectations.

This option is unavailable in a BIT regime as governments, at the time of signing the treaty, have little incentive or know-how about unforeseen situations (such as an economic downturn or emergence of disruptive technologies) in the future to negotiate appropriate political risk (political risk mitigation) for investors in the future, based on the requirements of the specific sector of investment. Providing investment friendly conditions to attract more investments in an economic

¹⁴³ Ministry of Electronics and Information Technology, Gov't of India, Notification No. W-28/1/2019-IPHW-MeitY – Production Linked Incentive Scheme (PLI) for Large Scale Electronics Manufacturing (Apr. 1, 2020), available at https://www.meity.gov.in/writereaddata/files/production_linked_incentive_scheme.pdf.

¹⁴⁴ Halabi, *supra* note 141, at 277.

¹⁴⁵ Thomas Wälde & George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation*, 31(2) TEX. INT'L L.J. 215, 224, 226–27, 231–37 (1996).

crisis or a willingness of the government to attract specific investors or investors in specific sectors may be reflected by providing investor-State contracts.

For example, a BIT based on the Model Indian BIT 2015 may provide that investors will have to wait for four (or five) years before recourse to investor-State arbitration. This may be acceptable to investors at times of economic stability or with small investments, but investors investing large sums of money in rapidly changing industries may wish faster resolution of disputes as a five-year wait may mean that their investment loses value by the time investor-State arbitration is possible.

Agreements based on the proposed scheme will save from the horrors of a wide interpretation of any clause of the BIT. Since investor-State contracts are based on the agreement of the parties and the specific requirements of the particular investment, customised provisions could be included in the contracts which could be designed in a narrower manner. BIT provisions, on the other hand, are designed to cover a wide range of future situations and provide the general agreement between the States. Further, in the context of re-emergence of State-to-State arbitration¹⁴⁶ and the prevailing view that State engagement can threaten investor's rights and re-politicise investor-State disputes, the scheme provides ways to retain investor-State arbitration, as the dispute resolution method, as discussed below.¹⁴⁷

The suggested schemes and agreements signed under them can radically promote the interest of both the investors and the State. This is because in the specific text of the contracts, the rights and claims of both, investors and host States, are recognised and valued, rather than one being reflexively privileged over the other.¹⁴⁸ As such, a major foreign investor who promises creation of large number of jobs or promises investment in a sector which is considered important for the country may be provided added incentives to facilitate its entry. This may not be possible under the BIT regime which lays down broad commitments for investment protection and facilitation rather than considering the requirements of a particular investor or the importance of a particular investment. Even a country which has a BIT model tilted in favour of the host State may be willing and able to provide additional exemptions/commitments for investments in strategic industries or for very large investments which it considers would benefit the State. Ultimately, the investment protection provisions will act as an added bonus to the incentives already promised under investment promotion schemes.

The standards of protection and the applicable law which are committed in this scheme may be broadly based on the Indian Model BIT 2015, since the Government has already conveyed that it is comfortable with providing those standards of protection. Investors and the Government may, however, choose to negotiate specific commitments which go beyond the BIT commitments to overcome any discomfort regarding them. Any provisions on fork-in-the-road clauses and waiting periods for the commencement of investor-State arbitration may be based on the Model BIT 2015

¹⁴⁶ Investment Cooperation and Facilitation Treaty, India-Braz., Jan. 25, 2020.

¹⁴⁷ Anthea Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55(1) HARV. INT'L L.J. 4 (2014).

¹⁴⁸ *Id.* at 5.

and India's recent BITs with Taiwan, Kyrgyz Republic, and Belarus, which were signed based on this Model BIT in 2018 and 2019, and reflect the latest Government's comfort level on the issue.¹⁴⁹

ii. *Inclusion of arbitration as a trusted dispute resolution mechanism*

The agreements entered into on the basis of the investment protection scheme discussed above would include an arbitration mechanism modelled on commercial arbitration. This would essentially entail the resolution of a dispute by an arbitral tribunal on the basis of the applicable law prescribed under the aforementioned scheme at a pre-determined seat outside the country, in a New York Convention country. This agreement would refer to established rules such as the ICC or the United Nations Commission on International Trade Law ["UNCITRAL"] Rules, and an award under this arbitration would be explicitly notified by the Government as an award arising from a commercial dispute. This would ensure that the generated award would have a guarantee of enforcement under the New York Convention in India.¹⁵⁰

The other key benefits of this mechanism are as follows:

- i. The investor and the Government are both clear about the standards of protection and the commitments under the system.
- ii. There is no requirement for the home State of the investor to enter into any BITs, which will make the process simpler and faster. India's BIT negotiations have turned out into a long-drawn process and only a handful of States have entered into BITs with India based on the new model. Considering that negotiating a treaty may take time and investors from across the globe may need immediate protection, the government may enter into agreements with investors based on the framework already available under the aforementioned investment promotion schemes.
- iii. The government can make different commitments under different schemes based on the specific requirements of the sector.
- iv. The investors will have recourse to arbitration, which is the preferred mode for investment dispute resolution.¹⁵¹

Investor-State arbitration, under this new mechanism, is proposed since the Government has still expressed willingness to submit to direct arbitration with investors in the recent India-Taiwan BIT, India-Kyrgyz Republic BIT and India-Belarus BIT. This means that there is still acceptability for arbitration which balances the interests of both parties. Overall, the inclusion of the arbitration mechanism will raise investor confidence in the protection of investments, as their rights will not be in abeyance even with the current vacuum in investor-protection frameworks.¹⁵²

¹⁴⁹ These treaties prescribe that the investor must have pursued domestic remedies for 4 years (or 5 years) and must waive their right to pursue further remedies in domestic forums. *See* India-Belr. BIT, arts. 15.2, 15.6; India-Taiwan BIT, art. 15.4; Treaty on Investments, Kyrgyz Rep.-India, arts. 15.2, 15.5(iv), June. 14, 2019.

¹⁵⁰ India has made a reservation under the New York Convention under which it has committed to apply the Convention for the recognition and enforcement of 'commercial' disputes only. *See* India, NEW YORK CONVENTION GUIDE, available at https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=11&menu=581&opac_view=-1.

¹⁵¹ Giupponi, *supra* note 134.

¹⁵² *See* discussion *supra* Part IV(A) regarding the 'vacuum'.

B. Development of coordination and response mechanism between the Central and State Governments

India's reaction to investor-State disputes has been to terminate many of its old BITs and issue unilateral and joint interpretative statements, but the provision of sunset clause in the terminated treaties continues to leave scope for the emergence of further investor-State arbitration claims.¹⁵³ For the avoidance of disputes reaching the stage of a treaty arbitration, the scattered response of the Government in the form of proposing Centre-State Investment Agreement,¹⁵⁴ setting up of inter-ministerial groups,¹⁵⁵ a proposal of appointment of mediators and setting up of fast track courts¹⁵⁶ may be inadequate, and convergence is required in its efforts. As a host State, India needs to preserve certain policy space by which it can ensure that investors are committing themselves to responsible business conduct.¹⁵⁷

Development of a State coordination and response system for investment disputes [**“State Coordination and Response System”**] may be a pathway to achieve this goal. Peru has established a similar system for international investment disputes.¹⁵⁸ India may be guided by Peru's approach to ensuring efficient handling of potential investor-State disputes. A State Coordination and Response System can:

- i. increase understanding and awareness of the implications of international dispute settlement clauses;
- ii. consolidate the investment obligations of the State;
- iii. provide a system that recognises investment controversies and disputes at an early stage;¹⁵⁹

¹⁵³ Kshama Loya Modani & Moazzam Khan, *India: Investment Arbitration & India – 2019 Year In Review*, MONDAQ (Jan. 14, 2020), available at <https://www.mondaq.com/india/arbitration-dispute-resolution/883366/investment-arbitration-india-2019-year-in-review>.

¹⁵⁴ Arup Roychoudhury, *FinMin preparing draft Centre-state investment pact*, BUS. STD., Mar. 18, 2016, available at https://www.business-standard.com/article/economy-policy/finmin-preparing-draft-centre-state-investment-pact-116031700999_1.html. Centre-State investment agreements were proposed to ensure fulfilment of the obligations of the State government under India's BITs. They were expected to ensure better implementation of investment treaty obligations and remove delays from the States in clearing projects. The agreements were also proposed to have dispute resolution provisions to deal with potential violation of obligations by States, before they are taken for international arbitration. See Surabhi, *Centre-State pact on cards to shield foreign investors*, HINDU BUSINESS LINE, Jul. 4, 2016, available at <https://www.thehindubusinessline.com/economy/policy/centrestate-pact-on-cards-to-shield-foreign-investors/article8807925.ece>.

¹⁵⁵ The inter-ministerial groups are formed to handle the issues which arise after a notice for arbitration has been served to the Indian Government by an Investor. See *Minutes of the 1st Inter-Ministerial Group (IMG) meeting on arbitration under BIPA by RAKLA, UAE held on 5.1.2017 at Sbastri Bhawan, New Delhi under the chairmanship of Secretary (Mines), Sbri Balvinder Kumar*, IFA LAW (2017), available at https://www.italaw.com/sites/default/files/case-documents/italaw8083_0.pdf.

¹⁵⁶ *Id.*

¹⁵⁷ K. P. Sauvart, *The Evolving International Investment Law and Policy Regime: Ways Forward* 7, 21 (Int'l Ctr. for Trade and Sustainable Dev. & World Econ. Forum, E15 Task Force on Inv. Pol'y, Policy Options Paper, 2016).

¹⁵⁸ United Nations Conference on Trade and Development (UNCTAD) Best Practices in Investment for Development, *How to Prevent and Manage Investor-State Disputes: Lessons from Peru* 38 (Investment Advisory Series, Series B, No. 10, 2011), available at https://unctad.org/system/files/official-document/webdiaepcb2011d9_en.pdf [*hereinafter* “Lessons from Peru”].

¹⁵⁹ Analysis, *Peru's State Coordination and Response System for International Investment Disputes*, INVESTMENT TREATY NEWS, Jan. 14, 2013, available at <https://cf.iisd.net/itn/2013/01/14/perus-state-coordination-and-response-system-for-international-investment-disputes>.

- iv. centralise actions when disputes arise at different levels of the State, to build capacity of the involved agencies and timely and coordinated management of the dispute; and
- v. make the officials responsible for their discretionary actions.

Commitments of a BIT are applicable to both the State and Central governments. Thus, it is essential that all levels of the government and people that deal with foreign investors consider the scope and consequences of the obligations under the BITs along with the practical implications of the decisions taken with regards to the investment.¹⁶⁰

The State Coordination and Response System can be empowered to directly negotiate, conciliate and mediate in the dispute. Basically, accumulation of expertise, experience, knowledge, and institutional capacity can play crucial roles in an effective response to investment disputes.¹⁶¹

C. Creation of a financial protection system to deal with sunset clauses

Financial issues play an important role in building a response system for investment disputes, and a stable mechanism for payment of investor claims helps in building investor confidence. As earlier mentioned, presence of sunset clauses in the terminated BITs still leaves India with chances of claims against it based on those treaties.¹⁶² In such a scenario, the Central Government would have to make provisions for losses arising out of claims from the sunset clauses of these BITs and ensure that a pathway is available for payment of potential investment claims, while minimising the impact on government finances.

The HLC has recommended preparing for the payment of investment treaty arbitration awards through an allocation from the Union Budget to a separate fund.¹⁶³ It is proposed, however, that instead of a separate fund, which may involve a substantial budget outgo, an insurance policy may be taken. Through the policy, a cover would be obtained for payment of any awards arising out of an unexpected interpretation of the investment agreements. The insurance policy will pay out any claims of previously unforeseen nature, which arise from the sunset clauses of the terminated agreements. As any insurer is unlikely to cover blatant violations of the treaty by the State, the policy could be limited to cover ‘unforeseen interpretation of treaty provisions and obligations’ by arbitral tribunals. Such a policy could be similar to a ‘Legal Protection Insurance’, which is commonly obtained by businesses to deal with potential unforeseen claims.¹⁶⁴ The investors are expected to feel secure due to this proposed insurance cover, as the presence of an insurance policy shows the intention of a State to pay the award money in case the investor wins a dispute against the Republic of India.

¹⁶⁰ Lessons from Peru, *supra* note 158.

¹⁶¹ UNCITRAL Working Group III, 38th Session, Submission from the Republic of Korea, at 5, U.N. Doc. A/CN.9/WG.III/WP.179 (July 31, 2019).

¹⁶² *See, e.g.*, Treaty for the promotion and protection of investments, Ger.-India, art. 15, July 10, 1995, 2071 U.N.T.S. 121; Agreement for the promotion and protection of investments, India-Neth., art. 16, Nov. 6, 1995, 2242 U.N.T.S. 101; Agreement on the promotion and protection of investment, India-S. Kor., art. 15, Feb. 26, 1996, 1942 U.N.T.S. 175. The aforementioned BITs are *available at* <https://dea.gov.in/bipa>.

¹⁶³ HLC Report, *supra* note 52, at 113.

¹⁶⁴ More details about Legal Protection Insurances are available here: ANNA MCNEE, IBA LEGAL POLICY & RESEARCH UNIT, LEGAL EXPENSES INSURANCE AND ACCESS TO JUSTICE 12 (2019).

Creation of such an insurance product, even if it may not be available immediately, is not impossible. Innovative insurance products to cover investment-arbitration related situations, such as possible adverse cost awards, a requirement to repay wrongfully granted awards, or repayment due to loss in an appeal/review against awards, are already available in the market.¹⁶⁵

The premium for the proposed insurance cover could be paid jointly by the central government and the States. States play a key regulatory role for many investments, and their decisions involve key issues such as land acquisition, construction permits and security provisions for investors.¹⁶⁶ Involving States in an insurance policy against ISDS claims might be an alternative pathway to achieve the goal of creating awareness about BIT obligations among the State government decision-makers, who would now be required to learn about them.¹⁶⁷ Further, the governments at both levels could internally negotiate the exact share of premiums payable by a State. The quantum of premiums for a State could be linked to the implementation of measures by the States to ensure that key officials in the State government are aware of India's obligations under the BITs. This would, also have the effect of addressing the recommendation laid down in the HLC Report, to tackle the lack of knowledge about BITs among government officials.¹⁶⁸

Involvement of State governments as parties in an investment protection regime was already foreseen in 2016 by the Finance Ministry through its general budget document which proposed to introduce a Centre-State Investment Agreement to ensure fulfilment of the obligations of the State government under India's BITs.¹⁶⁹ The proposal claimed that the States which signed such an agreement would be considered as more attractive destinations by foreign investors and if a State refuses to do so, it will be informed to all BIT partner countries.¹⁷⁰ This proposal was, however, withdrawn by the Ministry.¹⁷¹ The decision was prudent as the Central Government informing its BIT partners about a State government not signing a Centre-State agreement may not present the best image of the country abroad.¹⁷² Additionally, such a step may also have affected the coordination between the Centre and States by building an image among foreign investors and BIT partners that certain States are not supported as investment destinations by the Central government. This would be contrary to the balance which was sought to be maintained by mechanisms such as the Inter-State Council established under Article 263 of the Constitution of India.¹⁷³

¹⁶⁵ *Dispute Resolution Insurance*, GALLAGHER (Aug. 26, 2020), available at <https://www.ajg.com/uk/corporate-insurance/dispute-resolution-insurance>.

¹⁶⁶ Sudhanshu Roy, *Reconsidering Treaty-Making In India: An Argument for Reform Through the Prism of International Investment Agreements*, 54 IND. J. INT'L L. 283, 284 (2014)

¹⁶⁷ Dabhol, 2004 SCC OnLine Del 1298 (India); Nissan, PCA Case No. 2017-37, Decision on Jurisdiction (Perm. Ct. Arb. Apr. 29, 2019).

¹⁶⁸ HLC Report, *supra* note 52, at 114.

¹⁶⁹ Arun Jaitley, Minister of Fin., Speech announcing Budget 2016–2017, at 34 (Feb. 29, 2016), available at <https://www.indiabudget.gov.in/doc/bspeech/bs201617.pdf>.

¹⁷⁰ Prabhash Ranjan, *Sensitise States, don't intimidate them*, THE HINDU, Apr. 26, 2016, available at <https://www.thehindu.com/opinion/columns/Sensitise-States-don%E2%80%99t-intimidate-them/article14257240.ece>.

¹⁷¹ RANJAN, *supra* note 9, at 303.

¹⁷² Prabhash Ranjan & Jay M.S., *A proposal by the Centre to enter into investment agreements with States as an optional arrangement may further sour fragile Centre-State relations*, SOUTH ASIAN UNIVERSITY (Apr. 26, 2016), available at <http://blog.sau.ac.in/a-proposal-by-the-centre-to-enter-into-investment-agreements-with-states-as-an-optional-arrangement-may-further-sour-fragile-centre-state-relations>.

¹⁷³ Roy, *supra* note 166, at 359.

Considering the delicate balance of this relationship, in the extreme event that the Central and State governments are unable to agree on payment of premiums for the proposed insurance policy, as a last resort, premiums for this policy can be diverted from the aforementioned fund which has been proposed by the HLC.

D. Creation of a mechanism for enforcement of international investment arbitration awards
Proper recognition and enforcement of arbitral awards is of utmost importance to the parties and the successful party in the arbitration expects the award to be performed without undue delay. Non-compliance of the award renders the entire arbitral process meaningless.¹⁷⁴ The ease of enforceability of the arbitral award is the principal advantage of arbitration for the parties. Absence of an enforcement mechanism of investment arbitral awards in India raises grave concerns about India's commitment to investment promotion and protection.

The projection of India as a nation committed to the rule of law is extremely important, and this is currently under challenge due to the missing enforcement mechanism for investor treaty arbitration. While the executive decision to not ratify the Convention on the Settlement of Investment Disputes between States and Nationals of Other States,¹⁷⁵ can be debated, the recent conclusion of the Delhi High Court (in two cases) that the Arbitration Act applies only to commercial arbitrations and not to investment treaty arbitrations, has raised uncertainties for investors.¹⁷⁶ This is more surprising considering the recent arbitration-friendly attitude of the Indian Supreme Court,¹⁷⁷ in the existing case of the Calcutta High Court on the issue,¹⁷⁸ and the past law laid down by the Supreme Court in *R.M. Investments*, wherein it advocated a wide interpretation of the term 'commercial' under the New York Convention.¹⁷⁹

In order to prevent such a situation in the future, where an investor is left with an unenforceable award arising from an arbitration based on a treaty signed by India, it is proposed that a mechanism for enforcement of investor treaty arbitration awards in India be legislated. This can probably be done most rapidly through a notification of the Central Government under Section 2(c)(xxii) of the Commercial Courts Act, 2015, declaring investment treaty arbitration as a commercial dispute. This will fulfil the requirement of the Indian reservation under the New York Convention, through which it undertook to apply the Convention "*only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law*".¹⁸⁰ This will nullify the ground used

¹⁷⁴ Goyal, *supra* note 87, at 17, 25; Michael Hwang SC & Yeo Chuan Tat, *Recognition and Enforcement of Arbitral Awards*, in THE ASIAN LEADING ARBITRATOR'S GUIDE TO INTERNATIONAL ARBITRATION 407, 408 (Michael Pryles & Michael J Moser eds., 2007).

¹⁷⁵ Convention on the settlement of investment disputes between States and nationals of other States, Mar. 18, 1965, 575 U.N.T.S. 159.

¹⁷⁶ Union of India v. Khaitan Holdings (Mauritius) Ltd., 2019 SCC OnLine Del 6755 (India); Union of India v. Vodafone Group Plc United Kingdom, 2018 SCC OnLine Del 8842 (India) [*hereinafter* "Vodafone Delhi"]; see also Prabhaskar Ranjan & Pushkar Anand, *Indian courts and bilateral investment treaty arbitration*, 4 INDIAN L. REV. (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3542383.

¹⁷⁷ Vijay Karia v. Prysmian Cavi e Sistemi S.r.l., 2020 SCC OnLine SC 177 (India).

¹⁷⁸ *Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures S.A.S*, 2014 SCC OnLine Cal 17695 (India).

¹⁷⁹ *R.M. Invs. & Trading Co. Pvt. Ltd. v. Boeing Co. & Anr.*, (1994) 4 SCC 541 (India).

¹⁸⁰ India, NEW YORK CONVENTION GUIDE, available at http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=11&menu=581&opac_view=-1.

by the Delhi High Court in the *Vodafone* case to refuse coverage of an investor-State arbitration award under the Convention.¹⁸¹

The incumbent Government is ambitious about making India a global arbitration hub,¹⁸² and has the political will to promote arbitration, for which it is actively seeking to inspire confidence and credibility among potential investors. Greater clarity on the possibility to enforce investment arbitration awards will be a key step in this direction.

VII. Conclusion

With the new approach adopted by India, the old obligations still linger on through sunset clauses in old BITs and, therefore, while India tried to get rid of investment treaty arbitrations, there are still chances of India facing claims. Thus, it is only prudent to be prepared for such claims or nip them in the bud. The development of a preventive mechanism in the form of a Coordination and Response System between Central and State governments would help in resolving disputes before investors take the investment treaty route.

The unresolved and unenforced international commercial arbitrations have a possibility of later becoming investment treaty arbitrations.¹⁸³ In light of this fact, steps such as following evolved international commercial arbitration standards, development of arbitral institutions, and improving the commercial dispute resolution methods in India will also make the invocation of investment treaties redundant. This will serve India's goal of avoiding investor-State arbitration. The new Commercial Courts Act¹⁸⁴ and the signing of the Singapore Convention¹⁸⁵ further assure India's intention of safeguarding and prioritising commercial interests.

It will be interesting to see the impact on foreign direct investment inflows into India and on the Indian investors investing abroad, due to the current disconnect between the aim of economic liberalism in foreign investment and the new treaty-making approach. Nevertheless, investor-State arbitration is very much here to stay owing to India's efforts to become a global arbitration hub.

¹⁸¹ Vodafone Delhi, 2018 SCC OnLine Del 8842, ¶ 90 (India).

¹⁸² New Delhi International Arbitration Centre Act, No. 17 of 2019 (India).

¹⁸³ See, e.g., Romak S.A. v. Republic of Uzbekistan, PCA Case No. AA280, Final Award (Perm. Ct. Arb. Nov. 26, 2009); see also Marco Gavazzi & Stefano Gavazzi v. Romania, ICSID Case No. ARB/12/25, Decision on Jurisdiction Admissibility and Liability, ¶ 120 (April 21, 2015) (stating that “an award which compensates for an investment made in the host State is a claim to money covered by the BIT as an investment”); see also the notion of investment in Jan A. Bischoff & M. Wuhler, *The notion of investment*, in FOREIGN INVESTMENT UNDER THE COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (CETA) 19, 41 (M.M. Mbengue & S. Schacherer eds., 2019).

¹⁸⁴ Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, No. 4 of 2016 (India).

¹⁸⁵ United Nations Convention on International Settlement Agreements Resulting from Mediation, Sept. 12, 2020.