WINNING THE BATTLE BUT LOSING THE WAR: CHALLENGES TO ENFORCE INVESTMENT ARBITRAL AWARDS IN INDIA

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In the wake of surging claims under BITs against the Indian government and deficient domestic statutes to regulate the matters pertaining thereto, the conflicting decisions by the Indian judiciary, without concrete rationale, have received fervent criticisms. Although no jurisdictional challenge was raised before the Calcutta Court, it proceeded with the supposition of the applicability of the Arbitration and Conciliation Act, 1996 on such matters. On the other hand, the Delhi Court, upon encountering such challenge, precluded such matters entirely from the said Act and instead, proceeded by exercising its residuary jurisdiction under the Code of Civil Procedure, 1908 without any regard to Section 44A of the said Code. The paper critically analyses the observations made by the two Courts and puts forth the glaring irregularities and inadequacies inherent in them. Exploring the regulatory mechanism for the enforcement of treaty award under the ICSID Convention, the paper enunciates the copious challenges posed to the Republic of India for being a non-signatory state and the consequent alternatives adopted by it to overcome the challenges. Further, highlighting the absence of enforcement provisions in the 2003 Indian Model BIT and the subsequent incorporation of the same in the 2015 Model, the paper argues the readiness of the Indian government to broaden the horizons of the 1996 Act and accordingly, proposes a much called-for amendment in line with the UNCITRAL Model Law on International Commercial Arbitration as well as the internationally prevailing practice.

Key-words: Commercial, enforcement, Indian Model BIT, treaty award, UNCITRAL.

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I. INTRODUCTION

Since the introduction of the New Economic Policy in 1991, India has developed dynamically and found herself among the top ten desirable destinations across the globe for foreign investments in 2019.[1]The steady foreign direct investment ("**FDI**")inflows in the country has ensued in, *inter alia*, the execution of numerous Bilateral Investment Treaties("**BIT**")by India with other States.[2]However, despite being acknowledged as one of the most lucrative destinations for foreign investments, the inconsistent decision making by the Indian judiciary, coupled with unnecessary adjournments and delays, has engendered a great disinterest among the foreign investors to make investments in the Indian economy.[3]

One such incongruity, which has opened the Pandora's Box for the upcoming litigation, can be discerned in the judgments delivered by the High Courts of Delhi and Calcutta on the issue of the jurisdiction of domestic courts to adjudicate upon matters pertaining to investment arbitration. In the case of *Union of India* v. *Khaitan Holdings (Mauritius) Limited*[4]("**Khaitan case**"),the Hon'ble Delhi High Court declined to grant anti-arbitration injunction sought by the Union of India to restrain the claimant from proceeding before the international arbitral tribunal under the India-Mauritius BIT (1998)[5].The Hon'ble Court, to arrive at its decision, placed reliance upon its prior ruling in *Union of India* v. *Vodafone Group Plc*[6]("**Vodafone case**") and held that since an investment arbitration claim initiated under any investment treaty is fundamentally distinct from a commercial arbitration claim, it would not fall under the purview and/or protection of the Arbitration and Conciliation Act, 1996 ("**the1996 Act**"). The aforementioned decisions are in stark contrast to that of the Hon'ble High Court of Calcutta, which, in the case of *Board of Trustees of the Port of Kolkata* v. *Louis Dreyfus*[7]("**Louis Dreyfus case**"), proceeded under the supposition that arbitrations initiated under the investment treaties were covered under the ambit of Section 45[8] of the 1996 Act and accordingly, granted the anti-arbitration injunction to the petitioner.

Exacerbating the situation is the dearth of appropriate legislation to regulate such matters and assist the courts in decision making. Though the Indian Model BIT 2015[9] ("**the Model BIT**") incorporatesa mechanism for the enforcement of the resulting treaty awards[10], the omission to make corresponding amendments to the 1996 Act has rendered the proposition futile. The adverse clauses, such as the incorporation of the exhaustion of local remedies clause

[1]UNCTAD, 'World Investment Report 2020' (International Production Beyond the Pandemic), <https://unctad.org/en/PublicationsLibrary/wir2020_overview_en.pdf> accessed 15 July 2020.
[2]Department of Economic Affairs, 'Bilateral Investment Treaties (BITs)/Agreements' <https://dea.gov.in/bipa> accessed 15 July 2020.
[3]Vishnu Padmanabhan & Sriharsha Devulapalli, 'India's next generation reforms must begin in courts' (*Livemint* 18 June 2019) < www.livemint.com/news/india/india-s-next-generation-reforms-must-begin-in-courts-1560838699823.html> accessed 15 July 2020.
[4] *Union of India v. Khaitan Holdings (Mauritius) Limited* 2019 SCC OnLine Del 6755.
[5]'Agreement between The Government of The Republic of India and The Government of Republic of Mauritius for The Promotion and Protection of Investments' (signed on 4 September 1998, in force 20 June 2000) <https://dea.gov.in/sites/default/files/Mauritius.pdf> accessed 15 July 2020.
[6] *Union of India v Vodafone Group Plc* 2018 SCC OnLine Del 8842.
[7] *Board of Trustees of the Port of Kolkata v Louis Dreyfus* 2014 SCC OnLine Cal 17695.
[8]Section 45 of the 1996 Act states that a judicial authority shall refer the parties to arbitration if the matter in dispute is subject to an arbitration agreement as referred to in Section 44 of the 1996 Act, provided the said agreement is not null and void, inoperative or incapable of being performed.
[9]Model Text for the Indian Bilateral Investment Treaty, 2015 (Model BIT, 2015).
[10] ibid art 27.

("**ELRclause**")[11] and exclusion of the Most-Favoured-Nation clause[12] ("**the MFN clause**"), proposed in the Model BIT have turned the states hostile to sign an investment treaty inspired by it.[13]In consequence, by virtue of the sunset clause[14]in the former investment treaties, drafted in harmony with the Indian Model BIT 2003[15] ("**the 2003 Model Treaty**"), the respective investor-state relations and the disputes, if any, continue to be governed by them.[16]Unfortunately, the 2003 Model Treaty fails to provide any treaty award enforcement mechanism. Upon analysing the enforcement provisions in the Model BIT, which happened to be absent in the 2003 Model Treaty, it would be fair to say that the Delhi High Court has missed out on such proposition in letter and spirit while adjudicating the aforesaid disputes. Therefore, the unsettled law on enforcement of the treaty awards under the erstwhile treaty in conjunction with the wavering stance of judiciary has made the prospective foreign investors sceptical and apprehensive of investing in the country.

Thus, the moot question remains: Despite winning the hard-fought battle against the Indian government, would a foreign investor prevail in enforcing the resulting treaty award in India under its domestic legislation? If not, what are the possible alternatives available with such investor? To make the legal regime foreign investor-friendly, what possible changes could be adopted by the Indian government?

Part II of this paper evaluates the provisions for enforcement of arbitral awards under the ICSID Convention and the impact of India's non-participation. **Part III** highlights the lack of an adequate enforcement mechanism in India to regulate the matters pertaining to investment treaty claims under the 2003 Model Treaty. **Part IV** examines the judicial precedents on applicability of the 1996 Act on the enforcement of investment arbitral awards in light of the commercial reservation under the Convention on Recognition and Enforcement of Foreign Arbitral Awards ("**the New York Convention**").**Part V** critically analyses the deficiencies in the precedents and evaluates the impact of such obsolete provisions, thereby establishing the need for making amendments to the present regime. **Part VI** elucidates on the burgeoning practice of enforcing treaty awards in pro-arbitration jurisdictions by the foreign investors as a viable alternative to enforce award against the Republic of India. **Part VII** proposes an amendment to Section 44 of the 1996 Act to bring the investment arbitration claims within its confines and in harmony with the widely accepted international arbitration practice. **Part VIII** concludes the paper with key observations.

[11] The ELR clause mandates a foreign investor to resort to domestic courts of the Host state, to resolve any dispute arising under BIT, and exhaust the local remedies available for the time period prescribed thereunder. In the Indian context, the foreign investors would be effectively compelled to resort to the Indian legal system that lacks experience and expertise in adjudicating investment disputes. Further, the investment community anticipates prevalence of judicial bias towards its own government.

[12] The MFN clause, a principle fortifying equality and non-discrimination among foreign investors, warrants that the parties to one treaty shall provide treatment no less favourable than the treatment they provide under other treaties in areas covered by the clause. The obliteration of this clause from the Model Treaty gives birth to the fear of discriminatory treatment of the foreign investors hailing from different states.

[13] Prabhash Ranjan, 'As India's New Bilateral Investment Strategy Sputters Out, the Secrecy and Opaqueness Must Go' (*The Wire*, 1 May 2017) <https://thewire.in/business/bits-investment-strategy-failure> accessed 18 July 2020.

[14] The sunset clause extends the protection granted under a BIT to the investment made by foreign investors in the Host state prior to its termination for a duration stipulated therein. By virtue of this clause incorporated in the BITs executed between India and foreign states, the respective foreign investors shall stay protected for the specified time period from the date of termination of BITs.

[15] Indian Model Text of BIPA, 2003 (Model BIT, 2003).

[16] ibid art 15.

II. STREAMLINING THE DISPUTE RESOLUTION MECHANISM – THE ICSID CONVENTION

Observing the hassles of resorting to the domestic dispute resolution system and the concomitant hardships of foreign investors, especially when the economies across the globe were rampantly growing and foreign investment was the need of the hour, the international organisations and the states made conscious attempts to formulate a convention to streamline the mechanism for resolution of investment disputes.[17]It gave birth to the Convention on the Settlement of Investment Disputes between States and the Nationals of Other States ("**the ICSID Convention**"). The said Convention established the International Centre for Settlement of Investment Disputes and entrusted it with the responsibility of promoting international investment and creating confidence in the dispute resolution process.[18]It has put forth a robust regime effectuating an efficient mechanism for carrying out arbitral proceedings and enforcing arbitral awards, thereby averting unnecessary delays[19] and instilling confidence among the foreign investors.

Article 53(1) of the ICSID Convention mandates that an award passed by an arbitral tribunal shall be binding on all the parties to the proceeding and compliance must be made pursuant to its terms. The said Convention also prescribes for remedies in the event of non-compliance of such award.[20] Article 54(1) states that the successful party, i.e., the award creditor can pursue the enforcement of the award in the domestic court of any state, which is a member of the ICSID Convention, in the event the losing party, i.e., the award debtor, fails to comply with the terms of the award.[21]It further mandates that the said award shall have the same force as the judgment or decree or order of the domestic court of that state.[22] The ICSID Convention is supplemented by the Rules of Procedure for Arbitration Proceedings ("**the ICSID Arbitration Rules**") that lays down the procedural framework for administering the arbitral proceedings and enforcing the resulting arbitral award if the parties to the dispute decide to pursue arbitration under the ICSID Convention.[23]

It must be noted that only the states that are a signatory to and have ratified the ICSID Convention are bound by it and its Rules and Regulations.[24] India is not a signatory to the said Convention,[25] therefore, the foreign investors making investments in the Indian economy cannot employ the aforesaid mechanism for the resolution of any investment dispute arising from the breach of an investment treaty.[26] It also follows that the Indian State is under no

[17]ICSID, 'History of ICSID Convention' (Volume I) <https://icsid.worldbank.org/sites/default/files/publications/History%20of%20the%20ICSID%20Convention/History%20of%20ICSID%20Convention%20-%20VOLUME%20I.pdf> accessed 14 July 2020.
[18]ICSID, 'About ICSID' <https://icsid.worldbank.org/en/Pages/about/default.aspx> accessed 14 July 2020.
[19]The ICSID Convention, 2006, ch IV.
[20]ibid art 53.
[21]ibid art 54.
[22]ibid art 54(1).
[23]ibid art 44.
[24]ibid art 68(2).
[25]'India and World Bank Group' <https://dea.gov.in/sites/default/files/India_WB_0.pdf> accessed 15 July 2020
[26]The ICSID Convention, art 1(2).

obligation to designate the award passed by a tribunal under the ICSID Convention as a judgment, decree or order passed by its domestic court.[27]

The Model BIT, alternatively, recognises the pursuance of investment arbitration in guidance with the provisions of the ICSID Arbitration (Additional Facility) Rules ("**the ICSID Facility Rules**").[28] These Rules facilitate the administration of the dispute resolution proceedings, but lack enforcement mechanism, between the parties wherein one of them, either the Host State or the Home State of the investor, is not a member of the ICSID Convention.[29]Since the ICSID Convention does not apply to arbitrations initiated under the ICSID Facility Rules, a treaty award resulting from an arbitration administered according to the provisions of the latter cannot be enforced in accordance with the mechanism provided for the same by the former.[30]To overcome this impediment, the ICSID Facility Rules mandates the holding of arbitral proceedings only in those states that area party to the New York Convention.[31] This move has facilitated the investors in enforcing the treaty awards in jurisdictions which have signed and ratified the New York Convention.

III. ENFORCEMENT MECHANISM UNDER THE INDIAN MODEL BITs

The ICSID Convention has been signed and ratified by 163 states out of a maximum 195.[32]Being a party to the said Convention, the problems pertaining to treaty award enforcement at the legislation level was not a matter of concern for these States. Additionally, since these States could resort to the ICSID Convention' swell-designed mechanism for dispute resolution and award enforcement, it was difficult for them to fathom the probable impediments to enforce an award arising under a BIT executed with a non-ICSID State.

The investment arbitration regime of India was at its nascent stage when it executed its first BIT with the United Kingdom[33]. The Indian government framed and/or suggested its first investment treaty model[34] in the year 2003. The 2003 Model Treaty incorporated pro-investment clauses, such as the MFN clause and alternative dispute resolution mechanisms, which were embraced by the nations across the globe and impelled them to execute investment treaties with India.[35] At present, India has executed over 80 investment treaties in addition to multiple Free Trade Agreements.[36]

[27]UNCTAD, 'Dispute Settlement' (International Centre for Settlement of Investment Disputes, 2.9 Binding Force and Enforcement) (2003) <https://unctad.org/en/Docs/edmmisc232add8_en.pdf> accessed 15 July 2020
[28]Model BIT, 2013, art 16.1(b).
[29]ICSID (Additional Facility) Rules, art 2(a).
[30]ibid art 3.
[31]ibid art 19.
[32]ICSID, 'Database of ICSID Member States' <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> accessed16 July 2020.
[33]Agreement between the Government of United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Promotion and Protection of Investments, 1994.
[34] Model BIT, 2003.
[35] Prabhash Ranjan & Pushkar Anand, 'The 2016 Model Bilateral Investment Treaty: A Critical Deconstruction'(2017)38(1) Nw J Intl L & Business <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1824&context=njilb> accessed 18 July 2020.
[36]Department of Economic Affairs, 'Bilateral Investment Treaties (BITs)/Agreements' <https://dea.gov.in/bipa> accessed 15 July 2020.

While the Indian government ardently propagated investment-friendly clauses, it overlooked the provisions for enforcement of the resulting treaty award in the 2003 Model Treaty.[37] The absence of such a provision, however, did not draw any attention from the investment community until much later, as most of the disputes were settled amicably without invigorating any discussion on the subject matter.[38]

In the latter half of the 2000s, the Republic of India witnessed a steep rise in ISDS claims against it.[39] While the investor-state disputes were more often than not settled amicably between the parties, the treaty award passed in the *White Industries case*[40] proved to be taxing on the Indian economy.[41]Realising the grave error of omitting to consider the probable consequences of resolving the ISDS claims by arbitration, the Indian government was compelled to revamp its investment treaty regime and introduce the Model BIT in 2015.[42] In an attempt to align the BITs already executed with the Model BIT, the Indian government issued over sixty termination notices to its counterparts, thereby rescinding the treaties executed under the erstwhile model, and proposed to renegotiate new treaties in conformity with the Model BIT.[43]

The Model BIT has been vehemently criticised for the inclusion of the ELR clause and exclusion of the MFN clause.[44] However, it is interesting to point out that the government has introduced, for the first time, a provision for the enforcement of the treaty awards[45]. Article 27 of the Model BIT discusses at length the finality and enforcement of the awards. Article 27.4 encourages the states that are parties to the BIT to enforce the treaty award in accordance with the provisions of their respective state laws. The subsisting arbitration law in India does not entail treaty award enforcement mechanism. Rendering a solution to this predicament, Article 27.5 of the Model BIT explicitly lays down that an ISDS claim submitted to arbitration "*...shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention.*" By giving investment treaty claims the colour of commercial claims, the clause indicates the willingness of the Indian government to enforce the treaty awards in accordance with the existing provisions

[37]Ranjan & Anand, 'The 2016 Model Bilateral Investment Treaty' (n 35).
[38]ibid.
[39]UNCTAD Investment Policy Hub, 'Investment Dispute Settlement Navigator' (India, Cases as Respondent State) <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india/investor>accessed 18 July 2020.
[40]*White Industries (Australia) Limited v Republic of India*, Final Award (UNCITRAL, 30 November 2011). In this case, White Industries, an Australian company, alleged that it had incurred hefty losses due to the inordinate and inconceivable delay of 9 years at the hands of Indian judiciary to decide the suit initiated by it against the Coal India Limited, an Indian public sector undertaking.The arbitral tribunal held India to be in contraventionof the MFN clause and issued an award ofAUD 4 million approximatelyin the favour of claimant towards damages and legal expenses.
[41]KshamaLoyaModani, 'Why India's model bilateral investment treaty needs a thorough relook' (*Business Standard* 31 December 2018), <https://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20In%20The%20Media/News%20Articles/190102_A_Why-Indias-model-bilateral-investment-treaty-needs-a-thorough-relook.pdf > accessed 18 July 2020.
[42]Ranjan & Anand, 'The 2016 Model Bilateral Investment Treaty' (n 35).
[43]UNCTAD Investment Policy Hub, 'International Investment Agreements Navigator' (India, Bilateral Investment Treaties) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india> accessed 18 July 2020.
[44]Ranjan, 'As India's New Bilateral Investment Strategy Sputters Out, the Secrecy and Opaqueness Must Go' (n 13).
[45]Model BIT, 2015, art 27.

under the 1996 Act. However, no positive amendment in this respect has been effected in the domestic legislation.

Nonetheless, the investment community and states have perceived the Model BIT to be not even remotely favourable. Since 5 years of its formulation, only 3 states have signed the BITs drafted in line with the Model BIT.[46] Majority of the states, including matured economies like EU, UK and USA, have declined to execute any investment treaty in accordance with the Model BIT.While deliberating on the pending India-US BIT, the US vehemently contended in support of the incapability of Indian courts to adjudicate on foreign investment-related disputes and claims.[47]Holding a firm stand against the execution of investment treaty as per the Model BIT, but simultaneously recognising the strategic partnership it shares with India,[48] EU has alternatively proposed to enter, as a bloc, under a Free Trade Agreement with India, which it is yet to respond.[49]

Until the states re-negotiate and execute new investment treaties with the Indian government, the foreign investors will continue to be guided and protected under the respective erstwhile treaties for a period of 15 years from the date of termination.[50]Currently, the Indian government is a party to a multitude of claims raised by the foreign investors before the international tribunals.[51]Upon the resolution of these pending disputes, there is a possibility that the Indian judiciary may be flooded with applications for treaty award enforcement. In light of such circumstances, it is vital to elaborately understand the commercial reservation to Article I(3) of the New York Convention and scrutinise the approach of our domestic legal system towards the treaty award enforcement.

IV. THE QUALM ABOUT INDIA'S COMMERCIAL RESERVATION

Pursuant to the ratification of the New York Convention[52], the foundation of the 1996 Act was laid down, in conformity with the said Convention.[53] Further, the 1996 Act was also in line with the UNCITRAL Model Law on International Commercial Arbitration[54] ("**the Model Law**"). It is imperative to note that while becoming a signatory, prior to its ratification[55], India proposed a commercial reservation to Article I(3) of the said Convention.

A commercial reservation implies that India would apply the provisions of the New York Convention to "*the disputes or differences arising out of legal relationships, whether*

[46]UNCTAD, 'India and International Investment Agreements', <https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india> accessed 18 July 2020.
[47]PrabhashRanjan, 'Bit of a Bumpy Ride' (*The Hindu*, 2 June 2016) <https://www.thehindu.com/opinion/op-ed/Bit-of-a-bumpy-ride/article14378406.ece> accessed 18 July 2020.
[48]European Commission, 'Trade>Policy>Countries and Regions>India' <https://ec.europa.eu/trade/policy/countries-and-regions/countries/india/> accessed 20 July 2020.
[49]AmitiSen, 'EU wants a separate investment protection pact with India' (*The Hindu Business Line*, 25 December 2019)<https://www.thehindubusinessline.com/economy/eu-wants-a-separate-investment-protection-pact-with-india/article30390422.ece > accessed 18 July 2020.
[50] Model BIT, 2003, art15.2.
[51]UNCTAD Investment Policy Hub, 'International Investment Agreements Navigator' (n 43).
[52]Foreign Awards (Recognition and Enforcement) Act, 1961.
[53]Arbitration and Conciliation Act, 1996, pt II, ch I (The 1996 Act).
[54] ibid Preamble.
[55]Foreign Awards (Recognition and Enforcement) Act, 1961.

contractual or not, that are considered commercial under the national law".[56]The same has been reflected under Section 44 of the 1996 Act which explicitly incorporates *"...considered as commercial under the law in force in India"*.[57]Hence, itis incumbent to ascertain the gamut of the term "commercial" under the said Act and whether the term "investment" falls within its horizon.

Generally speaking, the word 'commercial' has received a wide import from the Indian judiciary. Observing it to be "...*a word of the largest import and takes in its sweep all business and trade transactions in any of their forms...*", the Hon'ble Gujarat High Court addressed the issue of limitation of the term by holding that the dispute must arise out of contractual and/or commercial obligations for the New York Convention to be applicable.[58]

Since Part II of the 1996 Act is heavily inspired by the Model Law, it would be fair to refer to the latter for the said purpose. The Model Law (as amended in 2006) confers a comprehensive interpretation to the term "commercial" to cover "*all relationships of a commercial nature, whether contractual or not*" and has specifically included "*investments*" under its ambit.[59] Drawing inference from it, the term "commercial" under Section 44 of 1996 Act should include "investment" under its scope.

However, the Hon'ble Delhi High Court has noted that the arbitral awards, arising out of investment treaty claims cannot be considered as commercial under the laws of India.[60] The observation was made primarily because investment arbitration claims arise out of breach of investment treaty obligations of the Host state and not due to that of its contractual and/or commercial obligations.[61] Now the question emerges: Would such commercial reservation essentially exclude investment arbitration claims from the scope of Section 44 of the 1996 Act?This issue has received mixed responses from the Indian Judiciary wherein the Calcutta and the Delhi High Courts have explicated divergent views.

A. The Louis Dreyfus case

The Indian judiciary was posed with a matter pertainingto investment arbitration claim, for the first time, in the *Louis Dreyfuscase.*[62] In the instant case, the Kolkata Port Trust ("**KOPT**") filed an application under Section 45 of the 1996 Act seeking an anti-arbitration injunction against Louis Dreyfus Armatures to restrain the latter from proceeding with the investment arbitration pending before the arbitral tribunal constituted under the France-India

[56]UNCITRAL, 'UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Awards' (New York, 1958), 5 <http://newyorkconvention1958.org/pdf/guide/2016_Guide_on_the_NY_Convention.pdf#page=19> accessed 20 July 2020.
[57]Arbitration and Conciliation Act, 1996, s 44.
[58]*Union of India v Owners and Parties interested in Motor Vessel M.V. Hoegh Orchid, Bhavnagar &Ors*. AIR 1983 Guj 34 [6] (Justice B.K. Mehta).
[59]UNCITRAL Model Law on International Commercial Arbitration, 1985, art 1 fn 2 (UNCITRAL Model Law).
[60]*Vodafone* (n 6) [89] – [90] (Justice Manmohan).
[61]ibid [91](Justice Manmohan).
[62]*Louis Dreyfus* (n 7).

BIT[63]. Citing the observation made by the Court of Appeal in *The Mayor and Commonality & Citizens of The City of London v Ashok Sancheti* [64], the Applicant asserted that since the KOPT is not a party to the investment treaty, the arbitration clause thereunder could not be invoked against it. It further contended that the proceedings would cause immense financial strain on its resources and hence, is oppressive in nature.[65]Countering the arguments of the Applicant, the Respondent averred that unlike the relevant powers conferred upon the Court of Appeal under the relevant statutes enforced in the United Kingdom, the Indian civil courts have not been empowered therewith under any domestic law in force and hence, lack jurisdiction to adjudicate upon the instant proceeding.[66]

Ruling in favour of the Applicant, the Hon'ble High Court at Calcutta held that such an injunction could be granted under Section 45 of the 1996 Act in exceptional circumstances where the arbitral proceedings would be vexatious or oppressive or inequitable in nature.[67] In the aforesaid decision, it is noteworthy that the counsels had advanced no arguments challenging the jurisdiction of the instant court to adjudicate on a matter pertaining to an investment arbitration claim under the 1996 Act.[68] Further, the Court, without delving into the scope of its jurisdiction to decide on such matters under the said Act, proceeded on the supposition that the 1996 Act applies to the matters pertaining to investment arbitration similar to that of commercial arbitration.[69]

B. The Vodafone case

Subsequently, in the year 2018, a similar application was filed before the Hon'ble Delhi High Court in the*Vodafone case*[70]. In this case, the Union of India, placing reliance on the *Louis Dreyfus case,* sought for an anti-arbitration injunction against the Vodafone Group to restrain the latter from initiating arbitral proceedings against the former under the India-United Kingdom BIPA[71].The Applicant submitted that since the Vodafone Group had already commenced the arbitral proceedings under the India-Netherlands BIPA[72] through its subsidiary, Vodafone International Holdings B.V., instituting another arbitral proceeding by the same entity would constitute an abuse of process.[73] The Respondent resisted the claim of the Applicant by raising jurisdictional challenge.[74] Calling attention of the Hon'ble Court to India's commercial reservation to Article I(3) of the New York Convention, it contended that

[63]'Agreement between The Government of The Republic of India and The Government of The Republic of France on The Reciprocal Promotion and Protection of Investments' (signed on 2 September 1997, in force 17 May 2000) < https://dea.gov.in/sites/default/files/France.pdf> accessed 20 July 2020.
[64][2008] EWCA Civ 1283.
[65]*Louis Dreyfus* (n 7) [3].
[66] ibid [12].
[67]ibid [24] – [25].
[68]ibid.
[69]ibid.
[70]*Vodafone* (n 6).
[71]ibid; 'Agreement between The Government of The Republic of India and The Government of The United Kingdom of Great Britain and Northern Ireland for The Promotion and Protection of Investments' (signed 14 March 1994, in force 6 January 1995)<https://dea.gov.in/sites/default/files/United%20Kingdom.pdf> accessed 21 July 2020.
[72]'Agreement between The Republic of India and The Kingdom of The Netherlands for The Promotion and Protection of Investments' (signed 6 November 1995, in force 5 December 1996) <https://dea.gov.in/sites/default/files/Netherlands.pdf> accessed 21 July 2020.
[73]*Vodafone* (n 6) [21-25](Justice Manmohan).
[74]ibid [5] – [6] (Justice Manmohan).

the 1996 Act applies only to matters relating to international commercial arbitration and not to investment arbitration.[75]

Accepting the arguments put forth by the Respondent, the Hon'ble Court noted that investment disputes, stemming from "*state guarantees and assurances*" and tracing its roots to public international law, state obligations, and administrative law, are not "*commercial in nature*" and ergo, inherently different from commercial disputes.[76]The Court observed that the *Louis Dreyfus case* was sub-silentio with respect to the applicability of the 1996 Act to matters relating to investment arbitration claims and hence, held that it could not be relied upon as a "*declaration of law or authority of general nature binding as a precedent*".[77] Concurrently, the Court placed due reliance on the decision of *Excalibur Ventures LLC v Texas Keystone Inc. & Others*,[78]and notedthat though the national courts should exercise great self-restraint in granting an anti-arbitration injunction, it may be granted in exceptional circumstances, such aswhen an arbitral proceeding is vexatious or oppressive in nature, no efficacious remedies are available and the court has been approached in good faith.[79]

C. The Khaitan case

Along the same lines, in the *Khaitan case*,[80] the Hon'ble Delhi High Court declined to entertain an application made by the Union of India seeking an anti-arbitration injunction against the Respondents to prevent the latter from initiating investment arbitration proceedings under the India-Mauritius BIT.[81]The Hon'ble Court relied on the *Vodafone* decision to hold that the arbitral proceedings initiated under the BITs are not governed by the 1996 Act.[82] While delivering its judgment, the Court observed that the BITs are self-contained and primarily governed by the principles of public international law.[83] The Court further pointed out that under the BIT regime, a state provides reasonable assurances to the foreign investors to protect their investments and comprehensive dispute resolution mechanism to boost their confidence.[84] Any interference with such mechanism would necessarily cause "*erosion of investor confidence and dislodge the fundamental precincts on which BITs are based*".[85]

V. AUTHORS' ANALYSIS

Although the Indian judiciary had three instances to clear the air and establish some clarity with respect to whether there exists recourse under the Indian legal system and if so, the appropriate laws to pursue such legal recourse, the contrasting decisions of the Hon'ble Courts without irrefutable rationales have only made the prevailing situation dismal for the investment community.

[75] ibid[89] – [90] (Justice Manmohan).
[76] ibid[91] (Justice Manmohan).
[77] ibid[92] (Justice Manmohan).
[78][2011] 2 Lloyds Law Report 289.
[79]*Vodafone* (n 6)[114] (Justice Manmohan).
[80]*Khaitan* (n 4).
[81] ibid.
[82]ibid [29] (Justice Prathiba M. Singh).
[83]ibid [23] (Justice Prathiba M. Singh).
[84]ibid.
[85]ibid.

The Hon'ble Calcutta High Court did not mull over its jurisdiction on matters pertaining to investment arbitration claims under the relevant provision of the 1996 Act, and instead, proceeded with a mere presumption in that respect.[86] On the other hand, theHon'ble Delhi High Court entirely precluded the matters pertaining to investment arbitration from the provisions of the1996 Act.[87] Dissenting from this view of the Hon'ble Court, the authors reckon that had it delved deeper into the provisions of the Model BIT, it would have observed the readiness of the Indian government to include investment arbitration claims within the bounds of commercial arbitration under the 1996 Act.[88]On the contrary, its tightly-worded verdicts have sparked a myriad of concerns vis-à-vis enforcement of the treaty awards in the minds of the investment community.

A. Distinction on basis of 'legal relationship' and not 'cause of action'

In the *Khaitan's case*, the Hon'ble Delhi High Court reasoned that because investment arbitration emanates from an investment treaty, rather than from a commercial contract, an award passed in such arbitration shall not be considered as foreign award under Section 44 of the 1996 Act.[89] A bare reading of the concerned provision establishes that for an arbitral award to qualify as a foreign award, it must be passed in disputes arising out of "*legal relationships, whether contractual or not, considered as commercial*" according to the laws of India. Juxtaposing the reasoning offered by the Hon'ble Court with the text of the law, the jurists believe that the non-applicability of the 1996 Act to all investment disputes is erroneous.[90] Unlike the rationale put forth by the Hon'ble Court, the law emphasizes on the commerciality of the 'legal relationship' shared between the parties to the dispute and not on the commerciality of the 'cause of action' of such dispute.[91]

An investment dispute under a BIT may arise out of a commercial relationship between a foreign investor and a Host state. For the sake of better understanding, let's presume that a foreign investor has executed a commercial contract with the Host state and the enforcement of a new policy by the latter culminates into unfair treatment to a foreign investor, thereby violating the investor's right of 'fair and equitable treatment' under the BIT executed between the Host state and the Home state of such investor. In this example, a sovereign action of the Host state has given rise to foreign-seated investment arbitration under the BIT, between parties sharing a commercial relationship. Any arbitral award passed in such investment arbitration should come under the purview of Section 44of the 1996 Act [92] by virtue of the commercial nature of the legal relationship of the parties to the dispute. On the contrary, if we apply the view of the Hon'ble Delhi High Court, it would render such an arbitral award outside the contours of Chapter I, Part II of the 1996 Act.

[86]*Louis Dreyfus* (n 7).
[87]*Khaitan* (n 4),*Vodafone* (n 6).
[88]Model BIT, 2015, art 27.5.
[89]*Khaitan* (n 4) [29] (Justice Prathiba M. Singh).
[90]PrabhashRanjan and PushkarAnand, 'Indian Court and Bilateral Investment Treaty Arbitration' (2020) 4(2) Indian Law Review <https://doi.org/10.1080/24730580.2020.1732693> accessed 23 July 2020.
[91] ibid.
[92]Section 44 of the 1996 Act states 'foreign award' means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India.

Thus, a blanket exclusion of investment arbitration, without taking into consideration the nature of legal relationship between the parties to the dispute, would not only be unlawful, but also irrational.

B. Non-Applicability of the Code

Having encountered the jurisdictional challenge twice, the Hon'ble Delhi High Court could have traversed this issue in depth and ascertained the circumstances when the courts may intervene, primarily to protect to the rights of the foreign investors. In the *Vodafone* case, the Hon'ble Court, while ruling out the possibility of applying the 1996 Act to matters pertaining to arbitral proceedings under the BITs, took due notice of its residuary powers[93]under the Code of Civil Procedure, 1908 ("**the Code**") to exercise its jurisdiction on the subject matter in hand.[94]Though the court abstained from indulging into the nitty-gritty of such enforcement under the Code, it went ahead to remark that if the Court accepted the argument of lack of jurisdiction under the Code to adjudicate upon the instant matter, such a standpoint wouldhave to be extended to the enforcement of treaty award if brought before it.[95]

The authors opine that the provisions of the Code would fail to provide any assistance to the foreign investors to enforce the treaty awards. Although the Code contains provisions with respect to the conclusiveness of foreign judgments under Sections 13 and 14, it fails to deal with the conclusiveness of foreign awards. Further, the Code explicitly bars the civil courts from enforcing aforeign arbitral award.[96] The Indian courts have been conferred with the power to enforce, in accordance with the due process of law, the foreign decrees passed by the superior courts established in the territory outside India.[97]The said provision clarifies the ingredients of a 'decree' and explicitly excludes an arbitration award from its ambit.[98]On a bare perusal of the provision, it is apparent that the Code does not make any classification between investment arbitration awards and commercial arbitration awards but only restricts itself to the term "arbitration award".[99] Applying the cardinal rule of interpretation,[100] it can be well-established that the provision entirely bars the civil courts from enforcing a foreign arbitral award irrespective of its nature. Therefore, the Code does not come in handy either.

C. Unfettered Supervisory Jurisdiction

The Hon'ble Calcutta High Court, in the *Louis Dreyfus case*, assumed the applicability of the 1996 Act over the matters relating to investment arbitration and examined the circumstances when the national courts could interfere with them under Part II of the 1996 Act.[101] It noted

[93]The Code of Civil Procedure, 1908, s 20.
[94]*Vodafone*(n 6) [76] – [79] (Justice Manmohan).
[95]ibid [87] – [88] (Justice Manmohan).
[96]The Code of Civil Procedure, 1908, expln 2.
[97]The Code of Civil Procedure, 1908, s44A.
[98]The Code of Civil Procedure, 1908 s 44A, expln 2.
[99]The Code of Civil Procedure, 1908.
[100]*Gurudevdatta VKSSS Maryadit&Ors.v State of Maharashtra &Ors.*(2001) 4 SCC 534 [26] (Justice Umesh C. Banerjee). This judgment discusses the applicability of the cardinal rule of interpretation and states that the words of a statute must be understood in their natural, ordinary or popular sense and construed according to grammatical meaning, unless such construction leads to some absurdity or there is something in the context or in the object of the statute to suggest to the contrary.
[101]*Louis Dreyfus* (n 7)[24].

that in addition to the restrictions placed by Section 45,[102] unless the foreign arbitral proceedings were vexatious, oppressive or inequitable, the national courts could not intervene in them.[103]The Court, while arriving at its decision, reiterated the observation made by the Apex Court in *Enercon (India) Ltd. & Ors*v. *Enercon GMBH*[104]on the pro-arbitration approach of the jurisdictions that have adopted the Model Law. It stated that the national courts play "*a supportive role in encouraging arbitration rather than letting it come to a grinding halt*".[105]

Thus, the decision not only affirmed applicability of the 1996 Act to matters pertaining to investment arbitrations, both seated in India and abroad, but also shackled the authority of the national courts to a great extent in such matters. On the contrary, by barring the applicability of the 1996 Act to such matters wholly, the decisions rendered by the Delhi High Court have vested the national courts with unfettered supervisory jurisdiction. It is believed that such unfettered authority of the national courts may undermine the efficacy of the entire arbitral process and give rise to a plethora of problems for the investor community.

In the absence of appropriate means to seek enforcement, the pronouncement of the Hon'ble High Court at Calcutta gave the foreign investors some breathing space. Widely welcomed by the investment community, it advanced the possibility of the enforcement of a treaty award and demonstrated the willingness of the Indian state to adapt to a pro-arbitration regime.

VI. EXPLORING JURISDICTIONS FOR AWARD ENFORCEMENT

According to a report[106], India is a party to over twenty investment treaty arbitrations, which is by far the maximum number of such arbitrations brought against any state.[107] Hypothetically speaking, even if the awards in all these arbitral proceedings are passed in favour of foreign investors, there shall still prevail obscurity and unease with respect to their enforcement. To protect the interest of the foreign investors, the conception and practice of the enforcement of the arbitral award in a different state, being a signatory to the New York Convention, has acquired some popularity in the investment community. The domestic courts are acknowledging and exercising their jurisdiction on matters pertaining to investment treaty award, including its enforcement, under their domestic statutes.

In the case of *Occidental Exploration & Production Co*.v. *Ecuador*[108], the investor-state dispute arose under the Ecuador-USA BIT[109]and the application for the enforcement of award, passed by London Court of International Arbitration in favour of the investor, was

[102]The 1996 Act, s 45.
[103]*Louis Dreyfus* (n 7)[24].
[104] (2014) 5 SCC 1.
[105]*Louis Dreyfus* (n 7)[25].
[106]UNCTAD Investment Policy Hub, 'Investment Dispute Settlement Navigator' (n 39).
[107]Aditi Shah & Aftab Ahmed, 'EXCLUSIVE – India plans new law to protect foreign investment – sources' (*Nasdaq*, 15 January 2020) <https://www.nasdaq.com/articles/exclusive-india-plans-new-law-to-protect-foreign-investment-sources-2020-01-15-2> accessed 19 July 2020.
[108][2007] EWCA Civ 656.
[109]'Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment' (signed 27 August 1993, in force 11 May 1997) < https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1065/download> accessed 23 July 2020.

filed before the Court of Appeals in England. The Hon'ble Court, while deciding the instant case, noted that the English courts are empowered under the English Arbitration Act, 1996 ("**the English Act**") to entertain lawsuits pertaining to investment treaty award.

Subsequently, upon the receipt of a petition[110] for enforcing a treaty award passed in Paris-seated arbitration under the Russia-Ukraine BIT[111], the Commercial Court, while exercising its jurisdiction under the English Act, decided in favour of the foreign investor to enforce the BIT award against Ukraine. The cases demonstrate the readiness of the English courts to imbibe pro-investment arbitration practice in the wake of open-ended provisions incorporated in the English Act, unlike that in the 1996 Act, thereby opening up the possibility to exercise their jurisdiction in treaty award disputes.

In another case of *The Russian Federation* v. *Franz J. Sedelmeyer*,[112] the foreign investor partially recovered the treaty award,[113] passed in his favour in a Stockholm-seated arbitration under the Germany-Russia BIT,[114] by enforcing it against the assets of Russia located in Sweden. Likewise, if a treaty award is passed against India, the foreign investor may search for other states that are signatories to the New York Convention, have vigorous investment treaty award enforcement regulations and where the Indian government holds assets against which the award shall be enforced. This practice of enforcing a treaty award against the asset of a state in a different jurisdiction has essentially been adopted from the ICSID Convention.[115]

Although, the ambiguity surrounding the applicability of the 1996 Act to treaty awards has caused great concern to the foreign investors, the practice of enforcing such awards in different jurisdictions has enabled them, to a certain extent, to recover their dues from the Host State. The aforesaid cases exemplify that pro-arbitration jurisdictions would always pay heed to the needs of the foreign investors and permit award enforcement against the assets of the Host State located in their respective jurisdictions. In this regard, it would be prudent for the foreign investors to assess, strategize and identify pro-arbitration jurisdictions which would enable them to enforce their treaty awards against the Host States. Moreover, while locating the assets of the award debtor, the foreign investors must ensure that such assets do not stand disqualified on account of diplomatic or sovereign immunity of the state.

VII. EXTENDING THE 1996 ACT TO INVESTMENT ARBITRATION

While enforcing a treaty award in a different jurisdiction may be accepted as an interim measure, it cannot be denied that India still needs a decisive remedy. It becomes

[110] *PAO Tatneft v Ukraine* [2018] EWHC 1797 (Comm).
[111] 'Agreement between the Government of The Russian Federation and the Cabinet of Ministers of The Ukraine on Encouragement and Mutual Protection of Investments'(signed 27 November 1998, in force 27 January 2000) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2233/download> accessed 23 July 2020.
[112] Case No. Ö 170-10 (Swedish Supreme Court, 1 July 2011).
[113] *Mr. Franz Sedelmayer v The Russian Federation,* Award (SCC, 7 July 1998).
[114] 'Federal Republic of Germany and Union of Soviet Socialist Republics, Agreement concerning the promotion and reciprocal protection of investments (with protocol)' (signed 13 June 1989, in force 5 August 1991) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1398/download> accessed 23 July 2020.
[115] The ICSID Convention, 2006, art 54.

indispensable to ascertain an alternative to create a congenial atmosphere and instil a sense of security in the minds of present as well as potential foreign investors regarding their investment. Well-structured reforms are needed to boost their confidence in the Indian legislation.

At the outset, incorporating necessary provisions for regulating the enforcement of treaty award under the umbrella of the 1996 Act becomes imperative. Part II of the 1996 Act comprises provisions enabling the enforcement of foreign award within the territory of India. For this purpose, Section 44 of the 1996 Act limits the scope of "foreign award" to arbitral awards arising out of legal relationships considered as "commercial" under the laws in force in India. In light of the explanation by the Model Law[116]and the proposition made by the Indian government in Article 27.5[117] of the Model BIT, amending Section 44 to expressly include the word 'investment' under the ambit of 'commercial' seems to be a viable option. This proposition is also in line with the objectives envisaged by the Indian legislators while contemplating over the enactment of Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Bill, 2015.During the parliamentary sessions organized to deliberate on the motion for consideration of the said Bill, subsequently enforced as the Commercial Courts Act, 2015[118] ("**the Commercial Courts Act**)",it was asserted that implementing the provisions of the Bill would encourage speedy disposal of commercial disputes and reduce the pendency of commercial cases, thereby making India an attractive and more favoured destination worldwide for making foreign investments.[119]Thus, it can be firmly construed that the Commercial Courts Act, being a "*law in force*" in India, incorporates investments made by foreign investors within its ambit.

To eliminate the subsisting ambiguity surrounding the 1996 Act with respect to investment arbitration, the authors recommend the inclusion of an explanation clause to Section 44 of the Act. The amended provision should read as under:

"S. 44. Definition – In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on the differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the laws in force in India, made on or after the 11th day of October, 1960 –

(a) In pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(b) In one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

[116]UNCITRAL Model Law.
[117]Article 27.5 of the Model BIT states that any claim submitted to arbitration under Article 27 shall be considered to arise out of a commercial relationship for purposes of Article I of the New York Convention.
[118]The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015.
[119]Sixteenth LokSabha, 'Further discussion on the motion for consideration of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Bill, 2015' <http://loksabhaph.nic.in/Debates/Result16.aspx?dbsl=6004> accessed 24 July 2020.

Explanation 1–For the purposes of this Chapter, the expression "commercial" shall cover matters arising from all relationships of a commercial nature, whether contractual or not, and shall include "investment" as defined under investment treaties executed by the Republic of India."

India would not be the first nation to follow this proposition. A similar approach has been adopted by Singapore in its International Arbitration Act, 1994[120] ("**the1994 Act"**) and Hong Kong in its Arbitration Ordinance, 2011[121] wherein their domestic legislations regulating the international arbitration regime of their respective territories adhere to the Model Law. As noted above, the Model Law includes 'investment' within the ambit of 'commercial', thereby enabling investment disputes to be adjudicated as commercial arbitration.

The Singapore national courts have recognised the supervisory role played by the national courts for arbitrations seated in Singapore and dealt with investment arbitrations claims under the purview of their national legislation. In *Sanum Investments Limited* v. *Government of the Lao People's Democratic Republic*,[122] the Singapore Court of Appeal confirmed the treaty award passed by the Singapore-seated tribunal under the PRC-Laos BIT[123] when it was challenged under the 1994 Act before the national courts. In another instance, the Singaporean Supreme Court, in *Swissbourgh Diamond Mines* v. *Kingdom of Lesotho*,[124]exercised its jurisdiction under its domestic legislation and made a similar observation in a matter arising out of investment arbitration seated in Singapore.

A similar move by the Indian government by amending the 1996 Act, to expressly include investment within the ambit of 'commercial' under Section 44 of the 1996 Act would contribute towards obliterating the subsisting ambiguity and augmenting the investor confidence in the Indian legal system.

VIII. CONCLUSION

In the recent years, India has improved its ranking immensely in the World Bank's Ease of Doing Business Index, rising from 142 out of 190 countries in the year 2014[125] to 63 as per the latest report.[126]This progress can be attributed to, inter alia, ameliorated regulatory policies, such as revamped extant laws like the Companies Act, 2013 and new statutes serving contemporary needs like the Commercial Courts Act, and unconventional programmes such as 'Make in India'. These conscious actions by the Indian Government have contributed towards amplifying the foreign investor's confidence.

[120]International Arbitration Act, 1994, ch 143A, Preamble.
[121]Arbitration Ordinance, 2011, ch 609, s4.
[122][2016] SGCA 57.
[123]'Agreement between the Government of The People's Republic of China and the Lao People's Democratic Republic Concerning the Encouragement and Reciprocal Protection of Investments' (signed 31 January 1993, in force 1 June 1993) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/753/download> accessed 23 July 2020.
[124][2018] SGCA 81.
[125]ET Bureau, 'India ranks 142 in latest "Ease of Doing Business" report: World Bank' (*The Economic Times*, 30 October 2014) <https://economictimes.indiatimes.com/news/economy/indicators/india-ranks-142-in-latest-ease-of-doing-business-report-world-bank/articleshow/44967304.cms> accessed 25 July 2020.
[126]World Bank's Ease of Doing Business, May 2019 < www.doingbusiness.org/en/rankings> accessed 25 July 2020.

However, despite introducing umpteen changes with the core intent to make Indian economy appealing to the foreign investors, the Indian government has failed to address the legal problems surrounding its investment treaty regime. Likewise, when the Indian judiciary encountered the disputes revolving around investment treaty claims, not once did it tread on the path of determining the appropriate laws under which a valid legal recourse relating to the investment arbitration claims could be sought.

The interpretation of the commercial reservation under Section 44 of the 1996 Act *sensustricto* has placed investment arbitration claims outside the scope of the primary legislation governing arbitration in India. Further, by explicitly excluding arbitral awards from the provisions regulating the enforcement of foreign judgments under the Code, the Courts cannot bank upon their residuary jurisdiction to entertain such matters. Furthermore, the decisions of the Hon'ble Delhi High Court in the two cases, being unfavourable and squarely inconsistent with the one delivered by the Hon'ble Calcutta High Court, have thrown the foreign investors in a quandary.

While the investor-state relations continue to be governed under the erstwhile treaties drafted in synchrony with the 2003 Model Treaty, they are silent on the governing laws of the treaty award enforcement. On the contrary, though the Model BIT provides for an alternative, the states have declined to execute the BITs with India and therefore, Article 27.5 proposed in the Model Treaty does not hold value, leaving us in the same position as we stood prior to the Model BIT. Nonetheless, had the Courts taken cues from the proposition of Article 27.5 while deciding on the aforementioned cases, the face of Indian investment arbitration regime might have been different.

Acknowledging the reluctance of the States to execute a BIT with the Republic of India, the Ministry of Finance is in discussion to propose a new statute that provides for a fast-track dispute resolution mechanism for settlement of investor-state disputes.[127] Though the specifics are not yet available in public space, the prospective legislation puts forth local remedial measures such as setting up investment tribunals at the High Courts of Indian States or vesting the National Company Law Tribunal with the responsibility to adjudicate the investment disputes.[128]

After suffering a thumping loss in the *White Industries case*, the Indian government appears to be sincerely inclined towards safeguarding its own interest while protecting that of the foreign investors. However, as it is minimizing its intervention in multiple sectors to the maximum possible degree and opening doors for inducing higher FDI inflows in inter-alia, defence, manufacturing and aviation sectors,[129] leaving the investors in a state of uncertainty and perplexity for long may be menacing for the Indian economy.

It is imperative to note that although, India's ranking has greatly improved in the Ease of Doing Business Index, its ranking with respect to the enforcement of contract still marks a

[127]Shah & Ahmed, 'EXCLUSIVE – India plans new law to protect foreign investment – sources' (n107).
[128]ibid.
[129]Noor Mohammad, 'Modi Government Eases FDI Norms in Key Sectors including Retail, Civil Aviation' (*The Wire*, 10 January 2018) <https://thewire.in/economy/modi-government-eases-fdi-norms-in-key-sectors-including-retail-civil-aviation> accessed 25 July 2020.

poor 163.[130] The Index suggests that it takes about 1445 days for enforcing a contract in India,[131] which indicates the reason behind the reluctance of the foreign investors in making investments in the country. It is vital for the Indian government to expedite and propose a concrete course of action to put the conundrum to rest without losing sight of its ultimate objective, i.e., to propagate a safe and secure foreign investment environment. When an ideal judicial system will be set in place, it will, in turn, escalate economic growth, increase foreign investment and make India an attractive place to do business in.[132]

[130]ET Bureau, 'India ranks 142 in latest "Ease of Doing Business" report: World Bank'(n 125).
[131]ibid.
[132]Sixteenth Lok Sabha, 'Further discussion on the motion for consideration of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Bill, 2015' (n 119).