BILATERAL INVESTMENT TREATIES AND THE INDIAN JUDICIARY

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ABSTRACT

India has entered into bilateral investment treaties (BITs) with eighty-six countries. Of these BITs, seventy-three have already come into force. Despite this massive BIT program, BITs in India did not attract much attention until foreign investors used BITs to slap India with investment treaty arbitration (ITA) notices. These foreign investors, ranging from telecommunication companies to hedge funds, have challenged a host of state measures like license cancellation by courts and retrospective taxes. The use of BITs to challenge actions of Indian courts has raised concerns in India regarding BITs encroachment of India's judicial sovereignty. These ITA notices against actions of the Indian judiciary have triggered a debate in India as to whether the ITA may be invoked against judicial actions (and omissions) at all.

India's top legal officer at the time of the claims stated that such notices were untenable. In this regard, this Article examines whether the investors can bring BIT claims against India for the actions of the Indian judiciary. The Article discusses the international law of attribution, India's limited ITA experience where judicial action or inaction has triggered BIT claims against India, and BIT jurisprudence on claims against states due to judiciary acts. The Article concludes by proposing how India could reduce the interface *between BITs and the Indian judiciary given its sensitivities to BIT claims against judicial actions.*

I. INTRODUCTION

Bilateral investment treaties (BITs) are often between two countries aimed at protecting investments made by investors from either country in the territory of the other.[1] BITs protect investments by

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1. For a general discussion on bilateral investment treaties (BITs), see RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 13–14 (2d ed. 2012); ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREA-

imposing conditions on the regulatory behavior of the host state, which prevents undue interference with the rights of the foreign investor.[2] These conditions include restrictions on the host state's power to expropriate the investment; imposition of obligations on the host state to treat foreign investment fairly and equitably and not to discriminate against foreign investment; allowing for repatriation of profits subject to conditions to which the two countries agree; and, most importantly, allowing individual investors to bring cases against host state if the latter's sovereign regulatory measures are inconsistent with the BIT. This procedure is known as the investor-state dispute settlement system often referred to as investment treaty arbitration (ITA).

India, one of the fastest growing economies in the world,[3] has entered into BITs[4] and Free Trade Agreements (FTAs) that contain chapters on investment protection.[5] India entered into its first BIT with the United Kingdom in 1994.[6] Since then, India has entered into BITs with eighty-six countries; of these BITS, seventy-three have already come into force.[7] Of these seventy-three BITs, sixty-nine are standalone investment treaties (BITs), whereas in the

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TIES: STANDARDS OF TREATMENT 41–49 (2009); JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 91–95 (2010).

2. DOLZER & SCHREUER, *supra* note 1, at 13.

3. *See* Prabhash Ranjan & Deepak Raju, *The Enigma of Enforceability of Investment Treaty Arbitration Awards in India*, 6 ASIAN J. COMP. L., May 2011, at 5. According to the International Monetary Fund (IMF), India's real Gross Domestic Product (GDP) growth rate in 2011 was 7.2 percent, and the projected real GDP in 2013 is 7.3 percent. This is second only to China, where the figures for 2011 and 2013 stand at 9.2 and 8.8 percent, respectively. *See* INT'L MONETARY FUND (IMF), WORLD ECONOMIC OUTLOOK APRIL 2012: GROWTH RESUMING, DANGERS REMAIN 61 (2012), *available at* https://www.imf.org/external/pubs/ft/weo/2012/01/pdf/text.pdf.

4. *Bilateral Investment Promotion and Protection Agreements (BIPA)*, MINISTRY FIN.: GOV'T INDIA, http://finmin.nic.in/bipa/bipa_index.asp (last updated Dec. 2013). Globally, the number of BITs (standalone investment treaties and investment chapters in free trade agreements) have increased from 500 in 1990 to 3196 by the end of 2012. UNITED NATIONS CONFERENCE ON TRADE & DEV. (UNCTAD), WORLD INVESTMENT REPORT 2013: GLOBAL VALUE CHAINS: INVESTMENT AND TRADE FOR DEVELOPMENT, at 101–02, U.N. Doc. UNCTAD/WIR/2013, U.N. Sales No. E.13.II.D.5 (2013). For a general discussion of BITs, see DOLZER & SCHREUER, *supra* note 1, at 13–14; NEWCOMBE & PARADELL, *supra* note 1, at 41–49.

5. IMF, *supra* note 3, at 1. This figure of seventy-three BITs includes sixty-nine standalone BITs and four Free Trade Agreements (FTAs), which contain a chapter on investment. *Bilateral Investment Promotion and Protection Agreements (BIPA)*, *supra* note 4. In India, FTAs are known as Comprehensive Economic Cooperation Agreement (CECA). Ranjan & Raju, *supra* note 3, at 1, 6. A full list of India's BITs is available at India's Ministry of Finance website. *Bilateral Investment Promotion and Protection Agreements (BIPA)*, *supra* note 4.

6. *Bilateral Investment Promotion and Protection Agreements (BIPA), supra* note *4.*

7. Ranjan & Raju, *supra* note 3, at 6.

case of four countries—Singapore, Korea, Malaysia, and Japan—investment protection obligations are part of an FTA.[8] These FTAs, apart from investment protection, also cover trade liberalization (goods and services), investment liberalization, competition policy, trade facilitation, rules of origin, and intellectual property rights. India recently finalized an FTA containing a chapter on investment with Association of Southeast Asian Nations (ASEAN).[9] India is also negotiating the FTAs containing investment chapters with Indonesia, Australia, Mauritius, New Zealand,[10] and the European Union.[11] It is also negotiating a BIT with Canada.[12] Moreover, India started negotiating a BIT with the United States in 2009. The summit meeting of the U.S. President Barack Obama and the then Prime Minister Manmohan Singh of India saw the two leaders reaffirming their commitment to conclude a high-end BIT between the two countries aimed at fostering openness to invest.[13]

Despite this massive BIT program, BITs in India did not attract much attention until recently, when foreign investors slapped India with the ITA notices.[14] From 1994, when India started its

8. *Bilateral Investment Promotion and Protection Agreements (BIPA)*, *supra* note 4. In India, FTAs are known as Comprehensive Economic Cooperation Agreements. Ranjan & Raju, *supra* note 3, at 6.

9. Sujay Mehdudia, *India, ASEAN Finalise FTA in Services, Investments*, THE HINDU (Dec. 20, 2012, 11:15 PM), http://www.thehindu.com/business/Economy/india-asean-finalise-fta-in-services-investments/article4222052.ece.

10. *India's Current Engagements in RTAs*, GOV'T INDIA, DEP'T COM., MINISTRY COM. & INDUSTRY, http://commerce.nic.in/trade/international_ta_current.asp (last visited Sept. 21, 2014). India already has a BIT each with Indonesia and Mauritius. *Id.*

11. *Luxembourg for Early Conclusion of India-EU FTA*, ECON. TIMES (Oct. 16, 2012, 6:36 PM), http://articles.economictimes.indiatimes.com/2012-10-16/news/34498965_1; *see also India's Current Engagements in RTAs*, *supra* note 10 (providing a list of ongoing negotiations of CECAs).

12. *Canada-India Foreign Investment Promotion and Protection Agreement (FIPA) Negotiations*, FOREIGN AFF., TRADE & DEV. CAN., http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/india-inde.aspx? (last updated June 27, 2013). Recent developments, however, suggest that this BIT has run into rough weather. *See* Prabhash Ranjan & Kajal Bhardwaj, *Stephen Harper Left India with No FIPA. Here's Why*, TROY MEDIA (Dec. 17, 2012), http://www.troymedia.com/2012/12/17/stephen-harper-left-india-with-no-fipa-heres-why.

13. Joint Statement by President Barack Obama & Prime Minister Manmohan Singh of India on Summit Meeting in Washington, D.C. (Sept. 27, 2013), *available at* http://www.mea.gov.in/bilateral-documents.htm?dtl/22265. For a full-fledged discussion on India's BIT programme, see Prabhash Ranjan, *India and Bilateral Investment Treaties—A Changing Landscape*, 29 ICSID REV.—FOREIGN INVESTMENT L.J., 419, 419–50, no. 2 (2014).

14. For details of these notices, see Press Release, FTAs, Ministry of Com. & Industry, Gov't India (May 14, 2012), *available at* http://pib.nic.in/newsite/PrintRelease.aspx?relid=83799. For more on Indian BITs, see Ranjan & Raju, *supra* note 3; Prabhash Ranjan, India's International Investment Agreements and India's Regulatory Power as a Host Nation (Aug. 12, 2012) (unpublished Ph.D. thesis, King's College

BIT program, to until the end of 2010, India's involvement with the ITA was marginal.[15] India was involved in only one ITA dispute, and even this dispute did not result in an ITA award, although there are a few non-ITA arbitral awards in this context.[16] The period after 2010, however, saw a surge in India's involvement with the ITA.[17] India lost a case to an Australian investor, White Industries, under the India-Australia BIT *(White Industries v. India*[18]), and there was a sudden influx of the ITA notices, with many foreign investors issuing the ITA notices to the Indian Republic.[19] Rattled by these ITA notices and the adverse BIT ruling in *White Industries*, India has put all ongoing BIT negotiations on hold.[20] Due to this increased involvement with the ITA, India has decided to review its model BIT.[21]

Different foreign telecommunication companies have issued many of these ITA notices due to the cancellation of their licenses by the Indian Supreme Court.[22] This relates to the grant of Unified Access Service License (UAS) with second-generation (2G) spectrum to telecommunication companies, of both Indian and foreign origin, by the Department of Telecommunication of the

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London), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2308853; Sreenivasa Rao, *Bilateral Investment Protection Agreements: A Legal Framework for the Protection of Foreign Investments*, 26 COMMONWEALTH L. BULL. 623 (2000); Devashish Krishan, *India and International Investment Laws*, 2 INDIA & INT'L L. 277 (2008).

15. Prabhash Ranjan & Deepak Raju, *BIT of a Problem Down Under*, INDIAN EXPRESS (Oct. 17, 2011, 12:04 AM), http://archive.indianexpress.com/news/bit-of-a-problem-down-under/860705/.

16. *See* Capital India Power Mauritius I v. Maharastra Power Dev. Corp., Case No. 12913/MS, Award (ICC Int'l Ct. Arb. 2005), http://italaw.com/documents/Dabhol_award_050305.pdf; Expropriation Claim of Bank of America (Trustee), Contract of Insurance No. F041, Memorandum of Determinations, at 25 (OPIC 2003), http://www.opic.gov/sites/default/files/docs/BankofAmericaColumbia032404.pdf.

17. *See* Prabhash Ranjan, *Can BIT Claims Be Made Against India for the Actions of the Indian Judiciary?*, 1 NAT'L L. U. JODHPUR L. REV. 87, 87–92 (2013).

18. White Indus. Austl. Ltd. v. India, Final Award (UNCITRAL 2011), http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf.

19. *See* Ranjan, *supra* note 17. For a list of such cases against India, see *Respondent State*, INV. TREATY ARBITRATION, http://www.italaw.com/cases-by-respondent?field_case_respondent_tid=622 (last visited Nov. 17, 2014).

20. Shutapa Paul, '*Cornered' Government Puts All BIPA Negotiations on Hold*, NEW INDIAN EXPRESS (Mar. 23, 2013, 8:56 AM), http://newindianexpress.com/business/news/article1513318.ece.

21. Press Release, Bilateral Investment Treaties, Ministry of Commerce & Indus., Press Info. Bureau, Gov't of India (May 6, 2013), *available at* http://pib.nic.in/newsite/erelease.aspx?relid=95593; Prabhash Ranjan, *More Than a BIT of a Problem*, FIN. EXPRESS (Apr. 27, 2013, 1:33 PM), http://www.financialexpress.com/news/column-more-than-a-bit-of-a-problem/1108228.

22. *See* Ranjan, *supra* note 17.

Indian Government.[23] The government employed a "first-come-first-served" policy, rather than an auction, for the allocation of these licenses.[24] A writ petition was filed in the Supreme Court of India, however, arguing that the granting of licenses following the "first-come-first-served" policy was arbitrary and unconstitutional.[25] The Supreme Court agreed with the petitioners and held that "[t]here is a fundamental flaw in the first-come-first-served-policy" because it allows people with access to the power-corridor to benefit over those who do not have such access.[26] The Court held that the 2G licenses granted by the Indian government were "arbitrary and unconstitutional," and hence all the licenses were illegal.[27] As a result, the Supreme Court quashed each of the 122 2G licenses granted on or after January 20, 2008, by the Department of Telecommunication.[28]

Arguably, the cancellation of these telecommunication licenses will adversely affect the investments of many foreign companies who claim that they invested in India based on the issuance of these licenses and after getting all the due approvals and clearances from the Indian state.[29] For example, according to the Norwegian company, Telenor, one of the companies whose licenses have been cancelled, it bought these licenses from an Indian company, Unitech, and it played no role either in the policy of allocating licenses or in the license-awarding process.[30] Thus, Telenor's argument is that its investment should not be jeopardized by the arbitrariness of the Indian state.[31] Subsequent to the cancellation of the 2G licenses, Telenor issued an ITA notice to India alleging that cancellation of its licenses by the Supreme Court violates the

23. Comptroller & Auditor Gen. of India, Performance Audit Report on the Issue of Licences and Allocation of 2G Spectrum (2010).

24. *See id.* at vii.

25. *See* Ctr. for Pub. Interest Litig. v. India, Writ Petition (Civil) No. 423/2010, at 57–59 (S. Ct. 2010) (arguing that granting licenses following the "first come first served" policy violated the principle of equality enshrined in Article 14 of the Indian Constitution). The Centre for Public Interest Litigation filed this writ petition. *Id.* at 1.

26. *See id.* at 85–86.

27. *See id.* at 92–93.

28. *See id.*

29. *See, e.g.*, Siddharth, *Telenor Seeks Arbitration, Claims Damages of $14 Billion from Government in 2G Case*, Times India (Mar. 27, 2012, 1:07 AM), http://timesofindia.indiatimes.com/business/india-business/Telenor-seeks-arbitration-claims-damages-of-14bn-from-govt-in-2G-case/articleshow/12420404.cms.

30. *See id.*

31. *See id.*

investment chapter of the India-Singapore FTA.[32] Sistema, a Russian firm, whose twenty-one licenses were also among the 122 licenses that the Supreme Court cancelled, has also served a notice to India to commence the ITA proceedings under the India-Russia BIT.[33] In the notice, Sistema argued that cancellation of its licenses following the investment of billions of dollars in the Indian telecommunication sector is contrary to India's obligations under the India-Russia BIT, including obligations like the nonexpropriation of investments and the provision of full protection and security for the investment.[34] Khaitan Holdings Mauritius Limited (KHML), another foreign investor whose twenty-one licenses were cancelled by the Supreme Court, issued an arbitration notice to the Union of India challenging the cancellation of its telecommunication licenses.[35]

These ITA notices have triggered a discussion in the Indian government on the interface between Indian BITs and India's judiciary.[36] The then attorney general of India, the top law officer in the country, stated that foreign telecommunication companies like Sistema and Telenor cannot claim damages from the Indian government under various BITs for losses emanating out of Supreme Court orders because court orders do not constitute a cause of action against the government.[37] The then attorney general also argued that the claim of damages by foreign investors is based on a

32. *See* Arun S. & Thomas K. Thomas, *2G Mess: Telenor May Invoke India-Singapore Bilateral Pact*, HINDU BUS. LINE (Mar. 22, 2012), http://www.thehindubusinessline.com/industry-and-economy/info-tech/article3155481.ece.

33. Press Release, Sistema, Sistema Sends a Notice to the Republic of India to Settle Dispute Relating to the Revocation of SSTL's Licenses (Feb. 28, 2012), *available at* http://www.sistema.com/press/press-releases/2012/02/sistema-sends-a-notice-to-the-republic-of-india-to-settle-dispute-relating-to-the-revocation-of-sstl's-licenses.aspx; *Fix Dispute in 6 Months or Face Arbitration, Sistema Tells India*, FIN. EXPRESS (Feb. 29, 2012, 2:13 AM), http://www.financialexpress.com/news/fix-dispute-in-6-months-or-face-arbitration-sistema-tells-india/918076/0 [hereinafter *Fix Dispute in 6 Months*].

34. *Fix Dispute in 6 Months*, *supra* note 33.

35. *2G Scam: Loop Investor Files International Arbitration Against Centre*, THE HINDU (Oct. 1, 2013, 3:58 PM), http://www.thehindu.com/business/Industry/2g-scam-loop-investor-files-intl-arbitration-against-centre/article5189682.ece.

36. *See* Ranjan, *supra* note 17.

37. Thomas K. Thomas, *Foreign Players Cannot Invoke Bilateral Treaties: Attorney-General*, HINDU BUS. LINE (Aug. 13, 2012), http://www.thehindubusinessline.com/industry-and-economy/info-tech/article3764819.ece. Not everyone in the Indian government, however, agrees with the former attorney general on this point. For example, the Indian Ministry of External Affairs believes that, for the purposes of international law, the Indian state is one entity: that is, actions of any organ of the state are attributable to India. *Foreign Telcos Can't Claim Damages from Government in 2G Case: AG*, NDTV PROFIT (Dec. 5, 2012, 8:36 PM), http://profit.ndtv.com/news/corporates/article-foreign-telcos-cant-claim-damages-from-government-in-2g-case-ag-314309 [hereinafter *Foreign Telcos*].

complete misunderstanding of the constitutional provision prevailing in India, which recognizes separation of powers between the executive, judiciary, and the legislature.[38] Inherent in this argument are the following points: first, only executive actions and not judicial actions can violate the BIT; second, one can have recourse to the domestic legal order to find out whether an international legal claim can be made.

Subsequent to these notices, various functionaries of the Indian state have expressed concerns regarding the interface between BITs and the Indian judiciary. For example, the then Finance Minister of India stated that India's highest court could not be subjected to the jurisdiction of foreign tribunals.[39] Likewise, before the summit meeting of the U.S. President and former Indian Prime Minister, India expressed concerns on the invocation of BITs to challenge judicial actions under investment treaty arbitration.[40]

These concerns on the interface between India's judiciary and BITs surfaced when India lost a BIT dispute to an Australian investor in 2011 in India's first publicly available ITA award, *White Industries v. India*.[41] In this case, an Australian investor brought a BIT claim against India for the inordinate delay by the Indian courts in enforcing an international commercial arbitration award in favor

38. *See* Thomas, *supra* note 37; *Foreign Telcos*, *supra* note 37; Anandita Singh Mankotia, *Notice by Sistema Not Relevant as SC Cancelled Licences, Not Government, Says AG*, FIN. EXPRESS (May 23, 2012, 2:10 AM), http://www.financialexpress.com/news/notice-by-sistema-not-relevant-as-sc-cancelled-licences-not-govt-says-ag/952533; Joji Thomas Philip, *AG Reiterates That 2G Investors Can't Seek Damages Under BIPA*, ECON. TIMES (Dec. 5, 2012, 10:27 PM), http://economictimes.indiatimes.com/news/news-by-industry/telecom/ag-reiterates-that-2g-investors-cant-seek-damages-under-bipa/articleshow/17496788.cms. At a conceptual level, this line of argument might also suggest that judicial actions of courts are not part of the actions of the Indian state. This would be quite misleading, however, because the Indian Constitution, although it does not expressly vest judicial power in the Supreme Court or other courts, clearly recognizes the division of three main functions of the state with the judicial power of the Indian state vesting in India's courts. *See* Kumar v. India, (1997) 2 S.C.R. 1186; *see also* MAHENDRA PAL SINGH, V.N. SHUKLA'S CONSTITUTION OF INDIA 472 (11th ed. 2008) (stating that judicial power of the state vests in the courts or the judiciary). As a result, exercise of judicial power by the courts is an exercise of state power by the Indian state.

39. *Investment Pacts Can't Be Subject to Foreign Jurisdictions: Chidambaram*, TIMES INDIA (Apr. 16, 2013, 2:11 PM), http://timesofindia.indiatimes.com/business/international-business/Investment-pacts-cant-be-subject-to-foreign-jurisdictions-Chidambaram/articleshow/19576234.cms.

40. Anirban Bhaumik, *Manmohan to Meet Obama in Washington*, DECCAN HERALD (Sept. 15, 2013), http://www.deccanherald.com/content/357352/manmohan-meet-obama-washington.html.

41. White Indus. Austl. Ltd. v. India, Final Award (UNCITRAL 2011), http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf.

of White Industries.[42] The ITA tribunal held that judicial delays by Indian courts in enforcing an international commercial arbitration award violated the India-Australia BIT.[43] Thus, the *White Industries* award was an indictment of domestic judicial delays, which triggered concerns related to the encroachment of India's judicial sovereignty.[44] According to a member of the Indian Parliament, the *White Industries* award "is an attack on the sovereignty of the Indian Judiciary."[45]

The concern in India over foreign investors using BITs to challenge judicial actions and the views of India's top law officer, the then attorney general, on whether investors can bring BIT claims against India for the actions of the Indian judiciary necessitates a full and detailed discussion. This Article discusses whether investors can bring BIT claims against India for the actions of the Indian judiciary. The Article answers this question by adopting a positivist legal framework,[46] discussing the international law on attribution in Part II, which explains that not just executive and legislative but also judicial action can be challenged under BITs.

Part III of the Article strengthens this position by providing examples from India's limited ITA experience where judicial action or inaction has been responsible for BIT claims against India. Part IV discusses the BIT jurisprudence on claims against states due to actions of the judiciary. It focuses on "denial of justice" cases involving the judiciary and the other grounds on which investors have challenged actions of local courts in an ITA. The overall objective is to show that investors can bring BIT cases against India for the actions of Indian courts not just in instances involving a denial of justice but also for other judicial conduct. As a subsidiary objective, the Article also contributes to the debate on BITs and judicial misconduct, a topic that has not received as

42. *Id.*

43. *Id.*

44. P.K. Suresh Kumar, *Globalisation and the Judicial Sovereignty of India*, 47 Econ. & Pol. Wkly., Dec. 8, 2012, at 27; *see* Jayati Ghosh, *Worrying Trend*, Frontline, Mar. 10–23, 2012, at 215.

45. Shri P. Rajeev, Remarks by Arbitration Tribunal, London, Questioning the Sovereignty of the Indian Judicial System (May 22, 2012), *in* Rajya Sabha, May 2012, at 274, 274–75. For another critique of how the *White Industries* award went beyond its mandate, see Capital India Power Mauritius I v. Maharastra Power Dev. Corp., Case No. 12913/MS, Award (ICC Int'l Ct. Arb. 2005), http://italaw.com/documents/Dabhol_award_050305.pdf.

46. For more on the positivist legal framework as a "method" in international law, see generally *Symposium on Method in International Law*, 93 Am. J. Int'l L. 291–451 (Steven R. Ratner & Ann-Marie Slaughter eds., 1999) (analyzing the background and significance of method as a means for application of legal theories).

much scholarly attention as BITs and other state misconduct. Part V argues that if India wishes to reduce the interface between BITs and the Indian judiciary, then India should consider molding the language of its BITs. Part VI concludes that investors may bring BIT claims against India for judicial actions.

II. International Law on Attribution

The discussion of the international law of attribution focuses on two core issues inherent in the former Indian attorney general's response to ITA notices against actions of Indian courts: first, whether international claims can be made against actions of the judiciary; and second, whether national law can be used to determine the legality of an international claim.

A. *International Claims Against Domestic Judicial Acts*

The general rule in international law is that conduct of the organs of the state or of those who have acted under the direction, instigation, or control of those organs ("agents" of the state) is attributable to a state.[47] Article 4(1) of the International Law Commission (ILC) Draft Articles on State Responsibility[48] states as follows:

> The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.[49]

The ILC thereby brings judicial organs within the purview of those organs, the conduct of which can result in the violation of a state's international obligations.[50] This codifies a broadly recog-

47. Ian Brownlie, System of the Law of Nations: State Responsibility: Part 1, at 132–33 (1983).

48. Under the U.N. Charter Article 13, the general assembly codifies and progressively develops customary international law. *See* U.N. Charter art. 13. This function has been delegated to the International Law Commission (ILC). *Introduction*, Int'l L. Comm'n, http://www.un.org/law/ilc/ (follow "Introduction" hyperlink) (last visited Sept. 22, 2014). For information on the process of drafting and implementing Article 13, see *id.* (Drafting and Implementing of Article 13). *See also* James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 Am. J. Int'l L. 874 (2002) (analyzing the ILC Articles approach to state responsibility).

49. *Report of the Commission to the General Assembly on the Work of its Fifty-Third Session, Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 56 U.N. GAOR Supp. No. 10, art. 4(1), U.N. Doc. A/56/10 (2001), *reprinted in* [2001] 2 Y.B. Int'l L. Comm'n 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1 [hereinafter *Draft Articles on Responsibility*].

50. *Id.*

nized principle of customary law.[51] The commentary on the ILC Articles of State Responsibility clearly states that the reference to "state" in Article 4 is not limited to the organs of the central government.[52] It also specifies that the reference to "state" in Article 4 "extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level. No distinction is made for this purpose between legislative, executive or judicial organs."[53] This clearly shows that the actions of the judiciary are very much a part of the actions of the state, and hence the judiciary can also be the source of an internationally wrongful act.[54] The International Court of Justice (ICJ) has also confirmed this interpretation: "[A]ccording to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule . . . is of a customary character."[55] In other words, judicial decisions emanate from a state organ in the same manner as legislation passed by the legislature or a decision made by the executive.[56] Furthermore, Professor Brownlie states that actions of courts relate substantially to the rubric of "denial of justice"[57] but may also affect the responsibility of the state in other ways.[58] One such way of affecting state responsibility is if courts commit errors in the task of application and interpretation of treaties.[59]

There have been several instances of claims against the conduct of a state's judicial organs before international courts and tribunals.[60] Although this Article discusses some examples from investor-state arbitration, BIT disputes are not unique among international courts in this regard. For instance, as early as 1927, France challenged the assumption of jurisdiction by Turkish courts

51. Malcolm N. Shaw, International Law 786–87 (6th ed. 2008).

52. *Draft Articles on Responsibility*, *supra* note 49, at 40.

53. *Id.*

54. *Id.*

55. Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62, 87 (Apr. 29); Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), 1926 P.C.I.J. (ser. A) No. 7, at 19 (May 25); Rosa Gelbtrunk (El Sal./U.S.), 15 R.I.A.A. 455, 477 (1902).

56. *See* Eduardo Jiménez de Aréchaga, International Law in the Past Third of a Century 275–81 (1978).

57. *See infra* Part IV.A.

58. Ian Brownlie, Principles of Public International Law 451 (7th ed. 2008). On "denial of justice" in international law, see generally Jan Paulsson, Denial of Justice in International Law (2005) (discussing the history and evolution of denial of justice).

59. For more on this, see Lord McNair, The Law of Treaties (1961).

60. *See infra* notes 61–64.

over the captain of a French vessel before the Permanent Court of International Justice.[61] In the *Barcelona Traction* case[62] before the ICJ, the judicial treatment of a foreign investor was among the claims to be adjudicated by the court.[63] In *La Grand*,[64] Germany successfully invoked the responsibility of the United States for the defects in the U.S. court's trial of a German national.[65] Thus, it is well established in international law that the conduct of state judicial organs attributes responsibility to the state and thus engages the international responsibility of the state where such conduct contravenes norms of international law.

Article 4(2) of the ILC Articles clarifies that "an organ includes any person or entity which has that status in accordance with the internal law of the State." The commentary on the ILC Articles of State Responsibility, while discussing the significance of the internal law of the country in determining attribution, provides that "it is not sufficient to refer to internal law for the status of State organs."[66] In other words, a country cannot deny responsibility for the action of a body, which in reality performs state functions, simply by relying on its internal legal classification where it may not have the status of a state organ.[67] Therefore, it is very well established that a state may be held liable for a violation of international law "incurred as a result of a decision of one of its national courts."[68]

B. *National Law as the Basis to Determine the Legality of International Claims*

The position of municipal law within international law is a fascinating issue. The general rule is that if a state has transgressed international law, it cannot justify such transgression by referring

61. S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

62. Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5).

63. *Id.*

64. LaGrand (Ger. v. U.S.), 2001 I.C.J. 466 (June 27).

65. *Id.*

66. *Draft Articles on Responsibility*, *supra* note 49, at 42.

67. *Id.*

68. Toby T. Landau, Essex Court Chambers London, International Arbitration and Pakistan's State Responsibility: Redefining the Role of the Court 21 (2003), *available at* http://www.supremecourt.gov.pk/ijc/Articles/8/3.pdf; *see also* Cristopher Greenwood, *State Responsibility for the Decisions of National Courts*, *in* Issues of State Responsibility Before International Judicial Institutions 55 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004) (discussing the principle that a state can be held responsible for the acts of its courts).

to its domestic legal order.[69] In other words, a country cannot escape liability under international law by arguing that its actions are in accordance with its municipal or internal laws.[70] The reason for this is obvious, as any other situation would allow countries to evade international law "by the simple method of domestic legislation."[71] This is clearly recognized in Article 3 of the ILC Articles, which states that whether an act of the state is internationally wrongful is governed by international law and not by domestic law.[72] In this regard, Article 27 of the Vienna Convention on Law of Treaties states that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[73]

Several judicial decisions recognize this principle. In *Applicability of the Obligation to Arbitrate*,[74] the ICJ emphasized the fundamental principle that international law prevails over domestic law.[75] Judge Shahabuddeen, in *Lockerbie*, underlined that the inability to act under domestic law constitutes no defense to noncompliance with international law.[76] This position was also reiterated in *Avena*,[77] where the court noted, "The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law."[78]

Thus, even if an act is lawful under Indian law and conforms to the constitution, it does not affect the characterization of the same act as internationally wrongful under Indian BITs.[79] In this light, it is very difficult to sustain the position of the former Indian attorney general that a BIT claim cannot be brought against India because

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69. SHAW, *supra* note 51, at 133–34.

70. *Draft Articles on Responsibility*, *supra* note 49, at 36.

71. SHAW, *supra* note 51, at 134.

72. *Draft Articles on Responsibility*, *supra* note 49, at 36.

73. Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331.

74. Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, 1988 I.C.J. 12 (Apr. 26).

75. *Id.* at 34.

76. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), 1992 I.C.J. 3, 32 (Apr. 14) (separate opinion of Judge Shahabuddeen); *see also* LaGrand (Ger. v. U.S.), 2001 I.C.J. 466, 497–98 (June 27) (discussing U.S. dispute concerning breach of international treaty).

77. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

78. *Id.* at 65.

79. *Id.*

of the Indian Constitution's separation of powers framework.[80] The logical corollary is that, even if an international tribunal applies international law and issues an ITA award against India, the ITA award so rendered will have no effect under India's legal system because the award ignores the separation of powers framework under the Indian constitution.[81] Such an approach looks at enforcement of international law from a domestic-law framework and undermines the credibility of international law.

In this regard, the decision of the European Court of Justice (ECJ) in the *Kadi* case proves relevant.[82] In *Kadi*, an individual challenged the European Commission's implementation of a U.N. Security Council Resolution under which he was arrested and his assets were frozen.[83] The ECJ delivered a judgment "annulling the relevant implementing measures and declaring that they violated fundamental rights protected by the [European Commission] legal order."[84] Although human rights advocates applaud this judgment,[85] other scholars question the attempt to establish the primacy of concerns of European constitutional order over international law.[86]

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80. *Id.*

81. The authors are grateful to Mr. Shashank P. Kumar for suggesting this point. For more information on the enforcement of BIT arbitral awards in India, see Ranjan & Raju, *supra* note 3. Such a situation can be loosely compared to the developments surrounding the enforcement of the International Court of Justice (ICJ) decision in the *Avena* case in the United States. In *Avena*, the ICJ found that the United States violated individual rights of Mexican nationals under Article 36 of the Vienna Convention on Consular Relations. *Avena and Other Mexican Nationals*, 2004 I.C.J. 12. Further, the ICJ held that the United States was required to provide these Mexican nationals with review and reconsideration of their convictions. *Id.* Some American scholars, however, argued that the *Avena* decision, although binding on the United States internationally, is not distinctly enforceable in U.S. courts. *See* Curtis A. Bradley, *Enforcing the* Avena *Decision in U.S. Courts*, 30 HARV. J.L. & PUB. POL'Y 119 (2004). These scholars argue that judicial decisions are not supreme federal law under the U.S. Constitution and thus cannot be given the status of preemptive federal law. *See* Medellín v. Texas, 552 U.S. 491, 526–27 (2008). For another viewpoint, see Linda E. Carter, *Lessons from Avena: The Inadequacy of Clemency and Judicial Proceedings for Violations of the Vienna Convention on Consular Relations*, 15 DUKE J. COMP. & INT'L. L. 259 (2005).

82. Joined Cases C-402/05 P & C-415/05 P, Kadi v. Council & Comm'n, 2008 E.C.R. I-6351.

83. *See id.* at I-6353, I-6382.

84. Gráinne de Búrca, *The European Court of Justice and the International Legal Order After* Kadi, 51 HARV. INT'L L.J. 1 (2010).

85. *See* Katja S. Ziegler, *Strengthening the Rule of Law, but Fragmenting International Law: The* Kadi *Decision of the ECJ from the Perspective of Human Rights*, 9 HUM. RTS. L. REV. 288, 303 (2009) (lauding the *Kadi* judgment for asserting a full judicial review for potential breaches of human rights).

86. Albert Posch, *The* Kadi *Case: Rethinking the Relationship Between EU Law and International Law?*, COLUM. J. EUR. L., http://www.cjel.net/online/15_2-posch/ (2009); de Búrca, *supra* note 84, at 49; Prabhakar Singh, *Why Wield Constitutions to Arrest International Law*, 16

Such a position, like the one the former Indian attorney general took, undermines the universality of and respect for international law and even contravenes Article 51(c) of the Indian Constitution.[87] Under Article 51(c), the Indian "State shall endeavour to foster respect for international law and treaty obligations."[88] Thus, India, in theory, must comply with all of its international obligations, including the treaty obligations contained in BITs.

Indian courts have relied on Article 51 of the Indian Constitution to introduce and implement various international treaties.[89] The Supreme Court of India, relying on this provision, has held that international law is binding and functions as part of Indian law so long as it is not inconsistent with Indian law.[90] India will not foster respect for international law if it continues to argue that the proper framework to judge the legality of its actions should be primarily national law and not international law.

This Article will next argue that India's experience in neither the ITA nor BIT jurisprudence supports the position of the former Indian attorney general on BITs.

III. ITA Disputes Involving the Indian Judiciary

The foreign telecommunication companies will not be the first to challenge the actions of the Indian judiciary as a violation of Indian BITs.[91] This Article discusses two ITA cases involving India in which an action of the Indian judiciary constituted an important reason behind BIT claims against India.[92] In fact, these are the only two ITA cases involving India.

A. White Industries Australia Limited v. Republic of India

In 2011, India lost a BIT dispute to an Australian company in *White Industries v. Republic of India*.[93] This case involved challenging judicial delays in enforcing an international commercial arbitra-

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Asian Y.B. Int'l L. 87, 126–28 (2010). Singh also argues that, from a third world perspective, this decision marks an attempt by the European Community to shift the headquarters of international law to the European Court of Justice (ECJ). *See* Singh, *supra*, at 126–28.

87. India Const. art. 51(c).

88. *Id.*

89. *See* Vishakha v. Rajastan, (1997) 6 S.C.C. 241, 248 (India).

90. *See id.* at 242–43; Shukla v. Delhi Admin., (1980) 3 S.C.C. 526, 532 (India); Mackinnon Mackenzie & Co. v. D'Costa, (1987) 2 S.C.R. 659, 667–69.

91. *See* White Indus. Austl. Ltd. v. India, Final Award (UNCITRAL 2011), http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf; *infra* note 116.

92. *See infra* Part III.A–B.

93. *White Indus. Austl. Ltd.*, at 139–40.

tion award as a violation of the India-Australia BIT (see Table I).[94] White Industries had obtained an arbitral award, under the arbitration rules of the International Chamber of Commerce (ICC), in its favor in a contractual dispute with Coal India, an Indian public sector company, and sought enforcement of the award before the Delhi High Court in India.[95] Simultaneously, Coal India approached the Calcutta High Court to have the award set aside, and the court granted the request.[96] White Industries appealed to the Supreme Court in 2004 and the final decision is still pending.[97]

After the appeal to the Supreme Court remained pending for a period of seven years (that is, nine years after the ICC award),[98] White Industries initiated a BIT arbitration against India in 2010[99] under the India-Australia BIT.[100] They claimed, *inter alia*, that the delay on the part of the Indian courts to enforce the ICC award amounted to a violation of the fair and equitable treatment standard on account of two factors: (1) a denial of justice, and (2) a breach of White Industries' legitimate expectation that India would adhere to the New York Convention's standards on enforcement of foreign arbitral awards.[101] Relying on the Most Favored Nation (MFN) clause[102] in the India-Australia BIT, White Industries also claimed that it was entitled to "effective means of asserting claims and enforcing rights," a guarantee found in the India-Kuwait BIT,[103] and that the conduct of the Indian courts had breached that standard.[104] White Industries also alleged that the delay on the part of the Indian courts amounted to an expropriation of its rights under the award.[105]

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94. *Id.* at 45.

95. *Id.* at 45–50.

96. *See id.* at 17–23.

97. *See id.*

98. *See id.* at 39.

99. *See* Prabhash Ranjan, *The White Industries Arbitration: Implications for India's Investment Treaty Program*, INVESTMENT TREATY NEWS, Apr. 2012, at 13; *see also* Manu Sanan, *The White Industries Award—Shades of Grey*, 13 J. WORLD INVESTMENT & TRADE 661, 673–74 (2012).

100. Agreement Between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments, Austl.-India, Feb. 6, 1999, 2116 U.N.T.S. 145 [hereinafter Austl.-India BIT Agreement].

101. *See White Indus. Austl. Ltd.*, at 91–92.

102. Austl.-India BIT Agreement, *supra* note 100, art. 4(3).

103. Agreement Between the State of Kuwait and the Republic of India for the Encouragement and Reciprocal Protection of Investment, India-Kuwait, art. 4(5), Nov. 27, 2001, http://finmin.nic.in/bipa/Kuwait.pdf.

104. *See White Indus. Austl. Ltd.*, at 105–08.

105. *See id.* at 119–21.

The tribunal, after examining prior investment arbitration jurisprudence, concluded that the ICC award represented a crystallization of White Industries' rights under a contract and hence could be characterized as part of White Industries' original "investment" in India.[106] The tribunal dismissed White Industries' claim of a "legitimate expectation" about Indian courts not entertaining an application to set aside a foreign award, noting that entertaining an application to set aside a foreign award was a regular practice in the Indian legal system, one of which White Industries should have been aware.[107] The tribunal also dismissed White Industries' claim of legitimate expectation that an award would be enforced without delay, citing the Report of the Law Commission of India on delays in the Indian judicial system.[108] The tribunal also dismissed White Industries' allegation of denial of justice after examining all the factors, including India's assertion that the Indian judiciary was overextended due to its large population.[109] In this regard, the tribunal held that while the delays were unsatisfactory, they did not meet the high standards required for establishing a claim of denial of justice.[110]

After agreeing with White Industries that it was entitled to "effective means of asserting claims and enforcing rights" at par with Kuwaiti investors by virtue of the MFN clause in the India-Australia BIT,[111] the tribunal held that the conduct of Indian courts, manifested in the inordinate delay in enforcing the arbitral award, had failed to meet this standard.[112] In determining the content of the "effective means" standard, the tribunal relied heavily on *Chevron-Texaco v. Ecuador*.[113]

Additionally, the tribunal rejected White Industries' claim of expropriation, noting that the award had not yet been "taken" or set aside.[114]

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106. *See id.* at 31–32.

107. *See id.* at 94–96.

108. *See id.* at 96.

109. *See id.* at 98–105.

110. *See id.* at 105.

111. *See id.* at 105–08.

112. *See id.* at 110–19.

113. Chevron Corp. (U.S.) v. Ecuador, Case No. 2009-23, Partial Award on Merits (UNCITRAL 2010), http://www.italaw.com/sites/default/files/case-documents/ita0151.pdf.

114. *See White Indus. Austl. Ltd.*, at 121.

TABLE I. BIT DISPUTES INVOLVING INDIA[115]

Foreign Investor	BIT	Reason for the Dispute	Year of ITA Award
White Industries	India-Australia	Judicial delays in enforcing arbitral award	2011
General Electric and Bechtel	India-Mauritius	Issuance of anti-arbitration injunctions by courts	ITA award not issued—compromise reached although a couple of other arbitral awards were issued

B. *Dabhol Power Project Claim*

Before the *White Industries* case, the only instance in which India was involved in the ITA was the Dabhol power project case.[116] This case involved a foreign direct investment (FDI) project related to building an electrical power plant in India in the early 1990s, soon after the adoption of the 1991 Indian liberalization program.[117] Enron Corporation, along with General Electric (GE) Corporation and Bechtel Enterprises, formed a company called Dabhol Power Company (DPC) in Maharashtra, a western Indian state, to generate electrical power.[118] This formed the biggest FDI up to that point in India.[119] DPC entered into an agreement with the Maharashtra State Electricity Board (MSEB), a public sector enterprise, as the sole purchaser of the power generated by DPC.[120] Subsequently, due to political opposition to the project on grounds of alleged irregularities and high cost of power charged by DPC, MSEB cancelled the contract to purchase power, leaving DPC without a consumer to whom to sell electrical power and thus having a huge adverse impact on DPC's business.[121] Further, the central government of India, which acted as a counter guarantor, after

115. *See id.*; Jayati Ghosh, *Treacherous Treaties*, 27 FRONTLINE, Nov. 20–Dec. 3, 2010, at 92.

116. For detailed facts of the case, see Preeti Kundra, *Looking Beyond the Dabhol Debacle: Examining Its Causes and Understanding Its Lessons*, 41 VAND. J. TRANSNAT'L L. 908 (2008); Gus Van Harten, *TWAIL and the Dabhol Arbitration*, 3 TRADE L. & DEV. 131 (2011).

117. *See* Van Harten, *supra* note 116, at 137.

118. *See* Kundra, *supra* note 116, at 911–14.

119. *See id.* at 908; Van Harten, *supra* note 116, at 137–38.

120. *See* Kundra, *supra* note 116, at 138.

121. For detailed facts of the case, see Van Harten, *supra* note 116; Kundra, *supra* note 116.

making some payments, also declined to pay DPC for different reasons.[122] DPC was meanwhile restrained from starting an international arbitration by antiarbitration injunctions issued by Indian courts.[123]

The Mauritius-based subsidiaries of GE and Bechtel, relying on the India-Mauritius BIT, challenged India's measures, including the judicial action of issuing antiarbitration injunctions by courts, as violations of the India-Mauritius BIT.[124] Before an ITA award could be issued, however, a mutual settlement was reached,[125] whereby India awarded a mammoth compensation ($1 billion, according to some estimates[126]) to foreign investors.

Notwithstanding the settlement on this issue, the Dabhol episode resulted in two uncontested arbitral awards: an ICC determination[127] and an Overseas Private Investment Corporation (OPIC) determination.[128] Both tribunals found India guilty of breaching its obligations.[129] Among other conclusions, the OPIC found that the active litigation strategy of the State Electricity Board to prevent effective arbitration despite having agreed to honour arbitration in the Contractual Agreement—thereby blocking DPC's arbitration rights against the State Electricity Board (MSEB), the State government (GOM) and the Central Government (GOI)—constituted a violation of its obligations.[130] It also found that the "actions of the government, supported by the judiciary, by effectively blocking revenue collection, escrow account arrangements and a letter of credit, constituted a 'deprivation of the fundamental rights of the insured as a creditor, including the rights against security'—thereby violating international law."[131]

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122. *See* Kundra, *supra* note 116, at 920.

123. *Id.* at 921.

124. *See* Ghosh, *supra* note 115. In fact, this dispute resulted in two BIT claims by the project companies, as well as seven BIT claims by the project lenders. All of these claims against India, however, have since been settled. *See* Sanan, *supra* note 99, at 673–74.

125. *GE Settles Dabhol Issue*, INDIAN EXPRESS (July 2, 2005, 1:22 AM), http://www.indianexpress.com/oldStory/73760.

126. *See* Ghosh, *supra* note 115.

127. Capital India Power Mauritius I v. Maharastra Power Dev. Corp., Case No. 12913/MS, Award (ICC Int'l Ct. Arb. 2005), http://italaw.com/documents/Dabhol_award_050305.pdf. This arbitration was based on a contract, the Dabhol Power Corporation Shareholders Agreement. *Id.*

128. Expropriation Claim of Bank of America (Trustee), Contract of Insurance No. F041, Memorandum of Determinations, at 25 (OPIC 2003), http://opil.ouplaw.com/view/10.1093/law:iic/25-2003.case.1/IIC025(2003)D.pdf.

129. *See Capital India Power Mauritius I*, at 1; *Expropriation Claim of Bank of America (Trustee)*, *supra* note 128, at 25.

130. *Expropriation Claim of Bank of America (Trustee)*, at 18–25.

131. *Id.* at 25.

Thus, India's limited involvement with the ITA regime shows that India has experienced BIT claims previously for the actions of its judiciary. In fact, despite the position articulated by India's former attorney general that judicial actions are immune from review by investment tribunals, India's submissions in the *White Industries* dispute took the opposite view. The award reproduces India's position on attribution of judicial conduct to states in the following words: "India properly concedes that a State may be liable for the acts of its judiciary."[132]

IV. Domestic Courts and International Investment Law

Through the ITA, several cases have challenged judicial conduct as violations of BITs. In *Saipem v. Bangladesh*, for example, the tribunal decided on jurisdictional grounds that courts are part of the state and that actions of the courts are attributable to Bangladesh.[133] In fact, Bangladesh did not even challenge this position.[134] Similarly, in *Azinian v. Mexico*, the tribunal held that a decision of a municipal court that is clearly incompatible with a rule of international law will trigger responsibility of the state under international law.[135] Moreover, in *Middle East v. Egypt*, the issue before the tribunal was whether a seizure and auction ordered by national courts of Egypt constituted indirect expropriation,[136] demonstrating that the actions of national courts can give rise to responsibility under international law.[137]

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132. *See* White Indus. Austl. Ltd. v. India, Final Award, at 99 (UNCITRAL 2011), http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf.

133. Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction & Recommendation on Provisional Measures, para. 143 (Mar. 21, 2007), 22 ICSID Rev. 100 (2007).

134. *See id.*

135. *See* Azinian v. The United Mexican States, ICSID Case No. ARB(AF)/97/2, Award, paras. 97–105 (Nov. 1, 1999), 5 ICSID Rep. 272 (2002).

136. Middle East Cement Shipping & Handling Co. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award, para. 139 (Apr. 12, 2002), 14 ICSID Rev. 602 (2003); *see also* Rumeli Telekom A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, para. 704 (July 29, 2008), http://italaw.com/documents/RumeliAnnulment.pdf (discussing what amounts to an expropriation may be attributable to the state); Waste Mgmt., Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), 45 I.L.M. 967 (2004) (discussing the nuances of direct and indirect expropriations); Jack J. Coe, Jr. & Noah Rubins, *Regulatory Expropriation and the* Tecmed *Case: Context and Contributions*, International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law, 597, 607–08 (Todd Weiler ed., 2005) (discussing expropriation jurisprudence in the context of international law).

137. *See generally* Sameer Sattar, *National Courts and International Arbitration: A Double Edged Sword?*, 27 J. Int'l Arb. 51 (2010) (highlighting the concern of national courts becoming involved in effective arbitration). There are other BIT cases where actions of

The following discussion focuses on the grounds on which actions of courts have been challenged. First, the Article discusses the traditional ground of "denial of justice" for claims against the state. Second, the Article discusses the other grounds on which claims can be brought against the state for the actions of courts. Third, the Article discusses the scope of review of domestic judicial action by international adjudicators.

A. *Denial of Justice*[138]

"Investors who go abroad in search of profits take a risk and go there for better or for worse, not only for better. They should respect the institutions and abide by the national laws of the country where they chose to go."[139]

The *Barcelona Traction*[140] judgment of the ICJ displayed some sharp divisions of opinion among the judges on the relationship between foreign investors and host states. Although all of the judges, with the exception of Judge Riphagen, agreed that Belgium's application was liable to be dismissed for a lack of standing, several observations of the judges leading up to their conclusions clearly reflected their differing views on the treatment to which foreign investors were entitled.[141] Judge Nervo's comment above captures the sentiment of judges on one side of this debate,

courts pertaining to interference with the arbitral process have been challenged by foreign investors. *See* ATA Constr., Indus. & Trading Co. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2, Award (May 18, 2010), http://www.italaw.com/sites/default/files/case-documents/ita0043.pdf; GEA Group Aktiengesellschaft v. Ukraine, ICSID Case No. ARB/08/16, Award (Mar. 31, 2011), [2011] I.I.C. 487; Frontier Petrol. Servs. Ltd. v. Czech Republic, Final Award, at 12–14 (Perm. Ct. Arb. 2010), http://italaw.com/sites/default/files/case-documents/ita0342.pdf; *see also* Charles Claypoole, Latham & Watkins LLP, *Recent Developments in the Jurisprudence of Investment Arbitration Tribunals*, *in* Eur. & Middle E. Arb. Rev. 2012, at 22 (2012) (analyzing the consequences of state refusal of arbitral awards).

138. The discussion here is on "denial of justice" by the courts, fully recognizing that there have been BIT cases which have dealt with "denial of justice" due to governmental interference in the administration of justice through executive or legislative acts. For more on this, see Paulsson, *supra* note 58, at 157–62; Petrobart Ltd. v. Kyrgyz Republic, SCC Case No. 126/2003, at 18–30 (Mar. 29, 2005), http://www.italaw.com/sites/default/files/case-documents/ita0628.pdf; LLC Amto v. Ukraine, SCC Case No. 080/2005, para. 90 (Mar. 26, 2008), http://www.italaw.com/sites/default/files/case-documents/ita0030.pdf (discussing AMTO's allegations of ad hoc interference in ongoing bankruptcy proceedings by Ukraine).

139. Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), 1970 I.C.J. 3, 250 (Feb. 5) (separate opinion of Judge Padilla).

140. *Id.* at 3.

141. *See id.* at 130, 192, 290.

as well as those of many contemporary critics[142] of investment treaty arbitration.

The law of treatment of foreign investors and investments is located within the larger context of obligations of states relating to the treatment of aliens. It was traditionally accepted in international law that, although states owed obligations relating to the treatment of aliens (including investors) in their territories,[143] the alien should be able to rely on domestic institutions for the dispensation of justice.[144] "As a rule, a foreigner must acknowledge as applicable to himself the kind of justice instituted in the country in which he did choose his residence including all deficiencies of such jurisdiction, imperfect as it is like every other human work."[145] The sole exception, where the treatment of a foreign investor at the hands of a domestic court could give rise to a claim on the international plane, was where a "denial of justice"[146] had occurred.[147]

In a denial of justice claim, the traditional focus tends to be on judicial propriety rather than efficiency.[148] It was generally recognized that foreigners must acknowledge the host country's justice system, including all its defects.[149] Therefore, common errors of judgment made by a domestic court, without more, would not amount to a denial of justice.[150] In *Salem*, for example, the tribunal

142. *See* Julia Hueckel, *Rebalancing Legitimacy and Sovereignty in International Investment Agreements*, 61 EMORY L.J. 601, 640 (2012); Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775, 832–33 (2008); Prabhash Ranjan, *The 'Object and Purpose' of Indian International Investment Agreements: Failing to Balance Investment Protection and Regulatory Power*, *in* FOREIGN INVESTMENT AND DISPUTE RESOLUTION LAW AND PRACTICE IN ASIA 192, 204–06 (Vivienne Bath & Luke Nottage eds., 2011).

143. *Barcelona Traction*, para. 33.

144. Salem Case (Egypt v. U.S.), 2 R.I.A.A. 1161, 1202 (1932).

145. *Id.*

146. For a full-length discussion on the "denial of justice," see Clyde Eagleton, *Denial of Justice in International Law*, 22 AM. J. INT'L. L. 538 (1928); A.O. Adede, *A Fresh Look at the Meaning of the Doctrine of Denial of Justice Under International Law*, 73 CAN. Y.B. INT'L L. 73, 74 (1976); J. Irizarry y Puente, *The Concept of "Denial of Justice" in Latin America*, 43 MICH. L. REV. 383, 384 (1944); BROWNLIE, *supra* note 58, at 529–531; PAULSSON, *supra* note 58.

147. *See* S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 24. (Sept. 7).

148. *Salem Case*, 2 R.I.A.A. at 1202; Irizarry y Puente, *supra* note 146, at 406 (defining the concept of denial of justice as an obligation "not to administer justice in a *notoriously unjust* manner").

149. *Salem Case*, 2 R.I.A.A. at 1202; Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), 1970 I.C.J. 3, para. 33 (Feb. 5).

150. S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 24 (Sept. 7); *Salem Case*, 1927 P.C.I.J. at 1202; *see also* PAULSSON, *supra* note 58, at 157–62 ("The mere violation of internal law may never justify an international claim based on denial of justice. It may be that the defectiveness of internal law, the refusal to apply it, or its wrongful application by

held that a denial of justice encompassed "only exorbitant cases of judicial injustice. . . . [a]bsolute denial of justice; inexcusable delay of proceedings; obvious discrimination of foreigners against natives; palpable and malicious iniquity of a judgment."[151] In the *ELSI* case, while refuting the U.S. argument that the decisions of the Italian courts were arbitrary and therefore amounted to a denial of justice, a Chamber of the ICJ held that what needed to be established was "a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[152] In *Mondev International Limited v. United States*,[153] moreover, a North American Free Trade Agreement (NAFTA) tribunal elaborated on the *ELSI* test: "[t]he test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome . . . ."[154] Therefore, strict adherence to judicial propriety sufficed for domestic courts to avoid an allegation of the denial of justice.[155] As long as their actions were within the contours of judicial propriety, any error in their reasoning or decisions would not sustain a claim of a denial of justice.[156]

A common definition of "denial of justice," however, has eluded international lawyers. The meaning of denial of justice has oscillated from any injury done to an alien[157] to a more restrictive definition referring to denial of access to courts or denial of procedural fairness.[158] This divergence shows that the threshold to be met before a delay in dispensing justice becomes a denial of justice and the mitigating effect of the workload of courts are somewhat disputed. Both the *ELSI* chamber and the *White Industries* tribunal undertook an examination of whether the delays in question were a general feature of the domestic administrative and

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judges, constitute . . . a denial of justice . . . but in and of themselves they never constitute this denial."); *Infra* Part I.C.

151. *Salem Case*, 2 R.I.A.A. at 1202.

152. Elettronica Sicula S.p.A. (U.S. v. It.), 1989 I.C.J. 15, para. 128 (July 28).

153. Mondev Int'l Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), 6 ICSID Rep. 192 (2004).

154. *Id.* para. 127.

155. *See id.*

156. *See* Azinian v. The United Mexican States, ICSID Case No. ARB(AF)/97/2, Award, para. 105 (Nov. 1, 1999), 5 ICSID Rep. 272 (2002).

157. Eagleton, *supra* note 146, at 539; Adede, *supra* note 146, at 82.

158. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 711 (1987). Spain argued for a narrow approach to defining denial of justice in the *Barcelona Traction* case. Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), 1970 I.C.J. 3, 15–16 (Feb. 5). See also the discussion in SALACUSE, *supra* note 1, 241–43 (discussing the differing interpretations of denial of justice).

judicial system.[159] In *Toto v. Lebanon*,[160] for example, the tribunal attached importance to the prevailing circumstances in Lebanon, including the assassination of former Prime Minister Rafic Hariri, terrorist bombings, internal armed conflicts, and Lebanon's war with Israel.[161] The tribunal further observed, "[t]hese circumstances undoubtedly were not conductive to the functioning of Lebanon's judicial system and affected the proper functioning of Lebanese courts between 2002 and 2008."[162] This approach was perhaps inspired by the tribunal's earlier observation that "[o]nly if there is *prima facie* evidence that the court delays in the case at stake are unfair and inequitable would the Tribunal have jurisdiction under Article 3.1 of the Treaty."[163] On the other hand, some authorities have treated backlogs of domestic courts as a nonmitigating effect when a delay in dispensing justice to a foreigner is alleged to be a denial of justice.[164]

159. Elettronica Sicula S.p.A. (U.S. v. It.), 1989 I.C.J. 15, paras. 109–19 (July 28); *see also* White Indus. Austl. Ltd. v. India, Final Award, at 94–96 (UNCITRAL 2011), http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf (White Industries had no legitimate expectation of prompt enforcement of arbitral awards in India. On the other hand, although the prevalence of delays in the Indian judicial system was held to be relevant in determining the legitimate expectations of White Industries, it did not operate to provide a defense in the face of "effective remedies standard."); Ruiz-Mateos v. Spain, 262 Eur. Ct. H.R. (ser. A), at 22–23 (1993) (holding that a violation of domestic legal time-limits was strong evidence of undue delay).

160. Toto Costruzioni Generali S.P.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction (Sept. 11, 2009), [2009] I.I.C. 391.

161. *See id.* para. 165.

162. *Id.*

163. *Id.* para. 153; Agreement Between the Italian Republic and the Lebanese Republic on the Promotion and Reciprocal Protection of Investments, It.-Leb., art. 3.1, Nov. 7, 1997, http://unctad.org/sections/dite/iia/docs/bits/lebanon_italy.pdf.

164. *See* El Oro Mining & Railway Ltd. v. Mex. (Gr. Brit v. Mex.), 5 R.I.A.A. 191, 198 (1931); *see also* Chevron Corp. (U.S.) v. Ecuador, Case No. 2009-23, Partial Award on Merits, para. 175 (UNCITRAL 2010), http://www.italaw.com/sites/default/files/case-documents/ita0151.pdf (on denial of justice by unreasonable delay, and calculation of quantum of damages: "There is no authority supporting the proposition that backlog or congestion in a domestic court system operates as a general defence to a denial of justice claim"). In *Chevron*, Ecuador's defense that the delay was occasioned due to a general backlog faced by courts in Ecuador was rejected. *See id.* at paras. 263–65; Charles De Visscher, *Le Deni de Justice en Droit International*, *in* 52 Recueil Des Cours (1935), *translated in* Carlo Focarelli, *Denial of Justice*, Max Planck Encyclopedia Pub. Int'l L., para. 1, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e775 (last updated Jan. 2009).

B. *Denial of Justice and the "Local Remedies Rule"*

A critical issue in the debate on "denial of justice" in BITs is the relationship with the "local remedies rule."[165] In public international law, before one makes an international claim on behalf of an investor, the investor must have exhausted the domestic remedies offered by the host state's legal system.[166] Parties may agree, however, to avoid applying this rule.[167] Indeed, this is true in the case of BITs, where the local remedies rule is more like an exception than a norm.[168]

This is certainly true in the case of Indian BITs that do not require the exhaustion of local remedies before submitting the dispute to international arbitration.[169] For instance, Article 9 of the Indian model BIT[170] states that the dispute between the foreign investor and India will first be resolved, as far as possible, amicably through negotiations between the parties.[171] If this is not possible, then the parties will submit the dispute either to the local courts of India (the country where the investment has been made) or to international conciliation under the U.N. Commission on International Trade Law (UNCITRAL) conciliation rules.[172] However, if the parties fail to agree on this mode of dispute resolution or the conciliation proceedings are terminated other than by signing a

165. Mavluda Sattorova, *Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct*, 61 Int'l & Comp. L.Q. 223, 246 (2012).

166. Brownlie, *supra* note 58, at 492; Chittharanjan Felix Amerasinghe, State Responsibility for Injuries to Aliens (1967); Chittharanjan Felix Amerasinghe, Local Remedies in International Law 1, 2 (1990); Interhandel, Preliminary Objection, (Switz. v. U.S.), 1959 I.C.J. 6, 27 (Mar. 21) (recognizing that an investor must have exhausted the domestic remedies offered by the host state's legal system as a well-established rule of customary international law).

167. Brownlie, *supra* note 58, at 492.

168. *See* Paul Peters, *Exhaustion of Local Remedies: Ignored in Most Bilateral Investment Treaties*, 44 Neth. Int'l L. Rev. 233 (1997) (showing empirically that the local remedies rule is more like an exception than a norm); George K. Foster, *Striking a Balance Between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration*, 49 Colum. J. Transnat'l L. 201, 211–15 (2011); *see also* Dolzer & Schreuer, *supra* note 1, 264–66 (arguing in favor of the absence of the local remedies rule in BITs); Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 26, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

169. Lanco International, Inc. v. The Argentine Republic, ICSID Case No. ARB/97/6, Decision on Jurisdiction, para. 39 (December 8, 1998); IBM World Trade Corp. v. Ecuador, ICSID Case No. ARB/02/10, Decision on Jurisdiction, paras. 77–84 (Dec. 22, 2003); *see* Dolzer & Schreuer, *supra* note 1, 264–66.

170. *Indian Model Text of Bilateral Investment Promotion and Protection Agreement (BIPA)*, Dep't Econ. Aff., Gov't India, http://finmin.nic.in/the_ministry/dept_eco_affairs/icsection/Indian%20Model%20Text%20BIPA.asp (last visited Sept. 24, 2014).

171. *Id.* art. 9(1).

172. *Id.* art. 9(2).

settlement agreement, the dispute may be referred to international arbitration.[173] Notably, Article 9 does not require the investor to exhaust local remedies (submitting the dispute to local courts in India) before submitting the dispute to international arbitration.[174] The only condition for submitting the dispute to international arbitration is if the parties fail to agree on submitting the dispute to local courts.[175]

Although the exhaustion of local remedies rule is an exception in BITs, this rule was reinstated in *Loewen v. Mexico*, a NAFTA ruling.[176] Despite the fact that NAFTA Article 1121 clearly envisages the waiver of "its right to initiate or continue" before any administrative tribunal or court as a condition for bringing a claim before a NAFTA tribunal,[177] the tribunal held that "Article 1121 involves no waiver of the duty to pursue local remedies in its application to a breach of international law constituted by a judicial act."[178] The tribunal upheld the principle of judicial finality: local remedies should be exhausted where a judicial act breaches international law.[179] The *Loewen* tribunal pronounced this as a substantive rule,[180] which attracted considerable criticism.[181]

This pronouncement of the local remedies rule as a substantive principle of denial of justice is "influenced by a theory that draws a distinction between 'obligations of conduct' and 'obligations of result.'"[182] "Obligations of conduct" refer to norms that obligate their addressee to act in a particular manner but not to achieve a

173. *Id.* art. 9(3).

174. *Id.* art. 9.

175. *See* Ranjan & Raju, *supra* note 3, at 12.

176. Loewen Group, Inc. v. United States of America, ICSID Case No. ARB(AF)/98/3, Award, para. 161 (June 26, 2003), 7 ICSID Rep. 442 (2005).

177. William S. Dodge, *National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter Eleven of NAFTA*, 23 Hastings Int'l & Comp. L. Rev. 357, 374; Andrea K. Bjorklund, *Waiver and the Exhaustion of Local Remedies Rule in NAFTA Jurisprudence*, *in* NAFTA Investment Law and Arbitration: Past Issues, Current Practice, and Future Prospects 253, 261 (2004).

178. *Loewen Group, Inc.*, 7 ICSID Rep. paras. 161–64.

179. *See also id.* para. 163 (distinguishing between breaches of international law by a judicial act and other state action); Sattorova, *supra* note 165, at 228.

180. Foster, *supra* note 168, at 219; Paulsson, *supra* note 58, at 107–08.

181. *See* Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 Va. J. Int'l L. 809, 885, 857–58 (2005); Bradford K. Gathright, *A Step in the Wrong Direction: The* Loewen *Finality Requirement and the Local Remedies Rule in NAFTA Chapter Eleven*, 54 Emory L.J. 1093, 1094 (2005); Noah Rubins, Loewen v. United States*: The Burial of an Investor-State Arbitration Claim*, 21 Arb. Int'l 1 (2005).

182. Sattorova, *supra* note 165, at 230.

particular result.[183] On the other hand, "obligations of results" require the addressee to achieve a particular outcome and not merely to conduct herself in a prescribed manner.[184] The *Loewen* principle yields the judicial finality rule as an "obligation of result"; however, as Sattorova has argued, there seems to be no basis to conceptualize only judicial conduct, separated from all other forms of state conduct, as an "obligation of result."[185] In other words, there is no basis to argue that on the one hand, failure in ensuring fairness at any stage with the investment during an administrative process will give the investor the right to bring a BIT claim; whereas, on the other hand, only in the case of judicial misconduct, it is not to be judged, under BIT, until the investor has exhausted all avenues to correct the past misconduct.[186]

C. *Moving Away from Denial of Justice to More Stringent Norms for Judicial Conduct*

Because BIT arbitral tribunals adjudicate an alleged violation of specific treaty commitments, it would not be possible to identify any specific norms relating to domestic judicial conduct that are universally applicable to BIT arbitrations.[187] The jurisprudence in this context, however, has grown out of the fair and equitable treatment provisions, expropriation provisions, and "effective remedies" provisions commonly found in BITs.

In *Saipem v. Bangladesh*, for example, the refusal by Bangladeshi courts to recognize and enforce an ICC arbitral award in favor of *Saipem* was held to amount to expropriation.[188] This finding was

183. On the distinction between obligations of conduct and obligations of result, see *Report of the Commission to the General Assembly on the Work of Its Twenty-Ninth Session*, 32 U.N. GAOR Supp. No. 10, U.N. Doc. A/32/10 (1977), *reprinted in* [1977] 2 Y.B. Int'l L. Comm'n 1, 12–18, U.N. Doc. A/CN.4/SER.A/1977/Add.l; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 47, para. 430 (Feb. 26).

184. *See id.*

185. Sattorova, *supra* note 165, at 231–33; *see also* Bjorklund, *supra* note 181, at 858 (highlighting the policies for or against exhaustion of local remedies); Campbell McLachlan et al., International Investment Arbitration: Substantive Principles 232 (Loukas Mistelis et al. eds., 2007) (stating a viewpoint that principally there seems to be no reason to distinguish between decisions of inferior courts and decisions of administrative officials when applying the test for local remedies).

186. *See* Bjorklund, *supra* note 181, at 856–58; Sattorova, *supra* note 165, at 231–33; McLachlan, *supra* note 185, at 232.

187. *See* McLachlan, *supra* note 185, at 234–36; Bjorklund, *supra* note 181, at 894–95.

188. Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction & Recommendation on Provisional Measures, para. 133 (Mar. 21, 2007), 22 ICSID Rev. 100 (2007). Nonenforcement of arbitral awards by courts can also trigger investment treaty arbitration. *See* ATA Constr., Indus. & Trading Co. v. The

based on the "illegality" (with reference to international law) of the decisions of Bangladeshi courts.[189] As discussed above, the *White Industries* tribunal held that the delays on the part of the Indian judiciary amounted to a breach of India's commitment on providing investors "effective remedies." Similarly, in *Chevron-Texaco v. Ecuador*, judicial delays were held to be a breach of the effective remedies standard.

None of the above mentioned decisions involved a finding that domestic courts or judges breached norms of judicial propriety. Although Chevron's pending arbitration with Ecuador[190] involves such an allegation, and although allegations of collusion and conspiracy were unsuccessfully raised in *Saipem*,[191] these cases involve judicial delays or errors in application of law, which certainly do not appear to "shock" or "surprise a sense of judicial propriety."[192] On this point, the *Texaco-Chevron* tribunal held that the effective remedies standard did not require a threshold as high as denial of justice.[193] Thus, it is clear that shortcomings on the front of judicial efficiency, which do not breach judicial propriety, can still fall short of the BIT standards. An important implication of assessing judicial conduct, not by the criterion of denial of justice, but by

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Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2, Award, paras. 119–20 (May 18, 2010), http://www.italaw.com/sites/default/files/case-documents/ita0043.pdf; GEA Group Aktiengesellschaft v. Ukraine, ICSID Case No. ARB/08/16, Award (Mar. 31, 2011), [2011] I.I.C. 487, para. 203; *see also* Claypoole, *supra* note 137 (discussing the nuances derived from the different decisions regarding the extent to which BITs may be invoked in support of international arbitration); Loukas A. Mistelis, *Award as an Investment: The Value of an Arbitral Award or the Cost of Non-Enforcement*, 28 ICSID Rev.—Foreign Investment L.J. 64, 87 (2013).

189. *See Saipem S.p.A.*, 22 ICSID Rev. para. 141.

190. Chevron Corp. (U.S.) v. Ecuador, Case No. 2009-23, Partial Award on Merits, para. 244 (UNCITRAL 2010), http://www.italaw.com/sites/default/files/case-documents/ita0151.pdf.

191. *Saipem S.p.A.*, 22 ICSID Rev. paras. 61, 183–85.

192. Elettronica Sicula S.p.A. (U.S. v. It.), 1989 I.C.J. 15, para. 128 (July 28) ("It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.").

193. *Chevron Corp.*, para. 244. In this regard, see Duke Energy Electroquil Partners v. Ecuador, ICSID Case No. ARB/04/19, Award, para. 391 (Aug. 12, 2008), http://www.italaw.com/sites/default/files/case-documents/ita0256.pdf, which did not distinguish between the "effective means" standard and denial of justice. This shows the divergent approaches adopted by different arbitral tribunals, adding to the conceptual confusion related to the difference between "denial of justice" and other BIT standards that can be used to judge alleged judicial misconduct. On the "effective means" standard, see also LLC Amto v. Ukraine, SCC Case No. 080/2005, paras. 85–89 (Mar. 26, 2008), http://www.italaw.com/sites/default/files/case-documents/ita0030.pdf (holding that claimant did not demonstrate that the Bankruptcy law in Ukraine did not provide an effective means to enforce a creditor's right in the country).

other BIT standards, is that it has resulted in dispensing with the *Loewen*'s judicial-finality rule.[194]

Saipem recognized in principle that judicial action in the form of not enforcing an arbitral award could amount to expropriation.[195] The tribunal expressly recognized that such a formulation, if not limited, could result in characterizing even the setting aside of legitimate arbitral awards by competent courts as expropriation.[196] To avoid this problem, the tribunal clarified that a domestic court's interference with an arbitral award would constitute expropriation only if it was "illegal" and examined the legality of Bangladeshi court decisions under both Bangladeshi law and international law.[197] This creates a situation in which a domestic court decision can be assailed at the international level, based not merely on its "propriety" but also on its "legality."[198] When a domestic court judgment is examined for "legality" with reference to domestic law, there appears to be a clear departure from the traditional position[199] that an erroneous decision, without more, does not amount to denial of justice.

In the context of judicial efficiency, there was some disagreement in the traditional denial of justice paradigm on the weight attached to general conditions prevailing in the domestic legal system. The sympathy for such factors, however, appears to be diminishing in the ITA context.[200] For instance, the *Chevron-Texaco* tribunal held that only court congestions of a temporary nature, and not the general state of the domestic legal system, were relevant defenses.[201] The tribunal further held that "whether effective means have been provided to the Claimants for the assertion of their claims and enforcement of their rights is ultimately to be measured against an objective, international standard."[202] This view was also reflected by the *White Industries* tribunal, which held

194. *See* Sattorova, *supra* note 165, at 234. Sattorova also argues that foreign investors would present their cases involving alleged judicial misconduct not as denial of justice cases but as cases of breach of other BIT standards to avoid satisfying the exhaustion rule. *See id.* at 234, 241. The assumption, however, that the exhaustion rule must be followed in the ITA regardless of the language of the treaty is questionable.

195. *Saipem S.p.A.*, 22 ICSID Rev. para. 132.

196. *Id.* paras. 132, 150–53

197. *Id.* paras. 134, 141.

198. *See id.*

199. *See id.*

200. *See id.*

201. Chevron Corp. (U.S.) v. Ecuador, Case No. 2009-23, Partial Award on Merits, paras. 264–65 (UNCITRAL 2010), http://www.italaw.com/sites/default/files/case-documents/ita0151.pdf.

202. *Id.* para. 263.

that judicial delays in India—which the tribunal recognized to be a prevailing problem in the Indian legal system within the knowledge of White Industries[203]—failed to be "effective" with reference to an objective international standard.

Thus, through decisions of investment arbitration tribunals, we see an evolution of more stringent standards for the conduct of domestic judicial bodies. Whereas the traditional denial of justice paradigm merely required them to act within the contours of judicial propriety, the investment jurisprudence requires their actions to be legal, with reference to both domestic and international law, and "effective" with reference to an objective international standard.

D. *Scope of Review of Domestic Judicial Action*

As stated above, the correctness of a domestic judicial decision was traditionally irrelevant for a finding of denial of justice. As observed by de Visscher, "[T]he simple misinterpretation or misapplication of municipal law is not per se denial of justice."[204] This has been accepted even in the context of the "effective means" standard in investment arbitration, as evidenced by the observations of the *Chevron-Texaco* tribunal: "the threshold of 'effectiveness' stipulated by the provision requires that a measure of deference be afforded to the domestic justice system; the Tribunal is not empowered by this provision to act as a court of appeal reviewing every individual alleged failure of the local judicial system *de novo*."[205]

The tribunal in *Saipem*, however, appears to have departed starkly from this position while determining whether the decisions of Bangladeshi courts were illegal and therefore expropriatory.[206] Having determined that it was not illegal under Bangladeshi law for the courts in Bangladesh to assert jurisdiction to revoke the authority of an ICC tribunal, the *Saipem* tribunal examined whether the "merits" of the Bangladeshi decision were illegal under Bangladeshi law.[207] The tribunal stated as follows: "Having carefully reviewed the procedural orders referred to in the Revoca-

203. White Indus. Austl. Ltd. v. India, Final Award, at 96 (UNCITRAL 2011), http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf.

204. De Visscher, *supra* note 164, para. 11.

205. *Chevron Corp.*, para. 247.

206. Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction & Recommendation on Provisional Measures, paras. 154–55 (Mar. 21, 2007), 22 ICSID Rev. 100 (2007).

207. *Id.*

tion Decision as the cause of the ICC Tribunal's misconduct, the Tribunal did not find the slightest trace of error or wrongdoing. Under these circumstances, the finding of the Court that the arbitrators 'committed misconduct' lacks any justification."[208] Here, the tribunal assessed the same material that the Bangladeshi courts had examined and sought to determine for itself—whether the ICC arbitrators had engaged in misconduct. Having concluded that the arbitrators had not engaged in misconduct, the *Saipem* tribunal in effect substituted its finding on the matter for that of the Bangladeshi courts, exhibiting the traits not merely of a court of appeal but of a court of appeal with wide-ranging powers to re-examine facts.[209] It is true that the tribunal noted the Bangladeshi courts' failure to point to any specific law that the ICC arbitrators had disregarded despite an assertion to that effect in the judgment.[210] However, it was not this failure to give reasons but the alleged error in judgment that made the Bangladeshi judgment illegal in the eyes of the tribunal.

Saipem may be seen as an exceptional case of departure from the general rule that precludes investment tribunals from acting as courts of appeal. If *Saipem's* pronouncement—that judicial decisions can amount to expropriation if they are illegal—is here to stay,[211] then review of domestic court decisions for "legality" may become a necessary feature of such claims.[212] In such a scenario, it is difficult to see how the "legality" of a domestic court judgment may be determined with reference to domestic law without engaging in a comprehensive appellate review of the impugned judgment.

V. Minimizing the Risk of Review of Judicial Actions by the ITA Tribunals

Given India's sensitivities about BIT claims against India due to the actions of its judiciary and in light of the BIT jurisprudence on

208. Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Awarded, para. 155 (June 30, 2009).

209. *See id.*

210. *Id.*

211. *See* White Indus. Austl. Ltd. v. India, Final Award, at 120 (UNCITRAL 2011), http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf (finding that there was no expropriation on the facts of the case while citing *Saipem* for the proposition that domestic judicial action can amount to expropriation).

212. For concerns on the possibility of arbitral review of national court decisions, see Ari Afilalo, *Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis*, 17 Geo. Int'l Envtl. L. Rev. 51 (2004).

"denial of justice" and the usage of other BIT standards to scrutinize judicial conduct, this Article explores the possibility of minimizing the conflict between BITs and the Indian judiciary. It discusses three distinct approaches: (1) specific treaty language excluding judicial conduct from the scope of review by the ITA tribunals, (2) treaty language specifying that the substantive obligations under the treaty do not extend to judicial conduct, and (3) treaty language imposing a requirement of the exhaustion of local remedies.

As noted, India recently decided to re-examine its model BIT.[213] It has also decided to review all its BITs,[214] thus revisiting its BIT-negotiation strategies.[215] In this context, we explore whether the express provisions this Article proposes may be incorporated in the future Indian BITs with the effect of minimizing the risk of review by ITA tribunals of the conduct of Indian courts.

At the outset, it is important to distinguish between the rights to which a foreign investor is entitled under customary international law and those to which the investor is entitled under the BIT. Although a right against expropriation or a right against denial of justice may derive from customary international law, the procedural right to invoke investor-state arbitration and several other rights conferred under a BIT originate in the BIT and do not exist independent of the BIT. At the same time, some rights may exist in both customary international law as well as a BIT. Alterations in the language of a BIT can eliminate or restrict the rights that are conferred by the BIT, but this will not affect the continuing existence of the very same rights in customary international law.[216]

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213. Press Release, Bilateral Investment Treaties, *supra* note 21; Ranjan, *supra* note 21.

214. Deepshikha Sikarwar & Joji Thomas Philip, *India to Relook at 82 BIPAs as Foreign Investors Invoke Global Arbitration*, ECON. TIMES (Apr. 5, 2013, 4:00 AM), http://articles.economictimes.indiatimes.com/2013-04-05/news/38306801.

215. *Id.*

216. *See generally* Quiborax S.A. v. Bolivia, ICSID Case No. ARB/06/02, Decision on Jurisdiction, para. 47 (Sept. 27, 2012), http://www.italaw.com/sites/default/files/case-documents/italaw1098.pdf (holding that Bolivia's withdrawal from the International Centre for the Settlement of Investment Disputes (ICSID) Convention does not affect jurisdiction in pending disputes); *see also* Luke Eric Peterson, *Bolivia Settles Bitterly-Contested Arbitration with Telecom Italia; UK Power Company Prepared to Pursue Arbitration over Power Generation Nationalization*, INV. ARB. REP. (Nov. 25, 2010), http://www.iareporter.com/articles/20101126_8 (highlighting Telecom India's $100 million compensation resulting from arbitration proceedings with Bolivia); Yukos Universal Ltd. (Isle of Man) v. Russian Federation, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility (Perm. Ct. Arb. 2009), http://www.encharter.org/index.php?id=213&L=0#Alstom (upholding jurisdiction despite withdrawal of the Russian Federation from the Energy Charter Treaty).

A. *Excluding the Jurisdiction of the ITA Tribunals in Claims Relating to Judicial Conduct*

The right to seek investor-state arbitration is a right originating in BITs and without basis in customary law. Although investor-state arbitration provisions are commonly found in BITs, this common state practice does not elevate the right to investor-state arbitration to the status of a customary norm of international law because states cannot exhibit a belief (*opinio juris sive necessitatis*) that these provisions are binding independent of treaty provisions.[217] Thus, this right is entirely dependent on treaty provisions and may be restricted or eliminated through appropriate choice of treaty language.

One possible way in which the language of a BIT may be drafted so that Indian judicial decisions are not open to examination by investment arbitral tribunals would be to restrictively define the term "investment dispute." The definition of an "investment dispute," which the investor may refer to arbitration, may be worded to expressly provide that any dispute arising out of, or in connection with, the conduct of the judicial organs of the host state, barring instances of the denial of justice, shall not qualify as an investment dispute. This will deny the investor the procedural right to challenge the conduct of Indian courts before an investment arbitral tribunal. Such formulation, however, affects only the procedural right to investor-state arbitration and does not eliminate or restrict the investor's substantive right to be treated in accordance with BIT standards by Indian courts and the obligation of the Indian state to ensure that Indian courts treat them in such a manner.

An analogy may be drawn here with several BITs into which China entered, which, despite guaranteeing a wide range of substantive rights to the investors, restrict the procedural right of resort to the ITA to questions relating to quantum of compensation alone.[218] This would mean that, in the event that Indian

217. *See* Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), 2010 I.C.J. 692 (Nov. 30); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 238–39 (July 8); North Sea Continental Shelf (Ger./Den.; Ger./Neth.), 1969 I.C.J. 3 (Feb. 20); S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 24 (Sept. 7).

218. *See, e.g.*, Agreement Between the Government of the People's Republic of China and the Government of the Republic of Albania Concerning the Encouragement and Reciprocal Protection of Investments, China-Alb., art. 8, para. 3, Feb. 13, 1993, http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=245954; Agreement on the Promotion and Reciprocal Protection of Investments, China-Arg., art. 8, para. 2, Nov. 5, 1992, 1862 U.N.T.S. 3; Agreement Concerning the Encouragement and Reciprocal Protection

courts breach a BIT provision, it will be possible for the investor's home state to raise a dispute in exercise of diplomatic protection if it chooses to do so (unless such claims are expressly barred by use of a Calvo clause[219] or its variants).

Recently, India has included a provision on these lines in its BIT with the United Arab Emirates (UAE).[220] Article 10 of the BIT vests the investors with the right to seek arbitration in respect of investment disputes.[221] Article 10(2) limits the scope of this right by stating "[in] the context of Republic of India, this Article shall cover Measures underlying a dispute taken by the Central Government and/or the state governments while exercising their executive powers in accordance with the Constitution of India."[222] A few points should be noted: first, the expression "dispute taken by [government]" appears to be an error, and this could lead to future disputes as to the interpretation of this term. Second, this provision does not exclude the substantive rights of the investors in respect of judicial conduct; it merely bars jurisdiction of investment arbitral tribunals in such cases. Third, this provision does nothing to exclude the jurisdiction of investment arbitral tribunals in those instances where a judicial decision is given effect through coercive executive action. Fourth, it is unclear whether this provision also seeks to immunize denial of justice claims against the judiciary. Fifth, while an investor can bring BIT claims against India only for executive action, no such restriction is present under the state-state dispute settlement mechanism given in Article 11 of the India-UAE BIT.[223] In other words, the government of UAE can bring BIT claims against India for "any dispute concerning the interpretation or application or execution of this Agreement."[224]

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of Investment, China-Bahr., art. 9, para. 3, June 17, 1999, http://unctad.org/sections/dite/iia/docs/bits/china_bahrain.pdf.

219. Calvo clauses sought to contractually preclude the exercise of diplomatic protection by the investor's home state with respect to an investment dispute. *See* Manuel R. Garcia-Mora, *The Calvo Clause in Latin American Constitutions and International Law*, 33 MARQ. L. REV. 205 (1950).

220. Agreement Between the Government of the Republic of India and the Government of the United Arab Emirates (UAE) on the Promotion and Protection of Investments, India-UAE, Dec. 12, 2013.

221. *Id.* art. 10.

222. *Id.* art. 10(2).

223. *See id.* art. 11.

224. *Id.* art. 11(1).

B. *Excluding Judicial Conduct from the Scope of Substantive BIT Rights*

Another manner in which the BIT language may eliminate review of Indian judicial conduct by investment tribunals is to provide, as a general exception to the BIT, that nothing done by Indian courts, barring instances of denial of justice, shall be a violation of the BIT. In this case, not only will the investor be unable to resort to investor-state arbitration, but the very applicability of BIT provisions to judicial conduct is eliminated, making it impossible for even the investor's home state to bring a claim against the actions of the Indian judiciary.

It is important to note that such exclusion is different from a contractual waiver of rights under a BIT. There is some authority to suggest that even where the investor enters into a contract with the host government that contains a dispute resolution clause that refers to a forum other than an arbitral tribunal constituted under the BIT, the investor's right to seek BIT arbitration may remain unaffected.[225] Unlike a scenario where an investor waives or agrees to modify rights under a BIT by way of a contractual stipulation, however, the suggestion of this Article is one where limited rights (not including BIT arbitration in cases arising out of judicial conduct) are created by the BIT in the first place. Several Indian BITs already make a limited effort in this direction by excluding certain judicial actions from the definition of "expropriation" as follows: "Actions and awards by judicial bodies of a Party that are designed, applied or issued in public interest including those designed to address health, safety and environmental concerns, do not constitute expropriation or nationalization."[226]

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225. *See* Aguas Del Tunari v. Republic of Bolivia, ICSID Case No. Arb/02/3, Decision on Respondent's Objections to Jurisdiction, paras. 1–5, 328–33 (Oct. 21, 2005), 20 ICSID Rev. 450 (2005) (rejecting Bolivia's argument that the ICSID did not have jurisdiction to arbitrate a dispute which arose under a BIT with claimant).

226. Agreement Between the Government of the Republic of India and the Government of the Republic of Lithuania for the Promotion and Protection of Investments, India v. Lith., Annex, para. 4, Mar. 31, 2011, http://finmin.nic.in/bipa/Lithuania.pdf; *see also* Agreement Between the Government of the Republic of India and the Government of the People's Republic of China for the Promotion and Protection of Investments, art. 5, para. 3, India v. China, Nov. 21, 2006, http://finmin.nic.in/bipa/China.pdf ("Except in rare circumstances, non-discriminatory regulatory measures adopted by a Contracting Party in pursuit of public interest, including measures pursuant to awards of general application rendered by judicial bodies do not constitute indirect expropriation or nationalization."); Agreement Between the Government of the Republic of India and the Government of the Republic of Trinidad and Tobago for the Promotion and Protection of Investments, India v. Trin. & Tobago, Annex, para. 4, Mar. 12, 2007, http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=310770 ("Actions and awards by judicial bodies of a Party

In comparison to these agreements, this Article proposes further excluding judicial actions from challenge before investment arbitral tribunals on any grounds, including but not limited to expropriation. At the same time, this suggestion does not deem judicial actions incapable of violating BIT provisions. Such actions may still amount to violations of BIT provisions and be addressed before forums other than investor-state arbitration (e.g., through the exercise of diplomatic protection by the investor's home state).

BITs should also make an exception for cases of "denial of justice." In other words, judicial conduct should be open to challenge on the grounds of "denial of justice" because this is a fundamental principle of international law. Seeking immunity for judicial conduct should not result in a manifestly unjust outcome. Nevertheless, India should clearly provide for the judicial-finality rule in its BITs to provide a strong conceptual footing to construe "judicial action" as an "obligation of result." In other words, like in customary international law, India's BITs should allow foreign investors to bring an ITA case against India for the alleged judicial misconduct only once the domestic remedies have been exhausted. This will provide a strong textual basis to distinguish between judicial conduct and other state conduct, without resulting in any kind of conceptual obfuscation.

It will also be important to carefully define what is covered by the scope of the exception. Although, in principle, "judicial action" could be excluded from the jurisdictional reach of investment tribunals, it is important to precisely define "judicial action" for this purpose. Where an investor is aggrieved by several actions of various branches of the state, including the judiciary, it may still be possible for the investor to invoke BIT arbitration with respect to the conduct of the other branches, despite the exclusion of judicial actions. Even though such resort to arbitration may not be fruitful in cases where judicial action is the primary source of the grievance, it may come to the aid of the investor in other cases where the primary source of the grievance lies in another branch of the state and the role of the judiciary is merely peripheral. Similarly,

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that are designed, applied or issued in public interest including those designed to address health, safety and environmental concerns, do not constitute expropriation or nationalization."); Agreement Between the Government of the Republic of India and the Government of the Syrian Arab Republic on the Mutual Promotion and Protection of Investments, India v. Syria, Annex, para. 4, June 18, 2008, http://finmin.nic.in/bipa/Syrian%20Arab%20Republic.pdf; Agreement Between the Government of the Republic of India and the Government of the Republic of Senegal for the Promotion and Protection of Investments, India-Sen., Annex 5.1, para. 4, July 3, 2008, http://finmin.nic.in/bipa/Senegal.pdf.

given the performance of judicial and quasi-judicial functions by several administrative executive authorities in India, policymakers should decide which of these authorities will be shielded by the exception. To ensure clarity, this Article proposes that the exception be available only with respect to the conduct of the higher judiciary (namely the High Courts and the Indian Supreme Court).

India will also have to renegotiate BIT standards like "effective means to enforcing claims" of the kind present in the India-Kuwait BIT, which, in *White Industries*, was used to scrutinize India's judicial conduct.[227] The presence of the "effective means" standard will not have any impact if an ITA tribunal, like the ones in *Duke Energy*[228] and, to some extent, in *AMTO v. Ukraine*,[229] does not distinguish between the effective means standard and denial of justice. Because the majority of the ITA tribunals, however, distinguish between the two, India will be better off dealing with this issue in its BITs rather than leaving it to the discretion of arbitrators.

C. *Requiring Exhaustion of Local Remedies*

The requirement of the exhaustion of local remedies in international dispute settlement in general and in the context of the ITA in particular has been discussed above.[230] India may specifically provide in future BITs that an investor may only approach an ITA tribunal once the investor has exhausted local remedies. Such language may prevent an investor from approaching an ITA tribunal against a dissatisfactory judicial decision until the appeals and other recourses available within the domestic judicial framework are exhausted. At the same time, international law allows a claimant to raise an international claim without exhausting certain local remedies, if the remedies in question are futile.[231] An investor may

227. White Indus. Austl. Ltd. v. India, Final Award, at 106–08 (UNCITRAL 2011), http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf.

228. *See* Duke Energy Electroquil Partners v. Ecuador, ICSID Case No. ARB/04/19, Award, paras. 390–91 (Aug. 12, 2008), http://www.italaw.com/sites/default/files/case-documents/ita0256.pdf.

229. *See* LLC Amto v. Ukraine, SCC Case No. 080/2005, paras. 27(a)(ii), 75 (Mar. 26, 2008), http://www.italaw.com/sites/default/files/case-documents/ita0030.pdf.

230. *See supra* Part IV.B.

231. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2006 I.C.J. 126, paras. 36–37 (Feb. 3) (separate opinion of Judge Simma); Decision of the Human Rights Committee Under the Optional Protocol to the International Covenant on Civil and Political Rights, H.R.C., 87th Sess., July 10–28, 2006, para. 6.5, U.N. Doc. CCPR/C/87/D/1403/2005 (July 25, 2006); Rep. of the Int'l Law Comm'n., art. 15(a), (b), (d),

claim that awaiting the conclusion of a long, pending appeal is a futile remedy, and the investor may bypass such a process to approach an ITA tribunal.[232]

Furthermore, regarding claims arising out of judicial delays, the issue of local remedies can be further complicated. Although the delay itself may not render the remedies before Indian courts futile, and although it may be possible to argue that those remedies must still be exhausted, those remedies would pertain to only the original claim. Where an investor claims the delay itself is a violation of the BIT standards, India, as a respondent, would need to demonstrate that there are remedies within its domestic legal framework to which the investor could resort to remedy the delay. Under the present Indian legal framework, the local remedies against judicial delays lie in an application for an expedited hearing under Section 151 of the Code of Civil Procedure 1908[233] and in the "out of turn-mentioning" procedures before the higher courts.[234] Both of these procedures are highly discretionary in nature.[235] Indeed, some authorities suggest that a claimant need not exhaust discretionary local remedies before raising a claim on the international plane.[236]

Reading the above considerations together with the prevalence of judicial delays in India, a provision incorporating the traditional understanding of the exhaustion of local remedies requirement is unlikely to go far in shielding India against the ITA claims arising out of judicial conduct. However, such a result may be achieved if the language specifically requires that local remedies be exhausted. But the language should then go on to clarify that no remedy shall

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58th Sess., May 1–June 9, July 3–Aug. 11, 2006, U.N. Doc A/61/10; GAOR, 61st Sess., Supp. No. 10 (2006); EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS § 383 (1919); Ambatielos Claim (Greece v. U.K.), 12 R.I.A.A. 83, 119 (Comm'n Arb. 1955); "*De Wilde, Ooms and Versyp" Cases (Vagrancy)*, 14 Y.B. EUR. CONVENTION HUM. RTS. 788, paras. 60–62; Louis B. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 577 (1961); BROWNLIE, *supra* note 58, at 499–500.

232. *See* Sohn & Baxter, *supra* note 231, art. 15(b).

233. "Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court." The Code of Civil Procedure, No. 5 of 1908, § 151, CODE CIV. PROC. (India).

234. SUPREME COURT OF INDIA: PRACTICE AND PROCEDURE: A HANDBOOK OF INFORMATION 43–44 (Bibhuti Bhushan Bose ed., 3d rev. ed. 2010).

235. *See id.*; The Code of Civil Procedure, § 151.

236. *See, e.g.*, AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW, *supra* note 166, at 189, 289–92; Rep. of the Int'l L. Comm., art. 44, 56th Sess., Apr. 23–June 1, 2001, July 2–Aug. 10, 2001, U.N. Doc A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001).

be deemed futile on account of the length of time involved—perhaps with a qualification that remedies that have already exceeded the reasonable time period, judged by reference to the usual track record of the domestic judiciary in similar disputes, are futile. If such a formulation is chosen, an additional provision needs to be inserted to ensure that judicial delays alone do not give rise to substantive claims.

In all of this, the MFN clause in the concerned BIT will need to be formulated in such a manner that the investor is not entitled to incorporate provisions of other BITs that allow the conduct of Indian courts to be challenged before investment arbitral tribunals.[237]

VI. Conclusion

Both international law principles relating to attribution and BIT jurisprudence amply demonstrate that states can be held liable internationally for the actions of its judiciary. In India's case, the two ITA cases clearly show how BIT claims have been brought against India for the actions of the judiciary and, in one case, *White Industries v. India*, the claim was successful. Furthermore, these claims can be made not just on the grounds of denial of justice, which requires a high threshold for proving a BIT violation, but also by using other BIT standards like expropriation and the "effective means" requirement. This means that the position of India's former attorney general that the conduct of Indian courts cannot trigger liability under a BIT is untenable. Moreover, the scope of review of domestic judicial conduct is unpredictable because it is subject to arbitral discretion.

Thus, in this light, one can safely conclude that the foreign telecommunication companies, in principle, can surely bring a BIT

237. *See also* Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, paras. 1, 22 (Jan. 25, 2000), 8 ICSID Rep. 406 (2005) (invoking the Most Favored Nation clause in the Argentine-Spain BIT as claimant's basis for jurisdiction); SGS Société Générale de Surveillance v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, paras. 130–33, 183–84 (Aug. 6, 2003), 42 I.L.M. 1290 (2003) (invoking futility of Swiss-Pakistan BIT's twelve-month waiting period as prerequisite for jurisdiction); Lauder v. Czech Republic, Final Award, paras. 187–91 (UNCITRAL 2001), http://www.italaw.com/sites/default/files/case-documents/ita0451.pdf (finding that requirement of six-month waiting period in Dutch-Czech BIT is not a jurisdictional provision before Arbitral Tribunal); Bayinder Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction, paras. 97–103 (Nov. 14, 2005), http://www.italaw.com/sites/default/files/case-documents/ita0074.pdf (finding that Turkey-Pakistan BIT's notice requirement did not constitute a prerequisite for ICSID jurisdiction).

dispute against India for the cancellation of the telecommunication licenses even if these licenses have been cancelled not by the executive but by the judiciary. Whether foreign companies will succeed in such BIT claims is a different matter altogether. If India desires to implement this change in future BITs, it could use the instrument of international law by carefully negotiating and drafting its BITs toward this end. Such an opportunity is now available to India in its ongoing review of BITs.[238] Exploring this path will also enable India to make a useful contribution to the "recalibration" phase of international investment law, which is witnessing rapid changes in investment treaty practice.[239]

238. Recently, Russia expressed its willingness to renegotiate the India-Russia BIT. *See* Rajeev Sharma, *Russia Asks India to Amend Bilateral Investment Pact*, RUSS. & INDIA REP. (May 20, 2013), http://indrus.in/economics/2013/05/20/russia_asks_india_to_amend_bilateral_investment_pact_25159.html.

239. For more on this, see Jürgen Kurtz, *The Shifting Landscape of International Investment Law and Its Commentary*, 106 AM. J. INT'L L. 686 (2012).