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"EFFECTIVE MEANS OF ENFORCING RIGHTS": AN ADDITIONAL SWORD FOR INVESTORS AGAINST DEVELOPING NATIONS?

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Abstract

In the sphere of international investment arbitration, the discourse on conduct of host states in providing access to judicial remedies to an investor has stagnated on the highest standard of treatment i.e. denial of justice. Owing to the same, a diluted standard in the form of "effective means" has been brought to the disposal of modern-day investors to counter the inadequacies of the defaulting state's judicial mechanism to enforce its rights. While "denial of justice" remains an overused and over-analysed standard, the "effective means" standard is gaining prominence nowadays. Nonetheless, the standard remains half-baked and only superficial. This paper attempts to trace the inception and explore the shift of balance of convenience in favour of the investors against the developing nations, brought about by this 'newly-found' treaty standard. In doing the same, the paper seeks to analyse recent arbitral awards and highlights the importance accorded to the effective means standard owing to its wording, placement and linkage to other operative parts of a relevant BIT. The paper also seeks to redefine this misinterpreted first-world favouring treaty standard and attempts to renegotiate the standard to the interests of developing nations, which due to insufficient resources and court congestions might face difficulties in providing such a standard of protection. In doing so, it looks into some pending cases initiated by investor in developing nations like Nigeria and Bangladesh, which may, in future,

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result in invocation of the said standard under the relevant investment treaty.

I. Introduction

The first Bilateral Investment Treaty (BIT) concerning the safety accords to be ensured to an investor by the host state dates back to 1959, *i.e.* the Germany-Pakistan BIT. In the current international law regime, the same has received recognition and has developed into a dense network of more than three thousand treaties concerning the protection of foreign investments.[1] The starlight feature of these BITs is the creation of a mechanism for the compulsory adjudication of investment disputes between a national of one of the contracting state and the host state to such national's investment. The rationale for creation of such a mechanism is that if the foreign investor is to seek remedy against the host state's actions in its domestic courts, the courts may not guarantee a level-playing field.

Even though adjudication has been divorced from the host state's courts by virtue of international tribunals, the threshold requirement to hold a host state internationally responsible for its actions is considerably high. Taking a cue from this reality, the home states of such investors have started to negotiate a separate and distinct treaty standard. The standard guarantees an effective means to the investors to enforce their claims and assert their rights before any judicial or administrative body of the host state failing which, the host state can indubitably be held liable for violating an express obligation under the treaty.

The existing commentaries on the standard of "effective means" in International Investment Agreements (IIAs) have already spilled much ink on the interpretation of the clause in the initial

[1] James Zhan, *UNCTAD World Investment Report 2011: Non-Equity Modes of International Production and Development*, U.N.C.T.A.D. (Oct. 15, 2019, 11:35 AM), https://unctad.org/en/PublicationsLibrary/wir2011_en.pdf.

cases of *Chevron* v. *Ecuador*[2] and *White Industries* v. *India*.[3] Nonetheless, there is hardly any narration which traces the very purpose of its inclusion in the present day IIAs. Most of the tribunals have considered the standard as an alternative to the archetypal breach of "Denial of Justice" (DOJ) by domestic courts and therefore, the examination of the said standard is only limited to a comparative analysis. This has led to a complete transformation of the intention with which the clause is used in present day IIAs.

The "effective means" clause was never intended to be a standard that merely rephrases the DOJ protection. As it currently stands, the dominant position taken by the proponents of the clause generally revolves around the idea of providing an effective remedy to private investors who struggle with the incongruous judicial, administrative or executive remedies available in the host state. Such erroneous interpretation does not pay due heed to the context in which it was intended to be used. The jurisprudence

[2] Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, P.C.A. Case No. 34877, ¶¶ 121-122 (Mar. 30, 2010) (partial award on the merits); Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, I.C.S.I.D. Case No. ARB/04/19, ¶¶ 105-106 (Aug. 18, 2008) (award).

[3] White Industries Australia Limited v. The Republic of India, (Nov. 20, 2011) (U.N.C.I.T.R.A.L. Final Award); S. K. Dholakia, *Investment Treaty Arbitration and Developing Countries: What Now and What Next? Impact of White Industries v Coal India Award*, (2013) 2 I.J.A.L. 4; P.L.C. Arbitration, *Breach of BIT obligation to provide effective means of asserting claim*, (Oct. 12, 2019, 10:45 AM), https://uk.practicallaw.thomsonreuters.com/3-501-9494?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1; Jessica Wirth, *"Effective Means" Means? The Legacy of Chevron v Ecuador*, (2014) 52 COLUM J. TRANSNAT'L L. 325; Seungwoo Cha, *Losing Credibility of Tribunals' Interpretations: The Standards of Review of "Denial of Justice" Lacking in Relationships with Treaty Wording*, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL (Sept. 25, 2019, 03:12 AM), http://pennjil.com/losing-credibility-of-tribunals-interpretations-the-standards-of-review-of-denial-of-justice-lacking-in-relationships-with-treaty-wording/; Marc Allen, *Effective Means and The Perils of Standard-Setting*, (2014) 1 S.P.I.L. I.L.J. 8; Mavluda Sattorova, *Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct*, (2012) 61 INT. & COMP. L. QUART. 223; Mann Sanan, *The White Industries award - Shades of Grey*, (2012) 13 J.W.I.T. 661.

relating to the interpretation of such a clause has majorly been developed in *Chevron* and *White Industries* awards. In both the cases, developing nations were seen grappling with the investors. Therefore, the initial interpretation itself sets a wrongful precedent which is likely to hamper the interests of other developing nations in the near future.

This paper will attempt to highlight the need for revamping our understanding regarding the said clause by focusing on some of the recent incidents that suggests the need of such departure. To provide footing to the pressing need for change, the last part of the paper dwells into an analysis of the effectiveness of means provided for enforcement of awards by certain developing nations across the globe. The analysis is based on the pretext that if the erroneous interpretation in *Chevron* case is further continued, then developing states like India, Bangladesh and Nigeria stand to face fate of investment awards running into millions of US Dollars. To that end, the conclusion part will also suggest some measures that could be adopted in achieving a favourable result.

II. Interpretation of the clause

In investment arbitration jurisprudence, effective means came to be recognised as a separate and distinct treaty standard only recently.[4] After its inclusion in modern day BIT's post-1980s, it was subjected to differing interpretations. It was only after the award of *Chevron*[5] in the year 2010 that it attracted the attention of practitioners and states that had negotiated them in their investment agreements. The importance bestowed to such standard by the *Chevron* tribunal portends an era of foreign investment protection wherein the host states are not only promising to refrain from denying access to domestic courts

[4] BERK DEMIRKOL, JUDICIAL ACTS AND INVESTMENT TREATY ARBITRATION 41 (1 ED. CAMBRIDGE UNIVERSITY PRESS 2017).
[5] *Chevron, supra* note 2.

(negative obligation) but also guaranteeing its investors an effective manner of contesting their rights in the territory (positive obligation).[6] Before understanding the implications of having such a standard in an investment treaty, it is necessary to reflect on pre-Chevron arbitral jurisprudence to understand the full extent of the clause's meaning.

A. *Petrobart* v. *The Kyrgyz Republic*: Negative Obligation On States

The first known arbitral award concerning the interpretation of the "*effective means"* standard was *Petrobart* v. *The Kyrgyz Republic*.[7] The investor i.e. Petrobart invoked the arbitration to scrutinise the intervention caused by the Vice Prime Minister of the Kyrgyz Republic in the execution of a judgement in its favour. The Vice Prime Minister wrote a letter to the Chairman of the executing court to grant a deferral of the enforcement of the court decisions in view of the critical financial standing of the judgment debtor (state joint stock company). The investor contended that the said actions were in violation of Article 10 (12) of Energy Charter Treaty (ECT) i.e. ensuring effective means for the assertion of claims and enforcement of rights.[8] The tribunal agreed with Petrobart without detailing its reasons for finding such breach. Instead, it combined the standard's breach with the breach of a different Fair and Equitable Treatment (FET) standard altogether.[9] This award, therefore, can be understood to elucidate the breach of effective means standard by deliberate interference

[6] Joshua Robbins, *The Emergence of Positive obligations in Bilateral Investment Treaties*, 13 U. MIAMI INT'L & COMP. L. REV. 403, 425 (2006); Chester Brown, *Evolution in Investment Treaty Law and Arbitration* 130 (Philippe Sands and David Williams, Cambridge University Press 2011); JAN OLE VOSS, THE IMPACT OF INVESTMENT TREATIES ON CONTRACTS BETWEEN HOST STATES AND FOREIGN INVESTORS 45 (4 ED. MARTINUS NIJHOFF PUBLISHERS 2010).

[7] Petrobart Limited v. Kyrgyz Republic, S.C.C. Case No. 126/2003 (Mar. 29, 2005).

[8] *Id*, ¶ 28; The Energy Charter Treaty. art. 10(12).

[9] *Petrobart*, *supra* note 7, ¶ 77.

in judicial access by state executives, thus imposing a negative obligation on host states not to deny an investor access to domestic courts by causing unreasonable hindrance through the executive arm of the state.

B. *Limited Liability Co. Amto* v. *Ukraine*: Effective Legislative Framework Requirement

In 2008, *Limited Liability Co. AMTO v. Ukraine*[10] became the second investment arbitration award wherein the investor brought about a claim for violation of the effective means standard of ECT. This was the first case wherein the investor also claimed that the standard imposes a positive obligation on host states to provide an "effective legislative framework" to foreign investors. [11] The tribunal, however, evaded its responsibility of engaging with the investor's contention and confined itself to the analysis of the "effectiveness" of the bankruptcy legislation in question. It observed that "existence" of a legislative mechanism is a *sine qua non* for providing effective means to an investor. This award, therefore, clarified that the standard can be breached by showing lack of a legislative framework which guarantees adequate rules of procedure to allow investors to avail remedies in domestic tribunals.

C. *Duke Energy* v. *Ecuador*: Performance Requirement

Duke Energy v. *Ecuador*[12] became the last investment award before Chevron's expansionist interpretation, which dealt with the standard of effective means as stated in the Ecuador-US BIT. The Claimants in this case restricted their claim to violation of DOJ standard by Ecuador as the host state failed to settle the claims in

[10] Limited Liability Co. A.M.T.O. v. Ukraine, S.C.C. Case No. 080/2005 (Mar. 26, 2008) (final award).
[11] *Id*, ¶ 29.
[12] Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, I.C.S.I.D. Case No. ARB/04/19 (Aug. 18, 2008) (award).

tax matters in a timely manner.[13] The tribunal, however, went on to hold that mere existence of such mechanisms that ensures investors an effective means to assert their rights and claims is not adequate. In addition, the *"performance"* of such framework is essential in achieving the end. The tribunal upheld the claim of investor i.e. the clause seeks to implement and provide for more general guarantee against DOJ.[14]

Whatever may be the method of interpretation, none of these awards comprehensively determine the extent of such a treaty standard. At the very best, they suggest a murky concept of providing the investor an *"effective"* access to an efficacious domestic forum, which is free from unreasonable executive interference and is governed by the "*rule of law*". This interpretation remains questionable because the extent of "*effectiveness*" has nowhere been clarified. At the outset, the standard appears to achieve the same goal as DOJ. If so, then what was the need to create a new positive obligation on states if there already existed one? [15] Was it a mere reiteration or a distinct treaty standard in itself? For a clearer understanding, it is imperative to analyse the reasons behind formulation of such treaty standard.

III. Inception and Coming into effect of the said clause

Kenneth J. Vandevelde, attorney-adviser of the Office of Investment Affairs at the Department of US[16], details the position taken by US with respect to the interpretation and application of BITs. His book titled *'US Investment Agreements*', which was later

[13] *Id*, ¶ 385.
[14] *Id*.
[15] Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, P.C.A. Case No. 2009-23, ¶ 25 (Mar. 12, 2012) (opinion of Jan Paulsson).
[16] *Kenneth J. Vandevelde*, (Aug. 13, 2019, 11:35 AM), https://www.tjsl.edu/directory/kenneth-j-vandevelde.

relied on by the *Chevron* tribunal, reasoned the inclusion of *'judicial access provision'* in US Model BITs. This provision first arrived in the 1983 Model, set forth in Article II (8), wherein the same appeared under the heading *'Treatment of investment'* and conferred three separate rights upon investors. One of such standards was *"effective means of asserting claims and enforcing rights with respect to investment agreements, investment authorizations and properties"*.[17] According to him, disagreement amongst publicists concerning the right of access to domestic courts forced US to seek treaty protection[18] by including 'judicial access provision' in it.[19] He further clarifies that effective means standard was added solely to create an "absolute standard for measuring the effectiveness of remedies and procedures for enforcing substantive rights".[20] The practice of including the effective means standard in negotiating texts of US-BITs continued for around two decades, with slight modifications, until it was finally scrapped from the operative part of its Model BIT in the year 2004. The reason cited by US drafters for shifting the standard from operative part to the preamble of the 2004 model BIT was that the customary international law standard of DOJ accorded sufficient protection and there was no need for a separate treaty obligation. [21] Such a course of action saved it from a positive obligation to provide effective remedy in situations when it acted as a host state.

It is not entirely known as to why developing nations like Kuwait, which played a dominant role in the *White Industries* award, began including such treaty provisions as a substantive obligation in their respective model BITs. One of the chief reasons is that they

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[17] KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 413 (OXFORD, 2009).
[18] Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L. L.J. 427, 438-39 (2010).
[19] Kenneth, *supra* note 17, at 411.
[20] *Id*.
[21] US Department of State, *2012 US Model Bilateral Investment Treaty*, (Oct. 15, 2019, 11:35 AM), http://www.state.gov/documents/organization/188371.pdf.

desired to follow the footprints[22] of developed nations like US to bolster their developing economy and grab every possible opportunity that reflects the ease of doing business in their territory. In an attempt of doing so, Kuwait also ended up negotiating such treaty standards in its investment agreements with other nations, for example Hungary[23], Austria[24], Belarus[25] and India[26]. Such developing nations, however, never intend to assume a positive obligation while attracting foreign direct investment. This is evident from the reaction of Kuwait post the *Chevron* interpretation of the standard since none of the BITs negotiated by Kuwait after 2010 contain such a treaty provision.[27] This intention of developing nations will be further strengthened by the analysis done at a later stage of this paper.

IV. Interpretation accorded in *Chevron Corporation* v. *Republic of Ecuador*

The seminal award of *Chevron Corporation* v. *The Republic of Ecuador*[28] has played a dominant role in moulding the clause's existing interpretation and interplay with the customary international law principle of DOJ. The factual matrix of the case dates back to a 1973 agreement between TexPet (which was later acquired by Chevron) and the Ecuadorian government under which the investor got the permit to explore and exploit oil reserves in Ecuador. The Agreements required TexPet to provide the Government a part of its production at a subsidised rate to help the host state meet its domestic needs. On top of the

[22] U.S.-Senegal B.I.T. (1983). art. II(9); *see* U.S.- Turkey B.I.T. (1985). art. II(8); Haiti - United States of America B.I.T. (1983). art. II(8); Cameroon - United States of America B.I.T. (1986). art. II(7).
[23] Hungary - Kuwait B.I.T. (1989). art. 10.
[24] Austria - Kuwait B.I.T. (1996). art. 3(5).
[25] Belarus - Kuwait B.I.T. (2001). art. 3(3).
[26] India - Kuwait B.I.T. (2001). art. 4(5).
[27] Kuwait - Mexico B.I.T. (2013); *see* Kuwait - Kenya B.I.T. (2013); Kuwait - Pakistan B.I.T. (2011); Kuwait - Kyrgyzstan B.I.T. (2015).
[28] *Chevron*, *supra* note 2.

subsidised produce, the government was also entitled to purchase the produce at the international market price for export purposes. In such a situation, TexPet suspected that the Government acted in breach of the Purchase Agreements and related Ecuadorian laws by exporting the barrels obtained by overstating its domestic needs.

Seeking damages for interest and lost profits, TexPet filed seven cases against the Government for the breach of Purchase Agreements before the Ecuadorian courts, starting from the year 1991. Nonetheless, for well over a decade, its claims remained unanswered in Ecuadorian courts. In May 2006, TexPet initiated investor-state arbitration against Ecuador. TexPet contended that the egregious delays suffered in its cases and the undue control exerted over the judiciary by the Executive Branch breached the DOJ standard. In addition, it also claimed violation of the obligation under the BIT to provide effective means for asserting claims and enforcing rights.[29] For better understanding, a brief overview of the judicial instability existing in Ecuador at the time of the Chevron award is a must.

- In November 2004, National Congress of Ecuador handed over impeachment letter to six (6) judges of the Constitutional Court along with dismissing the entire Supreme Court. In addition to this, in April 2005, the President of Ecuador dismissed all newly-appointed judges of the Supreme Court. [30]

- Later on, even when the Ecuador congress nullified its action of dismissal of the Supreme Court judges, no

[29] Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, P.C.A. Case No. 34877, ¶ 2(8) (Dec. 1, 2008) (interim award).
[30] Sandra Edwards, *Outside Rule of Law: Ecuador's Courts in Crisis*, Washington Office on Latin America (Mar. 29, 2019, 08:04 AM), https://www.wola.org/sites/default/files/downloadable/Andes/Ecuador/past/ecuador_memo_april_1_2005.pdf.

reappointment of the former judges took place. This resulted in a state of judicial absence.

- In September 2007, the Constituent Assembly formed as a result of the referendum. This Constituent Assembly sacked the Congress and proclaimed absolute authority. The Assembly also claimed the power to remove and sanction members of the judiciary that '*violate its decision'*.[31]

- In February 2008, the President of the Supreme Court of Ecuador went on record to state: "*the rule of law is only a partial reality in Ecuador . . . we cannot deny it: the judicial and constitutional reality in our country is a partial reality; we are not fully living in a state of law*". [32]

In light of this, the tribunal first gave an ordinary interpretation of the obligations imposed by the "effective means" standard. It compared and found the standard to co-exist with the protection accorded by the DOJ standard.[33] While doing so, it also agreed with the observation made in *Duke Energy v. Ecuador* award i.e. the effectiveness (performance) of the mechanism is also to be checked.[34] After providing such general and widespread peculiarities of the standard, it turned to a treaty-specific approach and surprisingly found it to be a *lex specialis* standard. The tribunal added that the standard is not a mere restatement of the law on DOJ. The reasons allocated by the tribunal for conceiving it a separate and distinct treaty obligation were:

1. That Article II (7) in dealing with the effective means standard, does not explicitly refer to DOJ or customary international law. Absence of such reference, according

[31] The Carter Centre, *Final Report on Ecuador's Constituent Assembly Elections*, (Sep. 23, 2019, 09:23 AM), www.aceproject.org/regions-en/countries-and-territories/EC/reports/ecuadors-constituent-assembly-elections-2007-final.
[32] *Chevron*, *supra* note 2, ¶ 89.
[33] *Id* at 242.
[34] *Duke*, *supra* note 12, at 391.

to the tribunal, indicates the intent of the BIT drafters to differentiate between the prevailing threshold of DOJ [which forms part of FET standard] from the said standard.

2. That the origin and purpose, as has been explained by Kenneth Vandevelde, signifies the *lex specialis* nature of the standard.

The tribunal additionally observed that in comparison to DOJ, the effective means standard has a potentially less-demanding threshold. Keeping in mind the aforesaid considerations and the factual matrix involved, the tribunal concluded that an undue delay of 13 to 15 years by Ecuadorian courts was sufficient to breach the effective means threshold. While doing the same, the tribunal proceeded on certain assertions that result in paradoxical equations and in turn leave certain questions unanswered. Does breach of DOJ standard lead to simultaneous breach of effective means standard also? Why "reasonableness of the delay" is not factored in effective means evaluation? Why the requirement of "Exhaustion of Local Remedies" is not mandatory for breach of effective means standard?

V. Flawed reasoning in creating a new standard

Though the analysis provided by the *Chevron* tribunal for creating a new treaty standard seems reasonable to a great extent, it lacks consideration of certain fundamental aspects which were germane while arriving at the conclusion.

A. FALLACIOUS INTERPRETATION OF STATE'S INTENTION

One of the reasons that the tribunal cited for recognizing effective means [Article II (7)] as a separate treaty standard was its placement and wording in the US-Ecuador BIT. The standard was placed close to the obligation of providing Fair and Equitable Treatment (FET) that shall be in no case "less than that required

by international law".[35] Lack of similar in the effective means clause was the chief reason for the tribunal's interpretation.[36] It is astounding to see that without any allusion to preparatory work or circumstances of the conclusion of the treaty, as suggested by the Vienna Convention on the Laws of Treaties[37] (VCLT), the tribunal deciphered the intention of the contracting parties.

In order to justify its conclusion, it made reference to the opinion expressed by a US attorney advisor who himself was not actually involved in the negotiation of the concerned treaty but only had access to negotiating history of US BITs.[38] Although the opinions expressed by US attorneys cannot straightforwardly be presumed to be inaccurate, it, of course, does not justify holding a sovereign liable at an international forum and also the intention of incorporating such a clause by the contracting parties to the treaty. Ecuador never intended to accord such an interpretation to effective means clause as is evident from the state-to-state arbitration initiated by it to ascertain interpretation and application of paragraph 7 of Article II of the Treaty. Ecuador in its request for arbitration unequivocally stated its limited "intention to incorporate into the Treaty pre-existing obligations under the customary international law relating to the prohibition against DOJ"[39] and not "to assure that the framework or system provided is effective in particular cases".[40]

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[35] U.S.-Ecuador B.I.T. art. II(3)(a).
[36] Courtney Kirkman, *Fair and Equitable Treatment: Methanex v United States and the Narrowing Scope of Nafta Article 1105,* 34 LAW & POL'Y. INT'L. BUS. 343, 345 (2002); Theodore Kill, *Don't Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations',* 106 MICH. L. REV. 853, 855-56 (2008).
[37] Vienna Convention on the Law of Treaties 1980. art. 32.
[38] Kenneth, *supra* note 17, Acknowledgement.
[39] Republic of Ecuador v. United States of America, P.C.A. Case No. 2012-5, ¶ 8 (Jun. 2011) (request for arbitration).
[40] *Id*.

Developing nations are more akin to interpret such clauses purely as an "open-ended invitations to deploy relevant Customary International Law or general principles of law, given, for example, emerging principles to promote due process, transparency, or accountability across a number of regimes, including those involving human rights."[41] They never intend to use such clauses in order to impose a separate and burdensome obligation on themselves, which they are aware of not being able to fulfil due to lack of resources and a developing economy. In such a situation, it is unreasonable to bring a prejudiced interpretation of effective means clause and impose it on a nation that is already struggling with its court congestion and backlogs.

B. FORMULATION OF A FRUITLESS AND VAGUE DEFINITION MUDDLING WITH DOJ'S THRESHOLD

The standard propounded by the *Chevron* tribunal serves no effective purpose when it comes to protecting and promoting the interest of an investor as is evident from US's action of dropping it from the substantive part of its model BIT in 2004. If such was the case, was the tribunal justified in devising a new standard that is significantly easier to breach and the remedies available are starkly similar as for DOJ?

The manner of devising such a treaty standard also remains questionable owing to its extent of similarity with DOJ standard. Breach of both of these standards is informed by the same factors and therefore it becomes highly improbable to consider breach of one and not the other.

Further, the tribunal erred by vaguely defining "*reasonableness*" of a delay as the initial basis for evaluating the breach of the effective means clause. With already more than 40 BITs in force

[41] José E. Alvarez, *14th Annual Herbert Rubin and Justice Rose Luttan Rubin International Law Symposium: A Special Tribute to Andreas Lowenfeld: A Bit On Custom*, 42 N.Y.U.J. INT'L. L. & POL. 17, 32 (2009).

guaranteeing "*effective means of asserting claims and enforcing rights*", developing nations were not given proper notice to structure their backlog-stricken judiciary to enforce rights of foreign investors "effectively". This has resulted in forceful dumping of investment treaties[42] by myriad of developing nations, who are now looking for a new foreign investment policy framework. Even the investors are perplexed in understanding the extent of "adequate utilization" of local remedies before bringing a claim for breach of "effective means" clause. The non-ending and pre-existing debate[43] of exhaustion of local remedies for contending DOJ will now be elongated in finding the thin line of difference between "adequate" and "strict" utilization of remedies available in the host state.

VI. White Industries- India Award: A Tale of Erroneous Adventurist Interpretation against a Developing State

As per the common perception, for the developing states, the BITs are nothing less than gold dust, however this is far from being true. This is because of the fact of the faulty and overt reading of the BIT text at the time of the dispute.[44] The idea of investor-state arbitration through BITs has been extended to such

[42] The Conversation, *Why developing countries are dumping investment treaties*, (Sep. 13, 2019, 09:35 AM), https://theconversation.com/why-developing-countries-are-dumping-investment-treaties-56448; Clint Peinhardt, *Withdrawing from Investment Treaties but Protecting Investment International Interactions*, (University of Durham and John Wiley & Sons, Ltd., 2017) 43, 6; Nihal Joseph, *Mixed messages to investors as India quietly terminates bilateral investment treaties with 58 countries*, H.S.F. Arbitration Notes (Aug. 15, 2019, 10:12 AM), https://hsfnotes.com/arbitration/2017/03/16/mixed-messages-to-investors-as-india-quietly-terminates-bilateral-investment-treaties-with-58-countries/.

[43] P.L.C. Arbitration, *supra* note 3.

[44] Poulsen, *The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY (OXFORD UNIVERSITY PRESS 2010).

avenues that the initial framers might not have intended.[45] The best example of the same is the interpretation and misapplication of *"effective means"* clause in the White Industries-India award. In 2015, as a consequence of the jolts by such an award, the Government of India served investment treaty termination notice to nearly 58 countries and sought to renegotiate the existing BITs with rest of the 25 nations.[46] In pre-context of the same, it becomes imperative to analyse the application and interpretation of *"effective means"* and how the same impacted the jurisprudence of investment protection especially in cases involving developing states.

A. *White Industries Award*: Preface to the Misfate

Even the adherent supporters of investment arbitration cannot deny the fact that adjudication of investment claims is a very delicate mechanism.[47] A single episode of an adventurist arbitrator going beyond the laid down and well documented scope of his jurisdiction may be sufficient to generate a disruptive backlash.[48] Such adventurist awards are potent enough to influence other tribunals into following the same.[49] The onus on

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[45] 65 C. PEINHARDT, CONTINGENT CREDIBILITY: THE REPUTATIONAL EFFECTS OF INVESTMENT TREATY DISPUTES ON FOREIGN DIRECT INVESTMENT 401-432 (INTERNATIONAL ORGANIZATION, 2009).

[46] Alison Ross, *India's termination of BITs to begin*, Global Arbitration Review (Mar. 29, 2019, 08:04 AM), https://globalarbitrationreview.com/article/1138510/indias-termination-of-bits-to-begin.

[47] Christoph H. Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, in TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES 129-152; *Interpreting Investment Treaties: Experiences and Examples*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 730, 746 (OXFORD UNIVERSITY PRESS 2009).

[48] Jan Paulsson, *Arbitration Without Privity*, I.C.S.I.D. REVIEW 10(2) FOREIGN INVESTMENT LAW JOURNAL 257 (1995); Fali Nariman, *Investment Arbitration under the Spotlight - What next for Asia* (Mar. 23, 2019, 04:02 PM), http://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=1002&context=hsmith_lect.

[49] LACKLAND H. BLOOM, DO GREAT CASES MAKE BAD LAW? (1 ED. OXFORD UNIVERSITY PRESS 2014); Katherine Jonckheere, *Practical Implications from an*

arbitral tribunals to tread the road from interpretation to resolution with utmost care and caution becomes even more burdensome when the host state in the matter is a second world-developing nation.[50] One such backlash happened to be caused against India by the award made in the White Industries case in 2011. The award rendered by the investment tribunal was against India, wherein the developing country had to make a payment to the tune of 4.08 million Australian Dollars for undue delay in the enforcement of the award. To compound the burden on the host state, an additional sum amounting to 4.25 million Australian Dollars was made payable to the investor by way of interest. [51]

The White Industries award was accorded on account of non-fulfilment of the obligation on part of India to provide effective means for enforcing rights i.e. the commercial award in favour of White Industries. Even though the effective means obligation was not expressly provided for in the Australia-India BIT, the same was borrowed from the India-Kuwait BIT through invocation of the Most Favoured Nation clause.[52] The importation of such obligation resulted in lowering the threshold for breach of the DOJ standard, putting additional burden on the host state to facilitate the foreign investor with effective means to enforce rights. As a consequence, non-enforcement of the award rendered in favour of White Industries for a period of 9 years, due to lengthy domestic courts proceedings was considered sufficient to be violative of the effective means standard. [53]

B. Erroneous Interpretation in *White Industries*

Expansive Interpretation of Umbrella Clauses in International Investment Law, SOUTH CAROLINA J. INT'L. LAW AND BUSINESS (2015).

[50] *A Law for Greed or a Law for Need? The Current State of the International Law on Foreign Investment*, 6 INT. ENV. AGR. 329-357 (2006); Merim Razbaeva, *State Control over Interpretation of Investment Treaties*, VALE COLUMBIA CENTRE ON SUSTAINABLE INTERNATIONAL INVESTMENT (2014).

[51] *White Industries, supra note* 3, ¶ 15.2.5, ¶ 16.1.1.

[52] *Id*, ¶ 11.2.9, ¶ 11.3.1.

[53] *Id*, ¶ 11.4.14.

On the face of it, the award seems to be a fair one wherein the investor got the just remedy from the developing state for non-enforcement despite being a New York Convention signatory. [54] However, upon review, the same award very well qualifies to be an adventurist award that suffers from infirmities.

1. Unjust expansive interpretation

Firstly, since its inception, the 'effective means' clause has been seen as a mere embodiment of the right to access to courts. The infirmity that plagues the award finds its genesis from the fact that even though there was a positive obligation on the state, the same were to merely have legislative framework in place and nothing else, as noted in the award in *Amto*.[55] Contrary to this, the tribunal in White Industries by an act of overarching interpretation crafted a standard that calls in for the ground level availability of the effective means clause. Such interpretation goes against the spirit and the intention for the inclusion of the effective means clause in the operative text of the BIT by the developing countries.[56] The intention of the states was limited to an obligation for providing such legislations and measures that enables access to court, no less no more! [57]

2. Exclusion of the national laws accordance

[54] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. art. III; ALBERT JAN VAN DEN BERG, THE NEW YORK CONVENTION OF 1958: AN OVERVIEW, XXVIII (2003).

[55] *Amto, supra* note 10, ¶ 75; Annelise Karreman, *Time to Reassess Remedies for Delays Breaching 'Effective Means'*, I.C.S.I.D. REVIEW 30(1) FOREIGN INVESTMENT LAW JOURNAL 118-141 (2015).

[56] SD Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM L. REV. 1523 (2004); Mahnaz Malik, *The Expanding Jurisdiction of Investment-State Tribunals: Lessons for Treaty Negotiators* (Apr. 19, 2019, 07:04 AM), https://www.iisd.org/pdf/2007/inv_expanding_jursidiction.pdf.

[57] Katherine, *supra* note 49; Investment Treaty News, *The White Industries Arbitration: Implications for India's Investment Treaty Program* (Oct. 14, 2019, 04:04 PM), https://www.iisd.org/itn/2012/04/13/the-white-industries-arbitration-implications-for-indias-investment-treaty-program/.

Secondly, in the International law jurisprudence, it is undisputed that the investment treaties are instruments that are governed by the VCLT i.e. in regards to the applicable rules of international law.[58] However, the same cannot mean that the international law has a superseding effect over the national laws of a state in regards to its own conduct.[59] Since in the present "*effective means*" clause there was due recognition of national laws in regards to determining the obligation, the tribunal was mandated to inquire into the conduct of the judiciary and the domestic framework of the country so as to ascertain the breach of the standard. However, in this case, such expansive interpretation was given on behest of being blindfolded to qualifier provided for in the effective means clause, i.e. *effective means of enforcing rights in accordance with the national laws* (emphasis provided). For ease of reference, Article 4(5) of the India-Kuwait BIT is reproduced below:

"*4(5) Each Contracting State shall in accordance with its applicable laws and regulations provide effective means of asserting claims and enforcing rights with respect to investments and ensure to investors of the other Contracting State the right of access to its courts of justice, administrative tribunals and agencies and all other bodies exercising adjudicatory authority, and the right to employ persons of their choice, for the purpose of the assertion of claims and the enforcement of rights with respect to their investments.*"

Such express wordings call in for an inquiry into national laws of India to ascertain if the actions of the host state were in consonance with the obligation under the investment treaty. The tribunal applied the standard of effective means provided for in *Chevron*, wherein the host country was held liable for not

[58] Makane Moïse Mbengue, *Rules of Interpretation (Article 32 of the Vienna Convention on the Law of Treaties)*, I.C.S.I.D. REVIEW 31(2) FOREIGN INVESTMENT LAW JOURNAL 388-412 (2016); J. ROMESH WEERAMANTRY, TREATY INTERPRETATION IN INVESTMENT ARBITRATION 212 (1 ED. O.U.P. OXFORD 2012).
[59] HEGE ELISABETH KJOS, THE PRIMARY APPLICABILITY OF NATIONAL LAW AND THE ROLE OF INTERNATIONAL LAW, (OXFORD SCHOLARSHIP ONLINE 2013); Fali Nariman (n 48) at 34.

enforcing the award for 9 years.[60] This was done on behest of the finding that the US-Ecuador investment treaty *"employs almost identical wording to that found in Article 4(5) of the India-Kuwait BIT".*[61] The same is egregiously wrong since the effective means clause provided in the US-Ecuador BIT was very different from that in the India-Kuwait BIT. For reference, the US-Ecuador BIT clause read as:

"II(7) Each party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorisations."[62]

The difference between the two clauses is colossal, since the exclusion of such qualifier results in an absolute standard for check wherein national laws make no difference.[63]

3. Chevron v. Ecuador, the undesired precedent

Thirdly, reference and over reliance on the *Chevron* award and elevation of the same to a precedent was also grossly inappropriate. The same was on the count that the extremities as to the state of affairs in the Ecuador made it impossible to have access to courts.

As has been pointed out in the initial part of the article, the tribunal in the *Chevron* case was faced with a markedly different treaty and that too begging for application in an exceptional factual circumstances. The judicial absence coupled with the political instability that Ecuador was facing at that point of time led to the breach of effective means standard. In addition, as the effective means in the US-Ecuador BIT came without a qualifier, it enabled the tribunal to depart from the precedents and arrive at

[60] *Chevron*, *supra* note 2, ¶ 270.
[61] *White Industries*, *supra* note 3, ¶ 108.
[62] U.S.-Ecuador B.I.T. (1993), art. II(7).
[63] Sumeet Kachwaha, *The White Industries Australia Limited – India Bit Award: A Critical Assessment*, 29(2) L.C.I.A.J. 288 (2013); Nariman, *supra* note 48, at 34.

a conclusion that effective means can be checked against an *'objective international standard'*.[64] The lack of recognition of the national laws coupled with the extremities in the circumstances relating to the judicial system, provided for a cause to deviate from the set precedents in investment law.

Nothing remotely close to this happened in White Industries. In stark comparison, in the White Industries neither there were any extreme circumstances of judicial instability nor the language of the "effective means" clause was broad enough to include international standard of obligation. A mere delay in enforcement proceedings cannot be elevated to being violative of the effective means standard.[65] Rather it was the Indian judiciary that gave White industries enforcement case a new lease of life by going against the set precedential authorities.[66] For understanding the same, tracing the litigation history of White Industries for enforcement of award is a prerequisite.

- In November 2003, White Industries sought to challenge Coal India's setting aside application on the grounds of lack of jurisdiction. Calcutta High Court dismissed the petition on the grounds that Indian courts will have jurisdiction even over foreign-seated arbitration, unless there is an express ousting as to the application of the Indian Arbitration Act, 1996.[67] The same was decided on behest of the 2002 Supreme Court three-judge bench decision in *Bhatia International v. Bulk Trading S.A.* wherein the court propounded the above-mentioned reasoning.

[64] U.S.-Ecuador B.I.T. (1993). art. II(7).
[65] Sumeet, *supra* note 63, at 291; Nariman, *supra* note 48, at 34.
[66] Sumeet, *supra* note 63, at 291.
[67] *White Industries* (n 3), ¶ 3.2.48; Bhatia International v. Bulk Trading S.A., (2002) 4 S.C.C. 105; National Thermal Power Corporation v. Singer Company & Ors., (1992) 3 S.C.C. 551; Nirma Ltd. v. Lurgi Energie Und Entsorgung Gmbh, A.I.R. 2003 Guj. 145.

- Even though White Industries preferred an appeal against the Single Bench judgement, the Division Bench of the Calcutta High Court dismissed the same in May, 2004.[68] In July, 2004, White Industries preferred an appeal to the Supreme Court of India against the same. [69]

- While the matter was still pending before the Supreme Court, the position of law as propounded in *Bhatia International v. Bulk Trading S.A.*[70] was further reiterated and reaffirmed by the Indian Supreme Court in the division bench judgement of *Venture Global Engineering v. Satyam Computer Services Ltd.*[71] In the 2008 judgement, the bench held that the Indian courts had the jurisdiction to try a setting aside application concerning a foreign award on the basis of the domestic law.[72]

- In light of such developments, six-days later on 16 January 2008, when the White Industries appeal came up for hearing, to everyone's surprise, against the flow tide, the two-judge bench differed on the matter. The court the held the following:

"In the midst of hearing of these appeals, learned counsel for the appellant has referred to the three-Judges Bench decision of this Court in Bhatia International Vs. Bulk Trading S.A. & Anr., (2002) 4 SCC 105. The said decision was followed in a recent decision of two Judges Bench in Venture Global Engineering Vs. Satyam Computer Services Ltd. & Anr. 2008 (1) Scale 214. My learned brother Hon'ble Mr. Justice Markandey Katju has reservation on the correctness of the said decisions in view of the interpretation

[68] *White Industries, supra* note 3, ¶ 3.2.59.
[69] *Id*, ¶ 11.4.4.
[70] *Bhatia International, supra* note 67.
[71] Venture Global Engineering v. Satyam Computer Services Ltd., (2008) 4 S.C.C. 190.
[72] The Indian Arbitration and Conciliation Act 1996, §§ 34, 48-49.

of Clause (2) of Section 2 of the Arbitration and Conciliation Act, 1996. My view is otherwise.

Place these appeals before Hon'ble CJI for listing them before any other Bench. [73]

Such order is a fit enough reflection of the willingness of judiciary to ensure to meet the end of justice, in order to ensure that the investor had effective means of enforcing rights. The Supreme Court could have easily, by placing reliance on decision of *Venture Globa*l read with *Bhatia International*, dismissed White's appeal. However, the same was not done. Therefore, it cannot be said that this case had similar factual standing as that in *Chevron*. Moreover, since there was a reference made to a higher bench, White ought to have known that the process of constituting a larger Bench would take time. This is on two counts. *Firstly*, the Chief Justice of India was required to constitute a special three judge Bench for consideration of the matter which is time taking.[74] *Secondly and more importantly,* even if the three judges Bench gave the matter a green flag, the issue at hand would have to be again decided by five-judge Bench (Constitution Bench). But why? This is because the judgement in *Bhatia International v. Bulk Trading S.A.* was rendered by a three-judge bench, therefore, it would require a larger bench to decide in derogation from the same.

On 1 November 2011, the appeal preferred by White Industries came up for hearing before a Full Bench of the Supreme Court (3 judges). Upon consideration, the Court felt that the dispute warranted to be referred to a Constitution Bench i.e. 5 judges, and the same was done. In the present context, it is important that we

[73] Bharat Aluminium Co. Ltd. v. Kaiser Aluminium Technical Service, Inc., (2012) 9 S.C.C. 552, ¶ 1.

[74] Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and US Supreme Courts*, AMERICAN J. COMP. LAW (2013); 1 Suresh Kumar, *Appointment Of Judges In India: An Analysis*, IND. L.J. CRIME & CRIMINOLOGY.

don't lose the sight of the fact that even the judiciary is bound to follow a certain mechanism. [75]

VII. The Road Ahead: The impact such an award can have on other developing jurisdictions like Nigeria and Bangladesh

The law and practice of arbitration is intricately tied to and dependent on the general mechanism of civil justice.[76] This is for multiple reasons, whether it be for pre-arbitral issues like reference to arbitration or post-arbitral issues like the enforcement of the award.[77] The latter finds due recognition in the New York Convention, 1958 that puts an obligation on the signatory states to enforce the award as early as possible.[78] Even though there exist such a positive obligation, majority of the developing states in Africa and South Asia still see a long arbitral award enforcement periods, ranging from 8-10 years.[79] The same is due to variety of reasons ranging from colossal backlogs to inefficient and inefficient judiciary. The application and

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[75] Kim Economides, *Are Courts Slow? Exposing and Measuring the Invisible Determinants of Case Disposition Time*, UNIVERSITY OF OTAGO ECONOMICS DISCUSSION PAPERS NO. 1317 (2013); Matthieu Chemin, *Does the Quality of the Judiciary Shape Economic Activity? Evidence from India* (Mar. 29, 2019, 08:04 AM), www.sticerd.lse.ac.uk/dps/03122004/chemin.pdf.

[76] Andrew Barraclough, *Mandatory Rules of Law in International Commercial Arbitration*, 6 MELBOURNE J. INT'L. L. (2005); P Sathasivam, *Judicial Dialogue on the New York Convention*, ICCA CONFERENCE (Apr. 19, 2019, 03:04 AM), www.arbitration-icca.org/media/2/13916004665430/nyc_roadshow_speech_23rd_nov_chief_justice_sathasivam.pdf.

[77] Christoph Schreuer, *Interactions of International Tribunals and Domestic Courts in Investment Law in: Contemporary Issues in International Arbitration and Mediation*, 71 FORDHAM L. REV. 2010 (2010); 2 Arpan Kr Gupta, *A New Dawn For India- Reducing Court Intervention In Enforcement Of Foreign Awards*, I.J.A.L.

[78] Albert Jan, *supra* note 54.

[79] Gabrielle Kaufmann-Kohler, *Commercial Arbitration Before International Courts and Tribunals - Reviewing Abusive Conduct of Domestic Courts*, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW ANNUAL LECTURE ON INTERNATIONAL COMMERCIAL ARBITRATION (2011) (Mar. 24, 2019, 05:34 AM), www.doc.rero.ch/record/291085/files/arbint29-0153.pdf.

effectiveness of the New York Convention in such states have been subjected to a lot of criticism.[80] To add to the miseries of such states, such expansive interpretation of the "effective means" clause has resulted in states being under a constant danger of being sued before an investment tribunal.

The ruling by the tribunal in White Industries should be seen by such states as a timely warning. For a more robust understanding as to the magnitude of danger that looms over such developing states, the enforcement track record of a few developing states needs to be discussed. This paper specifically takes up the enforcement trends in Nigeria and Bangladesh, however the same is not restricted to the countries of African and Indian Sub-Continent.[81] Even the Latin American jurisdictions like Paraguay etc. also plague from the same kind of delay in enforcement.[82]

A. ENFORCEMENT PROCESS IN NIGERIA: COON'S AGE

Nigeria, commonly referred to as the "Giant of Africa" has often been in the centre of criticism for delayed enforcement of arbitral awards. In certain cases, such delay can range from ten (10) to fifteen (15) years. The two cases that aptly highlight the delay that

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[80] GEORGE BERMANN, RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, IN THE INTERPRETATION AND APPLICATION OF THE NEW YORK CONVENTION BY NATIONAL COURTS (SPRINGER INTERNATIONAL PUBLISHING AG, 2017); Linda Silberman, *The New York Convention After Fifty Years: Some Reflections on the Role of National Law*, 38 GA. J. INT'L. & COMP. L. (2009).

[81] Philip Odiase, *Enforcement of Commercial Arbitration Awards in Nigeria More Than Just a Dalliance*, 13(4) T.D.M. (2016) (Apr. 12, 2019, 10:44 AM), https://www.transnational-dispute-management.com/article.asp?key=2378; Nicholas Peacock, *Arbitrating in "Developing" Arbitral Jurisdictions: A Discussion of Common Themes and Challenges Based on Experiences in India and Indonesia*, 6 INT'L. ARB. L. REV (2010).

[82] Jose Antonio Rodiguez, *Interpretation and Application of the New York Convention in Paraguay*, in THE INTERPRETATION AND APPLICATION OF THE NEW YORK CONVENTION BY NATIONAL COURTS 745 (SPRINGER INTERNATIONAL PUBLISHING AG, 2017).

an investor might be subjected to in Nigeria and forbear the wind of caution are discussed below.

a. The Clifco Nigeria Ltd. Case: 11-year delay and still counting

In *Nigerian National Petroleum Corporation Ltd. (NNPC) v. Clifco Nigeria Limited,*[83] (the *Clifco case*) the arbitral tribunal rendered an award in favour of Clifco Nigeria Limited and awarded cost against NNPC. The Clifo tale that concerns the enforcement of an award worth USD 340 million, will perfectly fits the illustration of the dismal state of affairs in Nigeria. The same act serves as a timely pretext and a wakeup call for Nigeria. The setting aside and enforcement timeline of the case is as follows:

- Being dissatisfied with the award, NNPC submitted a setting aside application before the Federal High Court Nigeria to restrict the enforcement of the award. The Federal High Court while deciding in merits of the application in affirmative set aside the award in December 2000. This was followed up with an order of the Federal High Court for non–enforcement on 31 October 2001.

- Clifco Ltd. dissatisfied with the outcome, took the recourse to the Court of Appeal. The Appellate Court partially set aside the award and decided the same in favour of Clifco Ltd. Displeased by the same; the respondents filed an appeal before the Supreme Court on 30 June 2003.

- In April 2011, Supreme Court dismissed the appeal of Nigerian Petroleum Corporation and upheld the partial as ordered by the Court of Appeals. The time period of 11 years was taken to merely the setting aside

[83] Nigerian National Petroleum Corporation Ltd (N.N.P.C.) v. Clifco Nigeria Limited, (2011) L.P.E.L.R.-2022 (SC).

proceedings, with the enforcement proceedings still pending.

- In November 2015, the English Courts enforced the award on grounds of "catastrophic" delay caused in enforcement of award in Nigeria.

The enforcement track record of the country reflects that enforcement of arbitral award can take up to 10 years and 15 years.[84] The courts in the present matter could have ensured that case be concluded sooner. Although the trial court set aside the award, the time taken was less than a year. While the Court of Appeal and the Supreme Court took two years and eight years respectively, to decide the same. Nigeria being a host state, might see itself being in the line of fire and defending a case for not providing *"effective means"* of asserting rights.

b. The Vessel MV Naval Gent Case: 15-year delay

In *the Vessel MV Naval Gent (Vessel MV) v. Associated Commodity International Ltd. (ACIL),* [85] the parties referred their dispute to arbitration seated in London pursuant to the dispute settlement between the parties. The Federal High Court put a stay on the proceedings initiated by the ACIL in 2000 until the final award is rendered.[86] The London seated arbitral tribunal passed an award pertaining the dispute referred in February 2004 and the same was registered as the judgement of the Federal High Court. Subsequent to the final award, ACIL filed an application for restoration of the initial suit that was stayed, which was objected

[84] Babatunde Ajibade, *Applicable procedural law for recognition and enforcement of arbitral awards*, GLOBAL ARBITRATION REVIEW (Mar. 29, 2019, 08:04 AM), https://globalarbitrationreview.com/jurisdiction/1004839/nigeria; Ngo-Martins Okonmah, *An Analysis of the Effective Means Standard as an alternative to securing enforcement of arbitral awards in Nigeria*, 11(2) CONST. L. INST'L (2016).

[85] The Vessel M.V. Naval Gent (Vessel M.V.) v. Associated Commodity International Ltd., (2015) L.P.E.L.R.-25973 (C.A.).

[86] *Id.*

by Vessel MV. The High Court deciding on the issue, *"whether the courts retain the jurisdiction to decide an issue on which an arbitral award is rendered"* held that it had the jurisdiction. The same put up for reconsideration before the Court of Appeal.[87] In November 2015, the court upheld that the High Court lacked jurisdiction in trying an issue on which an international award has been registered. In furtherance of the same, the appellate court ordered enforcement of the award and held that no setting aside proceedings can be initiated against the same.

In this case the Court of Appeals decided in favour of reducing the delay by not allowing re-initiation of the setting aside proceeding. However, one cannot be blind sighted to the amount of delay that occurred. Even though the same is a progressive award, the fact that the matter dragged on for 15 years before its deposal, is adequate to constitute the breach of *"effective means"* standard. Fifteen years is a lengthy time for a business dispute to linger on.

But should all such delay be accounted to the judiciary? The delay in enforcement is not limited to the initial recognition and enforcement proceedings, the same extends even after the court may have decided in favour or against the enforcement of the award. Even though the judiciary takes such proactive measures to curtail any further delay, such actions do not constitute for anything in the "*delay formula*" propounded in the White Industries case.[88] The question as to whether they should be held liable for the same should be decided on facts, but undoubtedly the Whites Industries case has tilted the balance in the favour of the investors.

B. ENFORCEMENT PROCESS IN BANGLADESH: LACK OF INTENT

[87] *id*, ¶ 5; Ngo-Martins, *supra* note 84.
[88] *White Industries*, *supra* note 3.

The enforcement trend of foreign arbitral awards in a state is dependent on compound effect of several different factors.[89] The State's legal infrastructure, exposure to international commercial arbitration and grip of the judges relating to the practice of international arbitration form its core. Even though the New York Convention has received wide acceptance, South Asian states like Bangladesh and Pakistan are still grappling to ensure an effective enforcement atmosphere to the investors.[90] The same is for two reasons, as detailed below:

The current Bangladesh arbitration regime lacks the pro-active legislative push for enforcement. In absence of any special rules to enhance the mechanism concerning the execution of the foreign awards by the national courts, the pace of enforcement remains to be dismal.[91] The fall out of the same being that there is no time limit for disposition of the case. Unlike India that now includes a fast-track procedural regime,[92] Bangladesh is still to learn lessons from the White Industries episode. Contrary to the pro-active push, the enforcement regime requires the application of the antiquated general provisions of the CPC.[93] Such reliance

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[89] Lindsay Oldenski, *What Do the Data Say about the Relationship between Investor-State Dispute Settlement Provisions and FDI?*, P.I.I.E. (Mar. 29, 2019, 09:04 AM), https://piie.com/blogs/trade-investment-policy-watch/what-do-data-say-about-relationship-between-investor-state; Catherine Amirfar, *The Current State and Future of International Arbitration: Regional Perspectives*, INTERNATIONAL BAR ASSOCIATION (2015) (Apr. 29, 2019, 11:04 AM) https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Publications.aspx.

[90] Rakiba Nabi, *Enforcement of foreign arbitral awards concerning commercial disputes in Bangladesh: A brief overview*, 24(4) HUMANOMICS 274-284 (2008).

[91] Choi Jin, *International Commercial Arbitration in South Asia: A Comparative Study*, (2012) KOREA LEGISLATION RESEARCH INSTITUTE (Mar. 29, 2019, 08:04 AM), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2359220.

[92] The Arbitration and Conciliation (Amendment) Act, 2015. §§ 29A, 29B; SAMEER SATTAR, ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN BANGLADESH: THE LAW, ITS IMPLEMENTATION AND CHALLENGES, PRIVATE INTERNATIONAL LAW, SPRINGER, SINGAPORE (2017).

[93] Muhammad S Hossain, *Causes of Delay in Administration of Civil Justice: A Look for Way Out in Bangladesh Perspective*, 6 A.S.A. UNIVERSITY REVIEW 103, 107 (2012).

further worsens the matter since the enforcement proceedings of the foreign awards are carried on like any other domestic proceeding.

Such lack of specialised set of rules has resulted in precedents where the enforcement of award has been compromised due to extensive delay caused. Majority chunk of such delay is caused at the level of lower courts as they lack firm legislation. *Smith Co-Generation (BD) Pvt. Ltd.* v. *Power Department Bangladesh*,[94] marks the sorry state of enforcement mechanism concerning the foreign awards in Bangladesh, wherein the enforcement process took nearly 10 (ten) years. In 2000, the ICC arbitral tribunal gave three awards determining the liability of the Bangladesh Power Development, wherein it held the Board liable for breaches of contract. When *Smith Co-Generation* filed a suit for the execution of the said decree before the District Court, the PDB challenged the legality of the arbitral proceedings that culminated into the award. Owing to the snarling pace of the enforcement mechanism, the judiciary took ten years to uphold validity and enforceability of the award. The present-day Bangladeshi legal regime does not restrict parties opposing execution of an award from filing a parallel civil proceeding that are instituted with the sole aim of tactically delaying enforcement. The said concern about the potential misuse of the CPC in enforcement mechanism can be best expressed by what has been observed by a member of Bangladesh's judiciary.

"*In the execution stage, judgment-debtors take advantage of technicalities and adopt dilatory tactics and make application of tricks with intent to delay the execution. The entire judicial process in civil suit has been brought to disrepute by the manner and method of executing proceedings that protract over decades.*" [95]

[94] Smith Co-Generation (B.D.) Pvt. Ltd. v. Bangladesh Power Development Board, (2010)15 B.L.C. (H.C.D.) 704, ¶ 24.
[95] Hossain, *supra* note 93.

Such practice whereby the dilatory tactics in the enforcement regime are not curbed is a cause of great concern.[96]

VIII. Conclusion: Effective Means obligation – a "Ticking Time-Bomb"

In the aftermath of the stellar arbitral awards in White Industries and Chevron, the seemingly and rarely deployed use of "effective means" standard has found new teeth. Owing to the said easier-to-breach standard, the investors are now catered with a more viable and far-reaching claim than what the customary DOJ clauses had to offer. While reality behind the ordeal investors suffer due to unnerving delays and judicial conduct in developing states cannot be questioned, the advantage brought to the investors by the expansive interpretation of the said clause far out-weighs the balance of convenience. The expansive reading of the "effective means" in Chevron, contrary to the founding intention, has resulted in transformation of the clause into a treacherous trap for the developing states. Consequently, in reality, owing to their scanty resourced and overburdened judiciary, developing states like India, Bangladesh, Nigeria, Ecuador etc. are to face the bane and burden of such an interpretation. Regrettably, such a subsequent reading of an ill-defined and unsubstantiated standard in White Industries by importation further compounds the problem and now hangs like a victorian investors sword over the developing states. Therefore, such arbitral awards, justifiably or not, have resulted in further compounding of the problems of the second world countries, raising their concern for the whole international investment arbitration regime

[96] Bangladesh International Arbitration Centre, *Statistics of case disposal*, (Oct. 15, 2019, 01:04 PM), https://www.biac.org.bd/statistics/; *Summary Report on Court Services Situation Analysis*, (2013) (Oct. 15, 2019, 01:04 PM), https://www.undp.org/content/dam/bangladesh/docs/Projects/JUST/Summary_Report_on%20Court%20Services%20Situation%20Analysis.pdf.