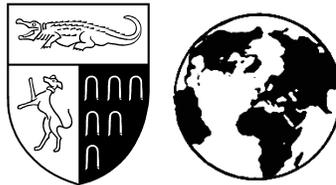


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## INDIAN EXECUTIVE'S PRO-ARBITRATION POWER MOVE SANCTIONED BY PARLIAMENT: TRANSNATIONAL IDEALS VERSUS NATIONAL REALITY

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On October 23, 2015, the President of India Pranab Mukherjee, with input from Prime Minister Narendra Modi, signed into law a new Arbitration Ordinance (“the Ordinance”),<sup>1</sup> which took effect immediately and was passed into law two months later as an Amending Act (“the Act”).<sup>2</sup> The Ordinance and its implementing Act are supposed to bring the existing 1996 India Arbitration Act further into line with international standards articulated by, among others, the World Bank and the International Bar Association.<sup>3</sup> The Act’s reforms include mandatory referral to arbitration, permission of interim measures in international cases,<sup>4</sup> a narrowed public policy review, and arbitral time limits

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1. See The Arbitration and Conciliation (Amendment) Ordinance, 2015, No. 9, Acts of Parliament, 2015 (India).

2. See The Arbitration and Conciliation (Amendment) Act, 2015, No. 3, Acts of Parliament, 2016 [hereinafter Act].

3. See *The Current State and Future of International Arbitration: Regional Perspectives*, Int’l Bar Ass’n Arb 40 Subcomm. (Aug. 2015), [http://res.cloudinary.com/lbresearch/image/upload/v1444234072/iba\\_survey\\_results\\_79115\\_177.pdf](http://res.cloudinary.com/lbresearch/image/upload/v1444234072/iba_survey_results_79115_177.pdf) (last visited Apr. 20, 2016) (identifying a growing standardization of international arbitration practice, as a result of greater convergence of institutional rules due to a “modern and pro-arbitration approach from the judiciary”); *Enforcing Contracts Methodology*, WORLD BANK GR., <http://www.doingbusiness.org/methodology/enforcing-contracts> (last visited Apr. 20, 2016); Promod Nair, *When Good Intentions Are Not Good Enough: The Arbitration Ordinance in India*, BAR & BENCH, (Nov. 4, 2015), <http://barandbench.com/when-good-intentions-are-not-good-enough-the-arbitration-ordinance-in-india> (last visited Apr. 20, 2016).

4. This brings the 1996 Act into line with United National Commission on International Trade Law (UNCITRAL) Model legislation, upon which it was originally based. See, e.g., the Indian

and fast-track procedures.<sup>5</sup> These changes to India's arbitration law, proponents hope, will have positive development impacts such as an increase in business activity and foreign investment. At the same time, however, the changes could limit Indian courts' ability to effectively supervise that activity and ensure sustainable development outcomes and business' conformity with Indian law.

The prevailing narrative on arbitration in India assumes that the same transnational, pro-arbitration ideals ought to be rapidly implemented across jurisdictions. However, when arbitral liberalization comes too fast and when nations rapidly cede their supervisory authority, there are two possible negative effects. First, even as gross domestic product (GDP) nominally rises from increased direct investment, the environmental soundness and social utility of economic development might be endangered. Second, reforms labeled by proponents as "pro-arbitration" might not in fact achieve "progress" on the international standards alleged; this focus may distract attention from the extent to which the reforms are part of national politics.

Taking the second point first: international norm approximation, used as a framework for assessing arbitral reform, fails to address repercussions for longstanding political practices of patronage. Further, it tunes out national particulars and the entrenched positions from which stakeholders traditionally operate. In India, for example, patronage democracy persists. Although Indian courts are notoriously stopped up, it is not clear that resort to arbitration—a parallel legal system with arguably less transparency and public accountability—could fully or even partially bypass this reality, let alone improve it. Nor is it self-evident that a tradeoff of transparency and participation for efficiency is justified. These shifts merit more precise rationales and defenses.

Consider, for example, the historic role of the Indian judiciary in governing—and even regulating—the country. It is common and acceptable for Indian courts to intervene in matters that, in the United States, are understood as the prerogatives of the legislative or executive branches. The Supreme Court of India routinely hears political controversies of the day and arguably receives more domestic media attention than either the Prime Minister or Parliament.<sup>6</sup> As one author notes, "With its multitude of benches sitting on a daily basis, the [Supreme] Court acts almost as a secondary government, issuing orders in cases that affect almost every aspect of Indian public life."<sup>7</sup>

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Supreme Court's interpretation of the 1996 Act: "Thus on a logical and schematic construction of the [1996 Act], the Indian courts do not have the power to grant interim measures when the seat of arbitration is outside India." *Bharat Aluminium Co v. Kaiser Aluminium Technical Services* (2012) 9 SCC 552 para ¶ 161; Cf. 1985 UNICTRAL Model Law on Int'l Commercial Arbitration arts. 9, 17 (empowering tribunal to issue provisional and interim measures), [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf) (last visited Apr. 20, 2016).

5. The Arbitration and Conciliation (Amendment) Bill, 2015, PRS Legislative Research, <http://www.prsindia.org/billtrack/the-arbitration-and-conciliation-amendment-bill-2015-4078> (summarizing key changes introduced by the Act).

6. Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts* 105-06, 2012 <http://www.cprindia.org/sites/default/files/articles/SSRN-id2061061.pdf> (last visited Apr. 20, 2016).

7. For example, the Court ordered that taxis and buses switch to natural gas, regulated preservation of public forests, and implemented specific guidelines for school buses. Nicholas Robinson,

In a system like India's that, at times, is subject to forms of political patronage,<sup>8</sup> a reduction of judicial intervention amounts to the loss of a significant legal "voice" for those without political clout or influence. This is the case, because politicians can find ample opportunities to control key industries for political and personal gain, and business groups still compete for preferential treatment from politicians. Government officials and businessmen have the aligned interests and power necessary to sell minerals and natural resources extracted from land they did not buy in the first place.<sup>9</sup> The effect of special economic zones (SEZ) and the new economic regime in India has been the displacement of at least 21.3 million people.<sup>10</sup> The legal "shift" embodied by the Ordinance and its implementing Act helps guarantee that private actors will be able to access arbitration, which could in turn exacerbate these negative development trends by putting commercial and investment dealings beyond the reach of Indian courts, and by extension, the Indian public.

Indian courts have an expanded mandate that makes them courts of "good governance," meaning that the Supreme Court in particular "sits in judgment over the rest of the Indian government."<sup>11</sup> Altering the responsibilities of the judiciary in investment and commercial cases therefore results in a different balance and amounts to a more dramatic reordering than it would in, say, the United States or France.

Significantly, the Act attempts to narrow the "public policy" justification that makes it possible for an Indian court to "set aside" or nullify an arbitration award that conflicts with India's public policy.<sup>12</sup> A decrease of public

*Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1, 21 (2009).

8. See S. Saraswathi, *Patronage Politics: India's Pressure Group Version*, INFA PUBLICATIONS, Apr. 9, 2014, [http://www.infa.in/index.php?option=com\\_content&task=view&id=2890&Itemid=40](http://www.infa.in/index.php?option=com_content&task=view&id=2890&Itemid=40); see generally *Spoils System*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/560744/spoils-system>.

9. Some land is simply purchased for a pittance. See Ranjana Diggikar, *Land Measurement for Second Phase of Delhi-Mumbai Industrial Corridor Project Ends*, TIMES OF INDIA, Feb. 1, 2014, <http://timesofindia.indiatimes.com/city/aurangabad/Land-measurement-for-second-phase-of-Delhi-Mumbai-Industrial-Corridor-project-ends/articleshow/29683649.cms>.

10. Some estimate the number of displaced persons is as high as 800 million. The figure quoted above doesn't include the number displaced by SEZs, which the government has never calculated.

It is worth noting that, while a fact sheet on SEZs on the Government of India website, give [sic] details of the number of approved and proposed SEZs, their land requirements as well as export and employment potential, there is no mention of the number of people to be displaced by these zones, leave alone how the government intends to attend the issues of displacement. The increasing role of the state as the promoter of corporate-led economic growth is underlined by the acquisition of land for SEZs and the transfer of ownership of this land to 'developers.' Displacement thus gets pushed to a private arena with compensation, potentially negotiated by the market and without the state's responsibility for rehabilitation.

*Displacement and Rehabilitation of People Due to Development Projects*, LOK SABHA SECRETARIAT, (Dec. 2013), <http://164.100.47.134/intranet/DisplacementandRehabilitation.pdf>

11. Nicholas Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1, 1 (2009).

12. The new Act limits setting aside for "patent illegality" to domestic arbitrations. See art. 18. This language appears to narrow the public policy doctrine as previously interpreted by the Indian Supreme Court, which had included other grounds for setting aside—for example being, "contrary to the interests of India," "shock[ing] the conscious of the court," or being "arbitrary and capricious" and grounds that were in the 1996 Act, for example nullification based on improper admissions. See The Arbitration and Conciliation Act, 1996 No. 26, Acts of Parliament, 1996, arts. 34, 75, 81. However, the

supervisory power would not be automatically a salutary deregulation; neither would it amount to an idle change in parts of India where the law might not sufficiently protect front-end public interests in health, safety, land, or other fundamental rights. As one parliamentarian objected, the Act further disempowers local civil courts in cases of international arbitration since under the new Act only the relevant high courts have jurisdiction in international cases.<sup>13</sup> This reduction of judicial supervision and concurrent centralization of courts' existing supervisory power in international cases creates a democratic deficit. Local subjectivities and interests are even less likely to be taken into account under the new law.<sup>14</sup>

In the future, the Indian Parliament should not automatically accept the teleological assumption of arbitral "evolution" nor should it prioritize transnational norm targets designed by others. The Parliament could have formed, for example, an expert committee to evaluate the likely development and human rights impacts of proposed reforms. While it is true that pro-arbitration changes may be good for improving external perceptions of investor-friendliness, they are not always economically wise evolutions *toward* a neutral transnational ideal. Rather, changes in a nation's arbitral law should be understood primarily as a *shift in and rebalancing of* national interests, which is always highly political and therefore contestable. The actual effect and desirability of such rebalancing will depend on India's civic, economic and social history, and will necessarily promote some interests at the expense of others. Yet, the norm approximation framework and comparative analysis it encourages actually obscure the national political dynamics behind particular arbitral reforms.

For example, the Minister of Justice, Sadananda Gowda, introduced the implementing Act to the lower house of Parliament stating publicly that it would "usher India in the direction of becoming a hub of international arbitration"<sup>15</sup> and would "improve India's ranking in Ease of doing business in respect of enforcing contracts."<sup>16</sup> Mr. Gowda was apparently referring to a World Bank indicator for measuring business regulations. A look at the methodology for this measure shows that an "Alternative Dispute Resolution Index" is part of the "Quality of Judicial Process" measure, which is in turn

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narrowing is arguably rather ineffective, since the possible grounds for setting aside are still quite sweeping and leave room for interpretation.

13. Saugata Roy objected that the "Bill creates two types of courts in States; one is for the States which have high courts with original jurisdiction and one for the States [sic] which have no high courts with original jurisdiction [and that] [t]his original jurisdiction is a British colonial legacy and is an anachronism in modern India." *Introduction of the Arbitration and Conciliation (Amendment) Bill, 2015*, Sixteenth Lok Sabha (Lower House of Parliament in India) Session 6, (2015). On the other hand, perhaps high courts are less susceptible to political influence.

14. For an example of how tensions between local perspectives and international investment objectives may be embodied in local court /federal court power struggles, but in a different country context, see Megan J. Ballard, *The Clash Between Local Courts and Global Economics: The Politics of Judicial Reform in Brazil*, 17 *BERKELEY J. INT'L L.* 230, 234 (1999) (describing the Brazilian executive's judicial reform initiatives, which included a revamped arbitration statute emphasizing, like India's amending Act, a reduction in court delays).

15. Sadananda Gowda, @DVSBJP, TWITTER (16 Dec. 2015, 6:05 AM EST) <http://twitter.com/DVSBJP/status/677127307631308800> (last visited Apr. 20, 2016).

16. Sadananda Gowda, @DVSBJP, TWITTER (16 Dec. 2015, 6:06 AM EST) <http://twitter.com/DVSBJP/status/677127786264334337> (last visited Apr. 20, 2016).

part of the World Bank Enforcing Contracts methodology.<sup>17</sup>

Assuming that international norm approximation was truly the Minister's goal, would the Act's changes in fact help India make progress on the Enforcing Contracts measure? Most likely not. The only indicator that the new Act could effect is "Whether valid arbitration clauses or agreements are enforced by local courts in more than 50% of cases. . . A score of 0.5 is assigned if yes; 0 if no."<sup>18</sup> However when the Act was passed, India had already received a "yes" in this area, because arbitral awards, both domestic and international, are already upheld more than half of the times they are challenged.<sup>19</sup>

In fact, to make progress on this indicator, India would have to make certain commercial disputes that are currently non-arbitrable subject to arbitration,<sup>20</sup> and it would have to provide financial incentives for parties to attempt mediation or conciliation (*e.g.* a refund of court fees or tax credits).<sup>21</sup> The Act made no progress on either front, and therefore did not accomplish the Justice Minister's stated objective of improving India's standing according to this measure. What did it achieve, then?

First, the Act, which was opposed by Indian jurists, circumvented the more gradual path of pro-arbitration reforms provided by the Indian judiciary and ignored several recommendations of an Arbitration Law Commission.<sup>22</sup> In May 2015, President Mukherjee's Attorney General openly challenged, in a written opinion, the arbitration "Law Commission" panel of prominent retired jurists. The Attorney General, apparently representing the Executive's view, deemed the pre-Ordinance 1996 Indian Arbitration Act (which was itself an attempt at international norm approximation) a "complete failure."<sup>23</sup> The chair of the Law Commission Justice Shah responded with a "strongly-worded" letter to Prime Minister Modi explaining reasons why his Ordinance amending the

17. *Enforcing Contracts Methodology*, WORLD BANK GROUP, <http://www.doingbusiness.org/methodology/enforcing-contracts>.

18. *Id.* The alternative dispute resolution index has six components, only one of which seems likely to be impacted by the new Act.

19. Presumably the effects of the New Ordinance could not have been observed after only two months. See *Ease of Doing Business in India*, WORLD BANK GROUP, <http://www.doingbusiness.org/data/exploreeconomies/india/#enforcing-contracts> (last visited Apr. 20, 2016); see also Sumeet Kachwaha, *Enforcement of Arbitration Awards in India*, ASIAN INT'L ARB. J. 64, 73-81 (demonstrating that 78.41% of domestic awards challenged before High Courts and 50% of domestic awards challenged before the Supreme Courts were upheld and that 88% of foreign awards challenged were upheld, from 1996 to September 2007).

20. For example mortgage suits, insolvency matters, testamentary matters, and "winding up" matters, see *Booz Allen and Hamilton Inc. v SBI Home Finance Ltd. and Others*, (2011) 5 SCC 532. Employment contracts are, however, arbitrable.

21. These two areas for legal reform are the only parts of the arbitration and conciliation index that India could still make progress on. See <http://www.doingbusiness.org/data/exploreeconomies/india/#enforcing-contracts> (last visited Apr. 20, 2016).

22. The Law Commission of India, with its chair former Delhi High Court Chief Justice AP Shah, had constituted an expert committee to work on the 246th Report on "Amendment to the Arbitration and Conciliation Act, 1996" which was recently submitted to the Government of India. See Ashutosh Ray, *Law Commission's Report to Revamp the Indian Arbitration Experience*, KLUWER ARB. BLOG (Aug. 23, 2014).

23. Maneesh Chhibber, *Law Panel, AG Differ on Arbitration Act, Govt Set to Revisit Its Clauses*, THE INDIAN EXPRESS, May 18, 2015, <http://indianexpress.com/article/india/india-others/law-panel-ag-differ-on-arbitration-act-govt-set-to-revisit-its-clauses/>.

1996 Act was “unacceptable.”<sup>24</sup> Despite this opposition, the Ordinance was immediately passed by Parliament.

This conflict between India’s executive and judicial branches may have taken place outside the courts and in the form of exchanged letters, but it is a fascinating example of the political economy of arbitration in action. The conflict resulted, because former Indian judges serve on arbitration tribunals and many of the same lawyers litigate these arbitral cases, leading in many ways to a reputation of pitfalls of the former arbitration system in the eyes of the Executive. The Ordinance threatened to disrupt the prior political bargain most directly by reducing arbitrator honoraria and imposing a twelve-month arbitration time limit.<sup>25</sup>

Some judges on the Law Commission may also have perceived the Ordinance as an attempt to push through the Modi government’s economic program, which aims to increase investment in India at the cost of Indian judicial authority to set aside awards that conflict with public policy objectives, broadly construed. Under this view, private arbitral authority would conflict with state authority as protected and defined by publicly accountable judges who oversee transparent and mediatized cases. A relentless focus on the extent of international norm approximation tends to overlook such dynamics.

Inter-branch political disputes should be extremely concerning for anyone worried about the legitimacy and integrity of the international arbitral order, whether one is statist or one’s perspective is transnationalist. As long as the Indian government presents a unified view of the arbitral system’s common source of legitimacy, even if its own view of the system conflicts with the transnational liberal ideal advocated by elite practitioners, their idiosyncratic views of arbitration will remain an integral part of that “multi-local” system. However, if the common source of arbitral normativity is destabilized because of political and social conflict, democratic deficit, or other problems at the heart of the state, then the legitimacy of the arbitral order becomes much more tenuous.<sup>26</sup> The global system of arbitration derives its coherence and legitimacy from the political communities that underlie it, and friction at the state level—between executive and judicial branches for example—can weaken the legitimacy of this important global ordering.

When national arbitration law is reformed, therefore, it is necessary to ask which—or *whose*—political interests are served. Is efficiency increased? If so, for whom, and for which programs? Does increased arbitral autonomy affect Indian politics and power balances? Mapping the flows of state and transnational power is highly complex, and the Indian Parliament could have

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24. *Id.*

25. The Act gives High Courts the power to frame rules for payment of tribunal members and provides a fee schedule. In international commercial cases or cases where parties agree to a different fee schedule (set by an arbitral institution, not ad hoc), these rules don’t apply. *See Act supra* note 2 at 6(ix)(13)-(14). The Law Commission had suggested a fee schedule, but *only* in domestic ad hoc arbitrations. The Act also imposes tight time limitations that the Law Commission never contemplated. The Attorney General had noted that arbitration has become “extremely expensive” adding that “costs in some arbitrations with three retired judges of the high court or Supreme Court often run into crores of rupees.” Chhibber, *supra* note 23.

26. The threat to which I refer comes from the broader public’s perception of illegitimacy and to the well-functioning of the system, not from any technical fault in the State’s “consent” to arbitration.

used this opportunity to engage in a serious debate about the pros and cons of the Ordinance. However, parliamentary debate was, at least according to the available record, indistinct, and the Ordinance was passed very quickly, just twenty days after it was introduced to the lower house.<sup>27</sup>

Two democratically elected branches of Government decided it is in India's interest to make the Ordinance law, altering the scope of power of the third branch. It seems that once put into effect, the Act will make Indian courts' role in arbitration that of *administrator* instead of *supervisor* (e.g., by imposing new procedures and authorizations, permitting interim measures, involving the court in arbitrator appointments, and requiring court approval for arbitral time extensions). The Act simultaneously fails to achieve its proponents' stated goals of norm approximation and puts in place new restrictions on the courts' ability to regulate foreign awards for compliance with Indian law, broadly construed.

The Indian government might partially mitigate risks to sustainable development, to political stability, and to arbitral legitimacy by taking preventive measures in the specialized area of international investment arbitration.<sup>28</sup> For example, India's negotiators could insist on provisions in future bilateral agreements requiring arbitral tribunals to allow third party participation and disclosure of certain arbitral documents to the public<sup>29</sup> by arguing that this level of public scrutiny is a legitimate expectation of Indians and a part of India's governance traditions. Second, in future investment agreements, India could make the *permanent and sustainable* character of international investment contributions a necessary precondition for subsequent investment protection. India might also insist on keeping its current requirement for exhaustion of local remedies (using for example newly established Commercial Courts and Commercial Divisions in High Courts), to prevent unnecessary internationalization of breach-of-contract claims. India's nationalistic ideals and colonial history understandably spark opposition to transnationalization of dispute resolution, and these specially designated commercial courts ought to be promoted (by outside investors as well as those inside India) as an alternative source of dispute resolution legitimacy.

Such opportunities are now available, especially in talks where the negotiating partner regularly protects its own nationals by including similar provisions. For example, India just reopened investment talks with Canada,<sup>30</sup> a

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27. *The Arbitration and Conciliation (Amendment) Bill 2015*, PRS LEGISLATIVE RESEARCH (2015), <http://www.prsindia.org/billtrack/the-arbitration-and-conciliation-amendment-bill-2015-4078/>.

28. Although Parliament has no formal role in approving treaties, Parliamentary Standing Committees have historically been involved in consultations where implementing legislation is required. The Judiciary has no role in treaty making, until and unless a question arises about whether the treaty violates any constitutional provisions. See A Consultation Paper on Treaty-Making Power Under Our Constitution, Nat'l Comm'n to Review the Working of the Constitution, ¶ 51 (2001), <http://lawmin.nic.in/ncrwc/finalreport/v2b2-3/htm>.

29. India released a new Model Bilateral Investment Treaty (BIT) in January, but this BIT did not contain provisions permitting *amicus curiae* submissions or other forms of third-party participation to safeguard the public interest. This does not mean such provisions could not be added in actual treaties, however.

30. Peter Mazereeuw, *Indian Model Could Be Trouble for Canada*, Embassy (Feb. 24, 2016), <http://www.embassynews.ca/2016/02/24/Indian-model-could-be-trouble-for-Canada/48283> (last visited Apr. 20, 2016).

country that has explicitly incorporated sustainable development goals into its own model agreements.<sup>31</sup> India has an opportunity to satisfy investors, as well as its national interest in upholding its traditions of public participation and transparency, by developing its domestic commercial courts. By focusing on these values India stands ready to create a counterexample to the widely distrusted judiciary systems of developing nations, secure its national interest in increased investment, and simultaneously protect its right to regulate.

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31. Specifically, Canada's 2004 Model Foreign Investment Promotion and Protection Agreement includes such goals. See, Marie-Claire Cordonier Segger & Avidan Kent, *Promoting Sustainable Investment through International Law*, in SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 771, 785 (Marie-Claire Cordonier Segger, et al. eds., 2011) 785 (2011).