

RIDING THE WAVE: FAIRNESS FOR FOREIGN INVESTORS IN INDIA'S IMPENDING INSOLVENCY TSUNAMI

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ABSTRACT

Reminiscent of the warning signs of a tsunami, bankruptcy and insolvency courts across the globe have been eerily calm despite unprecedented conditions during the COVID-19 pandemic. The full extent of the pandemic's effect, including a tidal wave of wide-spread corporate and financial sector harm and wide-spread economic distress, remains to be seen. Much like victims of natural disasters, unsuspecting and increasingly delayed courts will find themselves totally overwhelmed. The inconvenience felt by the courts is distinct, however, from potential harm to financial investors. Although investors could also be harmed by these judicial conditions, they knowingly assumed certain financial risk when they invested. As global economies continue to react to the aftermath of the pandemic, a tsunami of bankruptcy and insolvency cases is also approaching. This, too, sets the stage for potential mass harm if courts become plagued by delay.

Across the globe, governments have issued controversial initial responses to this impending tsunami of cases. For example, from March 2020 to March 2021, the Indian government suspended new corporate insolvency resolution proceedings under the country's recently reformed bankruptcy regime. It is worth noting that such judicial delay can impose serious risks on insolvent entities and their stakeholders. Asset, going concern, and recovery values may rapidly and significantly decline while debtors and creditors await resolution, undermining opportunities to emerge from the process with something of worth intact. Of course, the situation is ripe to harm American domestic companies and creditors and U.S. investors in foreign

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markets are at substantial risk. Specifically, U.S. investors in companies subject to India's suspension of new corporate insolvency resolution proceedings find themselves particularly at risk. This suspension of claims subjected investors to a year-long delay, in which a judicially-blessed resolution was largely unavailable. Making matters worse, their claims could be further delayed by the oncoming swell of insolvency cases or prohibited altogether.

This Note focuses on what recourse foreign investors in Indian companies may have against the controversial governmental measure under bilateral investment treaties. Primarily, it explores how foreign investors could challenge the relevant Ordinance by alleging the law treated them unfairly or inequitably as compared to domestic investors and creditors. A meritorious claim might demonstrate severely diminished recovery value while pointing to unique limitations on foreign investors' ability to propose reorganization plans and out-of-court resolutions. However, notwithstanding the legitimacy of investors' claims and demonstrable impairment of recovery value, the measure will likely be upheld as treating foreign and domestic investors fairly and equitably, especially in light of the government's purposes for the suspension: to protect the economic health of the country, shield enterprises of all sizes from unnecessary liquidation, and preserve jobs provided by businesses of all varieties.

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INTRODUCTION

Before a tsunami, the shoreline recedes as an eerie calm settles the shore. But when a wave rises forming a destructive wall, it brings mass demolition. Reminiscent of the warning signs of a tsunami, U.S. and global bankruptcy courts have been eerily calm; despite unprecedented economic conditions during the COVID-19 pandemic, the number of companies seeking an insolvency resolution was curiously low.¹ But tranquility in the courts is a temporary façade: the full extent of the pandemic's effect, including severe financial distress in the economic and corporate sectors, remains to be seen. Experts predict, like with a tsunami, bankruptcy systems will face a wave of insolvency filings after this period of repose—and quickly.²

If the systems facilitating insolvency resolutions, such as courts and alternative dispute tribunals, fail to adequately prepare for the pending wave of cases, they will become the flood's victims, overwhelmed and unable to maintain the efficiency needed to make multi-party insolvency proceedings worthwhile. Judicial delays impose serious risks on insolvent entities and their stakeholders. While debtors and creditors await a

1. In September 2020, bankruptcy filings were 28 percent lower than they were in the same period in 2019. Jialan Wang et al., *Bankruptcy and the COVID-19 Crisis* 6, 11 (Harvard Bus. Sch., Working Paper No. 21-041, 2020), https://www.hbs.edu/ris/Publication%20Files/21-041_a9e75f26-6e50-4eb7-84d8-89da3614a6f9.pdf [https://perma.cc/PF2Y-5SCJ]. The lower number of filings can be explained by the low cost of borrowing in the United States, stemming from historically low interest rates. See Corinne Ball et al., *Recent Trends in Corporate Debt and Reorganizations: Laying the Groundwork for Future Large Chapter 11 Cases or Just More Runway?*, JONES DAY WHITE PAPER 1, 7 (2022) <https://www.jonesday.com/en/insights/2022/01/recent-trends-in-corporate-debt-and-reorganizations-laying-the-groundwork-for-future-large-chapter-11-cases-or-just-more> [https://perma.cc/K9AT-7742]. Filings have been further suppressed by court closings in response to social distancing mandates. As social distancing orders lifted, bankruptcy filings began to reach more predictable rates. See *id.* at 11, 12.

2. See Adam J. Levitin, *Op-ed: Reform Our Bankruptcy Laws Before a Tsunami of Covid Debt Comes Due*, CNBC (Jan. 11, 2021), www.cnbc.com/2021/01/11/op-ed-reform-bankruptcy-laws-before-covid-debt-comes-due.html [https://perma.cc/manage/create?folder=4038-146836-155776-157672]. “This trend is particularly striking for large businesses. Filings with greater than \$50 million in assets have increased by nearly 200 percent year over year.” Wang et al., *supra* note 1, at 6. See also Colbert White, *The Bankruptcy Tsunami Ahead*, FIS (Sept. 14, 2020), www.fisglobal.com/en/insights/what-we-know/2020/september/the-bankruptcy-tsunami-ahead [https://perma.cc/W4BC-H2UP].

resolution, asset, going concern, and recovery values may rapidly and significantly depreciate, undermining investors' chance of emerging from the process with something of worth intact.³ The calamity will reach domestic stakeholders, foreign investors, adjudicating authorities, and all parties impacted by the poor economic condition. However, unlike the victims of a tsunami, investors consciously choose to assume financial risk. As such, courts and tribunals may consider the impending harm to investors, a result of crashing economic conditions globally, as a difficult wave but one that investors must ride out and hope to survive.

This Note addresses the impending insolvency tsunami in India (the "State"), focusing on what recourse foreign investors in Indian companies may have against controversial governmental measures. It begins with the notable changes made to the bankruptcy legal regime in India two years after the onset of the COVID-19 pandemic. Such measures include the year-long suspension of new corporate insolvency resolution proceedings (CIRP) from March 2020 to March 2021.⁴ The changes to the insolvency resolution framework under this unprecedented measure (the "CIRP Suspension" or the "Suspension") may give rise to claims by foreign investors challenging India's CIRP Suspension under the Insolvency and Bankruptcy Code of 2016 (the "2016 IBC," or "IBC").

The pandemic worsened the historically overburdened and backlogged Indian courts' ability to handle insolvency cases.⁵ A near-term solution to pandemic-related complications in bankruptcy cases may remain unlikely. There are, however, steps that foreign investors can take to help ensure the pending insolvency cases are addressed in a timely manner. One such measure includes challenging the Suspension. Foreign investors may bring such a challenge by alleging the Suspension arbitrarily delayed the necessary insolvency resolution, with the

3. See Saakshi Bangar, *Legal Perspective on Insolvency and Bankruptcy Laws in India*, 45 VIKALPA 119, 119 (2020).

4. The Insolvency and Bankruptcy Code (Second Amendment) Bill, Bill No. XXXI of 2020, § 10A (June 5, 2020). See The Insolvency and Bankruptcy Code, § 10A (2016) ("Notwithstanding anything contained in sections 7, 9, and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020").

5. BERTELSMANN STIFTUNG'S TRANSFORMATION INDEX, BTI 2022 COUNTRY REPORT – INDIA 12 (2022).

detrimental cascading effect of diminishing their value on recovery, both during and after the CIRP Suspension.⁶

Foreign investors seeking compensation for this type of harm may find recourse under applicable bilateral investment treaties (BITs), which, in recent years, have been interpreted in an investor-friendly manner across the globe.⁷ Foreign investors may be even more likely to challenge the State measure now in light of delays persisting beyond the CIRP Suspension and the prohibition on their ability to propose a scheme of arrangement. After analyzing the current conditions in India, legal standards that allow foreign investors to challenge host-state actions, and strength of such claims, this Note concludes that challenges to India's CIRP Suspension, which is strongly justified by public necessity, will likely fail for two reasons: (1) the measure applies equally to domestic and foreign investors; and (2) India's court system has long been overburdened.

Part I of this Note discusses the reforms made to India's bankruptcy framework in 2016, which improved legal and business conditions in the State. It further predicts that, despite the previous improvements in efficiency, India's court system will be overburdened by the pending insolvency tsunami created by the CIRP Suspension. Part I concludes by discussing the rights of foreign investors in Indian companies, including under applicable BITs. Part II describes the relevant legal standards established by investor-state dispute settlements (ISDS) jurisprudence, focusing particularly on the fair and equitable treatment (FET) claims a foreign investor may bring.⁸ While there are numerous ways for a foreign investor to sufficiently allege the FET clause of an applicable BIT was breached, Part II describes and analyzes three possible arguments supporting such a claim: (A) denial of justice to investors facing extreme judicial delay; (B) disturbance of the legal certainty provided under a

6. Prabhash Ranjan & Pushkar Anand, *The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction*, 38 NW. J. INT'L L. & BUS. 1, 29-30 (2017) (discussing international law's manifest arbitrariness standard).

7. PRABHASH RANJAN, INDIA AND BILATERAL INVESTMENT TREATIES: REFUSAL, ACCEPTANCE, BACKLASH 11-12 (2019).

8. Given the increasing frequency and broad interpretation of FET claims by ISDS tribunals, this paper selectively reports on the feasibility of FET claims and does not address the merits of claims under other common BITs clauses including most favored nation, direct and indirect expropriation, and guarantees of effective means of asserting rights. See NISHITH DESAI ASS'N, BILATERAL INVESTMENT TREATY ARBITRATION AND INDIA 25 (2018).

previous legal regime; and (C) disruption of a foreign investor's legitimate expectations at the time of their investment.⁹ Part III of this Note analyzes the merits of such arguments while recognizing the strong public policy underpinnings of the Suspension, and finds several weaknesses inherent in a foreign investor's potential arguments. The conclusion discusses that a foreign investor is unlikely to prevail because the harm it faces is not weighty enough to overcome strong arguments by the State, namely that Indian courts have been historically overburdened, the Suspension treats foreign and domestic investors equally, and the measure was justified by a strong and emergent public purpose.

I. BACKGROUND

Bankruptcy professionals and legal scholars predict an inundation of bankruptcy and insolvency filings as a result of the COVID-19 pandemic.¹⁰ Indeed, in September 2020, the United States saw “business Chapter 11’s [] increase[] by 35 percent year-over-year . . . [A]nd the filings with greater than \$50 million in assets [] increase[] by nearly 200 percent.”¹¹ The U.S. bankruptcy courts may soon be overwhelmed by a wave of new filings, which would lengthen the time it takes to resolve each case and result in the corresponding destruction of estate value and, therefore, recovery value.¹²

The oncoming bankruptcy tsunami is not restricted to the United States:¹³ Within the first month of the pandemic's onset, India saw an uptick in bankruptcy filings that threatened to apply back-breaking

9. See *infra* note 172 and accompanying text.

10. William Lobel, *A Wave of Bankruptcies and Foreclosures Appears to be Building*, KIPLINGER (Feb. 12, 2022), <https://www.kiplinger.com/personal-finance/credit-debt/debt/bankruptcy/604198/a-wave-of-bankruptcies-and-foreclosures-appears> [<https://perma.cc/FR8G-SDH7>].

11. See Wang et al., *supra* note 1, at 3.

12. See Dina Gerdeman, *Coronavirus Could Create a 'Bankruptcy Pandemic'*, WORKING KNOWLEDGE (May 28, 2020), <https://hbswk.hbs.edu/item/coronavirus-could-create-a-bankruptcy-pandemic> [<https://perma.cc/ZH63-B2CY>].

13. See Homi Kharas, *What To Do About the Coming Debt Crisis in Developing Countries*, BROOKINGS (Apr. 13, 2020), <https://www.brookings.edu/blog/future-development/2020/04/13/what-to-do-about-the-coming-debt-crisis-in-developing-countries/> [<https://perma.cc/UULL2-RXKQ>]; Russell Lynch, *Europe Faces Bankruptcy 'Tsunami'*, TELEGRAPH (Apr. 28, 2021), <https://www.msn.com/en-gb/money/other/europe-faces-bankruptcy-tsunami/ar-BB1g9Cjc?li=AAwnS0s> [<https://perma.cc/29V3-6MH4>].

pressure to its already-stressed judicial infrastructure.¹⁴ This caused delays two-fold: while CIRP were slow at the initiation, delays continued to plague cases into litigation.¹⁵ With courts operating remotely and at decreased capacity, resolving these delays would not be easy. So, the State suspended new CIRP filings to prevent additional backlog from damaging the developing legal framework.¹⁶ However, the judicial system in India has historically been fraught with inefficiency, posing serious and systematic barriers to timely legal resolutions; this is especially true for already unwieldy insolvency proceedings.¹⁷

In recent years, India has undertaken significant efforts to improve its business and legal conditions, including the major development of the 2016 IBC.¹⁸ Many of these endeavors have been successful, but some legal frameworks including one for cross-border insolvency, have yet to be adopted.¹⁹

A. INDIA'S PRE- AND POST-PANDEMIC BANKRUPTCY FRAMEWORK

1. 2016 and Earlier

In 2016, India enacted the IBC to overhaul the post-colonial regime: a patchwork of “three major laws, two ancillary laws, and one special provision.”²⁰ This reform was intended to improve foreign investment and economic development in India, with the stated goal of “break[ing] into the top fifty of the World Bank rankings.”²¹

14. MINISTRY CORP. AFFS. GOV'T INDIA, REPORT OF THE INSOLVENCY LAW COMMITTEE 21 (2020).

15. *Id.*

16. See The Insolvency and Bankruptcy Code, 2016, § 10A (suspending India's Insolvency and Bankruptcy Code Sections 7, 9, and 10), promulgated by The Insolvency and Bankruptcy Code (Second Amendment) Bill, 2020, Bill No. XXXI of 2020, § 10A (June 5, 2020), which enacted the CIRP Suspension, effective March 25, 2020.

17. REPORT OF THE INSOLVENCY LAW COMMITTEE *supra* note 14, at 24.

18. Jason D. Woodard, *Racing to Resolution: A Preliminary Study of India's New Bankruptcy Code*, 52 GEO. WASH. INT'L L. REV. 393, 396, 421, 424 (2020).

19. Gabriela Roca-Fernandez, Comment, *Cross-Border Insolvency in India: A Resistance to Change*, 29 TULANE J. INT'L & COMPAR. L. 99, 111-15 (2021).

20. BANKR. L. REFORMS COMM., THE REPORT OF THE BANKRUPTCY LAW REFORMS COMMITTEE VOLUME I: RATIONALE AND DESIGN 24 (2015). The State similarly overhauled the Companies Act in 2013. *Id.* at 7.

21. Woodard, *supra* note 18, at 393, 396, 421, 424.

Before the 2016 IBC was passed, insolvency proceedings were governed piecemeal by several laws.²² The fragmented regime was complicated, inconsistent, disjointed, and at times required up to 11 years before an insolvency case reached a resolution.²³ Before the 2016 reform, the regime was plagued by “poor enforcement mechanism[s], slow court process[es] and staggered business rescue measures.”²⁴

The IBC was developed to “maximi[ze] value of assets of [insolvent entities], to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders.”²⁵ It became, “*the* comprehensive insolvency code in India, and it expressly supersed[ed] all inconsistent prior laws.”²⁶ The following figure demonstrates the transformative impact of the 2016 IBC reform on recovery of insolvent banks.

22. Before 2016, the laws governing insolvency proceedings in India included: the Recovery of Debt Due to Banks and Financial Institutions Act of 1993, the Sick Industrial Companies Act of 1985, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act of 2002, the Companies Act of 1956, and other special provisions. All acts were effective simultaneously, including the oldest applicable act, issued 60 years before the IBC took effect. See BANKR. L. REFORMS COMM., *supra* note 20, at 25.

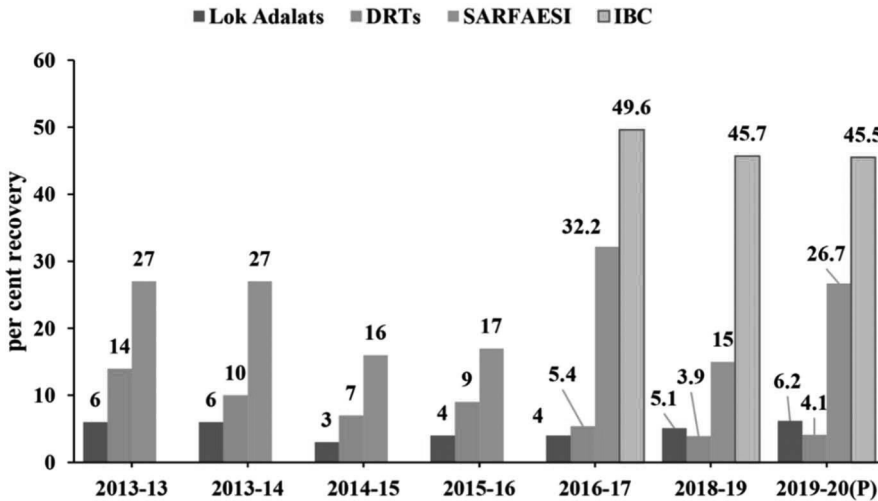
23. See Farok J. Contractor et al., *How Do Country Regulations and Business Environment Impact Foreign Direct Investment (FDI) Inflows?*, 29 INT’L BUS. REV. 1, 5 (2020) (analyzing data collected from 2004).

24. NEETI SHIKHA & URVASHI SHAHI, IBBI RESEARCH INITIATIVE: ASSESSMENT OF CORPORATE INSOLVENCY AND RESOLUTION TIMELINE 1 (2021). The Indian insolvency regime “prior to the Insolvency and Bankruptcy Code, 2016 (IBC/Code) was multi-layered with multiple fora for adjudication which resulted in undue delay in resolution, conflicting judgments and erosion of investor’s confidence.” *Id.*

25. The Insolvency and Bankruptcy Code (Second Amendment) Bill, 2020, Bill No. XXXI of 2020, § 10A (June 5, 2020), Statement of Objects and Reasons, ¶ 1.

26. Woodard, *supra* note 18, at 426.

Figure 1: Commercial Banks' Recovery of Non-Performing Assets Through Various Channels²⁷



2. The 2016 Insolvency and Bankruptcy Code

Designed to promote systematic efficiency and invite foreign investment into India, the IBC provided a new, sophisticated yet workable framework for resolving insolvency.²⁸ The Insolvency and Bankruptcy Board of India (the “IBBI”)²⁹ indicated that the 2016 IBC was enacted “to provide a facilitative mechanism for resolution of stressed assets in a time bound manner,”³⁰ uniquely pulling from regimes that favor both debtors-

27. MINISTRY FIN. GOV'T INDIA, *Chapter 4: Monetary Management and Financial Intermediation*, in ECON. SURV. 2020-21 VOLUME II: MONETARY MANAGEMENT AND FINANCIAL INTERMEDIATION, 153 (2021) [hereinafter ECON. SURV. 2020-21 VOLUME II].

28. REPORT OF THE INSOLVENCY LAW COMMITTEE *supra* note 14, at 5. *See generally* Insolvency & Bankr. Bd. India, *The Quarterly Newsletter of the Insolvency and Bankruptcy Board of India*, INSOLVENCY & BANKR. NEWS, July-Sept. 2020 [hereinafter July-Sept. 2020 IBBI Quarterly]; Jason Jack, *A Missing Variable: The Impact of Cross-Border Insolvency Laws on Foreign Direct Investment*, 27 MINN. J. INT'L L. 313, 313 (2018) (“[S]tates with more developed legal rights for creditors generally tend to have higher levels of FDI.”).

29. The IBBI is a regulatory and supervisory body created by the IBC, responsible for implementing and operationalizing the IBC. The Insolvency and Bankruptcy Code, 2016, § 196 (creating the IBBI). *See* NISHITH DESAI ASSOCS., A PRIMER ON THE INSOLVENCY AND BANKRUPTCY CODE, 2016 1 (2019).

30. *See* SHIKHA & SHAHI, *supra* note 24, at 1.

in-possession and creditors-in-control.³¹ These amendments made the new law “proactive, incentive compliant, market led, and time-bound.”³² Of course, professionals understood that realization of these goals would take time.³³ After the IBC was adopted in 2016, “infrastructure [still needed] to be created; capacity to be built; professions to be developed; the markets and practices to emerge.”³⁴

Under the updated regime, India made “meteoric” progress toward its stated goal to break into the top 50 of the World Bank rankings.³⁵ Jumping 57 spots “[s]ince the adoption of the IBC, India has risen in the *Doing Business*³⁶ index more than any other country.”³⁷ While measuring the IBC’s beneficial effects has not been a straightforward process,

31. See Insolvency & Bankr. Bd. India, *The Quarterly Newsletter of the Insolvency and Bankruptcy Board of India*, Insolvency & Bankr. News, Oct.-Dec. 2020 2 [hereinafter Oct.-Dec. 2020 IBBI Quarterly].

32. MINISTRY CORP. AFFS. GOV’T INDIA, REPORT OF THE SUB-COMMITTEE OF THE INSOLVENCY LAW COMMITTEE ON PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS 1 (2021) [hereinafter REPORT ON PRE-PACKAGED INSOLVENCY RESOLUTION].

33. *Id.*

34. See *id.*

35. See Woodard, *supra* note 18, at 421-22.

36. The Doing Business Index, including reports and data, are compiled and issued by the World Bank, and “rank[] the ease of opening and operating companies in 190 countries.” See DOING BUSINESS, *About* 19 (2016); Fernanda G. Nicola, *Scandal Involving World Bank’s ‘Doing Business’ Index Exposes Problems in Using Sportslike Rankings to Guide Development Goals*, CONVERSATION (Oct. 15, 2021), www.theconversation.com/scandal-involving-world-banks-doing-business-index-exposes-problems-in-using-sportslike-rankings-to-guide-development-goals-169691 [https://perma.cc/4QRV-2EGM]. While many methods of evaluating the growth of an economy exist, and the 2018 and 2020 Doing Business reports have been criticized for irregularity and lack of transparency, the World Bank is working to publicly disclose any problematic discrepancies in past data to restore the report’s credibility. RONALD C. MACHEN ET AL., INVESTIGATION OF DATA IRREGULARITIES IN DOING BUSINESS 2018 AND DOING BUSINESS 2020 (2021), thedocs.worldbank.org/en/doc/84a922cc9273b7b120d49ad3b9e9d3f9-0090012021/original/DB-Investigation-Findings-and-Report-to-the-Board-of-Executive-Directors-September-15-2021.pdf [https://perma.cc/MQ4Y-UG RB]; Andrea Shalal, *World Bank Aims To Replace Canceled ‘Doing Business’ Report in Two Years*, REUTERS (Nov. 10, 2021), <https://www.reuters.com/business/world-bank-aims-replace-canceled-doing-business-report-two-years-2021-11-10/> [https://perma.cc/52BD-4T9S].

37. See Woodard, *supra* note 18, at 421-22 (“India’s 2019 overall score was 67.23, which translated to a ranking of 77th. When Prime Minister Modi set the top-50 goal, India’s overall rank was 134th. This 57-spot jump over the last six years is the highest of any of the 190 countries measured.”). Evidence shows the World Bank Doing Business Reports are not a full measure of India’s economic and business sector development as multiple statistical categories remain unreported.

commercial lending has increased every year since it was enacted, alongside other measures of an efficient capital market.³⁸ Remarkably, under the IBC, the time required to resolve corporate reorganization proceedings decreased from up to 11 years, before the IBC took effect, to 364 days in the fourth quarter of 2019.³⁹

3. *During and Post-Pandemic*

While the 2016 IBC improved the efficiency of insolvency proceedings, protective responses to the pandemic changed the economic and legal landscape.⁴⁰ In March 2020, courts across the world closed their doors to abide by social distancing requirements, exacerbating existing judicial backlogs.⁴¹ India, too, suffered COVID-19's consequences: The historically overburdened courts, already saturated with a high volume of insolvency cases, faced increasing pressure and worsening delays during both the initiation and litigation stages of CIRP.⁴²

Shortly after COVID-19 was declared a global pandemic,⁴³ the State issued an Ordinance, effective March 25, 2020, suspending new CIRP. The CIRP Suspension stated that “no application *shall ever* be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.”⁴⁴ In addition to this

38. *See id.* (analyzing all available data to discern the true impact of the IBC on the business environment in India given categorical gaps in the statistics used by the *Doing Business* index, such as unreported recovery rates for debtors facing liquidation).

39. *See Contractor et al., supra* note 23. *See also* Insolvency & Bankr. Bd. India, *The Quarterly Newsletter of the Insolvency and Bankruptcy Board of India*, Insolvency & Bankr. News, Oct.-Dec. 2019, 18 [hereinafter Oct.-Dec. 2019 IBBI Quarterly].

40. *See* Woodard, *supra* note 18, at 396.

41. *See generally* Standing Int'l F. Com. Cts., *Delivering justice during the Covid-19 pandemic and the future use of technology, Annex A* (2020), sifocc.org/app/uploads/2020/05/SIFoCC-Covid-19-Annex-A-29-May-2020.pdf [<https://perma.cc/KN9L-RXPF>].

42. *See, e.g., Contractor et al., supra* note 23, at 5. *See also* REPORT OF THE INSOLVENCY LAW COMMITTEE *supra* note 14; *Post Suspension Analysis of Stressed Insolvencies*, IBC L. (Mar. 21, 2021), www.ibclaw.in/post-suspension-analysis-of-stressed-insolvencies-mr-miheer-jain [<https://perma.cc/P6MC-T3DX>].

43. *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 - 11 March 2020*, WORLD HEALTH ORG. (Mar. 11, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> [<https://perma.cc/UY9K-UF9P>].

44. The Insolvency and Bankruptcy Code (Second Amendment) Bill, Bill No. XXXI of 2020, § 10A (June 5, 2020). *See* The Insolvency and Bankruptcy Code, § 10A (2016)

wholesale prohibition of insolvency resolution for defaults occurring during the first year of the pandemic, the Suspension further prohibited debtors and creditors from initiating CIRP under Sections 7, 9, and 10 of the IBC via the new IBC Section 10A, which was effective until March 25, 2021.⁴⁵ Finally, the Suspension amended IBC Section 66 to state that “no application shall be filed by a resolution professional” against a corporate debtor for fraudulent or wrongful trading during the CIRP Suspension.⁴⁶

(“Notwithstanding anything contained in sections 7, 9, and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020”). *See also* Wanda Borges, *Insolvency and Restructuring Changes Around the World During COVID-19*, 2020 COMM. L. WORLD 10 (2021). The Suspension aimed to protect companies from forced insolvency proceedings resulting from the poor economic conditions in the wake of the pandemic. While some scholars have expressed skepticism about whether this change would perpetually disallow these insolvency claims, the IBBI confirmed the Ordinance prohibits defaults during the Suspension from ever becoming the basis for CIRPs. *Compare* Karry Lai, *India’s Suspension of Insolvency Proceedings Brings Risks*, 2020 INT’L FIN. L. REV. 1 (2020), *with* Insolvency & Bankr. Bd. India & Int’l Fin. Corp., *Introduction, in UNDERSTANDING THE IBC KEY JURISPRUDENCE AND PRACTICAL CONSIDERATIONS: A HANDBOOK*, 60 (2020) [hereinafter IBBI & IFC].

45. *See* The Insolvency and Bankruptcy Code, § 10A (2016). *See also* The Insolvency and Bankruptcy Code, § 7 (2016) (governing the application to initiate corporate insolvency resolution process by a financial creditor); The Insolvency and Bankruptcy Code, § 9 (2016) (governing initiation of corporate insolvency resolution process by an operational creditor); The Insolvency and Bankruptcy Code, § 10 (2016) (governing the initiation of corporate insolvency resolution process by corporate applicant (corporate debtor)). Extended in September and December of 2020, the CIRP Suspension finally ended on March 25, 2021. *See* The Insolvency and Bankruptcy Code (Second Amendment) Bill, 2020, Bill No. XXXI of 2020, § 10A (June 5, 2020) (beginning the CIRP Suspension on March 25, 2020); The Insolvency and Bankruptcy Code (Second Amendment) Act, 2020, Bill No. XVII of 2020, § 10A (Sept. 23, 2020) (extending the Suspension from 3 months to 6 months after enactment); The Insolvency and Bankruptcy Code (Second Amendment) Act, 2020, Bill No. XXXIII of 2020, § 10A (Dec. 25, 2020) (extending the Suspension 9 months after its issuance, for an additional 3 months).

46. *See* The Insolvency and Bankruptcy Code (Second Amendment) Bill, 2020, Bill No. XXXI of 2020, § 66(3) (June 5, 2020). While this Note does not discuss the potentially damaging implications of this provision, it has been purported that the change “may lead to a rise in fraudulent activities, as it provides unwarranted protection to the directors and partners of a corporate debtor from being held liable even for any fraudulent transactions committed during the pandemic period – even in the future.” Lai, *supra* note 44 at 2.

While the Suspension was intended to protect India's courts from further overburden, deferring new CIRP has a severe and negative effect on insolvent companies' chances of survival. The Suspension merely suspended new proceedings without dealing with the underlying culprit of a company's financial distress: the company's debt obligations.⁴⁷ Indeed, the underlying debt and onerous financial obligations remained active and in effect, and likely continued to accrue interest.⁴⁸ The Suspension only paused the *remedy* for resolving these unsustainable debts—not the harm itself.

While the Suspension may have been temporary, its effects will be long-lasting as many corporate debtors' financial distress worsened while new CIRP were unavailable. This is because a company's insolvency (an economic condition) would likely worsen during the postponement of their CIRP (a legal remedy for that condition).⁴⁹ Despite high demand for reorganization and liquidation under the IBC,⁵⁰ the Suspension removed this option (permanently to some).⁵¹ For companies and claims that survived the Suspension, potentially facing heightened financial distress, the year-long delay also gave rise to worsening conditions in the legal system.⁵²

Although two other countries⁵³ issued payment collection moratoriums during the pandemic, no country but India took the extreme

47. The Insolvency and Bankruptcy Code (Second Amendment) Bill, 2020, Bill No. XXXI of 2020, § 10A (June 5, 2020) (failing to address how corporate debtors and creditors are to address underlying, potentially distressed debt obligations).

48. *Id.*

49. See BERTELSMANN STIFTUNG'S TRANSFORMATION INDEX, *supra* note 5.

50. REPORT OF THE INSOLVENCY LAW COMMITTEE *supra* note 14.

51. The Insolvency and Bankruptcy Code (Second Amendment) Bill, Bill No. XXXI of 2020, § 10A (June 5, 2020). In effect, the Suspension prevents companies that defaulted under IBC Section 4 between March 25, 2020, and March 25, 2021 from ever filing insolvency claims based on defaults that occurred during the year-long Suspension. See Trilegal, *Covid-19: Insolvency and Bankruptcy Code Amended to Suspend Initiation of Insolvency Proceedings for Six Months*, LEXOLOGY (June 25, 2020), www.lexology.com/library/detail.aspx?g=87e4f867-455a-4dc4-8df4-9eab4d390f0b [<https://perma.cc/8F4R-LD4Y>].

52. See *Post Suspension Analysis of Stressed Insolvencies*, *supra* note 42.

53. Two other countries issued suspensions to their insolvency legal regimes: Germany and Russia. The German Parliament temporarily amended the Insolvency Act, suspending the mandate to file an insolvency proceeding which results from the coronavirus pandemic. See Borges, *supra* note 44, at 11. Unlike the situation in India, the suspension does not apply where the insolvency administrator can prove the insolvency

step of suspending new claims for all events of default that occurred during a specified period, blocking new insolvency cases.⁵⁴ The effects of this measure are drastic: Companies that became insolvent between March 2020 and March 2021 will never be eligible to file a CIRP based on any event of default during that purported year.⁵⁵ Creditors with claims against companies rendered insolvent during that year will be permanently left without recourse in the Indian court system.⁵⁶

Further, an insolvent company's asset value risked significant and rapid decline during this period, diminishing as quickly as "ice melts."⁵⁷ Concurrently, the creditors themselves may have suffered from financial distress and economic harm due to the diminishment of such asset value.⁵⁸ And yet, neither the company nor its creditors could find protection under the IBC because of the Suspension. Delayed insolvency resolutions hinder a debtor's ability to maximize company value; this in turn holds further deleterious economic implications for the debtor's creditors.⁵⁹

did not result from the pandemic. *See id.* The Russian Federation Government issued a moratorium on new insolvency proceedings by creditors only in only specific situations. *See id.* at 12.

54. *See* Borges, *supra* note 44, at 11-12.

55. *See id.* at 11. Insolvency resolution proceedings under the IBC begin when India's National Company Law Tribunal grants a debtor or creditor's application for such proceedings, which can be filed only after an event of a threshold amount of default occurs. *See* INSOLVENCY & BANKR. BD. INDIA, INSOLVENCY PROFESSIONAL: A KEY TO RESOLUTION INFORMATION BROCHURE (2021); C. Scott Pryor & Risham Garg, *Differential Treatment Among Creditors Under India's Insolvency and Bankruptcy Code, 2016: Issues and Solutions*, 94 AM. BANKR. L.J. 123, 125 (2020). The Ordinance also lifted the threshold amount constituting a default to further prevent unnecessary insolvency and liquidations especially best protect Micro, Small, and Medium Enterprises. *See* The Insolvency and Bankruptcy Code (Second Amendment) Bill, 2020, Bill No. XXXI of 2020, § 10A (June 5, 2020); REPORT OF THE INSOLVENCY LAW COMMITTEE, *supra* note 14.

56. Trilegal, *supra* note 51.

57. *See generally* Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862 (2014); Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Fire Sales*, 106 MICH. L. REV. 1, 30-31 (2007) (reporting that 16 of the 30 cases in their sample of large public company bankruptcies made "melting ice cube arguments"). *See also In re* Shoot the Moon, LLC, 635 B.R. 568, 570 (Bankr. D. Mont. 2022) (dicta) ("This need for speed derives from some debtors being the proverbial 'melting ice cube' [D]elay rarely increases stakeholder recoveries.").

58. *See* Bangar, *supra* note 3 at 119.

59. *See* REPORT OF THE INSOLVENCY LAW COMMITTEE, *supra* note 14 ("This large number of applications is adding pressure on judicial infrastructure, which is causing delays both at the stage of admission and during litigation in the CIRP. These delays

While judicial delay is never helpful, it is particularly harmful to parties in bankruptcy.

Since March 2020, the COVID-19 pandemic has impacted almost every industry in India, with the Nifty-Fifty Index falling below 8,100 for the first time since 2017.⁶⁰ Despite the implementation of the 2016 IBC and other pre-pandemic business law reforms, the few businesses that have not yet experienced financial distress are at risk of faltering.⁶¹ Companies making ends meet now by borrowing under low interest rates will be at risk when market conditions catch up;⁶² an alarming number of defaults and insolvencies could occur.⁶³

Though the aim of the Suspension was to prevent backlog and delay while courts operated at historically low capacity, CIRP delays actually worsened during the Suspension. In the fourth quarter of 2020, Indian corporate insolvency proceedings took, on average, 456 days—nearly 170 percent longer than the statutory mandate which requires proceedings to be resolved within 270 days of commencement.⁶⁴ During the same period, on average, 86 percent of CIRP lasted over 270 days.⁶⁵ Comparatively, during the same period in 2019, only 32 percent of CIRP required more than 270 days to reach a resolution.⁶⁶

Compounded with the existing backlog, the high volume of current cases will continue to saturate the judicial infrastructure, hampering the efficacy of the insolvency resolution framework; this will only be made

cause uncertainty for investors and have the potential to hinder a value maximizing insolvency resolution.”).

60. See *Post Suspension Analysis of Stressed Insolvencies*, *supra* note 42. The Nifty-Fifty Index is India’s National Stock Exchange. Praveen Kumar & Ankit Kumar, *Corporate Social Responsibility Disclosure and Financial Performance: Further Evidence from NIFTY 50 Firms*, 11 INT’L J. BUS. INSIGHTS & TRANSFORMATION 62, 64 (2018).

61. See generally R. Ramakumar & Tejal Kanitkar, *Impact of COVID-19 Pandemic on the Indian Economy*, 80 INVESTIGACIÓN ECONÓMICA 3 (2020).

62. See Ball et al., *supra* note 1 at 1, 6.

63. See *id.*; Wang et al., *supra* note 1, at 6.

64. See Oct.-Dec. 2020 IBBI Quarterly, *supra* note 31, at 17.

65. See *id.* at 17. “Section 12 of the Code provides for a specific timeline of 180 days for completion of a CIRP from the date of admission of application which can be extended further by maximum 90 days on filing of an application” providing the relevant 270 day “statutory period.” See Shikha & Shahi, *supra* note 24, at 1.

66. See Oct.-Dec. 2019 IBBI Quarterly, *supra* note 39, at 15.

worse when the tsunami of new insolvency proceedings crashes.⁶⁷ The rising number of financially troubled and insolvent companies could flood the courts with a wave of newly initiated CIRP.⁶⁸ The Indian courts, specifically the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT), may become more seriously overburdened by these new filings, worsening the delayed conditions and creating a backlog that could last for years.⁶⁹ The longstanding nature of the pandemic has been well established.⁷⁰ As the pandemic continues to impact global operations, severe judicial inefficiency is likely to continue impairing the rights of investors, lenders, and all parties seeking insolvency resolution. This creates uncertainty in the resolution process and forces company value to depreciate until a resolution can be reached.⁷¹ Likewise, public trust in the bankruptcy and insolvency system risks rapid, irreparable damage.⁷²

In light of the inefficiencies plaguing the courts and claimants across India, including in the NCLT, advocates and governmental committees are calling for amendments to the IBC and related business laws.⁷³ The

67. “[T]he suspension of sections 7, 9 or 10 of the IBC would only give a *temporary* relief to [corporate debtors] and postpone the stress but may fail to address their stress *per se*.” INSOLVENCY & BANKR. BD. INDIA, INSOLVENCY AND BANKRUPTCY REGIME IN INDIA: A NARRATIVE xvi (2020) (emphasis added).

68. See *Post Suspension Analysis of Stressed Insolvencies*, *supra* note 42.

69. The NCLT, established under Section 408 of India’s Companies Act of 2013, has jurisdiction over India’s insolvency proceedings, which are reviewed by the appellate court, the NCLAT. See *The Insolvency and Bankruptcy Code*, § 60(5)(c) (2016).

70. Krista Conger, *Two Years Into the Pandemic, Medical Scientists Consider What the Future May Hold*, STANFORD MED. (Mar. 11, 2022), <https://med.stanford.edu/news/all-news/2022/03/scientists-pandemic-future.html> [<https://perma.cc/VC9H-MENM>].

71. See REPORT OF THE INSOLVENCY LAW COMMITTEE, *supra* note 14, at 21 (“This large number of applications is adding pressure on judicial infrastructure, which is causing delays both at the stage of admission and during litigation in the CIRP. These delays cause uncertainty for investors and have the potential to hinder a value maximizing insolvency resolution.”).

72. See BANKR. L. REFORMS COMM., *supra* note 20, at 64.

73. See Misha et al., *Expectations from IBC 2.0 and the Impact of New COVID-19 Wave*, L. ST. INDIA (Apr. 30, 2021), www.lawstreetindia.com/experts/column?sid=556 [<https://perma.cc/CN6N-RLSD>] (advocating for further IBC reforms responsive to the current second wave of COVID infections); Anirudh Burman, *India’s Sustained Economic Recovery Will Require Changes to Its Bankruptcy L. 1, 6* (Carnegie India, Working Paper, 2021), <https://carnegieindia.org/2021/04/05/india-s-sustained-economic-recovery-will-require-changes-to-its-bankruptcy-law-pub-84234> [<https://perma.cc/M9>].

push for reform is focused on the need to improve the IBC's functioning to ensure a sustained economic recovery in India.⁷⁴ The Ministry of Corporate Affairs also encouraged changes to the legal framework to allow pre-packaged insolvency solutions, which are developed out of court and only later blessed by a judge in a confirmation *ex post facto*.⁷⁵ Despite legislative advocacy campaigns for reform, at this point, distressed companies that currently need an insolvency resolution will not reap the benefits of future changes. This is further evidence of how delay is particularly damaging for insolvency claimants.⁷⁶ Delayed bankruptcy proceedings often result in measurable, tangible, and avoidable harm due to the depreciating asset value that comes with insolvency.⁷⁷

XR-8MPU]. *See also*, REPORT OF THE INSOLVENCY LAW COMMITTEE, *supra* note 14, at 5-7; REPORT ON PRE-PACKAGED INSOLVENCY RESOLUTION, *supra* note 32.

74. *See* Burman, *supra* note 73.

75. *See* REPORT ON PRE-PACKAGED INSOLVENCY RESOLUTION, *supra* note 32. Pre-packaged insolvency resolutions are already allowed for corporate micro-, small-, and medium-enterprises, but permissions for larger businesses to utilize the tool could also be allowed. Insolvency & Bankr. Bd. India, *The Quarterly Newsletter of the Insolvency and Bankruptcy Board of India*, INSOLVENCY & BANKR. NEWS, Apr.-June 2021, at 6.

76. According to IBC Section 60(5)(c), the NCLT has jurisdiction over Indian corporate insolvencies. *See* The Insolvency and Bankruptcy Code, 2016, § 60(5)(c). Appeals from NCLT decisions are reviewed by the appellate court, (NCLAT).

77. The Insolvency and Bankruptcy Board of India describes this problem as follows:

Speed is of essence for the working of the bankruptcy code, for two reasons. First, while the “calm period” can help keep an organisation afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more likely it is that liquidation will be the only answer. Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation. From the viewpoint of creditors, a good realisation can generally be obtained if the firm is sold as a going concern. Hence, *when delays induce liquidation, there is value destruction*. Further, even in liquidation, the realisation is lower when there are delays. Hence, *delays cause value destruction*. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay.

Letter from I. Sreekara Rao, Chief General Manager, Insolvency and Bankruptcy Board of India, Re: Compliance with the provisions of Section 12 of the Insolvency and Bankruptcy Code, Nov. 11, 2019, ¶ 2 (Nov. 11, 2019) (emphasis added).

Despite the Suspension, borrowers' chances for rehabilitation and creditors' opportunity for distributions will almost certainly decrease.⁷⁸ Because the assets of an insolvent company continue to depreciate before and during insolvency proceedings, the Suspension will become a two-fold source of judicial delay. First, as the parties await filing during the Suspension, going concern and asset value are presumably lost, perhaps precipitously.⁷⁹ Where going concern value diminishes, some salvageable businesses may be forced to liquidate, depriving them of the second-chance that so frequently motivates insolvency proceedings.⁸⁰ Second, asset value and the remnants of a firm's going concern value will continue to decline during the adjudication of claims,⁸¹ a process that will require substantially more time during the tsunami of cases. Like a whirlpool, the negative effects of the existing judicial conditions compound one another, working together to push firms further and further under water.⁸²

4. *Foreign Parties' Rights Under India's Legal Regime Governing Insolvency*

Given the level of international investment in India, foreign investors likely make up a notable portion of creditors aggrieved by the Suspension. The recovery value of a foreign investor's claims, like claims by domestic lenders, will diminish over time.⁸³ Because of this, a foreign investor may attempt to file a FET claim challenging the Ordinance and seeking compensation for lost CIRP recovery value during the Suspension. But because the measure treats foreign and domestic parties indistinguishably, the measure will be considered fair and equitable toward foreign investors.⁸⁴ Yet, despite this facially equal treatment, foreign investors face unique challenges to insolvency recovery in India because there is

78. See Pratyush Hari, *IBC Suspension: Too Much to Chew on for the Banks?*, ACADEMIKE (Aug. 5, 2020), www.lawctopus.com/academike/ibc-suspension-too-much-to-chew-on-for-the-banks [<https://perma.cc/GL5V-Q765>]. See also Shikha & Shahi, *supra* note 24, at 5.

79. See Bangar, *supra* note 3.

80. WORLD BANK, PRINCIPLES AND GUIDELINES FOR EFFECTIVE INSOLVENCY AND CREDITOR RIGHTS SYSTEMS 19 (2001).

81. *Id.* at 30.

82. IBBI & IFC, *supra* note 44, at 4 (“[W]eak insolvency regimes, can push viable enterprises into non-viability through lengthy and overly complex restructuring procedures or lead to the proliferation of zombie firms that leach productive resources from the market.”).

83. See WORLD BANK, *supra* note 80, at 30.

84. *Id.*

no internationally agreed upon framework governing cross-border procedural issues.⁸⁵

Historically, India's cross-border insolvency practice has been nearly unworkable.⁸⁶ The bankruptcy of Jet Airways provides an example of the multi-tiered problems implicated by a cross-border insolvency case involving India's courts. In that matter, an Indian airline with assets and creditors both at home and in the Netherlands was pushed into CIRP in Indian courts while competing insolvency proceedings were also filed in the Netherlands.⁸⁷ Without a law enabling India's courts to recognize the foreign proceedings or any agreement regarding cross-border enforcement mechanisms, creditors raced to seize the company's assets.⁸⁸ This case exemplifies the challenges and complexities of attempting to reach an international insolvency resolution without a mutually agreeable framework governing, at least, procedural issues.⁸⁹ The difficulty of coming to a cross-border resolution—especially one that allows corporate debtors to continue operating to preserve their going concern—should be addressed with urgency in India and across the globe.⁹⁰

In light of such difficulties with reaching cross-border insolvency solutions, scholars and governmental groups have called for the adoption of the UN Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (the "Model Law") as a chapter in the IBC.⁹¹ Until the Model Law is adopted and embraced, however,

85. *Economic Survey Underlines Need for Standardised Framework for Cross Border Insolvency*, ECON. TIMES (Jan. 31, 2022), <https://economictimes.indiatimes.com/news/economy/policy/economic-survey-underlines-need-for-standardised-framework-for-cross-border-insolvency/articleshow/89247662.cms> [https://perma.cc/4K7G-YDAL].

86. See Priya Misra & Adam Feibelman, *The Institutional Challenges of a Cross-Border Insolvency Regime*, 2 CORP. & BUS. L.J. 329, 330 (2021).

87. *Id.*

88. *Id.* ("The Mumbai Tribunal refused to recognize the Dutch proceeding or allow the Dutch administrator to participate in the insolvency proceeding in India because it found that the Insolvency and Bankruptcy Code did not formally allow for either action.").

89. Gabriela Roca-Fernandez, Comment, *Cross-Border Insolvency in India: A Resistance to Change*, 29 TULANE J. INT'L & COMPAR. L. 99, 112 (2021).

90. See Misra & Feibelman, *supra* note 86, at 331-33.

91. See Roca-Fernandez, *supra* note 19; INSOLVENCY AND BANKRUPTCY REGIME IN INDIA: A NARRATIVE, *supra* note 67, at 16-17 ("The ILC has proposed to add a Chapter to the Code to introduce a globally accepted and well recognized cross border insolvency framework, the [UNCITRAL] Model Law on Cross-Border Insolvency, considering the

difficulties with resolving cross-border insolvencies under the IBC are to be expected.⁹² While the current conditions in India may slow the legislative process, scholars in India and across borders have advocated for the adoption of the Model Law, pressuring the government to make this change.⁹³

While foreign investors may challenge India's CIRP Suspension by alleging the law does not treat them fairly or equitably,⁹⁴ their claims against the measure suffer from inherent weakness because the Suspension applies identically to both domestic and foreign investors.⁹⁵ However, because the strength of a FET claim depends on the severity of the damage caused by the challenged measure, a contest of the year-long Suspension showing severe impairment of a foreign investor's CIRP recovery is not without merit.⁹⁶ Further, as a foreign investor's potential recovery under the IBC declines, its potential compensation for such harm, recoverable by bringing a successful FET claim, climbs. Under such a FET claim, the burden on the investor to establish harm caused by a challenged governmental measure will be balanced against the necessity of the governmental intervention.⁹⁷ If an international tribunal found that

fact that some corporates transact businesses in more than one jurisdiction and have assets across many jurisdictions.”).

92. See Misra & Feibelman, *supra* note 86, at 352.

93. See, e.g., Sneha Singh, *Duality of Regime to Handle Insolvency of Foreign Companies in India*, 10 INDIAN J.L. & JUST. 155, 156 (2019); Roca-Fernandez, *supra* note 19, at 112-13; INSOLVENCY AND BANKRUPTCY REGIME IN INDIA: A NARRATIVE, *supra* note 67; IBBI & IFC, *supra* note 44, at 20.

94. Legal commentators have hypothesized that foreign investors will challenge the Suspension under BITs. See, e.g., Pawan Jhabak et al., *Is All Well on the BIT and Arbitration Front After India's Insolvency Code Amendments?*, WIRE (July 12, 2020), www.thewire.in/business/bit-arbitration-front-india-amendments-insolvency-code [https://perma.cc/FH2U-66E3]. See also Poornima Advani, *Insolvency Code Amendments and Bits: A Possible Recourse for Foreign Creditors*, INT'L BAR ASS'N, www.ibanet.org/article/b4399826-fc9e-4dd3-9390-6785ae81d30c [https://perma.cc/98SE-JYBB] (last visited June 19, 2022); Aayush Akar, *Suspension of IBC Proceeding and Bilateral Investments: How It Affects India?*, LEGAL SERV. INDIA E-J. (Mar. 15, 2021), www.legalserviceindia.com/legal/article-5139-suspension-of-ibc-proceeding-and-bilateral-investments-how-it-affects-india.html [https://perma.cc/E56U-KKZE].

95. The Insolvency and Bankruptcy Code (Second Amendment) Bill, 2020, Bill No. XXXI of 2020, § 10A (June 5, 2020) (imposing the CIRP Suspension beginning March 25, 2020).

96. See *White Indus. Austl. Ltd. v. Republic of India*, *ad hoc* Trib., Final Award 4, 42 (2011).

97. See *Cairn Energy PLC v. Gov't of India*, PCA Case Repository, Final Award, ¶ 1788 (Dec. 21, 2020), www.investmentpolicy.unctad.org/investment-dispute-settlement/

the investor's impaired rights constituted a violation of international law, the State could be required to compensate the foreign investor.⁹⁸

Notwithstanding the facially equal application of the Suspension, foreign investors face another unique challenge to insolvency recovery in India. The value of a foreign investor's impairment differs from that of a domestic creditor in one important respect: certain foreign entities are disabled from proposing a resolution plan under either CIRP or through a scheme of arrangement under the Companies Act.⁹⁹ While foreign and domestic investors may both initiate an application for CIRP, and were both prevented from doing so during the Suspension, the IBC distinguishes between the rights of foreign and domestic parties once such a proceeding has been commenced in the following way: “[f]oreign banks, foreign institutional investors, foreign portfolio investors and foreign venture capital investors” are disqualified from presenting a resolution plan for a corporate debtor facing CIRP.¹⁰⁰ Domestic counterparts, however, are largely free to propose such a plan which, presumably, favors their claims and interests.¹⁰¹

cases/691/cairn-v-india [https://perma.cc/CR7Y-Y7WF] (requiring a governmental measure “not be more burdensome for the individual’s rights and interests than required by the [State’s] pursued public purpose” when analyzing whether a promise of fair and equitable treatment to foreign investors was breached).

98. See RANJAN, *supra* note 7, at 8; Joseph E. Stiglitz, *Multinational Corporations: Balancing Rights and Responsibilities*, 101 PROC. ANN. MEETING (AM. SOC’Y INT’L L.) 3, 5 (2007).

99. Also strengthening these claims is the ILC’s early finding that a governmentally imposed moratorium on insolvency proceedings should not exceed 60 days from the date of the order and should not be extended. See REPORT OF THE INSOLVENCY LAW COMMITTEE, *supra* note 14, at 29. The moratorium was initially ordered to persist for 180 days and was in fact extended twice to disallow claims for an entire year. See also The Insolvency and Bankruptcy Code, *supra* note 46.

100. See INSOLVENCY AND BANKRUPTCY REGIME IN INDIA: A NARRATIVE, *supra* note 67, at 102. See also The Insolvency and Bankruptcy Code, 2016, § 29A. The proportion of foreign investors within these categories is not negligible: 33 percent of all foreign direct investment (FDI) into India from April 2000 to December 2020 was from foreign institutional investors alone, which comprises only one of the four categories enumerated in Section 29A. See DEP’T FOR PROMOTION INDUS. & INTERNAL TRADE GOV’T INDIA, *Quarterly Fact Sheet: Fact Sheet on Foreign Direct Investment (FDI) From April, 2000 to December, 2020* (2021), www.dipp.gov.in/publications/fdi-statistics [https://perma.cc/LR7J-7LLY].

101. Scholars have recognized, “section 29A . . . will likely serve as a big deterrent to foreign investors Nowhere in the world does such a restriction in the nature of section

Although access to CIRP by distressed Indian companies was restricted from 2020 to 2021, Indian law allows an alternative method of resolution: Section 230 of the Companies Act enables stakeholders to come to an out-of-court resolution of the company's insolvency through a scheme of arrangement, which is subsequently acknowledged (or "blessed") by the NCLT.¹⁰² However, India's Supreme Court recently held that the restrictions on which parties can propose a resolution plan under IBC Section 29A also applies to Section 230 schemes of arrangement.¹⁰³ A scheme may no longer be proposed by foreign banks, institutional investors, portfolio investors, and venture capitalists.¹⁰⁴ Conflating the limitations imposed by the complicated cross-border insolvency conundrum, this ruling may further restrict foreign entities' rights.¹⁰⁵

It is important to note, however, that the Supreme Court did not issue its ruling restricting foreign entities from proposing a scheme until March 15, 2021.¹⁰⁶ Therefore, the restriction did not apply to limit the foreigners' proposal abilities for the duration of the Suspension, which ended on March 25, 2021.¹⁰⁷ Indeed, except during a 10 day period, all foreign investors could propose a scheme of arrangement throughout the

29A exist. They will find it hard to swallow this bitter pill." See *INSOLVENCY AND BANKRUPTCY REGIME IN INDIA: A NARRATIVE*, *supra* note 67, at 234.

102. The Companies Act, 2013, § 230. See *INSOLVENCY AND BANKRUPTCY REGIME IN INDIA: A NARRATIVE*, *supra* note 67, at 248. These schemes allow debtors and creditors to independently negotiate and restructure a company, and they are especially helpful where court facilitation is not needed for parties to reach an agreement about continuing the business or resolving the debt. See *IBBI & IFC*, *supra* note 44, at 13-15.

103. Arun Kumar Jagatramka v. Jindal Steel & Power Ltd., (2019) SCC ¶ 1 (India).

104. See *id.* at 8; Gautam Bhatikar et al., *Superior Court Clarifies the Restrictions Under Section 29A IBC to Schemes of Compromise or Arrangement*, MONDAQ (Apr. 16, 2021), www.mondaq.com/india/insolvencybankruptcy/1058488/supreme-court-clarifies-the-restrictions-under-section-29a-ibc-to-schemes-of-compromise-or-arrangement [<https://perma.cc/PRL6-CUPD>].

105. See generally Misra & Feibelman, *supra* note 86; *Jagatramka*, (2019) SCC ¶ 1.

106. See *Jagatramka*, (2019) SCC ¶ 91.

107. See The Insolvency and Bankruptcy Code (Second Amendment) Bill, 2020, Bill No. XXXI of 2020, § 10A (June 5, 2020) (beginning the CIRP Suspension March 25, 2020). Extended in September and December of 2020, the Suspension ended on March 25, 2021. See The Insolvency and Bankruptcy Code (Second Amendment) Act, 2020, Bill No. XVII of 2020, § 10A (Sept. 23, 2020) (extending the effect of the Suspension from 3 months to 6 months after enactment); The Insolvency and Bankruptcy Code (Second Amendment) Act, 2020, Bill No. XXXIII of 2020, § 10A (Dec. 25, 2020) (extending the Suspension 9 months after its issuance, for an additional 3 months).

Suspension.¹⁰⁸ Going forward, the restriction will likely continue to bar some investors from proposing schemes and resolution plans, but all parties currently seeking CIRP may file an application directly with the NCLT, including investors based abroad and in the United States.¹⁰⁹

The level of U.S.-firm investment in India's distressed debt and capital markets is not insignificant.¹¹⁰ Despite long-standing limitations on foreign investment and ownership of Indian companies, some major U.S.-based investors and investment firms have a significant presence in the Indian market.¹¹¹ In recent years, global firms based in the United States including Goldman Sachs Group Inc., Morgan Stanley, Apollo Global Management, and Oaktree Capital Group have undertaken multi-million-dollar investments in Indian companies.¹¹² In 2019, a consortium led by Goldman Sachs Group Inc. that included Varde Partners LP agreed to "one of the largest restructuring deals outside the [U.S.] bankruptcy

108. See Bhatikar et al., *supra* note 104.

109. CIRP may be initiated by a financial creditor under IBC Section 7, an operational creditor under Section 9 and corporate applicant of corporate debtor under Section 10. See Insolvency & Bankr. Bd. India, *Frequently Asked Questions (FAQs) on Corporate Insolvency Resolution Process ('CIRP')*, Insolvency & Bankr. News 1, 1 (2020) [hereinafter, "*CIRP FAQs*"]. CIRP applications may be filed without restriction since the Suspension was lifted on March 25, 2021. *Id.*

110. See Bijou George et al., *Global Funds Are Swooping in to Invest in India's Stressed Companies*, PRINT (Nov. 18, 2020, 9:35 AM), <https://theprint.in/economy/global-funds-are-swooping-in-to-invest-in-indias-stressed-companies/546561/> [<https://perma.cc/2C3G-DKED>].

111. See Jai S. Pathak et al., *New Foreign Investment Restrictions Imposed by India*, GIBSON DUNN (May 26, 2020), www.gibsondunn.com/new-foreign-investment-restrictions-imposed-by-india/ [<https://perma.cc/G9GM-6XHX>].

112. Blackstone Group Inc. and Morgan Stanley were part of a \$184 million deal in 2021 involving Indiabulls Housing Finance Ltd. See Rahul Satija & Suvashree Ghosh, *Indiabulls Housing Falls After Founder Sells to Blackstone*, BLOOMBERG (Dec. 15, 2021, 10:06 AM), www.bloomberg.com/news/articles/2021-12-15/blackstone-adia-said-to-near-indiabulls-housing-stake-purchase [<https://perma.cc/843M-GL5D>]. This deal was entered after Oaktree's \$294 million loan to the same Indian firm, agreed upon in July 2020. See Bloomberg, *Oaktree, Apollo Lead Giants Betting on Stressed India Assets*, MINT (Nov. 18, 2020, 10:38 AM), www.livemint.com/companies/news/oaktree-apollo-lead-giants-betting-on-stressed-india-assets-11605674164704.html [<https://perma.cc/8GN2-9AHN>]. In 2019, a consortium led by Goldman Sachs Group Inc., which included Varde Partners LP, agreed to "one of the largest restructuring deals outside the [U.S.] bankruptcy court" in the purchase of \$922 million of debt from an Indian power company. George et al., *supra* note 110.

court,” with the purchase of \$922 million of debt from an Indian power company.¹¹³

Now more than ever, foreign and U.S. firms are well-positioned to invest in Indian companies. At least in the insurance industry, limitations on foreign investment are being liberalized: the cap on foreign ownership of an Indian insurance firm was raised in February 2021, from 49 percent to 74 percent.¹¹⁴ Simultaneously, a path for foreign entities to invest without government approval via an “automatic route” was recently prescribed.¹¹⁵ Further enabling U.S. participation in India’s capital markets, unique limitations were imposed on countries that geographically border India.¹¹⁶ Because these restrictions do not apply elsewhere, the regulations could have the secondary effect of increasing the proportion of foreign investment from the United States, which faces fewer restrictions comparatively. The aggregate of these conditions provides a rosy outlook for the future United States-India investment relationship.

B. FOREIGN INVESTORS CAN SEEK RECOURSE UNDER BITs

Foreign investors may assert their rights and find legal recourse for the diminished value of their insolvency recovery through cross-border arbitration under international investment treaties, including BITs.¹¹⁷ Investor-state disputes can arise under applicable BITs: treaty agreements between two countries governing claims by foreign direct investors.¹¹⁸ BITs are the most important source of international investment law as “[ma]ny of the agreements . . . are concerned with the far broader issue of what happens when changes in regulations or other government policies adversely affect the value of a foreign-owned asset.”¹¹⁹ BITs give foreign

113. George et al., *supra* note 110.

114. See Gaurav Dayal & Kartik Chatrath, *Increase in FDI Limit: Allowing Foreign Ownership and Control in Indian Insurance Companies*, LEXOLOGY (Aug. 11, 2021), www.lexology.com/commentary/corporate-financema/india/lakshmikumaran-sridharan/increase-in-fdi-limit-allowing-foreign-ownership-and-control-in-indian-insurance-companies [https://perma.cc/2NSY-QJBP].

115. *Id.* Until the automatic route was introduced, foreign investments in Indian companies had to be reviewed by the governmental agency overseeing the relevant sector. *Id.*

116. Pathak et al., *supra* note 111.

117. RANJAN, *supra* note 7, at 2.

118. See *id.* at 1-2.

119. Stiglitz, *supra* note 98.

investors another venue, international arbitration tribunals, to seek recoupment of insolvency-related losses incurred while CIRPs were not available.

1. *The Global Rise of BITs and Their Downfall in India*

BITs first came into force in 1962 in response to an absence of protections for foreign investors, deficient customary international law (CIL), and increased liberalization following World War II; since then, the volume of the agreements has continued to rise.¹²⁰ In the 1960s through the 1980s, BITs often signaled a state's commitment to liberal economic policies.¹²¹ Especially for developing countries, BITs were adopted to attract foreign investment into the country and facilitate economic growth.¹²² An exponential uptick in the number of BITs occurred in the 1990s: on average, 147 BITs were entered each year during the 1990s.¹²³ By the end of 1999, 1,857 BITs were in effect across the globe, with the total rising to 3,322 in 2017.¹²⁴

BITs enhance protections for foreign investors by allowing them to challenge a host state's regulatory measures; a prevailing claimant challenging a governmental measure under applicable BITs is eligible for monetary compensation by the host state.¹²⁵ In the vast majority of BITs, the right to bring a claim requires adjudication through arbitration proceedings, which are not required to be publicly released.¹²⁶

Moreover, ISDS arbitration under BITs has continued to increase in frequency as a result of the agreements' broad and substantive guarantees

120. *Id.* at 3.

121. *Id.* at 3, 6.

122. Cree Jones, *Do Enforcement Provisions Promote Investment? New Evidence from a Natural Experiment in the Investment Treaty Network*, SSRN (Aug. 7, 2019), www.ssrn.com/abstract=3204964 [<https://perma.cc/PAU9-WYUL>] (“[There is] a positive, significant, and robust correlation between the number of BITs signed by a developing country and total FDI inflows to that country.”).

123. *See* Ranjan, *supra* note 7, at 4.

124. *Id.* at 4-5.

125. *Id.* at 2. The agreements “may require that the government compensate those [foreign investors] that are adversely affected, and in doing so, . . . increase the costs of governments changing regulations and or other government policies.” Stiglitz, *supra* note 98.

126. *See* Ranjan, *supra* note 7.

to foreign investors.¹²⁷ With few or no provisions recognizing the host state's right to regulate in the public interest, regulatory measures often give rise to broad BIT claims which ultimately require the host state to compensate an aggrieved foreign investor.¹²⁸ Foreign investors often allege a breach of the (common) FET clause, which promises foreign investors treatment that is not comparatively unfair to the treatment of domestic parties.¹²⁹ BIT claims also tend to resolve in favor of investors,¹³⁰ a trend that has sparked a global debate about whether the practice is fair at all.¹³¹ Critiques of the promise of "fairness" question BITs' wide reach, the broad construction of foreign investors' claims, and the fact that "most BITs allow foreign investors to bring claims against the host state without exhausting local remedies."¹³²

A state may become motivated to retrospectively exit BITs for many reasons.¹³³ At minimum, a foreign challenge of a governmental measure, brought under a BIT, might interfere with a sovereign state's right to regulate.¹³⁴ Making matters worse, many BITs allow parties to resolve their claims in arbitration before exhausting local remedies;¹³⁵ Such ISDS tribunals tend to favor investors¹³⁶ and lack transparency and predictability.¹³⁷ In 2015, the same year India became the 10th largest

127. *Id.* at 8. "From a negligible number in early 1990s, the total number of known treaty-based ISDS cases rose to 904 as of 31 July 2018." *Id.* at 10 (citing U.N. Conference on Trade and Development, *Investment Dispute Settlement Navigator*, <https://investmentpolicy.unctad.org/investment-dispute-settlement> [<https://perma.cc/HN7L-PWXQ>]).

128. *See* RANJAN, *supra* note 7; Stiglitz, *supra* note 98.

129. *See* RANJAN, *supra* note 7, at 2.

130.

[O]f [all] cases decided on merits (that is, cases where the tribunal ruled it had the jurisdiction and then went on to examine whether the state breached its BIT obligations) the numbers change in favour of the investor—investors have won 59 per cent cases whereas States have won 41 per cent cases.

Id. at 11-12.

131. *Id.* at 12.

132. *Id.*

133. *See generally* RANJAN, *supra* note 7.

134. *Id.* at 8.

135. *Id.* at 2.

136. *Id.* at 11-12.

137. *Id.* at 17 ("[T]he procedural aspects of commercial arbitration, such as party-appointed arbitrators, secrecy in arbitral proceedings, lack of access to arbitral documents

recipient of foreign direct investment (FDI), India was challenged in 17 ISDS arbitration disputes.¹³⁸ After the first ISDS arbitral award was entered against the Indian government for over \$4.75 million (USD), and in light of the spike in ISDS challenges by foreign investors, India unilaterally terminated 58 BITs in 2017.¹³⁹ However, those agreements remain effective as they relate to investments made before the termination date.¹⁴⁰ To improve its position in ISDS, India is currently seeking to re-negotiate the terminated BITs with provisions more closely aligned with the India Model BIT, promulgated in 2016.¹⁴¹

2. *India's Model BIT*

India's Model BIT was developed to mitigate the harmful effects of overbroad ISDS jurisprudence favoring investors challenging State actions.¹⁴² India described the shift as an attempt to provide "appropriate protection to foreign investors in India" while "maintaining a balance between investor's rights and the government's obligations."¹⁴³

The terms of the 2016 Model BIT is narrower in scope than the those in previously active BITs, providing a more limited basis from which future or re-negotiated agreements can be drafted.¹⁴⁴ The Model BIT sharply diverges from previous iterations by providing 38 highly detailed

including non-availability of arbitral awards (at times), have become characteristics of ISDS").

138. See Jones, *supra* note 122.

139. *Bilateral Investment Treaties (BITs)/Agreements*, DEP'T ECON. AFFS. GOV'T INDIA, www.dea.gov.in/bipa [<https://perma.cc/XKD3-5LUE>] (last updated Sept. 30, 2021); PRABHASH RANJAN ET AL., INDIA'S MODEL BILATERAL INVESTMENT TREATY 8, 10 (2018). The arbitral award entered against the Indian government in *White Industries v. India* was for \$4,085,180 (USD), with attorneys and other fees owed to White Industries Australia Ltd. in the amount of \$670,249.82 (AUD) plus 8 percent interest. *White Indus. Austrl. Ltd. v. Republic of India*, *ad hoc* Trib., Final Award, ¶ 16.1.1 (Nov. 30, 2011).

140. See Ranjan, *supra* note 7, at 39. India's BITs are effective for 15 years after the termination date. *Id.* This Note focuses on claims alleged under pre-existing BITs, including those 58 that were unilaterally terminated by India, given that they remain effective for investors who invested prior to the termination, and no BIT negotiations in India have adopted the Model BIT thus far.

141. See *id.*

142. *Id.* at 12.

143. See *id.* at 39.

144. See *id.*

provisions in seven chapters.¹⁴⁵ Further, the Model BIT omits certain clauses that ISDS tribunals have interpreted as giving rise to broad claims, including the FET clause.¹⁴⁶ Attempting reverse the wide reach of BIT claims and balance the interests of both the State and investors may be a commonsense response to the emerging ISDS jurisprudence, but such a change will have far-reaching effects: “[b]oth termination of BITs and launching negotiation for new BITs will impact as many as [84] countries with whom India has signed a BIT.”¹⁴⁷

Though the IBC does not provide a process for resolving cross-border insolvency like the widely adopted UNCITRAL Model Law on Cross Border Insolvency, the law allows the State to enter into bilateral agreements with foreign countries in order to apply the provisions of the IBC or foreign code.¹⁴⁸ Under such agreements, including BITs, the NCLT and other Indian insolvency authorities could request action by a foreign court overseeing the cross-border insolvency proceedings.¹⁴⁹ However, no such bilateral agreements have been entered into with India,

145. Ranjan & Anand, *supra* note 6, at 7-8 (2017).

146. *See id.* at 26, 52 (describing that FET provisions have “become a catch-all [] capable of sanctioning many legislative, regulatory, and administrative actions of the host state,” and that “[t]he Model BIT contains a narrow definition of investment, an extremely narrow FET-type provision”); Lucia Raimanova, *Indian Model Bilateral Investment Treaty*, ALLEN & OVERY, (Aug. 5, 2016), www.allenoverly.com/en-gb/global/news-and-insights/publications/indian-model-bilateral-investment-treaty [<https://perma.cc/J2SJ-UQ63>] (“Article 3.1 seeks to replace the autonomous [FET] standard with the customary international law standard of protection [for investors].”).

147. Ranjan & Anand, *supra* note 6, at 9.

148.

The Code enables the Government to enter into bilateral agreements with foreign countries for applying the provisions of the Code The ILC has proposed to add a Chapter to the Code to introduce a globally accepted and well recognized cross border insolvency framework, the [UNCITRAL] Model Law on Cross-Border Insolvency, considering the fact that some corporates transact businesses in more than one jurisdiction and have assets across many jurisdictions.

INSOLVENCY AND BANKRUPTCY REGIME IN INDIA: A NARRATIVE, *supra* note 67, at 16-17.

149. Karan Singh Chandhiok, *Restructuring & Insolvency Comparative Guide*, MONDAQ (Apr. 26, 2021), www.mondaq.com/india/insolvencybankruptcyre-structuring/939078/restructuring-insolvency-comparative-guide [<https://perma.cc/MGZ5-FHHH>].

and the framework for cross-border insolvency remains complicated and difficult to apply.¹⁵⁰

II. THREE STANDARDS FOR ASSESSING FAIR AND EQUITABLE TREATMENT CLAIMS

A. ORIGINS AND INTERPRETATION OF FAIR AND EQUITABLE TREATMENT

Notwithstanding differences in each BIT a country ratifies, the overarching aim of such treaties is to prevent a host state from unduly interfering with a foreign investor's rights.¹⁵¹ Typical BIT protections include claims for a broad interpretation of the definition of the term "investment," fair and equitable treatment of investors, most favored nation treatment, and full protection and security.¹⁵² These clauses are common to all Indian BITs, though "the language of these provisions undergoes minor variations from one treaty to the other."¹⁵³ The provisions restrict a host state from directly or indirectly expropriating property of foreign investors, prohibiting regulation in the public interest without the need to compensate foreign investors.¹⁵⁴ Going further, they also "impos[e] obligations on host states to accord [FET] to foreign invest[ors]," and "allow[] for repatriation of profits subject to conditions agreed to between the two countries."¹⁵⁵

Because BITs protect foreign investors at the expense of a state's regulatory power, "at times, the rights of foreign investors and host state's right to regulate come face-to-face."¹⁵⁶ Given the CIRP Suspension, judicial overwhelm, and inexorable delay, foreign investors in insolvent Indian companies might seek compensation for the asset value diminution under applicable BITs, claiming the State measure effectively breached a promise of FET.¹⁵⁷ While some defenses against ISDS challenges justify a State measure with a public health explanation, such defenses are not

150. *See id.*

151. *See* Ranjan, *supra* note 7, at 1 (citing RUDOLPH DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 3 (2012)).

152. *Id.*, at 42.

153. *Id.*

154. *Id.* at 1.

155. *Id.*

156. *Id.* at 12.

157. *See Post Suspension Analysis of Stressed Insolvencies, supra* note 42.

affirmative against broad FET claims.¹⁵⁸ The standard requires that host states treat foreign investors fairly and in a manner equivalent to the treatment of domestic nationals and foreign investors of other countries.¹⁵⁹

The FET clause is included in the large majority of BITs and gives rise to broad, sweeping claims; it has therefore emerged as the most important BIT standard of treatment.¹⁶⁰ Beyond this, what FET entails is imprecise, effectively giving discretion to ISDS tribunals to determine the scope of the standard.¹⁶¹ Because of the discretion granted to ISDS tribunals and the absence of clear normative content defining FET, the claims have become numerous and FET violation allegations over-utilized.¹⁶² FET violations have become a catch-all, “capable of sanctioning many legislative, regulatory, and administrative actions of the host state.”¹⁶³

One interpretation of FET defines the claim’s minimum standard through CIL.¹⁶⁴ This interpretation equates the FET standard with CIL standards, which, unfortunately, have also been criticized as lacking clear definition.¹⁶⁵ However, CIL has been described as, at the very least, establishing “a floor below which treatment of foreign investors must not fall, even if a government were not acting in a discriminatory manner.”¹⁶⁶ Although standards established under CIL can help inform the meaning of FET, because arbitral decisions lack the binding effect of precedent,

158. See Prabhash Ranjan, *COVID-19, India and Indirect Expropriation: Is the Police Powers Doctrine a Reliable Defence?*, 13 CONTEMP. ASIA ARB. J. 205 (2020); Ranjan, *supra* note 7, at 8, 10.

159. See Ranjan & Anand, *supra* note 6.

160. See *id.* at 26; Ranjan, *supra* note 7, at 150-51.

161. Ranjan & Anand, *supra* note 6; Ranjan, *supra* note 7, at 153.

162. See Ranjan, *supra* note 7, at 153.

163. See Ranjan & Anand, *supra* note 6, at 26; Ranjan, *supra* note 7, at 150-51.

164. See Ranjan, *supra* note 7, at 150-51.

165. See Ranjan & Anand, *supra* note 6, at 26-27. This standard is particularly compelling in BITs which link the FET provision to CIL. See Ranjan, *supra* note 7, at 151.

166. S.D. Myers, Inc. v. Canada, *ad hoc* Trib., Partial Award, ¶ 259 (Nov. 13, 2000), www.italaw.com/sites/default/files/case-documents/ita0747.pdf [<https://perma.cc/7LMC-WEUL>]. There is no precise definition of CIL that is universally agreed upon. CIL has also been described as promising, “an alien is protected against unacceptable measures of the host state by rules of international law which are independent of those of the host State.” See Ranjan, *supra* note 7, at 151 (citing RUDOLPH DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 3 (2012)).

competing interpretations of FET have been applied, and remain at issue, within a single jurisdiction.¹⁶⁷

Landmark cases *Tecmed v. Mexico* and *Cairn v. India* handed down competing interpretations of the FET promise.¹⁶⁸ Because the FET

167. Compare *Cairn v. India*, PCA Case Repository, Final Award, ¶¶ 1701-1707, 1718-1722 (Dec. 21, 2020) (citing *Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, ¶ 609 (July 29, 2008), www.italaw.com/sites/default/files/case-documents/ita0728.pdf [<https://perma.cc/H8Y4-RE9P>]) (finding the FET standard autonomous of CIL); *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, ¶ 284 (Jan. 14, 2010), www.italaw.com/sites/default/files/case-documents/ita0453.pdf [<https://perma.cc/2M38-FR7V>]; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, ¶ 178 (27 Aug., 2009), www.italaw.com/sites/default/files/case-documents/ita0075.pdf [<https://perma.cc/2HWQ-NFRJ>]; *Ioan Micula, Viorel Micula et al. v. Romania (I)*, ICSID Case No. ARB/05/20, Final Award, ¶ 520 (Dec. 11, 2013), www.italaw.com/sites/default/files/case-documents/italaw3036.pdf [<https://perma.cc/6NJE-SE8D>]), *with White Indus. Austl. Ltd. v. Republic of India*, *ad hoc* Trib., Final Award ¶ 10.3.6 (2011) (citing Zachary Douglas, *Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Euroko and Methanex* 22 ARB. INT'L 27, 28 (2006)) and *Saluka Investments BV v. Czech Republic*, PCA Case Repository, Partial Award, ¶ 304 (2006).

168. See *Cairn Energy PLC v. Gov't of India*, PCA Case Repository, Final Award, ¶ 968 (2020) (recognizing “the emergence of the explicit equation of FET and the customary minimum standard of treatment in treaty texts has been a response to the excessively broad interpretation of the FET standard by investment tribunals and is intended to clarify the original understanding of states as to the interpretation of the FET standard.”). These interpretations did not consistently evolve over time: the chronologically first case, *Tecmed v. Mexico*, adopts a very broad autonomous FET standard. *Técnicas Medioambientales Tecmed v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, (May 29, 2003). However, the Indian Tribunal in the next case, *White Indus. v. India*, tied the FET standard to the minimum standards set by CIL and explicitly denounced the standard in *Tecmed v. Mexico* as lacking a workability, instead providing a mere description of a “perfect world, to which all states should aspire but very few (if any) will ever attain.” See *White Indus. Austl. Ltd. v. Republic of India*, *ad hoc* Trib., Final Award, ¶ 10.3.6 (Nov. 30, 2011) (citing Zachary Douglas, *Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Euroko and Methanex* 22 ARB. INT'L 27, 28 (2006) and *Saluka Investments BV v. Czech Republic*, PCA Case Repository, Partial Award, ¶ 304 (2006)). The final case this paper uses to describe the FET interpretations, *Cairn v. India*, returns to the broad, independent interpretation of the FET standard. See *Cairn Energy PLC v. Gov't of India*, PCA Case Repository, Final Award, ¶¶ 1701-1707 (2020). Overall, each ISDS tribunal has the discretion to interpret the standard however they deem appropriate, dependent on the text of the individual BIT as well as the interpretations and preceding ISDS decisions they deem relevant. See

standard has been described and applied in a multitude of ways, FET has become so broad it is sometimes equated with the CIL standard.¹⁶⁹ The *Tecmed v. Mexico* arbitral award described an interpretation of FET that is autonomous of CIL, requiring that a state “provide international investment treatment that does not affect the basic expectations that were taken into account by the foreign investor [at the time of the investment decision].”¹⁷⁰ Although the ISDS Arbitral Tribunal in *Cairn v. India* acknowledged that CIL *can* help inform the meaning of FET, the Tribunal ultimately found the FET standard autonomous from, and broader than, CIL.¹⁷¹ Distinguishing the standards, the *Cairn* Tribunal explained:

A state may breach its FET obligation if its conduct is arbitrary, unreasonable, discriminatory, involves a lack of due process or a *denial of justice*, or is otherwise grossly unfair or unjust. It may also breach its FET obligation if it undermines the principles of *reasonable stability or predictability* or in violation of the investor’s *legitimate expectations*.¹⁷²

Under this *Cairn* standard, a foreign investor challenging any state measure, including the CIRP Suspension, may show that the FET clause of an applicable BIT was breached by stating a valid claim that the measure either: (1) denies them due justice; (2) disrupts the principles of legal certainty, including where the measure is arbitrary; and (3) disturbs the investor’s legitimate expectations.¹⁷³ This Section proceeds to describe what these claims entail and how an investor may assert each

Lorenzo Cotula, *Investment Contracts and International Law: Charting a Research Agenda*, 31 EUR. J. INT’L L. 353, 365 (2020).

169. See *Cairn Energy PLC v. Gov’t of India*, PCA Case Repository, Final Award, ¶¶ 1702, 1704 (2020) (rejecting the interpretation by other tribunals and scholars that the FET clause is equivalent to the “minimum standard” provided by CIL because the language of the relevant BIT refers only to “fair and equitable treatment” as opposed to those which explicitly refer to CIL, and finding that despite the FET clause sharing some elements with CIL, it is a more broad, autonomous standard); Ranjan & Anand, *supra* note 6, at 27.

170. See *White Indus. Austl. Ltd. v. Republic of India*, *ad hoc* Trib., Final Award, ¶ 10.3.5 (Nov. 30, 2011) (citing *Técnicas Medioambientales Tecmed v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 154 (May 29, 2003)).

171. See *Cairn Energy PLC v. Gov’t of India*, PCA Case Repository, Final Award, ¶¶ 1701-1707 (2020).

172. *Id.* ¶¶ 1718-1722 (emphasis added) (surveying tribunal decisions in which the FET standard was found autonomous of CIL standards).

173. *Id.*

claim to challenge the CIRP Suspension; it will then go on to analyze the weaknesses in each allegation.

B. ENUMERATED CHALLENGES TO THE SUSPENSION BY A FOREIGN INVESTOR: THE APPLICABLE LEGAL STANDARDS

1. *Denial of Justice Claims: Legal Standards*

The promise that a foreign investor will be treated fairly and equitably may be assessed under the widely recognized denial of justice standard.¹⁷⁴ Analysis of a denial of justice claim begins with an assessment of whether the result of the state's action is egregious, which depends on whether justice has been denied in a manner breaching FET:

[W]hether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in light of all the available facts that the impugned decision was clearly improper and discreditable with the result that the investment has been subjected to unfair and inequitable treatment.¹⁷⁵

Under this standard, the test for establishing denial of justice is an exceptionally high threshold, "requir[ing] the demonstration of 'a particularly serious shortcoming and egregious conduct that shocks, or at least surprises, a sense of judicial propriety.'"¹⁷⁶

In *White Indus. v. India*, an investor spent 9 years seeking recourse for an unfavorable investment outcome that resulted from a State action.¹⁷⁷ The investor alleged that the case's 9-year journey through India's court system amounted to an undue denial of justice that breached the promise of FET within the Australia-India BIT.¹⁷⁸ The decision issued five factors to assess when determining whether judicial delay amounts to a denial of justice, including: (1) the complexity of the proceedings; (2) the need for swiftness to the particular case and claimant; (3) the behavior of the litigants involved; (4) the significance of the interest at stake; and

174. See *White Indus. Austl. Ltd. v. Republic of India*, *ad hoc* Trib., Final Award, ¶¶ 10.4.4-.10 (Nov. 30, 2011).

175. *Id.* ¶ 10.4.6 (quoting *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AJ)/99/2, Award, ¶ 127 (Oct. 11, 2002)).

176. *Id.* ¶ 10.4.6 (quoting *Chevron Corp. v. Republic of Ecuador*, PCA Case Repository, Partial Award, ¶ 244 (2010)).

177. *Id.* ¶ 4.3.5.

178. *Id.* ¶ 10.4.4.

(5) the behavior of the courts themselves.¹⁷⁹ The inquiry of whether judicial delay amounts to a denial of justice is highly fact-sensitive, and “international law has no strict standards to assess whether court delays are a denial of justice.”¹⁸⁰

The *White Industries* decision cited several facts to support its finding that justice was not denied in the face of 9 years of adjudication.¹⁸¹ Although the investor sought local and international remedies over nearly a decade before reaching a resolution, the case moved at a typical pace through the Indian court system during the first 5 years.¹⁸² Because the award from previous court decisions accrued interest during the remaining 4 years of the case, monetary justice was not denied.¹⁸³ The investor was unable to claim that it was surprised by the delays as the overburdened Indian judiciary was serving a population of over 1.2 billion people, and the country was rapidly developing.¹⁸⁴ Ultimately, because the delay contained no particularly serious shortcoming or egregious conduct that could shock or surprise a sense of judicial propriety, the investor’s claim that they were denied justice when faced with severe judicial delay failed.¹⁸⁵

a. Challenge 1: Alleging Judicial Delay Denies Due Justice

Foreign investors may successfully claim the promise of FET was breached because they were denied access to justice when their claims faced lengthy court delays, a situation potentially exacerbated by the CIRP Suspension.¹⁸⁶ By delaying the resolution of the insolvency claim, the Suspension may indirectly harm the value of an investor’s recovery.¹⁸⁷ Because lifting the CIRP Suspension is likely to overwhelm, and therefore delay, the legal system’s ability to resolve insolvent firms, a

179. *Id.* ¶ 10.4.10.

180. *Id.* ¶ 10.4.9 (citing *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction of 11 September 2009, ¶ 155 (2009)).

181. *Id.* ¶¶ 10.4.22-.24.

182. *Id.* ¶¶ 10.4.21-.22.

183. *Id.* ¶ 10.4.14.

184. *Id.* ¶ 10.4.18.

185. *Id.* ¶ 10.4.23.

186. *Cairn Energy PLC v. Gov’t of India*, PCA Case Repository, Final Award, ¶¶ 1718-1722 (2020).

187. *See Bangar, supra* note 3, at 119; WORLD BANK, *supra* note 80, at 30 (“Rapid recovery ensures that market values are realized and avoids the loss of value due to delayed enforcement and reinvestment opportunities”).

company's asset value may significantly diminish before distribution or successful reorganization.¹⁸⁸ Thus, a foreign investor could argue that it was denied access to deserved justice during a critical time of the insolvency, when it likely would have recovered more on its claims, constituting a breach of FET.

To support such a denial of justice claim, the investor might show that the value of its assets in the company declined from the onset of insolvency to the time the CIRP filings became available in March 2021.¹⁸⁹ Its claim may be further supported by demonstrating the diminished recovery value is due solely to the delays imposed by the Suspension and the State's increasingly slow judiciary. Additionally, some foreign investors may allege that the recent *Arun Kumar Jagatramka*¹⁹⁰ decision heightens the significance of the interest at stake within CIRP because they may no longer propose a scheme under Companies Act Section 230.¹⁹¹ These arguments underscore the necessity of swiftness in CIRPs and the significance of the interest at stake;¹⁹² such factors are particularly important to the investor's claim given that the remaining three elements for consideration of a judicial delay claim are only relevant where an investor pursued a resolution through local remedies or the judicial system.¹⁹³

To speak to the next factor, the issue's importance, some investors may allege the heightened importance of CIRP given this new restriction on their ability to propose a scheme, further denying them justice by treating them differently from domestic creditors.¹⁹⁴ Finally, an investor could cite the insolvent balance sheet and outstanding financial obligations to underly the issue's significance.

188. See *White Indus. Austl. Ltd. v. Republic of India*, *ad hoc* Trib., Final Award, ¶¶ 10.4.4-10 (Nov. 30, 2011) (acknowledging judicial delay can constitute a denial of justice breaching FET promises under BITs).

189. See *id.* ¶ 10.4.14 (finding differences in compensation through court resolutions is relevant to the significance factor of a denial of justice claim).

190. See *supra* Section I.A.iii (discussing how the restriction this case imposes on foreign entities interacts with other limitations on foreign parties' rights).

191. See *Arun Kumar Jagatramka v. Jindal Steel & Power Ltd.*, (2019) SCC ¶ 91 (India).

192. See *White Indus. Austl. Ltd. v. Republic of India*, *ad hoc* Trib., Final Award, ¶ 10.4.14 (Nov. 30, 2011).

193. *Id.* ¶ 10.4.10.

194. See *Jagatramka*, (2019) SCC ¶¶ 66, 91.

Finally, an investor may emphasize the lost value in the firm's assets and going concern while awaiting the end of the CIRP Suspension.¹⁹⁵ To establish that the proceedings required expediency, foreign investors may underscore the rate at which their insolvency recovery depreciated in value during the CIRP Suspension.¹⁹⁶ Together, these arguments support a claim that the significant harm caused while proceedings were suspended was the direct result of the State's action and the judicial system's delayed conditions. Though an investor could assert denial of justice to challenge the CIRP Suspension, allegations of legal uncertainty, arbitrariness, and disruption of legitimate expectations could also establish such a violation of FET.

2. *Legal Uncertainty and Arbitrariness Claims: Legal Standards*

Under the broader, autonomous FET regime, the *Cairn* Tribunal found that allowing individuals to predict the legal consequences of their conduct is “one of the main characteristics and functions of the law” and of the FET standard.¹⁹⁷ This requires a host state compensate an investor for the harm caused by an arbitrary governmental measure.¹⁹⁸ An arbitrary measure is one that does not reflect the tradition of CIL or the rule of law, inherent in which is the principle of legal certainty.¹⁹⁹ “Many ISDS tribunals, . . . have held that if a state acts in a manifestly arbitrary manner, it breaches [CIL]”; These tribunals can find that a breach is due to

195. See *White Indus. Austl. Ltd. v. Republic of India*, *ad hoc* Trib., Final Award, ¶¶ 10.4.10 (Nov. 30, 2011) (setting the significance of the interest at stake as a factor relevant to whether judicial delay caused an investor to be denied justice).

196. See *id.* (setting the need for swiftness as a factor relevant to whether judicial delay caused an investor to be denied justice). See also *M/S. Innoventive Indus. Ltd. v. ICICI Bank & ANR.*, (2018) 1 SCC 407, ¶ 12 (India) (recognizing the risk of a firm's atrophy where insolvency proceedings are not swift and efficient).

197. See *Cairn Energy PLC v. Gov't of India*, PCA Case Repository, Final Award, ¶ 1740 (2020).

198. See *RANJAN*, *supra* note 7, at 8.

199. *Cairn Energy PLC v. Gov't of India*, PCA Case Repository, Final Award, ¶ 1741 (2020) (citing *Case Concerning Elettronica Sicula, S.p.A. (ELSI)* (United States v. Italy), I.C.J. Reports 1989, ¶ 128, which recognized legitimate expectations as a fundamental component of the rule of law where an “‘arbitrary action’ [was] ‘substituted for the rule of law’” and was thus found unlawful). See also *Ranjan & Anand*, *supra* note 6, at 30 (describing arbitrariness as a fundamental aspect of the FET standard and related to the principle of legal certainty).

disruption of legal certainty.²⁰⁰ Where such a breach is found, that conduct may also breach FET.²⁰¹

The principle of legal certainty requires a state's laws to be clear, certain, and, therefore, predictable to inform the conduct of individuals and entities.²⁰² Rules must provide advance notice of the consequences of unlawful behavior.²⁰³ However, the principle of legal certainty is not absolute and the expectation can be overcome when a host state's action was undertaken for a legitimate public purpose or in the public's interest.²⁰⁴ The justification for such state action, even if in the public interest, must be proportional to the harm prevented and balance against the burdens placed on foreign investors.²⁰⁵

The *Cairn* decision handed down a balancing test to assess proportionality: “[T]he [state] measures should not be more burdensome for the individual's rights and interests than required by the pursued public purpose, especially if a less burdensome measure would be available to satisfy the same public purpose.”²⁰⁶ In that decision, the Tribunal also clarified that rules applying retroactively must be justified not only by a public policy objective, but that justification must warrant the *retroactive* application of that change.²⁰⁷ In order to satisfy the added requirement of specifically justifying the retroactivity, the state must be “facing a situation where the new rule would not fulfil its purpose . . . if

200. See Ranjan & Anand, *supra* note 6, at 30 (the additional manifest arbitrariness standard “ensure[s] that foreign investors have recourse when host states act [] in bad faith or in an irrational or manifestly unreasonable manner.”).

201. See *Cairn Energy PLC v. Gov't of India*, PCA Case Repository, Final Award, ¶ 1741 (2020).

202. See *id.* ¶¶ 1757-1760, 1788.

203. See *id.* ¶ 1757.

204. See *id.* ¶¶ 1760, 1788-1790.

205. See *id.*

206. *Id.* ¶ 1788.

207. *Id.* ¶ 1760, 1790. Additionally, to balance these interests proportionally:

- (i) the retroactive application of a new regulation is only justified when the prospective application of that regulation would not achieve the specific public purpose sought, and
- (ii) the importance of that specific public purpose must manifestly outweigh the prejudice suffered by the individuals affected by the retroactive application of the regulation.

its effects were only prospective.”²⁰⁸ This requirement is not typically met.²⁰⁹

a. Challenge 2: Alleging Arbitrary Suspension Hinders Investor’s Certainty

The CIRP Suspension will almost certainly cause severe delays for companies seeking a judicially-blessed resolution of their financial distress.²¹⁰ An investor might argue that the year-long CIRP Suspension subverts the purpose of the IBC regime to invite foreign investment by providing a reliable, predictable framework of rules and thus, legal certainty.²¹¹ Because India’s bankruptcy regime was so strengthened by the 2016 amendments, a foreign investor may argue the strong legal certainty provided under the IBC was undermined by the Suspension and resultant judicial delays.²¹² While the Suspension is now lifted, because insolvent companies were prevented from initiating CIRP for an entire year, their race to file for such proceedings could flood and overwhelm the NCLT and NCLAT, resulting in further delays during which severe attenuation of value can occur.²¹³ Given this potential diminution in value, an investor may allege the disruption in IBC legal certainty breaches the FET clause of an applicable BIT, seeking compensation to the damaged value of its recovery.²¹⁴

However unfortunate for foreign investors, the financial harm they faced may be overcome by the test’s balancing aspect, as the Suspension could be justified by the unprecedented pandemic conditions. Should a foreign investor fail on this particular iteration of FET claim, it has one remaining weapon in their arsenal: disruption of legitimate expectations.

208. *Id.* ¶ 1790.

209. *Id.*

210. *Post Suspension Analysis of Stressed Insolvencies*, *supra* note 42. *See generally* The Insolvency and Bankruptcy Code, 2016, § 10A.

211. *See* Cairn Energy PLC v. Gov’t of India, PCA Case Repository, Final Award, ¶ 1750 (2020) (defining the legal system’s role imposing predictable obligations, sanctions, and rules, and the principle of legal certainty as rooted in the rule of law).

212. *See* REPORT OF THE INSOLVENCY LAW COMMITTEE, *supra* note 14, at 5 (2020); *Post Suspension Analysis of Stressed Insolvencies*, *supra* note 42 (warning of potential judicial delay given the increased volume of stressed insolvent Indian companies).

213. *See* Bangar, *supra* note 3, at 119.

214. *See* Cairn Energy PLC v. Gov’t of India, PCA Case Repository, Final Award, ¶ 1750 (2020) (analyzing breach of the FET clause through disruption of legal certainty); *Post Suspension Analysis of Stressed Insolvencies*, *supra* note 42.

3. *Disruption of Legitimate Expectation Claims: Legal Standards*

Tribunals have found FET promises breached where a host state's actions upset a foreign investor's legitimate expectations as to how its investments would be treated under the state's laws and regulations.²¹⁵ Notwithstanding whether an ISDS tribunal finds the FET standard autonomous or reliant on CIL:

[A]n overwhelming majority of cases support[] the contention that . . . where the state has acted in such a way so as to generate a legitimate expectation in the investor and that investor has relied on that expectation to make its investment, action by the state that reverses or destroys those legitimate expectations will be in breach of the fair and equitable treatment standard.²¹⁶

In other words, “[t]here must be an ‘unambiguous affirmation’ or ‘definitive, unambiguous and repeated assurances’ . . . targeted at a specific person or identifiable group.”²¹⁷ It is necessary that the state conduct is specifically and unambiguously related to the investor's legitimate expectation to constitute a breach.²¹⁸

The *White Industries* Tribunal ultimately found that State officers' reassurances that “it was safe for [the investor] to invest in India; that the Indian legal system was, to all intents and purposes, the same as the

215. See *White Indus. v. India*, ¶ 10.3.7 (citing ANDREW PAUL NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 281-82 (2009)). See also *Cairn Energy PLC v. Gov't of India*, PCA Case Repository, Final Award, ¶¶ 862, 885, 915-930, 1731 (2020). While some tribunals recognize the disruption of an investor's legitimate expectations as a principle incorporated into the FET standard through CIL, the *Cairn v. India* Tribunal stated clearly, “the doctrine of ‘legitimate expectations’ is not to be found in general rules of international law, but can be found in the FET standard of investment treaties.” See also *Ranjan & Anand, supra* note 6, at 25-31. While the doctrine of legitimate expectations is undoubtedly fundamental to FET, its precise origins are not determinative of the standard's applicability to a FET claim analysis. *Id. Compare Cairn v. India*, PCA Case Repository, Final Award (Dec. 21, 2020) with *White Indus. Austl. Ltd. v. Republic of India, ad hoc Trib.*, Final Award (Nov. 30, 2011).

216. Ioan Micula, Viorel Micula et al. v. Romania (I), ICSID Case No. ARB/05/20, Final Award, ¶ 667 (Dec. 11, 2013). See *Cairn Energy PLC v. Gov't of India*, PCA Case Repository, Final Award, ¶ 885 (2020).

217. See *White Indus. Austl. Ltd. v. Republic of India, ad hoc Trib.*, Final Award, ¶ 10.3.7 (Nov. 30, 2011) (citing ANDREW PAUL NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 281-82 (2009)).

218. *Id.*

Australian Legal system; and, accordingly, [the investor] could expect fair treatment” suffered from “vagueness and generality” and were thus incapable of giving rise to an investor’s reasonable legitimate expectation to have been breached under the FET standard.²¹⁹ The Tribunal therefore found no breach of the FET clause because the investor’s expectations were not supported by specific promises made by the appropriate authority, the State.²²⁰ In such a case, the investor’s expectations were not legitimate.²²¹

a. Challenge 3: Alleging Suspension Disrupted Investor’s Legitimate Expectations

A foreign investor’s argument that the CIRP Suspension and resultant judicial delays constitute a disruption of its legitimate expectations may be summarized as follows:²²² because the economic and business environment in India substantially improved since the IBC’s development in 2016, which has proven much more efficient than the previous legal regime, a foreign investor may have reasonably and legitimately expected the IBC would efficiently govern any future insolvency claims.²²³ Further, before the *Arun Kumar Jagatramka* decision prohibited some foreign investors from proposing a scheme of arrangement or a resolution plan in CIRP, foreign investors may have also expected greater abilities to propose a scheme of arrangement under Section 230 of the Companies Act.²²⁴ Foreign investors may conclude by arguing that the abrupt change disrupted their legitimate expectations of the applicable legal framework.

Prior to the enactment of the IBC, the time taken to resolve bankruptcies ranged from 6.5 to 11 years.²²⁵ Currently, investors can expect CIRP resolutions to face significant delays in the NCLT, during

219. *Id.* ¶¶ 10.3.2, 10.3.17.

220. *Id.* ¶¶ 10.3.2, 10.3.9.

221. *Id.*

222. *See* White Indus. Austl. Ltd. v. Republic of India, *ad hoc* Trib., Final Award, ¶ 10.3.7 (Nov. 30, 2011). In order to properly state this claim, the investor must be someone who invested after the 2016 IBC became effective because the insolvency resolution regime prior to 2016 was significantly less efficient, taking as long as 11 years to reach an insolvency resolution. *See also* Contractor et al., *supra* note 23, at 5.

223. *See* REPORT OF THE INSOLVENCY LAW COMMITTEE, *supra* note 14, at 5.

224. *See* White Indus. Austl. Ltd. v. Republic of India, *ad hoc* Trib., Final Award, ¶ 10.3.7 (Nov. 30, 2011). *See also* Contractor et al., *supra* note 23, at 5.

225. *See* Contractor et al., *supra* note 23, at 5.

which the insolvent company's going concern and asset value will diminish before distribution or reorganization.²²⁶ An investor may allege neither the conditions making resolutions proceed 160 percent slower than the statutory mandate nor the diminution of company value during that time were foreseeable at the time of its initial investment.

Even with delays in the NCLT, proceedings in the fourth quarter of 2020 took 433 days²²⁷ on average—much less than the 11 years required in some pre-IBC resolutions.²²⁸ Thus, a claim that the State's current bankruptcy regime upset an investor's legitimate expectations of expediency and swift resolution, constituting a breach of the FET clause, is the weakest of all FET claims.²²⁹ While there are other methods of claiming the FET promise was breached, weaknesses plague all the claims, which are ultimately unlikely to prevail in an arbitral analysis.

III. FOREIGN INVESTORS; FET CLAIMS WILL FAIL: WEAKNESSES INHERENT IN CHALLENGES TO THE CIRP SUSPENSION

Foreign investors that challenge the Suspension by alleging it breached the FET clause of an applicable BIT will fail.²³⁰ Even if an investor did prevail, requiring the State to compensate the value it lost during the Suspension, the amount recoverable would probably be insufficient to justify the case.²³¹ What could become very a costly arbitration case may not be worthwhile for small and medium investors who could only recover the value CIRP failed to recoup during the Suspension.²³² In light of robust debate about the validity of the

226. See The Insolvency and Bankruptcy Code, 2016, § 29A (prohibiting foreign investors from independently initiating CIRP); *Post Suspension Analysis of Stressed Insolvencies*, *supra* note 42, at 2.

227. See also July-Sept. 2020 IBBI Quarterly, *supra* note 28, at 20. While this is over 160 percent the statutory mandate requiring a resolution within 270 days, it is a nearly incomprehensible improvement from the pre-IBC delays. Compare *id.* with Contractor et al., *supra* note 23, at 5.

228. See Contractor et al., *supra* note 23, at 5.

229. See *White Indus. Austral. Ltd. v. Republic of India*, *ad hoc* Trib., Final Award, ¶ 10.3 (Nov. 30, 2011).

230. *Cairn Energy PLC v. Gov't of India*, PCA Case Repository, Final Award, ¶¶ 1718-1722 (2020).

231. See RANJAN, *supra* note 7, at 8; Stiglitz, *supra* note 98.

232. The result in *White Industries Australia Ltd. v. Republic of India* required the Indian government pay \$670,249.82 (USD) plus 8 percent interest in attorneys and other

Suspension, where the potential recovery would be significant, there is a strong possibility that foreign investors will bring such a challenge. Indeed, a domestic investor already challenged the measure on Constitutional grounds by arguing the Suspension, imposed in a historic moment, allowed rapid depreciation of company value to proceed unabated, without recourse or recovery.²³³

As discussed in Part II, under *Cairn*'s broad construction of the FET standard, a foreign investor could allege the Suspension breaches a FET clause by claiming the delays associated with the Ordinance either: (1) denied them deserved justice, (2) disrupted requisite legal certainty, or (3) disturbed their legitimate expectations.²³⁴ However, weaknesses inherent in each of these arguments will likely leave the aforementioned challenges dead on arrival. It is highly unlikely a challenge could overcome the fact that the Suspension treats foreign investors and domestic creditors identically, the measure did not risk legal uncertainty, and State officials would not have promised an expedient resolution.

fees. *White Indus. Austl. Ltd. v. Republic of India*, *ad hoc* Trib., Final Award, ¶ 16.1.1 (Nov. 30, 2011).

233. Rajeev Suri, claimant in Delhi High Court, challenged the CIRP Suspension, alleging: (1) the Suspension was “irrational, arbitrary, unjust and mala fide” as it prevents entities from exercising their statutory rights; (2) it pushed companies towards liquidation, discouraged entrepreneurship, and defeated the objectives of the IBC; (3) the issuance of the suspension was beyond the powers granted to the Government under Articles 14 and 19(1)(g) of the Constitution of India; and (4) the suspension would result in further deterioration of the insolvent entity, making the restructuring or revival of the entity unviable. Chirali Jain & Chahak Agarwal, *Lifting the Suspension on Section 10 of IBC- Need of the Hour?*, Hidayatullah Nat'l L. Univ. Corp. & Com. L. Blog (Aug. 19, 2020), www.hnluccls.in/2020/08/19/lifting-the-suspension-on-section-10-of-ibc-need-of-the-hour/. Ultimately, the petitioner withdrew the challenge. See Gurmukh Choudhri, *Section 10 A of the Insolvency & Bankruptcy Code, 2016 Dispensable or Indispensable?*, TMT L. Prac. (July 1, 2021), <https://tmtlaw.co.in/section-10-a-of-the-insolvency-bankruptcy-code-2016-dispensable-or-indispensable/>. Another challenge was subsequently filed, alleging the Suspension “discriminates against persons and personal guarantors” because “while the provision suspends the enforcement of sections 7, 9 and 10 of the IBC against corporate debtors, it excludes persons and personal guarantors from its ambit.” *Id.*

234. While the Suspension only explicitly halted new CIRP proceedings, which are reorganizations, 49.7 percent of insolvency proceedings initiated as CIRP resolutions ended in liquidation in 2020. July-Sept. 2020 IBBI Quarterly, *supra* note 28, at 17. Given that about half of CIRPs end in liquidation, this Note assumes the Suspension halted filings that would result in both reorganizations and liquidations. Further, the claims stated by the hypothetical foreign investor in this Note reflect arguments available in the event the insolvency proceedings would result in liquidation or reorganization.

A. JUSTICE IS NOT DENIED TO FOREIGN INVESTORS TREATED
IDENTICALLY TO DOMESTIC COUNTERPARTS

Because the Suspension applies equally to domestic and foreign investors, weakness plagues potential claims by foreign investors alleging judicial delay denied deserved justice. Under IBC Section 4, foreign and domestic investors alike may initiate a CIRP if the debtor is insolvent.²³⁵ Though some foreign investors are now restricted from proposing a resolution plan or scheme of arrangement, the parties may still vote on such proposals.²³⁶ Throughout the duration of the Suspension, foreign investors were not restricted from proposing a scheme of arrangement under Section 230, which remained an alternative option for insolvent Indian corporations to resolve outside the IBC.²³⁷ Thus, even if an investor successfully argues the Suspension is unfair, the Suspension's effect barring *all* new CIRPs substantially weakens the claim.

Given the equal application of the Suspension, the *Arun Kumar Jagatramka* decision does not heighten the importance of CIRP. Because the case places limits on the same foreign investors who were previously restricted from proposing a plan for CIRP resolution, the availability of CIRP would not provide a unique opportunity for those investors to participate in the firm's resolution. Thus, the decision does not play a role in demonstrating the significance of resolution through CIRP.²³⁸ Admittedly, these restrictions do treat foreign investors differently from domestic creditors. However, the Suspension treats foreign and domestic creditors equally, and both the IBC and Companies Act frameworks remain available in all other aspects to foreign creditors and the Indian companies in which they are invested, including rights to initiate

235. CIRP may be initiated by a financial creditor under IBC Section 7, an operational creditor under Section 9, and corporate applicant of corporate debtor under Section 10. See *CIRP FAQs*, *supra* note 109, at 1-2. There are no restrictions on the meaning of financial creditor, operational creditor, or corporate applicant based on geographic location or foreign status. *Id.*

236. See *Arun Kumar Jagatramka v. Jindal Steel & Power Ltd.*, (2019) SCC ¶ 91 (India) (failing to rule on any provision that would impact or impair the existing voting scheme).

237. See *id.* ¶ 1, 91 (decided March 15, 2021, 10 days before the year-long Suspension was lifted).

238. See *id.* at 2.

proceedings and vote for a resolution.²³⁹ Absent other discrepancies in the legal treatment of foreign and domestic investors, the restriction is likely insufficient to show the significance of the interest at stake.

While economic arguments might help demonstrate the weight of a foreign investor's losses, such arguments are not likely enough to establish the need for a swift resolution envisioned by the *White Industries* Tribunal, especially because of the pecuniary nature of the harm.²⁴⁰ Further, any interest that accrues on the investor's insolvency recovery while the proceeding is pending wholly undermines the need for swift resolution.²⁴¹ Given the two factors are the basis for a challenger's strongest arguments, without showing a need for swift resolution, the claim is significantly weakened. While the investor may succeed in demonstrating that judicial delay impaired or will impair the value of its recovery, it will meet, at best, only two of the five *White Industries* factors. Although that decision provided three additional factors to consider when resolving the inquiry, none are relevant to a claim that has not yet been filed, or in a case where a foreign investor did not utilize any of the local remedies available.²⁴²

Further, the standard for a violation of FET through the denial of a foreign investor's access to justice is a high bar, requiring "egregious conduct."²⁴³ A foreign investor's challenge to the CIRP Suspension is terminally impaired by the fact that India likely did not promulgate the

239. See also *CIRP FAQs*, *supra* note 109, at 2-3, 14; *Jagatramka*, (2019) SCC ¶ 91 (India) (narrowly extending the limitations under IBC Sections 29A and 35(f)(1) only to proposed schemes of arrangement under Companies Act Section 230). See generally *The Insolvency and Bankruptcy Code, 2016*, §§ 7, 9, 10, 10A (beginning the CIRP Suspension on March 25, 2020).

240. See *White Indus. Austl. Ltd. v. Republic of India*, *ad hoc* Trib., Final Award, ¶ 10.4.14 (Nov. 30, 2011) (recognizing the difference between criminal proceedings, where there is a particular need for urgent resolution in light of due process and human rights issues, as opposed to commercial matters).

241. See *id.* (finding the need for swift resolution was significantly "less compelling" where interest accrued during the period of judicial delay).

242. See *id.* ¶ 10.4.10 (setting the unrelated factors: the complexity of the proceedings; the behavior of the litigants involved; and the behavior of the courts themselves).

243. *Id.* ¶ 10.4.6 (quoting *Chevron Corp. & Texaco Petroleum Co. v. The Republic of Ecuador*, PCA Case Repository, Partial Award, ¶ 244 (2010) ("[T]he test . . . requires the demonstration of 'a particularly serious shortcoming and egregious conduct that shocks, or at least surprises, a sense of judicial propriety.'")).

Ordinance in bad faith, but in an attempt to protect its economy from fragility during a pandemic and a resultant period of economic distress.²⁴⁴

The essential nature of social distancing further weakens an investor's challenge; the Suspension and court delay were unavoidable downsides to protecting against the unforeseeable, deadly pandemic. The Suspension is justifiable as a practical attempt to protect Indian companies from avoidable, permanent closure.²⁴⁵ It would have been a monumental task for the Indian government to accept new CIRP filings while adjusting to strictly virtual connections given the unreliable availability of wifi throughout the nation.²⁴⁶ Given that India is a developing country with over 1.2 billion people, some judicial delay is to be expected, and could not reasonably be considered egregious.²⁴⁷ Indeed, the Indian court system has long been overburdened, and adjustments to a post-COVID world merely exacerbated these existing conditions.²⁴⁸ Even 9 years of pendency within the courts did not constitute delays sufficient to deny a claimant due justice.²⁴⁹ No realistic insolvency proceeding would take that long after the IBC's effect, even if facing delays exacerbated by the Suspension. In light of these facts, a reasonable investor would have mitigated its expectations of expediency, including at the time of its investment.²⁵⁰ As such, the investor's challenge, based on unreasonable expectations of expediency in the courts, would fail.

At first glance, economic and financial arguments may be compelling ways for a foreign investor to claim the Suspension denied it

244. *Id.* (quoting *Chevron Corp. & Texaco Petroleum Co. v. The Republic of Ecuador*, PCA Case Repository, Partial Award, ¶ 244 (2010)).

245. *See Cairn Energy PLC v. Gov't of India*, PCA Case Repository, Final Award, ¶¶ 1692, 1756-1757 (2020) (considering the government's public purpose relevant to the host State's defense against an investor's FET claim).

246. Vijay Kumar Singh & Shilpika Pandey, *COVID-19—Law and Policy Response in India*, 5 UPES L. REV. 1 (2020). *See generally* Meghna Kantharia, *Online School Education in India during Coronavirus Pandemic: Benefits and Challenges*, RSCH. J. HUMANS. & SOC. SCIS. (Jul. 19, 2020).

247. *See White Indus. Austl. Ltd. v. Republic of India*, *ad hoc* Trib., Final Award, ¶ 10.4.18 (Nov. 30, 2011) (citing India's size and status as developing as legitimate explanations for the "seriously overstretched judiciary").

248. *See* BERTELSMANN STIFTUNG'S TRANSFORMATION INDEX, *supra* note 5.

249. *See id.* ¶¶ 10.4.17-21 (considering the length of time the proceedings were delayed, balanced against the pace at which proceedings moved through the court systems as resolutions were appealed).

250. *See White Indus. Austl. Ltd. v. Republic of India*, *ad hoc* Trib., Final Award, ¶ 10.4.18 (Nov. 30, 2011).

due justice and recourse against an insolvent debtor. However, its claim would be fatally weakened by the Suspensions' application barring both domestic and foreign creditors.²⁵¹ Further, because investors are more likely to expend available resources to adjudicate their insolvency claim rather than to seek recourse against the State, it is difficult to say how often foreign investors will utilize local remedies. Where an investor does not exhaust local remedies, many of the factors establishing justice denied are not applicable. Finally, because India, as a massive, developing country, was exercising practicality in an emergency situation, the measure is likely justified as an act in the interest of public health.

B. MINISCULE RETROACTIVITY DOES NOT AMOUNT TO LEGAL UNCERTAINTY

A foreign investor may argue that the reasoning in the *Cairn* decision should be followed closely, but the facts in that case can be distinguished from the situation the Indian courts will soon find themselves in. The *Cairn* Tribunal deeply analyzed the retroactive effect of a tax law scheme in finding the principle of legal certainty, which is fundamental to a state's rule of law, was disrupted by the law's retrospective application.²⁵² These principles are distinct from the CIRP Suspension situation.

A foreign investor challenging IBC Section 10A may argue that the Suspension should have technically begun when the Ordinance was promulgated on June 5, 2020,²⁵³ meaning that the Suspension and tax law both retroactively affect the parties' rights.²⁵⁴ The argument would then conclude that, given the factually similar situation, the standards applied by the *Cairn* Tribunal when analyzing the tax legislation should also apply in an assessment of the Ordinance.²⁵⁵ Such a standard would allow

251. The Insolvency and Bankruptcy Code (Second Amendment) Bill, 2020, Bill No. XXXI of 2020, § 10A (June 5, 2020) (imposing the CIRP Suspension affecting domestic and foreign creditors alike).

252. See *Cairn Energy PLC v. Gov't of India*, PCA Case Repository, Final Award, ¶¶ 1774-1777 (Dec. 21, 2020).

253. Additionally, the Ordinance's language provided that the Suspension would prevent CIRP filings for events of default that occurred during the 12 days prior, as well. The Insolvency and Bankruptcy Code (Second Amendment) Bill, 2020, Bill No. XXXI of 2020, § 10A (issued on June 5, 2020, but effectively barring CIRP filings for events of default between March 25, 2020, and March 25, 2021).

254. The Insolvency and Bankruptcy Code (Second Amendment) Bill, 2020, Bill No. XXXI of 2020, § 10A (June 5, 2020).

255. *Cairn Energy PLC v. Gov't of India*, PCA Case Repository, Final Award, ¶ 1790 (2020).

the Suspension to stand only if the State, when issuing the rule, was “facing a situation where the new rule would not fulfil its purpose . . . if its effects were only prospective.”²⁵⁶

However, the Suspension is distinct from the tax scheme analyzed in *Cairn* in more than one way. First, due to the exceptionally brief period of retroactivity (from June 5, 2020 to March 25, 2020),²⁵⁷ the Ordinance cannot be likened to the years-long reach of the tax scheme challenged in *Cairn*.²⁵⁸ Further, the Ordinance provided at issuance that Section 10A would only be operative for a limited 6-month period, with the option of being extended *prospectively* until March 25, 2021.²⁵⁹ It is difficult to imagine the State, by issuing the Ordinance, intended to pull the rug out from under any investor or debtor. Rather, the brief period of retroactivity was a practical and logistical necessity. The State, in an attempt to protect the maximum number of distressed entities as early as possible, notified the public of the approaching Suspension only 2 days after the World Health Organization declared the rising COVID-19 infections a global pandemic on March 11, 2020.²⁶⁰ However, the Ordinance could not have been promulgated during that week, because the Indian government, including the court system, was not fully operational due to strict social distancing guidelines.²⁶¹ The logistical concerns contextualizing the issuance of the Ordinance and the miniscule period of retroactivity, announced in advance, would allow an ISDS tribunal to easily find the situation at hand wholly distinct from the years-long reach of the tax scheme in *Cairn*.

Even if the law challenged in the *Cairn* decision is distinguishable, rendering some proportionality factors irrelevant, the general statement of the FET standard may still be applicable (though which interpretation

256. Venancio D’Costa & Astha Ojha, *IBC Suspended for a Year: What’s in Store for the Creditors*, MONDAQ (Aug. 14, 2020), www.iisd.org/itn/2012/01/12/the-netherlands-treaty-shopping.

257. See *infra* note 16 and accompanying text.

258. See *Cairn Energy PLC v. Gov’t of India*, PCA Case Repository, Final Award, ¶ 124 (2020).

259. The Insolvency and Bankruptcy Code (Second Amendment) Bill, 2020, Bill No. XXXI of 2020, § 10A (June 5, 2020).

260. Domenico Cucinotta & Maurizio Vanelli, *WHO Declares COVID-19 a Pandemic*, PUBMED (Mar. 19, 2020), www.pubmed.ncbi.nlm.nih.gov/32191675.

261. See D’Costa & Ojha, *supra* note 256.

of FET to apply remains at the discretion of the ISDS tribunal).²⁶² The requirement of legal certainty, while rooted in the rule of law, “cannot be understood in absolute terms and should instead be balanced against the state’s power to act in pursuance of the public purpose.”²⁶³ The doctrine’s non-absolute nature requires “the [state] measures [are] not . . . more burdensome for the individual’s rights and interests than required by the pursued public purpose, especially if a less burdensome measure would be available to satisfy the same public purpose.”²⁶⁴

Applying these principles, the public purposes—to stave off economic damage, prevent premature liquidation of distressed Indian companies, and avoid overburdening the judicial system—should balance against the delays imposed, notwithstanding diminished recoveries among investors and creditors. At the pandemic’s onset, economic stability required the continued operation of companies of all sizes because of their contributions to the economy and ability to provide jobs that empower individuals with an income and improved standards of living. To protect as much of the economy as possible, the Suspension halted new CIRP to prevent companies from closing. Given that the NCLT and NCLAT were operating remotely and at reduced capacity, no less burdensome measure was available to deal with the huge volume of insolvency proceedings.²⁶⁵ Further, from the outset, the Ordinance limited the Suspension’s effect not to exceed March 25, 2021 in an attempt to minimize corporate sector harm.²⁶⁶ A tribunal assessing this claim and accounting for the economic pressures of the pandemic will likely find that the public purpose of the Suspension justified any resulting judicial delays.²⁶⁷ The measure could be permissible notwithstanding disturbances in legal certainty.

262. See *supra* Section II.A (discussing the different interpretations of FET and inconsistencies between ISDS tribunals’ applications).

263. See *Cairn Energy PLC v. Gov’t of India*, PCA Case Repository, Final Award, ¶¶ 1754, 1788 (2020).

264. *Id.* ¶ 1788.

265. See *Post Suspension Analysis of Stressed Insolvencies*, *supra* note 42.

266. The Insolvency and Bankruptcy Code (Second Amendment) Bill, 2020, Bill No. XXXI of 2020, § 10A (“[N]o application for [CIRP] . . . shall be filed . . . for a period of six months or such further period, not exceeding one year from such date.”).

267. See *Post Suspension Analysis of Stressed Insolvencies*, *supra* note 42 (“If the Code was allowed to operate it would have led to the institution of a huge number of default cases.”).

Finally, these claims are laid to rest by the logical reality that investors (foreign and domestic) know or should know about the laws governing their investments and the legal environment of the host state.²⁶⁸

In alleging the promise of FET was breached through a disruption in legal certainty, a foreign investor will likely concede that the IBC provided some legal certainty before the Suspension.²⁶⁹ In fact, a diligent investor should be aware of the recourse available upon default and the likely barriers to insolvency recovery, including that “the time taken to resolve bankruptcies ranged from 6.5 to 11 years.”²⁷⁰ Thus, by making the concession that an investor had some certainty and knowledge of the applicable legal system, the tribunal can conclude a diligent investor also knew, or should have known, about the judicial delay in the country.²⁷¹ Therefore, certainty could not have been disrupted because, before and after March 2020, foreign investors should have been certain of one thing: their insolvency claims would not likely be resolved swiftly.

C. ABSENT STATE OFFICIALS’ PROMISES, EXPECTATIONS ARE ILLEGITIMATE

To successfully show that FET was breached through a disruption in legitimate expectations, an investor must have held an expectation that the overseeing tribunal considers legitimate.²⁷² In order for an investor’s expectation to be considered legitimate, it must allege precise facts establishing a State officer specifically assured or guaranteed swift adjudication of CIRP.²⁷³ An Indian State Representative’s promise of speedy proceedings is highly unlikely and might be objectively unreasonable, given the country’s longstanding conditions of delay, the

268. See *Cairn Energy PLC v. Gov’t of India*, PCA Case Repository, Final Award, ¶ 1746 (2020).

269. This concession is necessary to support an argument that predictability was disturbed by the Suspension.

270. See *Contractor et al.*, *supra* note 23, at 5.

271. See *Post Suspension Analysis of Stressed Insolvencies*, *supra* note 42.

272. *White Indus. Austral. Ltd. v. Republic of India*, *ad hoc* Trib., Final Award, ¶ 10.3.7 (Nov. 30, 2011) (citing ANDREW PAUL NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* 281-82 (2009)). Whether an expectation is legitimate will depend on whether and what assurances the State provided the investor, which is a fact-specific inquiry which will vary by case. At this point, a situation in which sufficiently unambiguous promises would be made by the State to an investor are not foreseeable.

273. *Id.*

limited capacity of the courts during the pandemic, and the ensuing backlog.²⁷⁴ Even if assurances were made, the *White Industries* Tribunal made clear that “[e]ncouraging remarks from government officials do not of themselves give rise to legitimate expectations.”²⁷⁵ In the absence of such assurances, the government’s issuance of the new regulations are not sufficiently specific to create a legitimate expectation of expediency, and do not even begin to upset the investor’s expectations.

Even assuming *in arguendo* that a State Representative assured an investor of judicial expediency, because the IBC regime is not “targeted at a specific person or identifiable group,” the investor’s expectations would still lack an adequate basis to be considered legitimate.²⁷⁶ Thus, because the conditions of the Indian legal system apply to all Indian companies, businesses, and citizens, such a claim by an investor who was promised swift CIRP may still fail.

Likewise, the CIRP Suspension and delayed court conditions apply evenly to domestic and foreign creditors alike. While some foreign investors’ ability to propose a scheme of arrangement or CIRP resolution plan is restricted in a manner distinct from domestic investors, the Suspension applies equally to both domestic and foreign parties, as discussed above. Further, the recent ban preventing some foreign investors from proposing a scheme was not effective during the entire year-long suspension—the restriction only came into effect during the Suspension’s last 10 days.²⁷⁷ As such, those investors had 355 *days* during which they could have alternatively proposed a scheme to repair the insolvent entity notwithstanding the Suspension. Willful failure to do so will not be compensated by the State in ISDS arbitration.

Finally, the foreign investor likely knew, or at least should have known, about the widespread judicial delays in India prior to the effects of the pandemic, including in the legal regime governing insolvent companies.²⁷⁸ As such, an investor’s expectations for swift proceedings would be unreasonable and illegitimate, rendering its claim wholly

274. See REPORT OF THE INSOLVENCY LAW COMMITTEE, *supra* note 14, at 21, 24.

275. *White Indus. Austl. Ltd. v. Republic of India*, *ad hoc* Trib., Final Award, ¶ 10.3.7 (Nov. 30, 2011).

276. See *id.*

277. See *Arun Kumar Jagatramka v. Jindal Steel & Power Ltd.*, (2019) SCC ¶ 91 (India) (decided March 15, 2021, 10 days before the year-long CIRP Suspension was lifted on March 25, 2021).

278. See *White Indus. Austl. Ltd. v. Republic of India*, *ad hoc* Trib., Final Award, ¶ 10.4.18 (Nov. 30, 2011).

invalid.²⁷⁹ This is more significant where investments were made prior to the effect of the IBC in 2016, only 5 years ago, as the previous cumbersome legal regime allowed more significant, severe delays.

It is difficult to determine if an investor would prevail on such a claim because the inquiry is assessed on a case-by-case basis and relies on permissible evidence to establish specific facts. State officials' assurances must have been very strong, direct, and specific to overcome the severe deficiencies of a foreign investor's claim. Because it is highly unlikely a representative of the State would make such a promise, it is implausible to think a FET clause was breached by a usurpation of legitimate expectations.

CONCLUSION

Despite the potential legitimacy of foreign investors' challenges to India's CIRP Suspension, allegations that the Suspension constitutes a breach of the FET standard will likely fail. Just like a tsunami victim, a foreign investor may have felt powerless witnessing its potential recovery through CIRP diminish during the Suspension. However, unlike natural disaster victims, investors consciously choose to assume certain risks. Because domestic investors were likewise unable to recover expediently, and were therefore treated identically to their foreign counterparts, courts and tribunals will consider the treatment of foreign investors fair. While the option to propose a scheme of arrangement is no longer available to some foreign investors, notwithstanding the unavailability of the IBC to provide such an insolvency resolution, the option to propose a scheme was available to those investors during the Suspension.

Though the unavailability of new CIRP may have been unfortunate for countless investors, during which time the IBC maintained its strong reputation, the extreme nature of the pandemic would reasonably justify the measure. Because the State imposed the CIRP Suspension "to provide relief to companies affected by COVID-19 to recover from the financial stress without facing immediate threat of being pushed to insolvency proceedings" during a developing public health emergency, an ISDS tribunal will not likely find the measure arbitrary.²⁸⁰ The Suspension aimed not only to protect the financial stability of leveraged entities small

279. *Id.* ¶ 10.3.7.

280. The Insolvency and Bankruptcy Code (Second Amendment) Bill, 2020, Bill No. XXXI of 2020, § 10A (June 5, 2020), Statement of Objects and Reasons, ¶ 2.

and large, but also to decrease capacity required by the court system in light of mandated social distancing, which forced unfamiliar and impractical remote operations.²⁸¹ ISDS tribunals assessing a foreign investor's challenge would balance these justifications against the economic harm to investors, with the State's interests easily prevailing. Because the measure applies equally to domestic and foreign investors and the overburdened nature of India's court system is not new or unique to international parties, a foreign investor is not likely to find success challenging the CIRP Suspension as a breach of the familiar FET clause within any of India's applicable BITs.

281. See BERTELSMANN STIFTUNG'S TRANSFORMATION INDEX, *supra* note 5.