MAHARASHTRA NATIONAL LAW UNIVERSITY MUMBAI
CENTRE FOR ARBITRATION AND RESEARCH

HANDBOOK ON

INVESTMENT ARBITRATION IN INDIA

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PREFACE

The ‘Handbook on Investment Arbitration in India’ is prepared by the team at the Centre for Arbitration and Research (CAR), Maharashtra National Law University (MNLU) Mumbai to create an open access, reliable and authentic source for the students, researchers and practitioners to learn, understand and critically analyse the nuances of the Investment Treaty Arbitration (ITA) in the Indian context.

It is designed with an understanding that the ITA is not taught in most of the Indian universities as a core subject. Only select Indian universities offers this course but, even then the open access resources for the students and teachers are lacking. There are quite a few good blogs but, the information is not systematic and not India focussed.

This handbook is meant for the beginners and is not intended to be a full fledged treaties on the subject. However, to facilitate the further learning it provides an elaborate list of reference materials in the end notes. The presumption in preparing this book is that the reader is already aware about the basics of public international law, private international law and relevant domestic legal systems. Apart from it, a general sense of evidentiary and procedural principles as applicable in International Arbitration is also required to fathom the subject.

In fact, ITA is such a wide, dynamic and practice oriented subject area that no single treatise, commentary or text book will ever be able to comprehensively cover all of its aspects.

ITA lies at the intersection of law, politics and economy. A better understanding of the subject requires an appreciation of this

intersectionality. The changing legal, political and economic realities of a country can have a significant impact on the investment rule-making. For example, the 'backlash' after the infamous *White Industries Case* resulted in 'Indian model' of BIT's in 2016 in contrast to 'European model' and 'American model'. The Indian model can be viewed as her increasing domination as a capital exporting State from a capital importing State.

Further, ITA is in the state of flux due to the exponential rise of BIT's and International Investment Agreements (IIA's) providing for Investor State Dispute Settlement (ISDS) mechanism. This has significantly contributed to the investment rule-making. The arbitral tribunals while interpreting the broad language employed in such treaties have also engaged in the law-making activity. The private adjudicators performing the sovereign function of law-making have put a scanner on ISDS mechanisms. The ISDS legitimacy crisis is further deepened by the concerns such as, imposition of a limitation on regulatory power of host States by the BIT's and the lack of transparency in the ITA proceedings. In light of these issues, ITA has become a high profile area of contestation. Working Group (WG) III of UNCITRAL is already looking at a reform framework for the ISDS mechanism.

This handbook delves into the key conceptual, substantive, jurisdictional, procedural and post award issues in ITA. It also looks into the legitimacy issues and examines some of the undergoing reforms.

It is hoped that this handbook will be a step forward in democratising the knowledge of ITA and will assist the interested people in making an informed choice to pursue a career in this field. The idea of this handbook could be realised with the support and motivation of our Hon'ble Vice-Chancellor, Prof. (Dr.) Dilip Ukey - an eminent constitutional law and human rights expert.

Chirag Balyan

FOREWORD

Over the recent years, India has emerged as a prominent participant in the movement of foreign investment. Despite being predominantly a recipient of foreign investment, its role as a home State of corporations investing abroad is conspicuous and expanding. This makes the legal regime of protection foreign investment in relation to India of immense practical and academic significance. The current handbook is an important contribution towards the understanding of this regime.

The highlight of the handbook is its depth of analysis and comprehensive coverage of issues from a practical as well as scholarly perspective. The handbook addresses all aspects of investment arbitration, from both procedural and substantive law side that are pertinent in the life of an investment arbitration. The handbook starts with the background of the investment arbitration regime, then discusses jurisdictional issues, followed by a discussion on substantive standards and concludes by challenges one may face enforcing an investment arbitration award.

The handbook provides extensive information originating from a wide range of sources. It touches upon what may seem theoretical questions but actually of immense practical influence, such as the nuanced distinction between commercial and investment arbitration. Some important practical steps for conducting an investment arbitration, from the time of its commencement till the realization of the outcome of an award are elaborated in a simple and understandable manner. The role of arbitral institutions in administering investment arbitrations is extensively discussed. The differences in procedures of institutions, the practical differences that would arise when a case is administered by an institution vis-à-vis *ad hoc* arbitration at different stages of the arbitration

proceedings have been given the necessary and deserved attention. Another more serious question, maturely and extensively handled, is the relationship between human rights and investment arbitration. This is a recurring issue amidst the debate about the role of functioning of investment arbitration and its impact on other regimes and on the much broader issue of the freedom of States to regulate.

The handbook provides the broader background of the regime of international investment law and investment treaty arbitration and fits the specific discussion about India in this broader context. This contextualization helps understand the trends in the law at the international level and the reactions, shifts and transformations taking place within India. For example, the provisions of the Indian Model Bilateral Investment Treaty are discussed in light of the existing jurisprudence of investment tribunals. This would help understand the way some of these provisions may be interpreted.

These discussions are informative and instructive for other States as well that are looking at different policy options while formulating their own approach towards investment arbitration. In particular, the second half of the handbook with its focus on arbitrations in which India was involved and recently concluded or ongoing investment treaty negotiations hints at future trends. The ongoing discussions in the UNCITRAL Working Group III about the reforms to the regime and other related developments would also be of interest for the readers.

The handbook even offers a peek into how one could get involved in the field of investment arbitration, through a chapter dedicated to careers in investment arbitration. Persons interested in becoming a part of this exciting and expanding field of law would certainly find the description in that chapter very helpful.

As expected of an ideal handbook, the present handbook provides a ‘beginning-to-end’ functioning of investment arbitration proceedings in the Indian context. In fact, it goes a couple of steps

beyond as well. It is an essential aid for researchers and practitioners alike – or for that matter for anyone interested in knowing about investment arbitration in India.

Aniruddha Rajput

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ABBREVIATIONS

%	Percentage
&	And
€	Euro
A&C Act / ACA / Act, 1996	Indian Arbitration and Conciliation Act, 1996
AIR	All India Reporter
Arb	Arbitration
Art	Article
BIPA	Bilateral Investment Protection Agreement
BIT	Bilateral Investment Treaty
Bom	Bombay
CAFTA	Central America Free Trade Agreement
CAR	Centre for Arbitration and Research
CEO	Chief Executive Officer
ClArb	Chartered Institute of Arbitrators
CTIL	Centre for Trade and Investment Law
CV	Curriculum Viate
Del	Delhi
DIAC	Dubai International Arbitration Centre
ECtHR / ECHR	European Court of Human Rights
ETA	Economic and Trade Agreement
EU	European Union
FDI	Foreign Direct Investment
FEMA Regulations	Foreign Exchange Management (Transfer or

	Issue of Securities by a Person Resident Outside India) Regulations 2000
FEMA	Foreign Exchange Management Act, 1999
FET	Fair and Equitable Treatment
FOSFA	Federation of Oils, Seeds and Fats Associations Limited
FTA	Free Trade Agreement
GOI	Government of India
HC	High Court
HKIAC	Hong Kong International Arbitration Centre
ICAI	Institute of Chartered Accountants of India
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
Id	Previous citation
IIAM	Indian Institute of Arbitration & Mediation
INR	Indian Rupee
ISDS	Investor-State Dispute Settlement
ISRO	Indian Space Research Organisation
KFCRI	Kovise Foundation Conflict Resolution International

LCIA	London Centre for International Arbitration
LDCs	Least Developed Countries
LPG	Liberalisation, Privatisation and Globalisation
Ltd	Limited
MCIA	Mumbai Centre for International Arbitration
MFN	Most Favoured Nation
MIT	Multilateral Investment Treaty
MST	Minimum Standard of Treatment
NAFTA	North American Free Trade Agreement
NCLT	National Company Law Tribunal
New York Convention, 1950	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
No.	Number
NPAC	Nani Palkhivala Arbitration Centre
OECD	Organisation for Economic Cooperation and Development
p./pg.	Page
Para	Paragraph
PCA	Permanent Court of Arbitration
Pt.	Point
Pvt.	Private
SC	Supreme Court
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
SCRA	Securities Contracts (Regulation)Act, 1956
SIAC	Singapore International Arbitration Centre

Supra	above
Geneva Convention	Convention on the Execution of Foreign Arbitral Awards, 1927
UAE	United Arab Emirates
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US / USA	United States of America
USD / $	US Dollar
v.	Versus
VAT	Value Added Tax
WTO	World Trade Organisation

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CHAPTER 1
INTRODUCTION

By the end of World War II, a new chapter of the global economy unfolded: increasing technological advancement propagated by significant global trade and transnational exchange.[1] Within this backdrop, foreign direct investment (FDI) has become an important component for the socio-economic development of a country. FDI leads to technological advancement through constant development, assists human capital formation through skilled and unskilled employment generation, integrates international trade, and fosters more competition in the business environment by enhancing enterprise development.[2] In terms of the operational costs, FDI is driven by considerations related to the availability of raw materials, cheap labour and a large market for sales, making developing countries like India a viable destination for foreign investors.[3] In recent times, this has led to States making active diplomatic efforts towards attracting more FDI – with initiatives like tax exemptions and special economic zones ruling the roost.[4] Notably, however, FDI is equally dependent on the politico-economic and existing

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[1] World Economic Forum, *A brief history of globalization*, available at <https://www.weforum.org/agenda/2019/01/how-globalization-4-0-fits-into-the-history-of-globalization/> last accessed 12 May 2021.

[2] Organisation for Economic Cooperation and Development, *Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs – Overview*, *available at* <https://www.oecd.org/investment/investmentfordevelopment/1959815.pdf> last accessed 12 May 2021.

[3] Simplice Asongu, Uduak S. Akpan & Salisu Isihak, *Determinants of foreign direct investment in fast-growing economies: evidence from the BRICS and MINT countries,* 4 Financial Innovation 26 (2018).

[4] *See,* Holger Görg, Christiane Krieger-Boden, Theodore Moran & Adnan Serič, *How to attract quality FDI?* G20 Policy Briefs, available at <https://www.g20-insights.org/policy_briefs/attract-quality-fdi/> last accessed 13 May 2021.

legal regime of a State.[5] For foreign investors, the stability and predictability of the legal regime are specific decisive attributes that contribute to the attractiveness of a country, because it provides them with much-needed security to recover costs in exchange for the risks borne by them through their investment.[6]

The expansion of foreign investment and trade in India began especially after the 'Liberalisation-Privatisation-Globalisation' regime was institutionalised in 1991. Since then, India has been one of the fastest growing countries and is increasingly being considered as an FDI hub by investors worldwide.[7] From the years 2014 to 2019, FDI in India rose to $284 billion.

This represents an impressive increase from the 2009 to 2014 total of $190 billion. It is believed that this results from the foreign inflows growing at an exponential rate of 15%.[8] Despite these developments, the government has felt the need to revise the existing legal regime to further increase foreign investment. The intent to do so can be traced from the Finance Minister's 2021 budget speech, which laid emphasis on attracting FDI in India and relaxing restrictions prohibiting private funding, commercial activities, and direct investment in infrastructure.[9]

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[5] Christoph Schreuer, *Investment Arbitration* in The Oxford Handbook of International Adjudication (C. Romano et. al. ed.) (OUP, 2013) at 295.

[6] Zachary Douglas, *The juridical foundations of investment treaty arbitration* in The International Law of Investment Claims (Zachary Douglas ed.) (Cambridge University Press, 2009) at 1, 2; *See,* Indu Malhotra, Commentary on the Law of Arbitration (Wolters Kluwer, 2020)

[7] See, PTI United Nations, *India among top 10 FDI recipients, attracts $49 billion inflows in 2019: UN report*, The Hindu Bus. Line (Jan. 20, 2020), *available at* <https://www.thehindubusinessline.com/economy/india-among-top-10-fdi-recipients-attracts-49-billion-inflows-in-2019-un-report/article30608178.ece> last accessed May 10, 2021.

[8] Press Trust of India, *Budget 2020: FDI in India rises to $284 billion during 2014-19, says FM*, Bus. Standard (Feb. 1, 2020), *available at* <https://www.business-standard.com/budget/article/budget-2020-fdi-in-india-rises-to-284-billion-during-2014-19-says-fm-120020100403_1.html> last accessed 09 May 2021.

[9] *Indian Budget 2021-2022 Speech of Nirmala Sitharaman Minister of Finance*, *available at* <https://www.indiabudget.gov.in/doc/Budget_Speech.pdf> last accessed 09 May 2021.

In this respect, in addition to initiatives that attract FDI, there is a pressing need for States to provide adequate protection to foreign investors from any actions that may harm their foreign investments. In other words, States must provide foreign investors with a neutral and equipped mechanism to resort to if they believe that their interests are prejudiced or their foreign investment is being threatened by any State action. As mentioned above, this mechanism provides the much-needed stability and predictability to a legal regime and incentivises foreign investors. This is where international investment law and its subset of investment protection, a dynamic and important branch of international law, steps in.

International investment law guarantees rights and protections to a foreign investor by means of a bilateral investment treaty (BIT), select comprehensive free trade agreements (FTA) or an economic and trade agreement (ETA) signed between the foreign investor's home State and the State in which the investment is made (also called Host State).[10] These treaties are signed between two State parties but lay down standards of protection for foreign investments undertaken in the other's territory, akin to State affirmations guaranteeing such protection. The aforementioned protection standards are available to investors in the form of 'clauses.' Standard clauses include fair and equitable treatment (FET), national treatment, most favoured nation standard (MFN), denial of justice, full protection and security, protection from unlawful expropriation, etc. These are based on general standards prescribed in international investment law and are usually negotiated by the States in such a manner that any derogation would give rise to the foreign investor's right to initiate proceedings against the Host State.[11] They aim to recognise investment risks and protect foreign investors

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[10] For a comprehensive difference between BITs, BIPAs, FTAs and CEPAs, *see,* Chang Fa-LO, *A Comparison of Bit and the Investment Chapter of Free Trade Agreement from Policy Perspective*, 3 Asian Journal of WTO & International Health Law and Policy 1 (2008).

[11] Notably, the India-Brazil BIT does not provide for ISDS but only SSDS. *See* Part D, Chapter IV.

from adverse political, regulatory or legal actions of Host States having the potential to affect the working of such investments.

If the foreign investor is affected by any State actions that damage her investment, she can allege the violation of the terms of the aforementioned international investment law treaties and invoke the dispute resolution clause within the treaty.[12] Depending on the arbitral rules applicable to the treaty, the concerned arbitral institution will then assist the parties to constitute an arbitral tribunal that will hear the dispute and deliver an award. Since the arbitrators chosen are often experts in the principles of international law and international investment law, it is widely believed that their outcome is more 'just' than the one delivered by a domestic court.[13]

This mechanism of resolving treaty-based disputes through independent arbitration (as opposed to local proceedings with potentially biased courts)[14] is popularly called investment arbitration or investor-State dispute settlement (ISDS). This mechanism is also important because it allows foreign investors to file a claim with

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[12] However, many BITs require foreign investors to 'exhaust local remedies' prior to invoking the dispute resolution clause. Exhaustion of local remedies refers to the criterion whereby foreign investors are required to approach all relevant domestic courts of the Host State for adjudication, and can only resort to investor-State arbitration in the event that all such outcomes do not take the foreign investor's protection standards under the BIT into consideration. *See, for example,* Indian Model BIT (2016): Article 15.1 of the Model BIT mandates that the investor must seek remedy for the particular dispute before the relevant domestic courts or administrative bodies of the host state as a precondition to filing a claim before the tribunal. Article 15.2 specifies a temporal requirement for the exhaustion of local remedies, insofar as it clarifies that the investor must exhaust all judicial and administrative remedies relating to the measure underlying the claim for at least a period of five years prior to arbitration. Article 15.3 further adds that even after a notice to arbitrate has been sent, 6 months must be spent by parties on amicable consultation and negotiation.

[13] *See,* Albert Jan van den Berg, *Qualified Investment Arbitrators? A Comment on Arbitrators in Investment Arbitrations*, *available at* <http://www.hvdb.com/wp-content/uploads/Qualified-Investment-Arbitrators.pdf> last accessed 16 July 2020.

[14] A notable exception to this concept is the 'exhaustion of local remedies' requirement, that has recently become a prominent occurrence in investment treaties.

respect to actions emerging from the conduct of all organs of the Host State, including its judiciary.[15] By providing a level-playing field to foreign investors and Host States alike, it creates a desirable environment for FDI by guaranteeing foreign investors an unbiased hearing in case of prejudicial State action.

A. History of International Investment Law

The United States of America, in the late 1700s, signed a series of 'Friendship, Commerce and Navigation' treaties with many countries under the leadership of John Adams. This is widely recognised as being the source of contemporary investment protection law.[16] A few instruments, such as the commercial treaty between the United States and France (1778) also existed prior to these but were fewer in number. Nevertheless, their existence denotes that there has been a general understanding and acknowledgement of the need for investment protection throughout the ages.[17] However, since various parts of the world were facing an ideological clash between capitalism and communism in the period leading up to and during World War II, no special heed was paid to the protection of foreign investments, as it was widely believed that domestic laws were sufficient to protectforeign investments.[18] Additionally, no institutionalised

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[15] Asaf Niemoj, *Investment Arbitrations: Do Tribunals Take the Role of a Supra-National Appellate Court above National Courts*?, Kluwer Arbitration Blog (27 July 2018), *available at* <http://arbitrationblog.kluwerarbitration.com/2018/07/27/investment-arbitrations-tribunals-take-role-supra-national-appellate-court-national-courts/?doing_wp_cron=1594901284.0653278827667236328125> last accessed 15 July 2020.

[16] Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. Davis Journal of International Law & Policy 1 (2005).

[17] Doreen Lustig, From NIEO to the International Investment Law Regime: The Rise of the Multinational Corporation as a Subject of Regulatory Concern in International Law in Veiled Power: International Law and the Private Corporation 1886-1981 (2020).

[18] There is extensive literature on this convergence. To understand how ideological clashes were pivotal to the development of international investment law, *see generally,* Jacek Zralek, *The Impact of Economic Nationalism on Investment Arbitration - A Central European Perspective, available at* < https://ssrn.com/abstract=3573507> last accessed 15 July 2020.

investment arbitration framework was set up at the international level.

Modern investment law is rooted in the legal status of aliens under international law, which refers to persons that reside in a country without a legal right to do so.[19] One of the earliest methods of resolving claims of foreign investors can be found within the doctrine of diplomatic protection, being exercised from as early as the 1850's.[20]

Sometimes, this would translate to the use of economic coercion or military force (also called gunboat diplomacy). According to this doctrine, foreign investor interests are to be represented through an exercise of diplomatic protection, whereby a State espouses the claim of its national and pursues it in its own name against the other State. The origins of this doctrine can be traced back to the global expansion of European trading and investment operations that occurred during the 17th to early 20th centuries, which necessitated protecting their foreign investments in colonies worldwide.[21]

Diplomatic protection was the only remedy available to foreign investors back then because of the aforementioned ideological clash, having the effect of the non-availability of international

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[19] *See,* Rishab Gupta, Smrithi Bhaskar & Rishabha Meena, *Study on Investor Perceptions towards India's Investment Treaties*, Centre for Trade and Investment Law Report (2020), *available at* <https://ctil.org.in/cms/docs/Papers/Publish CTIL%20Study%20on%20BITs%20and%20Investments.pdf> last accessed 13 June 2021. For an alternative perspective arguing that international commercial arbitration (and parts of investment law) emerges from transatlantic slave trade under the Spanish crown, *see* Anne-Charlotte Martineau*, A Forgotten Chapter in the History of International Commercial Arbitration: The Slave Trade's Dispute Settlement System,* Leiden Journal of International Law.

[20] *See,* Cerutti case, Moore, International Arbitrations, History, Vol. II, 2117 (1898); Venezuelan Preferential case (Germany, UK, Italy v. Venezuela), Award of 22 February 1903.

[21] Christoph Schreuer, *Investment Protection and International Relations*, *available at* <https://www.univie.ac.at/intlaw/wordpress/pdf/87_investment_protect.pdf> last accessed 13 May 2021.

remedies under traditional international law. However, it was not a preferred form of dispute resolution because of various limitations.

A precondition to the exercise of diplomatic protection is the exhaustion of local remedies by the foreign investor, which would entail undergoing all relevant proceedings in local courts of the Host State. This requirement was criticised because of the possibility of local courts being biased towards then own governments. Additionally, the foreign investors did not have the *right* to diplomatic protection as it was dependent entirely on the political discretion of her government, which can reject representation if the political risks are high. States were often cautious when exercising diplomatic protection on behalf of investors because of the possibility of such proceedings disrupting international relations by causing protracted litigation.[22]

This was further complicated in the case of developing countries that are less keen on damaging relations with capital-intensive countries that send FDI to their territory. A famous study published by Argentine jurist Carlos Calvo in 1868 presented a different perspective to the then prevalent diplomatic protection route.[23] Calvo's theory, famously called the 'Calvo doctrine', stated that the amount of protection Host States should accord both foreign and domestic investments must reduce.

There are three major principles propounded by this doctrine:

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[22] *See,* Nottebohm case (Liechtenstein v. Guatemala), Second Phase, Judgment of 6 April 1955, 1955 ICJ Rep. 4; Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, Judgment of 5 February 1970, 1970 ICJ Rep. 3; Elettronica Sicula SpA (ELSI) (US v. Italy), Judgment of 20 July 1989, 1989 ICJ Rep. 15.

[23] Named after Argentine jurist Carlos Calvo, the doctrine argues that since jurisdiction over foreign investments lay with the domestic courts of the country where the investment was located, local resources must be exhausted first before diplomatic protection is sought. For an English version of the ideas of Calvo, *see generally* Pattrick Julliard, Calvo Doctrine/Calvo Clause*,* Oxford Public International Law Online, *available at* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e689> last accessed 15 July 2020.

(i) foreign nationals are entitled to no better treatment than nationals of the Host State;

(ii) rights of foreign nationals are only to be governed by laws of the Host State, and

(iii) Courts of the Host State have exclusive jurisdiction over disputes involving foreign nationals.

While these principles appear to be similar to those espoused within the diplomatic protection route, it is important to note that the doctrine prohibited diplomatic protection altogether.[24] The idea behind this doctrine was to prevent abuse of process of weaker States by powerful, capital-exporting nations and was inspired by political developments then. A large number of Communist countries did not want to be accountable towards foreign investors or their investments.[25] It is important to note that despite widespread discussions on the potential use of this doctrine and its desirability amongst Communist countries, it did not gain universal recommendation.

It was almost a decade after the collapse of the Soviet Union that a large number of judicial proceedings were initiated based on the treatment of investors during the 1917 Communist Revolution. The verdicts[26] delivered during this time, coupled with the principles of Calvo Doctrine, formed the basis of discussion about and efforts towards the subsequent creation of an international minimum standard for the protection of foreign alien property.

This was to be maintained through a neutral agency that could independently assess whether foreigners and natives were being

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[24] Bernardo Cremades, *Resurgence of the Calvo Doctrine in Latin America*, 7 Business Law International, 53-4 (2006).

[25] Shalaka Patil and Pratibha Jain, *Bilateral Investment Treaties and their Impact on the Global Economy*, pt 2.2, NDA, *available at* <http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Articles/Bilateral%20Investment%20Treaties.pdf > last accessed 15 July 2020

[26] Neer v Mexico; James and ors v United Kingdom, [1986] ECHR 2.

treated equally by States.[27] Subsequently, the first forms of institutionalised investment arbitration came in the form of the Iran-US Claims Tribunal[28] and the Eritrea-Ethiopia Claims Commission[29] It is for this reason that as a field of study, investment protection garnered the interest of international law and commentators only in the aftermath of World War II.

Academic discourse strengthened, even more, when new BITs were signed by now independent and developing countries that were earlier colonies. They sought to challenge Western control over customary international law governing investment protection.[30]

Assuming centre-stage in the recently-constituted United Nations General Assembly, these States advocated for a 'New International Economic Order' that would give precedence to

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[27] For understanding the international minimum standard of treatment, *see,* Adriana Sánchez Mussi, I*nternational Minimum Standard of Treatment* (2008), *available at* <https://asadip.files.wordpress.com/2008/09/mst.pdf> last accessed 15 July 2020.

[28] The Iran-US Claims Commission was established in the Hague, Netherlands in 1981 by Iran and the US to resolve claims by the States and nationals of these States against the other State. The establishment of this Commission was pursuant to the Algiers Accords, which brought an end to the impending embassy hostage crisis between the two countries, having the effect of affecting foreign investments. *See generally* US Department of State, 'Iran-US Claims Tribunal', *available at* <https://www.state.gov/iran-u-s-claims-tribunal/> last accessed 12 May 2021; *See also,* The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital – Katie Miles

[29] The Eritrea-Ethiopia Claims Commission was similarly established in the Hague, Netherlands in 2000. This also occurred pursuant to the Algiers Agreement to arbitrate claims for loss, damage or injury by one government against the other in lieu of the armed conflict that had occurred between the two States. States could submit claims on their own behalf and on behalf of their nationals (including both natural and legal persons) in this respect. *See,* Permanent Court of Arbitration, *Eritrea-Ethiopia Claims Commission*, *available at* <https://pca-cpa.org/en/cases/71/#:~:text=The%20Claims%20Commission%20was%20established,Conventions%2C%20or%20other%20violations%20of> last accessed 11 May 2021.

[30] Kate Miles, *Imperialism, Eurocentrism and International Investment Law: Whereto from here for Asia?*, Submission for the Second Biennial General Conference of the Asian Society of International Law, *available at* <http://asiansil-jp.org/wp/wp-content/uploads/2012/07/kate_miles.pdf> last accessed 9 May 2021.

domestic law with respect to allegations of expropriation made by foreign investors.[31]

However, the ideological shift from socialism to economic liberalism (prompted in part by the fall of the Soviet Union and the Latin American crisis) at around the same time ensured that this was not possible.[32] It is for this reason that in the period spanning 1945-1990, a number of BITs were signed amongst developed and developing countries with terms similar to the international minimum standard.

It was widely believed that the signing of investment treaties would attract much needed foreign direct investment to rebuild economies devastated by World War II and subsequent regional clashes. Developing countries also hoped to attract employment opportunities and economic growth through such FDI, leading them to accept terms at par with the international minimum standard. However, not all of these provided for a direct arbitration clause: some required submission of the dispute to the International Court of Justice (ICJ) or state-to-state arbitration.[33]

Apart from this gradual shift towards protection foreign investment, a need was felt to institutionalise international investment law through the creation of a multilateral treaty, so as to promote uniformity. The first codified attempt can be found within discussions of the Hague Conference on the Codification of International Law organised by the erstwhile League of Nations in

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[31] To know more about the political and legal angles to the New International Economic Order, *see,* Antony Anghie, *Legal Aspects of the New International Economic Order,* Humanity Journal available at <http://humanityjournal.org/wp-content/uploads/2014/06/HUM-6.1-final-text-ANGHIE.pdf> last accessed on 24 July 2020.

[32] Kenneth J. Vandevelde, *The Political Economy of a Bilateral Investment Treaty*, 92 Am. J. Int'l L. 621, 623.

[33] Mavrommatis Case (Greece v. Great Britain, PCIJ 1924) & Case Concerning the Factory at Chorzów (Germavy v. Poland, PCIJ 1928). These judgments reflected the view that states owe a duty to other States to treat foreign nationals and their property according to an international minimum standard of treatment, thus reaffirming the importance of customary international law for investment protection.

1930. Records indicate a discussion about State responsibility for harms caused to foreign investors in their territory during the seventh plenary meeting. However, the Third Committee tasked with the responsibility to submit a report was unable to do so.[34]

Another noteworthy development, albeit in the context of international trade law, are the negotiations surrounding the Havana Charter for an International Trade Organization. The Charter sought to create extensive commitments between States on substantive questions in trade law concerning numerous economic activities.[35] While the Charter never came into effect, it is generally acknowledged to have significantly influenced the General Agreement on Tariffs and Trade (GATT) 1947. Much later in 1957, Hermann Josef Abs and Sir Hartley Shawcross[36] called for universalisation of investment protection standards and institutional rules by creating a multilateral treaty to administer investment disputes.[37]

It was popularly called the 'Abs-Shawcross Draft Convention', or the 'Draft Convention on Investments Abroad'.[38] A noteworthy feature of this draft is the FET protection standard and protection against expropriation available to foreign investors against discriminatory measures enacted by the Host State.

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[34] League of Nations, *Acts on the Conference for the Codification of International Law*, *available at* <https://biblio-archive.unog.ch/Dateien/CouncilMSD/C-351-M-145-1930-V_EN.pdf> p. 43 ¶ 16 last accessed on May 12, 2021.

[35] Riyaz Dattu, A Journey from Havana to Paris: The Fifty-Year Quest for the Multilateral Agreement on Investment, 24 Fordham Int'l. L. J. 1.

[36] Hermann Josef Abs, then Chairperson of the Deutsche Bank was the first to make a recommendation in 1957 for a 'Magna Carta for the Protection of Foreign Property.'The Abs-Shawcross Draft Convention was a subsequent occurrence as a result of the collaboration between Abs and Sir Hartley Shawcross, former Attorney General for England and Wales.

[37] Taylor St. John, The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences (2018).

[38] Abs, Herman and Hartley Shawcross (1960). *Draft Convention on Investments Abroad* in The proposed convention to protect private foreign investment: a round table, Journal of Public Law (presently Emory Law Journal), vol. 1, Spring 1960, pp. 115-118.

These attempts made by them led to a subsequent multilateral treaty drafted by the Organisation for Economic Cooperation and Development (OECD) in 1962. However, the treaty could not be enacted and faced numerous protests because it was intended to apply even to countries that were not members of the OECD.[39] An important development during this decade is the enactment of the New York Convention, replacing the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.[40]

It was created to streamline the process of recognition and enforcement of foreign arbitral awards across countries and to ensure that foreign and non-domestic arbitral awards should not be discriminated against by the domestic courts that are asked to enforce them. A universal enforcement procedure was created through this Convention.[41]

The World Bank, under the leadership of then General Counsel Aron Broches, was of the view that an international treaty regulating the *procedure,* rather than *substantive standards* of investment disputes would help countries in arriving at a much-needed consensus towards investment protection and incentivise them to make commitments through international treaties.

Thus, it decided to take the bold step to draft the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) in 1965, which was a framework for the impartial settlement of international investment

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[39] *Ibid,* Articles II and III.

[40] The Geneva Protocol was established by the League of Nations (predecessor to the United Nations) to make arbitration agreements enforceable internationally in a uniform manner. However, due to various shortcomings, the Protocol was unsuccessful and required replacement. For a detailed analysis of the development of and problems with the Geneva Protocol, *see,* Jane Volz and Roger Haydock, *Foreign Arbitral Awards: Enforcing the Award against the recalcitrant loser,* 21 William Mitchel L. Rev. 3.

[41] *See, In Brief: New York Convention*, *available at* <https://www.newyorkconvention.org/in+brief> last accessed 12 May 2021.

disputes through an impartial organisation called ICSID.[42] The ICSID Convention entered into force in 1966 and was widely accepted back then particularly by developed countries that were then in dire need of capital through foreign investment.[43] Other multilateral investment treaties emerging within the same decade included the Energy Charter Treaty (ECT) and the North American Free Trade Agreement (NAFTA).[44] While the former was enacted for States to cooperate in the trade, transit, investments and energy efficiency of foreign investment in the energy sector, the latter was a trilateral agreement signed by Canada, Mexico, and the United States for the creation of a trade bloc in North America.

In terms of additional institutional support, the growing popularity of the ICSID Convention was further complemented by the emergence of the 1994 World Trade Organisation (WTO) Agreement, seeking to liberalise trade in goods and services by reducing unfair trading practices.[45] Despite the popularity of and resort to these organisations by most countries worldwide, the

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[42] Antonio R. Parra, *Establishing ICSID: an idea that was "in the air"*, OUP Blog (8 September 2015), *available at* <https://blog.oup.com/2015/09/history-of-icsid-law/> last accessed 16 July 2020. For more information on the personal life and contributions of Aron Broches, *see,* Antonio R. Parra, *Remembering Aron Broches, Investment Claims*, Oxford Public International Law (14 October 2016), *available at* <https://oxia.ouplaw.com/page/546> last accessed 16 July 2020; *See also,* Fali Nariman, Harmony amidst Disharmony, Vol II at p. 245.

[43] Developing countries and international investment law often have a varying relationship. To contextualise such development, *see,* Graham Mayeda, *International Investment Agreements Between Developed and Developing Countries: Dancing with the Devil? Case Comment on the Vivendi, Sempra and Enron Awards,* 4 McGill International Journal of Sustainable Development Law and Policy 2 (2008). For understanding this development in India's context, *see,* Prabhash Ranjan, India and Bilateral Investment Treaties: Refusal, Acceptance and Backlash, 64-76 (2019).

[44] For a brief overview of the NAFTA, *see,* M. Angeles Villareal & Ian F. Fergusson, *The North American Free Trade Agreement* (24 May 2017) Congressional Research Service, *available at* <https://fas.org/sgp/crs/row/R42965.pdf> last accessed May 10 2021. For a brief overview of the ECT, *see,* Kaj Hober, *Investment Arbitration and the Energy Charter Treaty,* 1(1) Journal of International Dispute Settlement (2010).

[45] *History of the Multilateral Trading System*, World Trade Organisation, *available at* <https://www.wto.org/english/thewto_e/history_e/history_e.htm> last accessed 16 July 2020.

ICSID and WTO Agreement have repeatedly faced opposition from developing countries, who believe that their legitimate regulatory rights are diminished in the name of foreign investment protection.

Nevertheless, BITs have assumed importance worldwide as an effective means for protection for foreign investments today. Over 2897 BITs have been signed between countries since the 1990s, of which 2340 are currently in force[46]. On the other hand, the number of investment arbitrations has increased steadily over the years. Over 1020 claims have been filed by foreign investors.[47] This indicates that investment arbitration seems to be a primary choice for investors to initiate claims to protect their assets abroad. The trend has been visible and continued during the pandemic, with ICSID reporting a record of 58 new cases being registered with it last year, up from 56 in 2018 and 39 in 2019.[48]

However, it is pertinent at this stage to note that there is sizeable opposition to the current ISDS regime's legitimacy.[49] *Inter alia,* these concerns stem from ISDS' inherent investor-centric provisions, encroachment of a State's sovereign regulatory ability and an inability to appeal decisions, which does not benefit Host

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[46] UNCTAD, *International Investment Agreement Navigator, Investment Policy Hub*, *available at* <https://investmentpolicy.unctad.org/international-investment-agreements> last accessed 16 June 2021.

[47] UNCTAD, *International Dispute Settlement Navigator, Investment Policy Hub*, last updated 31 December 2019, *available at* <https://investmentpolicy.unctad.org/investment-dispute-settlement> last accessed 16 June 2021.

[48] Clea Bigelow-Nuttal, *Record year for arbitration cases registered with ICSID*, *available at* <https://www.pinsentmasons.com/out-law/news/record-year-arbitration-cases-registered-icsid> last accessed on 13 May 2021.

[49] For a concise understanding of these criticisms, *see,* Jane Kelsey, *The crisis of legitimacy in international investment agreements and investor-state dispute settlement,* ISDS Platform (9 January 2018), *available at* <https://isds.bilaterals.org/?the-crisis-of-legitimacy-in&lang=en> last accessed 16 July 2020. These concerns have also led to the creation of the UNCITRAL Working Group III on ISDS Reforms, where proposals for reforming the process are being considered by States. To view a more recent and detailed account of these criticisms and understand this chain of developments, *see* Thomas Dietz, The legitimacy crisis of investor-state arbitration and the new EU investment court system

States. A host of reforms, aiming to eliminate these systemic concerns, are currently being discussed and debated by countries in a bid to make investment arbitration more equipped to handle competing interests (*see* Chapter 6).

B. India and International Investment Law

The Indian perception of and attitude towards foreign investment protection has evolved over time. In the early years after independence, the Indian government was receptive towards foreign investment because they believed that this would lead to a transfer of technology, skill and control to Indians in due course. However, the period ranging from early 1955 led to sector-wise nationalisation within the country, in line with the 'New International Economic Order' propagated by developing countries at the United Nations General Assembly, discussed above.[50] During the 1980s, India was suffering from an acute balance of payment crisis which meant that the country could not enter into BITs.[51]

During the mid-1990s, at the time of implementation of the Liberalisation, Privatisation and Globalisation regime, the Indian government decided to enter into BITs with other countries to offer favourable conditions and treaty-based protection to the foreign investors. The long-term aim was to attract other investors from abroad to invest in India with enhanced securities against adverse changes, thus promoting investment inflow. It is within this context that India signed her first BIT with the United Kingdom in 1994. By 1999, India had entered into 26 BITs and was party to 83 BITs in 2011.[52] The BIT signed with the United Kingdom served as the basis for India's 2003 Draft Model BIT. Whilst this was largely

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[50] Aniruddha Rajput, *Protection of Foreign Investment in India and International Rule of Law: Rise or Decline*? KFG Working Paper, Series No. 10 (June 2017), available at <https://dx.doi.org/10.2139/ssrn.3135261> last accessed 9 May 2021.

[51] *Ibid.*

[52] Law Commission of India, Report No 260: Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty, *available at* <https://lawcommissionofindia.nic.in/reports/Report260.pdf> last accessed 12 May 2021.

investor-centric, a slew of developments (notably, the *White Industries* proceedings discussed *infra*) led India to re-think its commitment to the breadth of investment protection available to foreign investors.

During this period, India also entered into its first FTA with Singapore in 2005, called the India-Singapore Comprehensive Economic Cooperation Agreement. At the time, there were disparities in the standards prescribed by the BITs and FTAs because the nodal ministries for negotiating them were different. The FTAs were more carefully drafted as compared to the BITs and gave more precedence to regulatory freedom.[53]

In December 2015, the government of India devised a new text of the Indian Model BIT.[54] It contained 38 Articles present within 7 Chapters and laid down the standards, types and conditions for the protection of foreign investment. Important developments included a broader right of regulation given to the Host State (India), lower FET protection and a requirement of exhausting local remedies prior to filing a notice of arbitration. This was seen as the Indian government's attempt to 'reduce' investor protection and prioritise sovereign discretion. Apart from these changes to the text, the Indian government called for termination, renegotiation or reinterpretation of 69 existing treaties with other nations.[55]

As per the Indian Department of Economic Affairs website, 69 out of 84 BITs have been shown to be terminated on various dates since 2016. Between 2019 and 2021, India has terminated BITs with Turkey, Finland, Serbia (Yugoslavia), Sudan, Bahrain, Saudi Arabia, Bosnia & Herzegovina, Jordan, Mexico, Iceland, Macedonia, Brunei

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[53] Prabhash Ranjan, *Comparing Investment Provisions in India's FTAs with India's Stand-Alone BITs*, 16.5-6 The Journal of World Investment & Trade, 899-930 (2015).

[54] Indian Model BIT (2015), *available at* <https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf> last accessed 16 July 2020.

[55] Rajendra Barot and Sonali Mathur, *India: Investor-State Arbitration 2020*, *available at* <https://iclg.com/practice-areas/investor-state-arbitration-laws-and-regulations/india> last accessed 31 July 2020.

Darussalam, Syrian Arab Republic, Myanmar and Mozambique.[56] Furthermore, several BITs and joint interpretative statements are under discussion with Morocco, Kuwait, Ukraine, UAE, San Marino, Mauritius, Hong Kong and Israel.

In January 2020, India signed the Investment Cooperation and Facilitation Treaty with Brazil, which reflects India's new approach towards foreign investment.[57] Article 18 states that a Joint Committee, composed of government officials of both States, are to look into allegations of breach of the BIT and recommend findings therefrom. In a way, this brings us back to the diplomatic protection route that was being utilised in the early 1850s, insofar as the investor has to depend on the administrative avenue (Joint Committee) between India and Brazil for their claims.[58] Thus, it is an interesting time for exploring investment arbitration in the Indian context, to reconcile India's FDI ambitions with the current legal framework for investment protection within the country.

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[56] Bhavana Sunder & Kshama Loya, *Investment Arbitration and India: 2020 Year in Review*, The National Law Review, *available at* <https://www.natlawreview.com/article/investment-arbitration-and-india-2020-year-review> last accessed 12 May 2021.

[57] For discussion on the India-Brazil BIT, s*ee,* Prabhash Ranjan, India-Brazil Bilateral Investment Treaty – A New Template for India*,* Kluwer Arbitration Blog (19 March 2020), <http://arbitrationblog.kluwerarbitration.com/2020/03/19/india-brazil-bilateral-investment-treaty-a-new-template-for-india/?doing_wp_cron=1594888308.6954579353332519531250> last accessed 16 July 2020.

[58] Martin Dietrich Brauch, The Best of Two Worlds? The Brazil–India Investment Cooperation and Facilitation Treaty, Investment Treaty News (10 March 2020), *available at* <https://cf.iisd.net/itn/2020/03/10/the-best-of-two-worlds-the-brazil-india-investment-cooperation-and-facilitation-treaty-martin-dietrich-brauch/> last accessed 16 July 2020. S*ee also,* Ashutosh Ray & Kabir Duggal, Dispute Resolution in the India-Brazil BIT: Symbolism or Systemic Reform?, Kluwer Arbitration Blog (9 April 2020), *available at* <http://arbitrationblog.kluwerarbitration.com/2020/04/09/dispute-resolution-in-the-india-brazil-bit-symbolism-or-systemic-reform/?doing_wp_cron=1594888397.0009570121765136718750> last accessed 16 July 2020.

CHAPTER 2
INVESTMENT ARBITRATION

Investment arbitration is a tool to resolve disputes between a foreign investor and the host State. It is also referred to as Investor-State Dispute Settlement. The basis of Investment arbitration may exist in the relevant investment treaties or even sometimes in the local legislation of the host State. Ultimately, such treaties or law shall signify the consent of the host State for utilisation of investment arbitration in case of a dispute. There are however some pre-conditions before an investor can initiate an investment arbitration. Importantly, the investor and investment must qualify as such in the relevant investment treaty. This chapter will discuss the nuances of investment arbitration.

A. Key Differences between Investment and Commercial Arbitration

Investment arbitration or investor-state dispute settlement is different from international commercial arbitration primarily due to the nature of the claim and the parties involved in the dispute.[1] As opposed to commercial arbitration, where the dispute arises out of a contractual obligation, investment arbitration deals with disputes arising out of an investment contract or bilateral/ multilateral

[1] Faraz Alam Sagar & Samilksha Pednekar, International Investment Arbitrations and International Commercial Arbitrations: A Guide to the Differences, Cyril Amarchand Mangaldas Blog, available at <https://corporate.cyrilamarchandblogs.com/2019/05/international-investment-arbitrations-international-commercial-arbitrations-guide-differences/> last accessed 27 August 2021.

investment treaty.[2] With respect to the parties involved, commercial arbitration deals with a dispute between private parties whereas, investment arbitration involves a foreign investor (private individual or legal entity) and a state. Though the procedure in both types of arbitration resembles, the applicability of public international law in investment treaty arbitration makes it distinct from commercial arbitration.

The jurisdictional issues are usually more complex in investment arbitration as the jurisdictional disputes in investment arbitration are more frequent. The jurisdictional disputes in commercial arbitration typically pertain to the scope of the contractual arbitration clause whereas, the jurisdiction of an investment tribunal is determined by the consent of the host state, which depends on whether the claimant qualifies as an 'investor' and whether the subject activity amounts to an 'investment' under the applicable bilateral or multilateral investment treaty.

When dealing with the existing laws on the enforcement of a commercial award and an investment award, there are certain differences. The most relevant legal framework for commercial arbitration in international law would be the New York Convention, whereas in investment arbitration there are several treaties like the ICSID Convention, the New York Convention, etc.[3] It is pertinent to note that the New York Convention, which is the most relevant legal treaty in commercial arbitration, only deals with the recognition and enforcement of foreign arbitral awards.

Insofar as the national law is concerned, its applicability is different in international commercial arbitration and investment arbitration. In international commercial arbitration, procedurally, the legal framework of the seat of the arbitration governs the arbitration and the domestic courts of the seat have supervisory jurisdiction on the arbitral procedure. On

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[2] *See,* Laurence Boisson de Chazournes, The Blurring of the Line Between Contract-Based and Treaty-Based Investment Arbitration, ITA IN Review, *available at* <https://www.itainreview.org/articles/Fall2019/the-blurring-of-the-line-between-contract-based-and-treaty-based-investment-arbitration.html> last accessed 16 July 2020.

[3] Karl-Heinz Bockstiegel, *Commercial and Investment Arbitration: How Different Are They Today?* 28(4) Arbitration International, 787–792 (2012).

the other hand, in ISDS, the mandatory provisions of national law are important only if the ISDS is governed by the rules of the international institutions such as the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC), etc. instead of the investment treaties such as the ICSID, NAFTA, etc.[4]

With respect to the substantive law, in commercial arbitration, substantive law is applied by the arbitrators to deal with the merits of the dispute.[5] Insofar the investment arbitration is concerned, majority BITs explicitly state that the substantive law of the host state would apply.[6] Since the substantive law of the host state would apply to investment arbitration, the foreign investor is bound by the changes in the domestic law of the host state.[7]

B. Institutional Arbitration and Ad Hoc Arbitration

The dispute resolution clause in the investment treaties gives the right to foreign investors to initiate proceedings against the host state with respect to their investments. The dispute between the host state and the foreign investor can be conducted under the ad-hoc or institutional format, depending upon the dispute settlement clause of the relevant investment treaty. With respect to the institutional format, the proceedings are administered by specialised institutions in accordance with their own set of rules. Institutional arbitration proceedings are usually conducted by the International Centre for Settlement of Investment Disputes (ICSID),

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[4] Faraz Alam Sagar & Samilksha Pednekar, International Investment Arbitrations and International Commercial Arbitrations: A Guide to the Differences, Cyril Amarchand Mangaldas Blog, available at < https://corporate.cyrilamarchandblogs.com/2019/05/international-investment-arbitrations-international-commercial-arbitrations-guide-differences/> last accessed 27 August 2021.

[5] *Ibid.*

[6] Karl-Heinz Bockstiegel, Commercial and Investment Arbitration: How Different Are They Today? 28(4) Arbitration International, 787–792 (2012).

[7] Faraz Alam Sagar & Samilksha Pednekar, International Investment Arbitrations and International Commercial Arbitrations: A Guide to the Differences, Cyril Amarchand Mangaldas Blog, available at < https://corporate.cyrilamarchandblogs.com/2019/05/international-investment-arbitrations-international-commercial-arbitrations-guide-differences/> last accessed 27 August 2021.

the International Court of Arbitration of the International Chamber of Commerce (ICC), or the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). The majority of the institutional arbitrations are conducted before the ICISID tribunals in accordance with the rules provided in the ICSID Convention. Unlike other institutions, the ICSID Convention includes certain jurisdictional requirements under Article 25, which provides that:

> {T}he jurisdiction of a Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.[8]

Since, article 25 of the ICSID Convention limits the jurisdiction to disputes between a contracting state and a national of a contracting state, some BITs of countries such as India, who are not contracting parties to the ICSID Convention, provide for the ad hoc format, usually referring under the UNCITRAL Arbitration Rules. Other sets of arbitration rules that are commonly referred to include the Rules of Arbitration of the ICC and the Arbitration Rules of the SCC.[9]

The arbitration format is determined by the mutual consent of the disputing parties. Insofar as the proceeding is concerned, the tribunal first determines whether it has jurisdiction over the dispute between the disputing parties. Once the jurisdiction is determined and the tribunal finds that it has the requisite jurisdiction, the tribunal deals with the merits of the case.

As mentioned above, according to article 25 of the ICSID Convention, the jurisdiction of an ICSID tribunal extends to disputes

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[8] ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 25, 18 March 1965.

[9] Katia Yannaca-Small, Arbitration under International Investment Agreements (Oxford University Press 2010) at p. 107.

between a contracting state and a national of a contracting state. However, it shall be noted that the Administrative Council of ICSID has adopted Additional Facility Rules, which empowers the Secretariat of ICSID to administer disputes which are not governed by the ICSID Convention. Therefore, the ICSID Additional Facility Rules can be made applicable for adjudication of disputes between a State and a foreign national, when one of which is not an ICSID member state or a national of an ICSID member state.[10]

C. International Centre for Settlement of Investment Disputes

The International Centre for Settlement of Investment Disputes (ICSID), which was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), administers the resolution of investment disputes by conciliation, arbitration or fact-finding. The provisions of the ICSID Convention are complemented by Regulations and Rules which includes Administrative and Financial Regulations, Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, Rules of Procedure for Conciliation Proceedings and Rules of Procedure for Arbitration Proceedings.[11] As of May 2021, 155 countries have ratified the ICSID Convention and become contracting states.[12] Moreover, eight member states have signed the ICSID Convention but not ratified it. A State becomes a contracting party 30 days after ratifying the ICSID Convention[13] and a contracting state may denounce the Convention

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[10] *Overview of Arbitration under the Additional Facility Rules*, ICSID, *available at* <https://icsid.worldbank.org/services/arbitration/additional-facility/process/overview> last accessed 10 June 2021.

[11] ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, p. 25, 18 Mar. 1965.

[12] Database of ICSID Member States, International Centre for Settlement of Investment Disputes, available at <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> last accessed June 25, 2020.

[13] ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 68, 18 March 1965.

by written notice to the World Bank and the denunciation shall take effect 6 months after the receipt of such notice.[14]

ICSID usually provides for the settlement of disputes between a contracting state and an investor who is a national of another contracting state. However, in certain circumstances, it administers arbitration of disputes between parties, of which one is neither a contracting state nor a national of a contracting state.[15] The arbitration proceedings conducted by ICSID are free from the interference of courts in the place where they are conducted, however, the parties may through an agreement seek provisional or interim measures from domestic courts.[16]

Investor-state dispute settlement (ISDS) has been negatively perceived by India and other developing countries and several countries have denounced the ICSID Convention. Bolivia, Ecuador, and Venezuela have denounced the ICSID Convention and Argentina has threatened to withdraw.[17] The developing countries fear that the protection accorded to the foreign investors affects the regulatory powers of the Host State. It is argued that ISDS undermines the sovereignty of the host state as they are bound by the undertakings in the investment treaties which prevent them from implementing various measures.[18] ISDS has been unfavourably looked at by India particularly after the decision in *White Industries v. India*.

The award which was rendered in favour of the foreign investor resulted in a series of investment proceedings against India pertaining to the regulatory and other measures adopted by the

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[14] ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 71, 18 March 1965.

[15] Katia Yannaca-Small, Arbitration Under International Investment Agreements, p. 65 (Oxford University Press 2010).

[16] ICSID Rules of Procedure For Arbitration Proceedings, R. 39(6).

[17] Aniruddha Rajput, Protection of Foreign Investment in India and Investment Treaty Arbitration (Kluwer Law International 2017) at pp. 171, 194.

[18] Kaj Hobér, Investment Treaty Arbitration and Its Future - If Any, 7 Y.B. Arb. & Mediation 58 (2015).

Indian Government. It shall be noted that after the White House Industries case in 2011, India signed only one BIT till 2015 and terminated 58 BITs.[19] Moreover, even though India participated in the drafting of the ICSID, it chose to not ratify the Convention. Indian has not provided reasons for not joining the Convention however, the Indian Council for Arbitration had recommended to the Finance Ministry to not sign the Convention because the rules of the ICSID favours the developed countries and there is no scope for a review of the award by an Indian court even if the award is against the public interest.[20]

ISDS has been criticised for being pro investor and therefore, many BITs such as the India Model BIT 2016, stipulates that the foreign investor shall exhaust its local remedies before initiating international investment proceedings.[21] ISDS has also been criticised for a lack of transparency in proceedings. Until 2006, the ICSID Convention did not include provisions to ensure transparency in the proceedings conducted by the ICSID tribunals. The level of transparency in an ICSID proceeding depends on the parties' agreement, the relevant treaty and the decision of the tribunal. The ICSID Convention does not include a general presumption of transparency and therefore, the parties can decide the level of transparency or confidentiality applicable to their proceedings. Moreover, the applicable investment treaty may include specific provisions pertaining to confidentiality or transparency. If the parties do not agree on the level of transparency and the proceedings are not subject to specific provisions, the parties may request the arbitral tribunal to decide the level of transparency and confidentiality.

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[19] Nishith Desai Associates, Bilateral Investment Treaty Arbitration and India: With a special focus on Indian Model BIT, 2016, *available at* <http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Bilateral_Investment_Treaty_Arbitration_and_India-PRINT-2.pdf> (2018). last accessed 25 June 2020.

[20] *ICA against India joining global dispute settlement body*, The Hindu Indian Business Line (Jun. 11, 2000), *available at* <https://www.thehindubusinessline.com/todays-paper/tp-others/article29064097.ece> last accessed 25 June 2020.

[21] India's Model Bilateral Investment Treaty, art. 15.1, 28 Dec. 2015.

Another major criticism of ICSID and ISDS, in general, is the absence of an appeal process. An award rendered by the ICSID tribunal is final and the contracting states are under the obligation to enforce it within their jurisdiction and comply with the award.[22] Article 53 of the ICSID Convention stipulates that:

> The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.[23]

One of the remedies provided for in the ICSID Convention is the annulment of the award. Upon request for annulment, an ad hoc committee is established which has the authority to annul the award on any of the following grounds set forth under article 52(1):

> a. that the Tribunal was not properly constituted;
> b. that the Tribunal has manifestly exceeded its powers;
> c. that there was corruption on the part of a member of Tribunal;
> d. that there has been a serious departure from a fundamental rule of procedure; or
> e. that the award has failed to state the reasons on which it is based.[24]

In *Wena Hotels v. Egypt*, the tribunal, while referring to the ground of annulment under article 52(1)(d), said that:

> In order to be a "serious" departure from a fundamental rule of procedure, the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed.[25]

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[22] ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 53, 18 Mar. 1965.

[23] *Ibid.*

[24] ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 52(1), 18 Mar. 1965.

[25] Wena Hotels Limited v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Decision on Annulment ¶48, (05 Feb. 2002)

While the proceedings of annulment are pending, the award can be enforced unless the enforcement is stayed by the ad hoc committee. The annulment committee has very limited powers as it cannot review the award on errors of fact and misapplication of the law is not subject to annulment.[26] Moreover, the committee is not empowered to amend the award, replace the award or remand it to the tribunal for a renewed decision. In *CMS v. Argentina,* the annulment committee pointed out that the tribunal had committed a 'manifest error of law', however, the committee rejected to annul the award due to its limited power under article 52 of the Convention. [27]

D. Preconditions to Arbitration

1. Exhaustion of Local Remedies

The foreign investor may be required to exhaust local remedies in the host state before initiating investment arbitration proceedings. The requirement of exhausting local remedies can be found in the relevant BIT, domestic legislation of the host state or in the arbitration agreement between the foreign investor and the host state.[28] Many BITs are silent on exhaustion of local remedies and some treaties even expressly waive this requirement.[29] In a plethora of cases, it has been held that the exhaustion of local remedies rule is waived unless expressly required. For instance, in *Yaung Chi Oo v. Myanmar*[30], the host state contended that the tribunal does not have jurisdiction over the dispute as the foreign

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[26] Amco Asia Corp. and Others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Annulment ¶23 (16 May 1986).

[27] CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Decision on Annulment ¶¶135-136 (25 Sep. 2005).

[28] Martin Dietrich Brauch, *Exhaustion of Local Remedies in International Investment Law*, International Institute for Sustainable Development (January 2017).

[29] Various BITs signed by Luxemburg, Belgium and other countries waive of the right to require exhaustion of local remedies.

[30] Yaung Chi Oo Trading Pte Ltd. v. Government of the Union of Myanmar, ASEAN I.D .Case No. ARB/01/1, Award, ¶¶ 40–41 (31 March 2003),

investor failed to exhaust local remedies. The tribunal dismissed the host state's objection as the applicable agreement did not require the investor to exhaust local remedies.

Few treaties like the Argentina-Netherlands BIT, allows the foreign investor to initiate international proceedings if the courts of the host state fail to render a decision within a specified period of time.[31] Other BITs such as the Austria-Philippines BIT, allows the foreign investor to initiate international proceedings if the domestic courts fail to settle the dispute between the parties.[32] Moreover, BITs like the Italy-Uruguay BIT authorises the foreign investor to initiate investment proceedings if the decision of the domestic court is contrary to the norms of international law or it is manifestly unjust or constitutes a denial of justice.[33]

BITs that require the investors to exhaust local remedies usually include the mandate to exhaust such remedies for a specified period,[34] ranging from a minimum of three months to maximum of five years. An example of this can be found in article 41 of Argentina-UK BIT:

> 1. Disputes with regard to an investment which arise within the terms of this Agreement between an investor of one Contracting Party and the other Contracting Party, which have not been amicably settled shall be submitted, at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made.
>
> 2. The aforementioned disputes shall be submitted to international arbitration in the following cases:

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[31] Argentina - Netherlands BIT, art. 10(3), Oct. 20, 1992.

[32] Austria - Philippines BIT, art. 9(3), Apr. 10, 2002; Josefa Sicard Mirabal & Yves Derains, Introduction to Investor-State Arbitration 41 – 74 (Kluwer Law International 2018).

[33] Italy - Uruguay BIT, art. 9(3), Feb. 21, 1990.

[34] Nishith Desai Associates, Bilateral Investment Treaty Arbitration and India: With a special focus on Indian Model BIT, 2016, *available at* <http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Bilateral_Investment_Treaty_Arbitration_and_India-PRINT-2.pdf> last accessed 25 June 2020.

> (a) if one of the Parties so requests, in any of the following circumstances:
>
> (i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;
>
> (ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute.[35]

In *ICS Inspection and Control Services Limited v. Argentina,* the investor had initiated arbitral proceedings alleging that the host state violated article 2(2) of the Argentina-United Kingdom BIT, which imposes an obligation on the host state to accord fair and equitable treatment to the investments. In the said case, the tribunal held that it had no jurisdiction over the dispute as the investor failed to pursue the matter in domestic courts i.e. exhaust local remedies for 18 months, as required by the Argentina-UK BIT. [36]

The India Model BIT 2016 provides that a foreign investor is allowed to initiate international proceedings if he has exhausted the local remedies for a period of 5 years.[37] However, it is pertinent to note that the foreign investor is not required to exhaust the local remedies if he can prove that there are no available local remedies capable of reasonably providing any relief pertaining to the investor's claim.[38] For instance, article 15 of the India Model BIT 2016 provides that:

> [T]he requirement to exhaust local remedies shall not be applicable if the investor or the locally established enterprise can demonstrate that there are no available domestic legal remedies capable of reasonably providing any relief in respect of the same

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[35] Argentina - United Kingdom BIT, art. 41, 12 Dec. 1990.

[36] ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina, UNCITRAL, PCA Case No. 2010-9, Award on Jurisdiction ¶250 (10 Feb. 2012).

[37] India's Model Bilateral Investment Treaty, art. 15.2, 28 Dec, 2015.

[38] India's Model Bilateral Investment Treaty, art. 15.1, 28 Dec, 2015.

> measure or similar factual matters for which a breach of this Treaty is claimed by the investor.[39]

Article 26 of the ICSID Convention recognises the rule of exhaustion of local remedies as a condition to host state's consent to international arbitration. The article reads as follows:

> Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.[40]

In *Lanco International Inc. v. Argentina*, the arbitral tribunal while dealing with article 26 of the ICSID, stated that:

> [A} State may require the exhaustion of domestic remedies as a prior condition for its consent to ICSID arbitration. This demand may be made (i) in a bilateral investment treaty that offers submission to ICSID arbitration, (ii) in domestic legislation, or (iii) in a direct investment agreement that contains an ICSID clause.[41]

In *Generation Ukraine v. Ukraine,* Ukraine contended that the tribunal lacked the requisite jurisdiction as the claimant failed to exhaust local remedies as required under article 26 of the ICSID Convention. The claimant submitted that the second sentence of article 26 of the ICSID Convention prevails over article VI(4) of the USA-Ukraine BIT, which does not contain the local remedies rule. The tribunal pointed out that the fact the relevant BIT did not require the exhaustion of local remedies shows that the contracting parties have chosen to 'omit any requirement that an investor must first exhaust local remedies before submitting a dispute to ICSID arbitration in the BIT'. In light of this, the tribunal held that the

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[39] *Ibid.*

[40] ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 26, 18 Mar. 1965.

[41] Lanco International Inc. v. The Argentine Republic, ICSID Case No. ARB/97/6, ¶39 (08 Dec. 1998).

claimant was under no obligation to exhaust local remedies in the courts of Ukraine before initiating arbitral proceedings.[42]

The requirement of exhaustion of local remedies does not apply to cases dealing with denial of justice. In *Saipem v Bangladesh*[43], the arbitral tribunal, while dealing with the claim based on expropriation, held that the requirement to exhaust local remedies would not be a ground to deny jurisdiction over claims brought on the ground of expropriation. In *Loewen v. USA*, it was held that a decision of the court would constitute a 'denial of justice' if the decision is final and it is issued by the court of last resort of the state. Moreover, it was stated the question of the applicability of requirement of local remedies in cases of denial of justice claim, shall be decided "in the light of the investor's situation, including its financial and economic circumstances."[44]

2. Cooling off Period

Majority of BITs provide for a 'cooling off' period or waiting period, which requires the parties to resolve the dispute amicably before the initiation of arbitral proceedings by the foreign investor.[45] During this period, the parties engage with each other in a good faith attempt to resolve the dispute through consultation, negotiation, etc. The duration of this period, provided in the majority of investment treaties is six months, however, the parties are not required to reach a specific result during this period.[46]

The cooling off period is initiated by the foreign investor by sending a 'notice of dispute' to the Host state. The India Model BIT

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[42] Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, ¶¶13.1-13.6 Award.

[43] Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, ¶¶150-156 (21 March 2007).

[44] Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, ¶169 (26 June 2003).

[45] Josefa Sicard Mirabal & Yves Derains, Introduction to Investor-State Arbitration 41 – 74 (Kluwer Law International 2018).

[46] Murphy Exploration and Production Company International v. Republic of Ecuador, ICSID Case No. ARB/08/4, Decision on Jurisdiction ¶135 (15 Dec. 2010).

2016 provides for six months waiting period[47] and it states that the 'notice of dispute' shall:

> specify the name and address of the disputing investor or the enterprise, where applicable; set out the factual basis of the claim, including the measures at issue; specify the provisions of the Treaty alleged to have been breached and any other relevant provisions; demonstrate compliance with Article 15.1 and 15.2, where applicable; specify the relief sought and the approximate amount of damages claimed; and furnish evidence establishing that the disputing investor is an investor of the other Party.[48]

In *Western NIS Enterprise Fund v Ukraine*, the tribunal held that "proper notice is an important element of the State's consent to arbitration, as it allows States, acting through its competent organs to examine and possibly resolve the disputes by negotiations."[49] The tribunal in *Lauder v Czech Republic* held that the cooling off period does not start from the date at which the alleged breach occurred, but from the date, the host state was made aware of the alleged breach by sending notice of arbitration.[50]

In *Murphy v. Ecuador*, the ICSID tribunal held that it lacked jurisdiction over the dispute as the investor failed to comply with the cooling off period as provided in the applicable BIT. [51]However, there are many cases wherein the tribunals have adopted a different view and held that failure to comply with the cooling off period does not result in a lack of jurisdiction. For instance, in *SGS v. Pakistan[52]*, the tribunal placed reliance on *Ethyl Corporation v. The Government of Canada* and held that:

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[47] India's Model Bilateral Investment Treaty, art. 15.4, 28 Dec. 2015.

[48] India's Model Bilateral Investment Treaty, art. 15.3, 28 Dec. 2015.

[49] Western NIS Enterprise Fund v. Ukraine, ICSID Case No. ARB/04/2, Oder ¶5, (06 March 2006).

[50] Ronald S. Lauder v. The Czech Republic, UNCITRAL, Final Award ¶185, (03 Sep. 2001).

[51] Murphy Exploration and Production Company International v. Republic of Ecuador, ICSID Case No. ARB/08/4, Decision on Jurisdiction ¶135 (15 Dec. 2010).

[52] SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction ¶185, (06 Aug. 2003).

> [T]ribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction. [53]

The same view was adopted in *Biwater Gauff v. the United Republic of Tanzania*, wherein the tribunal held that the cooling off period is:

> [P]rocedural and directory in nature, rather than jurisdictional and mandatory. Its underlying purpose is to facilitate opportunities for amicable settlement. Its purpose is not to impede or obstruct arbitration proceedings, where such settlement is not possible. Non-compliance with the six month period, therefore, does not preclude this Arbitral Tribunal from proceeding. If it did so, the provision would have curious effects, including:
>
> - preventing the prosecution of a claim, and forcing the claimant to do nothing until six months have elapsed, even where further negotiations are obviously futile, or settlement obviously impossible for any reason;
>
> - forcing the claimant to recommence an arbitration started too soon, even if the six month period has elapsed by the time the Arbitral Tribunal considers the matter.[54]

In light of the above, there is a lack of consensus on whether failure to comply with the cooling off period results in a lack of jurisdiction of the tribunal.[55] In certain cases, where the claimant fails to comply with the cooling-off period, the tribunal has

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[53] Ethyl Corporation v. Canada, NAFTA-UNCITRAL Case, Award on Jurisdiction, 24 June 1998, *available at* <https://www.italaw.com/sites/default/files/case-documents/ita0300_0.pdf> last accessed 06 July 2020.

[54] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award ¶343 (12 July 2008).

[55] *See,* Arvind Ganesh, *Cooling Off Period (Investment Arbitration),* Max Planck Institute Luxembourg. Department of International Law and Dispute Resolution (Nov. 2017), *available at* <https://www.mpi.lu/fileadmin/mpi/medien/research/MPEiPro/Cooling_Off_Periods__EiPro_Sample_Entry.pdf> last accessed 10 July 2020.

assumed jurisdiction but issued costs order against the claimant for not complying with the waiting period. For instance, in *Ethyl Corporation v. The Government of Canada,* even though the claimant initiated arbitral proceedings without complying with the cooling-off period, the tribunal assumed jurisdiction and awarded costs against the claimant. The tribunal held that the investor was responsible for the costs of the proceedings as the proceedings could have been avoided if the investor had complied with the cooling-off period.

3. Notice of Arbitration

If the parties fail to resolve the dispute during the cooling off period, the foreign investor may initiate arbitration proceedings by issuing a 'notice of arbitration', which refers to a request to submit a dispute to arbitration. A notice to Arbitration is a crucial step after the decision to arbitrate the dispute has been taken by the claimant as it signifies the intention to commence arbitral proceedings. In ad hoc arbitration, the claimant is required to send a 'notice of arbitration' to the host state whereas, in institutional arbitration, the claimant is usually required to send a 'request for arbitration' to the relevant institution, which sends a copy of the request to the respondent.

Under the UNCITRAL Rules as well as the PCA rules, the proceeding is deemed to commence on the day on which the notice of arbitration is received by the respondent. Certain information like the name and contact details of the parties, the reference of the dispute, and the remedy sought are needed to be included in the notice, that is to be served to the respondent by the claimants. With respect to arbitral proceedings before an ICSID tribunal, the proceeding is deemed to commence upon the constitution of the tribunal.[56]

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[56] ICSID Rules of Procedure for Arbitration Proceedings, Rule 6(1).

The India Model BIT 2016 provides that a 'notice of arbitration' shall be sent to the host state at least 90 days prior to submitting any claim to arbitration. Moreover, it stipulates that the notice of arbitration shall:

> a. attach the notice of dispute and the record of its transmission to the Defending Party with the details thereof;
>
> b. provide the consent to arbitration by the disputing investor, or where applicable, by the locally established enterprise, in accordance with the procedures set out in this Treaty;
>
> c. provide the waiver as required under Article 15.5 (iii) or (iv), as applicable; provided that a waiver from the enterprise under Article 15.5 (iii) or (iv) shall not be required only where the Defending Party has deprived the disputing investor of control of an enterprise;
>
> d. specify the name of the arbitrator appointed by the disputing investor[57]

[57] India's Model Bilateral Investment Treaty, art. 15.5(v), 28 Dec. 2015.

CHAPTER 3
FUNDAMENTAL CONCEPTS OF INVESTMENT ARBITRATION

This chapter discusses some of the fundamental concepts of investment arbitration including, treaty interpretation, jurisdiction and substantive rights and treaty shopping.

A. Interpretation of Investment Treaties

Unlike commercial arbitration, where the usual contractual means of interpretation, mainly derived from domestic legal orders, are applicable, investment arbitration is based on bilateral or multilateral treaties.[1] In principle, investment treaties are ordinary investment treaties and therefore, public international law principles are applicable for the interpretation of investment treaties. While interpreting investment treaties, majority tribunals invoke article 31 of the Vienna Convention on Law of Treaties (VCLT), which provides that:

> a treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.[2]

The investment tribunals have frequently interpreted treaties by referring to their preamble that lays down the object and purpose

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[1] Katia Yannaca-Small, Arbitration Under International Investment Agreements (Oxford University Press 2010) at p. 829.

[2] Vienna Convention on the Law of Treaties, art. 31, 23 May 1969.

of the respective treaty.[3] The object and purpose of a treaty play a very important role because as mentioned in article 31 of the VCLT, tribunals are required to interpret treaties in the light of the object and purpose of the relevant treaty.

Moreover, in accordance with article 32 of the VCLT, tribunals have also relied on supplementary means of interpretation, including preparatory work (*travaux preparatoires*) of the treaty. In *Noble Ventures v. Romania*, a dispute arose out of a bilateral investment treaty (BIT) entered between Romania and the USA. The contention was that Romania's action was inconsistent with the provisions under the BIT that provided for promotion and protection of investment of nationals or companies of the party in the territory of the other party. The tribunal in this case, after referring to article 31 of the VCLT, which is also known as the general rule of interpretation, pointed out:

> ...recourse may be had to supplementary means of interpretation, including the preparation work and the circumstances of its conclusions, only in order to confirm the meaning resulting from the application of the aforementioned methods of interpretation.[4]

Tribunals can resort to preparatory work only if it is available. ICSID tribunals have frequently relied on the preparatory work of the ICSID Convention as the drafting history of the convention is documented in detail and is readily available. On the other hand, the drafting history of BITs is usually not documented and therefore, tribunals cannot rely on its preparatory work.[5]

Unilateral assertions on the relevant BIT's interpretation made by the disputing state party in the course of arbitration proceedings

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[3] Lauder v. Czech Republic, Award, 3 September 2001, ICSID Reports 66, ¶292.

[4] Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11 Award, ¶150 (12 Oct. 2005).

[5] Rudolph Dolzer and Christoph Schreuer, Principles of International Investment Law (2nd ed., 2012) at p. 33.

are of limited value.[6] However, the contracting states may issue a joint, non-binding statement on a question of interpretation pending before the arbitral tribunal.[7]

B. Jurisdiction

The jurisdiction of an investment arbitral tribunal is based on the consent of the Host State (*ratione voluntatis*), which is given through investment treaties, domestic legislation or arbitration clauses in investor-state contracts.[8] The scope of the investment tribunal's jurisdiction can be understood through four kinds of jurisdictions viz. *Ratione Voluntatis*, *Ratione Personae, Ratione Materiae* and *Ratione Temporis.*

1. Ratione Voluntatis

Ratione Voluntatis (consent to arbitration) refers to the desire of the parties to submit their dispute to arbitration. The consent of the investor company and the host state is an important element in Investment Arbitration as the jurisdiction of the arbitral tribunal will be contingent on this consent. The ICSID Convention also relies heavily on the consent required by the ICSID tribunal to have jurisdiction over a particular dispute, and such consent may be expressed, either through Public international law like the Investment treaties or state legislations of the Host State or in the lodging of a claim with the ICSID.[9] The ICSID Convention has not provided for any specific requirements, form, or structure for giving consent, leaving the parties free to give consent in the manner they desire, provided it is free and written. Thus, consent may be

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[6] *Ibid* at p. 34.

[7] See, CME Czech Republic B.V. v. The Czech Republic, UNCITRAL (13 Sep. 2001).

[8] Michael Waibel, *Investment Arbitration: Jurisdiction and Admissibility*, Legal Studies Research Paper Series- University of Cambridge (Paper No. 9/2014).

[9] Bernardo M. Cremades, *Arbitration in Investment Treaties: Public Offer of Arbitration in Investment-Protection Treaties*, *available at* <https://www.cremades.com/pics/contenido/File634528980336478688.pdf> last accessed 18 June 2021.

given either directly through an agreement[10] between the host state and the foreign investor or through Bilateral or Multilateral treaties or by the state legislature mostly through investment code.[11]

Mere signing of the treaty by the parties does not mean that they have consented to the jurisdiction of the ICISD tribunal. The ICSID convention under Article 25 requires the express consent of the parties.[12] It also prohibits the unilateral withdrawal of consent by a party but, does not bar them from withdrawal by mutual consent. The tribunal must satisfy itself as to the component of mutuality of the parties in determining whether the consent is free or not. However, the underlying presumption is that the contracting parties must be signatories to the ICSID Convention.

In *SPP v. Egypt*, the investor had filed a request by placing reliance on article 8 of Egypt's Law No. 43 of 1974 Concerning the Investment of Arab and Foreign Funds and the Free Zone. The said article reads as follows:

> Investment disputes in respect of the implementation of the provisions of this Law shall be settled in a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country, or within the framework of the Convention for the Settlement of Investment Disputes between the State and the

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[10] Model clauses have been published by ICSID to facilitate parties to such agreements, s*ee,* ICSID 1993 Model Clauses, Doc. ICSID/5/Rev. 2 of 1993.

[11] UNCTAD, *Course Module on International Centre for Settlement of Investment Arbitration, Module 2.3 Consent to Arbitration*, UNCTAD/EDM/Misc.232/Add.2, *available at* <https://unctad.org/system/files/official-document/edmmisc232add2_en.pdf> last accessed 18 June 2021.

[12] Article 25.1 of the ICSID Convention lays down that: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

> nationals of other countries to which Egypt has adhered by virtue of Law No. 90 of 1971, where such Convention applies.[13]

The host state contended that the arbitral tribunal lacked the requisite jurisdiction as the said article does not amount to consent to arbitration. However, the arbitral tribunal rejected Egypt's contention and stated:

> Article 8 of Law No. 43 establishes a mandatory and hierarchic sequence of dispute settlement procedures, and constitutes an express "consent in writing" to the Centre's jurisdiction within the meaning of Article 25(1) of the Washington Convention in those cases where there is no other agreed upon method of dispute settlement and no applicable bilateral treaty.[14]

It was observed that the parties had not agreed upon any method of dispute resolution and there was no applicable BIT. Therefore, the tribunal held that it had the requisite jurisdiction to deal with the dispute.

2. Ratione Personae

An investment tribunal is said to have *ratione personae* jurisdiction over a dispute if the dispute is between a host state and a foreign investor.[15] Article 25 of the ICSID Convention, which is the jurisdictional provision, stipulates that ICSID tribunals have *rationae persone* jurisdiction over disputes:

> between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State.[16]

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[13] Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Decision on Jurisdiction I, (Nov. 1985).

[14] *Ibid.*

[15] C.F. Amerasinghe, *Interpretation of Article 25(2)(b) of the ICSID Convention* in International Arbitration in the 21st Century: Towards Judicialization and Uniformity? (Lillich, R. B./ Brower, Ch. N. eds.) 2 (1994).

[16] ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 25, 18 Mar. 1965.

Investors can be either natural or juridical persons and the nationality of an investor is an essential requirement to determine the jurisdiction of an investment tribunal.

i. Natural Person

Article 25(2) (a) of the ICSID Convention lays down the nationality requirement for a natural person and states that a natural person, who is a party to the dispute, shall have the nationality of a state other than the host state.[17] The burden of proof is on the investor to prove his nationality and the nationality[18] is decided in accordance with the laws of the host state whose nationality is claimed by the investor.[19] The investor shall have the relevant nationality at the time of the alleged breach continuously thereafter until the time the arbitral proceedings are commenced.[20]

Over the years, cases involving natural persons having dual nationality have attracted the most attention. In *Eudoro Armando Olguín v. Republic of Paraguay*, Mr. Olguín claimed dual nationality of USA and Peru and invoked Peru-Paraguay BIT. The tribunal investigated the claim and found that the claimant held dual nationality and both were effective. In light of this, the tribunal held that Mr. Olguín, being a national of Peru, is entitled to bring a claim under the Peru-Paraguay BIT. [21]In *Hussein Nuaman Soufraki v. United Arab Emirates*, the investor claimed dual nationality of Italy and Canada and sought protection under the Italy-UAE BIT. The

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[17] ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 25(2)(a), 18 Mar. 1965.

[18] Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Decision on Jurisdiction (11 Apr. 2007).

[19] Champion Trading Company, Ameritrade International, Inc. v. Arab Republic of Egypt, ICSID Case No. ARB/02/9, ¶¶282-289 (21 Oct. 2003).

[20] Zachary Douglas, International Law of Investment Claims, 16 (Cambridge University Press 2009); *See* Mr. Leonid Shmatenko, *Continuous Nationality Rule*, JusMundi, *available at* <https://jusmundi.com/en/document/wiki/en-continuous-nationality-rule> last accessed 10 June 2021.

[21] Eudoro Armando Olguín v. Republic of Paraguay, ICSID Case No. ARB/98/5 (08 Aug. 2000).

tribunal found that the investor ceased to be an Italian national when he acquired Canadian citizenship and therefore, held that he was not entitled to invoke the Italy-UAE BIT.[22]

It shall be noted that an investor is barred from bringing claims before an ICSID tribunal if he holds dual nationality and one of which is that of the host state's.[23] The India Model BIT 2016 states that in case of dual nationality/citizenship, the nationality of the investor shall be that of the dominant and effective nationality/ citizenship where the investor ordinarily or permanently resides.[24]

In certain cases, tribunals have treated a locally incorporated company as a foreign investor because of the inclusion of an arbitration clause.[25] For instance, in *Klöckner v. Cameroon*, the foreign investor was involved in the incorporation of a joint venture company in Cameroon and subsequently, an agreement was executed between Cameroon and the company. The agreement had an ICSID arbitration clause however, Cameroon contented that the tribunal lacked the requisite jurisdiction because the other party was a Cameroonian company as it was established in Cameroon. The tribunal rejected this contention and held that the mere inclusion of an ICSID clause shows that the parties intended to treat the company as a foreign company by agreeing that the company was under foreign control.[26]

ii. Juridical Person

The nationality of juridical persons such as companies are determined on the basis of the laws of the State under which the

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[22] Hussein Nuaman Soufraki v. The United Arab Emirates, ICSID Case No. ARB/02/7 (07 July 2004).

[23] ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 25 (2) (a), 18 March 1965.

[24] India's Model Bilateral Investment Treaty, art. 1.9, 28 Dec. 2015.

[25] United Nations Conference on Trade and Development, *Requirements of Ratione Personae* (2003) at p.24.

[26] Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais, ICSID Case No. ARB/81/2, Award, 21 October 1983.

company is incorporated.[27] Moreover, article 25 of the ICSID Convention provides that a locally incorporated juridical person is eligible to bring claims before the tribunal if it is foreign controlled. The same approach has been adopted by the India Model BIT 2016 in Article 1.5.

In *Tokios Tokelés v. Ukraine*, the tribunal held that the claimant, which was incorporated in Lithuania but controlled and 99 percent owned by Ukrainian nationals, was entitled to bring a claim against Ukraine under the Lithuania-Ukraine BIT. The investor was qualified as a Lithuanian national under the Lithuania-Ukraine BIT that defined nationality on the basis of the place of incorporation.[28] A similar view was adopted by a BIT established tribunal in *Flemingo v. Poland*. The tribunal allowed the Indian incorporated investor to invoke India- Poland BIT even though the investor was headquartered in the UAE.[29] Moreover, in *MINE v. Guinea*, an agreement was executed between Guinea and the investor which included an ICSID arbitration clause. MINE was incorporated in Liechtenstein however, the agreement stated that MINE was a Swiss national as the company was controlled by a Swiss national. Liechtenstein had not ratified the ICSID Convention and on the other hand, Switzerland had ratified the Convention. During the proceedings, the issue of *rationae personae* jurisdiction was not raised as the agreement clearly stated MINE's jurisdiction. Moreover, Guinea was aware of the circumstances underlying MINE's nationality when it gave the consent to resolve the dispute through ICSID. Therefore, in such cases, the tribunal would have the jurisdiction to deal with the disputes.[30]

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[27] United Nations Conference on Trade and Development, *Requirements of Ratione Personae* (2003) at p. 15.

[28] Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction (29 Apr. 2004).

[29] Flemingo DutyFree Shop Private Ltd v Republic of Poland, UNCITRAL (12 Aug. 2016).

[30] Maritime International Nominees Establishment (MINE) v. Republic of Guinea, ICSID Case No. ARB/84/4.

It is pertinent to note that the mere fact the ICSID's Preamble refers to 'private international investment', it does imply that partly or wholly owned governmental companies are excluded from the jurisdiction of the ICSID tribunal. In *CSOB v. Slovakia*, the tribunal held that the concept of 'national' under the ICSID Convention is not restricted to privately owned companies. The tribunal stated that a partially or wholly owned governmental company would be included if it is acting in a commercial capacity and not discharging an essential governmental function.[31] Therefore, the decisive criterion is whether the investor was discharging an essential government function.

3. Ratione Materiae

Jurisdiction *ratione materiae* refers to the subject matter of the dispute falling under the jurisdiction of the tribunal. [32]Article 25 of the ICSID Convention stipulates that ICSID tribunals have *ratione materiae* or subject matter jurisdiction over "any legal dispute arising directly out of an investment." The term 'directly' used in this article does not require that the investment shall be a foreign direct investment[33] rather, it requires that the dispute submitted shall be 'reasonably closely connected' to an investment.[34] The ICSID Convention does not define the term 'investment' and therefore, there exists a lack of consensus over the definition of investment. The following are the criteria that are usually taken into consideration by ICSID tribunals to determine whether the subject matter constitutes an investment:[35]

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[31] Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4.

[32] Simon Weber, Jurisdiction Ratione Materiae, Jus Mundi, *available at* <https://jusmundi.com/en/document/wiki/en-jurisdiction-ratione-materiae> last accessed on 20 June 2021.

[33] Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision on Jurisdiction, ¶¶275-276 (24 May 1999).

[34] Christoph H. Schreuer, ICSID Convention - A Commentary,(Cambridge University Press, 2001) at p. 67.

[35] Rudolph Dolzer and Christoph Schreuer, Principles of International Investment Law (2nd ed., 2012) at p. 68.

a. Contribution by the investor
b. The duration of the project
c. Existence of operational risk
d. Contribution to the Host's state development

The above-mentioned criteria were applied by the tribunal in *Salini v. Morocco*[36] and the application of these criteria is referred to as the *Salini* test. However, these criteria shall be reviewed in their totality and assessed in light of the circumstances of each case. It shall be noted that the requirement of contribution to the host state's development has become the subject of some disagreement.[37]

In various cases, the tribunals have held that investments usually include various interrelated economic activities each of which shall not be viewed in isolation. In *CSOB v. Slovakia*, the tribunal held:

> An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.[38]

In *Amco v. Indonesia*, the tribunal distinguished between rights and obligations that are applicable to legal or natural persons who are within the reach of a host state's jurisdiction, as a matter of general law; and rights and obligations that are applicable to an

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[36] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I], ICSID Case No. ARB/00/4, (July 31, 2001).

[37] Rudolph Dolzer and Christoph Schreuer, Principles of International Investment Law (2nd ed., 2012) at p. 69.

[38] Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision on Jurisdiction, (24 May 1999).

investor in furtherance to an investment agreement concluded between the investor and the host state. The tribunal held that:

> legal disputes relating to the latter will fall under Article 25(1) of the Convention. Legal disputes concerning the former in principle fall to be decided by the appropriate procedures in the relevant jurisdiction unless the general law generates an investment dispute under the Convention.[39]

BITs and multilateral treaties providing for ICSID jurisdiction usually include their own definitions of 'investment'.[40] Usually, investment treaties define investment as 'any asset' and then lay down a non-exhaustive list of assets that might qualify as an investment.[41] Majority of BITs define 'investments' in a comprehensive manner by adopting either an asset based approach or an enterprise based approach.[42] The asset based approach includes every asset with economic value, established or acquired by the foreign investor whereas, an enterprise based approach recognises only those investments that have been constituted or operated as a legal entity that has real and substantive business presence in the Host State.[43] The India Model 2016 adopts an enterprise approach however, all previous BITs of India, except the India-Mexico Bilateral Investment Promotion and Protection Agreement (BIPPA), have adopted an asset based approach.

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[39] Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction (25 Sep. 1983).

[40] Rudolph Dolzer and Christoph Schreuer, Principles of International Investment Law (2nd ed., 2012) at p. 61.

[41] Zachary Douglas, International Law of Investment Claims (Cambridge University Press 2009) at p. 164.

[42] Berk Demirkol, *The Notion of 'Investment' in International Investment Law,* I Turkish Commercial Law Review 41 (01 Feb. 2015)

[43] NDA, *Bilateral Investment Treaty Arbitration and India: With a special focus on Indian Model BIT*, 2016, *available at* <http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Bilateral_Investment_Treaty_Arbitration_and_In> last accessed 20 June 2021.

As mentioned above, many investment treaties contain a broad definition of investment, which includes 'every kind of asset'. Moreover, such definitions also lay down a non-exhaustive list of investments. For instance, article 1 of ASEAN Agreement for the Promotion and Protection of Investment defines investment as:

> The term 'investment' shall mean every kind of asset and in particular shall include though not exclusively:
>
> a) movable and immovable property and any other property rights such as mortgages, liens and pledges;
>
> b) shares, stocks and debentures of companies or interests in the property of such companies;
>
> c) claims to money or to any performance under contract having a financial value;
>
> d) intellectual property rights and goodwill;
>
> e) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.[44]

The five categories of investment as laid down under the ASEAN Agreement are common in many investment treaties.[45] The scope of such a broad definition of investment would include every kind of asset and therefore, many investment treaties include various limitations on the scope of the investment covered under the relevant treaty. There are various types of limitations that can be imposed to exclude certain types of investment. For instance, India-Brazil BIT categorically states that investment does not mean:

> i. an order or judgment sought or entered in any judicial, administrative or arbitral proceeding;
>
> ii. debt securities issued by a Party or loans granted from a Party to the other Party, bonds, debentures, loans or other debt instruments of-a State-owned enterprise of a Party that is considered to be public debt under the law of that Party;

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[44] ASEAN Agreement for the Promotion and Protection of Investments, article 1(3).

[45] UNCTAD Series on issues in international investment agreements, Scope and Definition, UNCTAD/ITE/IIT/11 p. 31 (vol. II), 1999, *available at* <https://unctad.org/system/files/official-document/psiteiitd11v2.en.pdf> last accessed 20 June 2021.

> iii. any expenditure incurred prior to the obtainment of all necessary licenses, permissions, clearances and permits required under the law of a Party;
>
> iv. portfolio investments of the enterprise or in another enterprise;
>
> v. claims to money that arise solely from commercial contracts for the sale of goods or services by a national or an enterprise in the territory of a Party to an enterprise in the territory of another Party;
>
> vi. goodwill, brand value, market share or similar intangible rights;
>
> vii. claims to money that arise solely from the extension of credit in connection with any commercial transaction; and
>
> viii. any other claims to money that do not involve the kind of interests or operations as set out in the definition of investment in this Treaty.[46]

4. Ratione Temporis

Ratione Temporis jurisdiction refers to the effect of date/time on a tribunal's jurisdiction to deal with the dispute between the investor and the host state under the relevant investment treaty.[47] The tribunal's *ratione temporis* jurisdiction extends to the claims relating to the claimant's investment, which are founded upon obligations in force and binding upon the host state at the time of the alleged breach.[48] The principle of application of treaties is laid down in article 28 of the VCLT, which reads as follows:

> Unless a different intention appears from the Treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which

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[46] India-Brazil BIT, art. 2.4.1 (24 Jan. 2020).

[47] Armand Terrien, *Jurisdiction Ratione Temporis*, Jus Mundi, *available at* <https://jusmundi.com/en/document/wiki/en-jurisdiction-ratione-temporis#:~:text=Jurisdiction%20ratione%20temporis%20refers%20to,contained%20in%20the%20applicable%20treaty> last accessed 16 April 2021.

[48] Zachary Douglas, International Law of Investment Claims (Cambridge University Press 2009) at p. 328.

> ceased to exist before the date of the entering into force of Treaty with respect to that party.[49]

This rule is also expressed in article 13 of the International Law Commission's (ILC) Articles on State Responsibility:

> An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

The international practice has also complied with this rule. The investor's investment can be made prior to or after the investment treaty entered into force, subject to an express provision to the contrary in the treaty. In *Tecmed v. Mexico*, the investor placed reliance on article 2(2) of the Spain-Mexico BIT and contended that the treaty applied to Mexico's conduct before the treaty had come into force because article 2(2) stipulates that the BIT "shall also apply to investments made prior to its entry into force by the investors of a Contracting Party".[50] The tribunal rejected this contention on two grounds. Firstly, it referred to article 28 of the VCLT, which lays down a general presumption of the non-retrospective application of treaties. Secondly, it referred to various substantive provisions of the relevant BIT and observed that the substantive obligations were couched in the future tense. In light of this, the tribunal stated:

> The continuous use of the future tense, which connotes the undertaking of an obligation linked to a time period, rules out any interpretation to the effect that the provisions of the Agreement, even in relation to investments existing as of the time of its entry into force, apply retroactively.[51]

The tribunal would not have the requisite jurisdiction if the investment was made after the breach. In *Messa Power v. Canada*,

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[49] Vienna Convention on the Law of Treaties, art. 28, 23 May 1969.

[50] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2 (May 2003).

[51] *Ibid,* para 65.

it was held that the tribunals's jurisdiction extends only to the investment that existed "at the time the challenged measure was adopted."[52] A similar view was adopted by the tribunal in *Phillips Morris Asia v. Australia.*[53] It shall be noted that the tribunal can take into consideration the facts pertaining to the claim but occurring before the tribunal's *ratione temporis* jurisdiction provided that such facts do not form the basis of the claim.

With respect to the India Model BIT 2016, article 2.1 provides that the treaty applies only to investments:

> in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter and which have been admitted by a Party in accordance with its law, regulations and policies as applicable from time to time.

The Indian Model BIT 2016 does not apply to any pre-investment activity related to the establishment, acquisition or expansion of any investment, or to any measure related to such pre-investment activities. Moreover, article 2.3 of the Indian Model BIT 2016 states that the treaty shall not apply to claims arising out of events that occurred before the treaty was entered into force.

C. Substantive Rights

Foreign investors are guaranteed the protections in terms of substantive rights which they can rely in case of qualifying investments under the relevant investment treaty or in some cases under foreign investment laws. The common form of substantive rights are protection from expropriation, fair and equitable treatment, national treatment, most favoured nation treatment and full protection and security.

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[52] Mesa Power Group, LLC v. Government of Canada, UNCITRAL, PCA Case No. 2012-17.

[53] Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12.

1. Expropriation

Expropriation refers to the act of the state to take the property of the private individual for the benefit of the public at large. Under international law, states have a sovereign right to take the property of the nationals or aliens through nationalisation or expropriation for various reasons such as economic, political, social, etc.[54] Most of the claims bought under BITs pertain to steps taken by the Host state which amounts to expropriating the foreign investment. Under international law, host states are allowed to expropriate foreign investment provided certain requirements are fulfilled. The requirements that shall be satisfied are that the investment shall be taken for a public purpose, as provided by law, in a non-discriminatory manner and with compensation.[55] Of these requirements, the measure of compensation has been the most controversial one. The method of determining compensation is often included in the BIT. For instance, article 6 of the Canada-Slovakia BIT, states:

> Investments or returns of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party, except for a public purpose, under due process of law, in a non-discriminatory manner and provided that such expropriation is accompanied by prompt, adequate and effective compensation. Such compensation shall be based on the real value of the investment at the time of the expropriation, shall be payable from the date of expropriation at a normal commercial rate of interest, shall be paid without delay and shall be effectively realizable and freely transferable.[56]

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[54] Expropriation, UNCTAD Series on Issues in International Investment Agreements II, United Nations Conference on Trade and Development, *available at* <https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf> last accessed 20 June 2021.

[55] Katia Yannaca-Small, Arbitration Under International Investment Agreements (Oxford University Press 2010) at p. 447.

[56] Canada-Slovakia BIT, art. VI, 20 Jul. 20 2010.

Expropriation can be direct or indirect and it covers not only tangible property but also intangible property such as intellectual property, contractual rights, etc.

i. Direct Expropriation

Direct expropriation of the property refers to the action of a host state which results in the involuntary transfer of title of the property or absolute seizure of assets. The tribunal in *Tecmed v. Mexico,* defined expropriation as:

> the forcible taking by the Government of tangible or intangible property owned by private persons by means of administrative or legislative action to that effect.[57]

Host states usually do not take such drastic measures and therefore, cases pertaining to direct expropriation have become rare.

Article 5.3(1) (a) of the 2016 India Model BIT states that:

> direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure.

ii. Indirect Expropriation

Indirect expropriation refers to the actions of the host state which does not affect the title of the owner but prevents him from using the investment in a meaningful way. Indirect expropriation occurs when the measures taken by the host state results in interference with the use, enjoyment or disposition of investment, loss of control and management over investment, and/or substantial deprivation in the value of the investment. Although

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[57] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2 (May 2003); *See,* Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability ¶396 (14 Dec. 2012).

majority investment treaties expressly provide protection to foreign investors against direct as well as indirect expropriation, there are few treaties that do not refer to indirect expropriation. However, the definition of expropriation provided under such treaties is usually broad enough so as to include both direct and indirect expropriation. [58]

In the India Model BIT 2016, there is an express reference to indirect expropriation. Article 5.3(a)(ii) states that "indirect expropriation occurs if a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it substantially or permanently deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure." Definition of indirect expropriation can be found in *Starrett Housing v. Iran*:

> ...it is recognized under international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.[59]

In some early arbitral decisions, as early as 1922, it was held that a measure taken by the host state can constitute indirect expropriation.[60] In *Chorzo Factory case*, the tribunal differentiated between lawful and unlawful expropriation and their financial takings. The tribunal held that in cases of lawful expropriation, the damage shall be remedied through the payment of fair compensation or the "just price of what was expropriated " at the time of the expropriation, i.e., the "value of the undertaking at the

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[58] Expropriation, UNCTAD Series on Issues in International Investment Agreements II, United Nations Conference on Trade and Development, *available at* <https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf> last accessed 20 June 2021.

[59] Starrett Housing Corporation v. Iran, Interlocutory Award No. ITL 32-24-1 (19 Dec. 1983).

[60] Norwegian Shipowners' Claims. Norway v. United States of America. Permanent Court of Arbitration. Award of 13 October 1922.

moment of dispossession, plus interest to the day of payment". In cases of unlawful expropriation, the tribunal said that "international law provides for r*estitutio in integrum* or, if impossible, its monetary equivalent at the time of the judgment". Moreover, the tribunal held that:

> The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[61]

Bilateral and multilateral treaties usually contain a reference to indirect expropriation or to measures tantamount to expropriation.[62] For instance, article 1110 of the North American Free Trade Agreement (NAFTA) which relates to expropriation and compensation, refers to "...a measure tantamount to nationalization or expropriation".[63] Moreover, few investment treaties make direct reference to indirect expropriation.[64] For instance, article 4 of the Egypt- Germany BIT states:

> Investments by investors of either Contracting State shall not directly or indirectly be expropriated, nationalized or subjected to

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[61] The Factory at Chorzów (Claim for Indemnity) (The Merits), Germany v. Poland, Permanent Court of International Justice, Judgment, 13 September 1928, 1928 P.C.I.J. (ser. A) No. 17, p. 47.

[62] Rudolph Dolzer and Christoph Schreuer, Principles of International Investment Law (2nd ed., 2012) at p. 93.

[63] North American Free Trade Agreement, art. 1110, 01 Jan. 1994.

[64] Mexico - United Kingdom BIT, art. 7 (2006); Japan - Lao People's Democratic Republic BIT, art. 12 (2008).

> any other measures the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting State except for the public benefit and against compensation.[65]

In *Metalclad v. Mexico*, the claimant was granted a permit by the Mexican Government to develop and operate a hazardous waste landfill. However, the local municipal authorities refused to grant the required construction permit to the investor and the regional government declared the particular land a national area for the protection of cactuses. The investment tribunal held the actions of the Mexican authorities were in violation of article 1110 of NAFTA.[66]

In *Goetz v. Burundi*, Burundi revoked the free zone status, which was provided to the claimant. Even though, there was no formal taking of property of the investor, the ICSID tribunal held that the actions of Burundi amount to measures having a similar effect to expropriation. The tribunal held:

> Since [...] the revocation of the Minister for Industry and Commerce of the free zone certificate forced them to halt all activities [...], which deprived their investments of all utility and deprived the claimant investors of the benefit which they could have expected from their investments, the disputed decision can be regarded as a 'measure having similar effect' to a measure depriving of or restricting property within the meaning of Article 4 of the Investment Treaty.[67]

Additionally, a measure taken by the host states amounts to indirect expropriation if the effect upon the economic benefit and the control over investment is substantial and lasts for a significant period. In *RFCC v. Morocco*, the tribunal held that an indirect expropriation takes place if the measure of the host state has:

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[65] Egypt - Germany BIT, art. 4.

[66] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1 (Jan., 1999).

[67] Antoine Goetz et consorts v. République du Burundi, ICSID Case No. ARB/95/3 (10 Feb. 1999).

> substantial effects of an intensity that reduces and/or removes the legitimate benefits related with the use of the rights targeted by the measure to an extent that they render their further possession useless.[68]

In *CMS v. Argentina*, Argentina had *inter alia* unilaterally suspended an agreed tariff adjustment formula for gas transport in light of the economic and financial crisis. The foreign investor argued that the steps taken by Argentina amount to indirect expropriation. The tribunal pointed out that though, the suspension had an effect on the investment, it does not amount to indirect expropriation. The tribunal held:

> The essential question is therefore to establish whether the enjoyment of the property has been effectively neutralised. The standard that a number of tribunals have applied in recent cases where indirect expropriation has been contended is that of substantial deprivation [....] the investor is in control of the investment; the Government does not manage the day to day operations of the company; and the investor has full ownership and control of the investment.[69]

In *Telenor v. Hungary*, the investor held a telecom concession, which was affected by a levy imposed on all telecommunications service providers. The tribunal stated that for an indirect expropriation to occur, the conduct complained must have a major adverse impact on the economic value of the investment. Moreover, the tribunal said:

> [T]he interference with the investor's rights must be such as substantially to deprive the investor of the economic value, use or enjoyment of its investment. In considering whether measures taken by the government constitute expropriation the determinative factors are the intensity and duration of the

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[68] RFFC v. Morocco, Award, 22 December 2003, 20 ICSID Review - FILJ 391 (2005).

[69] CMS v. Argentina, Award ¶¶262,263, 10 February 2005, 44 ILM 1205 (2005).

> economic deprivation suffered by the investor as the result of them.[70]

In light of this, the tribunal held "it is evident that the effect of the measures by Hungary of which Telenor complains fall far short of the substantial economic deprivation of its investment required to constitute expropriation."[71]

It shall be noted that the intention of the host state is not a decisive factor in deciding whether the measure taken by the host state amounts to indirect expropriation. In *Tecmed v. Mexico*, the tribunal held:

> The government's intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; and the form of the deprivation measure is less important than its actual effects.[72]

iii. Creeping Expropriation

Expropriation of investment does not always occur all at once. Expropriation of the investment may occur incrementally or step by step and such type of expropriation is referred to as a 'creeping expropriation'. Creeping expropriation can be defined as the:

> Incremental encroachment on one or more of the ownership rights of a foreign investor that eventually destroys (or nearly destroys) the value of his or her investment or deprives him or her of control over the investment. A series of separate State acts, usually taken within a limited time span, are then regarded as

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[70] Telenor v. Hungary, Award ¶64 (13 Sep. 2006).

[71] *Ibid,* ¶79.

[72] Tecmed v. Mexico, Award ¶116, 29 May 2003, 43 ILM 133 (204).

> constituent parts of the unified treatment of the investor or investment.[73]

In *Generation Ukraine v. Ukraine*, the claimant contended that the series of acts of the host state amounted to creeping expropriation as it interfered with the claimant's rights to its investment and blocked the completion of the project. The tribunal rejected the claimant's contention and held:

> Creeping expropriation is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property. The case of German Interests in Polish Upper Silesia is one of many examples of an indirect expropriation without a "creeping" element—the seizure of a factory and its machinery by the Polish Government was held by the PCIJ to constitute an indirect taking of the patents and contracts belonging to the management company of the factory because they were so closely interrelated with the factory itself. But although international precedents on indirect expropriation are plentiful, it is difficult to find many cases that fall squarely into the more specific paradigm of creeping expropriation.[74]

As mentioned above, the India Model BIT 2016 covers direct and indirect expropriation. It shall be noted that it lays down provisions pertaining to creeping expropriation as well. According to section 5.3(ii), a series of measures adopted by a host state would amount to indirect expropriation if the measures have:

> an effect equivalent to direct expropriation, in that it substantially or permanently deprives the investor of the fundamental attributes of property in its investment, including the

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[73] Expropriation, UNCTAD Series on Issues in International Investment Agreements II, United Nations Conference on Trade and Development, *available at* <https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf> last accessed 20 June 2021.

[74] Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, ¶¶13.1-13.6 Award.

> right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.

iv. Regulatory Measures

Exercise of regulatory function is the primary responsibility of the state. Regulations are essential for the protection of public interest and in genuine regulatory actions, non-economic factors play a prominent role. Usually, while performing regulatory functions, the actions of the state affect private parties.[75] Measures of the host state taken in exercise of its police power or right to regulate might significantly affect the property rights of an investor. In *Saluka Investments B.V. v. The Czech Republic*, the tribunal held that host states are not liable to compensate an investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulation that is aimed at the general welfare. The tribunal held:

> Faced with the question of when, how and at what point an otherwise valid regulation becomes, in fact and effect, an unlawful expropriation, international tribunals must consider the circumstances in which the question arises. The context within which an impugned measure is adopted and applied is critical to the determination of its validity.[76]

In *Nykomb Synergetics v. Latvia*, the tribunal held that:

> 'regulatory takings' may under the circumstances amount to expropriation or the equivalent of an expropriation. The decisive factor for drawing the border line towards expropriation must primarily be the degree of possession taking or control over the enterprise the disputed measures entail.[77]

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[75] Aniruddha Rajput, Regulatory Freedom and Indirect Expropriation in Investment Arbitration (Kluwer Law International 2018) at pp. 1 – 6.

[76] Saluka Investments B.V. v. The Czech Republic, UNCITRAL (1979).

[77] Nykomb Synergetics Technology Holding AB v. The Republic of Latvia, SCC Case No. 118/2001.

Many BITs include provisions which state that regulatory taking of the property does not constitute expropriation. For instance, Article 6 of the Colombia-India BIT stipulates:

> Non-discriminatory regulatory actions by a Contracting Party that are designed and applied to protect legitimate public welfare objectives including the protection of health, safety and environment do not constitute expropriation or nationalization; except in rare circumstances, where those actions are so severe that they cannot be reasonably viewed as having been adopted and applied in good faith for achieving their objectives.[78]

Public purpose, due process and non-discrimination are the three important factors in determining the validity of an expropriation. In *Methanex v. USA*, the government of California had imposed a ban on the gasoline additive MTBE and the investor argued that this measure taken by the government amounts to expropriation. The tribunal rejected the investor's claim on the grounds that the ban imposed was for a public purpose and non-discriminatory.[79]

In *Too v. Greater Modesto Insurance Associates,* the foreign investor demanded compensation as his liquor licence was seized by the Internal Revenue Service of the United States. The tribunal rejected the investors claim and held that action was within the police power:

> A State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation or any other action that is commonly accepted as within the police power of States, provided it is not discriminatory and is not designed to cause the alien to abandon the property to the State or to sell it at a distress price.[80]

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[78] Colombia - India BIT, art. 6.2, 10 Oct. 2009.

[79] Methanex v. The United States of America, Award, 03 August 2005.

[80] Too v. Greater Modesto Insurance Associates, Award of 29 December 1989, 23 Iran-U.S. Cl. Trib. Rep. 378.

In *ADC v. Hungary*, Hungary adopted various measures which deprived the foreign investor to operate and benefit from the investments in an airport project. Hungary argued that the measures were adopted to comply with the European Union requirements and it was for the 'strategic interest of the state'. The tribunal rejected Hungary's contention and held them liable as the host state failed to prove that the measures were adopted in the 'interest of the public'.[81]

2. Fair and Equitable Treatment

Majority of investment treaties provide for fair and equitable treatment (FET) of foreign investments. This standard protects the investors as it prevents the host state from acting in an arbitrary, discriminatory or abusive manner. The FET standard is frequently invoked and a majority of successful claims pertain to the violation of this standard. FET is a rule of international law and is not decided by the laws of the host state.[82] An example of the FET clause can be found in the India- UAE BIT:

> Each Contracting Party shall, at all times, ensure Investments made in its territory by Investors of the o her Contracting Party, fair and equitable treatment. Such treatment shall not be less favourable than that which it accords to Investments of its own investors or investors of any third Party, whichever is the most favourable.[83]

Notably, the 2016 Model BIT does not include a FET clause, but includes a 'treatment of investment' clause which provides protection against denial of justice, a fundamental breach of due process, targeted discrimination on manifestly unjustified grounds, or manifestly abusive treatment.[84]

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[81] ADC v. Hungary, Award, 02 Oct. 2006.

[82] Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II, United Nations Conference on Trade and Development, *available at* <https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf> last accessed 20 June 2021.

[83] India - United Arab Emirates BIT, art. 5, 12 Dec. 2013.

[84] India's Model Bilateral Investment Treaty, art. 3.1, 28 Dec. 2015.

While deciding whether the host state has violated the FET standard, discrimination against foreign investor is considered as an important indicator and at times, tribunals have included other standards such as 'important and discreditable',[85] or 'unreasonable conduct'.[86] The FET standard may be violated even if the foreign investor receives the same treatment as accorded to the investor of the host state's nationality and it does not depend on whether the host state has acted in good faith or not.[87]

FET standard is broad and its meaning is determined on a case to case basis. In *Modev v. USA*, the tribunal observed that "judgement of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case".[88] Similarly, in *Waste Management v. Mexico*, the tribunal said that "the standard is to some extent a flexible one which must be adapted to the circumstances to the circumstances of each case".[89] In Genin v. Estonia, the tribunal pointed out that acts violating the FET standard "would include acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith."[90] An elaborative description of the FET standard was provided by the tribunal in *TECMED v. Mexico*:

> The Arbitral Tribunal considers that these provisions of the Agreement, in light of the good faith principle established by the international law, requires the Contracting Parties to provide to international investments treatments that does not affect the basic expectations that were taken into account by the foreign

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[85] Mondev v. USA, Award, ¶127, (11 Oct. 2002).

[86] Saluka investments BV v. The Czech Republic, Partial Award, (17 March 2006)

[87] Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN3467, Final Award ¶48, (01 July 2004).

[88] Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award ¶118 (11 Oct. 2002).

[89] Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award ¶99 (03 Sept. 2001).

[90] Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2, Award ¶367, (25 June 2001).

> investors to make the investment. The foreign investor expects the host State to act in consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations... The foreign investor also expects the host state to act consistently, i.e., without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The Investor also expects the State to use the legal instruments that govern the actions of the investor or investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.[91]

In *Saluka v. Czech Republic,* an ailing bank in which the claimants had invested, was taken over by a competitor, who had received financial aid from the Czech Republic for the purpose of the takeover. However, the bank had not received similar assistance when the claimants tried to negotiate the conditions to keep the bank viable. The tribunal held that the actions of the Czech Republic amount to a violation of FET standard as the FET standard requires that an investor whose interests are protected under a treaty is entitled to expect that the Host state will not act in a manner that is manifestly inconsistent, non-transparent, unreasonable, or discriminatory.[92]

In various cases, tribunals have held that the host state's failure to comply with the contractual obligations would amount to a violation of FET standard. In *Nobel Ventures v. Romania*, the tribunal stated that the FET standard imposes an obligation upon

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[91] Técnicas Medioambientales TECMED S.A. v. The United Mexican States, ICSID Case No. ARB(AF)00/2, award dated 29 May 2003, para 154.

[92] Saluka investments BV v. The Czech Republic, Partial Award, (17 Mar. 2006).

the host state to comply with the terms of the contract. In light of this, it held that:

> ...one can consider this to be a more general standard which finds its specific application in inter alia the duty to provide full protection and security, the prohibition of arbitrary and discriminatory measures and the obligation to observe contractual obligations towards the investor.[93]

However, it shall be noted that there are various cases wherein it has been held that a mere breach of a contract by the host state would not amount to a violation of the FET standard. In *Consortium RFCC v. Morocco*, the investor and the host state were involved in a dispute arising out of a contract pertaining to the construction of a motorway. The tribunal held a breach of the terms of a contract, that could have been committed by an ordinary contracting party, would not amount to result in a violation of the FET standard. The tribunal held that:

> a State may perform a contract badly, but this will not result in a breach of treaty provisions, unless it be proved that the state... has gone beyond its role as a mere party to the contract, and has exercised the specific functions of a sovereign.[94]

In *MTD v. Chile*, it was observed that the host state shall create favourable conditions for investments.[95] In *TECMED v. Mexico*, the tribunal stated that the contracting party shall act in good faith and ensure that that the actions of the host state do not affect the basic expectations that were taken into account by the investor to make the investment. Moreover, the tribunal held:

> The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its

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[93] Nobel Ventures v. Romania, Award ¶162, 12 Oct. 2005.

[94] Consortium RFCC v. Morocco, Award ¶391, 20 ICSID Review –FILJ (22 Dec. 2003).

[95] MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile (ICSID Case No. ARB/01/7), para 104.

> investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation. In fact, failure by the host State to comply with such pattern of conduct with respect to the foreign investor or its investments affects the investor's ability to measure the treatment and protection awarded by the host State and to determine whether the actions of the host State conform to the fair and equitable treatment principle.[96]

i. FET and Minimum Standard Requirement

A significant number of investment treaties link FET to the Minimum Standard of Treatment (MST), which shall be provided to investors under customary international law. MST refers to a bare minimum treatment to foreign investors by host states to ensure that a foreign investor is protected against unacceptable and excessive actions of the host state by established rules and standards of customary international law which are independent of the domestic law of the state. The scope of MST was laid down in the case of *Neer v. Mexico*. In the said case, a claim was brought before the Mexico-US General Claims Commission on behalf of a US national, who was killed in Mexico. It was alleged that the Mexican authorities had failed to exercise due diligence in

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[96] Técnicas Medioambientales TECMED S.A. v. The United Mexican States, ICSID Case No. ARB(AF)00/2, award dated 29 May 2003, para 154.

prosecuting the individual responsible for it resulting into a denial of justice. The Commission rejected this claim and stated:

> Without attempting to announce a precise formula, it is in the opinion of the Commission possible to [...] hold (first) that the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial.[97]

Even though *Neer v. Mexico* is a landmark case pertaining to the MST standard, it shall be noted that the said case dealt with the physical security of the alien and not the treatment of foreign investment. In *Mondev International v. United States*[98] and *ADF Group Inc v. United States*[99], it was held that the MST standard is not confined to the *Neer* case standard. However, it is pertinent to note that in neither of the two cases, the tribunals laid down a new test pertaining to MST.

In *Waste Management* II, the tribunal noted down the circumstances in which host State conduct can be said to be infringing investors MST-FET. It observed the State infringes MST-FET:

> ...if the conduct is arbitrary. grossly unfair. unjust or idiosyncratic. is discriminatory and exposes the claimant to sectional or racial prejudice. or involves a lack of due process leading to an outcome which offends judicial propriety - as might

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[97] LFH Neer and Pauline Neer v Mexico (US v Mexico) (1926) 4 RIAA 60, pp. 61-62.

[98] Mondev International Ltd v. United States, ICSID Case No. ARB (AF)/99/2, Award, 11 October 2002.

[99] ADF Group Inc v. United States, ICSID Case No ARB(AF)/00/1, Award, 9 January 2003.

> be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. [100]

Notably, treatment of the host State must be in breach of its representations and the investor must have ‘’reasonably relied upon such representations. However, the standard is flexible and can be adapted to the circumstances of the case.

3. National Treatment

National treatment standard seeks to ensure that the host state extends to the foreign investor's treatment that is as favourable as the treatment granted to its domestic investors. The purpose of including the national treatment clause in investment treaties is to ensure that the host state does not make negative differentiation between foreign and domestic investors.[101] National Treatment clause provides that the foreign investor and his investments are ‘accorded treatment no less favourable than that which the host state accords to its own investors’.[102] This obligation extends to both *de jure* and *de facto* discrimination and any differentiations made are justifiable if rational grounds are shown by the host state.[103]

Determining whether the host state has breached the national treatment clause requires the identification of the appropriate comparator, as the violation of this obligation usually depends on whether the foreign investor was accorded less favourable treatment than the alleged domestic investor, who is in like

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[100] Waste Management, Inc v United Mexican States (Number 2), ICSID Case No ARB(AF)/00/3, Award (30 April 2004), para 98.

[101] National Treatment, UNCTAD Series on Issues in International Investment Agreements, *available at* <https://unctad.org/system/files/official-document/psiteiitd11v4.en.pdf.> last accessed 20 June 2021.

[102] Rudolph Dolzer and Christoph Schreuer, Principles of International Investment Law (2nd ed., 2012) at pp. 198-206.

[103] *See,* United Parcel Service of America Inc. v. Government of Canada, ICSID Case No. UNCT/02/1.

circumstances or situations with the foreign investor. Thus, there is a three-part analysis that tribunals must undertake to determine whether there is a breach of this clause:

- Whether there existed 'like circumstances' within which the domestic and foreign investors were situated?
- Whether the treatment accorded to foreign investors is at least as favourable as that accorded to domestic investors?
- if there is a differential treatment, whether it is justified?[104]

i. Like circumstances

Tribunals have often faced difficulties in determining what would constitute 'like circumstance.'[105] Tribunals have frequently grappled with the question of whether the 'likeness' is to be broad and include the entire economic sector or be restricted to companies performing the same type of business only. Thus, while the tribunal in *Occidental v Ecuador* suggested an extremely broad interpretation of the term 'circumstances', an alternative approach is being followed by tribunals like those in *SD Myers v Canada.*

In *Occidental v Ecuador,* a US-owned company had entered into a contract with Petroecuador (a state-owned entity of Ecuador) for oil exploration in Ecuador. Ecuador had a VAT refund programme that allowed exporters dealing in certain products, like flowers and seafood, to claim a refund of the VAT on all products exported from the country. The foreign investor was not allowed to claim a refund for the exports of oil and in light of this, it claimed that Ecuador violated the national treatment obligation under the Ecuador- US BIT. Ecuador contended that there was no discrimination against foreign investors as the VAT refund was not available to any exporters of oil, including the state-owned oil company. The tribunal rejected his contention and held that 'like situations' cannot be interpreted in a narrow sense because the

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[104] Gami Investments Inc. v. Mexico, UNCITRAL, Award, Nov. 15, 2004.

[105] *See* Marvin Feldman v. Mexico, Award of 16 December 2002 (Kerameus, Covarrubias Bravo, Gantz), 18 ICSID-Rev.- FILJ 488 (2003).

purpose of national treatment is to protect foreign investors and therefore, it would be inappropriate to address 'exclusively the sector in which that particular activity is undertaken'. Moreover, it was held that the exporters should not be placed at a disadvantage in foreign markets because they had to pay more taxes in the country of origin.[106]

On the other hand, *SD Myers v Canada* was based on a breach of the North American Free Trade Agreement (NAFTA). This case concerned the imposition of an export ban on a particular type of hazardous waste. The claimant contended that the Canadian export ban constituted a form of discrimination under the national treatment standard. In order to determine breach of this standard, the Tribunal held that the term 'like circumstances' must take into account principles emerging from the NAFTA, WTO jurisprudence and the OECD Declaration on International and Multinational Enterprises. Thus, it held that the key test was whether the domestic investors are in the same 'business sector' or 'economic sector' as the claimant.[107] In the ICSID context, a similar verdict was rendered by the Tribunal in *Feldman v Mexico,* where 'like circumstances' was interpreted to refer to the same business, i.e., the exporting of cigarettes.[108]

The India Model BIT 2016 provides that a Party shall not apply measures that accord less favourable treatment than it accords, in like circumstances, to its own investors with respect to the management, conduct, operation, sale or other disposition of investments in its territory. Moreover, it lays down the criteria for which 'like circumstance' is to be determined:

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[106] Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11.

[107] S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award dated 13 Nov. 2000, para 250.

[108] Marvin Feldman v. Mexico, Award of 16 December 2002 (Kerameus, Covarrubias Bravo, Gantz), 18 ICSID-Rev.- FILJ 488 (2003), para. 171

> like circumstances depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate regulatory objectives. These circumstances include, but are not limited to, (a) the goods or services consumed or produced by the investment; (b) the actual and potential impact of the investment on third persons, the local community, or the environment, (c) whether the investment is public, private, or state-owned or controlled, and (d) the practical challenges of regulating the investment.[109]

It is pertinent to note that article 4.2 states that treatment accorded by a party in 'like circumstances' means the treatment accorded by a sub-national government to the investors and investments within its area. Therefore, an investor cannot allege a breach of the national treatment standard in respect of a measure imposed by a state in India on the basis that another state accords domestic investors better treatment within its jurisdiction. Therefore, the national treatment standard would be breached only if the same state accords favourable treatment to domestic investors in like circumstances.[110]

ii. Differentiation between investors

In terms of a definition, the tribunal in *Lauder v Czech Republic* held that a discriminatory measure is one that fails to provide national treatment.[111] This definition requires evidence only demonstrating less favourable treatment to the foreign investor, regardless of whether the same is motivated by its nationality.[112]

It is common for host States to cite justifications for such differentiation during their arguments, based on their national

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[109] India's Model Bilateral Investment Treaty, art. 4, 02 Dec. 2015.

[110] Lucia Raimanova, *Indian Model Bilateral Investment Treaty*, Allen & Overy, *available at* <https://www.allenovery.com/en-gb/global/news-and-insights/publications/indian-model-bilateral-investment-treaty> last accessed 20 June 2021.

[111] Ronald S. Lauder v. Czech Republic (UNCITRAL, Final Award).

[112] Thunderbird v. Mexico, UNCITRAL, Award (15 November 2004), para 114.

policies. The prevalent view seems to be that while national policies favouring domestic investors may constitute an objective justification for such conduct, tribunals are free to assess their legality under international law or determine the legality of their motive.

The landmark case in this regard remains *SD Myers v Canada,* which is discussed herein above. Here, the tribunal recognised that the policy of the host State was enacted with the intention to save an important local sugar industry, demonstrating an absence of intent to discriminate against the foreign investor. [113]

iii. Discriminatory intent of host state

To prevail on a national treatment claim, the foreign investor is not required to prove the discriminatory intent of the host state as it is the impact of the host state's action that is taken into consideration by the tribunal. Although most BITs do not have an express requirement to show intent, the same needs to be shown in practice to demonstrate that the differentiations are unjustifiable.[114] With respect to this part of the analysis, Tribunals have mixed views as to whether 'intent to discriminate' or 'impact of discriminatory measure' is the correct standard of assessment. In the latter, the intent becomes irrelevant as mere practical discrimination suffices to show a breach of the national treatment clause.

In *S.D. Myers v. Canada*, the tribunal concluded that when a measure of the host state accords favourable treatment to a domestic investor the practical impact of the measure rather than the intent of the host state assumes priority in determining whether

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[113] S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award dated 13 Nov. 2000.

[114] Rudolph Dolzer and Christoph Schreuer, Principles of International Investment Law (2nd ed., 2012) at pp. 183, 202.

the host state has breached the national treatment standard.[115] Currently, this seems to be the prevalent view amongst tribunals.

This was also agreed upon by the Tribunal in *Siemens v. Argentina*:

> The Tribunal concurs that intent is not decisive or essential for a finding of discrimination, and that the impact of the measure on the investment would be the determining factor to ascertain whether it had resulted in non-discriminatory treatment.[116]

4. Most Favoured Nation

Most Favoured Nation (MFN) clauses are included in investment treaties to ensure that the relevant parties treat each other in a manner at least as favourable as they treat third parties. MFN clause may not have any significance if the host state fails to confer any relevant benefit to a third party. However, once the concerned state grants a relevant benefit, it is automatically extended to the state that benefits from the MFN clause.An example of the MFN clause can be found in the China–Benin BIT:

> Neither Contracting Party shall subject investments and activities associated with such investments by the investors of the other Contracting Party to treatment less favorable than that accorded to the investments and associated activities by the investors of any third State.[117]

It shall be noted that the 2016 India Model BIT does not include a MFN clause. It is believed that not including the MFN clause in an investment treaty can be detrimental to the foreign investors and their investments in the host state as the host may accord different treatment by discriminating among foreign investors pertaining to the application of domestic measures or regulations.

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[115] S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award dated 13 Nov. 2000, para 254.

[116] Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, (06 Feb. 2007).

[117] China - Benin BIT, art. 3.2, 18 Feb. 2004.

Many BITs link MFN with national treatment to ensure that the host state treats foreign investor no less favourably than they treat domestic investors or investors of other states. For instance, article 3 of the United Kingdom- Turkey BIT stipulates:

> 1. Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.
>
> 2. Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards the management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.[118]

In *Parkerings v. Lithuania*, the claimant contended that Lithuania had violated the FET standard as Lithuania refused to sign a contract with the claimant but later entered into a similar contract with other companies, which were facing similar circumstances. The tribunal pointed out that:

> Most-favoured-nation (MFN) clauses are by essence very similar to "National Treatment" clauses. They have similar conditions of application and basically afford indirect advantages to their beneficiaries, namely a treatment no less favourable than the one granted to third parties. Tribunals' analyses of the National Treatment standard will therefore also be useful to discuss the alleged violation of the MFN standard (....) The essential condition of the violation of a MFN clause is the existence of a different treatment accorded to another foreign investor in a similar situation. Therefore, a comparison is necessary with an investor in like circumstances. The notion of like circumstances has been broadly analysed by Tribunals". Therefore, the tribunals that link the MFN standard with national

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[118] United Kingdom - Turkey BIT, art. 3, 15 March 1991.

> treatment, analysed the notion of 'like circumstances' to determine breach of the MFN standard.[119]

Majority cases before tribunals involving the MFN clause pertain to circumstances in which benefits accorded in investment treaties with third states are invoked.[120] MFN clause has been invoked by foreign investors to seek both procedural and substantive benefits. However, in most disputes, investors have sought procedural rights, contending that the MFN clause in the treaty allows them to secure a more favourable dispute settlement mechanism by invoking investment treaties with third states. The first BIT dispute to address such an issue was *Maffezini v. Spain,* in which the tribunal pointed out that MFN treatment extends to procedural provisions pertaining to more favourable dispute resolution clauses.[121] The same approach has been adopted by the tribunals in several other cases. For instance, in *Siemens v. Argentina,* Argentina argued that the tribunal lacked jurisdiction as the claimant failed to comply with the Germany-Argentina BIT, which requires the claimant to pursue the matter in the local courts before initiating international investment proceedings. The tribunal rejected Argentina's contention by interpreting the MFN clause of the applicable BIT and allowed the claimant to invoke third party investment treaties.[122] The MFN clause of Germany- Argentina BIT reads as follows:

> Article 3(1): None of the Contracting Parties shall accord in its territory to the investments of nationals or companies of the other Contracting Party or to investments in which they hold shares, a less favorable treatment than the treatment granted to the

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[119] Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award ¶366, (Sep. 11, 2007).

[120] Rudolph Dolzer and Christoph Schreuer, Principles of International Investment Law (2nd ed., 2012) at p. 187.

[121] Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7 (09 Nov. 2000).

[122] Siemens A.G. v. Argentina, ICSID Case No. ARB/02/8, Decision on Jurisdiction ¶103, (03 Aug. 2004).

> investments of its own nationals or companies or to the investments of nationals or companies of third States.
>
> Article 3(2): None of the Contracting Parties shall accord in its territory to nationals or companies of the other Contracting Party a less favourable treatment of activities related to investments than granted to its own nationals and companies or to the nationals and companies of third States.[123]

The tribunal held that "the term 'treatment' and the phrase 'activities related to the investments' in the MFN clause are sufficiently wide to include settlement of disputes."[124]

However, it shall be noted that the tribunals in many cases such as *Salini v. Jordan*[125], *Telenor Mobile v. Hungary*[126], *RosInvest Co v. Russia*[127], B*erschader v. Russia*[128], have rejected the *Maffezini v. Spain* approach, thereby restricting the scope of MFN to limited rights.

In *Salini v. Jordan,* the foreign investor initiated a proceeding before the ICSID tribunal alleging violation of construction agreement by the host state. The host state objected to the tribunal's jurisdiction by placing reliance on the Italy-Jordan BIT, which stipulates that "*in case the investor and an entity of the Contracting Parties have stipulated an investment Agreement, the procedure foreseen in such investment agreement shall apply".*[129] In light of this, the host state contended that the tribunal lacks jurisdiction as the agreement requires the host state to resolve the dispute before domestic courts. However, the claimant invoked the

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123 Germany - Argentina BIT, art. 3, 09 April 1991.

124 Siemens A.G. v. Argentina, ICSID Case No. ARB/02/8, Decision on Jurisdiction ¶103, (03 Aug. 2004).

125 Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13.

126 Telenor Mobile Communications A.S. v. The Republic of Hungary, ICSID Case No. ARB/04/15, (13 Sep. 2006).

127 RosInvest Co UK Ltd. v. The Russian Federation, SCC Case No. V079/2005.

128 Vladimir Berschader and Moïse Berschader v. The Russian Federation, SCC Case No. 080/2004.

129 Italy - Jordan BIT, art. 9(2), 21 July 1997.

MFN clause and argued that they shall be allowed to initiate a proceeding before the ICSID tribunal. The MFN clause of Italy-Jordan BIT reads as follows:

> Both Contracting Parties, within the bounds of their own territory, shall grant investments effected by, and the income accruing to, investors of the Contracting Party no less favourable treatment than that accorded to investments effected by, and income accruing to, its own nationals or investors of Third States.[130]

The claimant argued that the MFN clause allows them to invoke third party investment treaties, which allows the foreign investor to bring claims before the ICSID tribunal. The tribunal while holding that Article 3 of BIT doesn't apply to dispute settlement clauses observed:

> Article 3 of the BIT between Italy and Jordan does not include any provision extending its scope of application to dispute settlement. It does not envisage "all rights or all matters covered by the agreement." Furthermore, the Claimants have submitted nothing from which it might be established that the common intention of the Parties was to have the most-favored-nation clause apply to dispute settlement. Quite on the contrary, the intention as expressed in Article 9(2) of the BIT was to exclude from ICSID jurisdiction contractual disputes between an investor and an entity of a State Party in order that such disputes might be settled in accordance with the procedures set forth in the investment agreements. Lastly, the Claimants have not cited any practice in Jordan or Italy in support of their claim.[131]

Therefore, the tribunal rejected the claimant's contentions and held that the tribunal did not have jurisdiction over the dispute.

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[130] Italy - Jordan BIT, art. 3, 21 July 1997.

[131] Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13, Award dated 31 Jan. 2006, para 118.

With respect to substantive rights, the MFN clause has been invoked by foreign investors to request the tribunal to incorporate a provision to their treaty that they can invoke as having been violated by the Host state. For instance, in *Bayinir v. Pakistan,* the ICISID tribunal permitted the invocation of the MFN clause to incorporate the FET clause from the Pakistan–Switzerland BIT into the Pakistan–Turkey BIT. The tribunal held that the MFN clause was drafted vaguely which allowed such interpretation.[132] Similarly, in *White Industries v. India*, the tribunal allowed the insertion of an obligation 'to provide means of asserting claims and enforcing rights' from the India- Kuwait BIT into the India-Australia BIT.[133] Moreover, in *CME v. Czech Republic*[134], the claimant was allowed to use the MFN clause in the Netherlands-Czech Republic BIT to rely on a more favourable definition of 'just compensation' from another BIT of the Czech Republic.

Investment treaties usually provide exceptions to the application of the MFN clause. One of the common exceptions is that a foreign investor cannot invoke the MFN clause to claim treatment that is accorded to investors of other states as a part of an economic integration area or double taxation policy. Few BITs exempt certain sectors from the application of the MFN clause. For instance, the Canada–Peru BIT (2008) excludes "*aviation, fisheries, maritime matters, including salvage*" from the scope of the MFN clause.[135] Moreover, article 3 of China-Germany BIT, which deals with the treatment of investment stipulates that:

> This Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege by virtue of

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[132] Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29 (14 Nov. 2005).

[133] White Industries Australia Limited v. Republic of India, (UNCITRAL, Award, 30 Nov. 2011).

[134] CME Czech Republic BV v Czech Republic (UNCITRAL, Award, 14 March 2003).

[135] Canada - Peru FTA, Annex II of the Canada list, 01 Aug. 2008.

(a) any membership or association with any existing or future customs union, free trade zone, economic union, common market;

(b) any double taxation agreement or other agreement regarding matters of taxation[136]

4. Full Protection and Security

Majority of investment treaties include clauses guaranteeing 'full protection and security' to foreign investments. This standard imposes a duty on the host state to take steps to protect the foreign investments from adverse effects such as invasion, encroachment, etc.[137] The purpose of this clause is to ensure that the host states are duly diligent and take reasonable efforts to protect foreign investments.[138] However, it shall be noted that the host state is under no obligation to provide absolute protection to investments.[139]

As highlighted above, host States have a duty to provide protection against physical violence such as invasion or encroachment. In *Wena Hotels v. Egypt*, the employees of the host state entity had seized the hotel. The police officers, despite being aware of the seizure, did not provide protection to the investment against such physical violence and therefore, the tribunal held Egypt liable for not providing full protection and security to the claimant's investment. This approach was subsequently relied on by numerous other tribunals as well. [140]

In *AMT v. Zaire*, the tribunal observed that the host state had taken no action to protect the investor's property's during riots in

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[136] China - Germany BIT, art. 3.4 (01 Dec. 2003).

[137] *See,* Sesbastian Blanco, Full Protection and Security in International Investment Law (Springer International Publishing 2019).

[138] Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3.

[139] Rudolf Dolzer & Margrete Stevens, Bilateral Investment Treaties (Martinus Nijhoff Publishers 1995) at p. 61.

[140] Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award ¶84 (08 Dec. 2000).

Zaire. The tribunal held that it was immaterial whether the acts on the basis of which the claim was based was committed by the host state or a common burglar because the host state had an obligation to protect the investment and therefore, its liability was invoked for failure to provide full protection and security and for losses owing to riots or acts of violence.[141]

Physical damage to investments is not the only factor that shows a violation of this clause. Many tribunals have found that this standard covers all types of protection from physical to legal and commercial.[142] In *Saluka investments BV v. The Czech Republic*, it was held that under the full protection and security standard, the host state's obligation to provide full protection and security also extends to providing legal protection to investments.[143] In *Azurix v. Argentina,* the tribunal pointed out that "full protection and security may be breached even if no physical violence or damage occurs".[144] Few BITs such as the Germany - Argentina BIT, specifically provide for 'full protection and legal security' to foreign investments.[145] In *CME v. Czech Republic*, an ICSID tribunal found the host state liable under the standard for not providing legal protection to the investment. In the said case, regulatory authority of the host state had created a legal situation that enabled the claimant's local partner to terminate the contract on which the investment was dependent. The tribunal held:

> The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies

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[141] AMT v. Zaire, 5 ICSID Rep. 11 (21 February 1997).

[142] Omar Moussly, *Same Concept, Different Interpretation: The Full Protection and Security Standard in Practice*, Kluwer Arbitration Blog, *available at* <http://arbitrationblog.kluwerarbitration.com/2019/10/27/same-concept-different-interpretation-the-full-protection-and-security-standard-in-practice/> last accessed 20 June 2021.

[143] Saluka investments BV v. The Czech Republic, Partial Award ¶483 (17 Mar. 2006).

[144] Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, (14 Jul. 2006).

[145] Germany - Argentina BIT, art. 4, 09 April 1991.

> is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued.[146]

The India Model BIT 2016 includes a full security clause. However, it expressly states that this obligation is limited to providing only physical protection to investments. Article 3.2 provides that "full protection and security only refers to a Party's obligations relating to the physical security of investors and investments made by the investors of the other Party and not to any other obligation whatsoever."[147] Therefore, under the India Model BIT 2016, a host state is under no obligation to protect foreign investments against legal infringement.

5. Denial of Benefits

A denial of benefits clause, which is included in most bilateral and multilateral treaties, restricts foreign investor's access to investment arbitration that lack any substantial business activity in the state of their incorporation.[148] It aims to deny protection of the relevant treaty to certain investors that the treaty did not intend to protect.[149] The idea is to avoid granting substantive protection to companies that seek to benefit from provisions by establishing 'mailbox or shell companies.'[150] This phenomenon is commonly referred to as 'treaty shopping', as it involves an attempt by a foreign investor to avail benefits that they are not entitled to under a particular treaty.[151] There are also specific clauses that require

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[146] CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Partial award ¶613 (13 Sep. 2001).

[147] India's Model Bilateral Investment Treaty, art. 3.2, 28 Dec. 2015.

[148] Yas Banifatemi, *Taking into account control under DOB clause, Jurisdiction in Investment Treaty Arbitration* (Jan., 2018).

[149] Mr. Mohammed Bashir, *Denial of Benefits*, JusMundi, *available at* <https://jusmundi.com/en/document/wiki/en-denial-of-benefits> last accessed 20 June 2021.

[150] Lindsay Gastrell and Paul-Jean Le Cannu, *Procedural Requirements of 'Denial-of-Benefits' Clauses in Investment Treaties: A Review of Arbitral Decisions,* 30(1) ICSID Review (2015).

[151] Waste Management, Inc v United Mexican States (Number 2), ICSID Case No ARB(AF)/00/3, Award (30 April 2004) para 80.

investors to have 'real entrepreneurial activities in order to avail of the protection of the treaty.[152] However, such clauses are different from denial of benefits clauses as they specify the scope *ratione materiae*. The denial of benefits clause under the India Model BIT 2016 provides that:

> A Party may at any time, including after the institution of arbitration proceedings in accordance with Chapter IV of this Treaty, deny the benefits of this Treaty to:
>
> i. an investment or investor owned or controlled, directly or indirectly, by persons of a non-Party or of the denying Party; or
>
> ii. an investment or investor that has been established or restructured with the primary purpose of gaining access to the dispute resolution mechanisms provided in this Treaty.[153]

In *AMTO v. Ukraine*, proceedings were initiated by *AMTO* under the Energy Charter Treaty following an inability of the Ukrainian government to pay outstanding dues to it. However, the State pleaded that since *AMTO* did not have a substantial business activity in the country, it could not avail the benefits of this clause. The tribunal defined 'substantial' as "of substance and not merely of form. It does not mean 'large', and the materiality not the magnitude of the business activity is the decisive question."[154] Few investment treaties contain 'ownership' and 'control' as conditions for denying benefits of the applicable treaty. In *Plama Consortium Limited v. Republic of Bulgaria,* the tribunal described the terms 'own or control' mentioned under the Energy Charter Treaty as:

> Ownership includes indirect and beneficial ownership; and control includes control in fact, including an ability to exercise substantial influence over the legal entity's management, operation and the selection of members of its board of directors or any other managing body.[155]

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[152] *See,* Chile - Finland BIT, art. 1.3(b), 27 May 1993.

[153] India's Model Bilateral Investment Treaty, art. 35, 28 Dec. 2015.

[154] Limited Liability Company Amto v. Ukraine, SCC Case No. 080/2005 (26 Mar. 2008)

[155] Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24 (27 Aug. 2008).

The *AMTO* approach generally remains prominent across jurisprudence of this clause. In *Pac Rim v El Salvador*, a similar claim was made by the Respondent State. While the tribunal acknowledged that the group of companies of which the putative investor formed a part had 'substantial business activities' in the territory of the US, it held that for the purpose of the 'denial of benefits' clause, it was the claimant's individual activities which must have a substantial business activity in the state.[156]

[156] Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on Jurisdiction dated. 01 June 2012, para 4.18.

CHAPTER 4
INDIA'S TRYST WITH INVESTMENT ARBITRATION

India can best be described as a 'new entrant' to the field of international investment arbitration, signing its first BIT only after its elaborate efforts towards globalisation and economic liberalisation in 1991.[1]

The post-independence period in India was arguably one of 'economic nationalism', wherein the focus was more on acknowledging India's (then) new-found self-reliance and sovereignty.[2] This involved improving and giving primacy to domestic production and vital industries, whilst permitting limited foreign capital entry in selected industries, thus perpetuating the idea that while India was open to embracing foreign investment, the same would be permissible only if it specifically contributed to the country's economic development. Thus, India was still averse to the idea of foreign investment. This idea also permeated into the late 1980s, with controls on foreign investment becoming stricter.[3]

However, things changed with the economic reforms initiated in 1991, which significantly opened up avenues for foreign investment and eased norms from the erstwhile *'License Raj.'* India signed its

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[1] Prabhash Ranjan, India and Bilateral Investment Treaties: Refusal, Acceptance and Backlash 64-76 (2019).

[2] *Id* at 71.

[3] *Id* at 92.

first BIT with the United Kingdom in 1994.[4] From 1994 to 2000, India entered into BITs with major European 'capital-exporting' countries like Germany, Italy, France, Netherlands, Denmark, Sweden, Poland, etc.[5] In addition to this, India also signed BITs with developing 'capital-importing' countries like Argentina, Mexico, China, Thailand and least developed countries (LDCs) such as Bangladesh, Sudan and Mozambique.[6] With India signing close to 40 BITs until 2000, it was only a matter of time before investment arbitration cases were filed against her.[7] By 2010, another 39 BITs were signed, showing India's new-found embrace of the neoliberal order.

This section briefly highlights some of the investment arbitration cases involving BITs entered into by India.

A. Arbitration Cases Involving India

1. The Dabhol Power Project case

The dispute in the Dabhol Power Project case arose, *inter alia,* over a contract entered into between the State of Maharashtra and the Dabhol Power Corporation, a joint venture between Enron Corporation, General Electric Corporation and Bechtel Enterprises entered into in 1992.[8] The purpose of the contract was to initiate a

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[4] Nishith Desai Associates, *Bilateral Investment Treaty Arbitration and India: With a special focus on Indian Model BIT, 2016*, *available at* <http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Bilateral_Investment_Treaty_Arbitration_and_India-PRINT-2.pdf > last accessed 25 June 25 2020.

[5] *Id.*

[6] Prabhash Ranjan, *India and Bilateral Investment Treaties—A Changing Landscape*, 29(2) ICSID Review - Foreign Investment Law Journal 420 (2014).

[7] Prabhash Ranjan, *How Manmohan Singh played a key role in India signing its first bilateral investment treaty*, The Print, *available at* <https://theprint.in/pageturner/excerpt/how-manmohan-singh-played-a-key-role-in-india-signing-its-first-bilateral-investmenttreaty/279710/#:~:text=India%20signed%20as%20many%20as,6%2D7%20BITs%20each%20year.> last accessed 25 June 2020.

[8] Capital India Power Mauritius I and Energy Enterprises (Mauritius) Company v. India ICC Case No 12913/MS, IIC 43 (2005).

two-phase electricity generation project in Maharashtra, with the first phase mandating the construction of a fuel power plant and the second phase of a gas-fired power plant.[9] Phase-I involved the production of 695 megawatts and would use locally produced natural gas, while Phase-II would produce 1,320 megawatts by making use of natural gas imported from Qatar.[10] This was subsequently followed by an agreement wherein the Maharashtra State Electricity Board agreed to purchase electricity from the Dabhol Power Plant that would be operated by Enron. Multifarious investors, bank guarantees, and insurances from foreign companies were also obtained, for it was India's largest investment project in those days.

This case proves to be a complicated study, for it involves recourse to domestic remedies, commercial arbitration, investor-state arbitration and state-state arbitration within the same set of facts. The initial set of disputes occurred when a new state government assumed power in Maharashtra, ordering for termination of the power plant's construction after having publicised doing so in their election manifesto to win state elections.[11] This is largely seen as a political move because there was public opposition to the manner in which the erstwhile government had agreed to the terms of the deal and other aspects such as charging of electricity tariff. Thus, the government ordered the termination of the project on nationalistic grounds that the project was aimed at 'hurting the poor' Indian citizens. The Enron Corporation invoked the commercial arbitration clause within the original agreement citing breach of contract. This was subsequently challenged in domestic courts by the state. The State sought to invalidate the arbitration by alleging that the contract was

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[9] Preeti Kundra, *Note: Looking Beyond the Dabhol Debacle: Examining its Causes and Understanding its Lessons,* 41 Vand. J. Transn'tl. L. 907 (2008).

[10] *See, Enron's Indian Negotiation Debacle*, *available at* <https://www.negotiations.com/case/negotiation-project-india/> last accessed 13 June 2021.

[11] Amulya Reddy, *Lessons from Enron, available at* <http://www.amulya-reddy.org.in/Publication/Lessons%20from%20Enron.pdf> last accessed 13 June 2021.

a product of illegal negotiations and that there was no further political will to renegotiate the same.

However, Enron approached the government of Maharashtra to consider renegotiation of various aspects such as the electricity tariff, the capital costs of the project, the payment plan and allied environmental concerns. The negotiations were successful and a new plan was approved by the Indian government in 1996. Nevertheless, the project was unable to continue because unions, activists and other public interest groups challenged these measures. Courts put a stay on the project till it completed hearing these objections, but eventually dismissed the suits by the end of the year.[12] Thus, Phase-I commenced in early 1997 with some external financing through development finance agreements.

Within nearly five years of the beginning of the project in India (May 1999), the next set of disputes arose when Enron again invoked arbitration on grounds that the State's Electricity Board defaulted on making payments. A case was filed in the Bombay High Court stating that such a dispute can only be resolved by the Maharashtra Electricity Commission and not an arbitral tribunal, and the order was appealed to the Supreme Court. While the matter was remanded back to the Bombay High Court and then again appealed, it continued to remain pending when investment arbitration proceedings commenced.

Simultaneously, the government of Maharashtra obtained an anti-arbitration injunction against the Corporation, preventing access to any remedy in India. Thus, the American insurance companies that had backed the Corporation instituted arbitration proceedings in America. The American arbitral authority ruled that the Maharashtra State Electricity Board was liable for paying damages for breach of contract and preventing access to arbitration, leading the US government to initiate arbitration against

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[12] Preeti Kundra, *Note: Looking Beyond the Dabhol Debacle: Examining its Causes and Understanding its Lessons,* 41 Vand. J. Transn'tl. L. 907 (2008).

India under their investment protection agreement.[13] Investors in the Dabhol joint venture initiated investor-state arbitration based on the India-Mauritius BIT and India - Netherlands BIT under the International Chamber of Commerce (ICC) Rules. They did so through their subsidiaries companies, to prevent acting against the anti-arbitration injunctions that the State of Maharashtra possessed against the parent companies.

The investors alleged unjust expropriation of their investment by the government. However, the dispute was subsequently settled between the parties and hence the international investment award was not delivered. Amidst various political and legal problems, the Dabhol Power Plant case also served as a major turning point in Indian electricity law. The importance of the Dabhol power plant case as being India's first tryst with investment arbitration cannot be understated. However, it did not result in any policy shift in India's stance towards ISDS and India continued to enter into BITs with numerous countries. It only served as a fitting reminder of the impact of political interference on foreign investments.[14]

2. White Industries v. India

The White Industries case is a landmark investment arbitration proceeding against India alleging violation of substantive investor protection clauses due to the inefficiency of the Indian judicial system.

The basis of the dispute was a 1989 contract between White Industries and Coal India (a government entity) for the supply of equipment and development of a coal mine in India. White entered into a contract with Coal India for the supply of equipment to and development of a coal mine at Piparwar. In return, White was to be paid approximately A$206.6 million. India entered into this contract

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[13] United States v. India, Request for Arbitration, 04 Nov. 2004, available at <http://www.opic.gov/sites/default/files/docs/GOI1 10804.pdf> last accessed 25 June2020.

[14] *See*, Prabhash Ranjan & Pushkar Anand, *The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction* 38 NW. J. INT'L L. & BUS. 1 (2017).

during the 1980s and 1990s, which was a time when the country wished to develop its coal resources.

Disputes arose between Coal India and White Industries as to whether White was entitled to the bonuses or Coal India was entitled to penalty payments. A number of other related technical disputes also arose, primarily concerning the quality of the washed and processed coal and the sampling process by which quality would be measured. White Industries subsequently filed a request for commercial arbitration with the ICC under the ICC Rules, and a majority of the tribunal decided in its favour.

On 11th September 2002, White Industries applied to Delhi High Court for enforcement of the Award. However, Coal India had already filed an application for setting aside the arbitral award before the Calcutta High Court on 6th September 2002. White Industries initially applied to the Supreme Court of India to transfer the proceedings to the Delhi High Court. The High Court granted an *ex parte* stay on proceedings before the Calcutta High Court. When the matter was finally heard by the Supreme Court, the Court advised White Industries to withdraw its transfer petition lieu of *res judicata*.[15]

Thus, White Industries filed an appeal in the Calcutta High Court challenging the jurisdiction of the Court to 'set aside' a foreign award, which was rejected. When the matter reached the Supreme Court subsequently through appeal, it similarly refused to grant a stay on the set aside proceedings before the Calcutta High Court. but granted White Industries the leave to appeal. Parallelly, the enforcement proceedings that commenced at the Delhi High Court were stayed by the Court, granting White Industries leave to revive the proceeding on receipt of appropriate orders of either the Supreme Court of India or the Calcutta High Court.

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[15] Sumeet Kachwaha, *The White Industries Australia Limited – India Bit Award: A Critical Assessment*, 29(2) Arbitration International 912, 913 (2013).

By 2008, the Special Leave Petition (SLP) reached the Supreme Court of India, which was referred to a special bench constituted by the Chief Justice of India. Constituting this bench took close to 3 years, as the Chief Justice of India believed that a Constitution Bench would be better equipped to address the question of law arising out of the dispute. It was at this time, in 2011, that White Industries initiated arbitration proceedings against the Government of India pursuant to the India-Australia BIT *inter alia* alleging denial of justice and fair and equitable treatment. Denial of justice was alleged owing to inordinate judicial delays in enforcing the award against Coal India Limited within India. White Industries argued that because of the judicial delays, India had failed to provide an "effective means of asserting claims and enforcing rights" to White Industries and had thus "denied justice".[16] The tribunal found in favour of White Industries, awarding them with compensation worth USD 4.08 million as compensation on grounds that the Indian government, through delays in its judicial system, had failed to provide White with the 'most effective means' to enforce its rights (i.e. enforcement of the ICC arbitral award). This was done by borrowing the protection standard from the India - Kuwait BIT, by means of an MFN clause in the India - Australia BIT.

After this award, a plethora of foreign corporations initiated ISDS against India, challenging various regulatory measures such as the imposition of retrospective taxes[17], cancellation of spectrum licences[18], and revocation of telecom licenses[19]. Thus, this case served as a major turning point for India's approach towards investment arbitration from a policy standpoint. In light of the adverse award in *White Industries* and the surge in investment treaty claims, in 2015, India decided to revisit its BIT program. It renegotiated its existing obligations with most countries by

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[16] 4.3: Breach of Article 3(2) of the BIT, Award.

[17] *See*, Vodafone v. India, UNCITRAL, Notice of Arbitration (not public) (17 Apr. 2014).

[18] *See*, Deutsche Telekom v. India, ICSID Additional Facility, Notice of Arbitration (not public) (02 Sept. 2013).

[19] Tenoch Holdings Limited, Mr Maxim Naumchenko & Mr. Andre Poluektov v. The Republic of India, PCA Case No. 2013-23.

terminating existing BITs, and also released a new Model BIT (in 2016) which notably diluted substantive investment protection available to foreign investors, such as the removal of the MFN clause.[20]

3. Deutsche Telekom v. India

In 2007, Deutsche Telekom (a German foreign investor) purchased 19.62% share in Devas Multimedia through a Singaporean subsidiary. The dispute arose based on a 2008 contract entered into between Devas Multimedia and Antrix. The latter is the commercial arm of the Indian Space Research Organisation (ISRO), which contracted with Devas for leasing transponders to provide broadband services to rural areas in India through Indian satellites.

According to the agreed terms of the aforementioned contract, Antrix's responsibility was to lease 90% transponders to ISRO's satellites GSAT-6 and GSAT-6A. Back when the contract was entered into, these satellites were only proposed satellites. No work had taken place with respect to their construction. Devas, in turn, was to pay Antrix a total of 300 million US dollars over the next 12 years.[21]

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[20] Nicholas Peacock and Nihal Joseph, *Mixed messages to investors as India quietly terminates bilateral investment treaties with 58 countries*, HSF Arbitration Notes, *available at* <http://hsfnotes.com/arbitration/2017/03/16/mixed-messages-to-investors-as-india-quietly-terminates-bilateral-investment-treaties-with-58-countries/> last accessed 25 June 25 2020. *For other impacts, see also* Prabhash Ranjan, T*he White Industries Arbitration: Implications for India's Investment Treaty Programme* 2(3) Investment Treaty News 13-14 (April 2012); Manu Sanan, *The White Industries Award: Shades of Grey* 13(4) J. World Investment and Trade 661 (2012); Patricia Nacimiento & Sven Lange, *White Industries Australia Limited v Republic of India*, 27(2) ICSID Review 274-280 (2012).

[21] CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited., and Telcom Devas Mauritius Limited v. The Republic of India, PCA Case No. 2013-09; *See generally,* Antrix-Devas case: Fifteen points to help you understand the deal, Firstpost, *available at* <https://www.firstpost.com/business/antrix-devas-case-fifteen-points-to-help-you-understand-the-deal-2918312.html> last accessed 25 June 2020.

By 2011, numerous news reports surfaced, alleging irregularities between the terms of the contract, indicating possible favouritism to Devas. Amidst such uncertainties, the Indian Cabinet Committee decided to cancel the deal due to security concerns by invoking the 'force majeure' clause in the contract.[22] This led Deutsche Telekom (through its subsidiary Devas) to file for an investment arbitration proceeding under the India-Germany BIT in 2013, claiming USD 1.6 billion in damages.

The tribunal found in favour of Deutsche Telekom, awarding them USD 672 million in damages for violation of the 'fair and equitable treatment' clause in the BIT. The jurisdictional objections raised by India were rejected by the Swiss Federal Supreme Court, which ruled in Deutsche Telekom's favour.[23] The tribunal, in May 2020, awarded $101 million plus interest in compensation to Deutsche Telekom, which held 19 % shareholding in Devas.[24]

On the other hand, an allied development is a similar investment arbitration proceeding initiated by Mauritian investors in Devas before the Permanent Court of Arbitration (PCA), administered by the UNCITRAL Arbitration Rules. The tribunal found India to be in breach of unlawful expropriation and for breach of the fair and equitable treatment clause under the India-Mauritius BIT. Notably, India's "essential security interests" defence was also rejected. The Tribunal further found that the termination of the contract amounted to an expropriation of the claimants' investments in India and constituted a denial of FET. Thus, it ruled

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22 Nishith Desai Associates, *Investment Arbitration & India*, available at <http://www.nishithdesai.com/information/news-storage/news-details/article/investment-arbitration-india-2019-year-in-review.html> last accessed 25 June 2020.

23 The judgment has been published in French. However, for an analysis of the same, please see: Nicholas Peacock, Kritika Venugopal and Karan Talwar, *Swiss Federal Tribunal refuses to set aside the Deutsche Telekom v India Award*, HSF Arbitration Notes, (*available at* <https://hsfnotes.com/arbitration/2019/01/24/swiss-federal-tribunal-refuses-to-set-aside-the-deutsche-telekom-v-india-award/> last accessed 25 July 2021.

24 Pushkar Anand, Antrix-Devas, BIT Arbitrations and India's quixotic approach, The Wire (31 May 2021), *available at* <https://thewire.in/business/antrix-devas-bit-arbitrations-isro-india-nclt> last accessed 12 June 2021.

that India must compensate the claimants for 40% of the investment that is not protected by India's essential security interests.[25] After this, India challenged the award before the Hague District Court, which upheld the award.[26] Finally, the award on quantum was rendered as recently as October 2020, which is currently not public.[27] It awarded $111.30 million plus interest in compensation to the investors. Devas has filed an enforcement petition before the District Court for the District of Columbia in January 2021, which is likely to be challenged by India.[28]

As of May 2021, Devas' winding up has been ordered by the National Company Law Tribunal (NCLT) citing 'corrupt functioning of the organisation', a move that may have possible consequences on the enforcement of the awards in both cases and is being viewed as an attempt to resist enforcement of the award. The NCLT is an Indian quasi-judicial body (tribunal) in India that has been constituted under the Indian Companies Act, 2013 to adjudicate issues relating to Indian companies.

Being one of the first cases against India in the aftermath of the *White Industries* dispute, the importance of this dispute lies in the fact that it was part of a series of repeated subsequent attempts by foreign investors to challenge unfair Indian regulatory measures. It serves as a case in point to reconsider the implications of policy

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[25] Gladwin Issac, *PCA tribunal holds India liable for unlawful expropriation and FET breach under India–Mauritius BIPA*, Investment Treaty News, *available at* <https://cf.iisd.net/itn/2018/10/17/pca-tribunal-holds-india-liable-for-unlawful-expropriation-and-fet-breach-under-india-mauritius-bipa-gladwin-issac/#:~:text=In%20a%20proceeding%20brought%20by,to%20a%20contract%20concluded%20between> last accessed June 25, 2020.

[26] Judgment of the Hague District Court, *available at* <https://www.italaw.com/sites/default/files/case-documents/italaw10801_1.pdf > last accessed 25 July 2021.

[27] *See*, Devas v. India, (PCA Case No. 2013-09), *available at* <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/484/devas-v-india> last accessed 25 July 2021.

[28] *Antrix-Devas case: India to question US court jurisdiction*, The Hindu Business Line (January 17, 2021) *available at* <https://www.thehindubusinessline.com/companies/antrix-devas-case-india-to-question-us-court-jurisdiction/article33594384.ece> last accessed 25 July 2021.

measures enacted (largely) for the benefit of locals. Additionally, a foreign investor might likely be dissuaded by the extent to which efforts at enforcement is being avoided by the government. In sum, the picture painted is not pro-investment.

4. Khaitan Holdings Mauritius Limited v. India

The subject matter of dispute, in this case, arises from the 2-G scam and the subsequent cancellation of licenses given to Loop Telecom, an Indian company having investments of Mauritian investor Khaitan Holdings. In 2008, Loop was awarded a 2G license by the Government of India, which was later cancelled by the Supreme Court in the renowned '2G Scam case'[29] for irregularities in the bidding process.[30] At the same time, Khaitan Holding acquired a roughly 27% stake in Loop. While Loop requested a refund of license fees, the same was denied, leading Khaitan Holdings to initiate investment arbitration proceedings against India pursuant to the India-Mauritius BIT.[31] This was administered under the UNCITRAL Arbitration Rules and filed in 2018, while the notice to arbitrate was served to India in early 2013.

However, India, in a move similar to that in the *Vodafone International Holdings BV v. Union of India*, applied for an anti-arbitration injunction before the Delhi High Court stating that since Indian investors were the true "beneficiary shareholders," and not Khaitan, such proceedings cannot be commenced and must be stopped. Denying such injunction, the Delhi High Court relied on the *Vodafone* case and reiterated its observations on the scope of the A&C Act, stating that while Indian Courts retained jurisdiction to intervene in investment arbitration proceedings under Sections 20 (b) and (c) of the Civil Procedure Code, in lieu of the judgment in

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[29] Centre for Public Interest Litigation v. Union of India, AIR 2003 SC 3277.

[30] Devidutta Tripathy, *India court orders licences cancelled in telecom scandal*, Reuters, *available at* <https://www.reuters.com/article/us-india-telecoms/india-court-orders-licenses-cancelled-in-telecom-scandal-idUSTRE8110NV20120202> last accessed 25 June 2020.

[31] Khaitan Holdings Mauritius Limited v. India, PCA Case No. 2018-50.

Vodafone, such intervention is restricted only to the extent of granting injunctions and not enforcing awards.[32] Subsequently, the tribunal was constituted in 2019 and the decision on merits is pending.[33]

This case is particularly important in the context of enforcement of investment arbitration awards in India.

5. Louis Dreyfus Armatures v. India

Louis Dreyfus Armatures, a French company, had invested in an Indian company Haldia Bulk Terminals Private Limited. Haldia Bulk Terminals was awarded a contract by the Calcutta Port Trust, containing an arbitration clause that was invoked when disputes arose between the parties.[34] These problems formalised in 2012, when Haldia Bulk Terminals terminated the contract citing mounting losses, non-allocation of cargo and other factors like declining law and order issues.

Simultaneously, Louis Dreyfus, being a foreign investor under the India-France BIT, initiated investor-state arbitration against the Union of India, State of West Bengal and the Port Trust. This was administered under the UNCITRAL Arbitration Rules. It claimed that India failed to protect its investment made in the project and filed for claims amounting to $36.15 million (₹260 crores). Specifically, it stated that treaty commitment to provide full protection and security was absent.

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[32] Union of India v. Khaitan Holdings (Mauritius) Ltd. & Ors., 2019 SCC OnLine Del 6755, at 35.

[33] See, Khaitan Holdings Mauritius Limited v. India, (PCA Case No. 2018-50), *available at* <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/553/khml-v-india> last accessed 25 June 2021.

[34] *See,* Nicholas Peacock and Jake Savile-Tucker, *Tribunal awards India first BIT case win, dismissing claims of French investor*, HSF Notes, *available at* <https://hsfnotes.com/arbitration/2018/09/17/tribunal-awards-india-first-bit-case-win-dismissing-claims-of-french-investor/> last accessed 12 June 2021.

The Calcutta Port Trust approached the Calcutta High Court seeking an anti-arbitration injunction restraining Louis Dreyfus from continuing with the arbitral proceedings initiated pursuant to the India – France BIT.

Presuming that investment arbitrations come under the scope of Section 44 of the A&C Act and that BITs constitute a valid "arbitration agreement" for the purposes of Section 7, the High Court granted an anti-arbitration injunction to Kolkata Port Trusts, stating that the BIT was enforceable only against the Union of India and not against other government bodies like the Port.[35] It can be stated that since thus judgment was rendered in the context of the 'abuse of process' doctrine, it was not anti-arbitration in nature and also made reasonable attempts to acknowledge the arbitral tribunal's autonomy to decide on the merits of a dispute.[36]

Nevertheless, the first round of arbitration that commenced in 2015 ended in India's favour,[37] as the tribunal found that Louis Dreyfus, lacking 51% investment in the Indian intermediary company, did not qualify as an investor and hence lacked the requisite jurisdiction to initiate the claim.[38] However, it was given time to reformulate its claim. During the second round of proceedings, the UNCITRAL tribunal again upheld India's jurisdictional objection and dismissed its USD 36 million claim against India. According to press releases available publicly, Louis

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[35] Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS, 2014 SCC OnLine Cal 17695.

[36] Bhushan Satish and Shreyas Jayasimha, *Indian Courts' First Brush with Investment Treaty Arbitration: Taking Some Lessons from the Calcutta High Court*, Kluwer Arbitration Blog, *available at* <http://arbitrationblog.kluwerarbitration.com/2015/03/16/indian-courts-first-brush-with-investment-treaty-arbitration-taking-some-lessons-from-the-calcutta-high-court/?doing_wp_cron=1592129029.4178979396820068359375> last accessed 25 June 2020.

[37] *India wins arbitration against French co. LDA*, The Hindu Business Line (September 11, 2018), *available at* <https://www.thehindubusinessline.com/companies/india-wins-arbitration-against-french-co-lda/article24928835.ece> last accessed 25 June 2020.

[38] Louis Dreysfus Armateurs v. Republic of India, PCA Case No. 2014-26.

Dreyfus was also instructed to pay approximately USD 7 million towards India's legal expenses.[39]

6. Vodafone Group v. India

Vodafone was a foreign entity that undertook the acquisition of the Indian-based Hutchison Whampoa telecoms business to enter the mobile service provider market in India in 2007. The transaction, stated to be worth $11.206 billion, was approved by the Indian government's Foreign Investment Promotion Board on 7 May 2007. In 2012, the Indian income tax authorities filed a case against Vodafone for allegedly evading tax liability (capital gains tax) with respect to this acquisition. The alleged amount was tax to the tune of around Rs. 12000 crores.[40] However, the Supreme Court of India held in Vodafone's favour, absolving them of any liability to pay taxes.[41] In order to effectively nullify the impact of this judgment, the legislature brought about retrospective changes to the Indian Income Tax Act, 1962 to impute liability to Vodafone.

Thus, Vodafone initiated investment arbitration proceedings against India challenging these discriminatory measures targeted specifically to them, under the protection provisions of the India-Netherlands BIT.[42] After the constitution of the tribunal, the initial India-appointed arbitrator vacated his seat, after which the President of the Tribunal followed suit. While a replacement to the India-appointed arbitrator was appointed, the new tribunal members were unable to agree on a President that could be appointed. Thus, Vodafone moved the Chief Justice of the ICJ for

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[39] Nicholas Peacock and Jake Savile-Tucker, *Tribunal awards India first BIT case win, dismissing claims of French investor,* HSF Notes, *available at* <https://hsfnotes.com/arbitration/2018/09/17/tribunal-awards-india-first-bit-case-win-dismissing-claims-of-french-investor/> last accessed 12 June 2021.

[40] Abir Dasgupta and Paranjoy Guha Thakurta, *The Vodafone Tax Saga and India's Arbitration Worries*, NewsClick, *available at* <https://www.newsclick.in/vodafone-tax-saga-and-indias-arbitration-worries> last accessed 25 June 2020.

[41] Vodafone International Holdings BV v. Union of India, [2012] 1 SCR, at 573, 778.

[42] Vodafone Group v. India, PCA Case No*,* PCA Case No. 2016-35.

this nomination.[43] However, this was subsequently contested by India on grounds that the nationality of the arbitrator appointed, being the same as Vodafone Group's origin, revealed a conflict of interest. This plea was rejected and the arbitration commenced. In the meantime, a subsequent proceeding was also initiated by Vodafone Group PLC, the English parent company, under the India-UK BIT citing similar facts and violations.[44]

At this time, India approached the Delhi High Court seeking an anti-arbitration injunction to restrain Vodafone from continuing with the second proceeding, it being an "abuse of process." India argued that this would amount to an abuse of process as two different arbitrations on the same issue would amount to parallel proceedings and inconsistent awards. The Delhi High Court held that since investment awards were not based on a commercial cause of action, they could not be included under the scope of Section 44 of the A&C Act and were hence unenforceable.[45] However, the Court rejected the claim that they did not have jurisdiction to listen to claims arising out of BITs and BIPAs. It traced the emergence of any BIT arbitration to public international law principles and not private contracts. Hence, it found that no relief can be sought under Section 45 of the A&C Act and that such awards are unenforceable in India. In terms of relief, the Delhi High Court initially granted an *ex parte* interim order restraining arbitration under India-UK BIT. However, later, it passed another

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[43] *See, President of ICJ Nominates Chair For Vodafone v. India Arbitration – and Then Rejects India's Effort To Disqualify The Nominee*, *available at* <http://www.iareporter.com/articles/president-of-icj-nominates-chair-for-vodafone-v-india-arbitration-and-then-rejects-indias-effort-to-disqualify-the-nominee/> last accessed 25 June 2021.

[44] Danish Khan, *Vodafone Group serves second notice on India to formally start 2nd arbitration in tax case*, Telecom Economic Times, *available at* <https://telecom.economictimes.indiatimes.com/news/vodafone-group-serves-second-notice-on-india-to-formally-start-2nd-arbitration-in-tax-case/58697253> last accessed 25 June 2020.

[45] Union of India v. Vodafone Group PLC United Kingdom, 2018 SCC OnLine Del 8842, at 89-92.

final judgment dismissing the plea seeking an anti-arbitration injunction.[46]

In a unanimous decision of the PCA, the arbitral tribunal constituted ruled in favour of Vodafone on the grounds that India's retrospective demand of capital gains and withholding tax violated the "fair and equitable treatment" guaranteed under the Netherlands-India BIT.[47] According to the award, the government needed to reimburse Vodafone 60 per cent of its legal costs and half the cost borne by it for appointing an arbitrator on the panel. Hence, the government's liability in the case would have come to around Rs 75 crore.[48] The Indian government has currently challenged the award before the Singapore High Court.[49] However, the entire exercise may prove to be redundant as the Indian government nullified the retrospective tax law by legislative route subject to the fulfilment of the specified conditions.[50]

7. Nissan Motor Co. Ltd. v. India

Nissan Motors is a Japanese incorporated motor company. It acquired a 70 per cent share in Renault Nissan Automotive India

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[46] Pushkar Anand, *Vodafone v. India – End of a Saga?*, The Wire, *available at* <https://thewire.in/business/vodafone-india-end-of-a-saga-investment-treaty-arbitration> last accessed 12 June 2021.

[47] Kshama Loya and Vyapak Desai, *Vodafone Investment Treaty Arbitration Award – Part I: Implications of Vodafone arbitration award on rights of investors to claim under treaties*, *available at* <https://www.nishithdesai.com/information/news-storage/news-details/article/vodafone-investment-treaty-arbitration-award-part-i.html> last accessed 12 June 2021.

[48] Dilasha Seth, *India challenges Vodafone arbitration award, plans the same in Cairn case, Business Standard*, *available at* <https://www.business-standard.com/article/companies/india-challenges-vodafone-arbitration-award-plans-the-same-in-cairn-case-120122401064_1.html> last accessed 12 June 2021.

[49] *Vodafone tax case: India files application in Singapore High Court against arbitration panel verdic*t, Economic Times, *available at* <https://economictimes.indiatimes.com/news/economy/policy/vodafone-tax-case-india-files-application-in-singapore-high-court-against-arbitration-panel-verdict/articleshow/80752018.cms?from=mdr> last accessed 12 June 2021.

[50] Taxation Laws (Amendment) Act, 2021.

Private Limited, an India-based entity that built an industrial automotive facility in Chennai, Tamil Nadu. Nissan invested 61 billion rupees to set up the car manufacturing plant, having an annual production capacity of 480,000 vehicles and creating nearly 40,000 jobs.[51] For this, it signed an agreement with the government of Tamil Nadu in 2008 according to which it was promised incentives in nature of output VAT incentives and/or CST Incentives, input VAT incentives and Capital Goods VAT Incentives by the State government.[52] However, the State did not pay these dues to Nissan. Thus, they initiated investment arbitration proceedings against India under the India-Japan Economic Partnership Agreement, seeking USD 770 Million as compensation for the unpaid incentives and damages due to delay. A tribunal was constituted by the Permanent Court of Arbitration, seated in Singapore. India raised numerous jurisdictional objections to the case at the very beginning. All of these were rejected by the Tribunal, and news reports indicate that the first evidentiary hearing was to occur in February 2020.[53] The award on jurisdiction has been challenged before the Singapore International Commercial Court.

However, there is confirmed the news of a settlement that has been reached between Nissan and the State of Tamil Nadu, leading Nissan to withdraw its claims against India. The settlement amount was roughly valued at around 14-18 billion rupees

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[51] Aditi Shah and Sudarshan Varadhan, *Exclusive: Nissan settles dispute with Indian state over unpaid dues – sources,* Reuters, *available at* <https://www.reuters.com/article/us-nissan-india-arbitration-exclusive/exclusive-nissan-settles-dispute-with-indian-state-over-unpaid-dues-sources-idUSKBN2342AR> last accessed 25 June 2020.

[52] Nishith Desai Associates, *Investment Arbitration & India*, a*vailable at* <http://www.nishithdesai.com/information/news-storage/news-details/article/investment-arbitration-india-2019-year-in-review.html> last accessed 25June 2020.

[53] Aditi Shah and Sudarshan Varadhan, E*xclusive: Arbitration court rejects India's plea in case against Nissan - sources, document*, Reuters, *available at* <https://www.reuters.com/article/us-nissan-india-arbitration-exclusive/exclusive-arbitration-court-rejects-indias-plea-in-case-against-nissan-sources-document-idUSKCN1SZ0X8> last accessed 25 June 2020.

(equivalent to USD 185-238 million) against an amount in dispute of some USD 660 million.[54]

B. Other Noteworthy Cases

Two Malaysian investors, part of the satellite-TV group Astro, filed investment arbitration proceedings against India. However, it was later reported that these claims were withdrawn before the hearing.[55] In line with the claims for retrospective tax measures, bilateral investment treaty arbitration was sought to be initiated by Nokia against India (*Nokia v. India*), as Indian tax authorities issued a tax notice for flouting tax norms since 2006 while making royalty payments to its Finnish parent company. The income tax department was of the view that capital gains must be paid on such transaction since the transfer occurred through an Indian permanent establishment. Disputing the claim, the company initially filed a case in the Delhi High Court seeking a stay on such payment, which was granted.[56] In the meantime, the company decided to initiate investment arbitration proceedings under the India-Finland BIT. However, the Indian government sought to resolve this through the 'Mutual Agreement Procedure' clause in the BIT, and the settled tax amount was eventually paid by the company in March 2019.[57]

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[54] Aditi Shah and Sudarshan Varadhan, *Exclusive: Nissan settles dispute with Indian state over unpaid dues – sources*, Reuters, *available at* <https://www.reuters.com/article/us-nissan-india-arbitration-exclusive/exclusive-nissan-settles-dispute-with-indian-state-over-unpaid-dues-sources-idUSKBN2342AR> last accessed 25 June 2020.

[55] Cosmo Sanderson, Treaty claims against India withdrawn ahead of hearing, Global Arbitration Review (June 16, 2019), *available at* <https://globalarbitrationreview.com/article/1194127/treaty-claims-against-india-withdrawn-ahead-of-hearing> last accessed June 25, 2020.

[56] Delhi High court asks Nokia to give simple undertaking, no Rs 3,500 crore escrow account deposit, *available at* <https://economictimes.indiatimes.com/industry/telecom/delhi-high-court-asks-nokia-to-give-simple-undertaking-no-rs-3500-crore-escrow-account-deposit/articleshow/29314601.cms?from=mdr> last accessed 12 June 2021.

[57] *Nokia says it paid 202 million euro to settle tax row with India*, Economic Times, *available at* <https://economictimes.indiatimes.com/tech/hardware/nokia-paid-202-million-euro-to-settle-tax-row-with-india/articleshow/63942891.cms?from=mdr> last accessed 25 June 2020.

In 2012, Korean Western Power Company Ltd. (KOWEPO), a South Korean utility invested in India's natural gas sector by acquiring an approximately 40% stake in the Pioneer Gas Power Plant in Maharashtra. Despite promising smooth functioning of the plant, the Indian government did not allocate gas to them on time, delaying the beginning of the operation. In addition to this, since the government-operated Gas Authority of India (GAIL) did not complete its pipeline on time, KOWEPO could not participate in the government's subsequent scheme for allocations.[58]

These factors led KOWEPO to issue a notice of arbitration to India in 2018 under the India-South Korean BIT and the India – Korea Comprehensive Economic Partnership Agreement (CEPA).[59] While the notice is not public, the compensation claim is estimated to be about USD 400 million. After issuance of the notice of arbitration, an inter-ministerial group for exploring possible options of settlement. The government of South Korea also reached out to the Indian government to resolve the pending dispute.[60]

There are also reports that a tribunal constituted to adjudicate the case of *Maxim Naumchenko, Andrey Poluektov and Tenoch Holdings Limited* v. *Republic of India*[61] (PCA administered case under UNCITRAL Arbitration Rules) dismissed the claims of foreign investors in entirety. The case reportedly dealt with the cancellation of letters of intent in light of the telecommunication scam in India.

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[58] Cosmo Sanderson, *Korean state entity launches claim against India*, Global Arbitration Review (10 December 2019), *available at* <https://singularitylegal.com/public/GAR_Article2.pdf> last accessed 12 June 2021.

[59] International Arbitration Newsletter – November 2018 (Asia-Pacific), Garrigues (19 November 2018), available at <https://www.garrigues.com/en_GB/new/international-arbitration-newsletter-november-2018-regional-overview-asia-pacific> last accessed 14 June 2021).

[60] Sarita Singh, *Korean company starts arbitration against India,* Economic Times, *available at* <https://economictimes.indiatimes.com/industry/energy/power/korean-company-starts-arbitration-against-india/articleshow/72449677.cms?from=mdr> last accessed 25 June 2020.

[61] Maxim Naumchenko, Andrey Poluektov and Tenoch Holdings Limited v. Republic of India, PCA Case No. 2013-23.

India was believed to have invoked the "essential security interests" defence for such an act.[62]

Another important and extremely recent case is *Cairn Energy PLC and Cairn UK Holdings Limited v. Republic of India.*[63] The proceedings in this case also begun in the backdrop of income tax proceedings. In October 2006, Cairn India Holdings Limited sold its shares to Cairn India Limited in an internal group restructuring by way of a share subscription and share purchase agreement and a share purchase deed. Thus, shares constituting the entire issued share capital of CIHL were transferred to CIL for consideration partly in cash and partly in the form of shares of Cairn India Limited.[64] The Income Tax Department similarly issued a notice for attracting capital gains, which was challenged by investors such as *Cairn* and *Vodafone* (case discussed above). The Supreme Court held in favour of the investors, but the legislature introduced a subsequent retrospective amendment to the Income Tax Act to impose taxes on such transactions. [65]Aggrieved by these measures, Cairn invoked investment arbitration in 2015 under the India - UK BIT. The proceedings continued in the backdrop of attempts by the income tax authorities to undertake reassessment.[66] The tribunal finally passed a verdict on 21

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[62] Ministry of Finance, *BIT claims against India dismissed*, Press Information Bureau, *available at* <https://www.italaw.com/sites/default/files/case-documents/italaw11106.pdf> last accessed 25 June 2020.

[63] Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India, PCA Case No. 2016-07.

[64] Kshama Loya, Moazzam Khan and Vyapak Desai, 'Cairn v India – Investment Treaty Arbitration' *available at* <https://www.natlawreview.com/article/cairn-v-india-investment-treaty-arbitration> last accessed June 12, 2021.

[65] *Retrospective taxation: India loses Cairn Energy arbitration case but goes after Vodafone*, Economic Times (24 December 2020), *available at* <https://economictimes.indiatimes.com/news/economy/policy/retrospective-taxation-india-loses-cairn-energy-arbitration-case-but-goes-after-vodafone/challenging-the-judgement/slideshow/79941576.cms> last accessed 12 June 2021.

[66] *Arbitration Tribunal delays award in ₹10,247-cr Cairn retro tax case to mid-2020*, The Hindu Business Line, *available at* <https://www.thehindubusinessline.com/companies/arbitration-tribunal-delays-award-in-10247-cr-cairn-retro-tax-case-to-mid-2020/article29812914.ece> last accessed June 25, 2020.

December 2020, wherein it held that India had failed to uphold its obligations under the India-UK BIT and international law. The Tribunal ordered India to compensate Cairn by paying them USD 1.2 billion plus interests and costs. Currently, India has filed an appeal in a Dutch court to challenge enforcement of the award but also offered to settle the dispute under the 'Vivad se Vishwas' direct tax dispute resolution scheme.[67]

As of June 2021, the following is a tabular representation of India's participation in investment arbitration cases:

Cases in which India is a Respor	26
Cases in which India is a hom Claimant	9

C. Select Investment Arbitrations Initiated by Indian Investors Against other Host States

One of the first few cases launched by an Indian investor abroad is *Ashok Sancheti v. Germany,* which appears to have been settled or discontinued before a decision on liability was rendered by the tribunal.[68] The same investor also launched proceedings under the India-United Kingdom BIT through *Sancheti v. United Kingdom.* Largely, the claims arose out of the increase in the rent price for the investor's lease of a commercial space owned by the city of London. However, the records of the arbitration were never made public.[69]

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[67] Gireesh Chandra Prasad, *India files appeal against Cairn arbitration award*, LiveMint, *available at* <https://www.livemint.com/companies/news/india-files-appeal-against-cairn-arbitration-award-11616522417671.html> last accessed 12 June 2021.

[68] *See generally* https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/46/sancheti-v-germany.

[69] *See generally* <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/234/sancheti-v-uk> last accessed 25 June 2020.

Indian investor Khadamat Integrated Solutions Private Limited has brought a claim against Saudi Arabia under the India-Saudi Arabia BIT in early 2018.[70] It has been reported that the dispute concerns a large-scale development project in Saudi Arabia.[71] The Permanent Court of Arbitration administered the claim and a tribunal was constituted under the UNCITRAL rules in September 2019. However, the case has been decided in favour of Saudi Arabia.[72]

Another recent and renowned case lodged by an Indian investor abroad is that in *Flemingo Duty Free Shop v. Poland*, where the cause of dispute arose from the Polish Government's steps to 'evict' them from Chopin Airport without compensation.[73] According to the Polish government, such concerns were necessary for 'modernisation' of the airport. Flemingo Group had purchased a stake in BH Travel, which owned duty free stores at this airport, and was thus naturally affected. In 2014, the Group initiated arbitration in 2014 citing unlawful expropriation pursuant to the India-Poland BIT. By 2016, the tribunal rendered its award in favour of the Group, holding that Poland had expropriated Flemingo DutyFree's investment without compensation, thus violating the fair and equitable treatment protection under the BIT. Costs of over €20 million were also imposed on Poland. Around the same time, another case *Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia*[74] was filed in Indonesia in the context of overlaps between the claimants' coal mining permits and those of other companies, resulting in conflicting rights to mine coal in the same territory. However, all claims were dismissed on the merits.

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[70] Khadamat v. Saudi Arabia Khadamat Integrated Solutions Private Limited (India) v. The Kingdom of Saudi Arabia (PCA Case No. 2019-24).

[71] *See generally* <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1021/khadamat-v-saudi-arabia> last accessed 25 June 2020.

[72] *See generally* https://pca-cpa.org/en/cases/222/.

[73] *White & Case Wins Award for Indian Investor Against Poland,* White & Case, *available at* <https://www.whitecase.com/news/white-case-wins-award-indian-investor-against-poland> last accessed 25 June 2020.

[74] *See generally* <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/682/imfa-v-indonesia>.

In Bosnia and Herzegovina, Indian investors Naveen Aggarwal and Neete Gupta (owners of New Delhi-based chemicals company Usha Industries) filed a request for UNCITRAL arbitration under the India-Bosnia 2006 BIT, seeking US $40 million for fraudulent acquisition of their shares by the government in pursuance of privatisation of a company by the name of Krajina osiguranje. While it appears that the case was decided in favour of the State, further details are not available.[75]

It was also reported that a case has been initiated against Macedonia by an Indian investor couple, over alleged expropriation in awarding a mining contract in Macedonia. This case goes by the name of *Binani v. Macedonia.*[76] Currently, the case has been discontinued.[77]

D. Developments in India's BITs and Foreign Investment Law

1. The signing of the India-Brazil BIT[78]

India and Brazil recently signed a BIT as part of a strategic partnership by both countries to develop commercial and cultural relations.[79] Scholars have noted that this BIT draws more similarities to the Brazilian Model BIT as compared to the Indian

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[75] *See generally* <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india/investor>.

[76] Nicholas Peacock, Kritika Venugopal and Nihal Joseph, *Recent Developments in India-Related Treaty Arbitration*, HSF Arbitration Notes, *available at* <https://hsfnotes.com/arbitration/2019/11/08/recent-developments-in-india-related-investment-treaty-arbitration/> last accessed 25 June 2020.

[77] *See generally* <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/946/binani-v-north-macedonia>.

[78] Henrique Choer Moraes and Pedro Mendonça Cavalcante, The Brazil-India Investment Cooperation and Facilitation Treaty: Giving Concrete Meaning to the "Right to Regulate" in Investment Treaty-Making, ICSID Rev. (forthcoming).

[79] David Matthews, *India-Brazil BIT: A Step in the Right Direction*, The Arbitration Brief, *available at* <https://thearbitrationbrief.com/2020/04/12/india-brazil-bit-a-step-in-the-right-direction/> last accessed 25 June 2020.

Model BIT. It is also evident that this BIT gives precedence to the right of States to regulate foreign investments.

Some of the interesting features of this BIT include:

a. Definition of Investment

The India Brazil BIT adopts an enterprise-based approach to define 'investment' and recognizes both tangible and intangible investments. The enterprise-based definition of investment comprises a comprehensive list of asset inclusion, exclusion and characteristics to identify an investment.

b. Expropriation

Unlike the India Model BIT 2016, the India Brazil BIT accords protection to foreign investments only against direct expropriation and not indirect expropriation. The India Model BIT expressly recognises indirect expropriation and stipulates that "indirect expropriation occurs if a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it substantially or permanently deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure." However, Article 6.3 of the India Brazil BIT, which is in accordance with the Brazil Model BIT, states:

> For greater certainty, this treaty only covers direct expropriation, which occurs when an investment is nationalised or otherwise directly expropriated through a formal transfer of title or outright seizure.

c. Dispute Prevention and Settlement

The India-Model BIT provides for a significantly different mechanism to resolve investment disputes. Though the India Model BIT 2016 provides for Investor-State Dispute Settlement (ISDS), the India Brail BIT provides for state-to-state arbitration and

there is no provision of ISDS. The state-to-state dispute settlement mechanism is consistent with the Brazil Model BIT.

Article 13 of the India Brazil BIT states that a joint committee shall be established for the administration of the treaty and it shall include government representatives of both states. One of the functions of this joint committee is to resolve disputes concerning investments of investors in an amicable manner. Article 18, which provides for a dispute prevention procedure, stipulates that:

> if a party considers that a specific measure adopted by the other party constitutes a breach of this treaty, the party may initiate dispute prevention procedure within the Joint Committee.

If the joint committee fails to resolve the dispute, a party may initiate state to state arbitration in accordance with article 19 of the investment treaty. It is pertinent to note that the ad hoc tribunal constituted under article 19 is not empowered to award compensation.

2. New foreign investment protection law by Finance Ministry

In January 2020, numerous Indian[80] and international[81] newspapers reported that the Indian Finance Ministry has proposed a 40-page draft (not public) that is rumoured to have recommended mediation and the establishment of special fast-track courts. This has been done for boosting foreign investor confidence in India, especially since most BITs have been terminated and/or reinterpreted. Recently, a large number of Indian

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[80] Kshama A Loya and Moazzam Khan, View: Balancing state regulation & investor rights, <https://economictimes.indiatimes.com/markets/stocks/news/view-balancing-state-regulation-investor-rights/articleshow/73792172.cms?from=mdr> last accessed June 25 2020.

[81] Aditi Shah and Aftab Ahmed, Exclusive: India plans new law to protect foreign investment – sources, Nasdaq, <https://www.nasdaq.com/articles/exclusive-india-plans-new-law-to-protect-foreign-investment-sources-2020-01-15-2> last accessed June 25 2020.

states have also defaulted in contract enforcement, causing additional woe to investors. [82]Alternatively, the draft is also believed to make a suggestion to consider vesting jurisdiction for such disputes with the NCLT.

The draft was aimed at creating a domestic regime similar to BIT-based investment protection for foreign investments, as it is believed that India is in dire need of infusion of capital in the economy through investment.[83] However, there are no confirmed reports on the contents of this draft proposal. More clarity in this regard is awaited.

3. Imposition of stricter FDI norms

The economic effects of the pandemic have led to India revising its foreign direct investment policy. This has been done to prevent opportunistic takeovers and/or acquisitions of Indian companies during the pandemic.[84] Under this new FDI Policy, amended through a Press Note, mandatory prior government approval has now become a prerequisite for foreign investments in the form of direct or indirect acquisition or transfer of an Indian company, where the acquirer or beneficial owner of such investment is based out of a country which "shares land borders with India".[85]

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[82] *Govt plans new law to protect foreign investment; draft proposal aims at diffusing investor mistrust on agreements*, Firstpost <https://www.firstpost.com/business/govt-plans-new-law-to-protect-foreign-investment-draft-proposal-aims-at-diffusing-investor-mistrust-on-agreements-7910681.html> last accessed June 25 2020.

[83] Rajeev Jayasmal, *Long-awaited FDI protection provision expected in Budget*, Hindustan Times <https://www.hindustantimes.com/india-news/long-awaited-fdi-protection-provision-expected-in-budget/story-0V3o1e6SvvfS8ZcPyAUAIL.html> last accessed June 25 2020.

[84] *India Introduces Stricter FDI Rules for Foreign Investment From China And Other Border Countries*, Mondaq, <<https://www.mondaq.com/india/inward-foreign-investment/926764/india-introduces-stricter-fdi-rules-for-foreign-investment-from-china-and-other-border-countries> last accessed 25 June 2020.

[85] For the Press Note No. 3 of 2020*, see generally* <https://dipp.gov.in/sites/default/files/pn3_2020.pdf>

Furthermore, the number of countries whose investors will have to seek government approvals have also been increased.

While it is believed that this move has come to ensure that Chinese investors do not take advantage of the pandemic to buy a large stake in Indian companies,[86] the same cannot be conclusively said as there is no official comment from the government about this.

4. FDI in the insurance sector

In the 2021 budget, the Indian Finance Minister announced that FDI in insurance companies would be permitted up to 74% as against the existing cap of 49%. Conditions for eligibility and compliances were also introduced through the subsequent Insurance (Amendment) Act, 2021 effective from 1 April 2021.[87]

5. India and EU to resume negotiations on the India-EU Bilateral Trade and Investment Agreement (BTIA)

Negotiations on the India-EU BTIA began in 2007 but were suspended in 2013 after 16 rounds of negotiation and little progress.[88] However recently, in the first India-EU leaders' meeting held virtually in May, the two parties agreed to resume talks separately on trade, investment and geographical indications (GIs) that earlier formed a part of BTIA negotiations. A joint statement of intent was also released subsequently by both sides. It appears that the idea is to negotiate three separate deals on each of these

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[86] Saibal Dasgupta, *New FDI policy: Can India manage to stem Chinese predatory trade practices?* Economic Times, available at <https://economictimes.indiatimes.com/news/economy/policy/new-fdi-policy-can-india-manage-to-stem-chinese-predatory-trade-practices/articleshow/75361718.cms?from=mdr> last accessed 25 June 2020.

[87] Insurance (Amendment) Bill, 2021, *available at* https://prsindia.org/files/bill_track/2015-03-15/The%20Insurance%20(Amendment)%20Bill,%202021.pdf.

[88] Asit Ranjan Mishra, *India, EU see tricky restart to FTA talks,* LiveMint, *available at* <https://www.livemint.com/news/world/india-eu-see-tricky-restart-to-fta-talks-11620409702854.html> last accessed 13 June 2021.

considerations.[89] Furthermore, India intends to resume similar negotiations with the United Kingdom as well.[90] In this regard, the UK has already begun a 14-week public consultation process seeking views from businesses and key stakeholders.[91]

6. Canada-India Foreign Investment Promotion and Protection Agreement negotiations

Canada and India have been in negotiations to finalise a Foreign Investment Promotion and Protection Agreement (FIPA). The negotiations commenced in September 2008 and 10 negotiation rounds have taken place till date. A virtual bilateral meeting was held in June 2020 between the Chief Negotiators from both countries. After this, another meeting occurred in October 2020 to explore the possibility of an interim agreement. In this regard, India shared a 'scoping paper' with Canada, which was discussed in November 2020 virtually.

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[89] Asit Ranjan Mishra, *EU may gain from negotiating separate trade and investment pacts with India,* India Briefing <https://www.livemint.com/news/india/eu-may-gain-from-negotiating-separate-trade-and-investment-pacts-with-india-11620590461896.html> last accessed 13 June 2021.

[90] Asit Ranjan Mishra, *India to begin FTA negotiations with EU and UK by year end,* LiveMint, *available at* https://www.livemint.com/news/world/india-to-begin-fta-negotiations-with-eu-and-uk-by-yearend-11622729132316.html (last visited 13 June 2021).

[91] Melissa Cyrill, *UK Initiates Public Consultation Process to Prepare for Trade Negotiations with India,* India Briefing, *available at* <https://www.india-briefing.com/news/uk-initiates-public-consultation-process-to-prepare-for-trade-negotiations-with-india-22321.html/> last accessed 13 June 2021.

CHAPTER 5
ENFORCEMENT OF INVESTMENT ARBITRATION AWARD

A stable legal system is an important concern for foreign investors.[1] Of this, an important consideration is the presence of a domestic mechanism that permits the enforcement of investment arbitration awards through local Indian courts. For foreign investors having a favourable award against India, a domestic enforcement mechanism is most preferred because it allows them to pursue domestic assets located within the territory of the Host State itself. In the event that this is not possible, foreign investors have to go through the painful procedure of locating foreign assets of the Host State and pursue enforcement in those local courts.[2] Additionally, having a domestic enforcement mechanism provides a policy assurance to investors that the State will be more receptive towards enforcement and not refuse its obligations under the award, and goes a long way towards demonstrating the seriousness of the Host State's commitments to investment protection. Currently, there is no law in India that expressly governs investment arbitration, as a result of which the enforcement of an investment treaty arbitral award becomes a dilemma. The Indian

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[1] Daksha Baxi, Radhika Dubey and Sanskriti Sidana, *BIT arbitration awards: Enforcement regime in India,* Bar and Bench, *available at* <https://www.barandbench.com/columns/bit-arbitration-awards-enforcement-regime-in-india> last accessed 20 May 2021.

[2] Michael S. Kim, *Pursuing Protected Assets of Sovereign Award Debtors*, *available at* <https://www.arbitration-ch.org/asset/ecb76fcfffbca5ebaf61bec65b973525/article-michael-kim-pursuing-protected-assets-of-sovereign-award-debtors.pdf> last accessed 27 March 2021.

A&C Act does not *prima facie* appear to be equipped with addressing any issues arising out of investment arbitration.[3]

Furthermore, the implementation of a separate law governing investment arbitration would *ipso facto* not be enough if no systematic enforcement mechanism is in place. The non-existence of any mechanism in India to enforce an investment arbitration award may also itself be contended to lead be a breach of obligations under the BIT between States.

The enforceability of investment awards has become a widely discussed topic among Indian academicians, researchers and scholars.[4] While India has terminated most of its investment treaties,[5] the sunset clauses present within most of these treaties

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[3] *See generally,* Part II, Arbitration and Conciliation Act. Section 44 states that "In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India..." (emphasis supplied).

[4] *See for example,* Kshama A Loya & Moazzam Khan, *Enforcement of BIT Awards at Bay in India as the Courts Rule Out the Applicability of the Arbitration and Conciliation Act 1996,* Asian Dispute Review *available at* <http://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20In%20The%20Media/News%20Articles/200122_A_Asian_Dispute_Review_Jan_2020.pdf> last accessed 20 May 2021; Sahil Tagotra & Ishita Mishra, *Recent Developments in the Enforcement of New York Convention Awards in India* Kluwer Arbitration Blog, *available at* <http://arbitrationblog.kluwerarbitration.com/2020/07/06/recent-developments-in-the-enforcement-of-new-york-convention-awards-in-india/?doing_wp_cron=1594011608.7542729377746582031250&print=print> last accessed 21 May 2021; Prabhash Ranjan & Deepak Raju, *The enigma of enforceability of investment arbitration awards in India*, Asian Journal of Comparative Law (2011); Prabhash Ranjan & Pushkar Anand, *Indian Courts and Bilateral Investment Treaty Arbitration*, 4 Indian L. Rev. 1, 15 (forthcoming 2020); Pratyush Miglani, Nikhil Varma & Prakhar Srivastava, *BIT Arbitral Awards Virtually Non-Enforceable in India: Does the Delhi High Court Need Course Correction,* SCC Online, *available at* <https://www.scconline.com/blog/post/2021/04/10/arbitral-awards-2/> (last visited May 20, 2021); Siddharth S. Aatreya, *Can investment arbitral awards be enforced in India?,* Kluwer Arbitration Blog *available at* <http://arbitrationblog.kluwerarbitration.com/2019/04/04/can-investment-arbitral-awards-be-enforced-in-india/> last accessed 21 May 2021.

[5] *See generally* <https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india>.

continue to protect existing investments as of the date of termination.[6] In effect, this would mean that such foreign investors would continue to have a valid claim under the erstwhile BIT and hence the enforcement of any favourable awards in Indian courts is a key concern for them.

A. Understanding the conundrum

Part II of the A&C Act deals with recognition and enforcement of foreign awards in India and is based on the principles of the New York Convention, making it most relevant for this situation. The wordings of Section 44, which broadly lays down the scope and applicability of Part II, specifically provides that a foreign award must be "*considered as commercial under the law in force in India*" to be enforced under the A&C Act.[7] For investment arbitration awards to be enforced in India, they need to be considered 'commercial' not just by virtue of the New York Convention, but by virtue of other legal principles, guidelines or laws of India. This requirement reflects India's 'commercial reservation' to Article 1(3) of the New York Convention, by virtue of which Indian courts are to determine the commerciality of transactions under existing Indian law prior to determining whether awards arising out of these transactions are enforceable.[8] The problem is exacerbated by the fact that the word "commercial" is not defined under the A&C Act. The absence of any interpretative mechanism within the A&C Act itself means that reference to both itself and foreign jurisprudence,

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[6] *See generally* Nicholas Peacock & Nihal Joseph, *Mixed messages to investors as India quietly terminates bilateral investment treaties with 58 countries,* Herbert Smith Freehills Notes, *available at* <https://hsfnotes.com/publicinternationallaw/2017/03/16/mixed-messages-to-investors-as-india-quietly-terminates-bilateral-investment-treaties-with-58-countries/> last accessed 19 May 2021.

[7] Section 44, Arbitration & Conciliation Act, 1996.

[8] European Grain and Shipping Ltd. v. Bombay Extractions Ltd., AIR 1983 Bom 36, ¶ 17 (1982) (India). *See generally* United Nations Comm'n on International Trade Law, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, art I (2016), *available at* <https://newyorkconvention1958.org/pdf/guide/2016_Guide_on_the_NY_Convention.pdf> last accessed 2 April 2020.

two key sources of interpretation for Indian courts when dealing with arbitration law, become unavailable.

This would not have been a problem by itself if India was a signatory to the ICSID Convention. The ICSID Convention is a self-contained regime for enforcing investment arbitration awards. Section 6 of the Convention lays down an elaborate mechanism for the enforcement of arbitral awards in national courts. For instance, Article 54(1) provides finality and bindingness to investment arbitration awards. Article 53 states that parties will not be permitted to appeals or remedies apart from those specified in the ICSID Convention, which means that there is complete immunity to such awards from challenge in domestic courts. There is also another safeguard for foreign investors seeking enforcement. While ICSID itself has no formal role in the recognition and enforcement of an award, if a party informs ICSID of the other party's non-compliance, ICSID generally contacts the non-complying party to request information on the steps that party has taken, or will take, to comply with the award.[9]

However, since India is not a party to the ICSID Convention, majority arbitrations are likely to be administered under the *ad hoc* UNCITRAL Arbitration Rules or the ICSID Additional Facility Rules, which do not provide the same protection to investment arbitration awards.[10] Additionally, since Part II of the A&C Act recognises 'public policy' as a scope of challenge of foreign awards (much in line with the New York Convention), even if investment arbitrations are hypothetically recognised as enforceable under Indian law, the scope for judicial interference is much higher in cases where India is the seat of the arbitration.

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[9] *See generally,* International Centre for Settlement of Investment Disputes, *Process of Recognition and Enforcement, available at* <https://icsid.worldbank.org/services/arbitration/convention/process/recognition-enforcement> last accessed 19 May 2021.

[10] *See generally* Giammarco Rao, *ICSID and non-ICSID awards,* Jus Mundi, *available at* <https://jusmundi.com/en/document/wiki/en-icsid-and-non-icsid-awards> last visited 21 May 2021.

It is for this reason that it is key for the Indian regime to domestically recognise and permit enforcement of investment arbitration awards. Owing to the array of public and State sovereignty related considerations involved in such disputes, there appears to be a conundrum as to whether these disputes and their resulting awards, are indeed 'commercial' as per Indian law. This is further complicated by the fact that the parties to an investment arbitration involve a private investor and a Sovereign State, indicating that the causes of dispute and implications of any ruling on the dispute are likely to have effects on third parties that are not present within the dispute itself.

B. Analysing the current Indian scenario

When interpreting the word 'commercial' under Section 44, let us first examine jurisprudence generally laid down by Indian courts in this respect. An overview of different cases suggests that there exists a disparity between different Indian courts about the understanding of the term itself. One of the earlier cases in this respect was *R.M. Investments & Trading Co. Pvt. Ltd. v. Boeing Co.*,[11] before the Supreme Court, where the Court had to determine whether a dispute arising out of an investment consultancy service contract between the parties was a commercial transaction.[12] This was a case under the Foreign Awards (Recognition & Enforcement) Act, 1961, which was the enforcement regime that existed prior to the A&C Act.

The Court referred to the intent of Section 2 of the erstwhile Act, noting that this was done to facilitate and promote international trade. Therefore, while answering in the affirmative, the Court went on to define the term, stating that:

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[11] R.M. Investments & Trading Co. Pvt. Ltd. v. Boeing Co., AIR 1994 SC 1136.

[12] Nishith Desai Associates, *International Commercial Arbitration; Law and Recent Developments in India*, *available at* <https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/International_Commercial_Arbitration.pdf> last accessed 27 August 2021.

> The expression 'commercial' should, therefore, be construed broadly having regard to the manifold activities which are integral part of international trade today.[13]

The aforementioned interpretation is extremely wide and can easily be argued to encompass investment arbitration awards since the very presence of foreign investment is integral to international trade. However, the problem arose through the subsequent ruling of the Gujarat High Court in *Union of India* v. *Lief Hoegh & Co. (Norway),* wherein it was held that the term 'commerce'

> is a word of the largest import and takes in its sweep all the businesses and trade transactions in any of their forms, including the transportation, purchase, sale and exchange of commodities between the citizens of different countries.[14]

Although the underlying idea of the term remains the same, the scope is narrowed down only to transactions between *individuals.* This poses a major challenge to investment arbitrations involving the sovereign state of India, which are to be enforced within India.

Other relationships that have been considered 'commercial' in India include a charter party agreement,[15] a catering contract,[16] a contract for shipment of goods,[17] an employment contract of the Chief Executive Officer,[18] and an agreement for the division of property and businesses.[19] On at least one occasion[20], a contract

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[13] R.M. Investments & Trading Co. Pvt. Ltd. v. Boeing Co., AIR 1994 SC 1136 at ¶12.

[14] Union of India v. Lief Hoegh & Co. (Norway), Vol. IX (1984) Y.B. Com. Arb. 405, ¶6.

[15] Swiss Singapore Overseas Enters. Pvt. Ltd. v. M/V African Trader, Civil Application No. 23 of 2005, ¶35.

[16] Bharat Catering Corp. v. Indian Railway Catering & Tourism Corp. Ltd., (2009) 162 DLT 219, ¶5.

[17] European Grain & Shipping Ltd. v. Bombay Extractions Ltd., AIR 1983 Bom 36.

[18] Comed Chemicals Ltd. v. C.N. Ramachand, (2009) 1 SCC 91 at ¶33.

[19] Harendra H. Mehta, et al. v. Mukesh H. Mehta, et al., 1999 (3) SCR 562.

[20] Kamani Engg. Corp. Ltd. v. Societe De Traction Et D'Electricite Societe Anonyme, AIR 1965 Bom 114, ¶19.

of technical assistance was not considered ‘commercial’ because no consideration of it being ‘commercial' was at issue.

An overall review of these cases reveals the reluctance of Indian courts to enlarge the meaning of the term ‘commercial’ to include transactions beyond *private party contracts whose remedy for breach is also necessarily monetary.* Therefore, it appears that the nature of the ‘legal relationship’ is to be determined by the nature of the ‘transaction', which traces its nature from the type of and parties to the contract/instrument from which the dispute emerges. Another implied requirement is that the subject matter of the contract must ideally involve the existence of a *tangible* good or service and must not be based on services.

It appears that similar questions have reached courts when dealing with enforcement of investment arbitration awards under the A&C Act itself. The first case in this respect is the *Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS and Ors.,* which dealt with problems arising out of a contract concerning the Kolkata Port Trust.[21] The High Court delivered a pro-arbitration judgment, insofar as it presumed that investment arbitrations come under the scope of Section 44 of the A&C Act and held that BITs constitute a valid “arbitration agreement” for the purposes of Section 7.

The same stance, however, did not reflect in subsequent judgments of the Delhi High Court. Through its *two judgements in Union of India v. Vodafone Group PLC United Kingdom* (arising out of the contentious proceedings between Vodafone India and the income tax authorities about charging capital gains taxes)[22] *and Union of India v. Khaitan Holdings (Mauritius) Ltd. & Ors.* (arising out of cancellation of licenses in the aftermath of the 2G scam)*,*[23]

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[21] The Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS and Ors, 2014 SCC OnLine Cal 17695. *Refer to chapter 4, pt 5 for further explanation.*

[22] Union of India v. Vodafone Group PLC United Kingdom, 2018 SCC OnLine Del 8842. *Refer to chapter 4, pt 6 for further explanation.*

[23] Union of India v. Khaitan Holdings (Mauritius) Ltd. & Ors., 2019 SCC OnLine Del 6755.

the Court refused to acknowledge that investment arbitration awards are 'commercial'.

In both these cases, the Court made common points to the effect that since investment awards are not based on a commercial cause of action and hence fall outside the scope of Section 44 of the A&C Act. Additionally, there exist certain fundamental differences between investment treaty and commercial arbitration, as the former is based on violations resulting from general principles of public international law and international administrative law. Khaitan Holdings further broadened the scope of judicial interference in investment arbitration awards, by holding that Indian Courts retained limited jurisdiction to intervene in investment arbitration proceedings under Sections 20 (b) and (c) of the Civil Procedure Code (CPC). In the absence of a conclusive ruling by the Supreme Court of India on a direct question pertaining to the enforcement of investment arbitration awards, reference to these conflicting High Court judgments is not of much avail.

Thus, it is necessary to refer to other Indian legislations or instruments that may be useful to address this apparent anomaly.

C. Looking beyond the A&C Act

Literature on this topic argues that the very act of foreign investment is based entirely on a commercial relationship between the State and the foreign investor, insofar as the investor seeks to derive some form of commercial returns from the investment itself.[24] Therefore, any award addressing the dispute based on this

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[24] Prabhash Ranjan & Pushkar Anand, *Indian Courts and Bilateral Investment Treaty Arbitration*, Indian L. Rev. (forthcoming); *See also* N. Jansen Calamita, *UNCITRAL Working Group III Debate: Enforceability of awards by an appellate mechanism or an investment court under the ICSID and New York Conventions*, Investment Treaty News, *available at* <https://cf.iisd.net/itn/2020/03/10/uncitral-working-group-iii-debate-enforceability-of-awards-by-an-appellate-mechanism-or-an-investment-court-under-the-icsid-and-new-york-conventions-jansen-calamita/#_ftn14> last accessed 27 August 2021.

commercial relationship becomes commercial by itself. It can also be argued that since Section 44 itself envisages 'legal relationships' that are 'commercial' even if they are not 'contractual', an investment arbitration award will be enforceable in India as the underlying relationship is established with a commercial advantage in mind for both parties.

In addition, reference to Section 2(c) of the Commercial Courts Act, 2015 is important as it provides an exhaustive definition of "commercial disputes", making it the starting point for any examination in this respect. While the definition is exhaustive and lists various transactions/contractual arrangements, Section 2(c)(xxii) specifically states that any other transaction that may be so considered needs to be expressly notified by the Central Government.[25] This means that the definition is likely intended to be wide and expand with time. A cue is found within the second Explanation to Section 2(1)(c), which states that merely because one of the contracting parties is the State does not mean that a commercial dispute will cease to be one. Thus, it appears that a 'commercial dispute' can accrue between a State and a private investor. This overcomes the challenges posed by the Gujarat High Court's interpretation in *Union of India* v. *Lief Hoegh & Co. (Norway)*.

Article 27 of the Indian Model BIT is also a useful indicator of legislative intent. Clause 5 of Article 27 considers any claim submitted to arbitration under this article to be of a 'commercial nature' for the purpose of the New York Convention.[26] A simple understanding of this would mean that India's Model BIT includes investment treaty arbitration under the umbrella of commercial in nature. However, this being within the Model BIT would still not address major concerns pertaining to enforcement because (i) it

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[25] The Commercial Courts Act, No. 04, § 2(c)(xxii), India Code (2015).

[26] Model Text for the Indian Bilateral Investment Treaty 2016, Finality and enforcement of awards - Article 27.5 "A claim that is submitted to arbitration under this Article shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention."

solely provides a background of how India wishes to negotiate treaties with other countries; (ii) it is not 'law in force' in India for the purposes of Section 44 and would require to be so adopted by Courts or express legislative amendment to meet the criteria; and (iii) there remains an ambiguity on the manner of interpretation of BITs that were NOT modelled on the 2016 Model BIT/were released prior to it.

Therefore, there is a chance that Indian courts will interpret the term 'commercial' in a broad manner because that seems to be the approach of both the Indian judiciary and the legislature. If this happens, investment treaty awards may be enforceable in India under the New York Convention, which is incorporated under Part II of the A&C Act. That being said, it remains to be seen whether courts will examine and pay heed to their narrow interpretation of the word 'commercial' and to what extent this can serve as a counter-argument to the enforcement of investment arbitration awards in India. There are various important considerations that the Court must decide upon as well to ensure that there is proper clarity:

- The scope of the challenge of investment arbitration awards (whether this should be at par with the ICSID Convention or permit a wider range of challenges, as the New York Convention permits)
- The fate of awards rendered under treaties prior to the release of the 2016 Model BIT
- The scope of 'commercial' in the context of the A&C Act.

To conclude, Investment protection is a paramount consideration for foreign investors looking to invest in countries, and for Host States themselves to attract much-needed funding. The basis of such claims is a BIT signed between the Host State and the country of the foreign investor's nationality. Investment arbitration is a mode of dispute resolution of claims made based on BITs. Thus, despite its shortcomings, it is particularly beneficial for developing countries like India.

That being said, India's tryst with ISDS is akin to a mixed bag. Our policy approach to the system has undergone a drastic change across the past 30 years. Beginning with an ambitious start in the post-1991 reforms era, India currently finds itself renegotiating and terminating existing BIT obligations. Whilst our former aim was to provide protection to foreign investors to increase credibility in the market, India has recently come to realise the importance of balancing such protections with its own right to regulate internal affairs, a power challenged frequently before arbitral tribunals by foreign investors. It is widely believed that India's approach to investment protection changed as a result of its experience in the Dabhol Power Project case, White Industries Case and Vodafone case. Dabhol revealed the negative effects of changing political control on investors, White Industries exposed the government to the problems associated with the Indian judicial system, and the Vodafone case challenged the sovereign right to regulate entirely. These cases made India realise the importance of giving its sovereign rights supremacy in the arbitral process.

The 2016 Model BIT is a reflection of India's attempt towards formalising this balance through its future negotiations with other countries, reflective of a rather protectionist stance. Since India has signed only four new BITs since the release of the 2016 Model Treaty, it remains to be seen whether other states, specifically capital-exporting in nature, would be ready to agree to such terms.

That being said, investment arbitration is most likely to pick up in India, since the sunset clauses in most existing BITs have already led to a large number of claims by foreign investors. Sunset clauses stipulate that all investments made prior to the termination of the relevant investment treaty continue to be protected by a specific period of time. For instance, India-Slovenia BIT provides that investments are protected for a period of 10 years from the termination of the treaty.

Furthermore, considering India's policy considerations to increase the ease of doing business, it cannot shy away from

entering into newer investment protection agreements. Even at an international level, cross-border investment arbitration is an exciting career choice for anyone wishing to practice in the EU, USA, etc. There are a variety of career options, in India and abroad, which can be tapped at this time to create a name in a niche area of law. Since there do not currently exist many Indian authorities (academicians and practitioners) within investment arbitration, now is a good time to tap any opportunities in this field. Within the EU, with negotiations for treaties underway, there are exciting policy, research and advocacy opportunities. There is also a need for cutting-edge research in this field to balance India's recently adopted nationalist objectives with its desire to become an FDI superpower through the correct drafting of newer treaties.

CHAPTER 6
REFORMS IN INVESTMENT ARBITRATION

Investment arbitration is generally acknowledged to host multiple oft-competing considerations. While this can and is largely attributed to the fact that a Host State and private investor are differently situated parties,[1] the past decade has witnessed numerous scholars pointing towards a 'legitimacy crisis' building up against investment arbitration, having the effect of challenging the very auspices and foundation upon which it is built.

In principle, investment arbitration resolves public issues having economic and political consequences in private amongst a particular set of individuals, having the liberty to issue different decisions on the same or similar points of law.[2] This becomes potentially problematic for Host States that are subjected to different liability in respect of the same action. Additionally, the absence of *jurisprudence constante* (the ability to predict outcomes through previous jurisprudence) adds to the uncertainty of the process and deters Host States from complying with these

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[1] *International Arbitration: International Arbitration Information by Aceris Law LLC, available at* <https://www.international-arbitration-attorney.com/investment-arbitration/#:~:text=Investment%20arbitration%20is%20a%20procedure,State%20Dispute%20Settlement%20or%20ISDS).&text=For%20a%20foreign%20investor%20to%20be%20able%20to%20initiate%20an,have%20given%20consent%20to%20this> last accessed 10 May 2021.

[2] Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 Fordham L. Rev. 1521 (2005).

decisions.[3] A common example in this respect involves conflicting decisions issued by several tribunals constituted in the aftermath of the Argentine *peso* crisis. In the period ranging from 2003-2007, claims against Argentina represented a quarter of all the cases initiated within the framework of the ICSID Convention and challenged the economic measures taken by Argentina to contain the potentially disastrous effects of an ongoing economic cycle.[4] Despite there being a common cause of action (with different effects on individual investors), tribunals differed on the key issue concerning the liability of Argentina for violation of obligations under its BITs.

Commentators have argued that this tendency undermines the Host State's goals of stability and sovereignty by scrutinising their emergency measures without giving undue importance to the context within which these developments are ideally to be located.[5] There is also a prevalent view that the regime has become overly pro-investor and biased against developing countries, in part also accentuated by the high costs, high compensation and low transparency currently afforded by the regime.[6] There remain concerns about the possibility of different interpretations of the same key concepts within investment law (eg. Fair and Equitable Treatment) that cause further furore amongst stakeholders. While there have been defenders of the regime that argue in favour of its

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[3] Akshay Kolse-Patil, *Precedents in Investor-State Arbitration 3(1) Indian,* Journal of International Economic Law 37 (2010).

[4] For a breakup of the number of cases and the outcomes of these proceedings, *available at* <https://www.southcentre.int/wp-content/uploads/2015/07/IPB2_Crisis-Emergency-Measures-and-the-Failure-of-the-ISDS-System-The-Case-of-Argentina.pdf> last accessed 10 May 2021.

[5] To understand these arguments and for a subsequent rebuttal of these criticisms, *See* José E. Alvarez and Gustavo Topalian, *The Paradoxical Argentina Cases* 6(3) World Arbitration and Mediation View 491 (2012); *See also,* Benedict Kingsbury and Stephan Schill, I*nvestor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law*, 2 TDM (2011).

[6] Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50 Osgoode Hall Law Journal 211, 251 (2012); Zachary Douglas, The *MFN Clause in Investment Arbitration: Treaty Interpretation off the Rails*, 2 Journal of International Dispute Settlement 97 (2011).

evolution to accommodate such problems, the controversy sparked by ISDS has led to stakeholders demanding a 'reform' of the system in a manner that balances all interests and takes the sensitivity and possible political implications of these proceedings into consideration.

The initial response of States to these issues were multifarious, ranging from individual to regional measures. For instance, a cohort of Latin American countries (Bolivia, Ecuador and Venezuela) withdrew from the ICSID Convention, while countries such as India, Indonesia and South Africa made public announcements about termination of existing BITs in the period ranging from 2012-17. Brazil, United States of America and Australia are a few countries that opted for the development of new model treaties and revisiting existing IIAs. The EU publicly announced its intention to replace arbitration with an Investment Court System (ICS) while numerous countries refused to pay awards issued against them. In order to prevent these responses from threatening the long-term survival of ISDS, it was believed that 'reforms' were the need of the hour.

These measures for 'reform' will be discussed in greater detail throughout this chapter. Although the guide is India-centric, the reforms highlighted are not necessarily of direct relevance to India but have been included because they deal with the larger issue of international legitimacy of investment arbitration.

A. UNCITRAL Working Group III

The aforementioned legitimacy crisis and the reactions by States were undertaken only by select countries and aimed to tackle only a few pressing issues, owing to which they were inadequate in addressing structural concerns and contributed to reducing the popularity of investment arbitration. Thus, there was a pressing need for deliberated and comprehensive attempts towards multilateral reform to reduce individual State measures that may reduce the relevance of investment arbitration. It is with this objective that the United Nations Commission on International Trade

Law (*hereinafter,* UNCITRAL) constituted and entrusted its Working Group III (*hereinafter,* WG III) with the wide agenda to work towards reforming ISDS multilaterally in 2017.[7] The reform process aims to tackle particular procedural concerns with ISDS, such as excessive costs and lengthy proceedings, inconsistent and potentially incorrect jurisprudence contributing to reduced predictability, and a lack of arbitral diversity and independence in adjudication.[8]

WG III divided its areas of work into three areas or "phases" and meets biannually in April and November, respectively in New York and Vienna for discussions.[9] It began work from the 34th session held in Vienna in 2017. In addition to having discussions amongst the Member States, various research organisations and public welfare institutes have been provided with an 'observer status' as non-governmental organisations to attend sessions and provide submissions.[10]

After each session, WG III publishes a report of the proceedings throughout each session providing a brief overview of the discussions, comments and suggestions floated by participants. In revisiting the legitimacy debate, WG III has established two major courses of action through its discussion: one is the (total or partial)

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[7] Esme Shirlow, UNCITRAL Working Group III: An Introduction and Update, *available at* <http://arbitrationblog.kluwerarbitration.com/2020/03/23/uncitral-working-group-iii-an-introduction-and-update/> last accessed May 10 2021.

[8] Marike R. P. Paulsson, UNCITRAL Working Group III: Reforms in the Realm of Investor-State Disputes – UNCITRAL's Proposals for an Appellate Mechanism and its Impact on Duration and Cost, *available at* <http://arbitrationblog.kluwerarbitration.com/2020/03/26/uncitral-working-group-iii-reforms-in-the-realm-of-investor-state-disputes-uncitrals-proposals-for-an-appellate-mechanism-and-its-impact-on-duration-and-cost/> last accessed May 10 2021.

[9] International Institute for Sustainable Development, *available at* <https://www.iisd.org/projects/uncitral-and-reform-investment-dispute-settlement> last accessed May 9 2021.

[10] Investment Treaty News, UNCITRAL receives mandate to work on ISDS reform; Transparency Convention to enter into force on October 18, 2017, *available at* <https://www.iisd.org/itn/2017/09/26/uncitral-receives-mandate-to-work-on-isds-reform-transparency-convention-to-enter-into-force-on-october-18-2017/> last accessed May 9 2021.

replacement of the system; and the second is incremental reforms within the system.[11]

Within its inaugural 34th session, WG III discussed the duration and costs of investment arbitration proceedings, allocating these costs (and apportioning financial responsibility) along with increasing transparency in investment arbitration. Sometime close to the next session of WG III, the Council of the European Union notably submitted a paper highlighting its desire to establish a 'Multilateral Investment Court' to alleviate the impending legitimacy crisis by becoming a substitute to the current system of creating independent arbitral tribunals. The EU further submitted that such a court may have an appellate mechanism and a list of empanelled arbitrators to prevent irregularity and streamline the standard for appeals. [12]

At subsequent sessions, the discussions ranged along considering possible reform options for broader themes and issues such as the establishment of an investment advisory centre and its financing, creation of a code of conduct for adjudicators laying down thresholds for determination of impartiality, development of a unified appellate mechanism for consistency, creating a framework for the enforcement of awards (similar to international commercial arbitration) and possible ways to address issues of third-party funding in ISDS.[13] Additionally, the 39th and 40th session involved discussions on the EU's proposal of a standalone Multilateral

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[11] Marike R. P. Paulsson, UNCITRAL Working Group III: Reforms in the Realm of Investor-State Disputes – UNCITRAL's Proposals for an Appellate Mechanism and its Impact on Duration and Cost, *available at* <http://arbitrationblog.kluwerarbitration.com/2020/03/26/uncitral-working-group-iii-reforms-in-the-realm-of-investor-state-disputes-uncitrals-proposals-for-an-appellate-mechanism-and-its-impact-on-duration-and-cost/> last accessed May 10 2021.

[12] EU's proposal *available at* <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V17/088/32/PDF/V1708832.pdf?OpenElement>.

[13] Esme Shirlow, UNCITRAL Working Group III: An Introduction and Update, *available at* <http://arbitrationblog.kluwerarbitration.com/2020/03/23/uncitral-working-group-iii-an-introduction-and-update/> last accessed May 10 2021.

Investment Court, which seeks to serve as an institutionalised alternative to ISDS clauses in BITs.[14]

Although these sessions were postponed in lieu of the pandemic and subsequent worldwide lockdown, WG III published draft working papers on pertinent issues to provide information to members attending subsequent sessions for a background of proposed reforms. Topics considered included appellate mechanisms (such as the ones proposed by the EU) and conditions for selection and appointment of tribunal members.[15] In the recently concluded 40th session of the WG III, discussions centred around enforcement and the selection of adjudicators in a potential institutionalised mechanism. The 40th session is to be resumed in Vienna in May 2021.

All in all, the mandate of the WG III seems aptly captured within the statement made in its 38th session: "reform efforts should focus on improving the existing regime rather than replacing it".[16]

India is currently not a party to the ICSID Convention. Additionally, it appears from India's recent steps to renegotiate/terminate/amend its existing BITs that it is keen on entering into arrangements that reflect and recognise its sovereignty.[17] Therefore, the impact of these discussions of the WGIII on India cannot directly be ascertained, more specifically since India has attended discussions but has never provided a public stance with

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[14] Christian Leathley, Andrew Cannon & Helin Laufer, 'Update on the future of ISDS: latest Working Group III UNCITRAL discussions', *available at* https://hsfnotes.com/publicinternationallaw/2019/11/29/update-on-the-future-of-isds-latest-working-group-iii-uncitral-discussions/> last accessed May 10, 2021.

[15] *Ibid.*

[16] UNCITRAL WG III 38th session.

[17] *See generally* Abhisar Vidyarthi, Revisiting India's Position to Not Join the ICSID Convention' KLUWER ARBITRATION BLOG (August 2, 2020), *available at* <http://arbitrationblog.kluwerarbitration.com/2020/08/02/revisiting-indias-position-to-not-join-the-icsid-convention/> last accessed June 13 2021.

respect to these measures.[18] Nevertheless, since the discussions are centred around the general structural reform of ISDS, it is likely that they may prove to be an important consideration for India should she reconsider her decision to remain a non-signatory to the ICSID Convention. It may also impact India's future BIT negotiations with other countries.

B. ICSID-UNCITRAL Code of Conduct

In May 2020, ICSID and UNCITRAL's secretariats jointly released the 'Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement' (*hereinafter,* Code).[19] The Code addresses a range of potential ethical issues in investor-State dispute settlement by propagating independence and impartiality amongst adjudicators. This development is to be contextualised in light of wider ISDS reform initiatives, such as ICSID's proposals to amend its rules of procedure for effective adjudication,[20] and the aforementioned work and discussions of WG III to create a code of conduct for impartiality. The Code was drafted after comments were received from the Member States to create a more streamlined mechanism through the prescription of standards of impartiality.

It consists of 12 articles and is based on a comparative review of the standards of conduct set out in investment treaties, arbitration rules applicable to ISDS, and codes of conduct of international courts. Since it applies to 'adjudicators', the scope is broad and encompasses existing and possible future participants including

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[18] *See generally* United Nations Commission on Internationalo Trade Law, Draft report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session, *available at* <https://uncitral.un.org/sites/uncitral.un.org/files/draft_report_of_wg_iii_for_the_website.pdf> last accessed June 13 2021.

[19] ICSID & UNCITRAL Secretariat, Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement, *available at* <https://icsid.worldbank.org/sites/default/files/amendments/Draft_Code_Conduct_Adjudicators_ISDS.pdf> last accessed May 9 2021.

[20] International Centre for Settlement of Investment Disputes, Proposals for Amendment of the ICSID Rules, *available at* <https://icsid.worldbank.org/sites/default/files/WP_4_Vol_1_En.pdf>.

arbitrators, ad hoc committee members, candidates to become adjudicators, appeal judges, and judges in permanent bodies.[21] The Code identifies key ethical and contested issues (double hatting, issue conflict, pre-appointment interviews, threshold of disclosure) and seeks to provide standards through 12 articles and their commentaries.

The Secretariats invited comments to consider underlying proposals,[22] after which a revised 'Version 2' of the Draft Code was released.[23] Substantial changes were made to provisions concerning the availability of arbitrators, issue conflict requirements and potential enforceability of the Code. Nevertheless, it will be interesting to witness the options that are selected by WG III for inclusion in the finalised Code after its discussions.

C. Singapore International Mediation Convention

The Singapore International Convention on Mediation (Convention) entered into force on 12 September 2020. An examination of the *travaux preparatoires* of the Convention reveals an intention[24] to include "commercial" disputes to which even a

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[21] *Ibid.*

[22] For comments submitted on behalf of the Centre for Arbitration and Research, please see <http://iriarb.com/comments-on-daft.pdf>. Our comments were acknowledged and considered within the official 'Comments by Article & Topic' jointly released by the ICSID and UNCITRAL secretariat subsequently, *available at* <https://icsid.worldbank.org/sites/default/files/Code%20of%20Conduct%20-%20Comments%20by%20Article%20-%20Update%2001.14.21.pdf>.

[23] Draft Version 2, UNCITRAL & ICSID Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement, *available at* <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/draft_code_of_conduct_v2.pdf> <last visited May 8 2021>.

[24] Mushegh Manukyan, Singapore Convention Series: A Call for a Broad Interpretation of the Singapore Mediation Convention in the Context of Investor-State Disputes, *available at* http://mediationblog.kluwerarbitration.com/2019/06/10/singapore-convention-series-a-call-for-a-broad-interpretation-of-the-singapore-mediation-convention-in-the-context-of-investor-state-disputes/?_ga=2.155589115.1310292540.1620368252-1919973272.1616052505 last accessed May 8 2021.

State is a party. Importantly, the Convention (much like its counterpart New York Convention) provides for the enforceability of mediated settlements between parties across national borders.[25] Contracting Parties will now have the choice of directly enforcing mediated settlement agreements in states that ratify the Convention, instead of relying on a mediated settlement agreement as a contract to be enforced in a local court.

Since India is a signatory to the Convention,[26] there is a theoretical possibility that after ratification, foreign investors can resort to the mediation of their investor-state disputes, so long as the dispute is "commercial".

However, owing to the stringent requirements of exhaustion of local remedies under the Indian Model BIT,[27] this appears unlikely. Additionally, it appears that India's commercial reservation to the New York Convention reflects India's stance to consider "commercial" and "investment" disputes to be disjunctive – which is why investment arbitration awards are currently unenforceable in the country. Thus, only the enactment of a specific legislation legalising mediation of such disputes or a shift in India's policy stance can likely change this trend.

In order to bridge the gap that exists currently between preference for mediation and arbitration of investor-state disputes (with the former being extremely low), the WG III's Pre-Inter sessional Meeting discussed the possibility of hybrid ISDS mechanisms (such as mandatory pre-arbitral mediation or institutionalised med-arb-med clauses) to do away with these concerns. Additionally, they discussed the possibility of developing

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[25] Article 3(1), United Nations Convention on International Settlement Agreements Resulting from Mediation 2019.

[26] Status of Treaty: United Nations Convention on International Settlement Agreements Resulting from Mediation (2019), *available at* <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en> last accessed May 9 2021.

[27] Article 15, Indian Model BIT (2016).

model mediation-related treaty clauses and capacity building for structural, long-term reform.[28]

D. Human Rights and Investment Arbitration

Consider two small seeds being planted in neighbouring backyards such that they are unintentionally being planted quite close to each other. As time passes by and each neighbour nurtures the seed in his backyard, the seeds grow into strong trees. The growth of these trees inevitably leads to their branches intertangling with each other and more often than not tend to stunt the other's growth. Such is the case with the different fields of international law. For our consideration, we take the two seeds of *'International Investment Law'* and *'Human Rights Law'*. For a considerable time period, both these fields have followed through their individual growth trajectory and have developed quite a considerable amount of jurisprudence. Much like the neighbours, the proponents of these fields of law did not foresee the problems of their convergence and a dispute arises. This conflict gives us the opportunity to analyse how the branches of these trees will have to be shaped so as to make enough space for the growth and seamless convergence of both trees.

The essential issues of such convergence are two-fold. *Firstly*, in analysing how Human Rights have operated as a defence for host-states in the protection of their actions. This aspect implicitly also looks at how human rights been side-lined in the progress of international investment law and how can they be brought again into the picture. And *secondly*, how has the jurisprudence and content of Human Rights Law informed or played its role in the development of International Investment Law.

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[28] Vincent Cheung, Investor-State Mediation: Insight and Inspiration from the First Pre-Intersessional Meeting of UNCITRAL WG III, *available at* <http://arbitrationblog.kluwerarbitration.com/2021/01/18/investor-state-mediation-insight-and-inspiration-from-the-first-virtual-pre-intersessional-meeting-of-uncitral-wgiii/> last accessed May 10 2021.

The development of two fields of law in their *own spheres* creates a lot of issues. Most prominently, it leads to the field developing and building its own set of doctrines and principles without regard to the adjoining fields of law or general principles of international law.[29] This fragmentation of international law leads to regular conflicts and difficulties in the harmonious enforcement of the law while allowing for considerations inherent in the primary field of the law taking precedence over considerations of secondary fields of law. The purported model of the field operating in a 'clinical isolation'[30] fails miserably in light of the multi-layered nature of activities it aims to govern.

With the sophistication of the IIAs regime and the emergence of the Investor-State Dispute Settlement (ISDS) mechanisms, the international investment law is ripe for conflicting with principles of human rights law and their objectives. The discussion below is divided into two parts: firstly discussing the *combative* aspects of the convergence and discussing how Human Rights have been preserved by way of a defence of the Host State's actions; secondly, discussing the *collaborative* aspects of the convergence and discussing how jurisprudence of Human Rights Law has informed the development of International Investment Law.

1. Fruition of Human Rights as a Defence of Host State

With the growth and expansion of fields of international investment law as well as human rights law, their convergence is inevitable and hence efforts of their conciliation are of prime importance. Preliminary efforts since the 1970s in this regard were aimed at curbing the power of the MNCs.[31] However, such efforts for creating a comprehensive treaty only saw some concretisation in 1988 with draft UN Norms being released by a working group and subsequently the 'Guiding principles' which contained a mix of

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[29] ILC at ¶8.

[30] ILC at ¶ 163.

[31] Karl P. Sauvant, The Negotiations of the United Nations Code of Conduct on Transnational Corporations, 16 J. OF WORLD INV. & TRADE 11, 12-13 (2015).

voluntary and mandatory obligations.[32] However, these efforts are seen as a failure of international efforts to counter problems of human rights effectively.[33]

Human Rights and their protection, by all means, is an objective taken quite seriously by a host-state; and hence they are capable of shielding its actions from the scrutiny of arbitral tribunals and its contractual obligations under the IIA. Such usage, therefore, allows human rights to enjoy fruition in the thicket of international investment law. The idea behind the IIA is of a 'grand bargain'.[34] It implies that the states promise to protect investment in exchange for the hope that this will increase investment in the state. This premise leads to various IIAs employing similar terms and clauses, however, they are essentially based on private negotiations between states and therefore are subject to conditions and relations between the concerned states. Generally, the treaties are biased towards the investors and provide four primary protections which are national treatment, most-favoured nation treatment, fair and equitable treatment and prohibitions on expropriation.[35]

A prime example of usage of human rights defence is when Phillip Morris had unsuccessfully initiated arbitration against Uruguay and Australia against the anti-smoking regulations of the countries.[36] These cases have reemphasised the impact that

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[32] U.N. Commission on Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).

[33] *See* Florian Wettstein, Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment, 14 **J.** HUM. RTS. 162, 166 (2015).

[34] Jeswald W. Salacuse & Nicholas P. Sullivan, Do BITs Really Work?: An Evaluation Of Bilateral Investment Treaties And Their Grand Bargain, 46 HARV. INT'L. L. **J.** 67, 77 (2005).

[35] The exact content and nature of these protections is discusses above in the Handbook and they are also discussed in the context of human rights in the second part of this chapter.

[36] Bob Violino, *An Uruguayan Lawsuit With International Implications For Philip Morris,* FORBES (Sep. 22, 2014), *available at* <http://www.forbes.com/sites/greatspeculations/2014/09/22/an-uruguayan-lawsuit-with-internationalimplications for-philip-morris/>.

international investment law can have on public health issues. The argument is that these cases show the convergence of the fields of law and further point how a reconfiguration of the IIAs amongst the contracting states can help inject an appreciation of human rights goals.

The impediment to this exercise is that IIAs are traditionally biased towards the investor but they can be changed to ensure the state has enough regulatory space for legislating on its human rights objectives without upsetting its treaty obligations.

While placing human rights within an established regime of investment law is difficult but if rightly done can catalyse the entire process that is clogged by international politics at the UN. The primary interest under the agreement is the promotion of development in the state, and this development further in itself includes the human rights goals of the states.[37] The arbitral tribunals strike a balance between the investor and the state where the rights of the investor are not absolute in any regard.[38]

The international investment law has protections that are contingent on the legitimacy of the investor's expectations.[39] One of the most triggered protections is the obligation on the state to provide a fair and equitable treatment (FET) to the investor. In such claims, it is contingent on the basis of a special commitment or representation granted to the investor.[40] Further, inherent principles of the law help arbitral tribunals aim at assessing the validity of the state action on a deep analysis of the treaty

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[37] Yannick Radi, Realizing Human Rights in Investment Treaty Arbitration: A Perspective from within the International Investment Law Toolbox, 37 N.C. J. Int'l L. & Com. Reg. 1107 (2011).

[38] Kate Miles, International Investment Law: Origins, Imperialism and Conceptualizing the Environment, 21 COLO. J. INT'L ENVTL. L. & POL'Y 1, 2 (2010).

[39] Stephen Fietta, Expropriation and the "Fair and Equitable" Standard The Developing Role of Investors' "Expectations" in International Investment Arbitration, 23 J. INT'L ARB. 375, 380 (2006).

[40] Bayindir Insaat Turizm Ticaret Ve Sanayi A.S v. Islamic Republic of Pak., ICSID Case No. ARB/03/29, Decision on Jurisdiction, T 240 (Nov. 14, 2005), *available* at <http://italaw.com/documents/Bayandiraward.pdf>.

provisions and other principles.[41] Because these are international instruments they allow for the inclusion of international principles of interpretation which include considerations of human rights through Article 31(3)(c) of the Vienna Convention on Law of Treaties.[42] Such flexibility legitimises the usage of the purpose of upholding human rights as a strong defence for host states. The jurisprudence and the specific facts of the situation are closely looked at by the tribunal in striking a balance and therefore the 'investor's expectations' are trimmed and shaped by the human rights considerations of the state.

The arguments above make a good case for IIAs to be capable of helping enforcement of human rights when they conflict with the actions of investors; however, these arguments are not without opposition. The essential problem that emerges in the human rights discussion in international investment law emerges from a *schizophrenic ethos* of the law. This ethos generally looks at the problem from the investor's point of view and is therefore to a great extent biased.[43] The considerations involved are generally from the side of investors and that is reflected in the drafting of such agreements that essentially declare the rights of the investors.[44] It is generally the case that IIAs have no mention of human rights obligations in them.[45] For instance, no explicit reference to human rights is found in the Model BITs of Germany (2008), France (2006), China (2003), India (2003) the United Kingdom (2005), or the United States (2004).[46]

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[41] Vassilis Tzevelekos, The Use of Article 31(3)(C) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology-Between Evolution and Systemic Integration, 31 MICH. J. INT'L L. 621, *653-54* (2010).

[42] *Ibid.*

[43] ILC at ¶ 21.

[44] Marc Jacob, International Investments Agreements and Human Rights, in I.N.E.F. Research Paper Series: Human Rights, Corporate Responsibilities And Sustainable Development 6 (Mar. 2010).

[45] OECD, 'International Investment Agreements: A Survey of Environmental, Labour and Anti-Corruption Issues' (2008).

[46] For model BITs, see annexes of Dolzer and Schruer, *supra* note 14.

However, it is important to realise that the IIAs also further the state's interests and the interests of their population. This is clearly spelt out in the preamble of the ICSID convention,[47] and this has also been relied upon by arbitral tribunals[48] to show that the purpose of the treaty is to also protect the right of development of the state. However, the lack of their direct reference in the substantive part of the IIA has led to some problems. This lack of reference gives the arbitral tribunal ample amount of discretion on how to treat human rights in the present dispute. Hence, leading to a pool of case law that is inconsistent and further muddled with various considerations. A particular instance are the two cases of *CME and Lauder* arbitrations[49] that were decided completely differently even when the facts of the dispute were essentially the same. This is further demonstrated when we look closely at the ICESCR and the CEDR provisions. In Article 2(1) of the ICESCR, the covenant provides for the progressive realisation of the state in light of resource constraints.[50]

However, the covenant also includes certain immediate obligations such as the adoption of legislative measures and the provision of judicial remedies.[51] This ingrains certain obligations of

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[47] Convention on the Settlement of Investment Disputes between States and Nationals of other States, Int'l Ctr. For Settlement Of Investment Disputes, *available at* <http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR Englishfinal. pdf>.

[48] *Amco Asia Corp. v. Republic of Indon*., ICSID Case No. ARB/81/01, Award on Jurisdiction, 23 (Sept. 24 1985), 1 ICSID Rep. 389 (1993).

[49] *CME Czech Republic B.V. v. Czech Republic*, Ad hoc—UNCITRAL Arbitration Rules, Partial Award of 13 September 2001 and IIC 62 (2003), Final Award of 14 March 2003 and *Lauder v. Czech Republic*, Ad hoc—UNCITRAL Arbitration Rules, Final Award, 3 September 2001.

[50] International Covenant on Economic, Social and Cultural Rights, 19 December 1966, United Nations, Treaty Series, vol. 993, p. 3, *available at* <https://treaties.un.org/doc/Treaties/1976/01/19760103%2009-57%20PM/Ch_IV_03.pdf accessed 10 October 2020>.

[51] Committee on Economic Social and Cultural Rights (CESCR) General Comment No. 3, The nature of States parties obligations (art 2, para 1), 14 December 1990, *available at* <https://www.refworld.org/docid/4538838e10.html> last accessed 10 October 2020.

respecting[52] and *protecting*[53] certain rights which informs the interpretation of certain clauses in the BIT. As mentioned before in this strive to strike a balance, the tribunals promulgate a jurisprudence that has no coherent shape and meaning. For instance, certain tribunals[54] rely on these obligations of the state and affirm the state's powers to regulate while others[55] focus solely on the economic impact on the investment of the regulatory measure. All of this puts the fate of human rights in the hands of uncertain circumstances and contingencies while rendering the force of their character weak. Further, many have argued the use of the principle of *systemic integration* in IIAs[56] however, admittedly the interpretation only finds light in academic writings and not in arbitral awards. The arbitration as a method of dispute resolution is in itself of a private nature and sits in judgement of specific questions posed before it. Hence, it seems to be an unsuitable forum to discuss questions of public relevance such as human rights.

2. Human rights in the Substantive Jurisprudence of International Investment Law

This section discusses the *collaborative* aspects of the convergence of Human Right in the context of investment

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[52] General Comment No. 14 (2000), The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C. 12/2000/ 4, 11 August 2000, ¶ 50, *available at* <https://www.refworld.org/pdfid/4538838d0.pdf> last accessed 10 October 2020.

[53] General Comment No. 15 (2002), The right to water (arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2002/11, 20 January 2003, *available at* <https://www.refworld.org/pdfid/4538838d11.pdf> last accessed 10 October 2020>.

[54] *Methanex v United States*, UNCITRAL Case No. ARB/98/3 (2005), at Part IV, Chapter D, p 7; *Sedco Inc v Iran*, 9 Iran-US Claims Tribunal Reports.

[55] *Metalclad v Mexico*, ICSID Case No. ARB (AF)/97/ 1, Award on the Merits, 16 December 2002; *Compania de Desarrollo de Santa Elena SA v Costa Rica*, ICSID Case No. ARB/ 96/1, Award on the Merits, 17 February 2000, ¶ 72.

[56] Yannick Radi, Realizing Human Rights in Investment Treaty Arbitration: A Perspective from within the International Investment Law Toolbox, 37 N.C. J. Int'l L. & Com. Reg. 1107 (2011).

arbitration. As explained above, the entire exercise of the arbitrators in such disputes revolves around the balancing of competing interests and many times, such an exercise highlights the human dimension of investment law. This human dimension shapes the body of investment law, specifically the protections of FET and indirect expropriation prohibition by the inclusion of human rights considerations *dressed* in the names of 'general' or 'public' interest. One example for such a scenario was the case of *Biwater case*[57] revolving around the water service development projects given to Biwater for management by the govt. of Tanzania. While there were various human rights considerations mentioned in the submissions stage, the awards only refers to such submissions in a single paragraph and categorise them as '*useful'*.[58] The award's reasoning, however, is rooted in the idea of the predominance of public interest, ultimately ruling in favour of the host state. One possible explanation for such a disguise is that arbitrators generally believe that rooting their decisions in their competency in investment law will increase the legitimacy that their actions enjoy. Nevertheless, the absence of direct references to human rights does not imply their complete alienation.

As far as FET goes, it has developed itself into the most frequently triggered protection, hence the overflowing amounts of jurisprudence. One reason for this is its malleable construction in treaty provisions and hence the ever-expanding width of its conceptual reach. Notably, in arbitrator decisions Argentine Investment Disputes, tribunals have applied the criteria of larger notions of equity and fairness in determining the disputes.[59] However, owing to the inherent nature of the FET jurisprudence, it's largely difficult to draw a concrete line of precedent that would

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[57] Biwater Gauff (Tanzania) Limited v United Republic of Tanzania, ICSID Case No ARB/05/22, (Award 24 July 2008). Award available at <http://icsid.worldbank.org/ICSID/FrontServlet>.

[58] *Id* at ¶112.

[59] *See* S.M Perera, 'Equity-Based Decision-Making and the Fair and Equitable Treatment Standard: Lessons from the Argentine Investment Disputes – Part I' (2012) 13 Journal of World Investment & Trade 210.

help define the four corners of the legal provision. Nevertheless, a tribunal's examination is therefore largely rooted in the specific facts of the case, however, the examination is not immune from human rights considerations. In fact, certain notions of human right consideration have crept into FET provisions and established a permanent place for them. For example, the right to justice in the form of protection of the investor's access to justice are nowadays common notions under the FET clause. They find their presence in treaty provisions, for example, the 2004 US Model Treaty, or even directly in landmark arbitral decisions.[60] In essence, this helps investor claim a non-fulfilment of the host state's obligation to establish a legal system for the efficacious exercise of substantive rights ranging from the due procedure being followed to a right to judicial review of government action.[61] Increasingly, tribunals have referred to the Investors' *legitimate expectations* when assessing a breach of FET protection.[62] The concept of *legitimate expectations* finds its place in domestic administrative law and the exercise consists of first determining the legitimacy of the investors' expectation on the basis of the commitment of the host state and further balancing these expectations against the larger public interest.[63] Owing to the inconsistency of arbitration practice across cases, the way arbitrators examine the legitimacy of the investor's expectation differs in relation to the type of claims.

In relation to the protection of indirect expropriation prohibition, tribunals generally take consideration of the wider realm of all relevant circumstances.[64] Such a width of arbitrator discretion led

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[60] *See for eg Waste Management v. Mexico,* ICSID Case No. ARB(AF)/00/3. https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/54/waste-management-v-mexico-ii-.

[61] Rudolf Dolzer & Christoph Schreuer, Principles Of International Investment Law (2nd ed. 2012).

[62] *See* generally Chester Brown, The Protection of Legitimate Expectations as a 'General Principle of Law': Some Preliminary Thoughts, 6 Transnat'l Disp. Mgmt (2009).

[63] *See* Elizabeth Snodgrass, Protecting Investors' Legitimate Expectations: Recognizing and Delimiting a General Principle, 21 ICSID Rev. Foreign Inv. L.J. 1, 46 (2006).

[64] Yannick Radi, Realizing Human Rights in Investment Treaty Arbitration: A Perspective from within the International Investment Law Toolbox, 37 N.C. J. Int'l L. & Com. Reg. 1107 (2011).

to differing practices and opinions in relation to such expectations. Nevertheless, the examinations traces its principles back to the American doctrine of *distinct investment-backed expectations* as elaborated in relation to the Fifth Amendment constitutional Right to Property.[65] As a result, the core of such expectations is tested on the cornerstone of the state of the regulatory landscape of the industry at the time of the investor's entry.[66] Hence, in a highly regulated sector, it is considered as giving notice to the investor that a future state measure may, hypothetically, affect his property and hence, the investor is said to not have a distinct investment-backed expectation. The nature of the industry is however not the only factor considered. There is a balancing of the economic impact; the character; and the distinct investment-backed expectation of the state measure.[67] Beyond this, examining the notions of non-discrimination and fairness will also inform the investor's expectations.[68]

In essence, the tests of legitimate expectations in FET and distinct investment-backed expectation in indirect expropriation prohibition both have an underlying aim of *fairness.* In that their conceptual and technical make-up borrows from the jurisprudence revolving around human rights. In this scenario, the legality of state measures is tested with whether such measures are reasonable when seen vis-à-vis the investor 'expectations. Such exercises often provide the tribunals with ample width of adjudicatory discretion to take into consideration various factors of the case that may not have been possible if the examination was strictly done within the contours of traditional investment law. Hence, the usage and reference to the doctrine of human rights law and their adoption in

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[65] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[66] *See* J.A. Kupiec, Returning to Principles of "Fairness and Justice": The Role ofInvestment-Backed Expectations in Total Regulatory Taking Claims,43 B. C. L. Rev. 865, 878 (2008).

[67] *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[68] *See* J.D. Bremer & R.S. Radford, The (Less?) Murky Doctrine of Investment-Backed Expectations after Palazzolo, and the Lower Courts' Disturbing Insistence on Wallowing in the Pre-Palazzolo Muck, 34 Sw. U. L. Rev. 351, 359 (2005).

investment arbitration is a key aspect showcasing the collaborative results of the convergence of the two fields of law.

3. Future Outlook

The analysis above has analysed the conflict between International Investment and Human Rights and how far a role has international arbitration has played in shaping this conflict. The primary argument is that while there are rays of hope of realising Human Rights through arbitration, the subjectivity, uncertainty and inconsistency in the jurisprudence, to a great extent, threatens the very reason of human right law in the international context. What is therefore needed are methods and procedures in place to reduce this inconsistency and ingrain a certain ethic in the international investment law that not only respects but promotes human rights. Only by carving out a cohabiting space of operation for both of these fields, can the true benefits they offer can be realised to the optimum potential.

In this vein, in recent times, there have been some new Model BITs[69] by countries that do showcase a cognisance of the human rights aspect to the investment. These model BITs are an evidence of a point of inflexion in the life of IIAs which impose obligations on the investors directly. However, these agreements do not provide the state with the right to bring a claim against the investor to impose these obligations except in the form of a counterclaim that presupposes an existing claim from the investor against the state. Nevertheless, it is a step towards a more robust enforcement of human rights. However, the problems regarding the incoherent and fragmented jurisprudence produced by arbitral tribunals are still prevalent.

Further, there have also been inclinations to move away from the traditional mechanism of investment arbitration. The proposed Transatlantic Trade and Investment Partnership (TTIP)[70] is held back

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[69] *Ibid.*

[70] EU Commission, *Draft text on investment in TTIP*, available at <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf>

from signing primarily due to the dispute mechanism choice. The EU has proposed an Investment Court System (ICS) as a method of dispute resolution in lieu of ad hoc arbitration. The EU in general is working towards the creation of a multilateral ICS to solve investment disputes.[71] In a concluded treaty with Canada, the EU has already implemented the ICS however, the treaty is yet to come into force.[72] This ICS creates a permanent tribunal with persons who occupy a judicial office or are 'jurists of recognised competence'.[73] This permanent nature of the court helps ingrain a certain consistency in the jurisprudence of IIAs. However, some have argued that this is not enough, and the law requires the establishment of a World Investment Organisation.[74]

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[71] EU Commission, A future multilateral investment court', Press Release, 13 December 2016, *available at* <http://europa.eu/rapid/press-release_MEMO-16-4350_en.htm>.

[72] EU Commission, CETA, *available at* <https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>.

[73] Article 9 of TTIP, *supra* note 40.

[74] Nicolette Butler and Surya Subedi, The Future of International Investment Regulation: Towards a World Investment Organisation?, 64 Neth Int Law Rev 43 (2017).

CHAPTER 7
CAREERS IN INVESTMENT ARBITRATION

As is evident through earlier chapters, investment arbitration is neither expressly recognised nor institutionalised in India. Thus, there is not much publicly available information about the qualifications required and jobs associated with investment arbitration domestically. Considering the relatively under explored state of investment arbitration in India, and the possibility of increased investment arbitration cases in the future, a career in this field automatically becomes niche and maybe extremely high-paying and in-demand in the post-COVID economy. This chapter attempts to broadly collate and explain plausible career options in investment arbitration.

In sum, the career opportunities available in international arbitration are that of an arbitrator, an acting counsel for parties, a tribunal secretary, an independent expert or a researcher. Career opportunities in the fields of international commercial arbitration and international investment arbitration do not vary as far as the designations are concerned, but they may in terms of the specialisation (meaning, the subjects studied or the degree applied for) that can be undertaken.[1]

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[1] Rishabh Aggarwal, *Career opportunities of an arbitrato*r, Legal Bites (December 18, 2019), *available at* <https://www.legalbites.in/career-opportunities-of-an-arbitrator/> last accessed June 25, 2020.

A. Arbitrators

The first job that may come to mind when considering arbitration generally is to become an arbitrator. The arbitrator is the neutral adjudicator of the dispute. Arbitrators are appointed by parties to the dispute, following the much-known principle of party autonomy. It is not incorrect to state that arbitration is only as good as the arbitrator.[2]

1. Selection of Arbitrators

Most tribunals consist of three arbitrators, with one being the 'President' or 'Presiding Arbitrator'. Article 37 of the ICSID Convention states that a tribunal may consist of a sole arbitrator or an uneven number of arbitrators appointed in accordance with the agreement of the parties.[3] In the absence of agreement between parties, the tribunal will consist of three arbitrators: one arbitrator appointed by each party, and the third presiding arbitrator appointed by agreement of the parties. In the event that there is no agreement between the parties or their arbitrators, the arbitral institution itself appoints the third arbitrator.[4] In the case of the appointment of a sole arbitrator, institutional rules will have to be followed. For instance, UNCITRAL Arbitration Rules require the Secretary-General to prepare a list of suitable candidates and return to the parties for their rankings. Depending upon the responses received from both sides, the Secretary-General is to make a decision and appoint the arbitrator.[5]

There are two common ways in which arbitrators are appointed by parties:

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[2] Yves Derains and Laurent Levy (eds.), Is Arbitration Only as Good as the Arbitrator? Status, Powers and Role of the Arbitrator (Paris: ICC Institute of World Business Law, 2012).

[3] Article 37 of the ICSID Convention.

[4] *See,* Article 38 of the ICSID Convention.

[5] *See, for example,* Article 6(3) of the UNCITRAL Arbitration Rules 1976, Article 8(2) of the UNCITRAL Arbitration Rules 2010, Articles 8(2) of the PCA Arbitration Rules 2012.

*Self-inspection***:** This method involves parties, assisted by their counsel, identifying and approaching arbitrators they find equipped to handle the dispute. Generally, parties rely on their counsel, who are aware of suitable candidates through experience or by having knowledge of previously published investment awards and decisions posted on websites like the ICSID and ITA Law.[6]

*ICSID Panel of Arbitrators***:** If parties are unable to locate arbitrators through a simple 'google search' or reference to previous decisions, and belong to an ICSID Member State, they can refer to the ICSID Panel of Arbitrators to identify potential suitable candidates. The ICSID Convention entitles each Member State to designate up to four persons to the Panel of Arbitrators.[7]

According to Article 14 of the ICSID Convention, which lists down the qualifications of these arbitrators, candidates designated by the Member States must:

> be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.[8]

However, this does not mean that these criteria are binding on the Member States and they have the discretion to choose candidates. The designees on the Panels can serve for a maximum term of 6 years. These criteria provide a useful overview of the qualifications that arbitrators should ideally have. Additional criteria may depend upon whether there are any further requirements

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[6] Albert Jan van den Berg, 'Qualified Investment Arbitrators? A Comment on Arbitrators in Investment Arbitrations', *available at* <http://www.hvdb.com/wp-content/uploads/Qualified-Investment-Arbitrators.pdf> last accessed 18 May 2021.

[7] *See*, Articles 12-16, ICSID Convention.

[8] Article 14, ICSID Convention.

within the treaty itself.[9] It is also useful to refer to Article 1124(4) of the NAFTA's Chapter Eleven Rules on the appointment of arbitrators, which provides that the contracting parties are to establish a roster of presiding arbitrators, which need to meet "the qualifications of the Convention and rules referred to in Article 1120 and experienced in international law and investment matters".[10]

Apart from the aforementioned criteria, parties will often have various practical considerations. Generally, anyone having commercial knowledge relevant to the dispute between parties can become an arbitrator, because the process often involves private contractual considerations.

Owing to the legal aspects that are also involved in the dispute, arbitrators are most likely to come from the legal profession, but that may not always be the case as it is possible for parties to choose a candidate that may be from a technical profession related to the subject in dispute.

The attributes of the arbitrator, in most cases, depends on concerns such as relevant work experience, case management skills and an ability to understand and contextualise the nuances of the dispute. Thus, it is often stated that knowledge about the law of contract/tort/evidence and appropriate procedural law is important for arbitrators. The specialised knowledge that will be useful is that of public international law, international investment law, and some experience of domestic or international commercial arbitration.

Another important consideration for parties is the independence and impartiality of the proposed candidate. This requires arbitrators to possess 'absence from external control' and 'absence of bias or

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[9] Permanent Court of Arbitration, *Mechanisms for selection and appointment of presiding arbitrators or sole arbitrators*, *available at* <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/pca_mechanisms_for_selection_and_appointment.pdf> last accessed 18 May 2021.

[10] Article 1124, North American Free Trade Agreement.

predisposition towards a party'.[11] This is extremely important because parties will be allowed to challenge, or disqualify an appointed arbitrator if found partial or dependent on either party in any manner.[12] Albeit not a 'qualification', it is an important requirement for parties and hence requires arbitrators to provide relevant disclosures in a bid to maintain the sanctity of the process. The latest development in this respect the ICSID and UNCITRAL's Code of Conduct (*see* Chapter 7), which creates streamlined criteria for ensuring independence and impartiality of arbitrators.

Miscellaneous factors that impact the parties' decision to appoint an arbitrator would include their language proficiency, current availability to devote time to hearings/award and their related previous track record, good health, etc. This may translate to seniority of age, as that is often perceived as being indicative of experience and credibility. Some other relevant factors may be the geographic and gender diversity of the appointed candidates, especially for parties belonging to or identifying themselves with lesser-represented communities.[13] In majority instances, parties appoint professors of law, former international or domestic judges, or retiring/practising lawyers with expertise in international arbitration to become arbitrators.[14] Additionally, parties prefer public international lawyers because lawyers with a background in international commercial arbitration are more likely to pay attention

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[11] Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic, ICSID Case No. ARB/03/ 17, Decision on Proposal for Disqualification (Oct. 22, 2007), ¶¶ 28–30; Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Venezuela, ICSID Case No. ARB/12/21, Reasoned Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (Mar. 28, 2016), ¶ 28; İçkale İnşaat Limited Şirketi v. Turkmenistan, ISCID Case No. ARB/10/24, Decision on Claimant's Proposal to Disqualify Professor Phillipe Sands (July 11, 2014), ¶ 116.

[12] Article 57, ICSID Convention.

[13] Permanent Court of Arbitration, *Mechanisms for selection and appointment of presiding arbitrators or sole arbitrators*, *available at* <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/pca_mechanisms_for_selection_and_appointment.pdf> last accessed 18 May 2021.

[14] Albert Jan van den Berg, *Qualified Investment Arbitrators? A Comment on Arbitrators in Investment Arbitrations*, *available at* <http://www.hvdb.com/wp-content/uploads/Qualified-Investment-Arbitrators.pdf> last accessed 20 May 2021.

to the private function of investment treaty arbitration: being the settlement of the dispute between the parties as opposed to the public interest/public policy aspects of investment arbitration.

In the Indian context, the A&C Act also provides complete autonomy to parties to decide upon the qualifications of potential arbitrators. However, it is important to contextualise this in light of the fact that the Act has currently not been expanded to investment arbitration

Nevertheless, some Indian commercial arbitration institutions have their own list of arbitrators that can be chosen by parties that wish to utilise the services of the said institution.[15] On the other hand, MCIA does not have a published list of arbitrators but runs training programmes along with the Chartered Institution of Arbitrators to get them certified and qualified.[16] Recently, the MCIA announced a rolling 'Call for Arbitrators' to be empanelled with them, and publicised the selection criteria, which included the following:

- The number of cases the applicant has acted as an arbitrator
- The number of years at the bar (if an advocate)
- Area of expertise
- Accreditation from bodies of repute, such as the CIArb
- Jurisdiction/location.[17]

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[15] *See, for example,* Nani Palkhivala Arbitration Centre: <http://www.nparbitration.com/Arbitration/PanelOfArbitrators>*;* Indian Council for Arbitration: <http://www.icaindia.co.in/htm/arbitrators.htm>

last accessed 20 June 2021.

[16] Sonam Saigal, *Arbitration centre in city pushes to be among global best*, The Hindu, *available at* <https://www.thehindu.com/news/cities/mumbai/arbitration-centre-in-city-pushes-to-be-among-global-best/article28816946.ece> last accessed May 19, 2021

[17] Ashutosh Ray, *Interviews with our Editors: Mapping India's Institutional Arbitration Journey with Mumbai Centre for International Arbitration (MCIA)*, Klwuer Arbitration Blog, *available at* <http://arbitrationblog.kluwerarbitration.com/2021/02/19/interviews-with-our-editors-mapping-indias-institutional-arbitration-journey-with-mumbai-centre-for-international-arbitration-mcia/> last accessed 17 May 2021.

This reveals that the underlying considerations for the appointment of an arbitrator, and basic qualifications that an arbitrator can consider having, are similar. Over time, many become full-time arbitrators who only spend their time adjudicating disputes.

Some training programmes that can be undertaken by budding arbitrator candidates include:

- CIArb Training Program: https://www.ciarb.org/training/
- FINRA (industry-specific training): https://www.finra.org/arbitration-mediation/arbitrator-training
- HKIAC Arbitrator Training Series: https://www.hkiac.org/events/hkiac-arbitrator-training-series
- IIAM Training Programs (India specific, thus no mention of investment arbitration): https://www.arbitrationindia.com/training.html

B. Counsel

Becoming a counsel in an investment arbitration proceeding is also another lucrative career choice associated with investment arbitration. The two best ways to become a counsel in the Indian context includes:

1. Joining the Dispute Resolution Practice of a Law Firm

There are few firms in India that are engaged to represent clients in bilateral investment treaty proceedings.[18] Currently, many Indian law firms do not appear to have specific 'investment arbitration' departments but deal with such cases through their dispute resolution/international arbitration teams.

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[18] *See, Legal 500 Dispute Resolution in Asia-Pacific*, *available at* <https://www.legal500.com/c/india/dispute-resolution/> last accessed 25 June 2020.

Joining these teams as an associate, and then moving up the ranks can help secure a long-term career in investment arbitration.[19] These firms also provide associates opportunities to network and represent the firm in cross-border conferences, which further assist budding lawyers to gain a global perspective.

With respect to qualifications, these firms hire students either through pre-placement offers (PPOs) or on Day Zero Placements conducted at law schools. People often undertake specialised LLMs in international arbitration after a few years of work experience. Indian and foreign firms alike have an additional lateral hiring program, which you can apply to after a few years of practice.

2. Joining the Chamber

There are a few senior advocates in India that are dual-qualified and/or partake in bilateral treaty proceedings.[20] Joining their chambers as a 'junior' and assisting in these proceedings (often high-profile) can be particularly beneficial for practical experience. There is no need of specific qualifications apart from a law degree for this.

C. Tribunal Secretary

Becoming a tribunal secretary is another potential career opportunity in international investment arbitration. Most investment treaties do not expressly provide for the appointment of tribunal secretaries, but their appointment has recently become popular with institutional practice, complexities of incoming disputes, and

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[19] *See generally*, Anubhab Sarkar, Co-founder, Triumvir Law on starting his own law firm and a successful career in International arbitration, SuperLawyer (June 22, 2018), *available at* <https://superlawyer.in/anubhab-sarkar-co-founder-triumvir-law-starting-law-firm-successful-career-international-arbitration/> last accessed 25 June 2020.

[20] Some noteworthy senior advocates include Gourab Banerji, Nakul Dewan, Harish Salve QC, Darius Khambata,

reference to international commercial arbitration. As a result, it has been codified by several arbitral institutions, while others are silent on the subject.[21] The job of a secretary is to assist the tribunal with administrative tasks like coordination of logistics and secretarial services.[22] They ensure the smooth functioning of the tribunal. Their jobs are being given more and more importance even in investment arbitration, with many scholars advocating for them to be involved in substantive research assistance to the tribunal as well.[23] That being said, tribunal secretaries cannot currently undertake any fundamental decision-making functions that are generally discharged by arbitrators.[24] In this regard, there is an important debate about whether essential functions pertaining to the adjudication of dispute can be 'delegated' to the Tribunal Secretary and whether their actions, meant to be 'assistive', end up being influential.[25]

A 'Tribunal Secretary Training Programme' is conducted by arbitral institutions like HKIAC to provide accreditation and training to budding tribunal secretaries. These are two-day programs, with some tailored courses that are also available for arbitrators, and

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[21] Abhisar Vidyarthi, *The Problem of Assistance in Investment Arbitration?*, *available at* <http://arbitrationblog.kluwerarbitration.com/2019/04/17/the-problem-of-assistance-in-investment-arbitration/> last accessed 17 May 2021.

[22] Michael Polkinghorne and Charles B Rosenberg, *The Role of the Tribunal Secretary in International Arbitration: A Call for a Uniform Standard*, International Bar Association, *available at* <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=987d1cfc-3bc2-48d3-959e-e18d7935f542> last accessed 25 June 2020.

[23] Claudia Wilmoth-Smith, *Tribunal secretaries and decision-making in arbitration,* Lexology, *available at* <https://www.lexology.com/library/detail.aspx?g=4c359f86-f8f2-4e71-a0c8-515f13e6227f > last accessed 25 June 2020.

[24] *The LCIA updates its guidance on the use of Tribunal Secretaries*, HSF Arbitration Notes, *available at* <https://hsfnotes.com/arbitration/2017/11/09/the-lcia-updates-its-guidance-on-the-use-of-tribunal-secretaries/ > last accessed 25 June 2020.

[25] These developments are beyond the scope of this chapter. For a general overview, see, Peter Hirst, *When Does a Tribunal Secretary Overstep the Mark?*, *available at* <http://arbitrationblog.kluwerarbitration.com/2017/04/18/when-does-a-tribunal-secretary-overstep-the-mark/> last accessed May 16, 2021; Constantine Partasides, *The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration* 18(2) Arbitration International (2002).

provide excellent networking opportunities and feature panel discussions and training sessions taken by renowned practitioners. Owing to the absence of legislative recognition to tribunal secretaries in Indian law, there is no clarity on their fees and role within the arbitral process, much less on their role in investment arbitration cases.[26]

Some training programmes that give accreditation for tribunal secretaries include:

- HKIAC Tribunal Secretary Accreditation Programme: https://hkiac.eventbank.com/event/tribunal-secretary-training-programme-12904/ (week-long, intensive court teaching administration of proceedings and drafting of documents)
- KFCRI Tribunal Secretary Course: https://kfcri.org/tribunal-secretary.php (India-specific: entails accreditation, membership and qualification)
- CIArb Tribunal Secretaries Course: https://www.lcia.org/News/ciarb-tribunal-secretaries-course-and-swedish-arbitration-days.aspx

Alternatively, one can pursue arbitrator qualifications in the jurisdiction of choice to be equipped with relevant skills to be a tribunal secretary. Networking through online training courses and webinars is also useful and assists candidates with future appointments after accreditation.[27]

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[26] Badrinath Srinivasan, *Tribunal Secretaries & the Proposed Amendments to the Indian Arbitration Law*, Practical Academic (October 1, 2018), *available at* <http://practicalacademic.blogspot.com/2018/10/tribunal-secretaries-proposed.html > last accessed 25 June 2020.

[27] *See,* Suvethan G.S. and Anubhav Garg, Being a Tribunal Secretary in India: Career, Job profile & skills, *available at,* <https://www.youtube.com/watch?v=5DOulriSOgY> last accessed 20 June 2021.

D. Independent Expert/Amicus Curiae

At the outset, it is to be noted that there is a slight difference between the two terms. An expert witness is called in to provide an independent, technical opinion on the nuances of the dispute. They are generally called to provide an opinion on the legal or technical/scientific intricacies and valuation/quantum of damages in the dispute.[28] There are two main types of expert witnesses in international arbitration: party-appointed expert and tribunal-appointed expert if permitted by the BIT.[29] Additionally, Article 43 of the ICSID Convention read with Rule 35 of the ICSID Arbitration Rules permits tribunals to examine experts before itself.

Independent experts are often called upon by the Tribunal (independent experts) or parties (expert witnesses) to assist in the determination of a certain issue, generally related to technicalities of the dispute and/or valuation.[30] They are called upon to provide reports (common in the case of valuation experts) or express their opinions on core topics of the dispute (mercantile law, trade terms, etc.) in hearings. Their opinions are extremely relevant in contemporary arbitrations. Importantly, the qualifications of such experts can be wide-ranging, which is what helps them provide a holistic perspective. Since the criteria is the possession of "technical expertise", this is not restricted to law and can be from fields like engineering, economics, or even accounting.[31] However, the focus in international arbitration is currently to ensure that they

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[28] Alexey Drobyshev, *Expert Witness*, *available at* <https://jusmundi.com/en/document/wiki en-expert-witness> last accessed 18 May 2021.

[29] Xu Zhihe, Li Tingwei, *The Use of Expert Witness in Arbitration from the Perspective of SHIAC, available at* <http://arbitrationblog.kluwerarbitration.com/2020/04/29/the-use-of-expert-witness-in-arbitration-from-the-perspective-of-shiac/> last accessed 19 May 2021.

[30] Richard Boulton QC, Joe Skilton and Amit Arora, *The Function and Role of Damages Experts*, *available at* <https://globalarbitrationreview.com/chapter/1151334/the-function-and-role-of-damages-experts> last accessed 25 June 25 2020.

[31] Michael E. Schneider, Technical experts in international arbitration, introductory comments to the materials from arbitration practice, available at <https://www.lalive.law/wp-content/uploads/2019/10/mes_technical_experts.pdf> last accessed 25 June 2020.

are independent and impartial under all circumstances, and do not direct the parties to act in a particular way.[32]

In international investment arbitration, an amicus curiae is a third party that intervenes in the proceedings with the view of assisting the arbitral tribunal regarding some of the aspects of a case, either through testimony, participation in proceedings or through the presentation of written submissions.[33] At the outset, it is to be noted that this cannot be termed a 'career' as such because it is generally a position of the responsibility conferred on one who has gained reasonable expertise, repute and credibility in the field as a practitioner. However, it is an important opportunity that arises out of engagement with investment arbitration and thus finds mention within this chapter.

Generally, amici include public interest or non-governmental organisations raising public welfare concerns through participation in the arbitral proceedings. However, practitioners in the field also become amici. Often, over time, a large number of practitioners gain repute and are called to become amicus curiae to ongoing investment arbitration proceedings. Tribunals worldwide have not been averse to the idea of amici submissions. Generally, these are invited in proceedings that have a public interest/imminent public health concern that may be alleviated/increased by the verdict of the tribunal and is not necessarily the immediate concern of the disputing parties. Cases wherein amici participation has been invited previously includes *Methanex v. United States, Glamis Gold, Ltd. v. The United States of America, Suez, Vivendi v. Argentina,*

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[32] Jack Marshall, Use of Experts in Arbitration: An Arbitrator's Perspective, ADR Institute of Canada, *available at* <https://adric.ca/adr-perspectives/use-of-experts-in-arbitration-an-arbitrators-perspective/ > last accessed 25 June 2020.

[33] Pablo Jaroslavksy and Juan Pablo Blasco, *Amici Curiae in Investment Arbitration*, *available at* <https://jusmundi.com/en/document/wiki/en-amici-curiae-in-investment-arbitration#:~:text=The%20term%20amicus%20curiae%20(plural,view%20of%20assisting%20the%20arbitral> last accessed 19 May 2021.

Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania.[34] In the Indian context specifically, Sumeet Kachwaha (Kachwaha and Partners) was appointed as amicus curiae in the *Vodafone* case. His interpretation of the BIT has also been referred to by the Delhi High Court in their judgment.

E. Researcher/Policy Expert

International investment arbitration traces its roots in the principles and ideology prescribed within international investment law, which forms a part of international economic law (international investment law, international trade law, legal issues pertaining to economic integration and international taxation law). For someone that is more inclined towards the academic or policy effect of such disputes, there are a plethora of research options available as well.

Currently, there is a dire need for in-depth policy research into understanding how to strike the intricate balance between the increasing use of nationalist policies within countries worldwide and the inherent necessity of foreign investment for socio-economic development.

Apart from this, there is also a need for rigorous academic research into India's investment protection practices (notable examples include India's decision to stay away from signing the ICSID Convention, termination of BITs), their future impact, and other relevant policy issues at both the domestic and international level (for example, the effects of discussions at the UNCITRAL's Working Group III on ISDS). In addition, there is also a need for cutting-edge policy research in this domain to assist the government with subsequent BITs, negotiations and legislative measures in this regard.

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[34] Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation* 29 Berkeley Journal of International Law 200 (2011).

1. Research Centres

In India, a prominent organisation dealing with policy research is the Centre for Trade and Investment Law (CTIL), established by the Ministry of Commerce in 2016.[35] They are mainly involved in providing a thorough analysis of legal issues and possible implications of measures (mainly through discussion papers) pertaining to international trade and investment law to the Government of India and other governmental agencies, for the purpose of enhancing India's participation in international trade and investment negotiations and dispute settlement. Additionally, the Centre hosts numerous training sessions, capacity building programmes and webinars to foster interest in the field and sponsors initiatives at the law school level such as the GNLU International Moot Court Competition, RGNUL-CTIL Multidisciplinary Congress on Foreign Direct Investment in South Asian Region and the RMLNLU-CTIL Conference on International Trade Law. While their website does not mention any specific qualifications as a prerequisite to joining, an interest in trade and/or investment laws demonstrated on the CV will be an added boost. They also provide internship opportunities to law students.

Many law universities in India have also established Arbitration Centres to promote research and training in arbitration. Centre for Arbitration and Research of Maharashtra National Law University Mumbai is one of such centres.

2. Ministry of External Affairs, Government of India

Lastly, the Indian Ministry of External Affairs has a 'Legal and Treaties' Division that advises the government of India on important matters concerning international law. They hire 'Legal Officers' or 'Consultants', for whom the responsibilities, application procedure and remuneration are generally explained in greater depth in each

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[35] Centre for Trade and Investment Law, *available at* <https://ctil.org.in/ > last accessed 25 June 2020.

opening. This profile involves extensive research into the diplomatic and policy consequences of initiatives, however the same is not restricted to international investment law and can be considered for a career in international law generally. As a necessary prerequisite, Legal Officers would require:

- Postgraduate experience in international law, international organisations or international relations
- 10 years of specified relevant work experience
- Preferably, knowledge of foreign languages.

On the other hand, Consultants may have a post-graduation in any law and are expected to be less than 40 years of age on the date of application.[36]

F. Building an Interest in Investment Arbitration during Law School

In order to understand investment arbitration at the law school level, students can consciously undertake numerous activities to develop their liking or discover an inclination towards international arbitration.

Some ways in which we believe the same is possible have been listed below:

Join youth chapters initiated by Indian and international arbitral institutions such as the 'Young MCIA', 'Young ICCA', 'Young LCIA', 'Young CIArb' etc. They frequently organise a large number of seminars and online lectures for members of these chapters on various contemporary topics in both international investment and commercial arbitration. This, coupled with some background

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[36] For responsibilities and qualifications required, *please see,* <https://www.mea.gov.in/Images/amb1/Advt_final.pdf> (The Applicant must be an Indian national, less than 40 years of age, and posses an LLM/postgraduate degree in law. Responsibilities include development of a registry, collation of information and other relevant tasks).

reading on the basic principles of investment arbitration, can assist in garnering preliminary interest in the field.

Reading authorities in the field of international and domestic principles pertaining to investment protection law can also be particularly useful. Some international authorities in the field of investment arbitration include Christoph Schreur, Rudolph Dolzer, Gabrielle Kaufmann-Kohler, Brigitte Stern, Jeswald Salacuse, Jan Paulsson, and Zachary Douglas. Other international experts writing regularly in the field are *inter alia* Kabir Duggal, Julien Chaisse, Loukas Mistelis, Jarrod Hepburn, Gus Van Harten and Stephan Schill. Authors that write about investment arbitration in the Indian context include Aniruddha Rajput, Kshama Loya, Bhavana Sunder, Moazzam Khan, Shreyas Jayasimha and Vyapak Desai. For a more theoretical and nuanced understanding of the basis of investment arbitration in India, a reading of articles and books written by Prabhash Ranjan, James Nedumpara and Pushkar Anand is particularly useful. Reports by the Centre for Trade and Investment Law are also extremely useful.

(This list is in no way exhaustive or in any particular order and is intended to purely be recommendatory.)

Participating in moot courts having investment arbitration as their subject matter can also help strengthen aptitude in the subject or help in understanding the foundations of international investment law. The Frankfurt Investment Arbitration Moot Court Competition and Foreign Direct Investment Moot Court are two such prestigious international moots. Apart from assisting one to obtain a deeper insight into the field, they can also provide excellent networking opportunities, especially at the international rounds.

Writing blog posts and research papers can help interested students and researchers to demonstrate a continuous and genuine interest in the field of investment arbitration. Since there is not much literature specific to India, writing on such topics would more often than not be contemporary and attract academic

interest. This can be supplemented by doing research internships/ assistantships with qualified arbitrators, lecturers and arbitration practitioners to understand the contemporary relevance of one's research interests as well and obtain a deeper understanding of the nuances and practicalities of the profession. Such internships are particularly attractive on a CV.

By now, since someone would most likely have a strong 'arbitration CV' or a considerable amount of knowledge in investment arbitration, applying to arbitration firms/dispute resolution departments in renowned Indian firms can help students obtain a practical overview of the process and decide if they really wish to continue in the field. Currently, there are no firms in India that list investment arbitration as a specific practice area. Thus, a student interning in such firms must map such cases the firm is dealing with during their internship and show interest to work on related assignments. Applying to Chambers of practising advocates having arbitration matters is also a probable and equally enriching experience.

Lastly, one can apply for an LL.M. in International Arbitration/ International Investment Arbitration/International Economic Law, depending on the nature of work they wish to undertake subsequently. This is particularly beneficial to those who wish to work at foreign arbitration firms or wish to undertake academic writing/research in the field. It may also provide a boost to applicants looking to practice in India, particularly after a few years of work experience, by providing a comparative experience. It is widely recommended that a specialised LLM in arbitration should be sought after a few years of relevant work experience has been obtained.

About the book

The handbook on Investment Arbitration in India has been prepared by the team at the Centre for Arbitration and Research of Maharashtra National Law University Mumbai to create a reliable and accessible resource for the students, lawyers and practitioners. The handbook discusses the history, nature and fundamental concepts of investment arbitration. It also examines the investment arbitration cases involving India as a party, how investment arbitration awards are enforced in India and the recent debates and trends for the reforms in the investor-state dispute mechanisms. The handbook charts out various career options in this field.

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