**ARBITRATION IN INTERNATIONAL INVESTMENT DISPUTES –**

**BILATERAL INVESTMENT TREATIES**

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**BILATERAL INVESTMENT TREATIES (BITS)**

Bilateral Investment Treaties (BITs) are agreements between two countries/sovereigns aimed at reciprocal protection of interest of the investors against discriminatory treatment as well as arbitrary and unreasonable regulatory actions by the host state. A BIT is essentially an International treaty which creates a stable legal regime by which foreign investors can espouse claims within the framework of International law. Such agreements increase the comfort level and boost the confidence of the investors by assuring a minimum standard of treatment and non-discrimination in all matters while providing for an independent forum for dispute settlement by arbitration. In turn, BITs help project India as an attractive Foreign Direct Investment (FDI) destination as well as protect outbound Indian FDI.

The period between 1990 and 2010 witnessed a surge of BITs between developed and developing nations. Since then, there has been an exponential growth in their numbers. India signed its first Bilateral Investment Promotion and Protection Agreement (BIPAs) with the United Kingdom in 1994 and until 2015, India concluded about 83 Investment treaties, some of which have now been terminated. These earlier BIPAs were based on the model text of 1993 (revised in 2003).

Considerable socio-economic changes have taken place since 1993 when the model text of BIT was first approved. The nature of Government regulation concerning Foreign investment has evolved. A wide variety of laws now regulate investments both at the Central and the State levels. During the last few years, significant changes have occurred globally regarding BITs, in general, and Investor-State dispute resolution mechanism in particular, leading to review of BITs in various parts of the world. It is pertinent to note that a number of other countries have also attempted to reform their policy on BITs. USA reviewed and notified a new model BIT in 2012. Indonesia announced its first intention to terminate and re-negotiate more than 60 BITs. In addition to the above, it was felt imperative that while it is important to have investment treaties to provide a normative institutional framework to Foreign investors to enforce their rights and claims, it is also important to ensure that BITs do not impede on the policy space or impede the government’s power to regulate foreign investment for legitimate public purposes.

The aforesaid developments lead to the exercise of understanding and identifying the legal and policy changes emanating from existing BIT’s. as a part of this exercise, the government completed the review of the earlier model BIT and came out with a revised model BIT version on 16th December 2015.the government terminated its BIT’s with most of the countries and is currently re-negotiating them based on the new model BIT text.

**INTERNATIONAL INVESTMENT LAW AND ARBITRATION:**

International Investment law is one of the most dynamic fields of International law, made up of a vast network of bilateral treaties and free trade agreements amongst various nations. This article attempts to explore through the history and development of the International Investment laws, its current prevalent practices and the future prospects that it holds. The investment treaties follow a sufficiently uniform structure, lay down relatively uniform principles for the treatment of foreign investors, and build on a common dispute settlement mechanism, which arguably results in a regime that is largely comparable to a multilateral system. Investment treaties follow a sufficiently uniform structure, lay down relatively uniform principles for the treatment of foreign investors, and build on a common dispute settlement mechanism, which arguably results in a regime that is largely comparable to a multilateral system

The modern system of Foreign Investment, the BITs in particular have been majorly influenced by the economic liberalism ideologies of eighteenth century. These ideas formed the basis of modern market economies promote policies like freedom of movement of capital, respect for private property rights and contracts.[[1]](#footnote-1) A large chunk of the popularity that these investment treaties are credited to the perception that these treaties contribute to the Foreign Direct Investment in a country’s economy. Modern BITs adopt the ideals of FDI which promote and protect private capital flows.

It is said that positive law must be policy neutral; treaty terms must be immune to manipulation by any external forces. However, in modern international investment law, different persons influence the system and the rules of investment known as the Protagonists. These protagonists include states negotiating the treaties, companies and individuals who are the principal beneficiaries of investment treaties, Non-Governmental Organisations (NGOs), Inter-governmental agencies, arbitrators and experts who apply or interpret the law.

Over the years, many have attempted to categorise the principles of Investment treaties into one paradigm; like Benedict Kingsbury and Stephan Schill consider it as a part of global administrative law whereas Zachary Douglas calls the system as a hybrid of many paradigms rather than endorsing any one for it.

**GENESIS OF THE LAW:**

The origins of the laws on protection of foreign investment and rights of foreign investors date back to 19th and early 20th century when foreign nationals, also referred to as aliens had little or no redress. In that periods, there was less protection available to these foreign investors and the local investors were given priority. The European powers and the US used what was called the “gunboat diplomacy” where home states rely on economic sanction threats to protect their national interests. Apart from this, United States of America began to develop legal doctrines giving rise to the laws of protection of aliens by developing the idea of a minimum standard of protection that must be given to foreign investors. This standard mandated that the disputes from the host states and the aliens must be settled in accordance with International law by extraterritorial neutral tribunals similar to those that apply in cases of protection of nationals abroad and that expropriation must be accompanied by just and adequate compensation. On the other side, however, developing nations like the Latin American states followed the doctrine called as the *Calvo doctrine* where the host state government is not required to grant any treatment more favourable than the treatment that local investors are meted with. Despite all these doctrines for the protection of aliens, have had very little impact in improving the situation of a foreign investor as the right to recourse before a competent tribunal was not available as such individuals or companies had no standing under International law to sue sovereign state before any International authority. However, as the time passed by, states used the method of diplomatic protection or espousal effectively elevating the claims of their investor to the International level as the home state’s claim. Although a precondition to this was the need for exhaustion of local remedies by litigating in local courts. The only exception to this was the futile exception where this exhaustion of local remedies would be futile, the same is not a necessary prerequisite.

With an increase in cross-border economic activity, the focus of the International communities shifted to developing peaceful means of dispute settlement including international arbitration which was used to resolve disputes between states. The Hague peace conference of 1899 and 1907 led to the creation of Permanent Court of Arbitration (PCA) that was later largely applied to Investor-state disputes. In addition to this, the primal wave of ad hoc international arbitral disputes was initiated based on arbitration clauses in major contracts. The Permanent Court of International Justice was the next development in this course in the context of creation of League of Nations post World War I. Prominent cases the *Mavrommatis Palestine Concession[[2]](#footnote-2)* although the case was submitted the espousal. The International Court of Justice (ICJ) is the successor to the former PCIJ post the Second World War. Post-World War II, with the Introduction of International Trade Organisation (ITO), discussions began regarding the redressal mechanism, which led to the creation of many such avenues for dispute settlement the OPIC (Overseas Private Investment Corporation) in 1969 by the US, Multilateral Investment Guarantee Agency (MIGA) under the auspices of the World Bank which finally led to the institution of The International Centre for Settlement of Investment Disputes (ICSID) in 1966 which was a reflection of the Hague Charter of 1948. The ICSID, a reflection of the International Community’s intention to protect foreign investment that is essential for development of the country, is one of the most approach forums which administers investment arbitration disputes.

Parallel to these developments, transnational corporations devised contractual techniques to protect their investments against various risks, gradually becoming the main method of protecting foreign investors prior to the advent of investment treaty-based protections by applying contractual sanctity as the basic norm of investment treaties.

In the advent of the New International Economic Order (NIEO), developing countries demanded a relaxed norm for compensation in the case of expropriation rather than the erstwhile method of application of the Hull’s formula. The issue was move dot the UNGA (UN General Assembly) where owing to the fact that a majority of its members were developing nations a series of resolutions were passed that the capital imported shall be governed by the legislation of the country in force and international law and that expropriations shall only be based on public utility overriding the private interests of individuals. In 1974, it also released a charter of Economic Rights and Duties of states which allowed preferential treatment for local capital over foreign capital stating that “ Every state has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.”[[3]](#footnote-3) In a way, the adoption of CERDS marked the tipping point of the NIEO.[[4]](#footnote-4)

Prior to the formulation of BITs, the US treaties were known as FCNs (friendship, Commerce and Navigation) prior to WWII which became an important tool in the implementation of US economic policy regarding its investments in foreign nations. These treaties included many standards that today’s modern BITs entail such as “equitable treatment”, equivalent to fair and equitable treatment in modern BITs, “most constant protection and security, a precursor to Full protection and security (FPS) and prohibition of “unreasonable and discriminatory treatment”, a precursor to arbitrary and discriminatory measures. Even compensation for expropriation was an essential of FCNs. These treaties however had no investor-state dispute resolution mechanisms. Although US signed a number of FCNs with a majority of the developed nations, it failed to do so with many developing nations owing to complexity of the same. The European counterpart of the same resulted in the formation

With the culmination of the cold war in 1989, many former soviet states resorted to capitalist prescriptions like BITs which were an instrument to attract foreign investment into the stagnated economies of the states. The conclusion of BITs has coincided with the privatisation of state-owned assets and enterprises across various economies worldwide.

**MODERN ARBITRATION:**

The very first modern arbitration under the ICSID Convention was the AAPL v. Sri Lanka*[[5]](#footnote-5)* in 1989. Within three of the ratification of NAFTA, several arbitrations started off against parties of NAFTA in 1994. This prospect of independent arbitrators presiding over and reviewing state measures and potentially contradicting US precedents became troublesome for the US judiciary. In 1999, the second NAFTA case against the US[[6]](#footnote-6) was brought and due to the gravity of the issue and public health concerns, public hearings were held contradictory to the UNICTRAL rules of confidentiality of the proceedings. The Argentine Republic in 2001 experienced one of its worst economic crises in decades followed by a torrent of cases by foreign investors who invested in Argentina during its privatisation. Inspite of this fate of Argentina, many nations continued to adopt investment treaties with US updating its BIT model in 2004 and subsequently in 2012.

There were many attempts at regional levels to create a comprehensive investment regime post NAFTA like the DR-CAFTA, ASEAN Comprehensive Investment Agreement, Trans-Pacific Partnership (TPP), Energy Charter Treaty (ECT) to name a few. In addition to this, foreign investors have also begun bringing claims under older agreements like the Islamic Conference Investment Agreement and the European Development Fund all of which where the investors have directly sued the host states of an investment.

While a majority of BITs concluded during this period had covered issues pertaining only to the post-establishment phase of investment, a majority of the free trade agreements (FTAs) included non-discriminatory treatment of establishment by foreign investors as a means to facilitate market access in their investment. The 1990s also witnessed renegotiation of the first-generation BITs to further enhance investment protection by including protection elements which were missing earlier. 1990 also witnessed the first award in a treaty-based case which was followed by a number of other cases during 1990s which increased significantly in the 2000s.

 As most observers acknowledge, states never win; they only do not lose. Only investors win awards of damages; states may at best, receive an award of costs. So, despite the oft-heard refrain that “states ‘win’ more often than they lose,” it is the investors that have actually won most of the time: 72 per cent of the decisions on jurisdiction, and 60 per cent of cases decided on the merits.

**CONTENT OF MODERN BITS:**

BITs are generally similar in their organisation and content addressing four substantive issues:

1. Methods for investment dispute resolution,

The most revolutionary feature of a modern BIT is the direct right of foreign investors to initiate commercial international arbitration against host states with the consent of the host states, making it a standing offer on behalf of the host state or unilateral consent for arbitration thereby creating a binding arbitration agreement between the two. This feature has sparked a significant debate amongst nations as it touches upon a fundamental question of whether individuals are subjects of International law. This waivable claim belongs to the foreign investor only and not the other way around.

1. Conditions for market access or admission of foreign investors in host states

Under International law, a state is free to prevent access or entry to its market or territory alike. However, market access is one of the key objectives of trading systems allowing investors to sell their products or services in other territories which create competition for the local economic players. Admission refers to the right of entry of investment into the host state market.[[7]](#footnote-7) The right of establishment however refers to the right to set up and carry out business. A majority of investment treaties have no preferential treatment with regards to pre establishment phases of a foreign investment resulting in no protection of the rights regarding same. On the contrary, the investment treaties of the US, CETA (Canada-EU Trade Agreement) grant National Treatment and MFN to foreign investors effectively undertaking to not discriminate on the basis of nationality of a foreign investor intending to make an investment in its territory. That being said, market access rights are rarely litigated or disputed through arbitration.

1. Standard of treatment of foreign investors in host states

Modern BITs are known for the substantive protection given to foreign investors and a summary of the same have been entailed below.

NT and MFN- prohibition of discrimination against foreign due to their nationality. NT requires foreign investors to be treated similarly to local investors and MFN requires that a foreign investor is treated no less favourably than a third country. Attempts to apply MFN to procedural rights enables expansion of the scope of dispute resolution provisions of a treaty as in the case of Maffezini v. Spain*[[8]](#footnote-8)* . however, UNICTRAL and ICSID remain receptive of the expansion of substantive standard to include MFN clause.

Fair and Equitable treatment, FPS and Minimum Standard- FET is one of the most invoked standards of treatment in arbitration disputes in the recent years requiring state to act consistently and reasonably, abstain from arbitrariness and ensuring due process. It also includes protection of the legitimate expectations of the investors which remains high debated and litigated.

Other provisions include the Umbrella clause, present in many investment treaties which require state to honour even the contractual obligations which ahs been subject to a significant amount of litigation.

1. Compensation for expropriation.

Expropriation is the process of taking of private-owned property by a state. This is an inherent right of the state under the International law provided it is for a public purpose in accordance with due process with compensation. Such compensation must approximate the market value of the property or in easy terms, must be just and adequate. Expropriation may be direct through outright physical seizure of the property or through more subtle measures like regulation affecting its economic value. While it is easy to identify direct expropriation, the same cannot be said in case of indirect expropriation. While countries like US have identified criteria to determine whether expropriation ahs taken place, a majority of the BITs do not specifically address these issues.

**KEY ASPECTS OF INVESTOR-STATE ARBITRATION PROCESS:**

Investor-state arbitration is by and large similar to International commercial arbitration. Investment treaty disputes commonly involve major investment projects and sensitive issues which require a measured approach to litigation.

1. Arbitral Rules and Organisational process

The Arbitral process is governed by the rules of arbitration decided upon in a BIT. The most common rules used in *ad hoc* arbitration are that of ICSID and the UNICTRAL Arbitration rules. While ICSID Convention is a self-contained system where all aspects of a dispute including annulment of awards are dealt in pursuance with the ICSID rules, under the UNICTRAL Arbitration Rules, recourse to local courts is necessary to annul an award under the 1958 New York Convention.

1. Selection and challenge of arbitrators

Arbitral panels for investor-state disputes consist of three-member panel where each party appoints one and the two together appoint a presiding arbitrator as opposed to a sole arbitrator. A fundamental tenet of arbitration is that an arbitrator must be independent and impartial. To ensure the impartiality of the arbitrators, they are required to disclose material facts which will reasonably lead to disqualification. Parties usually look for arbitrators who predisposition in terms of legal or cultural background coincides with that of the selecting party. Another ground for disqualification is the repeated appointment of an arbitrator by a party.[[9]](#footnote-9) Other disqualifications include pre-conceived position outside the context of a case, conflict of interest, improper conduct during proceedings and double hatting.[[10]](#footnote-10)

1. Interpretation of laws and governing precedents

Some investment treaties have a choice of laws and provisions to be consulted requiring application of the laws. In the absence of such provisions, article 24 of the ICSID Convention provides for the application of law agreed upon by the parties and in the absence of the same, law of the contracting state party to the dispute. In a UNICTRAL case, article 33 provides that in absence of consensus by parties regarding application of laws, the tribunal can apply the law of the state it deems appropriate. Arbitral tribunals rely on the Vienna Convention on the Law of Treaties (VCLT) article 31 and 32 and cannons of treaty such as *lex specialis* to interpret BITs.

1. Jurisdiction

The main basis for establishment of jurisdiction is consent of the parties. For a foreign investor to bring a claim, he must prove that (1) the investor has an investment within the BIT definitions and (2) the investor is a qualified investor under the definition of the treaty and if the claim is filed before ICSID, requirements of the ICSID Convention must also be satisfied. Forum shopping and treaty shopping by the foreign investors lead to dismissal of the cases.[[11]](#footnote-11)

1. Notion of Investment

Investment under modern BITs is very broad including ownership of shares, tangible and intangible property rights amongst similar others. ICSID Convention, however, does not define investment. Essential ingredients of an investment followed by tribunals[[12]](#footnote-12) include:

1. Contribution of money or assets
2. Duration over which the project was to be implemented
3. Participation of risk in the transaction and
4. Contribution to the economy of the host state.
5. Legality of Investments

Some investment treaties require that the treaty made is in consonance with the relevant domestic laws. Relying on such clauses, arbitral tribunals have dismissed cases where the investors appeared to have circumvented the local laws.[[13]](#footnote-13) Even in cases where the treaty is silent on the issue of legality, cases are dismissed when the foreign investors resort to illegal activities.[[14]](#footnote-14)

1. State defences

Defenses raised by the host state are derived from the Articles on State Responsibility of the International Law Commission’s “circumstances precluding wrongfulness” which include force major, distress and necessity. State’s responsibility might also be limited in case of war, civil strife and other similar matters. Although arbitration rules allow counterclaims as long as the same is within the scope of parties’ consent to arbitration, there is limited opportunity to bring counterclaims. Until recent judgements like[[15]](#footnote-15), no arbitral tribunal had asserted jurisdiction over counterclaims. This is one of the main criticisms of the ISDS system.

1. Compensation, Damages and Valuation

Measurement of compensation in cases of expropriation generally requires payment of fair market value (FMV) calculated immediately before expropriation. With respect to other violations of the treaty, determination of amount of compensation is derived from the principles of reparation of the Customary International Law.

1. Annulment and Enforcement

Once an arbitral award is passed, the losing party always has the option of seeking for an overturn of the same. The grounds for challenging the award are limited under both ICSID Convention and New York Convention focussing primarily on procedural aspects rather than the merits of the case. It is therefore of the view that annulments mechanisms of investment treaty arbitral awards are not synonymous to appeals. However, in exceptional case, annulment of an award can also be done on the grounds of manifest errors of law.

**INVESTOR-STATE DISPUTE SETTLEMENT (ISDS):**

The Investor-State Dispute Settlement (ISDS) is a treaty based dispute resolution mechanism as a part of many International Investment Agreements, most commonly Bilateral Investment Treaty (BITs) which acts as a standing offer on part of the host state to recourse to arbitration in a situation where any Foreign Investor alleges to breach of the substantive obligations under

the BIT[[16]](#footnote-16) for monetary compensation. It is and instrument of Public International Law and a redressal mechanism that allows an investor of a state party to bring a claim through arbitration against the host state of such investment if that state has allegedly breached a standard in the agreement. It was envisaged as a way to protect investor from arbitrary state abuse. It is also intended to settle the disputes between the states and the foreign investors through arbitration rather than approaching public courts. ISDS provisions are intended to avoid state-to-state conflict, protect citizens abroad, and signal to potential investors that the rule of law will be respected. ISDS elevates the foreign investors to the status of subjects of International law for the purpose of protecting the rights that have been conferred upon them by the International Investment agreements between states. Arguably, the most important procedural protection of an ISDS agreement is the right to have disputes resolved in a neutral forum, before impartial adjudicators and in accordance with transparent rules.

Without ISDS provisions, to enforce its rights, an investor would normally need to seek the intervention of the government of its home state. Obstacles include an absence of protections under the local law, domestic sovereign or crown immunity rules and/or a lack of judicial independence. The ISDS system provides for only foreign investor to initiate a claim against host state but not the other way around.

**HOW DOES THE ISDS SYSTEM WORK?**

Generally, the tribunal is constituted of three arbitrators as opposed to a sole arbitrator. Each party to the dispute i.e., the foreign investor and the host state appoint one arbitrator each and they in turn appoint an umpire to the arbitration hearings. These hearings are conducted in an International Arbitral Tribunal as there is no International Investment court or a global treaty on investment. An ISDS agreement will entail the rules that will apply to the proceedings or permit the foreign investors to elect between certain rules which the host state has consented to in advance. The seat of the arbitration may be defined within the ISDS agreement and in the absence of the same, it is determined by the tribunal, once constituted, in accordance with the applicable rules. The seat of the arbitration is essential as it establishes the supporting legal framework for the arbitration, including how and when the courts of the seat may intervene and the grounds for challenging any arbitral award. [[17]](#footnote-17)

**CRITICISM TO ISDS:**

Originally modelled on the system of ad hoc confidential commercial arbitration between private parties, today, the ISDS system suffers from a legitimacy crisis. The current mechanism exposes host States to additional legal and financial risks which are often not foreseen while entering into IIAs and also grants foreign investors more rights when it comes to dispute settlement than the local investors and also the host states and consequentially creates a risk of a “regulatory chill” on legitimate government policymaking. It also leads to an inconsistent arbitral award and is insufficient in terms of ensuring transparency, selecting independent arbitrators, and guaranteeing due process.

1. The ISDS aims on providing monetary compensation to a breach to BIT which results in the diversion of taxpayer’s money foreign investors which has created an adverse reaction against International Investment law.
2. The provisions of BITs have been interpreted differently by different tribunals which has resulted in ambiguity with regards to the clauses of a BIT. This ambiguity is credited mostly to the textual indeterminacy of BITs.[[18]](#footnote-18)

**BACKLASH TOWARDS INVESTMENT TREATIES:**

The standard of investment protection has been widely incorporated and accepted into BITs and similar investment agreements which have been complemented by Investor-state arbitration being the preferential method of dispute resolution. Nonetheless, this system has often been criticised for its lack of legitimacy as an inherent system that favours the foreign investors. This has led to critics arguing against this model and in favour of model similar to the WTO Dispute Settlement Body (DSB).

**INDIA’S NEW MODEL INVESTMENT TREATY:**

India has established one of the largest BIT network amongst all developing countries after concluding its first Bilateral investment treaty with the UK in 1994, which were originally based on a 1993 model developed from a 1967 OECD draft convention. India payed less attention to these treaties until it was held liable by an arbitral tribunal for breaching the Australia-India BIT which woke up to India the importance of its BIT network. As a consequence, India halted all further BIT negotiations in 2013 and proceeded to review its 2003 model treaty thus producing a new model in March 2015.

Now the question that is to be pondered upon is why states create such treaties. It is further essential to analyse the extent to which India’s BIT model fulfils the very basic purposes of a model investment treaty.

There are a good number of novel provisions in the model through which India tries to adopt a deliberate new path, in an effort to shape the global investment treaty regime. The first purpose that the model serves is that it serves as the ground for negotiations on newly made investment treaties. In multiple areas, the model also departs consciously from well-known clauses of a typical investment treaty. For example, one of the major criticisms of investment treaties has been that of their asymmetrical nature: imposing obligations on states and granting rights to investors but not the reverse and this criticism has been remedied in the Draft model as it includes extensive provisions on investor obligations relating to anti-corruption, transparency, taxation, labour law etc. The model also contains various other provisions that allow issues relevant to counterclaims to be raised. For instance, though not explicitly, implicitly the model gives tribunals the power to condemn investors for causing environmental harm despite the absence of legal duty to behave responsibly. Unlike other treaties, it explicitly requires investments to comply with domestic law throughout their operations.

But, although India has forged new paths in developing a novel model investment treaty, there is a presence of some amount of textual silences and drafting ambiguities a closer analysis of which reveals that the drafting and the intentions behind it are somewhat confused.

The aforesaid problem can be seen in Article 5 of the model which excludes a condition as important as non-discriminatory expropriation out of the conditions for lawfulness. This condition is seldom excluded from Investment treaties, particularly since the condition forms part of customary international law (CIL) on expropriation and this results in restricting the model’s scope for expropriation claims, compared to other typical BITs and CIL. The next issue that is seen to have risen in the model treaty comes into view on closer analysis of the definition of investor and investment wherein the model’s shift to an enterprise-based definition has left the question of minority shareholder investors unclear. While other treaties are seen to protect all kinds of indirect and minority shareholders, which is not present in India’s model treaty perhaps shows its intention to exclude such claimants. This failure of the model to clarify the position of minority shareholders is unfortunate, particularly since foreign investors in India cannot hold majority stakes in local enterprises in many sectors.

When it comes to the aspect of exhaustion of local remedies, the Indian Model imposes a requirement to pursue local remedies for “at least a period of 5 years” before commencing international arbitration which is not the same as the obligation under CIL which dictates full exhaustion of local remedies. In addition to this, it also has the “futility” exception which excuses pursuance of local remedies if it is not able to provide any relief. This exception mirrors the equivalent futility exception to the customary ELR requirement. The interpretation of the Model suggests that it seeks to offer domestic courts the opportunity to resolve the dispute by delivering a first-instance judgement with the possibility of an appeal of a decision for which the current 5-year specified time period seems sufficient.

 The model further lays down the rule that an investor must first submit its claim before the relevant domestic courts or administrative bodies of the host state but fails to clarify the nature of the administrative bodies to which the claims must be submitted and India’s model treaty seems to have an expanded view of administrative bodies.

The Model is also observed to have created interpretive challenges where it speaks about dismissal of frivolous claims. Earlier, investor-claimants have been observed to oppose the tribunal’s jurisdiction to conduct and expedited review on the grounds that the claims for which an award in favour of the claimant cannot be made are frivolous claims while on the other hand. The tribunals have rejected such arguments and have interpreted objections to have a broader scope including legally unsuitable claims too. Article 21 of the Model treaty fails to differentiate between the 2 and uses them interchangeably which doesn’t clarify the extent to which objections can be raised as the ambit of a provision is determined by its title.

Furthermore, there are some provisions of the Model Treaty that appear to do nothing at all and are simply redundant when seen in light of India’s existing customary and treaty obligations. When a closer glimpse is taken into articles 23.3 and 13.5 of the treaty, what can be perceived is that tribunals are bound by domestic court decisions on domestic law matters. But there may arise situations in which the investor might allege that host state courts are not to be trusted. Under the executive’s influence, local courts might end up issuing a self-serving ruling. If any such ruling turns out to be problematic, and binds the tribunals, the security of international oversight in a neutral forum provided to the investor by the Model is largely lost. An ideal position to take in such a situation which is also acknowledged by various international courts would be that of giving utmost regard to domestic court rulings but departing from them when needed in exceptional circumstances. Article 13.5 can also be called simply redundant as it unnecessarily replicates article 15.1 and 26.3 which already confirm that tribunals cannot make any principal findings on domestic law questions but are restricted to determining whether the treaty itself has been breached.

Article 34.2 talks about treaty conflicts, that is the Model’s relation with other treaties and puts forward that any conflicting treaty should prevail over the model. This doesn’t cause any interpretive difficulties, but it adds nothing to the process or outcome of interpretation that would be followed in any case under CIL rules as the Vienna Convention on the Law of Treaties (VCLT) is used to resolve treaty-based conflicts and its provisions reflect CIL.

Article 23.2 confirms the general position that under international law, the party making an allegation bears the burden of proving that allegation and requires the investor to prove jurisdiction, breach, loss and causation. It further requires the investor to prove the very existence of an obligation under Chapter 2 of this Treaty, the obligations claimed to be breached must be in force and binding on the host state. However, proof of the existing obligations already forms part of proving jurisdiction since the tribunal will not have jurisdiction if the underlying investment treaty is not in force, thus making article 23.2(b) also redundant.

 This presence of multiple redundant provisions in the Model, serves more to confuse he reader than to clarify the parties’ respective burdens of proof in investor-state arbitration.

But, one of the main concerns raised in the Model Treaty of 2015 would be that of denying available remedies to Indian investors abroad by limiting the forum for dispute resolution. India has made provisions for conducting arbitration proceedings under the UNCITRAL model but for an arbitration to proceed under the ICSID convention, the investor- claimant should be a party to the convention which India is not yet thus having no effect until India accedes to the convention. Regardless of India consenting to proceed with arbitration under the ICSID convention, it cannot do so as it is not a party to it hence bringing neither immediate benefits, nor additional remedies to India investors abroad.

**COMMERCIAL ARBITRATION AND INDIA:**

There are a total of 30 commercial arbitration disputes with India as a party either as a respondent host state or an Indian Investment company as the foreign investor in any other country on the terms of IIAs or BITs. 24 disputes involved India as a host and 6 were initiated by Indian Investors in other nations. The very first dispute against India was Betchel v. India based on the India-Mauritius BIT (2008) which Sancheti v. Germany was amicably settled amongst the parties. Whereas the first dispute with India as a petitioner was (Sancheti is an Indian Investment company) based on Germany-India BIT (1995) which was amicably settled.

First International Arbitration regarding International Investment Treaties decided against India was White Industries v India. On 28 September 1989, White entered into a contract with Coal India (a Government of India Public Sector Undertaking) which is governed by Indian law and contained an arbitration clause requiring disputes to be settled as per the ICC Arbitration Rules for the supply of equipment and development of a coal mine in India. Disputes and differences arose between the parties and the same were referred to arbitration in London resulting in an award dated 27 May 2002 in White’s favour.

The Vodafone case: - The central issue in Vodafone’s acquisition of Hutchinson Telecom was that the deal was affected through financial transactions between foreign entities, though what was ultimately transferred was ownership of Indian assets. Vodafone International Holdings initiated an International Commercial Arbitration against the Republic of India on 17 April 2014 under the India – Netherlands Bilateral Investment Protection Agreement (“BIPA”) and subsequently under the India – U.K. BIPA on the same grounds. The latter arbitration was contended to amount to an abuse of process by India before the Court, seeking an AAI against the such arbitration proceedings following which the court granted an interim stay restraining Vodafone U.K. from proceeding with the arbitration which was rejected by Delhi High court.

The hearings of the same have begun in February 2019.

**ISDS AND INDIAN MODEL BIT:**

Due to the backlash faced by BITs due to the exposure to ISDS claims is evident in state practice, which has been classified into two categories: one where the states have completely denounced the ISDS and another where the states have diluted the system in order to minimise the possibility of BIT claims be brought against such states. While countries like Bolivia, Ecuador and Venezuela fall under the first category, India and Latin American countries fall under the second category.

The 2016 Indian Model BIT is a result of this backlash and change in approach by the state towards ISDS mainly due to the case of White Industries v. India. [[19]](#footnote-19)Recourse of foreign investors to International arbitration is heavily qualified due to three reasons in India:

1. *Jurisdictional Qualification:* The Indian Model BIT limits the scope of ISDS to disputes solely arising out of an alleged breach of an obligation of the host state under chapter II of the BIT and not under any other chapter. A foreign investor can make a claim against a host state only for the violation of “treatment of investments” like national treatment, expropriation, FPS (Full protection and security), MTPs (Monetary Transfer Provisions) and compensation for losses and not disputes arising out of any other provision of the BIT.

The Indian Model BIT does not contain an Umbrella clause that elevates a contractual breach to the breach of BIT obligations by requiring the host state to observe not just treaty but “any other obligations” that it owes to the foreign investors. This is an attempt to limit arbitral discretion and to bring clarity with regards to the rights of both the foreign investors and the host states. In addition to these limits, the Indian Model BIT also imposes jurisdictional restriction on the ISDS tribunal: firstly, that the tribunal will have no jurisdiction to review the decision of a domestic courts on its merits and secondly that an ISDS tribunal does not have jurisdiction over interstate dispute settlements.

1. *Exhaustion of Local Remedies:* the rule of “exhaustion of local remedies” to approach an arbitral tribunal is a long-standing customary International law.[[20]](#footnote-20) A critical qualification to India’s consent to ISDS is that the foreign investors must first exhaust all local remedies for a period of at least five years before commencing international arbitration.[[21]](#footnote-21) An exception to this requirement is that if the investor can demonstrate that there are no available domestic legal remedies that are capable of reasonably providing any relief in respect to the measure, the five-year time period will not be applicable and the foreign investor can opt for arbitration. This is known as the futility exception. The intention behind this to plug attempts made by the investors to circumscribe the mandatory requirements and to reduce the arbitrary discretion which may be exercised in this regard.
2. *Additional Qualifications:* after exhausting the local remedies for five years with no satisfactory result, arbitral procedures may be initiated by transmission of a notice of dispute to the host state which will be accompanied by another six months with attempts to resolve the issue through negotiation or consultation. In a case of no amicable settlement to the dispute, the investor can submit a claim to arbitration. Further conditions to submit this claim are:
3. not more than six years should have elapsed from the date of knowledge of the measure in question
4. Not more than 12 months should have elapsed from the conclusion of domestic proceedings
5. Minimum 90 days’ notice has to be given to the host state before submitting the claim to arbitration
6. The investor must waive the “right to initiate or continue any proceedings” under the domestic laws of the host state.

The qualifications on ISDS that the 2016 Model BIT provides makes it extremely difficult, if not impossible for any foreign investor to make effective use of the said remedy under ISDS owing to the serious backlog of cases in almost all domestic courts throughout India which would inevitably delay the already lengthy and tedious approach. This very rigid limitation period is making the ISDS mechanism more favourable to host State than to the foreign investor in India, defeating its very purpose to provide easy and fast redressal mechanism to the foreign investors under a bilateral investment treaty.

**FUTURE PROSPECTS**

After a series of upcoming criticisms related to investor-state arbitrations, multiple number of states have been re-assessing the costs and benefits of this method of dispute settlement. An absence of stare decisis as well as a lack of impartial arbitrators has led to distrust in Investor-State Dispute Settlement and further to a number of states eliminating ISDS from their investment agreements, while the others are trying to make substantial revisions to their investment framework. With respect to this, Europe’s EU Commission has vocally put forward a public proposal for the establishment of a Multilateral Permanent Investment Court in July 2015 which was adopted a few months later in the EU Parliament. The goal of this proposal was to create a standing investment court for each investment treaty that it concludes. This was official presented to the US as part of their ongoing negotiations of the Transatlantic Trade and Investment Partnership (“TTIP”) and had the US adopted this proposal, it would have resulted in the formation of the ‘Tribunal for First Instance’ and an ‘Appeal Tribunal’. These tribunals would have jurisdiction to hear appeals based on legal errors, factual errors or any other challenges brought under article 52 of the ICSID Convention, which provides the grounds for annulment of an award, thus the final award would then be enforced under the former or the New York Convention. Several model treaties have provided for appeal mechanisms to review awards through further negotiations. This European proposal thus is a response with rigorous standards to the point of contention with ISDS. The independence of judges is secured through this proposal as well, neither would they be allowed to act as counsel in any investment case while their tenure lasts nor would they be affiliated with any government thus preventing any conflict of interests. It further provides for discretionary grounds of disclosure and obliges judges to reveal any circumstances that might create an appearance of bias in the proceeding.

While this system seems like an enhanced solution, it also poses a number of important legal and political issues. There is no mechanism specified in the proposal for 28 European States to agree upon 5 EU judges for inclusion in the roster as every state may wanted to be represented. The fact that judges will be entirely elected and then re-elected by states, creates an appearance of bias towards them. This further mean a 6-year term with a possible 6-year renewal of term thus indirectly reverting back to the ‘party appointing arbitrator’ system of the ISDS. Expertise in the international investment law is also made desirable in the selection of jurists as it complements international investment arbitration. International investment law in itself is a young field of international law which strengthens the stance that it is difficult to eliminate the issue of inconsistent rulings in ISDS with the creation of a court system. The consistency promised by the court is difficult to achieve due to the presence of over 3000 investment treaties with different investment standards all over.

But what can be agreed upon is that the establishment of the first standing investment court will guide the development of any future courts.

**CONCLUSION**

Due to the rapid increase in contracting of investment treaties amongst states, the International community has entered into an era of reorientation of International Investment law. The boundaries and the standard principles of the same have seen a drastic change trying to equip itself with the outcomes of the BITs and other investment treaties. Together, with the reorientation of ISDS, participation of mega blocs in trade like CETA, TPP, TTIP and TISA has become the most preferred method for the facilitation of foreign investment as these mega blocs allow countries to engage in new markets and expand their trade regime. Over the years, the dispute resolution mechanism has seen a drastic change from no redress to an entire mechanism for disputes solely to be raised by foreign investors with unilateral consent. This system still needs to undergo furthermore changes to achieve the equality and justice it aims to achieve in order to have peaceful investment treaties amongst nations worldwide.

Conclusively, what can be drawn from the analysis of India’s model BIT is that the model’s use will only hamper rather than facilitate negotiations if the meaning and intention of the provisions is not easily discernible. Such unclear drafting and apparently redundant clauses are unlikely to provide any assistance to a tribunal and it must thus be questioned whether the model can achieve any of its goals. But India remains committed to the regime, and the model itself represents an ambitious attempt to re-think the prevailing understanding of what an investment treaty looks like.

**LIST OF ABBREVIATIONS:**

|  |  |  |
| --- | --- | --- |
|  | BIPA | Bilateral Investment Promotion and Protection Agreement |
| 2. | BIT | Bilateral Investment Treaties |
| 3. | CERDS | Charter of Economic Rights and Duties of States |
| 4. | DSB | WTO Dispute Settlement Body |
| 5. | FCN | Friendship, Commerce and Navigation |
| 6. | FDI | Foreign Direct Investment |
| 7. | FET | Fair and Equitable Treatment |
| 8. | FPS | Full Protection and Security |
| 9. | ICJ | International Court of Justice |
| 10. | ICSID | International Centre for Settlement of Investment Disputes |
| 11. | ISDS | Investor-State Dispute Settlement |
| 12. | ITO | International Trade Organisation |
| 13. | MFN | Most Favoured Nation |
| 14. | MIGA | Multilateral Investment Guarantee Agency |
| 15. | NAFTA | North American Free Trade Agreement |
| 16. | NGOs | Non-Governmental Organisation |
| 17. | NIEO | New International Economic Order |
| 18. | NT | National Treatment |
| 19. | OPIC | Overseas Private Investment Corporation |
| 20. | PCA | Permanent Court of Arbitration |
| 21. | PCIJ | Permanent Court of International Justice |
| 22. | TTIP | Transatlantic Trade and Investment Partnership |
| 23. | UNGA | UN General Assembly |
| 24. | UNCITRAL | United Nations Commission on International Trade Law |
| 25. | VCLT | Vienna Convention on the Law of Treaties |

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