INVESTMENT ARBITRATION IN INDIA WITH SPECIAL REFERENCE TO MODEL BIT 2016: FUTURE OPPORTUNITIES AND CHALLENGES

Dissertation submitted to National Law University, Assam

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MASTER OF LAWS

Supervised by

Monmi Gohain

Assistant Professor of Law

National Law University, Assam

Submitted by

Swarnali Barua

UID-SF0217016

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National Law University, Assam

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SUPERVISOR CERTIFICATE

It is to certify that **Ms. Swarnali Barua** is pursuing Master of Laws (LL.M.) from the National Law University, Assam and has completed her dissertation titled **"INVESTMENT ARBITRATION IN INDIA WITH SPECIAL REFERENCE TO MODEL BIT 2016: FUTURE OPPORTUNITIES AND CHALLENGES"** under my supervision. This research work is found to be original and suitable for submission.

Monmi Gohain

Assistant Professor of Law

National Law University, Assam.

DECLARATION:

I, Swarnali Barua, pursuing Master of Laws (LL.M.) from the National Law University, Assam, do hereby declare that the present dissertation titled **"INVESTMENT ARBITRATION IN INDIA WITH SPECIAL REFERENCE TO MODEL BIT 2016: FUTURE OPPORTUNITIES AND CHALLENGES"** is an original research work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise, to the best of my knowledge.

Swarnali Barua

UID: SF0217016

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Swarnali Barua
UID-SF0217016
LL.M. One Year
(2017-18)

PREFACE:

Investment arbitration appears to have opened a new avenue for foreign investors to seek redressal for treatment accorded to them by the Government of India. Such arbitration, available under Bilateral Investment Treaties signed by India with various countries, gives individual investors access to protection under international law, for various acts of omission and commission on part of the Government of India. Earlier, India had experienced several BITs with other countries but due to lack of protection to the investors, they had to be terminated from the investment regime. Since, foreign investment plays a very important role in all the country India had to re-draft its BIT in the year 2015 and thus brought many new changes and opportunities. BIT plays a very important role for the host country to attract foreign investors. Almost all the BITs in the world have similar objectives that are protection and promotion of the foreign investment. India's BIT has the objective of maintain the balance between the interest of the investors as well as sovereignty of the state. Thus, the provisions of the treaty contain some of the provision which shows that protections had been given to the investors and on the other hand there are some provisions which show state's sovereignty. The provision relating to investment arbitration in India shows that the state has kept the provision of exhaustion of local remedy under which the investor has to first go the domestic court for settlement of his investment claim ad after the period of five year only they can resort to international remedy under international arbitration institution. Thus, there are some situations which have proved to be very harsh for the investors. It is evident to have issues and challenges in every field but to keep a pace for future opportunity by reforming it has always a better opportunity for future.

TABLE OF CASES:

TABLE OF STATUTES:

1697- Arbitration Act.

1854- Common Law Procedure Act.

1859- Code of Civil Procedure.

1882- Code of Civil Procedure.

1908- Code of Civil Procedure.

1937- Arbitration (Protocol and Convention) Act.

1940- Arbitration Act.

1950- Constitution of India.

1961- Foreign Awards (Recognition and Enforcement) Act.

1987- Legal Services Authority Act.

1996- Arbitration (International Investment Disputes) Act.

1996- Arbitration and Conciliation Act.

1999- Foreign Exchange and Management Act.

2015- Arbitration and Conciliation (Amendment) Act.

TABLE OF ABBREVIATIONS:

1.	BIT	Bilateral Investment Treaty
2.	BIPA	Bilateral Investment Protection Agreement
3.	ICSID	International Centre for Settlement of Investment Disputes
4.	SIAC	Singapore International Arbitration Centre
5.	HKIAC	Hong Kong International Arbitration Centre
6.	ICC	International Chamber of Commerce
7.	LCIA	London Court of international Arbitration
8.	USA	United States of America
9.	UNCITRAL	United Nations Commission on International Trade Law
10.	UK	United Kingdom
11.	IIA	International Investment Agreement

12.	ISDS	Investor State Dispute Settlement
13.	PCIJ	Permanent Court of International Justice
14.	UDHR	Universal Declaration of Human Rights
15.	OECD	Organization for Economic Co-operation and Development
16.	IBRD	International Bank for Reconstruction and Development
17.	FCN	Friendship Commerce and Navigation
18.	GATT	General Agreement on Tariffs and Trade
19.	TRIPS	Trade-Related Aspects of Intellectual Property Rights
20.	TRIMS	Trade-Related Investment Measures
21.	WTO	World Trade Organization
22.	DSU	Dispute Settlement Understanding

23.	MAI	Multilateral Agreement on Investment
24.	ADR	Alternative Dispute Resolution.
25.	NAFTA	North American Free Trade Agreement
26.	ASEAN	Association of Southeast Asian Nations
27.	UN	United Nations
28.	UNTAD	United Nations Conference on Trade and Development
29.	MFN	Most Favored Nations
30.	FDI	Foreign Direct Investment
31.	UAE	United Arab Emirates
32.	VCLT	Vienna Convention on the Law of Treaties
33.	LDCs	Least Developed Countries
34.	DPC	Dabhol Power Company

35.	MSEB	Maharashtra State Electricity Board
36.	USD	United States Dollar
37.	CL	Compulsory license
38.	SGS	Societe Generale de Surveillance
39.	EU	European Union
40.	SCC	Supreme Court Cases
41.	SC	Supreme Court
42.	Co.	Company
44.	Ors.	Others
45.	Ltd.	Limited
46.	Id.	Ibidem (in the same case)
47.	Corp.	Corporation

48.	Supra	Something Mentioned Above
49.	v.	Versus
50.	Vol.	Volume

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CHAPTER I:

INTRODUCTION:

1.1. INTRODUCTION:

Henry Ward Beecher once observed, "*Laws and institutions are constantly tending to gravitate and like clocks, they must be occasionally cleansed and wound up, and set to true time*."[1]

It is known to everyone that the society is dynamic and never static. The statement given by Beecher shows that along with the changes in the society, government and situation also changes. This leads to the fact that foundation, upon which a legal system is based, should also be re-examined time and again. The dispute settlement mechanism is not excluded from the purview of the statement. Alternative dispute settlement mechanism is gaining more importance in present era. One of the most recent developments of arbitration is investment arbitration. Since, the practice of foreign investment is increasing all over the world; the law relating to international investment is also facing some changes. Since, the global trade and investment is expanding at an utmost exponential rate, there has been the chances of exploring the disputes cross-border[2]. Those cross-border dispute and foreign investment give rise to international investment arbitration. Before investing, the investor should be informed about the whole status of the country in which he is investing. Thus, for that purpose they used to enter into some arrangement with the host country with the help of which they come to know about the current scenario of the host state as well as they secure themselves from some future dispute. Those

[1]HENRY BEECHER, LIFE THOUGHTS, GATHERED FROM THE EXTEMPORANEOUS DISCOURSES OF HENRY WARDBEECHER 129 (1sted.2005). Henry Ward Beecher (1813-1887) was an American Congregationalist clergyman, social reformer, and speaker, known for his support of the abolition of slavery in America. See also Susan D. Franck, *Challenges Facing Investment Disputes: Reconsidering Dispute Resolution in International Investment Agreements*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1427590, last accessed on April 30, 2018.

[2] Vikramaditya Khanna, & Aditya Singh, *Current Trends in International Investment Arbitration*, 41 Litig.41, 44 (2015).

kinds of arrangements are called Treaty entered into between the investor and the host state regarding the international investment. Thus, those Treaties are called International Investment Treaties.

Generally, international investment takes place on three accounts- bilateral, multilateral and regional[3]. Among this three, international investment mostly takes place at bilateral level with the help of *Bilateral Investment Treaties (BITs)* or *Bilateral Investment Protection Agreements (BIPAs).* The investors or the companies who wants to investment in some other country used to make a BIT with the suitable rules, regulation and clauses which will govern their investment and behavior of the host country. Most BITs often include the investor-state dispute resolution clause under which they used to refer to arbitration whenever there is any dispute relating to international investment. Bilateral Investment Treaties (BITs) are gaining more importance in the field of international investment. Parties choose for BIT because their existence has a great significance in formulating international public policy[4]. BITs are defined as, "*agreements that protect investments by investors of one state in the territory of another state by articulating substantive rules governing the host state's treatment of the investment and by establishing dispute resolution dispute resolution mechanism applicable to alleged violations of those rules.*"[5] In other words BITs are termed as "*International treaties entered into between two sovereign states, under which the states reciprocally agree to accord certain standards of treatment to investors and investments made by nationals of the opposite party*"[6]. The substantive law which is followed in BITs is public international law, and is mostly independent of the domestic legal system[7]. Thus, if a country willfully violate any of the conditions of BIT then it will be liable under public international law, not under the domestic law of the host country.

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[3] Nishith Desai, *Bilateral Investment Treaty Arbitration and India,* available at www.nishihdesai.com, last accessed on April 28, 2018.
[4] *Id*.
[5] Kenneth J. Vandevelde, *The Economics of Bilateral Investment Treaties*, 41 Harv. Int. L. J.469, 469-470, (2000).
[6] Raj Panchmatia and Meghna Rajadhyaksh, *Investment Arbitration in India: An introduction to Concepts and Challenges in the White Industries Dispute*, available at https://barandbench.com/wpcontent/uploads/2016/11/Investment-Arbitration-in-India.pdf, last accessed on April 30, 2018.
[7] *Id.*. See also Desai, *supra* note 3, at 2.

The era of 1990's witnessed a large number of BITs between the developed countries and the developing countries[8]. Since then there has been a significant growth in their number. India is also not lagging behind it. India started taking part in investment treaty since 1990. The first BIT which India signed was with United Kingdom in the year 1994, which was based on the model created by a developed country where emphasis lied on the protection and promotion of foreign investment, rather than recognizing the regulatory powers of the state. And the BIT had the clear objective of attracting the incentives of foreign investment in India. Since then India had signed more than 80 BITs and ratified over 70 treaties[9]. India's investment regime was undergoing very smoothly till 2011 with several BITs with different nations. But in the year 2011, India's BIT regime had undergone sea-changes when the arbitration decision came against India in the White Industries case[10]. After that India had terminated all the treaties which were in force. Again, in the year 2016, India had introduces a Model BIT to reformulate the existing treaties. But the Model BIT 2016 is slightly different from the previous treaties that it attempts to identify the issues and current challenges that India was facing in distinct from the global landscape of BITs. The Model BIT 2016 introduces a new prism of investor-state dispute resolution mechanism to serve the entire BIT claim.

The investment arbitration is opted by only those parties who entered into investment treaty with other country and in such type of arbitration parties agree to refer any dispute arising out of their investment to arbitration. Such arbitration can take place either on- institutional format[11] or on ad-hoc format[12]. In the institutional format, there are certain well known or reputed institutions who settle the cases like International Centre for Settlement of Disputes

[8] Desai, *supra* note 3, at 7.
[9] *Id.* .
[10] White Industries Australia Limited v. The Republic of India, Final Award November 30, 2011.
[11] Institutional arbitration is one where the arbitral institution administers the arbitration. The parties submit their dispute to the arbitration institution for the arbitral proceedings. The arbitral institution has their own set of rules for proceedings. See also: Sundra Rajoo, *Institutional and Ad-hoc Arbitrations: advantages and disadvantages*, available at, http://sundrarajoo.com/wp-content/uploads/2016/01/Institutional-and-Ad-hoc-Arbitrations-Advantages-Disadvantages-by-Sundra-Rajoo.pdf, last accessed on April 30, 2018.
[12] Ad-hoc arbitration is one here disputes are not administered by the institutions and where parties are free to determine the process of arbitration like number of arbitrators, manners of appointment, procedure to be followed etc. Basically, ad-hoc arbitration based on party autonomy. Also Available at http://www.legalserviceindia.com/article/l64-Ad-Hoc-and-Institutional-Arbitration.html, last accessed on April 30, 2018.

(ICSID)[13], Singapore International Arbitration Centre (SIAC), Hong Kong International Arbitration Centre (HKIAC) International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), UNCITRAL model rules[14] etc. At present, ICSID is the most preferred institution by the countries for investment dispute. But the countries, who are not member of ICSID like India, are the followers of UNCITRAL model law. Generally, India used to follow ad-hoc arbitration process in most of the investor-state dispute cases with UNCITRAL model law[15].

The India's Model BIT 2016 is a completely different testimony towards India's investment treaty disputes. It is a departure from generally structured treaties. It Contains 38 Articles divided into 7 Chapters[16]. The dispute resolution clause in 2016 BIT plays a very important role in the India's economic activity. The dispute resolution clause in the BIT gives the investor a comfortable zone based on which they initiate investing in India and as a result it will help in growing India's economy.

1.2. STATEMENT OF PROBLEM:

As the Bilateral Investment Treaties are expanding in a speedy manner, the investment arbitration is also gaining significance in the same way. As stated earlier, the most effective forum for solving investment dispute is the ICSID, but the countries who are not a member of ICSID face some difficulty in the enforcement for the investment foreign arbitral award. Basically, the countries who are not a member of ICSID used to follow the UNCITRAL model

[13] ICSID is one of the world's most leading institutions which is recognized for international state-investment dispute settlement organization. ICSID was established in the year 1966 by the ICSID Convention (Convention on Settlement of Investment Disputes). The ICSID was mainly formulated by the Executive Directors of World Bank for promoting international investment. It is an independent and effective dispute settlement institution. ICSID provides for "conciliation, arbitration and fact-findings". Also Available at, https://icsid.worldbank.org/en/Pages/about/default.aspx, last accessed on April 30, 2018.

[14] The UNCITRAL Arbitration Rules deals with set of procedural rule based on which parties agree for the conduct of arbitral proceedings arising out of their commercial relationship. The rules are mostly used in ad-hoc arbitration proceedings. The rules covers- "model arbitration clauses, setting out setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in relation to the form, effect and interpretation of the award". Currently, there are three versions of arbitration rules: 1976 version, 2010 version and 2013 version (which includes UNCITRAL rules for treaty based Investor state arbitration). Also available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html, last accessed on April 30, 2018.

[15] Shalaka Patil and Pratibha Jain, *Bite of the BIT, The Steady Rise of Bilateral Investment Treaties and a Pro-investors Regime in the Global Economy*, available at www.nishithdesai.com, last accessed on April 30, 2018.

[16] Model Text for India's Bilateral Investment Treaty 2016, available at www.finmin.nic.in/report/modelTextIndia_BIT.pdf, last accessed on April 30, 2018.

rule. But the award enforcement mechanism of the UNCITRAL model rule is not that effective like ICSID. Moreover, UNCITRAL model rule is only a set of rules which is designed for applying in various disputes; it is not a set-up institution which will support the arbitral process, which is again a challenge for India[17]. Besides that, while an investor enter into bilateral treaty then they are governed by the rules of the treaty and in the event of dispute between them they have to resort the mechanism which is given in the Treaty. With regards to India's Bilateral Treaty, the dispute settlement provide for both investor-state dispute resolution as well as state-state dispute resolution. The core of the Treaty that is investor-state dispute resolution mechanism gives jurisdiction of investment dispute is again in the hands of domestic courts which are again judicial intervention and thus it might be a threat to the speedy disposal of the disputes. Thus, there are many issues which need to be focused on. And for that purpose, we have to first look into the bilateral treaties which are the core of investment and then the dispute resolution mechanism.

1.3. AIMS AND OBJECTIVES:

The main aim of the research is to analyze the investment treaties both in international as well as domestic level and also different resolution process of investment disputes which are relevant for enhancement of foreign investment in a country. The following are the objectives of the research:

- To understand the historical development of international investment law and arbitration.
- To understand the various rules and institutions which are supporting in resolving disputes of the investment treaties.
- To understand the investor-state dispute resolution mechanism provided under BITs.
- To understand the new approach of India after adopting the Model BIT 2016.

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[17] S.R.Subhramanian, *BIT and Pieces in International Investment Law: Enforcement of Investment Treaty Arbitration Awards in the Non-ICSID States: the Case of India*, 14 J.WIT 198, 205 (2013). See also, Judith Levine, *Navigating the Parallel Universe of Investor-state-arbitrations under the UNCITRAL Rules*, available at https://acica.org.au/wp-content/uploads/Board/CVs/Judith-Levine.pdf, last accessed on March 2, 2018. See also, Chester Brown and Kate Miles, *Evolution in Investment Treaty Law and Arbitration*, Cambridge University Press, (2011). Also available at http://www.cambridge.org/gb/academic/subjects/law/arbitration-dispute-resolution-and-mediation/evolution-investment-treaty-law-and arbitration, last accessed on March 2, 2018.

1.4. SCOPE AND LIMITATION:

Since the research work is related to investment treaty arbitration, hence the scope of the research will be limited to analysis of bilateral investment treaties and dispute settlement mechanism of those treaties. Moreover, the research will also include some present scenario of other countries for the purpose of comparison and that countries will be limited to USA and UK.

1.5. LITERATURE REVIEW:

The existing legal and extra-legal literature available in the forms of books, journals, law review, dictionaries, encyclopedias, articles, research paper, decided cases, newspaper etc. would be collected which are available in the library and the materials which are available in the online will also be collected and analyzed in order to make a research on the topic. The researcher has briefly outlined the studies that have come across and are relevant to the topic, they are as follows:

1.5.1. BOOKS:

1. **Investment Treaty Arbitration and Public Law (2007):**

The book has emphasized investment treaty arbitration as a public law system and demonstrates how the system goes beyond all other forms of international adjudication in giving arbitrators a comprehensive jurisdiction to determine the legality of sovereign acts and to award public funds to businesses that sustain loss as a result of government regulation. The analysis also reveals some starling consequences of transplanting rules of commercial arbitration onto the regulatory sphere. For instance, the system allows public law to be interpreted by arbitrations in private as a matter of course, with limited scope for judicial review. Further, arbitrators can award compensation to investors to investors in ways that go beyond domestic systems of state liability, and these awards may then be enforced in as many as 165 countries, making them more widely enforceable than any other adjudicative decisions in public law. The system is the mixture of private arbitration and public law which undermines accountability and openness in judicial decision making.

2. **Human Rights in International Investment Law and Arbitration (2010):**

The book has given a systematic analysis of the interaction between international investment law, investment arbitration, and human rights, including the role of national and international courts; investor-state arbitral tribunals and alternative jurisdiction; the risks of legal and jurisdictional fragmentation; the human rights dimensions of investment law and arbitration; the relationships of substantive and procedural principles of justice to international investment law.

3. **International Dispute Settlement (2011):**

The book is a guide to the technique and institutions used to solve international dispute, how they work and when they are used. Many often topical examples place the theory of how things are supposed to work in the context of real life events so that people can understand the strengths and weaknesses of different methods in practice. The book also includes most recent arbitration, development in the international scenario and case laws.

1.5.2. ARTICLES:

1. **Rosmy Joan, "Renegotiation of Indian Bilateral Investment Treaties: An Analysis from a Development Perspective" (2017)**:

The article has stated that Bilateral Investment Treaties (BITs) promote foreign investments and seek to protect investments abroad, which is an integral component of economic development of the State. In a dynamic global economy, BITs must be stable to bring balance between investment protection and regulatory autonomy. This paper is about India's experiences in Investor State Dispute Settlement (ISDS) cases and the proposed International Investment Agreements (IIA) reform in the form of renegotiation of existing BITs. This paper critically evaluates the Indian Model BIT 2015 from a development perspective and analyzes how sustainable development can be included and implemented within the Indian investment law practice for better investment relations. This paper observes that renegotiation of existing BITs incorporating economic and development policies helps the government to provide a more stable response to investment disputes, and to manage ISDS cases effectively in tune with the principles of sustainable economic development.

2. **Joseph D' Agostino, "Rescuing International Investment Arbitration: Introduction Derivative Actions, Class Actions, and Compulsory Joinder" (2012):**

The paper has analyses the rapidly expanding network of international investment arbitration (IIA) has reached a state of crisis that could threaten the foreign investment system. The number and economic influence of arbitration claims have exploded over the past two decades, along with denunciations of IIA. Many involved in IIA believe that crucial parts of the system could disintegrate over the next few years if systemic reforms are not implemented. Given IIA's role in the growth of international investment, especially in developing countries, such a result could restrict international capital flows, improvements in the livelihoods of residents of developing nations, returns on investment in developed countries, and, global economic growth itself.

3. **Anton Strezhnev, "Detecting Bias in International Investment Arbitration" (2016):**

The book has stated that foreign direct investment is increasingly coming under the governance of a patchwork of bilateral investment agreements among states that grant investors rights to legal recourse and arbitration in the event of property rights violations by a host country. These investor-state arbitrations often take place in international legal fora such as the World Bank's International Centre for Settlement of Investment Disputes (ICSID). While meant as an impartial alternative to weak host country legal systems, these international investment fora have been criticized for favoring the rights of investors over those of states. However, uncovering empirical evidence of this bias is difficult because of strategic pre-award settlement by parties to a dispute. If panel composition affects claimants win probabilities, it also likely affects the probability of settlement. As a result, analyzing only those cases that result in a decision generates a form of selection bias. This paper outlines a new a method for estimating panel composition affects in the presence of non-random settlement. I apply this estimator to examine whether arbitrator career background affects the likelihood of claimant victory in ICSID arbitration.

4. **Nishit Desai, "Bilateral Investment Treaty Arbitration and India, With special focus on India Model BIT, 2016" (2018):**

This paper maps out the landscape of international investment treaty law and it's connect with India. While it studies the India Model BIT 2016 to inform the new era of investment treaty arbitration, it attempts to identify challenges that for India distinct from the global landscape of

BITs, and views India through a prism of dispute resolution mechanism. The paper also focuses on the advent of Model BIT of India and on international scenario. The paper mainly focuses on the dispute resolution system and its issues in India.

5. **Shalaka Patil and Pratibha Jain, "Bite of the BIT, The Steady Rise of Bilateral Investment Treaties and a Pro-Investor Regime in the Global Economy" (2017):**

The paper focuses on the Model BIT 2016 and its various provisions offering protections and the paper also focus on the investment regime, its definitions, merits, its dispute resolution mechanism and its exceptions. The paper mainly highlights the provisions of investment dispute settlement mechanism, the challenges faces by the dispute settlement mechanism and its continuity and changes.

6. **S. K. Dholakia, "Investment Treaty Arbitration and Developing Countries: What Now and What Next? Impact of White Industries v. Coal India Award" (2017):**

The paper has focused on the classical way in which the international investment law dealt with this was that the countries providing FDI would require the countries to follow a minimum standard of treatment. For developing countries, however, the dilemma is: they want foreign investments but wish to keep power to take decisions on how far in public interest the investments should be allowed to go; For developed countries, the dilemma is that they want markets for products and services, but do not want to be stopped in the middle because of perceived public interest.

7. **S. R. Subramanian, "BITs and Pieces in International Investment Law: Enforcement of Investment Treaty Arbitration Awards in the Non-ICSID States: The Case of India" (2013):**

The paper focuses on The ICSID Convention provides for one of the strongest regimes for enforcement of its awards. Consequently, finality of the ICSID awards was rarely disputed in the past. However, recently, there has been a growing sense of investment awards being subjected to challenge by domestic courts. Moreover, this phenomenon is not only confined to investment disputes arising under the ICSID Convention and even amongst non-ICSID states also, taking advantage of the greater space granted to the national law under the New York Convention, the

investment treaty awards are subject to unwarranted challenges at the stage of enforcement of awards. It is in this background, taking India as an example, the paper aims to find out how the international investment awards will be enforced in India and what major legal challenges that it will encounter during the process of recognition and enforcement. For this purpose, the paper closely reviews a number of recent and significant Indian rulings on arbitration and notes that the enforcement of such awards faces a number of challenges including interpretative hurdles, multiple jurisdictional claims and parallel proceedings and extreme judicial delays. It finally suggests that the creation of an exclusive legal mechanism for the enforcement of investment arbitral awards will remove the legal impediments associated with the enforcement of the arbitral awards and bring about the desired changes in the expeditious disposal of enforcement cases.

8. **Vikramaditya Khanna & Aditya Singh, "Current Trends in International Investment Arbitration" (2015):**

This article lays out some of the key issues likely to face litigators and arbitrators in international investment arbitration. It begins by providing a brief background to international investment arbitration and how the dispute resolution process operates. it then explore the kinds of issues foreign investors are likely to face and how most investment treaties attempt to address such concerns. Finally, we mention some of the more recent developments in investment arbitration, with a few concluding thoughts for those representing clients who have global sales or operations or who are planning cross-border investments.

9. **V. Inbavijayan & Kirthi Jayakumar, "Arbitration and Investments - Initial Focus" (2013):**

The article has stated that international investment law and arbitration have grown exponentially, as a result of the growth in foreign direct investment in the world and investors' increasing reliance on investment treaties to bring arbitration proceedings against host States. It is a fast evolving field of law and dispute resolution which presents numerous difficult issues and can only be handled effectively with adequate specialized knowledge. Most investment arbitrations nowadays are brought on the basis of bilateral or multilateral treaties (BITs, NAFTA**,** the Energy Charter Treaty, etc.) and are conducted under the ICSID Convention, UNCITRAL Arbitration

Rules, or less frequently also under the Arbitration Institute of the Stockholm Chamber of Commerce, ICC and LCIA arbitration rules.

10. **Prabhash Ranjan, "International Investment Agreements and Regulatory Discretion: Case Study of India" (2008):**

This paper analyses the linkages between IIA and regulatory discretion with respect to India. It examines certain features of the Indian arbitrations and studies the interplay between these provisions and the regulatory discretion of India. Before one looks at the reasons for choosing India as a case study and the provisions of Indian investment it is pertinent to briefly understand why countries endeavor to attract foreign investment in the first place and how is this related to Countries endeavor to attract foreign investment so as to fill the gap between resources mobilized and the resources needed to achieve growth and development targets.

1.6. RESEARCH QUESTIONS:

1. Whether the Indian Model BIT 2016 successful enough for granting protection to foreign investors.
2. Whether the investment dispute resolution mechanism proves to be adequate for settlement of claim under BITs.
3. Whether India is facing any challenges with regard to the present BIT.
4. Whether there is any future scope of expanding India's Bilateral Treaty with other countries.

1.7. RESEARCH METHODOLOGY:

The methodology which will be adopted in the research work is doctrinal. Since the research will include the detail analysis of all the treaties, hence the methodology will also include analytical research and this will also include a comparative study with other countries. Hence, the methodology which will be followed in the research is doctrinal, analytical and comparative in nature.

1.8. MODE OF CITATION:

The citation which is followed in the dissertation is Blue Book 19th edition.

1.9. RESEARCH DESIGN:

.Chapter I: Introduction and Research Methodology:

This chapter will include a brief introduction about the topic and the statement of problem which will highlight the problems relating to the topic and the chapter will include the basic aims and objectives of the research, the methodology followed as well as scope and limitation of the research.

Chapter II: Historical Development of Investment Arbitration:

The chapter will incorporate the historical development and evolution of the investment arbitration in the world, in particular in India. This chapter will also include the conceptual framework of investment treaty arbitration and definitions.

Chapter III: Existing Legislative Framework on Investment Arbitration:

The chapter deals with the governing laws, rules and regulations on investment treaties in India as well as in UK and USA. This chapter will also include the major conventions and model rules which are mostly adopted by various countries in dispute settlement.

Chapter IV: India's Model Bilateral Investment Treaty 2016 and Dispute Resolution.

The chapter will include the overview of the Model BIT 2016 and it will also focus on the protection given by the treaty. The major part of the chapter will be judicial pronouncement on various investor-state disputes. The chapter will specifically deal will the dispute settlement part of the Treaty.

Chapter V: Current Issues and Challenges of Investment Arbitration in India and its future opportunities:

The chapter will specifically deal with the issues and challenges faced by the dispute settlement mechanism in India under various BITs and the chapter will also cover the merits and future opportunities of the treaty.

Chapter VI: Conclusion and Suggestion:

Lastly, the chapter will end up with a conclusion on the topic after the conclusion of the research and the chapter will include a few suggestions on the topic so that the existing situation can be further developed and the suggestions might be beneficial to it.

CHAPTER II:

HISTORICAL DEVELOPMENT OF INVESTMENT ARBITRATION:

2.1. BACKGROUND:

At the initial stage, investment treaty arbitration was virtually unknown beyond the knowledge of those who were involved in the treaties[18]. The treaties got expanded in the mid of 19th century where there was a rapid growth in the corporation and technology which led to the advent of foreign investment. Historically, under the public international law, foreign investors were treated as "outsiders" and they were deprived of the equal status with the nationals and were denied legal capacity[19]. Their claim for justice was denied by the domestic courts of the host countries. They were left with a little remedy to restore to their own domestic courts to seek compensation. As a result, home state would have to entertain the claim of their domestic nationals against the diplomacy of the host state. Permanent Court of International Justice (PCIJ) recognized this right as a right under public international law[20]. This led to the creation of ad-hoc arbitration which had the jurisdiction to try such disputes[21]. One of the most landmark cases of PCIJ which was about the investment dispute was *Chorzow Factory*[22] case. In this case, "there was there was an agreement between the company and the German Reich for the construction of a factory in Chorzow which was in the disputed region of Upper Silesia. Subsequently, Geneva Convention was signed between Poland and Germany wherein the Chorzow region as handed over to Poland. The Convention required reparation damages to be provided by Poland where German's Government property was taken over". The disputes arising out there were referred to PCIJ. The question was whether the land was Company's private property or German's property. And PCIJ held that the land was privately owned and Poland's action amounted to the seizure and expropriation of private property.

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[18] GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 3 (1st ed. 2007).
[19] Patil & Jain, *supra* note 15, at 9.
[20] Mavrommatis Palestine Concessions (Greece v. U.K.), P.C.I.J. (1924). Available at http://www.worldcourts.com/pcij/eng/decisions/1924.08.30_mavrommatis.htm, last accessed on May 10, 2018. See also, Patil & Jain, *supra* note 15, at 9.
[21] *Id*.
[22] Germany v. Poland , P.C.I.J.(1927).

Hence, there was a remarkable development on the investment dispute resolution when it was felt that there is a need for establishing some measures which will better protect the investor's right; called the "Hull Rule" which provided that "*in the event of expropriation there would be prompt and adequate compensation*"[23]. After the World War II, compensation for expropriation became a universally accepted rule of international law and was applied in almost all the conventions like *Universal Declaration of Human Rights (UDHR)* and other national legislations[24]. Thereafter, "multilateral investment code" was developed by the International Trade Organization but it became obsolete during the post-war negotiations on the international economy. Since after that, many unsuccessful attempts were made by the authority to establish rules like draft of *Havana Charter, 1948*[25]. In the charter there was no mention about the compensation for expropriation and compulsory arbitration among the parties. That's why the Charter got rejected by major state parties. Another one is Draft Convention on the Protection of Foreign Property of the *Organization for Economic Co-operation and Development (OECD)*[26], but this also did not get any formal status though it provided for the provision for the compulsory arbitration. Thereafter, so many attempts by the states got abandoned. But at the end, the *International Bank for Reconstruction and Development (IBRD)*'s Convention on the Settlement of Investment Disputes between States and Nationals came into force in 1966; the *World Bank International Centre of Investment Dispute (ICSID)* was established to deal with investor-state disputes as a set-up organization, even the *New York Convention 1958*[27] offer a framework for the settlement of investment disputes.

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[23] Andrew T. Guzman, *the Hull Rule, Explaining the Popularity of Bilateral Investment Treaty: why LDCs sign Treaties that Hurt them*, available at http://centers.law.nyu.edu/jeanmonnet/archieve/papers/97-12-111.htm, last accessed on May 15, 2018.

[24] Patil & Jain, *supra* note 15 at 13. See also, R Doak Bishop, James Crawford & W. Michael Reisman, *Foreign Investment Disputes cases*, KLI 3 (2005).

[25] The conference was made at Havana on November 21, 1947, and ended on March 24, 1948, drew up the Havana Charter for an International Trade Organisation with the purpose and objective of "recognizing the determination of the United Nations to create conditions of stability and well-being which are necessary for peaceful and friendly relations among nations". Available at https://www.wto.org/english/docs_e/legal_e/havana_e.pdf, last accessed on May 15, 2018.

[26] Draft Convention on the Protection of Foreign Property is available at www.oecd.org/investment/internationalinvestment agreements/39286571.pdf, last accessed on May 15, 2018.

[27] New York Convention was signed in the year 1958 for the purpose of "*recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration*". This is originally the founding treaty for commercial arbitration. But it provides roadmap for the international enforcement of awards with a limited supervision of domestic courts. Also available at http://www.newyorkconvention.org/, last accessed on May 15, 2018.

2.2. EVOLUTIONARY PROCESS:

The evolution of modern investment arbitration has gone through many unsuccessful attempts. There were several processes to establish multilateral framework on investment arbitration by providing multilateral treaties which also did not get any formal status. Hence, to summarize, the fundamental principles of the international investment law had gone through three evolutionary stages:

FCN:

The fundamental law on international investment had their origin through the *"Friendship, Commerce and Navigation" treaties (FCN)*[28]. These kinds of treaties were primarily used to "promote international trade by facilitating inter alia, navigation, interstate trading rights and rights over property by foreign individuals"[29]. But towards the end of 20th century, FCN treaties evolved to provide limited rights to aliens over foreign property and gave similar status to foreign and domestic investment.

GATT:

The General Agreement on Tariffs and Trade (GATT)[30] was signed on the year 1947 as a form of multilateral treaties. It was basically adopted for the purpose of developing international trade; it did not fully focus on foreign direct investment until the *Uruguay Round*[31]. The Uruguay round establishes some agreements and understanding in relation to the matter of investment. These

[28] FCN was the first step in the evolutionary process of the investor regulation. FCN included general obligation to protect the property of the nationals of the other country on the event of expropriation and repatriation. In the year of 1920 and 1930, foreign commercial relation began to expand and FCN treaties became the primary instrument for the protection of the foreign investment. There was also a provision for the adequate compensation for the expropriation of the properties. And breach of such treaties could be brought before International Court of Justice (ICJ). The ICJ upheld many important decisions on FCN treaties like United States v. Italy, I.C.J. 15 (1989), Belgium v. Spain I.C.J (1964). See also, D. Murphy, *the ELSI Case; An Investment Dispute at the International Court of Justice*, 16 Yale Int. L.J. 391 (1991).

[29] Desai, *supra* note 3, at 4.

[30] The General Agreement on Tariffs and Trade became enforceable on 1 January, 1948. It provisionally applied to all its contracting parties. It was created basically for the purpose of recognizing the relationship among various nations in the field of trade and commerce. Later on it was also made applicable to foreign direct investment. Also available at https://www.wto.org/english/docs_e/legal_e/gatt47.pdf, last accessed on May 16, 2018.

[31] The Uruguay Round is the 8th round of Multilateral Trade Negotiations (MTN) conducted within the framework of the GATT, lasted from 1986 to 1994 and covering 123 countries as "contracting states". But the best part of the round is that it led to the establishment of WTO. And GATT remained as an integral part of the WTO agreement. It included the areas of "agriculture, textile, services, intellectual property, investment policy etc." also available at https://www.wto.org/english/thewto_e/minist_e/min98_e/slide_e/ur.htm, last accessed on May 16, 2018.

agreements are termed as Agreements on *Trade-Related Investment Measures (TRIMS),* the *General Agreement on Trade in Services (GATS);* and agreement on *Trade-Related Aspects of Intellectual Property Rights (TRIPS)*.[32]

The TRIMs was one of the measures which have been adopted at the Uruguay round. This agreement is particularly applicable to trade in goods, but it also applies as an "investment restriction that affects the making or operation of an investment"[33]. It can also restrict import and export. The TRIM agreement is the first step towards the regulation and liberalization of direct investment. The TRIM has also the provision for the reparation of capital, expropriation and compensation issues. One of the important provisions of TRIMs is the incorporation of Article 9; that is review of agreements within five years. This provision provides a built-in authority for negotiating the possible expansion of the WTO's coverage of direct investment.[34]

GATS:

General Agreement on Trade in Services (GATS)[35]; is the form of investment agreement which is also the outcome of Uruguay round. It incorporates in itself foreign direct investment by including the definition of 'trade in services' to contain the "supply of a service by a service supplier of one member, through commercial presence in the territory of any other member". The general provisions GATS cover are: notification, transparency, most favored nation treatment, national treatment, market treatment, market access, subsidiary, and foreign exchange restriction on capital account and current account transaction. GATS agreement is also responsible for softening the regulation of foreign direct investment.[36]

TRIPs:

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[32] Adair, *supra* note 33 at 199.
[33] *Id*. See also, Thomas L Brewer, *International Dispute Settlement Procedures: The Evolving Regime for Foreign Investment*, 26 LAW & PLO'Y INT'L Bus.633, 645 (1995).
[34] *Id*. See also, World Trade Organization Secretariat, Singapore Ministerial Declaration, Para. 20.
[35]General Agreement on Trade in Services (GATS) is one of the multilateral trading rules which cover all "international trade in services". It became enforceable on 1995 and as negotiated under the auspices of World Trade Organization (WTO). GATS have two categories of rules- *general rules* and *rules applicable to national commitments*. General rules cover the Most Favored Nation Treatment (MFN) principle; and rules for national commitments include market asset and national treatment. Also available at http://www.unesco.org/education/studyingabroad/highlights/global_forum/gats_he/basics_gats.shtml, last accessed on May 17, 2018.
[36] Adair, *supra* note 33 at 200.

The next important development of Uruguay round is the TRIPs agreement. The agreement provides for the "protection of the distribution of technology through foreign direct investment operations". This is very significant for the foreign direct investors because their investment often include international technology transfers between firms and foreign affiliates. TRIPs also define *intellectual property* which includes "copyrights, trademark, industrial designs, patents, and the layout designs of integrated circuits".[37]

Under the framework of WTO, and all its agreements like GATT, GATS, TRIMS and TRIPs; if any disputes occur with respect to foreign direct investment then it will be subject to the "*Understanding on Rules and Procedures Governing the Settlement of Disputes*" or *DSU*[38]. Dispute settlement mechanism under WTO is the central pillar of all the multilateral trading system, and it is the most unique contribution by the WTO to the global economy, because without such system, the enforcement mechanism of all the treaties will suffer hardships. Moreover, the Uruguay round Understanding on the Rules and Procedures Governing the Settlement of Disputes will further make the existing system more efficient and strong by extending the Mid-term Review to the adoption of the panels' and a new Appellate Body's findings[39]. Besides that, the unit will establish an integrated system which will permit the WTO members to uphold their claims on any multilateral trading agreements incorporated in the Annexure to the Agreement establishing the WTO. For that purpose, a dispute settlement body is there which will exercise the powers of the General Council and the Councils and committees of the covered agreements[40].

MULTILATERAL AGREEMENT ON INVESTMENT (MAI):

Multilateral Agreement on Investment comes in the final evolutionary stage of investment treaties. After the Uruguay Round, the US Council for International Business, a national affiliate of International Chamber of Commerce have pushed for renewed negotiation for a "high

[37] *Id*. at 201.
[38] DSU or the Dispute Settlement Understanding was adopted in the year 1994 by the WTO members who agreed on the Understanding on Rules and Procedures Governing the Settlement of Disputes. The provision is annexed to the "Final Act" signed in Marrakesh in 1994. The conflicting parties undertake to resolve the dispute by "consultation" with the help of the rules, if not successful then only it will be referred to the WTO penal. Also available at http://www.meti.go.jp/english/report/downloadfiles/2012WTO/02_16.pdf, last accessed on May 20, 2018.
[39] Available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm, last accessed on May 21, 2018.
[40] Available at http://wtocenter.vn/wto/legal-documents/understanding-rules-and-procedures-governing-settlement-disputes, last accessed on May 21, 2018.

standard, liberal investment regime" at the OECD, this has led to the drafting of Multilateral Agreement on Investment (MAI)[41]. At the initial stage, this process was particularly important for US because most of the investors were from US who had participated on the foreign direct investment[42]. But other OECD members are equally interested in completion of the treaty. Other countries such as France, Germany, Japan, and the United Kingdom, along with US increased their outflows[43]. It is through the billions of dollar that OECD hopes to promote and increase the implementation of the MAI. The goals and aim of OECD behind establishing MAI, was to liberalize investment measure, post-establishment investment protection and effective dispute settlement mechanism[44]. The dispute settlement mechanism of MAI provided for both state to state and investor to state disputes. When comes to the content, MAI includes the "definition of investment, obligation of parties and the dispute settlement system". The definition of investment is said to be the core component of MAI, which is one of the main intention of the OECD members. The obligation of MAI includes the *"national treatment and most favored nation provision"*[45]. Lastly, the dispute settlement mechanism under MAI is one of the most important aspects of such agreements. Since the members of OECD intended to establish a high standard protection for its individual investor, thus an effective and strong dispute settlement mechanism has to be there. As stated earlier that it has both type of dispute resolution that is state to state and investor to state arbitration. The state to state dispute resolution has a little effect on the individual investor because the investor got a little chance of receiving the national support that is needed for such a claim. And the investor state dispute settlement system covers greater image because it has a direct impact upon the investor[46].

The state to state dispute settlement provision consists of five basic points, they are- "it follows the precedent set forth by the WTO, which regains parties to resolve their dispute through consultation, If the parties fail to come to an agreement, then at the request of any of the contracting parties of the dispute, the dispute can be submitted to an arbitration committee. The second fundamental provision is that all arbitration panels will consist of either three or five

[41] Patil & Jain, *supra* note 19 at 21.
[42] Adair, *supra* note 33 at 212.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*

members[47]. The three members of the panel will be selected by the agreement of the parties to the claim, based on a proposal made by the Secretary- General of ICSID[48]. Either of the parties to the dispute can choose the five-member panel. If this avenue is pursued then each party will appoint one additional member[49]. The third point allows the parties to a dispute to modify the rules, if the parties to the action agree[50]. The forth point establishes that the substantive law application of the MAI would be relied upon for disputes, but international law and domestic law could be considered for certain relevant situations. The final pillar of the state-to-state arbitration provision is that the awards issued by an arbitral panel would be final and binding upon the parties to the dispute."[51]

The most vital provision of the treaty is investor-state dispute settlement provision. The most significant component of the provision is that it has to be agreed upon by the members and it should provide the investor the widest power for taking a dispute directly against the breaching state. But these investor-state dispute resolution mechanisms are also borrowed from the bilateral treaties. For the purpose of settling all those kind of disputes, the OECD provides the following measures.

The party may submit the dispute to any of the following:

- To any competent authority or court or tribunal of the party to dispute;
- Settlement of disputes in accordance with any dispute settlement procedure agreed on by the parties prior to the arising of the dispute;
- Under any proceedings provided by MAI.

[47] *Id.*. at 215. See also Marino Baldi, *The OECD Web Page*, available at http://www.oecd.org/daf/cmis/mai/baldi4.htm, last accessed on May 23, 2018.
[48] *Id.*
[49] *Id.* (This represents a compromise between those favoring an arbitrator being appointed by each of the two disputing parties, as in most bilateral investment agreements, and those believing that a majority of non-party arbitrators is preferable for a multilateral agreement, which should develop an institutional jurisprudence). Also available at http://www.oecd.org/daf/mai/pdf/eg1/eg19612e.pdf, last accessed on May 23, 2018.
[50] *Id.* (If gaps in the MAI rules appear during a dispute and the parties are not able to agree on supplementary rules, the PCA Optional Rules for Arbitration Disputes between two state UNCITRAL rules serve as default rules).
[51] *Id.* (An award shall be provided first to the parties as a draft to give them the opportunity to comment. This procedural safety valve should help to avoid aberrant decisions, particularly with respect to question of fact).

If the party chooses to opt the proceedings under MAI then, as stated earlier, they have the option of: ICSID rule of arbitration, its additional facility, UNCITRAL rule, and ICC. The remedy given by the courts on such investor-state disputes are much wider than the state to state dispute resolution. Thus, multilateral agreements have also set out some vital provisions regarding the dispute resolution on investment. But with the passage of time, states had moved forwards towards the better protection of the investors and thus leading towards bilateral form of treaties.

BIT:

Since, the remedy given by the earlier treaties was very less with regard to investor protection, the emergence of BITs or BIPAs were the urge of time. BITs were similar to the FCN treaties in the state-state dispute resolution mechanism. But, unlike the FCN treaty, the BITs had an additional provision for the resolution of the conflicts between states. A vital difference between the FCN and BIT is that "a national citizen or company has the ability to present the conflict arising in relation to an investment authorization, an investment agreement or an alleged breach of any right conferred, created or recognized by the treaty"[52]. Such conflicts can be raised in the international forum for investment arbitral tribunals. But it should be remembered that FCN treaties form the genesis of BITs and BITs are the improvised version of the FCN treaties by providing a way for investor-state disputes. These mechanisms have been proved to be effective in the protection of foreign investment and in providing a suitable framework for the resolution of disputes. The BITs were initiated in the year 1960[53], with a view to provide a suitable international legal framework for the regulation of the FDIs[54]. Most of the BITs are common in its essential features with the provisions like Most Favored Nation Treatment (MFN), expropriation and nationalization, transfer of capitals, performance requirements and dispute resolution mechanism. But there are certain treaties which defers in terms of their jurisdiction, scope, rules, procedures etc. for example, the BITs of western Europe countries defers from US base modeled BIT which do not normally extend to the past investment disputes, on the other hand, there are some treaties which do not necessarily provide for compulsory arbitration

[52] Christopher N. Camponovo, *Dispute Settlement and the OECD Multilateral Agreement on Investment*, 1 UCLA J. INT'L L. & FOREIGN AFF. 190, 193 (1996).
[53] World's first BIT was signed between Germany and Pakistan on November 25, 1959. See also V. Inbavijayan & Kirthi Jayakumar, *Arbitration and Investments- Initial Focus*, 2 I.J.A.L.35, 37 (2013).
[54] David r. Adair, *Investor's Rights: The Evolutionary Process of Investment Treaties*, TJCIL, 197, 197 (1999).

framework. Thus it basically depends upon the terms and conditions of the state parties. Nevertheless, it has one of the vital provisions of all such treaties is the investor-state disputes resolution clause. Such provisions may include some other things like "cooling off periods, negotiations, mediation, and exhaustion of local remedies" etc. generally, the rules followed in such dispute resolutions are ICSID, ICC and UNCITRAL model rules. India had also entered into several BITs with different nations. As have stated earlier, India signed its first BIT with United Kingdom in the year 1994. Since then India is constantly making BITs with various countries and it had signed almost 80 BITs. But after the year 2011, India had reformulated its original BIT and had drafted a model BIT 2016 with various modifications over the earlier BITs. Not only in India, BITs are being chosen by majority of the countries for its investment protection regime and this has been proven to be very effective in the protection of foreign investors and promotion of foreign investment. Not only is that, BITs also proven as the suitable framework for investment dispute resolution[55].

2.3. HISTORY OF INDIA'S MODEL BIT:

India's Model BIT had an origin from the period of liberalization and globalization. Since the advent of BITs in the word, India was not a part of it. India entered into the regime only after the period of globalization where there was a rise in the expansion of corporation in the world and countries started in participating in Bilateral Investment Treaties. For India, it was the year 1994, when India drafted its first Bilateral Investment Treaty. The first model of BIT was based on the model of BIT of UK. India also signed its first BIT with UK. After that as many as 80 BITs were signed by India. The situation was going smoothly till the year 2011. But after the year 2011, the decision of the White Industries[56] case gone against India. It threatened the India's investment regime. Thereafter, it had terminated all its earlier BITs and had re formulated a Model BIT 2016 which is a departure from all its earlier BITs and had included many provisions for protection of the investors and state sovereignty.

2.4. HISTORY OF INDIAN ARBITRATION FRAMEWORK:

[55] *Id* at 197. See also Paul Peters, *Dispute Settlement Arrangements in Investment Treaties*, 22 NETH. Y.B. INT'L. L., 91, 93 (1991).
[56] White Industries Australia Limited v. The Republic of India, Final Award November 30, 2011.

Before the official recognition of the dispute settlement mechanism in India, there were several systems prevailing in India which was alike the alternative dispute resolution. Historically, there were agreements to settle the disputes through the community elders which can be stated as arbitration agreement[57]. After that, the Panchayat system was evolved on which various communities and groups had their own panchayats to settle the disputes, and the agreement to abide by the rules of panchayat was also considered to be the arbitration agreement[58]. It was also evident in the ancient and medieval history that there was a *"puga"* which means *"a board at community level".* There was also a system of *"Srani"* which means a *"territorial assembly of traders, artisans and kulas which are equivalent to family groups".*[59] Finally, it became well-known that Gram Panchayat consists of village elders were in trend throughout the India. And the awards of these authorities were enforced by the community as a whole[60]. But soon after the periods of liberalization and globalization, many changes have been seen in the Indian alternative dispute redressal mechanism[61]. Basically when the economic activities of the country increased then the number of commercial disputes had also increased. And it was the demand of the time that there should be some forums in India which will work for redressal of such disputes[62]. As such a need was felt to reassess our legal system and the existing laws, particularly Labour laws and Dispute Resolution laws[63].

Development of Indian law of arbitration:

Like most of the Indian laws, Indian law relating to arbitration is also based on the English arbitration law[64]. English traders and merchants submitted their commercial disputes to the specifically selected arbitrators who were specially appointed for the purpose. At the initial stage, *Arbitration Act, 1697* was enacted in England to resolve the disputes of the merchants and traders[65]. Besides that, *Common Law Procedure Act, 1854* also contain some provisions with respect to arbitration for making the arbitral award more binding upon the parties and ensuring

[57] N.K. ACHARYA, LAW RELATING TO ARBITRATION & A.D.R., 1(3rd ed. 2011).
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] DR. S.S.MISRA, LAW OF ARBITRATION AND CONCILIATION IN INDIA, 2 (2nd ed. 2010).
[62] *Id.*
[63] *Id.*
[64] DR. N.V.PRANJAPE, LAW OF ARBITRATION AND CONCILIATION IN INDIA , 6 (5th ed. 2015).
[65] *Id.*

its strong enforcement[66]. But these enactments were subsequently replaced by the *Arbitration Act, 1889* which repealed all the earlier statutes on arbitration[67].

In India, there were so many practices prevailing prior to the British rule. And in order to give recognition to such practices of arbitration, the then administrative body established by the British Crown through the Directors of East India Company issued a regulation of 1781 whereby several courts were constituted to administer justice. The said regulation of 1781 provides that, "the judge do recommend as far as he can without compulsion and prevail upon he parties submit to arbitration by one person to be mutually agreed upon by the parties". The regulation further provided that "no award of arbitrator or arbitrators can be set aside except upon the full proof made upon oath of credible witnesses that the arbitrators have been guilty of gross corruption or partially to the cause in which they had made their awards". After some years another regulation was passed by the British Government in 1787. The regulation empowered the court to promote arbitration in the cases in which the subject matter did not exceed Rs. 200 /-. Arbitration was allowed in the cases of breach of contract and cases of partnership. Then the Regulation VII of 1833 came into picture which stated that the *arbitration agreement should be in writing*. The Regulation also provided one time limit within which the arbitrator has to pass the award.

In India, the first statutory enactment on arbitration was *Indian Arbitration Act, 1899* which was based on the English law of arbitration: Arbitration Act, 1889[68]. Thereafter, after the enactment of *Code of Civil Procedure, 1859*, the provision relating to arbitration was inserted in Chapter VI of the code. But there was a limitation with regard to its application; it was not applicable to the Non-Regulation Provinces and the Presidency small cause courts as well as the Supreme Court of Calcutta, Madras and Bombay[69]. Thus, the Code of 1859 was subsequently repealed and replaced by the *Code of Civil Procedure, 1882*[70], which was further replaced by the *Code of Civil Procedure, 1908*[71]. *Section 89* of the said Code contains the provisions relating to arbitration or alternative dispute resolution (ADR) mechanism[72].

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[66] *Id.*
[67] *Id.*
[68] MISRA, *supra* note 61.
[69] *Id.*
[70] Act XIV of 1882.
[71] Act V of 1908.
[72] MISRA, *supra* note 67.

Section 89 of the Code of Civil Procedure, 1908 states; "Settlement of dispute outside the court: - (1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may re-formulate the terms of a possible settlement and refer the same for- arbitration; conciliation; judicial settlement including settlement through Lok Adalat; or mediation.

(2) Where a dispute has been referred- (a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the *Legal Services Authority Act, 1987*[73]and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."[74]

Finally, in the year 1940 the law relating to arbitration was consolidated and re drafted in the form of *Arbitration Act, 1940*[75]. The Act was in the pattern of English Arbitration Act, 1934. The then period of globalization of trade and commerce pushed the need for an effective implementation of the Act with the objective of smooth and adequate settlement of disputes. But the Act could not stand on the desired thoughts. The main problem was with the "recognition and enforcement of arbitral award" in one country by the courts of another country. This difficulty was tried to be removed by applying various provisions of *Geneva Convention, 1927* and *New*

[73] NO. 39 OF 1987.
[74]Justice R.V. Raveendran, *Section 89 CPC: need for an urgent relook*, available at http://www.supremecourtcases.com/index2.php?option=com_content&itemid=54&do_pdf=1&id=6642, last accessed on May 31, 2018.
[75] NO.10 OF 1940

York Convention, 1958. The Geneva Convention on the execution of Foreign Arbitral Awards, 1927 came into force on 25th July 1929. India became a signatory to the protocol as well as the convention on 23 October, 1937. Thereafter, the *Arbitration (Protocol and Convention) Act, 1937*[76] was enacted for giving effect to the obligations under the said international law. Again in pursuant to the obligations of the New York convention, the *Foreign Awards (Recognition and Enforcement) Act, 1961*[77] was enacted. In a nutshell, the law relating to arbitration in India was governed by these three Acts namely; the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961.

Since the Act of 1940 contains some difficulties, there was a need to have a more effective method of ADR system in India. Even the *Constitution of India* in its *Article 39-A* contains a provision which states that "the state will ensure that the legal system operates in a manner so as to promote justice to all and to ensure that no citizen is denied the opportunity of securing justice by reason of economic or any other disability"[78], but the reality does not meet the expectation of the provision. The remedy given by law hardly reaches people with some vulnerable situation and some backwardness[79]. Even the delay in justice system is also threatening such a provision. Thus various committees have been constituted from time to time to give some suitable recommendations on the matter and Law Commission of India has given various reports which address such issues. The Law Commission of India, in its 76th Report[80] had recommended for a need of updating and modification of the Arbitration Act, 1940 to cop up with the new dimension of the country. Moreover, the Law Commission had given recommendations on the delay in the proceedings. The 77th report of the Law Commission dealt exclusively with the problems of "delays and arrears in trial courts"[81], which suggested that "arbitration should be made compulsory in certain types of compulsory arbitration cases".

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[76] No. VI of 1937.
[77] No. 45 Of 1961.
[78] Article 39-A was inserted in Part IV of the Constitution of India, 1950 as a Directive Principles of State Policy (DPSP), by the 42nd Constitutional amendment. See also, *supra* note 71, at pp. 358.
[79] MISRA, *supra* note 72 at 359.
[80] The Law Commission of India had recommended through its 76th report on November, 1978 on the defaults of the Arbitration Act, 1940. The report specifically deals with the area of the Act and the purpose for which it should be updated. Available at http://lawcommissionofindia.nic.in/51-100/Report76.pdf, last accessed on June 1, 2018.
[81] The report was published in November 1978 which admitted that, "The problem of delay in the disposal of cases pending in law Courts is not a recent phenomenon. It has been with us since a long time. A number of Commissions and Committees have dealt with the problem, and given their reports. Although, the recommendations, when implemented, have had some effect, the problem has persisted. Of late, it has assumed gigantic proportions. This has

Apart from that, the Government of India had also constituted a Committee on 1989 under the chairmanship of Justice V.S.Malimath for "comprehensive review on court system, particularly all aspects of arrears and delays". The Committee is popularly known as *"**Malimath Committee**"* or *"**Arrears Committee**"*[82]. The Malimath Committee highlighted the urgent need for an alternative dispute mechanism such as arbitration, mediation, conciliation, Lok Adalats etc. as a possible alternative to the conventional court litigation. Besides that, several other authorities and bodies and committees gave their views and suggested for a change in the existing arbitration law in India. Accordingly, the *Arbitration and Conciliation Act, 1996*[83] was passed and replaced the earlier statute.

Existing law on arbitration in India:

The current law on arbitration in India is governed by the Arbitration and Conciliation Act, 1996. The Act covers domestic arbitration, international commercial arbitration and conciliation[84]. The Act has repealed the earlier Act on arbitration, namely:

- The Arbitration Act, 1940;
- The Arbitration (Protocol and Convention) Act, 1937; and
- The Foreign Awards (Recognition and Enforcement) Act, 1961.

The Act is more comprehensive than the earlier Act. It consists of 86 sections in four parts. First part relates to arbitration in India, second part deals with enforcement of foreign awards under the New York Convention and Geneva Convention[85]. Third part relates to conciliation and last part relates to supplementary provisions of rule making power of High

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subjected out judicial system, as it must, to severe strain. It has also shaken in some measure the confidence of the people in the capacity of the Courts to redress their grievances and to grant adequate and timely relief", also available at http://lawcommissionofindia.nic.in/51-100/Report77.pdf, last accessed on June 1, 2018.

[82] The report of the Malimath Committee (1989-90). The committee was headed by the Justice V.S. Malimath, the two other members: Justice P.D.Desai and Justice A.S.Anand. Also available at http://www.icsi.edu/WebModules/Programmes/PCS/7PCS/BG%20PCS-4-dixit.pdf, last accessed on June 1, 2018.

[83] 26 of 1996.

[84] The preamble of the Act says that "an Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto". Also available at http://www.wipo.int/edocs/lexdocs/laws/en/in/in063en.pdf, last accessed on June 1, 2018.

[85] MISRA, *supra* note 72, at 10.

Court. The Act is based on UNCITRAL model law[86]. The Indian law of arbitration applies to commercial matters relating to sale, purchase, banking, insurance, building construction, engineering, technical assistance, scientific know-how, patents, trade-marks, management etc. arising between the parties.[87] However, the law has undergone several amendments time to time to make the Act more effective. The Hon'ble Supreme Court of India, in the case M/s. Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.[88] observed some defects in the Act like for challenging the award of the arbitrator the party again has to start from the district court. Keeping in mind all the defects of the Act, the Law Commission of India in its 176th Report highlighted the deficiencies of the 1996 Act and suggested certain amendments on the Act. Accordingly, the Arbitration and Conciliation (Amendment) Bill, 2003 was prepared by the Government and referred to Justice Saraf Committee which opined that the Bill was insufficient and should be withdrawn and re-drafted.[89] Thereafter, the Law Commission of India in its 246th Report recommended for "amendment to the Arbitration and Conciliation Act, 1996". Accordingly, the Arbitration and Conciliation (Amendment) Act, 2015[90] was passed to serve the purpose.

2.5. CONCEPTUAL FRAMEWORK:

The term, investment arbitration is different from commercial arbitration which have found place in many domestic arbitration legislations. Thus, in order to understand the whole concept, the definition of investment arbitration has to be analysed. There is a difference between the investment treaty arbitration and other forms of investment arbitration. The difference lies upon fact of *"consent"*. Normally, state can consent to the arbitration in investment disputes in three ways[91]; by-

- Contract,

[86] *Id.* at 8. "The UNCITRAL model law of arbitration was designed to meet the need for harmonizing and improving the domestic law on arbitration which had considerable disparity which created difficulties in resolving international commercial disputes".
[87] Renusagar Power Co. Ltd. v. General Electric Co., AIR 1985 SC 1156, Kochi Navigation v. Hindustan Petroleum, AIR 1989 SC 2198.
[88] (2006) 11 SCC 245 (India).
[89] Available at; http://lawcommissionofindia.nic.in/reports/report246.pdf, last accessed on June 1, 2018.
[90] 3 of 2016. Also available at http://docs.manupatra.in, last accessed on June 1, 2018.
[91] Patil & Jain, *Supra* note 19 at 24. See also, AR Parra, *The role of ICSID in the settlement of investment disputes* 16 (1) ICSID News 5, 1999.

- Domestic legislation; and
- Treaty.

Firstly, state can form an arbitration clause in a contract with foreign investor, in which case, the state is regarded as acting in a private capacity and it comes under the preview of commercial relationship with the other party[92].

Secondly, state can consent to investment arbitration by enacting legislation which will authorize the investor to submit the investment dispute to the international arbitration[93].

Thirdly, a state can enter into a treaty which will provide for compulsory arbitration of disputes with foreign investors. In this case, the state generally gives its consent to investment arbitration, pursuant to either domestic law or international law[94]. The first treaty which was the result of general consent of states to investment arbitration was Bilateral Investment Treaties. In the late 1970s consent over BITs became more common but not universal. Moreover, a good number of regional treaties were also created by the countries in the era of 1990s. The most important regional treaties were NAFTA and the Energy Charter Treaty, the Association of South East Asian Nations (ASEAN) in which there was a settled provision of investors claim under compulsory investment arbitration. The establishment of such agreements had led to more investor claim and more awards than any other investment treaty and it grew attention of investment treaty arbitration and helped to rapid expansion of claims under other treaties also[95]. But the term, investment arbitration has not been clearly defined. But the terms like investors and investments are found in many of the model bilateral treaties. Generally, the term investment arbitration means," a procedure to resolve disputes between foreign investors and host States (also called Investor-State Dispute Settlement or ISDS). The possibility for a

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[92] *Id.*

[93] *Id.*

[94] *Id*. See also, J Paulson, *Arbitration without Privity*,10 ICSID Rev 232, 233-240 (1995). "When the consent is given in domestic legislation, it is subject to domestic law and can be withdrawn or amended according to the domestic law, and when the consent is given in a treaty then it is subjected to the terms and conditions of the treaty and can only be amended or withdrawn with the consent of the state parties or by termination of the treaty".

[95] Patil & Jain, *supra* note 19 at 26; "to August 2006, there has been 41 notices of intent by investors to submit a claim under NAFTA chapter 11, of which at least 22 have led to arbitration proceedings. Of these, 13 have resulted in final awards on the merits, including 2 in claims against Canada, 7 in claims against Mexico, and 4 in claims against the United States. Of the 13 awards on the merits to date, damages were awards in 2 claims against Canada and 2 claims Mexico. Each of the four claims against the United States was unsuccessful".

foreign investor to sue a host State is a guarantee for the foreign investor that, in the case of a dispute, it will have access to independent and qualified arbitrators who will solve the dispute and render an enforceable award".[96]

Meaning and Definition of investment:

Earlier, the term "investment" has been categorized as two types of investment. One is direct investment and another is portfolio investment[97]. During the end of 19th century, the most prominent form of investment was portfolio investment[98]. But the era of globalization and expansion of corporations and companies had led to the entry of direct investment in several sectors of the economy[99]. But the term investment lacks any single or uniform definition.

Definition of investment under ICSID:

When the ICSID was created, then the signatories had chosen not to define the term "investment"[100]. The countries had defined the investment in their respective bilateral treaties. But with the passage of time, the arbitrators realized that consent solely cannot make an element of investment. There has to be some definition of investment to frame a bound for the authorities so that there would be some subject matter of dispute for sending the matters to ICSID. The need for incorporating the definition of investment was felt through many case laws before ICSID. The case, Fedax N.V. v. The Republic of Venezuela[101], has laid some elements for the term investment which was finally recognized in the case of Salini et al. v. Morocco[102]. In that case, it was highlighted that "the term investment has four elements:

i. A contribution of money or assets;

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[96] Available at https://www.international-arbitration-attorney.com/investment-arbitration/, last accessed on June 4, 2018.
[97] Definition of Investor and Investment in International Investment Agreements, pp. 49. Also available at https://www.oecd.org/investment/internationalinvestmentagreements/40471468.pdf, last accessed on June 5, 2018.
[98] *Id.*
[99] *Id.*
[100] Alex Grabowski, *the Definition of Investment under the ICSID Convention*: *A Defense of Salini*, 15 CJIL280, 289 (2005). Also available at, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=https://www.google.co.in/&httpsredir=1&article=1058&context=cjil, last accessed on June 4, 2018.
[101]Fedax NV. v. Republic of Venezuela, ICSID Case No. ARB/96/3.
[102] Salini et al v. Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 152 (Jul. 23, 2001), 42 I.L.M. 609 (2003).

ii. A certain duration;

iii. An element of risk; and

iv. Contribution to the economic development of the host state."[103]

Thus, the elements laid down in the Salini case were used as a test which has to be satisfied in order to become an investment. But these elements were not universal. It was refused in many of the subsequent cases[104]. On the other hand, there were certain conventions and case laws which had adopted the definition and applied it. Vienna Convention and UN Charter had adopted the definition of the investment which was laid down in the Salini test.[105] Thus, there is no any definite and clear definition of investment on the ICSID Convention but the term had been interpreted differently on different occasions through various judicial decisions.

Definition of investment under India's Model BIT 2016:

The Indian Bilateral Investment Treaty also defines the term "investment" under Article 1 of Chapter 1. It defines investment as: "an enterprise constituted, organized and operated in good faith by an investor in accordance with the law of the Party in whose territory the investment is made, taken together with the assets of the enterprise, has the characteristics of an investment such as the commitment of capital or other resources, certain duration, the expectation of gain or profit, the assumption of risk and a significance for the development of the Party in whose territory the investment is made." In furtherance with that, the definition also provides the elements of enterprise. It may possess "shares, stocks and other forms of equity instruments of the enterprise or in another enterprise, a debt instrument or security of another enterprise, Copyrights, know-how and intellectual property rights such as patents, trademarks, industrial designs and trade names, to the extent they are recognized under the law of a Party, moveable or immovable property and related rights, portfolio investments of the enterprise or in another enterprise etc."[106]

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[103] Parra, *supra* note 100 at 290.
[104] *Id.*
[105] *Id.*
[106] Model Text for the Indian Bilateral Investment Treaty, Chapter 1, Article 1.4: "Investment". Also available at, https://www.finmin.nic.in/sites/default/files/ModelTextIndia_BIT%20%281%29.pdf?download=1, last accessed on June 5, 2018.

Definition of investor:

The term investor has also been defined in the India's BIT 2016. Investor means "a natural or juridical person of a Party, other than a branch or representative office, that has made an investment in the territory of the other Party; and for the purposes of this definition, a "juridical person" means:

(a) a legal entity that is constituted, organised and operated under the law of that Party and that has substantial business activities in the territory of that Party; or

(b) a legal entity that is constituted, organised and operated under the laws of that Party and that is directly or indirectly owned or controlled by a natural person of that Party or by a legal entity mentioned under sub-clause (a) herein."[107]

Moreover, the draft of MAI also defines the term investor. According to it, investor is "a legal person or any other entity constituted or organised under the applicable law of a Contracting Party, whether or not for profit, and whether private or government owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, joint venture, association or organization."[108]

Meaning and definition of arbitration:

Arbitration is that legal procedure which is used to resolve the disputes outside the courts. That is why; arbitration falls in the category of alternative dispute resolution.[109] It is mostly used to resolve the commercial disputes, in the light of international commercial arbitration. And in the present era, its scope has been increased to include investment disputes also occurring under the purview of international investment treaty. The term generally means, "Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make

[107] Model Text for the Indian Bilateral Investment Treaty, Chapter 1, Article 1.4: "Investment". Also available at, https://www.finmin.nic.in/sites/default/files/ModelTextIndia_BIT%20%281%29.pdf?download=1, last accessed on June 5, 2018.
[108] Parra, *supra* note 100, at 20.
[109] Available at https://www.hg.org/arbitration-definition.html, last accessed on June 16, 2018.

a binding decision on the dispute. In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court."[110]

Indian Arbitration and Conciliation Act, 1996 have adopted the definition of arbitration given in the UNCITRAL Model Law on International Commercial Arbitration. According to Section 2 (1) (a) of Arbitration and Conciliation Act, 1996, arbitration means "any arbitration whether or not administered by permanent arbitral institution".[111]

Moreover, UNTAD has also given some element which will constitute arbitration. The definition of arbitration given by the UNTAD has the following characteristics:

- Arbitration is a mechanism for settlement of disputes;
- Arbitration is consensual;
- Arbitration is a private procedure;
- Arbitration leads to final and binding determination of the rights and obligations of the parties[112].

Moreover, the UNTAD has also defined international arbitration. It states that the arbitration is international if any one of the four elements is present:

- The parties to arbitration agreement have, at the time of the conclusion of the agreement, their places of business in different states;
- The place of arbitration, if determined in or pursuant to, the arbitration agreement, is situated outside the state in which the parties have their places of business;
- Any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected is situated outside the State in which the parties have their places of business;

[110] Available at http://www.wipo.int/amc/en/arbitration/what-is-arb.html, last accessed on June 16, 2018.
[111] Section 2 (1) (a) of Arbitration and Conciliation Act, 1996. See also Article 2 (a) of UNCITRAL Model Law.
[112] Available at http://unctad.org/en/Docs/edmmisc232add38_en.pdf, last accessed on June 27, 2018.

- The parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country[113].

Thus, the Model law is very broad in its definition as to make arbitration international. However, it is found that the international arbitration is mostly defined with regards to commercial arbitration. There is lack of statutory definition with regards to international investment arbitration. The domestic law on arbitration also recognizes international commercial arbitration; they do not include international investment arbitration.

[113] *Id.*

CHAPTER III:

EXISTING LEGISLATIVE FRAMEWORK ON INVESTMENT ARBITRATION:

3.1. BACKGROUND:

Among all the international treaties which are related to investment agreement, the Bilateral Treaties are occupying the most significant position in the present era. Many major countries in the world, whether developed or developing countries, are engaging into bilateral treaties with other countries through their respective Model BITs. And almost all the BITs have contained the similar provisions relating to foreign investor's protections. It is evident that one of the most distinctive characteristics of the worldwide BIT network is the "degree of similarity found among core substantive provisions".[114] Since, the number of BITs is at rise, it is inviting the worldwide foreign investment into the host countries because it sought to provide a favorable environment for the foreign investor by giving them the adequate protection in the host state. It is also to be noted that, all the bilateral treaties include the fundamental provisions of international trade law, like most favored nation clause, national treatment, expropriation etc., thus the investors find it suitable to investment through such treaties. Earlier, it was well-settled that the foreign investors had no remedy except approaching their domestic court of their own domestic countries. But now with the applications of the principles of international trade law, all the BITs allow the foreign investors to bring an action directly against the host state either through exhaustion of local remedy or through international arbitration institution. The most applicable governing laws on such treaties are ICSID Convention, New York Convention, and the UNCITRAL arbitration rules. Moreover, the parties also governed by the principles of public international law. One of the advantages of adopting the authority of New York Convention and ICSID Convention is that the awards given by these authorities are enforceable on the parties even in the territory of the host state. But the countries that do not follow such conventions, it becomes a challenge for them to bring uniformity in the enforcement procedure. Because all other institutions, does not have same enforcement mechanism and as a result, the method of

[114] Available at https://law.yale.edu/system/files/documents/pdf/sela/Montt--State_Liability-1-27.pdf, last accessed on June 17, 2018.

exhaustion of local remedy is being first sought by such countries which in turn affects such countries' BIT and foreign investment also.

With regards to the arbitral process, there is no much distinction between the international commercial arbitration and international investment arbitration. The principle of party autonomy is the ultimate rule governing the arbitration made out from the treaties. When the particular dispute is being referred for arbitration to an arbitration institution then the arbitrator will have to take consideration of the concern made by the parties', along with its own rules for settling the disputes.

3.2. APPLICABLE LAWS ON INVESTMENT ARBITRATION:

***ICSID Convention**:*

There is no doubt to say that the dispute settlement mechanism provided by the World Bank's International Convention for the Settlement of Investment Dispute (ICSID) has made a unique contribution to the system of international investment dispute settlement[115]. Its provisions are unique in comparison with the other institutions. The Convention was signed in 18 March, 1965 at Washington and entered into force on 14 October, 1966.[116] It is a treaty ratified by 153 Contracting states. One of the latest features of the Convention is that not only the states are subject to international law but also the investors as individuals have the benefit of international legal remedy.[117] Article 6 of the ICSID Convention provides that "Administrative Council of the ICSID to adopt rules of procedure for arbitration and conciliation and for the administrative and financial regulation of the Centre"[118]. Sometimes, party's agreement to refer to arbitration may include the particular legal system or the rules of law that will govern the whole procedure of the dispute.[119] In that respect the investment treaty arbitration recognizes that party autonomy or choice of law by the parties. Article 42 (1) of the Convention provides that, "the Tribunal shall

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[115] Subramaniam, *supra* note 17 at 199.
[116] Available at https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx, last accessed on June 18, 2018.
[117] Subramaniam, *supra* note 17.
[118] *Id.*
[119] Yas Banifatemi, *The Law Applicable in Investment Treaty Arbitration*. Also available at https://www.shearman.com/~/media/Files/NewsInsights/Publications/2010/06/The-Law-Applicable-in-Investment-Treaty-Arbitrat/Files/View-full-article-The-Law-Applicable inInvestme/FileAttachment/IA061010TheLawApplicableinInvestmentTreatyArbitr__.pdf, last accessed on June 18, 2018.

decide a dispute in accordance with such rules of law as may be agreed by the parties". Thus, the tribunal is flexible on that part. The tribunal is constituted with three arbitrators, unless the parties agreed otherwise. Once the tribunal is constituted, it hears both the side and render award. The investment arbitral award passed by the Convention is binding in nature. According to Article 53 of the Convention, "An award of a Tribunal is binding on all parties to the proceeding and each party must comply with it pursuant to its terms" and Article 54 states that, "If a party fails to comply with the award, the other party can seek to have the pecuniary obligations recognized and enforced in the courts of any ICSID Member State as though it were a final judgment of that State's courts".[120] The award rendered in the investment dispute is not only binding on the parties to the dispute but it is also recognized as binding even by the other members of ICSID Convention[121]. The award given by the tribunal is eligible for appeal only according to the procedure prescribed by the Convention but not otherwise.[122] These enforcement mechanisms of ICSID are often called as: "independent", "autonomous", "delocalized", "self-executing", "effective" etc.[123] Therefore, many developed countries in the world choose ICSID convention as their governing laws on investment agreement. Thus, it would be more convenient for the ICSID signatory states to adopt the rule. But the problem arises regarding the non-ICSID countries.

One of the most significant issues regarding the enforcement of investment awards in some non-ICSID states is non-enforceability of the award because in such countries the award is not binding, as a result they cannot resort the remedy of ICSID Convention. But such states are also becoming the centre of FDI flows from the hub of the world and as a result rising the phenomenon of investment dispute in such countries. Hence, the countries used to go for ICSID Additional Facility. But the awards rendered by the ICSID Additional Facility are not the same enforceable like ICSID Convention, because they are subject to the law of the place of the arbitration, *lex arbitri*, which again encourage certain amount of judicial intervention in the procedure of its enforcement mechanism.[124]

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[120] Available at https://icsid.worldbank.org/en/Pages/process/Recognition-and-Enforcement-Convention-Arbitration.aspx, last accessed on June 18, 2018.
[121] Subramaniam, *supra* note 118.
[122] *Id.*
[123] *Id.* at 200.
[124] *Id.* at 201.

Among all the non-ICSID Countries, India is one which is not yet signed the Convention. But in recent years, India is proved to be a major destination for FDI flow and also entering in bilateral treaties with other countries. Thus, India prefers to adopt ICSID Additional facility or ad-hoc arbitration.[125]

***ICSID Additional Facility*:**

Apart from the ICSID main arbitration forum, the ICSID Additional facility is there to serve the purpose. Many bilateral treaties or agreements specify an arbitration institution other than ICSID whose services is usually available for commercial dispute rather than investment dispute[126]. Many countries including India's Model BIT also prefer ICSID supported Additional Facility Arbitration rules. Such type of facility was primarily created to address the dispute which falls outside the jurisdiction of ICSID Convention. Articles 25 of the ICSID Convention specify that, "disputes between a State and a national of another State are eligible for arbitration under the Facility if:

- they are investment disputes between parties, one of which is not an ICSID Member State or a national of an ICSID Member State; or
- they do not directly arise out of an investment between parties, at least one of which is an ICSID Member State or a national of an ICSID Member State.

Since such disputes are not covered by the ICSID Convention, none of the provisions of the ICSID Convention is applicable to Additional Facility proceedings[127]. An agreement to arbitrate under the Additional Facility Rules is subject to approval by the Secretary-General under the Additional Facility Rules before proceedings can commence".[128] Since none of the provisions of ICSID Convention is followed in such facility, the award rendered by this method will not get any advantage of ICSID enforcement mechanism. So, this is a limitation of such facility

[125] *Id.* at 203.
[126] *Id.*
[127] Article 3 of ICSID Additional Facility Rules. Also available at https://icsid.worldbank.org/en/Pages/process/Overview-ICSID-Additional-Facility-Arbitration.aspx, last accessed on June 18, 2018.
[128] *Id*.

award.[129] However, this limitation can be overcome by applying to the New York Convention, 1958.[130]

New York Convention, 1958:

The New York Convention, 1958 applies to the "recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought".[131] Since, the New York Convention is always applies for recognition and enforcement of foreign arbitral award, it has a direct effect on ICSID Additional facility rules. According to Article 19 of the ICSID Arbitration (Additional Facility) Rules, "the arbitration under such facility can only happen in those states who are parties to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards".[132] Hence, the reference to New York Convention makes it clear that the award will be enforceable in the states that falls in the jurisdiction of the Convention. However, it is also to be noted that, as soon as the award will be referred to the Convention for its enforcement, it attracts the grounds for refusal of enforcement of arbitral award prescribes by the national law of the particular state. Thus, such reference also encourages judicial intervention prescribed by the law of the place of arbitration.[133]

India has also given its ratification on the Convention on 13th July, 1960 and became a signatory state to the Convention. India complies with the provisions of the Convention by incorporating it in the domestic law. But the provisions of the "Convention will only be applicable:

- to the recognition and enforcement of awards made in the territory of another contracting states; and

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[129] *Id.* at 204.
[130] *Id.*
[131] Article1: field of application of New York Convention, 1958. Available at http://www.newyorkconvention.org/11165/web/files/document/1/5/15975.pdf, last accessed on June 19, 2018.
[132] *supra* note 129.
[133] *Id*.

- to the differences, arising out of legal relationship whether contractual or not, considered as commercial under the national law."[134]

UNCITRAL Arbitration Rules:

Apart from the above mentioned method of dispute resolution, the UNCITRAL Arbitration Rule, 1976 are also adopted by various state parties for their investor-state dispute resolution as well as state-state dispute resolution.[135] The rule provides for "comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations. The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in relation to the form, effect and interpretation of the award. At present, there exist three different versions of the Arbitration Rules: (i) the 1976 version; (ii) the 2010 revised version; and (iii) the 2013 version which incorporates the UNCITRAL Rules on Transparency for Treaty-based Investor-State Arbitration".[136] The UNCITRAL rule is basically adopted as ad-hoc arbitration. However, it is to be noted that the UNCITRAL Model rules are merely rules, and not a permanent or set-up institution to support the whole arbitration process. Such a limitation can be a major stumbling block in the successful conduct of the whole arbitration proceedings[137]. The basic requirement of the UNCITRAL rule is that "the award shall be in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay"[138] With regards to the enforcement mechanism, the UNCITRAL rule does not provide any specific enforcement mechanism. Again, they have to comply with the rules of New York Convention.

With regards to Indian investment regime, India normally prefers to be governed by the ICSID Additional facility rules and by UNCITRAL rules. And in both the method of arbitration, the arbitral award will always be enforced by the New York Convention. But in case of ICSID Additional facility, the reference to New York Convention for award enforcement is governed by

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[134] Section 44 to 52 of the Arbitration and Conciliation Act, 1996.
[135] *supra* note 133.
[136]Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html, last accessed on June 19, 2018.
[137] *supra* note 135.
[138] Article 32(2) of the UNCITRAL Arbitration Rules, 1976.

the internal rule of the facility itself, and in UNCITRAL rule the award will be made enforceable by their national law in any of the contracting state.

3.3. LEGISLATIVE FRAMEWORK OF UNITED STATES (US):

United States had also entered in many major treaties bilateral, multilateral as well as regional. It had ratified many significant international conventions which will govern their investment regime. Most importantly US had ratified the ICSID Convention on June 10, 1966[139] and thus the country is governed by the rules of this Convention in its treaties. Recently, there has been a limelight of US Model BIT. US had first entered into BIT with Egypt in the year 1982 but that treaty did not contain detail provision regarding investor protection. The detail provision was present in the second BIT with Panama which was also concluded in the year 1982. Prior to that, US investment regime was governed by the FCN treaties which were succeeded by the BITs in the forthcoming years. Like many other countries US had also engaged itself in modification their existing BITs. US had entered into BIT with India in the year 2009. But after that both the countries had stated renegotiating their treaties. US have adopted a Model BIT 2012 replacing its all earlier BITs. But there are some differences in the protection given to foreign investors. With regards to the scope and application the treaty, is applicable to the investment made by other contracting party as well as covered investment[140]. The US model BIT contains the Most Favored Nation (MFN) principle, national treatment principle which is the cornerstone of non-discrimination principle in the international economic relations. In a nutshell, the objective and purpose of the US BIT is to provide assistance and assurance to the foreign investors by providing: "either national or most-favored-nation treatment for their investments; adequate compensation in the event of expropriation or nationalization; the ability to transfer capital and profits relating to their investments to other countries, including the United States; and the right to obtain international arbitration for investment disputes".[141]

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[139]Available at https://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf, last accessed on June 19, 2018.

[140]2012 U.S. Model Bilateral Investment Treaty; Article 2: scope and coverage. Also available at https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf, last accessed on June 19, 2018.

[141] Valerie H. Ruttenberg, The *United States Bilateral Investment Treaty Program: variations on the model*,available at https://www.law.upenn.edu/journals/jil/articles/volume9/issue1/Ruttenberg9U.Pa.J.Int'lBus.L.121(1987).pdf, last accessed on June 19, 2018.

Moreover, the treaty also complies with the international environment standard by incorporating environment protection measure in its BIT. With regards to its investment dispute, the US BIT makes it obligatory that all the investment disputes shall be referred to arbitration[142]. The treaty also specifies that, "the disputes shall be governed:

- under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;
- under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;
- under the UNCITRAL Arbitration Rules; or
- if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules."[143]

Thus, the 2012 US Model BIT had proved to be more adequate in providing investment protection to the individual foreign investors. Reference to ICSID Convention for the enforcement of arbitral award makes it more strong and binding upon the parties.

3.4. LEGISLATIVE FRAMEWORK OF UNITED KINGDOM (UK):

At present, UK is the one of the major recipient of the Foreign Direct Investment in the World. According to the UNTAD World Investment Report, 2016, UK is in the position of 12th largest recipient of FDI in the whole world[144]. Thus, UK government is trying to maintain an investor friendly environment through its international investment treaties. At present, UK has entered into 106 BITs, of which 94 are currently in force. UK Model BIT 2008 includes all such provisions which are commonly found in all other treaties[145]. UK BIT typically includes a

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[142] 2012 U.S. Model Bilateral Investment Treaty; Article 24: Submission of a Claim to Arbitration.
[143] *Id.*
[144] Available at http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf, last accessed on June 26, 2018.
[145] Available at http://www.law.ed.ac.uk/includes/remote_people_profile/remote_staff_profile?sq_content_src=%2BdXJsPWh0dHAlM0ElMkYlMkZ3d3cyLmxhdy5lZC5hYy51ayUyRmZpbGVfZG93bmxvYWQlMkZwdWJsaWNhdGlvbnMlMkYxXzYyOF91bml0ZWRraW5nZG9tcmVwb3J0b250aGVwcm90ZWN0aW9ub2Zmb3JlLnBkZiZhbGw9MQ%3D%3D, last accessed on June 26, 2018.

territorial application according to which the territory of the UK comprises its metropolitan territories i.e. Great Britain and Northern Ireland, and to any territory to which the BIT is extended according to its Exchange of noted between the contracting parties[146]. The very purpose of UK Model BIT is reflected in its preamble that it is "for the promotion and protection of investments". The preamble also reflects that it is desire "to create a favorable condition for greater investment by national's greater investment by nationals and companies of one State in the territory of the other State". The treaty has moved towards definition which shows that the definition of "investment" of the treaty is asset-based definition, unlike the definition of India which is enterprise based definition.[147] For the purpose of extending favorable protection to the investors, the Treaty includes the provisions like "National Treatment" and "Most Favored Nation Treatment (MFN)" so that the investors should not be subjected to any discriminatory provisions[148]. The treaty also provides the provisions like expropriation and compensation for losses.[149] Regarding the investment dispute settlement mechanism, the UK Model BIT provides for reference to ICSID Convention[150]. Since, UK is a signatory to the ICSID Convention, thus it is governed by the rules of ICSID Convention on investment dispute. Moreover, with respect to settlement of investor-state disputes, party has the option to adopt ICSID, International Chamber of Commerce (ICC) or ad-hoc arbitration under the rules of UNCITRAL Model law. Therefore, in the event of investment dispute, the UK Model BIT will be governed by the following rules and institutions:

- ICSID Convention;
- ICSID Additional Facility;
- Court of Arbitration of the International Chamber of Commerce; and

[146] Article 1 (e) of the UK Model BIT, 2008.
[147] Article 1 of the UK Model BIT 2008. It states that "investment" means "every kind of asset, owned or controlled directly or indirectly, and in particular, though not exclusively, includes: (i) movable and immovable property and any other property rights such as mortgages, liens or pledges; (ii) shares in and stock and debentures of a company and any other form of participation in a company; (iii) claims to money or to any performance under contract having a financial value; (iv) intellectual property rights, goodwill, technical processes and know-how; (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources. Also available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/2847, last accessed on June 26, 2018.
[148] Article 3 of the UK Model BIT.
[149] Article 4 and 5 of UK Model BIT.
[150] Article 8 of UK Model BIT.

- An international arbitrator or ad-hoc arbitration tribunal established under the Rules of UNCITRAL Model law[151].

Besides that, one another unique feature is found in UK investment treaty regime which is enforcement of investment arbitration in UK. UK government has drafted a specific law on the point. The investment arbitral award passed by the tribunal has to be enforced through the *"Arbitration (International Investment Disputes) Act, 1966"*[152]. The Act provides for the enforcement of Convention awards, registration of Convention award and effect of registration[153]. Thus, this unique feature is hardly found in any other country with respect to the enforcement of international investment arbitral award. Hence, UK Model BIT 2008 provided for an entire investor friendly regime which made UK one of the major destinations of foreign investment in today's date.

3.5. LAWS GOVERNING INDIA'S INVESTMENT ARBITRATION:

India started taking part in the international investment treaty regime only in the wake of 1990s with the new economic liberalization approach in 1991[154]. Prior to that, international commercial arbitration was prevalent in India which found place in the earlier Arbitration Act, 1940 which was repealed and then the concept was incorporated in the Arbitration and Conciliation Act, 1996. Thus, with regards to international commercial arbitration, India has drafted a law which could address that, but with regards to investment arbitration India's approach is still lagging behind. But with the passage of time India has also become a chosen destination for foreign investment by the various countries of the world. Thus, India had also taken part in making BITs with other nation according to its own model bilateral treaties. As have stated earlier, India had signed its first BIT with UK in the year 1994 with the sole purpose of attracting the incentives of foreign investment.[155] India's first BIT was created on the model of developed countries where emphasis lied on "the protection of the interest of the foreign investors rather than internationally recognized regulatory powers of the state".[156] The Model BIT was again renegotiated and a 2003

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[151] *Id.*
[152] 1966 Chapter 41. Also available at http://www.legislation.gov.uk/ukpga/1966/41/introduction, last accessed on June 26, 2018.
[153] *Id.*
[154] Desai, *supra* note 3 at 7.
[155] *Id.*
[156] *Id.*

Model BIT was adopted. Until 2015, India had signed as many 84 investment agreements[157]. Recently, India had signed its BIT with UAE in the year 2013 which came into force on August 2014[158]. India's investment regime was going smoothly until the year 2011. But after the decision of White Industries, India had reportedly terminated its entire BITs with other nations.[159] Thereafter, Central government working group began to renegotiate the process in 2012 and had decided to create an investor-state dispute resolution which can balance investor right and state regulatory obligation[160]. Accordingly, the Government had drafted a Model BIT 2016 to serve the investment regime more efficiently.

Law Commission of India, in its 260th report had stated that "the draft model of India's BIT has walked the tightrope and tried its best to maintain the balance between the rights of the investors and the rights of the state"[161]. The Model BIT 2016 has addresses many things which will ensure states obligation towards foreign investment but had fail to address many of the important provisions of international law on arbitration like MFN principle, national treatment principle etc. Moreover, the treaty has also attracted some defaults in it like "exhaustion of local remedy before approaching to international institution for arbitration, number of exceptional self-judging state actions, which would not be within the purview of challenge before an arbitral tribunal set up pursuant to the dispute resolutions contained in the BIT"[162]. The treaty, if compared with the bilateral treaties with other developed countries lacks many significant provisions which would have been incorporated in the treaty for better protection of the interest of the investors. Thus, the Law Commission of India through its 260th report had suggested for certain amendment to the Model BIT 2016.

Generally, the Vienna Convention on Law of Treaties, 1969 is the primary governing law on interpretation of treaties by the tribunals[163]. Article 31 of the VCLT provides the most

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[157] Jane Kelsey, *India's New Model BIT: A Comparative Analysis*, available at http://www.madhyam.org.in/indias-new-model-bit-a-comparative-analysis/, last accessed on June 19, 2018.
[158] *Id*.
[159] Kelsey, *supra* note 156.
[160] Anirudh Krishnan, *A bit for the state, a bit for the investor*, the Hindu September 8, 2015. Also available at http://www.thehindu.com/opinion/op-ed/a-bit-for-the-state-a-bit-for-the-investor/article7625893.ece, last accessed on June 20, 2018.

[162] *Id*.
[163] The Vienna Convention on Law of treaties was concluded at Vienna on 23 May, 1969. The basic objective of the treaty is that "the States Parties to the present Convention, Considering the fundamental role of treaties in the history of international relations, recognizing the ever-increasing importance of treaties as a source of international law and

important provision in this regard:*"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".*[164] Apart from that, another way of interpretation used by the tribunal is the reference to the preamble of the BIT because generally the object and purpose of BIT is reflected in its preamble[165].

Article 23 of the Indian Model BIT 2016 also provides for the governing laws which will be used for interpretation of the treaty. It provides that "the governing law for interpretation of this Treaty by a tribunal constituted under this Article shall be:

(a) this Treaty;

(b) the general principles of public international law relating to the interpretation of treaties, including the presumption of consistency between international treaties to which the Parties are party; and

(c) for matters relating to domestic law, the law of the Defending Party".[166]

However, it is also provided that, "This Treaty shall be interpreted in the context of the high level of deference that international law accords to States with regard to their development and implementation of domestic policies".[167] It is also further provided that whatever the interpretations of the specific provisions and decisions on application of the Treaty shall be binding on the tribunals established under this Article upon the issuance of such interpretation or decisions.[168] It is also given in the Treaty that "in accordance with the Vienna Convention of the Law of Treaties, 1969 and customary international law, other evidence of the Parties subsequent agreement and practice regarding interpretation or application of this Treaty shall constitute

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as a means of developing peaceful co-operation among nations, whatever their constitutional and social systems". Also available at https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf, last accessed on June 20, 2018.

[164] Desai, *supra* note 3 at 6.

[165] *Id.*

[166] Article 23.3 of the Model BIT 2016.

[167] Article 23.1 of the Model BIT 2016.

[168] Article 24.1 of the Model BIT 2016.

authoritative interpretations of this Treaty and must be taken into account by tribunals under this Chapter"[169].

Moreover, with regards to its investor-state dispute the treaty used to provide that the aggrieved party first have to restore the remedy provided by the domestic courts of the host state. And if no such remedy has been given with a period of five years, then only by serving proper notice to the other part and after lapse of a particular amount of time, the parties can move towards international arbitration institution for getting remedy.[170] Thus, the domestic law of the host state would be applicable in all the disputes arising out of the treaty and regarding arbitral proceedings, the Treaty makes it clear that arbitration shall be conducted according to the UNCITRAL Model Law, and the seat and place of the arbitration will be chosen by the parties[171]. Thus, it is very clear from the provisions of the treaty that the treaty have kept intact their sovereign position over the other investor and the treaty has mostly chosen to be governed by ad-hoc arbitration rather than institutional arbitration.

[169] Article 24.2 of the Model BIT 2016.
[170] *Supra* note 165 at 46.
[171] Model Text for the Indian Bilateral Investment Treaty, Article 14.7: conduct of arbitral proceedings (applicable rules).

CHAPTER IV:

MODEL BILATERAL INVESTMENT TREATY 2016 AND DISPUTE RESOLUTION:

4.1. BACKGROUND:

Prior to the period of globalization and liberalization, India's attitude towards the foreign investment was different and unreceptive. Many developed countries in the world were busy in formulating their own regional treaties and entered into investment regime. But during the period of globalization and liberalization, many changes happened in the world economy. Many developing and LDCs were got the chance to participate in the investment regime. India has started participating in the world economy specifically during the year 1994 and which had made India a suitable destination for the investment and as a result, it started making bilateral treaties with other countries in order to keep a balance between the investor's right and state's obligation. BITs are generally made to protect the investment made by a foreign individual or a foreign state to the host state by imposing conditions on the regulatory behavior of the host state and thus, restrict the action of the host state by preventing undue interference with the rights of the foreign investors[172]. These protections include granting expropriation, compensation, giving fair and equitable treatment to foreign investment and not to discriminate against foreign investment; allowing for repatriation of profits subject to conditions agreed to between the two countries; and most importantly, allowing individual investors to bring cases against host states if the latter's sovereign regulatory measures are not consistent with the BIT, for monetary compensation.[173]Such type of measure is commonly known as investor-state dispute resolution.[174] The 1994 Model BIT also provided for such resolution and protection but it was not adequate. The treaty could not give sufficient safeguard to the investors which are evident from the landmark judicial pronouncement in India regarding investment. Again the 2003 Model was adopted to give protection to the foreign investors. The said Model was in force and had

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[172] Prabhash Ranjan Pushkar Anand, *The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction*, 38 NJILB, 2017 pp. 2. Also available at https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1824&context=njilb, last accessed on June 20, 2018.
[173] *Id.*
[174] *Id.*

executed with many countries. In fact, the India-UK BIT 1994 also had a close resemblance with the 2003 Model BIT. Thus, from the year 1994 to 2011, India had signed as many as 80 BITs with several nations in the world and ratified over 70 treaties[175].

The investor-friendly regime in India remained intact until the year 2011. Until that year, only one arbitration was initiated against India. The case was related to Dabhol Power Project[176], 1990s. The company constituted largest FDI in India in the year 1990. After that, the investor friendly regime got changed when the decision of the White Industries came in the limelight. The decision was against India. India had to pay a huge amount of compensation for the violation of India-Australia BIT. Thus, after that decision, India had re-negotiated the treaty and drafted a Model BIT 2016.

4.2. JUDICIAL PRONOUNCEMENT LED TO THE ADOPTION OF MODEL BIT 2016:

There are some landmark cases regarding investment arbitration in India which have influenced the modification of Indian Model BIT. Some of them are discussed below:

i. Dabhol Power Project case, 1990[177]:

In the year 1990, a joint venture company of Dabhol Power Company, Enron Corporation, General Electric Corporation and Bechtel Enterprises was formed in Maharashtra to generate electrical power in the state of Maharashtra. The Company entered into an agreement with the Maharashtra State Electricity Board which is an Indian public sector enterprise. The Board entered into the agreement as the sole purchaser of power generated by Dabhol Company. However, the MSEB had terminated the agreement due to "irregularities, political opposition, and high cost of power charged by DPC". Thus, DPC lost its sole consumer to sell its electricity which adversely affected their investment. Thereafter, DPC instituted arbitration proceedings against the MSEB. But, Indian court exercising their power granted "anti-arbitration injunction" against it. Therefore, the companies invoked the India-Mauritius BIT asking for expropriation.

[175] Desai, *supra* note 3 at 7.
[176] Capital India Power Mauritius I and Energy Enterprises (Mauritius) Company v. India, ICC Case No. 12913/MS. IIC 43 (2005).
[177] Maharashtra Power Development v. Dabhol Power Company and others, AIR 2004 Bom 38.

As many as nine cases were filed in relation to the project. However, the cases were ultimately solved and did not go before international investment institution.[178]

ii. White Industries case, 2011[179]

The brief fact of the case was "White Industries, an Australian mining company, entered into a long-term mining contract with Coal India Limited (Coal India), a State-owned Indian company in 1989. Disputes relating to quality, bonus and penalty payments arose between Coal India and White Industries, prompting the latter to commence arbitration under the ICC Arbitration Rules. In May 2002, the ICC tribunal awarded USD 4.08 million to White Industries. In September 2002, Coal India applied to the Calcutta High Court to set aside the ICC Award under the Indian Arbitration and Conciliation Act. Simultaneously, White Industries applied to the High Court of New Delhi to enforce the ICC Award in India. Both proceedings experienced significant delays. The enforcement proceedings were eventually stayed pending a decision in the set-aside proceedings. White Industries appealed to the Supreme Court while the High Court of New Delhi stayed the enforcement proceedings. The matter was pending before the Supreme Court for nine years until 2010. White Industries finally invoked arbitration under the India-Australia BIT.

The Tribunal ultimately awarded White USD 4.08 million as compensation as it found that India had violated its obligation to provide to the investor 'effective means' of asserting claims and enforcing rights i.e. a provision borrowed from the India-Korea BIT by way of a most-favored nation clause in the India- Australia BIT."[180]

iii. Vodafone international case[181]

This was a case regarding retrospective taxation. The facts of the case is "on April 2017, Vodafone invoked the India-Netherlands BIT and filed a claim against the government of India, challenging the infamous retrospective tax amendment which had led to a tax demand of Rs 11,000 crore plus interest against Vodafone on its 2007 acquisition of a 67% stake in Hutch-Essar in India. Importantly, the retrospective amendment was carried out by the Union

[178] Desai, *supra* note 3 7.
[179] White Industries Australia Ltd v Republic of India, IIC 529 (2011).
[180] Desai, *supra* note 178 at 8.
[181] Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613.

government after the Supreme Court decided this issue in favor of Vodafone, i.e. quashed the tax demand in 2012. While the first investment treaty arbitration proceeding under the India-Netherlands BIT was pending, Vodafone again initiated a fresh arbitration, invoking the India-UK BIT. It appears that the second arbitration was commenced due to a jurisdictional objection raised by the Union government in the first arbitration.

In turn, the Union government filed a civil suit before the Delhi High Court seeking an anti-arbitration injunction against Vodafone from initiating arbitration proceedings under the India-UK BIT. The Union government contended that this is an abuse of process, insofar as Vodafone has maintained two identical claims under two different bilateral investment treaties against the same subject matter. The Delhi High Court, on August 22, 2017, passed an interim order in favor of the Union government, and held that multiple claims cannot be filed by Vodafone against the same measure of the host state—under different bilateral investment treaties. The ruling restrained Vodafone from taking any further action on the second arbitration filed under the India-UK BIT. However, on October 26, 2017, the Delhi High Court allowed the parties to participate in the appointment of the arbitral tribunal pending final disposal of the proceedings filed by the Union government.

This order was subsequently challenged by the Union government before the Supreme Court, which, in turn, allowed the parties to proceed as per the Delhi High Court's order dated October 26 and participate in the appointment of the arbitral tribunal. The Supreme Court did not express any observations on the merits of the contentions in view of the fact that the final arguments were due earlier this year. The Delhi High Court has disposed of the suit filed by the Union government and granted liberty to raise the issue of abuse of process before the arbitral tribunal constituted under the India-UK BIT.

The interim order which had restrained Vodafone from continuing with the proceedings under the India-UK BIT has been vacated. The Delhi High Court reasoned the judgment on the basis that: it is not an absolute proposition of law that national courts are divested of their jurisdiction in an investment treaty arbitration, investment treaty arbitration is fundamentally different from commercial disputes as the cause of action is premised on state guarantees and assurances, it is unknown for courts to issue anti-arbitration injunction under their inherent power in a situation where neither the seat of arbitration or the curial law has been agreed upon;

and national courts will exercise great self-restraint and grant injunction only if there are very compelling circumstances, the court has been approached in good faith, and there is no alternative efficacious remedy available. Although the civil suit has been rejected, the Delhi High Court has opined that the jurisdiction of the national courts is not completely ousted in investment treaty arbitration. This is also in line with a recent decision of the High Court of England and Wales where a partial arbitral award on jurisdiction was set aside. As sovereign states crumble with claims from investors, the courts are increasingly finding a way to retain the jurisdiction, or supervisory control even in case of investment treaty arbitration which is fundamentally different from commercial arbitration.

There appears to be a tension between the legislature and the judiciary; while the judiciary has always supported the investor in this case, i.e. Vodafone, the government is vehement on their tax demand so much so that they had to retrospectively amend the tax law to make Vodafone accountable to pay a hefty sum of money."[182]

iv. 2G license controversy[183]:

The controversy arosed, when there was an allocation of spectrum license 122 Indian and foreign telecom companies on a first cum first service basis[184]. On 2008, Government of India announced a policy allocating telecom spectrum to the applicants, taking a deliberate decision that not to maximize profit for the state, but to allow the license on a low license fee on the first cum first service[185]. The policy was sanctioned by various officials including Attorney General of India Telecom Regulators etc. But Comptroller and Auditor General of India opposed to the policy stating that the "public exchequer had been severely compromised, whereupon a Public Interest Litigation was filed in the Supreme Court inter alia challenging the allocation of licenses". The Honorable Supreme Court, however, held that "first come first serve policy adopted by the Government to be unconstitutional"[186]. The Court further upheld that "the

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[182] Alipak Banerjee & Moazzam Khan, Vodafone case: a bit more arbitration-friendly, available at http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-singleview/article/vodafone-case-a-bit-more-arbitration, last accessed on June 21, 2018.
[183] Center For Pil & Ors v. Union Of India & Ors on 16 December, 2010.
[184] V. Inbavijayan & Kirthi Jayakumar, *Arbitration and Investments - Initial Focus*, 2 Indian J. Arb. L. 33, 48(2013),
[185] Sumeet Kachwaha, The New *Challenges and Opportunities for India in Bilateral Investment Treaties*, also available at https://www.kaplegal.com/upload/pdf/The_New_Challenges_and_Opportunities_for_India_in-Bilateral_Investment_Treaties.pdf, last accessed on June 24, 2018.
[186] *Id.*

Government could not have given away precious natural resources on an arbitrary and non-transparent basis. It ought to have proceeded through public auction"[187]. As a consequent, the Supreme Court struck down all 122 licenses that had granted under the impugned government policy[188]. But all the foreign companies did not accept the decision because those foreign companies owned investments in the Indian telecom sector[189]. They have threatened India with BIT arbitration for a huge amount claiming reimbursement or compensation for their lost investment. One of such companies being Sistema JSFC which is a Russian company served notice of dispute on February 2012 under the Russia-India BIT. Other companies like Norwegian firm, Telenor, served a dispute notice to India on March 27, 2012 under the India-Singapore CECA[190], which contained investment protection clause[191]. Telenor claimed it because it entered into the market of India through its Singapore subsidy[192]. Apart from that the other countries also instituted arbitration against India under their respective BITs[193].

The above mentioned cases on bilateral investment treaty in India show that there have a number of instances where India got the judgment against it and had to undergo several consequences. Specially, after the White Industries case, India's scenario on investment regime undergo sea changes. It led to the draft of new BIT with several new provisions and protections for the investors.

4.3. OVERVIEW OF INDIAN MODEL BIT 2016:

The Indian Model BIT 2016 is the biggest testimony towards India's significantly changes outlook for investment treaty disputes[194]. The treaty contains 38 Articles which is divided into 7 Chapters[195]. Though the treaty has been drafted on the same footing with the earlier BITs but the

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[187] *Id*.
[188] *Id*.
[189] Kachwaha, *supra* note 184.
[190] Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore (CECA). Also available at http://www.indiantradeportal.in/vs.jsp?lang=1&id=0,1,63,68, last accessed on June 24, 2018.
[191] *Id*.
[192] *Id*.
[193] *Id*.
[194] Desai, *supra* note 188 at 9.
[195] *Id*.

new treaty is a departure from the previous treaty.[196] The 2003 Model BIT contained "broad substantive provisions offering precedence to investment protection over the State's right to regulate". On the other hand, the present BIT is different in its "*form, structure, content and accords increased latitude to regulatory powers of the State*".[197] The very object of the treaty is found in its preamble which shows that it had added some more extensive provision in addition to foreign investment. The preamble of the treaty states that "in addition to the promotion of bilateral cooperation, it provides for promotion of sustainable development of the Parties. It specifically lays out that Parties shall have the right to regulate the investments in accordance with the law and policy objectives"[198]. This means that the treaty is giving equal emphasis on the state regulation along with investment protection[199].

APPLICABILITY OF BIT 2016:

Article 2.1 of the Treaty speaks about general application and scope of the treaty. It states that "the 2016 India Model BIT only applies to investments in existence as of the date of entry into force of this Treaty; and investments established, acquired, or expanded thereafter". Moreover, an additional requirement is that "the investments must investments must qualify as being admitted in the host State in accordance with its law, regulations and policies as applicable from time to time".[200] Thus, it is very clear from the provision that the protection given under the BIT does not extend to the pre-investment activities relating to the investment or establishment, acquisition or expansion of any investment, or any law or measure regulating such activities.[201] In addition to that, the treaty had included many provisions which will ensure investor's protection in the host state. But at the same time, the treaty has excluded some of the important

[196]Model Text for the Indian Bilateral Investment Treaty 2016. Available at http://www.finmin.nic.in/reports/ModelTextIndia_BIT.pdf., last accessed on June 21, 2018.
[197] Desai, *supra* note 195.
[198] Preamble of the Model Text for the Indian Bilateral Investment Treaty, 2016. Available at https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf, last accessed on June 21, 2018.
[199] Desai, *supra* note 197 at 15.
[200] Indian Model BIT 2016, Article 2.1 provides that "This Treaty shall apply to measures adopted or maintained by a Party relating 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. to investments of investors of another Party in its territory."
[201] Indian Model BIT 2016, Article 2.2 provides: "Subject to the provisions of Chapter III of this Treaty, nothing in this Treaty shall extend to any Pre-investment activity related to establishment, acquisition or expansion of any investment, or to any measure related to such Pre-investment activities, including terms and conditions under such measure which continue to apply post-investment to the management, conduct, operation, sale or other disposition of such investments".

provisions as the treaty exceptions, which are found in other BITs in the world. Article 2.4 of the Indian Model BIT 2016 specifically excludes certain measures from its scope. They are- "measures by local governments, taxation measures, compulsory licenses, government procurement, grants and subsidies provided by the government and services supplied in exercise of governmental authority by body or organ of the host State".[202] The key exclusions of the treaty are discussed below:

- ***Measures by local government:*** The 2016 Model BIT excludes the measures taken by local government from the purview of the treaty[203]. Local government includes urban, local and rural bodies.[204] Thus, if local government of the host state would take such a measure will be detriment to the interest of the investors then they cannot institute proceedings because such measures will not come under the jurisdiction of the treaty.

- ***Taxation:*** The matter of taxation is also outside the purview of the treaty. Article 2.4 (ii) of the BIT 2016 states that "the treaty shall not apply to any law or measure regarding taxation, including measures taken to enforce taxation obligations. For greater certainty, it is clarified that where the State in which investment is made decides that conduct alleged to be a breach of its obligations under this Treaty is a subject matter of taxation, such decision of that State, whether before or after the commencement of arbitral proceedings, shall be nonjusticiable and it shall not be open to any arbitration tribunal to review such decision"[205]. The decision to exclude taxation from the applicability of the treaty is visibly in response to the claims brought by Vodafone and Cairn against India retrospective application of taxation law[206].

- ***Compulsory licenses:*** The BIT 2016 also excludes compulsory licenses from its purview provided that they are inconsistent with WTO. It provides that, the treaty shall not apply to "the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that

[202] Article 2.4 (i) to (vi) of the Model BIT 2016.
[203] Article 2.4(i) of the Model BIT 2016.
[204] Model BIT 2016, Article 1.7 provides that "local government includes: (i) An urban local body, municipal corporation or village level government; or (ii) an enterprise owned or controlled by an urban local body, a municipal corporation or a village level government".
[205] Article 2.4 (ii) of the Model BIT 2016.
[206] Desai, *supra* note 197. .

such issuance, revocation, limitation or creation is consistent with the international obligations of Parties under the WTO Agreement"[207]. Thus, the treaty does not completely exclude the compulsory licenses. The tribunals take entertain such issue provided that they have to determine whether the compulsory licenses is consistent with TRIPS or not.

4.4. PROVISIONS OFFERING PROTECTION:

Generally the provisions offering protection under all the major BITs in the world are similar in nature. But sometimes it happens that in order to maintain status quo in their state supremacy the provisions offering protection tend to vary from country to country. Thus, it is necessary to check the wordings of the particular treaty to ensure the protection sought under the treaty. There are some differences among the provisions of the treaty, there are some exceptions in the treaty depends upon the status of the country. Indian Model 2016 incorporate some of the protections to its investors which is also found in many other BITs in the world, but on the other hand, the said BIT also exclude some of the important provisions which ought to have been included in the Model BIT. Following are the provisions which offer protection to the investors:

- ***National treatment:***

The principle of national treatment is the most fundamental principle of international law. Such clauses offer protection to the investors by ensuring that "there will be no discrimination based n nationality for the purpose of trade"[208]. Such provisions are often used in the international treaties, be it bilateral treaties or multilateral treaties. But such provisions are always being a serious concern for the developing countries, especially when they seek to protect their domestic industry[209]. Such clauses often stated as "the foreign investor will be accorded treatment no less favorable than that which the host State accords to its own investors"[210] India's earlier BITs had also provided such treatment to investors. And most importantly, Indian Model BIT 2016 also contains the provision of national treatment. It provides that *"Each Party shall not apply to investor or to investments made by investors of the other Party, measures that accord*

[207] Article 2.4 (iii) of the Model BIT 2016.
[208] Desai, *supra* note 206 at 30.
[209] *Id.*
[210] *Id.*

*less favorable treatment than that it accords, in **like circumstances**, to its own investors or to investments by such investors with respect to the management, conduct, operation, sale or other disposition of investments in its territory".*[211] Further, the BIT also provides for guidance that what would constitute like circumstances. It provides that "assessing whether the treatment is accorded in like circumstances would depend 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 the goods or services consumed or produced by the investment; the actual and potential impact of the investment on third persons, the local community, or the environment; whether the investment is public, private, or state-owned or controlled; and the practical challenges of regulating the investment"[212].

- ***Protection from expropriation:***

Expropriation has been one of the most important causes of dispute under the BITs. Many disputes arise from the measures taken by the host state which constitute some form of *"taking on investment"*[213]. Generally, expropriation is not prohibited under international law[214]. Under the international investment treaty law, expropriation of the foreign investment is permissible. But BITs regulate the condition of expropriation. Indian Model BIT 2016 covers both ***direct and indirect expropriation***[215]. Some tribunals rely on the sole effects of the measures on the investment in order to determine expropriation[216]. Regarding the matter of expropriation, the 2016 Model BIT provides that "Neither Party may nationalize or expropriate an investment of an investor of the other Party either directly or through measures having an effect equivalent to expropriation, except for reasons of public purpose, in accordance with the due process of law

[211] Article 4.1 of Indian Model Text of BIT 2016.
[212] *Id.*
[213] *Supra* note 208 at 21.
[214] *Id.*
[215]Indian Model BIT 2016 Article 5.3 provides: "The Parties confirm their shared understanding that: Expropriation may be direct or indirect: (i) direct expropriation occurs when an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure and (ii) 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".
[216] *Supra* note 213.

and on payment of adequate compensation".[217] Moreover, the 2016 Model BIT also sets out some additional guideline with regards to expropriation of land by India. It states that "where India is the expropriating party then any measures of expropriation relating to the land shall be for the purpose as set out in its Law relating to land acquisition and any questions as to 'public purpose' and compensation shall be determined in accordance with the procedure specified therein"[218].

- ***Monetary transfer provision:***

Transfer or repatriation of funds is the one of the important object and purpose of all the BITs under the international investment treaty regime[219]. Reducing barriers to trade is an integral part of meaningful economic integration. Thus, the monetary transfer provision is very important for foreign investor because they provide the freedom to transfer all funds related to investment[220]. Thus, restriction on the part of the foreign investor from such provision will deprive them from the benefit accruing from the investment, such as repatriating profit, and will also not have the freedom to develop their investment[221]. Thus, generally all the BITs contain the monetary transfer provision which will ensure the foreign investor to transfer the funds in and out of the host state.

The Indian Model BIT 2016 also recognizes the investor's right to transfer all funds related to investment such as contributions to capital, profits, dividends, interest payment etc.[222] However, the investor's right to transfer is subject to three restrictions. Such restrictions are under the India's law on foreign exchange that is *Foreign Exchange and Management Act, 1999*[223]. Under Section 6 of the Act, it allows for capital transactions but subject to the condition that the Reserve Bank of India has to specify, in consultation with the central government, "any class or classes of capital account transaction which are permissible and the limit up to which the

[217] Article 5.1 of the Model BIT 2016.
[218] *Id*.
[219] *Supra* note 216 at 32.
[220] *Id.*
[221] *Id.*
[222]Article 6 of Indian Model BIT which provides that "Subject to its law, each Party shall permit all funds of an investor of the other Party related to an investment in its territory to be freely transferred and on a non-discriminatory basis".
[223] No. 42 of 1999.

foreign exchange shall be admissible for such transaction"[224]. Moreover, the Act also gives power to RBI to prohibit, restrict and regulate a number of capital account transactions[225].

Further, the Model BIT under Article 6.3 provides that "nothing in this treaty shall prevent' the host State the good faith application of its laws, including actions relating to bankruptcy, insolvency, compliance with judicial decisions, labour obligations and laws on taxation, etc." Besides that the BIT also provides that the host state may temporarily restrict the investor's right to transfer in the event of serious balance of payment deficit or in the case when transfer of capital could cause or threaten to cause "serious difficulties for macroeconomic management"[226]. Thus, where in one side, the state is allowing the foreign investor to freely transfer their rights, at the same time by putting such condition of restriction the state is also exercising its sovereign power of regulation.

- ***Compensation for loss:***

Compensation for loss is also another feature of almost all the major BITs in the World. By providing such protection, the BITs ensure that the foreign investor should not subject to any discriminatory treatment and arbitrariness. Indian Model BIT 2016 also provide for such protection. Article 7 of the treaty provides the investors another protection by granting them compensation for losses. It provides that "Each Party shall accord to investors of another Party, and to investments by such investors, non-discriminatory treatment with respect to measures, including restitution, indemnification, compensation or other settlement, it adopts or maintains relating to losses suffered by investments in its territory owing to war or other armed conflict, civil strife, state of national emergency or a natural disaster".[227]

- ***Full protection and security:***

The government of a particular host state is under an obligation to ensure that they exercise due diligence by protecting the foreign investment, including their officials, employees and facilities[228]. Thus, this is an essential element of international law to incorporate such

[224] Section 6(2) (b) of the Foreign Exchange Management Act 1999.
[225] Section 6 (3) of the Foreign Exchange Management Act, 1999.
[226] Article 6.4 of the Model BIT 2016.
[227] Article 7 of the Model BIT 2016.
[228] Desai, *supra* note 197 at 43.

provisions. Indian Model BIT 2016 also provides for full protection and security under Chapter III of the treaty which deals with "obligations of parties". The provision is such *"Each Party shall accord in its territory to investments of the other Party and to investors with respect to their investments full protection and security"*[229]. The treaty further provides that for greater certainty, full protection and security only refers to "Party's obligations relating to physical security of investors and to investments made by the investors of the other Party and not to any other obligation whatsoever"[230].

- ***Fair and equitable treatment:***

Most of the major BITs in the world include the Fair and Equitable clause. But Indian Model BIT contain "*treatment of investment clause*" rather than fair and equitable treatment clause. The treaty provides that No Party shall subject investments made by investors of the other Party to measures which constitute a violation of customary international law through:

(i) Denial of justice in any judicial or administrative proceedings; or

(ii) Fundamental breach of due process; or

(iii) Targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or

(iv) Manifestly abusive treatment, such as coercion, duress and harassment[231].

Thus, the provisions offering protection to the investors under the treaty is a great advantage for the host country to attract more investors in invest on the country. However, there are some provisions which show that state is maintaining status quo in its state sovereignty. Thus, a balance is required to be maintained in between state sovereignty and investor protection.

4.5. DISPUTE RESOLUTION UNDER BIT 2016:

Dispute resolution clause under BIT is one sort of protection given to the foreign investors. It provides mechanism for resolution of both investor-state dispute as well as state-state disputes.

[229] Article 3 of the Model BIT 2016.
[230] *Id.*
[231] Article 3.1 of the Model BIT 2016.

Dispute resolution under BITs plays a very crucial role in an investment activity. Indian Model BIT 2016 also provides for both investor-state disputes as well as state-state disputes[232]. Firstly, Chapter IV applies only to the disputes arising out of alleged breach of obligation under Chapter II of the treaty[233]. Chapter II of the treaty deals with "obligations of Parties and covers treatment of investments (including treatment not in violation of customary international law through denial of justice, fundamental breach of due process, targeted discrimination and manifestly abusive treatment), full protection and security and national treatment"[234]. Thus, disputes relating to other provisions of the treaty are excluded from the purview of the treaty. Secondly, contract claims are outside the provisions of the treaty. An arbitral tribunal constituted under the BIT can only entertain such disputes which are relating to breaches of the treaty under Chapter II. Disputes arising out of a separate contract shall be adjudicated by the domestic courts or dispute resolution mechanism under the specific contract[235]. Thirdly, some disputes would be non-arbitrable, for example, disputes relating to investment which has been made through fraudulent misrepresentation, concealment, corruption, money laundering or conduct amounting to an abuse of process or similar illegal mechanism[236]. The BIT also puts additional limitation on the tribunal stating that "a Tribunal constituted under this Chapter shall not have the jurisdiction to:

(i) Review the merits of a decision made by a judicial authority of the Parties; or

(ii) Accept jurisdiction over any claim that is or has been subject of arbitration under Chapter V"[237].

Condition precedent to submit a claim to arbitration:

With regards to a claim under Chapter II of the Treaty, the disputing investors must first submit the claim before relevant domestic courts or administrative bodies of the defending party for

[232] Chapter IV of the Model BIT 2016.
[233] Article 13.2 of the Model BIT 2016.
[234] Desai, *supra* note 228 at 44.
[235] Article 13.3 of the Model BIT 2016 which provides that "a tribunal constituted under this Chapter shall only decide claims in respect of a breach of this Treaty as set out in Chapter II, except under Articles 9 and 10,and not disputes arising solely from an alleged breach of a contract between a Party and an investor. Such disputes shall only be resolved by the domestic courts or in accordance with the dispute resolution provisions set out in the relevant contract".
[236] Article 13.5 of the Model BIT 2016.
[237] Article 13.5 of the Model BIT 2016.

getting domestic remedy in respect of the mater[238]. The provision further provides that such a claim must be submitted within one year from the date on which the investor first acquired knowledge of the matter in question and knowledge that the investment had incurred losses or damage[239]. It is also further provided that "the 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 measure or similar factual matters for which a breach of this Treaty is claimed by the investor"[240]. If within five years from the exhaustion of local remedy, no resolution has been drawn then the investors has to serve a notice to the opposite party for amicable settlement of the disputes through consultation, negotiation or other third party procedures for a period of six months[241]. In case, the parties are not able to amicably settle the dispute then the disputing investor may submit the claim to arbitration within the purview of the Treaty. But it is also subject to the following conditions:

(i) not more than six years have elapsed from the date on which the disputing investor first acquired, or should have first acquired, knowledge of the measure in question and knowledge that the disputing investor with respect to its investment, had incurred loss or damage as a result; or;

(ii) Where applicable, not more than twelve months have elapsed from the conclusion of domestic proceedings pursuant to 15.1.

(iii) the disputing investor or the locally established enterprise have waived their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the Defending Party that is alleged to be a breach referred to in Article 13.2.

(iv)where the claim submitted by the disputing investor is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the disputing investor owns or controls, that enterprise has waived its right to initiate or continue before any administrative tribunal or

[238] Article 15.1 of the Model BIT 2016.
[239] *Id.*
[240] *Id.*
[241] Article 15.4 of the Model BIT 2016.

court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the Defending Party that is alleged to be a breach referred to in Article 13.2.

(v) At least 90 days before submitting any claim to arbitration, the disputing investor has transmitted to the Defending Party a written notice of its intention to submit the claim to arbitration[242].

Submission of claim to arbitration:

After fulfilling the above mentioned requirement, the disputing party is free to submit their claim to arbitration For the purpose of the Treaty; the provision allows the following rules for arbitration:

- The ICSID Convention, if both the parties are full members of the Convention;
- ICSID Additional Facility Rules, provided that either party, but not both, is a member if ICSID Convention; or
- UNCITRAL Arbitration Rules.[243]

With regards to the conduct of arbitral proceedings, unless the disputing party otherwise agree, the tribunal shall hold the arbitration in the territory of a country that is a party to the New York Convention in accordance with ICSID Additional Facility Rules and the UNCITRAL Arbitration Rules[244].

The Tribunal, while determining the seat of arbitration, will take into consideration the convenience of the disputing parties and if the parties are unable to decide the place of the arbitration then the Tribunal will chose the place if the arbitration itself[245].

Moreover, the Treaty also provides for *state-state dispute resolution*[246], under which any disputes may be settled which occur in relation to "interpretation of the treaty, and whether there

[242] Article 15.5 of the Model BIT 2016.
[243] Article 16.1 of the Model BIT 2016.
[244] Article 20.1 of the Model BIT 2016.
[245] Article 20.2 of the Model BIT 2016.
[246] Chapter V of the Model BIT 2016.

has been compliance with compliance with obligations to consult in good faith under Articles 30 or 36"[247]. Such a dispute should be at first, be settled through consultation, negotiation or non-binding third party mediation or other mechanisms. And if, the dispute is not settled through these means within six months then it will be referred to arbitration[248].

Thus, it is evident from the provisions of the Treaty that the provisions offering ISDS mechanism has to go through a long route to reach arbitration. Sometimes, exhaustion of local remedy may be proved to be harsh for the investors because waiting for a period of five years before submitting a claim to arbitration may affect the parties with their investment. Moreover, bringing a judicial intervention in the dispute resolution mechanism, shows that the state wants to keep its sovereignty rather than interest of the investors. Thus, such type of provision should be revised and suitable modification should be done.

[247] Article 31.1 of the Model BIT 2016.
[248] Article 31.2 of the Model BIT 2016.

CHAPTER V:

CURRENT ISSUES AND CHALLENGES OF INVESTMENT ARBITRATION IN INDIA AND ITS FUTURE OPPORTUNITIES:

5.1. BACKGROUND:

Dispute resolution clause under the Model BIT 2016 constitutes an essential element of the treaty. It extends to both investor-state dispute and state-state disputes. The treaty contains some obligation on the part of the parties violation of which will make the parties liable under the treaty. Since the dispute resolution clause plays a crucial role in the investment activity of a country based on which the foreign investors will find it suitable for investment, thus it becomes very important on the part of the host state to develop an investment-friendly regime for the outsiders[249]. The lesson learned from the White industries case left India to think about the future of its investment regime. Though the Model BIT contains in it some protections in favor of the investors but it has still retained its state sovereignty on some matters. Such sovereignty may also have some adverse affect on the investor state dispute resolution process. The inclusion of the clause of *"exhaustion of local remedy"* has given rise to some conflicts and challenges on the part of India's dispute resolution method. Such a clause has not been frequently found in many major BITs in the world. For example, US Model BIT 2012 has given a right to the aggrieved party to directly institute a claim under the international investment institution without passing though its national or domestic law. But Indian scenario is quite different in this matter. In India, the aggrieved investor has to first institute the proceedings under domestic law into the domestic court then after the lapse of a period of five years, they are free to institute arbitration proceedings into some international arbitration institution. In addition to that, another challenges faced by India is enforceability of arbitral award in the investment arbitration. In India, commercial arbitration has found place in Indian Arbitration and Conciliation Act, 1996, but with regards to investment arbitration, India does not have any codified law. The most commonly used method for investment arbitration in India is ad-hoc arbitration which again has to go through New York Convention for its enforcement. Thus, the issue of enforceability of

[249] Desai, *supra* note 234 at 43.

investment arbitral process is also requiring proper attention. Some of the major issues and challenges related to investment arbitration in India under the Model BIT 2016 are discussed below.

5.2. ISSUES RELATING TO JURISDICTION AND ADMISSIBILITY:

There are some provisions in the treaty which are to be followed by the arbitral tribunal at the stage of jurisdiction and admissibility relation to investor-state disputes[250]. *Article 14.2* of the Model BIT deals with such provision. When a dispute has been referred for arbitration, then the first thing the tribunal needs to do is *determination of jurisdiction* of the alleged dispute[251]. For determining the jurisdiction, the tribunal should take into consideration the two conditions: "whether the subject activity constitutes an 'investment' under the BIT and whether the private party qualifies as an 'investor' under the BIT".[252]

Moreover, the 2016 Model BIT restricts the scope of dispute settlement stating that the scope of the treaty will only be applicable to "disputes arising out of an alleged breach of an obligation of the Party under Chapter II of the BIT. It excludes from the scope disputes arising due to the breach of the obligations contained in Articles 9 (Entry and Sojourn of Personnel) and 10 (Transparency) of the BIT. In other words, a foreign investor can bring a claim against host State only for alleged violation of 'treatment of investments' under Chapter II of the BIT - which includes treatment of investments including full protection and security, national treatment, expropriation, monetary transfer provisions and compensation for losses".[253] This can be serious backdrop of the treaty because in order to be an investor-friendly treaty it has to offer utmost protection to the investors. But here, the basis of instituting a proceeding is violation of chapter II which excludes the investors from instituting a proceeding under the other chapters which may be relevant for determination of jurisdiction.

5.3. ISSUES RELATING TO DISPUTE RESOLUTION *(exhaustion of local remedy):*

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[250] Desai, *supra* note 249 at 14.
[251] *Id.*
[252] *Id*.
[253] *Id*. See also Model Text of Indian Bilateral Investment Treaty; Chapter IV - Dispute Settlement; Article 14: Settlement of Disputes between an Investor and a Party. Also available at https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf, last accessed on June 21, 2018.

The roadmap to investment arbitration under the Model BIT 2016 is extremely long and exhausting for the foreign investors. The investor has to go through a long route to initiate investment arbitration proceedings in the international institution. The investor is not able to institute proceedings for a period of five years after acquiring knowledge of the loss or damage caused to the investment. Several BITs stipulate that *"recourse to arbitration for disputes arising out of a BIT is subject to exhaustion of local remedies"*[254]. The provision of exhaustion of local remedy may exist in different manners in all BITs[255]. It often includes "express requirement of exhaustion of local remedies, to making no reference to exhaustion of local remedies, to express rejection of the exhaustion principle in certain BITs"[256], which means that states put different degree of importance to this remedy and later approach to other tribunals.[257] In support of the view, the arbitral tribunal in *ICS Inspection v. Argentina*[258], noted that "it lacked jurisdiction due to the claimant's failure to comply with the mandatory 18-month recourse-to-local courts requirement set forth in Article 8 of the Argentina-UK BIT". A similar view was also found in the case of *Daimler v. Argentina*[259] where the tribunal held that "since the 18-month domestic courts provision constitutes a treaty-based pre-condition to the Host State's consent to arbitrate, it cannot be bypassed or otherwise waived by the Tribunal as a mere 'procedural' or 'admissibility-related' matter".

However, in Indian context it is seen that a period of five years should elapse from the date on which the investor first acquire knowledge of the fact that he had acquired damage or loss to the investment. Moreover, the remedy of the exhaustion of local remedy is not applicable "if there are no available local remedies that can provide relief with respect to the relevant measure. This exemption to the exhaustion of local remedies gives effect to the "futility exception. Accordingly, the onus to demonstrate the non-existence of an appropriate domestic remedy lies on the foreign investor"[260]. Besides that, after exhausting the local remedy, if the

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[254] Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8.
[255] Desai, s*upra* note 198 at 46.
[256] Croatia-Cambodia BIT, Article 10.2(b).
[257] Desai, *supra* note 255.
[258]ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina (UNCITRAL, PCA Case No. 2010-9), 2012.
[259] Daimler Financial Services AG v. Argentine Republic (ICSID Case No. ARB/05/1), 2012.
[260] Indian Model BIT 2016, Article 15.1 provides: "the 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 measure or similar factual matters for which a breach of this Treaty is claimed by the investor".

investor does not get satisfactory result then he has to serve a notice of dispute to the host state containing factual basis of dispute, measures for challenge and other important details. After receipt of the notice, the parties have to attempt to solve the dispute through *consultation, negotiation or through other third party procedure*. And if, the said procedure is fail then the investor may serve a notice of arbitration to the other party but that too after a period of three months passed from serving the notice. Moreover, one additional requirement is that "not more than 12 months should have elapsed from the conclusion of the proceedings of the domestic courts".[261]

Thus, from the aforesaid provision it is clear that it is extremely difficult for the foreign investor to get remedy under international arbitration. Moreover, these huge amounts of time after exhaustion of local remedy encourage judicial intervention in the investment arbitration which is again one disadvantage for the future of Indian investment regime. This provision has proved to be draconian and less investor-friendly.

However, if the dispute settlement mechanism of UK Model BIT 2008 is taken into consideration, then it is seen that such type of draconian provision does not exist there. The dispute settlement mechanism under those BITs is very flexible and investor-friendly. The investment dispute arising from UK Model BIT 2008 requires that "Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes".[262] Thus, it can be seen that the dispute resolution of investment arbitration under UK model bilateral treaty is very speedy in nature. The investor does not find many difficulties to go before international arbitral tribunal for arbitral procedure.

Moreover, if the ISDS provision under Indian BIT is compared with US BIT then it is seen that, "*ISDS provision in BITs allows foreign investors to directly bring claims against the host state under international law, without the approval of the investor's home state. The Indian*

[261] Article 15.5(ii) of the Model BIT 2016.
[262] UK Model BIT 2008, Article 8: Settlement of Disputes between an Investor and a Host State. Also available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/2847, last accessed on June 21, 2018.

model BIT, unlike the U.S. model, mandatorily requires foreign investors to litigate in domestic courts for five years before pursuing a claim under international law. This is not at all an attractive proposition for U.S. companies in India because of the overstretched Indian judicial system where more than three crore cases are pending".[263]

In a nutshell, the major drawback of Indian bilateral regime can be said to be the dispute resolution mechanism. As it is already known that in order to avoid the overburden of cases of the judiciary, such alternative dispute resolution mechanism have evolved. But Indian BITs are encouraging such judicial intervention again in resolving investment dispute which have proved to be a serious loophole in the treaty.

5.4. ISSUES RELATING TO ENFORCEMENT OF INVESTMENT ARBITRAL AWARD:

India does not have any specific legal framework or codified law for the enforcement of investment arbitral award[264]. Since India is not a member of ICSID Convention, it always follows ad-hoc arbitration by means of UNCITRAL Model law or through Additional facility rules.[265] The award made under these rules has to be enforced on the parties. One of such mechanism will be through existing legal framework for arbitration. In India, the general rule for enforcement for international commercial award is contained in the Indian domestic legislation called, Arbitration and Conciliation Act, 1996. Since, the Act is entirely based on UNCITRAL Model law on International Commercial Arbitration, 1985, it provides for enforcement of both domestic award and international award. The legal regime for enforcement of foreign award is contained in the provision of New York Convention under part II, chapter I of Arbitration and Conciliation Act, 1996[266]. It provides that an "arbitral award will be considered as foreign award for the purpose of application of the New York Convention if it is on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial

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[263] Prabhash Ranjan, *Bit of a bumpy ride*, the Hindu, June 2, 2016 the hindu. Also available at http://www.thehindu.com/opinion/op-ed/Bit-of-a-bumpy-ride/article14378406.ece, last accessed on June 22, 2018.
[264] Patil & Jain, *supra* note 19 at 208.
[264] Patil & Jain, *supra* note 19 at 208.
[265] *Id.* Though India is not a signatory of ICSID Convention, a number of signatories have taken certain legislative or other measures with regard to the implementation of the Convention. Article 69 of the ICSID Convention provides that "each contracting states shall take legislative or other measures as may be necessary for making the provisions of the Convention effective in its territories".
[266] Section 44 to 52 of Arbitration and Conciliation Act, 1996.

under the law in force in India, made on or after October, 1960 (the date of entry into force of the New York Convention in the case of India) in pursuance of an agreement in writing for arbitration to which the New York Convention applies and made in one of such territories as the Central Government notifies in Official Gazette on the basis of reciprocity".[267] However, with regards to foreign arbitral award, there is an ongoing controversy of allowing judicial intervention in the award given by international arbitration institution. In the case of *Bhatia International v. Bulk Trading SA*[268], the parties agreed to settle their dispute under the measures of ICC in Paris but one of the parties filed in the Indian court to grant interim relief under Section 9 of the Arbitration and Conciliation Act, 1996. After granting interim relief, there was a huge chaos and controversy occurred with regard to the judgment of the Court. When the matter reached to the Supreme Court by an appeal the Supreme Court also held that granting interim relief under Indian law is justiceable and thus allowed judicial intervention in the award passed by an international institution. After this decision, the Supreme Court faced many criticism and harsh comment regarding the judgment of the particular case. But again in the year 2008, the same decision was re-affirmed in the case *Venture Global Engineering v. Satyam Computer Services Ltd*.[269] However, these controversy was finally solved on 2012 in the case *Bharat Aluminium Co Ltd v. Kaiser Aluminium Technical Service Inc*[270], where it was finally settled that "the Indian courts cannot set aside arbitral awards made, or otherwise intervene in arbitrations seated, outside India, the Supreme Court has firmly signaled that the Indian courts will give effect to party autonomy and efficacy to the parties' choice of a foreign seat".[271]

However, the matter of investment arbitration is different from commercial arbitration. In case of commercial arbitration, there exist an arbitration agreement with the other party based on which the matter is referred to arbitration but in case of investment dispute, there is no arbitration agreement. The parties instead of making an agreement, they enter into bilateral investment treaty with the other party and thus the parties are governed by the provisions of the treaty. Hence, there is no any specific law on this point. The enforcement of the investment arbitral award has also to be gone through the New York Convention. Hence, there should be

[267] Section 44.
[268] 2002 (4) SCC 105.
[269] (2008) 4 SCC 190.
[270] (2012) 9 SCC 649.
[271] Available at http://www.jsalaw.com/wp-content/uploads/2015/09/The-Decision-of-the-Indian-Supreme-Court-in-BALCO-v-Kaiser-Aluminium.pdf, last accessed on June 22, 2018.

some specific legislative framework for enforcement of investment arbitration. Because, New York Convention also specifically deals with "commercial dispute" rather than investment dispute.

If this scenario is compared with UK Model BIT and its enforcement mechanism then it is seen that in UK, there is a legislation called Arbitration (International Investment Disputes) Act 1966[272] which is responsible for settlement of investment dispute, registration of convention award, enforcement of convention award etc[273]. Section 1(2) of the Arbitration (Investment Disputes) Act of 1966, deals with "implementation the obligations contained in Article 54 of the ICSID Convention".[274]

Thus, India should also frame some law which can suitably address the issue of investment dispute and its enforcement mechanism in the territory.

5.5. OTHER ISSUES:

- ***Definition of "investment":*** The definition of "Investment" plays a very important role in determining the jurisdiction and applicability of the investment dispute. Thus, it is required to have a very clear and certain definition of investment in all the BITs. The earlier FCN treaties provided for *asset based definition*[275]. Even earlier Indian BITs provide an *asset-based definition* of investment where "every kind of asset with economic value established or acquired by the foreign investor is an investment".[276]. But

[272] 1966 c. 41. The preamble of the Act says that "An Act to implement an international Convention on the settlement of investment disputes between States and nationals of other States". See also http://www.legislation.gov.uk/ukpga/1966/41/enacted, last accessed on June 22, 2018.
[273] Enforcement of an ICSID Arbitration Award in the United Kingdom and EU Law, available at https://www.acerislaw.com/enforcement-icsid-arbitration-award-united-kingdom-eu-law/, last accessed on June 22, 2018.
[274] *Id.*
[275] *Id.*
[276] For example, the 2003 Indian Model BIT, Article1(b) provides: "'investment means every kind of asset established or acquired including changes in the form of such investment, in accordance with the national laws of the Contracting Party in whose territory the investment is made and in particular, though not exclusively, includes: (i) movable and immovable property as well as other rights such as mortgages, liens or pledge (ii) shares in and stock and debentures of a company and any other similar forms of participation in a company; (iii) rights to money or to any performance under contract having a financial value; (iv) intellectual property rights, in accordance with the relevant laws of the respective Contracting Party; (v) business concessions conferred by law or under contract, including concessions to search for and extract oil and other minerals."

2016 BIT has chosen an *enterprise base definition.*[277] It places autonomy to the parties to define the outer limit of investment.[278] The Model BIT 2016 defines enterprise "as any legal entity constituted, organised and operated in compliance with the law of a Party, including any company, corporation, limited liability partnership or a joint venture; and a branch of any such entity established in the territory of a Party in accordance with its law and carrying out business activities there"[279]. And the definition of investment is "it means an enterprise constituted, organized and operated in good faith by an investor in accordance with the law of the Party in whose territory the investment is made, taken together with the assets of the enterprise, has the characteristics of an investment such as the commitment of capital or other resources, certain duration, the expectation of gain or profit, the assumption of risk and a significance for the development of the Party in whose territory the investment is made"[280]. The definition also includes a list of assets which the enterprise might possess such as "shares, debt instruments of another enterprise, licenses or similar rights conferred in accordance with the law of the Host State, amongst others"[281]. Moreover, the treaty also provides negative lists of assets which exclude certain assets from the purview of enterprise. Such exclusions are "pre-operational expenditure up to commencement of substantial business operations of the enterprise; orders or judgments sought in judicial, administrative as well as arbitral proceedings; and any other claims to money that do not involve the kind of interests or operations set out in the definition of investment"[282]. Thus, from the definition of the investment, it is not clear that whether the characteristics of investment are to e possessed by enterprise or asset. The definition is also not clear in its actual meaning of characteristics that one enterprise should actually possess[283]. For example, the definition does not specifically provide that how long the enterprise should be in existence and

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[277] Prabhash Ranjan & Pushkar Anand, *The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction*, 38 NJILB PP. 20 , 2017. Also available at https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1824&context=njilb, last accessed on June 22, 2018.
[278] *Id.*
[279] Article 1.3 of BIT 2016. Also available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/3560, last accessed on June 22, 2018.
[280] Article 1.4 of the BIT 2016.
[281] Ranjan & Anand , *supra* note 277.
[282] *Id.*
[283] *Id.*

leaves these things to be determined by the tribunal. Moreover, the problem arises when the definition of the term "investment" itself includes the same term "investment"[284]. For instance, *"claims to money related to an investment";* or reference to the investment being *"in accordance with the Host State law".* In such a situation also, it is left to the tribunals to interpret it whether tribunal adopt a broad view or narrow view[285].

It is not that the definition of investment as an enterprise base is not common. But it does not take into account the increased scope of investment made by foreign national in the present globalised era[286].

- ***Exclusion of "measures by local government":*** The BIT 2016 does not include the measures by local government in its ambit[287]. Since India is a quasi-federal country with many forms of government having in provincial as well as local bodies which enjoy a substantial level of autonomy[288]. Since local government fall under the definition of state under Indian Constitutional practice, the action done by the local government can be attributed to state under the public international law[289]. Thus, by excluding the provisions of local government, BIT 2016 is giving immunity to local government from fulfilling the obligations under the treaty[290]. This can possibly be harmful to the foreign investors when local government will adopt such measures which will be against the foreign investor or investment[291]. It is interesting here to note that, although such a measure will constitute violation of BIT but still the action will not come within the purview of the treaty[292]. In a host state where large amount of public functions are done by local authority, exclusion of measures undertaken by such authority will not be justiceable. It amounts to give undue advantage to the host state to discriminate the foreign investors.

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[284] *Id.*
[285] *Id.*
[286] *Id.*
[287] Article 1.7 of Model BIT 2016 provides "local government" includes: (i) An urban local body, Municipal Corporation or village level government; or (ii) an enterprise owned or controlled by an urban local body, a municipal corporation or a village level government.
[288] Ranjan & Anand, *supra* note 286.
[289] Article 12 of Constitution of India, 1950.
[290] Ranjan & Anand, *supra* note 288at 12.
[291] *Id.*
[292] *Id.*

- ***Exclusion of "taxation":*** The BIT 2016 excludes from its purview *"any law or measure regarding taxation".* No arbitral tribunal is empowered to take jurisdiction of such measure[293]. The decision to preclude the measures relating to taxation from the purview of the treaty is in response to the spate of claim brought by Vodafone International against India with respect to retrospective application of taxation law[294]. The exclusion of such measure is proved to be hard for the foreign investor that whether the matter could be discriminatory, arbitrary but still falls outside the jurisdiction of the treaty and foreign investors shall not be able to challenge such measures under BITs under any circumstance.[295]

However, in US the Model BIT includes the measures relating to taxation. Foreign investors can bring claim regarding to taxation matter which involve expropriation of foreign investment or confiscatory taxation[296].

- ***Exclusion of "compulsory license":*** The 2016 Model BIT excludes compulsory licenses from its ambit, provided that such issuance of compulsory license is consistent with WTO treaty[297]. In another words, "notwithstanding the specific exemption of CL from the scope of the BIT, foreign investors can still challenge the issuance of CLs as a violation of some BIT provision arguing that CLs have not been issued in accordance with the TRIPS Agreement"[298]. In such a situation, the tribunal has to examine that whether the issuance of CL is inconsistent with TRIPs or not, if not then BIT would continue to apply[299]. Thus, in the case of compulsory licensing the tribunal is not fully outside the jurisdiction to entertain such case.

- ***Umbrella clause:*** Some BITs contain *"umbrella clause"* in it like *"Each Contracting Party shall observe any obligations it may have entered into with regard to investments of investors of the other Contracting Party", or* contracting party shall *"observe any*

[293] Article 2.4 of Indian Model BIT 2016.
[294] Ranjan & Anand, *supra* note 292 at 12.
[295] Ranjan & Anand, *supra* note 294 at 44.
[296] Article 21 of US Model BIT 2012 which deals with "taxation".
[297] Desai, *supra* note 257.
[298] *Id*.
[299] *Id.*

obligation it has assumed or entered into"; or *"constantly guarantee the observance of the commitments it has entered into"*, with respect to investment[300].

Breach of such obligation by the states could amount to breach of the treaty by virtue of the aforesaid "observation and obligation clause"[301]. When the clauses transform contract claim into treaty claim then they are known as umbrella clause[302]. These clauses serve the mechanism to enforce the obligation undertaken by the state and at the same time it gives the foreign investors the right to bring pure investment dispute contact claims under the breach of the treaty[303].

The case of SGS v. Pakistan[304] was the first case to rule on the ground of Umbrella clause. The fact of the case was "SGS claimed that the breach of its pre-inspection shipping agreement by Pakistan amounted to violation of the umbrella clause in the Swiss- Pakistan BIT in addition to breach of other treaty standards. SGS also argued that if the breaches of its agreement with Pakistan were not 'elevated' to the level of treaty breaches due to the operation of the umbrella clause, and remained contract breaches, the tribunal could claim jurisdiction under the broadly drafted investor state arbitration clause in the BIT. The Tribunal ruled that the umbrella clause did not provide it with jurisdiction to hear contract claims and emphasized the distinction between the two types of claims, i.e. contract and treaty. It held that a broad interpretation of the umbrella clause would have the effect of elevating every contractual claim into a treaty claim, thereby rendering contractual forum clauses superfluous"[305].

Umbrella clauses cover all the obligations, both contractual and non-contractual. And thus obliges the host state to be complied with it. But 2016 Model BIT does not contain an umbrella clause. It therefore rules on the ground for elevating contract claim to the level of treaty claim[306].

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[300] *Id*.
[301] *Id*.
[302] *Id*. Also available at https://www.oecd.org/daf/inv/investment-policy/WP-2006_3.pdf, last accessed on June 23, 2018.
[303] *Id.*
[304] SGS Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13.
[305] Desai, *supra* note 303 at 40.
[306] *Id.* at 41.

- ***Exclusion of Most Favored Nation (MFN) treatment:*** MFN clause in a BIT plays a very important role for the foreign investors. Such clauses ensures that *"State must extend to investors from one foreign country the same or no less favorable treatment than it accords to investors from another foreign country"*[307]. The applicability of MFN treatment in the substantive provisions of BIT has always been a subject of debate. But Countries like USA and UK have adopted such provisions in their Model BIT[308]. But Indian Model BIT does not contain MFN provision. This exclusion can be traced back to the historic case of White Industries[309]. The tribunal in the case "awarded White USD 4.08 million as compensation as it found that India had violated its obligation to provide to the investor 'effective means' of asserting claims and enforcing rights i.e. the effective means standard. The effective means standard was not organically applicable to White, as it was not present in the India- Australia BIT; however, the Tribunal applied this standard by importing it from the India- Kuwait BIT which states that: This standard was imported through the MFN clause contained in both the BITs. At the outset of this contention, India argued that such borrowing would subvert the negotiated balance of the BIT (between India and Australia) as the BIT in and of itself did not contain the 'effective standard', and borrowing it from a third-party treaty would be contrary to the intention of the parties while negotiating the BIT. However, the Tribunal held that the borrowing achieves exactly the result which the parties intended by the incorporation in the BIT of an MFN clause." The tribunal in turn found that the undue and long delay by the Indian judiciary constitutes a breach of India's voluntarily assumed obligation of providing White with 'effective means' of asserting claims and enforcing rights, accepting the applicability of the MFN clause and the borrowed substantive remedy"[310]. Therefore, Indian BIT by its exclusion has tries to circumvent this particular challenge and barriers in the future. But not having such a provision can leave the foreign investor in the state of discriminatory treatment[311].

[307] Desai, *supra* note 305 at 35.
[308] Article 3 of UK Model BIT 2008 and Article 4 of US Model BIT 2012.
[309] Desai, *supra* note 307.
[310] *Id.*
[311] *Id.*

Hence, the above mentioned issues are a hindrance in the smooth execution of Indian Model BIT and its dispute resolution. The rationale behind a strong dispute resolution is consensus on the part of the parties. But if the substantive provisions of the treaty does not provide suitable environment to the parties then it will hardly attract their consent on it. It is inevitable to have issues and challenges in every field but these can be overcome by adopting a suitable model for continuity in future.

5.6. FUTURE OPPORTUNITIES OF INVESTMENT ARBITRATION IN INDIA:

Despite of having a number of challenges in the path of investment treaty, the broad requirement of the treaty cannot be ignored. It took a long way for India to enter into the regime. Earlier, India was confronted to a very bleak fiscal scenario[312]. It took a very bold decision to move away from its socialist approach to embrace liberalize economy by attracting foreign investment[313]. As a result of this effort, India entered into the position of host state by entering into BITs. In the absence of BITs India had only individual or ad-hoc arbitration arrangement which guarantees rights of the parties but such process lacked transparency and consistency[314]. Thus, entering into BIT was the most suitable and right path that India had adopted to boost its economic phenomenon. Since, the outcome of such treaties, India had been engaged in several capital outflows and inflows in the country. Hence, such BITs are most suitable means of foreign investment. Especially for developing countries they are very important and part and parcel for the growth of their economy. There also a question arises that as soon as the number of investment will increase among the countries, it is obvious to occur disputes among them. BITs include dispute resolution mechanism also. Moreover, the settlement of dispute is an important part legal protection of foreign investment[315]. Besides that, there are some advantages of investment arbitration, *firstly it gets direct access to the effective international forum and secondly, there is always a legal security before making the investment*[316]. The host country also used to get advantages. They are like improvement of country's investment climate through the

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[312] Sumeet Kachwaha, The *New Challenges and Opportunities for India in Bilateral Investment Treaties*,available at https://www.kaplegal.com/upload/pdf/The_New_Challenges_and_Opportunities_for_India_inBilateral_Investment_Treaties.pdf, last accessed on June 24, 2018.
[313] *Id.*
[314] *Id.*
[315]Christoph Schreuer, The Future of Investment Arbitration, available at https://www.univie.ac.at/intlaw/pdf/98_futureinvestmentarbitr.pdf, last accessed on June 24, 2018.
[316] *Id.*

availability of international arbitration. By offering arbitration as a measure the host state create an important incentive to the foreign investors. In the case of *Amco v. Indonesia*[317], the Tribunal held that *"investment arbitration is to protect investment in order to protect general interest of development and of developing countries"*[318]. In addition to that, by consenting to investment arbitration, the host state usually protects itself against all sorts of litigation and political pressure. Specifically, with reference to ICSID arbitral procedure is that the host state effectively shields itself against all the diplomatic protection by the state of the investor's nationality[319].

After the period of 1990s, there has been an enormous increase in the number of investment arbitration. This boom of cases has continued unabated after the turn of the century. It was proved to be exceptional remedy for on that unusual situation that occurred[320]. This unexpected success of investment arbitration has not remained unchanged. Some countries, including India have been targeted with a series of claim by the investors, have become worry of being serious object of recurrent lawsuits by foreign investors and have started thinking of measures to put the seed of investment arbitration back into the picture[321].

However, there has always been a controversy regarding discrepancies and contradiction in the practice of investment arbitral tribunal. There are many areas on investment law that shows diverse line of authority that does not have any consistency with the established practice. But there are some ways to deal with such problems. One of such way can be *establishment of an appeal procedure*[322]. The US Model BIT and several many other US treaties have provided for possibility to the establishment of an appellate body or similar mechanism. Another possible model would be the establishment of a multilateral appeal mechanism. The investment arbitral body ICSID does not have any appellate body[323]. Thus, there are several voices for establishing an appellate body in the ICSID. In doing so, the drafters can adopt the model of *WTO Appellate Body* which is serving a greater opportunity for investment law. And the rationale behind establishing the appellate facility in the ICSID would be *"to ensure coherence and consistency"*

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317 Amco v. Indonesia, ICSID Case No. ARB/81/1.
318 Schreuer , *supra* note 315.
319 *Id.*
320 *Id.*
321 *Id.*
322 *Id.*
323 *Id.*

in the matter of investment law. One of such example is European law that had successful coherence and consistency[324].

Another possible way to enhance more efficiency would be to create a permanent investment court as a durable solution to the problem of inconsistency[325]. The method will require the adoption of either bilateral or regional treaties under which consent to arbitration or to create its own mechanism for submission by the states will be required[326]. Moreover, reliance on the previous rulings seems to be more realistic in the way to achieve consistency. Because reference to earlier decisions is a very standard feature of most the decisions. And under the proceedings of the ICSID arbitral tribunal there is no doctrine of binding precedent[327].

Thus, the effectiveness of the bilateral treaties cannot be ignored. If the treaties would be adopted with all the reformative measures and modification then it will serve the best purpose. Such treaties provide flexibility and policy space to determine how to catalyze foreign investment for economic development[328]. This could not have happened in case of multilateral investment[329]. Recently, UNTAD had organized one public debate on reformation of investment in dispute settlement. The debate addresses *"the number of investment disputes brought to international arbitration reached a new peak in 2012, amplifying the need for public debate about the efficacy of the investor-State dispute settlement (ISDS) mechanism and ways to reform it, a new UNTAD report says"*[330]. Thus, the countries got a better opportunity to develop their investment regime by participating in the debate. Therefore, the country is at high need of afresh BIT arrangement and explores alternatives which could balance investor's protection and country's sovereign rights and expectations[331]. From an Indian perspective, investment treaties are not only instrument for investor's protection but also a very effective tool to promote

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[324] *Id*.
[325] *Id*.
[326] *Id*.
[327] *Id*.
[328] Saurabh Garg, Ishita G. Tripathy and Sudhanshu Roy, *The Indian Model Bilateral Investment Treaty: Continuity and Change*, available at http://www.madhyam.org.in/wp-content/uploads/2016/03/Rethinking-BIT-Book-PDF-15-March-2016.pdf, last accessed on June 24, 2018.
[329] *Id*.
[330] UNCTAD Press Release No. PR/2013/007 dated 10th April 2013. See also United Nations Conference on Trade and Development (UNCTAD); an annual Report on Recent Developments in Investor State Dispute Settlement (ISDS) highlighting the developments during the previous year. Also available at https://www.kaplegal.com/upload/pdf/The_New_Challenges_and_Opportunities_for_India_inBilateral_Investment_Treaties.pdf, last accessed on June 24, 2018.
[331] *Id*.

development goals, transparency and prevent unethical business practices[332]. Thus, the present Model draft of BIT in India has a great future opportunity both for the investors as well as for the state. Thus, it has to be viewed in the context of changes in the investment regime worldwide. For a democratic system to sustain in the long run it needs both continuity and changes. By revising its present model BIT and participating in the debate on the global investment regime, India has embraced all its attributes more suitably.

[332] *Id.*

CHAPTER VI:

CONCLUSION AND SUGGESTION:

7.1. CONCLUSION:

The emergence of ADR mechanism is proved to be very effective in the field of international investment. It can effectively be used as a means of investment dispute resolution as per the requirement. The method has been in practice through various multilateral treaties, regional treaties and bilateral treaties. But with the passage of time the bilateral treaties got more significance because of its flexibility and investor friendly substantive provision. Specifically, after the period of liberalization and globalization the world faced a huge change in the entire global economy. The countries started indulging themselves into the regime of foreign investment. And the growing number of foreign investment in between the countries gave rise to the number of BITs. BITs are more flexible as compared to the multilateral treaties because it is drafted according to the suitable economic and social condition of the country and the provisions of the treaty are more flexible and understandable. On the other hand, before entering into the bilateral treaties with another country, the home country has to be well-informed about the existing condition of the host state and its all foreign investment and international investment agreements that have entered into. Because since the draft of the model BIT is according the stake of the host state, it might keep such provisions which will encourage the state's supremacy over the protection of the interest of the foreign investors. Thus, there is a strong need to keep a balance between the investor's protection and state sovereignty. When the substantive provisions will be such that it is capable to meet the requirement of the investors then it will be beneficial for the host state to attract more and more investment from outside and contribute to its economy.

One of the vital requirements in the bilateral treaty is the investor-state dispute resolution mechanism. If the treaty provides an effective means of setting the investment dispute then only the true object of the treaty will be fulfilled. The settlement of commercial dispute can be referred here, though there are some differences between them. The settlement of commercial dispute is done though either ad-hoc arbitration or through institutional arbitration. Party

autonomy is given by all the domestic laws whereby the parties choose the law or method by which they wish to be governed. A number of institutional arbitration centre is there which are dealing with the worldwide commercial dispute and are enforced through "*Convention on the Recognition and Enforcement of Foreign Arbitral Award, 1958 (the New York Convention)"*. But the most interesting thing is that all the international commercial disputes found place in the domestic law of the country. With regards to India, international commercial arbitration found place in the Arbitration and Conciliation Act, 1996 and its enforceability is there on the provision of New York Convention. But regarding investment arbitral award or its enforceability, Indian law is silent. Investment treaty and arbitration is facing huge challenges in India. Indian Model BIT 2016 includes the investor-state dispute resolution clause where it is seen that at first the dispute will be resolved by domestic courts and then after a period of five years only, the parties can further move towards international arbitration institution. Thus, it is condition precedent for the investors to first exhaust the local remedy then they are permitted to arbitration. Hence, India is bringing judicial intervention in the investment dispute. When the scenario is compared with other major countries like USA or UK, it is found that there is no such condition precedent in their model BITs. They have given the right to the parties to move to arbitration directly without having any hardship of running through the domestic courts. Thus, Indian law on investment arbitration should be modified and a codified law on investment arbitration should be enacted which will address investment arbitration and its enforcement procedure. Besides that, with regards to the Model BIT 2016, several provisions are there which are insufficient for the protection of foreign investors. Since, the very purpose of the BITs is the promotion of developing country, thus the insufficient provisions should be re-negotiated and suitable provisions should be incorporated, then only the true purpose of the treaty will be served and the country will attract more foreign investment. Since, India has become a major foreign investment destination in the present era; it should focus on all its point which will be helpful in its economic development.

However, with regards to the current challenges and issues of investment arbitration in India, various committees have been constituted and Law Commission of India had also given its report on investment arbitration and Model BIT 2016. The Law Commission of India while finalizing its 260th Report titled *"Analysis of the 2015 Draft Model Indian Bilateral Investment*

Treaty"[333] found that the international investment treaties in India are at high risk in the absence of clear legal position on the subject. Thus, the Model draft was taken for analysis and suitable suggestion for its amendment was given by the Commission. Moreover, on 29th December, 2016, a high level committee was constituted by Government of India under the Chairmanship of Justice B. N. Srikrishna[334], in order to give suitable suggestion and recommendation relating to promotion of institutional arbitration in India. The Committee was specifically constituted for the speedy resolution of the commercial disputes and to India a hub for arbitration like the other countries. But, in the report of the Committee, it was found that the Committee had also focused on the promotion of investment arbitration. The Committee had advocated that *"the country should move away from the investor state arbitration and has recommended various measures such as state to state arbitration, compulsory negotiation and mediation and also toyed with the idea of a multilateral investment court"*[335].

The recommendations given by the Commissions can be suitably adopted and the re-negotiation of the draft should have been made. After the decision of White Industries, India had faced huge crisis with regards to its BITs. Thus, in order to avoid the similar situation, India needs to re-look its Model BIT 2016 and amendment should have been done in the inconvenient provisions. For that purpose, it can have a look at its historical background and find out the most suitable solution out there, it can also check the provisions and governing laws on investment arbitration of the other important countries. It can also follow the model of WTO dispute settlement mechanism and draw the needful for India. It should also, at the same time, incorporate all the inherent provisions and principles of international trade law which addresses foreign investment and provide non-discriminatory provision for the investors. Thus, all the important and convenient provisions should be incorporated into the Model BIT 2016. Then only, the outsiders will find it a suitable place to invest and thereby promoting the economy of the country. Thus, a probable balance is sought in the investment regime; that is between the state sovereignty and interest of the investors. Thus, in order to make the BIT 2016 more

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[333] 260th Report of Law Commission of India. see also http://lawcommissionofindia.nic.in/reports/Report260.pdf, last accessed on June 25, 2018.

[334] High level Committee to Review the Institutionalization of Arbitration Mechanism in India. the Committee was constituted under the chairmanship of Mr. Justice B.N.Srikrishna, retired Judge of Supreme Court of India. See also http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf, last accessed on June 25, 2018.

[335] *Id.*

efficient and to make investment arbitration as a convenient way of settlement of dispute, the following suggestions can be given.

7.2. SUGGESTIONS:

After analyzing all the provisions of BIT 2016 and the concept of investment arbitration in other BITs, the following suggestion can be put forward:

- ***Exclusion of the provision of exhaustion of local remedy:*** Since the Model BIT 2016 has received many criticisms on the point that it has a very harsh provision of exhaustion of local remedy which have proved to be very inconvenient for the foreign investors. Existence of such provision can result in failure of investors to initiate or continue a claim against the host state under BIT. It fails to consider that the 2016 Model BIT is bilateral arrangement between India and other states. Thus, India will also be governed by the provisions of the treaty if adopted. It has to go through the rigorous and long route of exhaustion f local remedy by indulging themselves in the proceedings in the court. Thus, as India is strive to promote fastest growing economy; it is essential for it that it provides a robust framework for protection of investors and investment. Thus, it is very reasonable to remove such provisions and submit the claim directly to international arbitration. However, in the event of hesitation to completely remove such provision, it can be reduced to a lesser period. Hence, it would be less draconian and acceptable to the international investment community.

- ***Specific law:*** Since, India is facing the problem of enforcement of investment arbitral award; it has to go through the route of New York Convention for the enforcement of award. Because India is not a signatory of ICSID Convention and mostly adopts the ad-hoc arbitration format under UNCITRAL model law, which enforcement mechanism is not that strong like ICSID. Thus, India can have such a law which will recognize the enforcement of investment arbitral award. Apart from that, Arbitration and Conciliation Act, 1996 only addressed international commercial arbitration. Therefore, investment arbitration can also be included in the purview of the legislation. If compared to the enforcement of investment arbitral award in UK, the country has a specific legislation on

the point namely Arbitration (International Investment Disputes) Act 1966[336], which addresses investment dispute and its registration as well as enforcement. Thus, India can learn from such existing condition of other countries and may incorporate such provisions in the Indian legal framework. Moreover, it has been evident that international commercial arbitration has certain systematic efficiencies in its model that could be grafted onto the investment treaty model.

- ***Appellate facility with regards to investment arbitration:*** Regarding investment arbitration, the institutions does not have any appellate tribunal. Article 53 of the ICSID Convention states 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". Despite the matter that India is a non-signatory of ICSID, but it access the ICSID Additional facility rules. Thus, if an appellate tribunal would have been constituted then there would have been some chances to review the decision of the original tribunal. Thus, this is a significant point to be taken into consideration. Moreover, Indian Model BIT 2016 also contains the similar provision. Article 13.5 of the BIT places some additional limitation on the dispute settlement mechanism. It states that "it shall not have the jurisdiction to review the decisions made by the judicial authority". It means that tribunals will not have any power to sit on appeal on the decisions made by Indian Court. This is a serious limitation on the power of the tribunal which will adversely affect both the parties to the treaty. Thus such type of rigorous provisions should be omitted from the treaty. And an appellate machinery should be established.

- ***Ombudsman facility:*** Appointment of Ombudsman to manage the conflict of investment dispute can also be an alternative. Ombudsman facility can be effectively used to prevent the escalation of disputes. Ombudsman is "an official appointed by either public or private institution, whose fundamental function is to remain impartial, receive complaint, and questions from the defined constituency about the issues within the ombuds' express jurisdiction".[337] Such process has some benefit which is benefit of pertaining smaller

[336] *Supra* note 272.
[337] Susan D. Franck, *Challenges Facing Investment Dispute Resolution in International Investment Agreements*, also available at http://ssrn.com/abtract, last accessed on June 25, 2018.

investors with smaller conflict to have their concerns heard and addressed.[338] In a nutshell, it facilitates the access to justice and decreases the stigma of announcing and quickly resolves the disputes. Recently, it was found that Ombudsman process had been very successful in the countries like China, Egypt, and German etc. and some countries like UK, USA and EU had newly adopted the procedure which also proved to be most successful in settling the disputes[339].

- ***Negotiation, conciliation and mediation:*** Apart from the above mentioned alternatives, the Government of a country should promote negotiation, conciliation and mediation as a means of settling the investment dispute. The host country in the BIT should start participating in the negotiation, conciliation and mediation for the settlement of investor-state disputes. These methods can also mitigate the need of international investment conflicts at the outset rather than waiting for harmful effects of regular proceedings. Moreover, the provisions of compulsory mediation, negotiation and conciliation have significant benefits. For example, it reduces the chance of subsequent dispute, it can lead to modeling good government, improve the quality of government regulation and promotion of democratic values and enhancement of government legitimacy[340]. Besides these advantages, those mechanisms also has the element of being flexible, being cost effective, protecting confidentiality, strengthening relationship between the parties and preserving long term relationship etc.[341] Thus, the Model BIT 2016 also tries to incorporate such method as a means of settlement of investment dispute. Such methods could be suitably incorporated in place of exhaustion of local remedy.

- ***Other effective means:*** The Model BIT 2016, besides adopting the above mentioned provisions in its treaty; it can also adopt some suitable mechanism for dispute resolution. The appropriate suggestions will include: constitution of a body that would be responsible for dispute management and claims of investors; creation of a body that will be responsible for conducting all stages of arbitration; close monitoring of the disputes to

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[338] *Id.*
[339] *Id.*
[340] *Id.*
[341] Rohit Bhat, *Will India do away with investor state arbitration?* Also available at http://arbitration blog.kluwerarbitration.com/2017/08/23/ will-India- do- away –with- investor -state –arbitration/, last accessed on June 25, 2018.

ensure that treaty interpretations by the Indian investors do not go contrary to the position adopted by the Indian Government; appointing qualified and expert counsel without any conflict of interest; and India can also adopt all such suitable mechanism from the other reputed institution in the world to make its arbitration regime more strong.

Thus, after the conclusion of the research, it is found that the investor-state dispute resolution in India is lagging behind as compared to the other countries in the world. Some countries had showed their concern with the 2016 Model BIT. Recently, United States Ambassador to India also noted that "the 2016 Model BIT contained departure from the high standards that we had seen in other treaties India had negotiated, for example, South Korea and Japan".[342] There has been constant criticism against India's Model BIT that it had reduced its investor protection, protectionist measure, and requirement to fully exhaust all local remedies in the Model BIT 2016. Thus, it is the high time to re-negotiate the Model BIT and its dispute settlement mechanism because it contains more stringent provisions which could prove harmful for India in the sense that no other major countries in the world would be willing to investment here. As India has grown up to be a fastest growing economy, it is very much essential for it to incorporate some robust substantive provision in its international investment treaty so that the country maintain its consistency in the growing economy in the world. For that purpose the above mentioned suggestions can be implemented. Thus, what India awaits is an efficient legal and regulatory framework that would sufficiently build up confidence and faith for the foreign investors and thereby promoting its economic relationship towards effective and sustainable development of both foreign investors and Republic of India.

[342] Desai, *supra* note 3 at 51.

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