International Journal of Advances in Engineering and Management (IJAEM)
Volume 2, Issue 9, pp: 395-403 www.ijaem.net ISSN: 2395-5252

Investment and Trade Arbitration

Harshit Parasher, Shivangi Tandon
Llm, symbiosis law school
Ll.b, faculty of law,du

Date of Submission: 10-11-2020 Date of Acceptance: 25-11-2020

I. INTRODUCTION

The growth of corporations and technology in the mid-nineteenth century led to the advent of foreign investment. Increase in foreign investment also saw an increase in expropriation of foreign projects[1]. Investment arbitration is a procedure to resolve disputes between foreign investors and host States (also called Investor-State Dispute Settlement or ISDS). The possibility for a 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. This allows the foreign investor to bypass national jurisdictions that might be perceived to be biased or to lack independence, and to resolve the dispute in accordance to different protections afforded under international treaties. For a foreign investor to be able to initiate an investment arbitration, a host State must have given consent to this[2].

Thus, the home State would have to exercise the right for diplomatic protection of its injured national against the host State (for unequal treatment and expropriation). The Permanent Court of International Justice (PCIJ) recognized this as a right under public international law[3]**.** One of the early and prominent cases of the PCIJ which dealt with an investment dispute is the Chorzow Factory case[4]**.** In this case, an agreement was signed between a company and the German Reich for construction of a factory in Chorzow. This lied in the disputed region of Upper Silesia. Subsequently, the Geneva Convention was signed between Poland and Germany whereby Chorzow region was handed over to Poland. The Convention required reparation damages to be provided by Poland where the property of German government was taken over. Disputes arising from the Convention were to be referred to the PCIJ. The question arose whether the land was private property of the company or the public property of Germany. If it were German property, Poland could have seized the same - subject to the reparation. The PCIJ held that the land was privately owned and that Poland's action amounted to seizure and expropriation of private property. It held that "there can be no doubt that the expropriation is a derogation from the rules generally applied in regard to the treatment of foreigners and the principle of respect for vested rights."[5]

II. BILATERAL INVESTMENT TREATIES

Towards the 20th century, FCN treaties evolved to grant limited rights to aliens over foreign property, and accord similar status to foreign and domestic investments. Such investment protection standards formed the genesis of modern-day investment protection standards enshrined in BITs. Such instruments entered into between two countries for protection and regulation of foreign investment are commonly known as Bilateral Investment Treaties ("BITs") or Bilateral Investment Protection Agreements ("BIPAs"). BITs began to include international arbitration as an effective means of resolving disputes between a foreign investor and a host State. Subsequently, the regime evolved to ensure and protect repatriation of foreign funds into the originating country. This is fundamental for the protection and promotion of foreign investment. The advent of BITs commenced in 1959, with the first BIT between Germany and Pakistan. In 1965, the International

[1] R Doak Bishop, James Crawford and W. Michael Reisman, Foreign Investment Disputes, Cases, Material and Commentary (Kluwer Law International, 2005)

[2] Available on- https://www.international-arbitration-attorney.com/investment-arbitration/

[3] The Mavrommatis Palestine Concessions (1924) PCIJ Ser. A, No. 2

[4] Germany v. Poland) (1927) P.C.I.J., Ser. A Nos. 7, 9, 17, 19

[5] The Chorzow Factory Case, 1928 P.C.I.J., Ser. A, Nos. 7, 9, 17, 19, reprinted in in Henry J. Steiner, Detlev F. Vagts, & Harold H. Koh, Transnational Legal Problems, p. 452

International Journal of Advances in Engineering and Management (IJAEM)
Volume 2, Issue 9, pp: 395-403 www.ijaem.net ISSN: 2395-5252

Centre for Settlement of Investment Disputes was established by the Washington Convention. This marked the onward journey of BITs. Traditionally, BITs were thought of only in the context of nationalization i.e. unlawful taking of foreign property by the State, or direct expropriation of foreign investor's property in the host State. With time, international jurisprudence began to accept interpretations of BITs where indirect State acts leading to deprivation of foreign investment and breach of the minimum standard of treatment were considered as violations of BITs. Today, these obligations have further evolved into offering substantive protections, including the right against direct and indirect expropriation, national treatment and right to fair and equitable treatment[6].

1.1 The Umbrella Clause

In the context of a **bilateral investment treaty** (BIT), a clause that obliges the host state to observe specific undertakings towards its foreign investors. An umbrella clause protects investments by bringing obligations or commitments that the host state entered into in connection with a foreign investment under the protective "umbrella" of the BIT. Investors often rely on an umbrella clause as a catch-all provision to pursue claims when a host state's actions do not otherwise breach the BIT. Umbrella clauses are usually broadly written to cover every conceivable obligation of the host state.

Practically speaking, an umbrella clause can elevate a contract claim to the level of a treaty claim. Usually, violating a contract does not invoke treaty protection under international law. However, adding an umbrella clause to a BIT:

- Effectively circumvents that customary restriction by expressly stating that a violation of an investment contract is deemed a violation of the BIT.
- Removes the need for investors to rely on the dispute resolution clauses in an investment contract (which may, for example, give exclusive jurisdiction to local courts).
- Allows an investor to bring the claim before an international arbitral body, such as the International Centre for Settlement of Investment Disputes[7]. Investors typically prefer ICSID awards over other arbitral awards, as the host state is more likely to comply with an ICSID award. This is because ICSID is part of the World Bank Group, and the host state's failure to comply with the award may jeopardise the state's access to World Bank funding or international credit in general[8].

III. INDIA AND BITS[9]

India started signing BITs in the early 1990s as a part of its overall strategy of economic liberalisation adopted in 1991 and had the clear objective of attracting foreign investment[10]**.** The Ministry of Finance, the nodal body in India that deals with BIT policy and negotiations, states: "As part of the Economic Reforms Programme initiated in 1991, the foreign investment policy of the Government of India was liberalised and negotiations undertaken with a number of countries

[6] Available online at-http: //www.nishithdesai.com/fileadmin /user_upload/pdfs/ResearchPapers/International _ Investment_Treaty_Arbitration_and_India pdf.

[7] Herein after referred as ICSID.

[8] For further details see- https://uk.practicallaw.thomsonreuters.com/8-519-0939? transitionType=Default& contextData =(sc.Default)&firstPage=true&bhcp=1

[9] Available online at - https://www.brookings.edu/wp-content/uploads/2018/08/India%E2%80%99s-Model-Bilateral-Investment-Treaty-2018.pdf

[10] For a full discussion of India's BIT programme, including its origin and evolution, see Prabhash Ranjan, India and Bilateral Investment Treaties – A Changing Landscape 29 ICSID Rev. Foreign Inv. L.J. 419 (2014) [hereinafter Ranjan, Changing Landscape]; Prabhash Ranjan, India's International Investment Agreements and India's Regulatory Power as a Host Nation (PhD thesis, King's College London 2012), https://kclpure.kcl.ac.uk/portal/files/13524464/Studentthesis-Prabhash_Ranjan_2013.pdf [hereinafter Ranjan, PhD Thesis]. A recent study claims that BITs signed by India have contributed to rising FDI inflows 'by providing protection and commitment to foreign investors contemplating investment in India' – see Niti Bhasin & Rinku Manocha, Do Bilateral Investment Treaties Promote FDI Inflows? Evidence from India, 41(4) VIKALPA: J. Decision Makers 275-287 (2016). Luke Nottage & Jaivir Singh, Does ISDS Promote FDI? Asia-Pacific Insights from and for Australia and India, Asia Pacific Forum for International Arbitration (AFIA) (Nov. 17, 2016), http://afia.asia/2016/11/does-isds-promote-fdi-asia-pacific-insights-from-and-for-australia-and-india/.(lastvisited Aug. 8, 2017)

International Journal of Advances in Engineering and Management (IJAEM)
Volume 2, Issue 9, pp: 395-403 www.ijaem.net ISSN: 2395-5252

to enter into Bilateral Investment Promotion and Protection Agreement (BIPAs) in order to promote and protect on reciprocal basis investment of the investors."[11]

1.2 India's BITs

India signed the first BIT with the United Kingdom (UK) in 1994. Since 1994 India has signed BITs with 84 countries[12]. Additionally, it has also signed investment agreements with ASEAN countries;[13] and FTAs with investment chapters with the following Asian countries: Singapore, Japan, Malaysia and Korea. India's BITs with these 84 countries, by and large, contain broad substantive provisions that could be interpreted in a manner that gives precedence to investment protection over the host state's right to regulate.[14] Most Indian BITs resemble the lean European style BITs developed by capital-exporting countries of western Europe to protect their investment in developing countries.[15] Despite India's mammoth BIT programme, BITs in India didn't attract much critical attention from 1994 to the end of 2011.[16] This was mainly because of India's marginal involvement with ISDS.[17] In this period, although nine BIT cases were brought against India,[18] they all pertained to just one project – the Dabhol power project.[19] And none of these challenges resulted in an ISDS award though there were a couple of other arbitral awards.[20] This lack of attention on BITs, as mentioned above, started to change from 2011 onwards owing to India's increased involvement with ISDS from that year on.

[11] Ministry of Finance (2011). Also see the 'Forewords' written by various Indian Finance Ministers on the BIT programme available in Ministry of Finance, Government of India Compendiums on BIPAs (Finance Ministry 1996-2011).

[12] UNCTAD, International Investment Agreements Navigator, India, http://investmentpolicyhub.unctad.org/IIA /CountryBits/96#iiaInnerMenu. However, despite this termination, the treaty provisions shall continue to remain effective for investments made before the date of termination for a further period of 15 years – see Article 16(1) of the India-Netherlands BIT.

[13] Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India, Nov. 12, 2014 (yet to come into force). [ASEAN-India FTA]

[14] See Ranjan, PhD Thesis, supra note 5; see Government of India, Ministry of Commerce and Industry, Rajya Sabha, Question No. 1122, Answered on Jul. 26, 2017, http://164.100.47.4/newrsquestion/ShowQn.aspx (last visited, Aug. 8, 2017).

[15] Prabhash Ranjan, 'Comparing Investment Provisions in India's FTAs with India's Stand-Alone BIT: Contributing to the Evolution of the New Indian BIT Practice' (2015) 16 (5-6) JWIT 899, 901. See also Lauge Poulsen, Bounded Rationality and Economic Diplomacy: The Politics of Bilateral Investment Treaties in Developing Countries (CUP 2015) 17-26.

[16] Ranjan, Changing Landscape, supra note 57, at 436-438.

[17] Ranjan, Changing Landscape, supra note 57. This is confirmed by three Indian government officials who recently wrote that 'until the White Industries award, there had been little debate about the investment regime' in India – Saurabh Garg et al., Continuity and Change, supra note 39, at 71. It has been found that till countries are hit by BIT claims, it may be difficult for the country concerned to fully appreciate the cost of the BIT – Lauge N. Skovgaard Poulsen & Emma Aisbett, When Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning 65:2 World Pol. (2013).

[18] India – as Respondent State, Investment Policy Hub, UNCTAD http:// investment policyhub.unctad.org/ISDS /CountryCases/96?partyRole=2

[19] For detailed facts of the case, see P. Kundra, Looking Beyond the Dabhol Debacle: Examining its Causes and Understanding its Lessons 41 Vand. J. Transnat'l L. 908 (2008). Also see GE settles Dabhol Issue, The Indian Express (Mumbai, July 3, 2005), http://www.indianexpress.com/oldStory/73760/

[20] Capital India Power Mauritius I and Energy Enterprises (Mauritius) Company v. India, ICC Case No. 12913 / MS, Award, (Apr. 27, 2005); Bank of America, Memorandum of Determinations, OPIC, IIC 25 (2003), https://www.opic.gov/sites/default/files/docs/BankofAmerica- September30-2003.pdf.

International Journal of Advances in Engineering and Management (IJAEM)
Volume 2, Issue 9, pp: 395-403 www.ijaem.net ISSN: 2395-5252

IV. TREATMENT OF INVESTMENTS[21]

Majority BITs contain a clause under the chapter "Standards of Protection". The first and foremost, and probably the most significant standard of protection thereunder is the fair and equitable treatment standard. The Fair and Equitable Treatment[22] standard is a key element in contemporary international investment agreements[23]. Over the years, it has emerged as the most relied upon and successful basis for BIT claims by investors[24]. The standard is aimed at protecting investors against serious instances of arbitrary, discriminatory or abusive conduct by host States.[25] It has thus become an overarching provision that has come to include in its ambit legislative, regulatory and administrative actions of the host State.[26] At the core of the FET standard is an interpretative conundrum. The standard does not have a consolidated and conventional core meaning. There is only consensus in accepting that the standard constitutes a standard that is independent from national legal order and is not limited to restricting bad faith conduct of host States.

1.3 Treatment under 2016 India Model BIT

The 2016 India Model BIT does not contain an FET clause, but rather a "treatment of investments" clause[27] and prohibits a country from subjecting foreign investments to measures that constitute a violation of customary international law. The reference to customary international law highlights India's attempt to restrict the interpretation of the standard to minimum standard treatment without making an express mention of the FET standard.[28] The 2016 India Model BIT however, does substantiate the protections that it will provide to investments as - denial of justice (judicial and administrative), breaches of due process, and targeted discrimination on manifestly unjustified grounds or manifestly abusive treatment, such as coercion, duress and harassment.[29] The repeated inclusion of the term "manifestly" in the text with regard to targeted discrimination and abusive treatment clearly suggests that India would only assume liability for discrimination and abusive treatment if it meets a very high threshold. This tilts the balance of the BIT regime in the favour of the State's regulatory power. However, since there is no textual guidance in the BIT to interpret "manifestly" it would be open to the discretion of ISDS tribunals.

1.4 Investor State Dispute resolution

Dispute resolution clauses providing for international arbitration gives a private investor the right to initiate arbitration against the Host State. The BIT signifies an understanding between signatory States that investors of one contracting state will have the right to initiate arbitration against the Host State for breaches committed by the Host State under the BIT. This makes an investment treaty arbitration differ from an international commercial arbitration. However, in the wake of an investor-State dispute, the internal procedure for arbitration remains the same as in any international commercial arbitration. An

---

[21] Available online at-http: //www.nishithdesai.com/fileadmin /user_upload/pdfs/ResearchPapers/International _Investment_Treaty_Arbitration_and_India pdf.

[22] hereinafter referred as FET

[23] FAIR AND EQUITABLE TREATMENT, UNCTAD Series on Issues in International Investment, 2012 at 20.

[24] R. DOLZER & C. SCHREUER, PRINCIPLES

[25] See A. NEWCOMBE & L PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 1-73 (2009) [hereinafter NEWCOMBE AND PARADELL, LAW AND PRACTICE]; SALACUSE, THE LAW OF INVESTMENT TREATIES

[26] SURYA PRASAD SUBEDI, INTERNATIONAL INVESTMENT LAW 172-173 (2008); Mondev International Ltd v. United States, ICSID Case No. ARB (AF)/99/2, Award, (Oct.11 2002); Merrill and Ring Forestry L.P. v. Canada, ICSID Case No. UNCT/07/1, Award (Mar. 31, 2010); Teco v. Guatemala, ICSID Case No. ARB/10/23, Award ¶ 454 (Dec. 19, 2013); Bilcon v. Canada, PCA Case No. 2009-04, Award on Jurisdiction and Liability ¶¶ 442-444 (Mar. 17,

[27] Indian Model BIT 2016, Article 3.1 provides: 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

[28] Ranjan and Pushkar, The 2016 Indian Model BIT at 23.

[29] Indian Model BIT 2016, Article 3.1

International Journal of Advances in Engineering and Management (IJAEM)
Volume 2, Issue 9, pp: 395-403 www.ijaem.net ISSN: 2395-5252

investment treaty arbitration can be undertaken under an institutional format or an ad-hoc format. In an institutional format, rules of the institution apply, and the institution facilitates appointment of arbitrators and conduct of the arbitration. The **"ICSID"** is at the forefront of BIT institutional arbitration.[30] ICSID arbitrations are governed by the rules and regulations set forth in the Washington Convention, commonly referred to as the ICSID Convention. The primary reason for the same is that signatories to the ICSID Convention undertake to be bound directly by the award issued by an ICSID Tribunal - subject to annulment and rectification measures. It is also pertinent to note that since ICSID is a creature of international law, it imposes certain qualifications to the definitions of 'Investment' and 'nationality', in addition to retaining sufficient control over the dispute resolution process. The ICSID Convention has helped institutionalize the process of investment arbitration. Currently, there are 159 signatory States to the ICSID Convention.[31] Of these, 150 States have ratified the Convention. [32]Alternatively, countries like India, who are not signatories to the ICSID Convention, follow an ad-hoc arbitration format - relying typically on the UNCITRAL (United Nations Commission on International Trade Law) Rules. Arbitrator appointment is made pursuant to the relevant BIT. Arbitrator appointment may also be made by an institution such as the Permanent Court of Arbitration.[33] In contrast, the ICSID has its own panel of arbitrators who are appointed in the manner specified under the ICSID Convention.

[30] ICSID Member States, available at https://icsid.worldbank. org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.aspx?tab=FtoJ&rdo=BOTH

[31] Data available from International Centre for Settlement of Investment Disputes, available at https:// icsid. worldbank. org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome& page Name =Member States Home

[32] International Centre for Settlement of Investment Disputes, The ICSID Caseload – Statistics (Issue 2014-2), available at wds.worldbank.org/external/

[33] Articles 6, 7 and 8 of the UNCITRAL Arbitration Rules available at http://www.uncitral.org/pdf/english/texts/ arbitration/arb-rules-revised/pre-arbrules-revised.pdf

V. SETTLEMENT OF DISPUTES UNDER THE 2016 INDIA MODEL BIT

Chapter IV of the 2016 India Model BIT deals with Settlement of Disputes between an Investor and a Party'. This is the longest chapter on settlement of disputes in any BIT so far and contains eighteen (18) articles. Evidently, this chapter was drafted to safeguard India as a host State from the large number of investment treaty claims it has been facing since White Industries. Chapter IV covers the following provisions: scope and definitions (Article 13), proceedings under different international agreements (Article 14), conditions precedent for submission of a claim to arbitration (Article 15), submission of claim to arbitration (Article 16), consent to arbitration (Article 17), arbitrator related provisions (Article 18 & 19), conduct of arbitral proceedings (Article 20), dismissal of frivolous claims (Article 21), transparency in arbitral proceedings (Article 22), burden of proof and governing law (Article 23), joint interpretation and expert reports (Articles 24 and 25), Award and finality and enforcement (Articles 26 and 27), costs (Article 28), appeals facility (Article 29) and diplomatic exchanges between Parties (Article 30). Chapter II of the 2016 India Model BIT, barring Articles 9 and 10. Chapter II 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. An arbitral tribunal constituted under the BIT can only adjudicate upon disputes relating to breaches of the treaty under Chapter II. Disputes arising between the investor and the host State under a separate contract shall be adjudicated upon by the domestic courts or the dispute resolution mechanism under the specific contract.

1.5 Litigation in India Relating to Bilateral Investment Treaty Arbitration When a dispute arises between a foreign investor and the Host State, the foreign investor (or the Host State in rare circumstances) initiates arbitration against the other party if permitted under the relevant dispute settlement provisions in the subject BIT. However, parties connected with the arbitration proceedings under a BIT may approach state courts seeking a variety of reliefs, such as anti-arbitration injunctions; enforcement of a BIT award amongst others.

-The **Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armaturs SAS**[34] is a one of the first judgments by an Indian Court interpreting a BIT and it's inter play with the Arbitration Act. The Judgment lays down principle for grant of anti-arbitration injunction under Indian Law and adopts a narrow and pro arbitration approach.

-In **Union of India v. Vodafone Group PLC United Kingdom & Anr.**[35]**,** Vodafone Blv. 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 government after the Supreme Court decided this issue in favour 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 Plc initiated a fresh arbitration, invoking the India-UK BIT.

VI. SINGAPORE INTERNATIONAL ARBITRATION CENTRE[36]

- SIAC is an independent, neutral and not-for-profit global arbitration institution which provides case management services to the international business community. In terms of its international administered caseload, SIAC is amongst the Top 5 institutions in the world.[37] SIAC administers a wide range of disputes, including, among others, corporate and commercial, trade and investment, construction/engineering, shipping/maritime, insurance, intellectual property, and banking and finance. Singapore has a reputation, not only as a hub for transnational trade and investment, but also as a key neutral venue for the resolution of cross-border disputes. Singapore is also one of the most preferred seats of arbitration in the world.[38] A number of factors have contributed to this popularity:
- robust and efficient legal system, as well as a judiciary that is supportive of arbitration;
- comprehensive legal infrastructure that is supportive of arbitration, including the adoption of the UNCITRAL Model Law on International Commercial Arbitration (1985); convenient geographical location and political neutrality;
- use of technology and availability of infrastructure that supports new technology
- world-class facilities and services at Maxwell Chambers for arbitration hearings; and enforceability of Singapore-issued arbitral awards in more than 150 countries through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (New York Convention).[39]

1.6 India and SIAC

In 2013, SIAC established its first overseas representative office in Mumbai, India. A second representative office in India was opened in GIFT, Gujarat, in 2017. The offices embody SIAC's firm commitment and close ties to India. Indian parties have consistently been one of the top three users of SIAC over the last five years and ranked as the top foreign user in 2013, 2015 and 2016. This growing trend follows on from recent years where the number of new cases involving at least one Indian party has grown steadily, increasing tenfold in the period from 2001 to 2012. Recognising the significant role played by India towards SIAC's success as an international arbitral institution, SIAC established a presence in India to interact closely with the business and legal communities in India and develop greater awareness of institutional arbitration.

The primary objectives of the Indian representative offices are to:

• facilitate the dissemination of necessary information on arbitration at SIAC and in Singapore;

• promote the use of institutional arbitration and SIAC as a leading international arbitration institution;

• promote Singapore as an arbitration destination for Indian parties;

[34] G.A. 1997 of 2014 & CS. No. 220 of 2014 (Original Side)

[35] CS(OS) 383/2017 & I.A.No.9460/2017

[36] Herein after referred as SIAC

[37] MARK MANGAN, LUCY REED & JOHN CHOONG, A GUIDE TO THE SIAC ARBITRATION RULES 16 (2014).

[38] *See* ICC, "*ICC report confirms Singapore as a leading Asia arbitration hub*" (6 June 2016) (online: http://www.iccwbo.org/News/Articles/2016/ICC-report-confirms-Singapore-as-a-leading-Asia-arbitration-hub/); *see also* White & Case LLP, "*The 2010 International Arbitration Survey: Choices of International Arbitration*" (2010).

[39] Available online at - http://www.siac.org.sg

• create a line of communication for SIAC and the community in Singapore with key players for international arbitration in India; and
• work closely with the judiciary and the government in India on policy initiatives, regular exchange of ideas on live issues, and legislative change, amongst others.

The function of administering arbitrations under the SIAC Rules continues to be handled by SIAC's multinational Secretariat in Singapore, irrespective of the seat of arbitration or the geographical origin of disputing parties. The Secretariat is able to, and has, administered arbitrations seated outside of Singapore in various jurisdictions, including India. Singapore is no longer the default seat of arbitration under the latest SIAC Rules. Parties may agree to hold hearings at any venue that is convenient or appropriate[40].

VII. INTRODUCTION OF ARBITRATION IN INDIA

The Arbitration process in India is based on the UNCITRAL Model Law on International Commercial Arbitration. Indian law is largely based on English common law because of the long period of British colonial influence during the British Raj. The Indian Arbitration and Conciliation Act, 1996 the governing arbitration statute in India. It is based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1985. Previous statutory provisions on arbitration were contained in three different enactments, namely, the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. The Arbitration and Conciliation Act, 1996 has repealed the Arbitration Act, 1940 and also the Acts of 1937 and 1961.

1.7 International Conventions on Arbitration

India is a party to the following conventions:

- the Geneva Protocol on Arbitration Clauses of 1923
- the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927; and
- the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. It became a party to the 1958 Convention on 10th June, 1958 and ratified it on 13th July, 1961.

There are no bilateral Conventions between India and any other country concerning arbitration.

VIII. NEW DELHI ARBITRATION CENTRE BILL, 2019

The New Delhi International Arbitration Centre Bill, 2019 was introduced in Lok Sabha by the Minister of Law and Justice, Mr. Ravi Shankar Prasad on July 3, 2019. It seeks to establish an autonomous and independent institution for better management of arbitration in India. The provisions of the Bill will be effective from March 2, 2019.Key feature of this bill include:

- **New Delhi International Arbitration Centre (NDIAC):** The Bill seeks to provide for the establishment of the NDIAC to conduct arbitration, mediation, and conciliation proceedings. The Bill declares the NDIAC as an institution of national importance.
- **International Centre for Alternative Dispute Resolution (ICADR):** The ICADR is a registered society to promote the resolution of disputes through alternative dispute resolution methods (such as arbitration and mediation). The Bill seeks to transfer the existing ICADR to the central government. Upon notification by the central government, all the rights, title, and interest in the ICADR will be transferred to the NDIAC.
- **Composition:** Under the Bill, the NDIAC will consist of seven members including: (i) a Chairperson who may be a Judge of the Supreme Court or a High Court, or an eminent person with special knowledge and experience in the conduct or administration of arbitration; (ii) two eminent persons having substantial knowledge and experience in institutional arbitration; (iii) three ex-officio members, including a nominee from the Ministry of Finance and a Chief Executive Officer (responsible for the day-to-day administration of the NDIAC); and (iv) a representative from a recognised body of commerce and industry, appointed as a part-time member, on a rotational basis.
- **Term and superannuation:** The members of NDIAC will hold office for three years and will be eligible for re-appointment. The retirement age for the Chairperson is 70 years and other members is 67 years.
- **Objectives and functions of the NDIAC:** The key objectives of the NDIAC include (i) promoting research, providing training and organising conferences and seminars in alternative dispute resolution matters; (ii) providing facilities and administrative

[40] Available online at - http://www.siac.org.sg/2014-11-03-13-33-43/about-us/siac-india-representative-offices

assistance for the conduct of arbitration, mediation and conciliation proceedings; (iii) maintaining a panel of accredited professionals to conduct arbitration, mediation and conciliation proceedings. Key functions of the NDIAC will include: (i) facilitating conduct of arbitration and conciliation in a professional, timely and cost-effective manner; and (ii) promoting studies in the field of alternative dispute resolution.

- **Finance and audit:** The NDIAC will be required to maintain a fund which will be credited with grants received from the central government, fees collected for its activities, and other sources. The accounts of the NDIAC will be audited and certified by the Comptroller and Auditor-General of India.
- **Institutional support:** The Bill specifies that the NDIAC will establish a Chamber of Arbitration which will maintain a permanent panel of arbitrators. Further, the NDIAC may also establish an Arbitration Academy for training arbitrators and conducting research in the area of alternative dispute resolution. The NDIAC may also constitute other committees to administer its functions[41].

IX. HISTORY AND RECENT DEVELOPMENTS IN INDIA OF INVESTMENT ARBITRATION

The investment arbitrations concerning India have not concerned any specific sector. However, India is witnessing a growing number of investment arbitration disputes in sectors such as telecommunications, and oil and gas. Publicly available information indicates that, to date, India has been involved in 24 investment treaty arbitrations as the respondent, out of which 12 are pending, nine have been settled and awards have been rendered.[42]

In the case of **White Industries Australia Limited v. Republic of India**[43] the award was decided in favour of the investor i.e. White Industries and it was held that India breached "The Republic of India has breached its obligation to provide "effective means of asserting claims and enforcing rights" with respect to White Industries Australia Limited's investment pursuant to Articles 4(2) of the BIT incorporating 4(5) of the India-Kuwait BIT" and hence fine was imposed on India[44].

In the case of **CC/Devas (Mauritius) Ltd v India**[45] it was held unanimously that the Claimants' i.e. CC/Devas (Mauritius) Ltd claims relate to an "investment" protected under the Treaty and hence the award was decided in the favour of claimant.[46]

In another case of **Louis Dreyfus Armateurs SAS v India**[47] the award has been rendered in favour of India. The Tribunal held that LDA's investment is "not entitled to protections" under the Reciprocal Promotion & Protection Investment 1997 Treaty (signed between India and France) as it does not have "minimum 51 per cent" in the project. The Permanent Court of Arbitration has also awarded India over $7 million (50 crore) as compensation towards legal expenses.[48]

X. CONCLUSION

Despite the increasing inflow of foreign capital in the Indian economy, India's potential to attract to attract FDI from the world has not yet been fully trapped most probably due to the lack of an efficient dispute resolution system in the country. Due to the slow pace of the Indian Courts, Indian Arbitration and Conciliation Act 1996 was introduced as a solution to the international commercial settlement disputes in India.

Arbitration law in India is modelled on the UNCITRAL Model of arbitration which empowers the parties to resolve disputes without approaching the Court of Law which has made it the preferred mode of dispute resolution in international commercial transactions of India. The 1996 Act provides choices to the parties in international commercial arbitration for deciding the nature of arbitration like ad hoc arbitration, institutional arbitration, where retired judges of High Courts/

[41] Available online at https://www.prsindia.org/billtrack/new-delhi-international-arbitration-centre-bill-2019

[42] Available online at https://www.lexology.com/library/detail.aspx?g=7094436c-d694-46e3-bedf-657c69f275ff

[43] Award of 30 November 2011

[44] for further details on the award see https://www.italaw.com/sites/default/files/case-documents /ita0906 .pdf

[45] Award on Jurisdiction and Merits of 25 July 2016

[46] for further details on the award see https://www.italaw.com/sites/default/files/case-documents/italaw 9750.pdf

[47] Award of 11 September 2018

[48] for further details see https://www.thehindubusinessline.com/companies/india-wins-arbitration-against-french-co-lda/article24928835.ece

Supreme Courts acts as arbitrators. These dispute resolution methods lack efficiency due to the lack of ability on part of retired judges to work efficiently, or the time-consuming factor where it takes 3-5 years for settlement. Even low fees payable at institutional arbitration to arbitrators is a hindrance in the commercial arbitration, as it does not have good arbitrators working in it.

Furthermore, International arbitration outside India attracts disputing parties to enlist the services outside India. International arbitration outside India can be held under the auspices of institutions like London Court of International Arbitration (LCIA), the ICC International Court of Arbitration (ICC), the American Arbitration Association (AAA), the World Intellectual Property Arbitration (WIPO), the Stockholm Chamber of Commerce and the International Council for Settlement of Investment Disputes (ICSID) which provide procedural rules, fixed arbitration costs, and various support services which are is big issue/challenge for the dispute resolution for Indian contexts.

The grey areas in enforcement of arbitration awards should be removed as India is going to become the hub of international arbitration, geographically and strategically as the country witnesses a boom in economic activities. However, international commercial arbitration stands on a different footing where competent, conscientious and fair arbitrators belonging to legal as well as business community are appointed. The Indian Courts should espouse a liberal interpretation in the international sphere and a constricted one in the domestic sphere. Therefore, India needs two separate pieces of legislations on domestic and international commercial arbitration.[49]

[49] Bafna, Rohit and Srivastava, Rhea, Arbitration & Alternative Dispute Resolution in India: Issues & Challenges in International Commercial Arbitration (August 9, 2012). Available at SSRN: https://ssrn.com/abstract=2126954 or http://dx.doi.org/10.2139/ssrn.2126954