BILATERAL INVESTMENT TREATIES AND INVESTMENT ARBITRATION: RENUNCIATION OR RE-INVENTION?

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Abstract

Little more than two decades ago, investment treaties and investment treaty arbitration were virtually unknown to anyone beyond the circles of those who were involved in treaty negotiations. But in the last few years, Bilateral Investment Treaties have been creating ripples across international arbitration landscapes and are considered conducive to a perception of domestic regime as supportive of foreign investments. Investment Treaty Arbitration has risen along with the spike in BITs and has spawned a new body of jurisprudence almost entirely on its own. The swift pace of growth in the two has also resulted in a gradually growing disillusionment with the framework on part of States. This paper will commence with a discussion regarding the nature of BITs and proceed to analyze the issues that make BITs a thorny path for States. The paper will then conduct an analysis of the challenges inherent in the ITA framework juxtaposed with the model of international commercial arbitration. The experience of India in the realm of investment treaty arbitration has been explored followed by the conclusion and recommendations of the author.

I. INTRODUCTION

Once upon a time, it was a basic principle of customary international law that only a State has the legal capacity to assert a claim against another State for a breach of its obligations owed to the citizens of the Claimant State. This principle was even endorsed by the International Court of Justice in *Barcelona Traction*:

"*The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law… emphasis added.*"[1]

But the times have changed; States are witnessing the rise of foreign investors as actors in public international law. These investors, as beneficiaries of Bilateral Investment Treaties ("**BITs**") concluded between States, can now institute a claim against a State where their investments are located and more importantly, in a forum of equal standing: Arbitration.[2] The once dormant[3] area of International

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[1]Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), 1970 I.C.J. Reports 3, 78.

[2]A.P. NEWCOMBE & L. PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 18-39, (Kluwer Law International, 2009);W.S. Dodge, *Investor-State Dispute Settlement between Developed Countries: Reflections on the Australia-United States Free Trade Agreement*, 39 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 1 (2006); C Schreuer, *Course on Dispute Settlement ICSID 2.1 Overview,* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT(2003), http://www.unctad.org/en/docs/edmmisc232overview_en.pdf.

[3]The ICJ made the following remarks in 1970 about the state of development of the law of foreign investment in the Barcelona traction case: 'Considering the important developments of the last-half century, the growth of foreign investments and the expansion of international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of states have proliferated, it may at first sight appear surprising that the evolution of the

investment arbitration has been transformed into "one of the liveliest fields of international dispute resolution",[4] especially since 1995.[5]

The focal point of this transformation has been the explosion in the number of bilateral Investment Treaties, mainly due to the desire of the developing countries to attract capital and the interest of capital-exporting countries to safeguard their citizens' investment.[6] Since Germany and Pakistan concluded their 'Friendship, Commerce and Navigation' (FCN) Treaty in 1959, more than 2,500 similar treaties have been entered into, over 2,000 of which have been signed since 1990 alone.[7] BITs are *"[a]greements that establish the terms and conditions for investments by nationals and companies of one country in the jurisdiction of another."*[8] These treaties provide legal protection to investments made by foreign investors — individuals and corporations alike — within the territory of a State ("**host State**").

law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane.'

[4]Gabrielle Kaufmann-Kohler, *Overview of Investor-State Arbitration Articles, in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION (Arthur Rovine ed., Brill, 2009).

[5]*Investor-state Dispute Settlement And Impact On Investment Rulemaking: The Asia-pacific Perspective*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT(2006); *Latest Developments In Investor-state Dispute Settlement, IIA Monitor No. 4*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT(2006), https://unctad.org/system/files/official-document/webiteiit20052_en.pdf; Alexandre de Gramont & Maria Gritsenko, *Key Issues And Recent Developments In International Investment Treaty Arbitration*, ABA SECTION OF INTERNATIONAL LAW SPRING MEETING WASHINGTON, D.C., http://www.crowell.com/documents/Key-Issues-and-Recent-Developments-in-International-Investment-Treaty-Arbitration.pdf [hereinafter Gramont & Gritsenko]; Barton Legum, *The "New" Regime of Foreign Direct Investment - Investment Arbitration: A Big Bang*, 99TH ANNUAL AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS (2005).

[6]Asoka de. Z. Gunawardena, *Inception and Growth of Bilateral Investment Promotion and Protection Treaties,* 86TH ANNUAL AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS (1992).

[7]John Beechey & Anthony Crockett, *New Generation of Bilateral Investment Treaties: Consensus or Divergence, in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION(Arthur Rovine ed., Brill, 2009).

[8]Zachary Elkins et al., *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, U. ILL. L. REV. 265 (2008).

BITs generally provide for investment treaty arbitration ("**ITA**") that can be initiated either by the investor or the host state in the event that a dispute arises in relation to the investment. These treaties sometimes allow for arbitration only under the aegis of International Centre for Settlement of Investment disputes ("**ICSID**"), an institution established by the World Bank in 1965 under the ICSID Convention to provide rules and procedural facilities to investor-State disputes.[9] It may even be possible that BITs enlist a choice of fora where arbitration proceedings may take place such as the ICSID, the International Chamber of Commerce ("**ICC**"), the Stockholm Chamber of Commerce ("**SCC**"), or an ad-hoc tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law ("**UNCITRAL**").

It remains disputed whether the significant rise in the conclusion of BITs alone has stimulated additional foreign investments[10] but it certainly has contributed to the steep and dramatic rise in investment treaty arbitration.[11] Claims in ITA are usually substantial, ranging from US$120 billion to "billions and billions" of dollars.[12] Recent arbitral awards have made States wary of BITs and some States such as Venezuela, Bolivia and Ecuador have withdrawn from the ICSID Convention and even

[9]*Background Information on the International Centre for Settlement of Investment Disputes (ICSID)*,WORLD BANK, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&icsidOverview=true&language=English.

[10]Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a bit…and They could Bite*, WORLD BANK GROUP, 1-21 (2003); Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*3(1) WORLD DEVELOPMENT(2004);Jennifer Tobin & Susan Rose-Ackerman, *When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties*, 6(1)THE REVIEW OF INTERNATIONAL ORGANIZATIONS(2011).

[11]Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73(4) FORDHAM LAW REVIEW,1527 (2005) [hereinafter D. Franck]; Michael D. Goldhaber, *Big Arbitrations*, AMERICAN LAWYER, 22 (2003),http://www.americanlawyer.com/focuseurope/bigarbitrations.html.

[12]*Id.*

terminated a number of their BITs.[13] In the background of this mounting averseness to the BIT framework, this paper will analyze the ambiguities of investment treaties and uncertainties of ITA, followed by the Indian experience in this field.

II. BILATERAL INVESTMENT TREATIES

A. *What Makes Investment Treaties So Special?*

In order to avoid the historical difficulties associated with "gunboat diplomacy", States promulgated investment treaties as a device to attract foreign investment and instil confidence in the stability of the investment climate. The success of these treaties is owed largely to the rights in the treaties themselves. First, under these treaties, investors are guaranteed a series of specific substantive rights,[14] which help contribute to the stability of the investment climate of an investment. Second, investors are offered direct remedies[15] to address violations of those substantive rights. Though the substance of specific rights and obligations in individual treaties may differ, it is chiefly due to treaty-specific negotiations.[16]

There is a general trend in the rights that States guarantee under BITs, gravitated towards laying down "*specific substantive standards that govern the host state's treatment of an investment*".[17] A typical investment treaty will usually guarantee different permutations of the following protections:

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[13]*UNCTAD, IIA Issues Note*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (2010),http://unctad.org/en/docs/webdiaeia20106_en.pdf[hereinafter UNCTAD, IIA Issues Note].

[14]Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law,*19(2)PACIFIC MCGEORGE GLOBAL BUSINESS & DEVELOPMENT LAW JOURNAL,337-374 (2007).

[15]Alejandro Escobar, *An Overview of the International Legal Framework Governing Investment, American Society of International Law Proceedings*, 91ST AM. SOC'Y INT'L L. PROC., 489-491 (1997).

[16]D. Franck, *supra* note 11.

[17]Patricia M. Robin, *The BIT Won't Bite: The American Bilateral Investment Treaty Program,* 33 AM. U. L. REV. p.942-43 (1984).

Fair and Equitable treatment, including a policy of non-discrimination on the basis of nationality of the investor;[18]

a. Protection from expropriation and adequate compensation in the event of violation;

b. Prohibition on States from enforcing any barriers on free flow of capital;[19]

c. Full protection and security for an investment.

Most treaties define, albeit broadly,[20] the kind of investors and investments entitled to these substantive protections and the entitlement arises only if there is a qualifying person or entity (the *ratione personae* requirement),[21] a subject matter within the scope of the treaty (the *ratione materiae* requirement)[22] and a dispute within a qualifying time frame (the *ratione temporis* requirement). The Investment Arbitral Tribunal is the chief body that determines the satisfaction of the three-fold threshold, which gradually has been becoming increasingly complicated due to the structuring[23] of investments by investors through other countries. For instance, an Indian citizen making an investment in Kuwait through a British company may be able to claim substantive rights under both the

[18]See Hungary-Netherlands BIT Art 3(1), 1987; United States-Azerbaijan BIT Art II(3), 1997; Lithuania-Kuwait BIT Art 2(1), 2001.

[19]See US-Romania BIT Art 4, 1992; India-Kazakhstan BIT Art. 7(1), 1996; Germany-Nigeria BIT Art. 6, 2000.

[20]J.R. Weeramantry, *Treaty Interpretation in Investment Arbitration, in*OXFORD INTERNATIONAL ARBITRATION SERIES168-170 (Oxford University Press, 2012); Todd Weiler, *The Ethyl Arbitration: First of Its Kind and a Harbinger of Things to Come,* 11 AM. REV. INT'L ARB. 187, 188 (2000).

[21]THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 6 (Peter Muchlinski, Federico Ortino & Christoph Schreuer (eds.), Oxford University Press, 2008).

[22]*Dispute Settlement, 2.5 Requirements of Ratione Materiae*, UNCTAD, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES(2003),http://www.unctad.org/en/docs/edmmisc232add4-en.pdf.

[23]Matthew Saunders, *Bilateral Investment Treaties Oil the Wheels of Commerce: An Increase in BITs in Recent Years Is Helping to Encourage and Protect International Business,* LEXIS NEXIS,http://www.lexisnexis.com/publisher/EndUser?Action=UserDisplayFullDocument&orgld=1746&topicld=26635&docId=l:214719388&start=24.html.

India-Kuwait BIT and the Kuwait-UK BIT. In the event that an investor is able to take advantage of two BITs simultaneously, this accentuates the possibility of inconsistency[24] in arbitral decisions on the same set of facts.

B. *Ambiguities and Uncertainties in BITs*

The massive proliferation of treaties in the last two decades was significant especially for developing countries who viewed them as opportunities to attract greater foreign investment from the Western capital-exporting countries. But in recent times, States are growing increasingly disillusioned with the bilateral investment regime[25] and seeking alternatives, largely due to the risks inherent in the structure of these treaties that do not bode well for States in the event that investors file a claim under the treaty.

a) *Overbroad definition of 'investment'*

Investment treaties usually adopt a very broad definition of investment. The majority of the agreements have a non-exhaustive list of various types of investment which typically include stocks, credits, securities, real estate and personal property, in rem assets, intellectual property rights, prospecting, extraction or development of natural resources, including public law concessions, etc.[26] For example, the Model Indian BIT defines investment as:

> "*[E]very 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 pledges;*

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[24]D. Franck, *supra* note 11.

[25]Ioan Micula v. Romania (Jurisdiction), ICSID Case No ARB/05/20 (2008) p.28-32; UNCTAD, IIA Issues Note, *supra* note 13.

[26]Jose Luis Sequiros, *Bilateral Treaties on the Reciprocal Protection of Foreign Investment*, 24 CAL. W. INT'L L.J. 259 (1994).

(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*."[27]

With such a sweeping definition finding place in several BITs, few respondent states have challenged the claimant on *ratione materiae* grounds. During the course of the research, there was only one ITA case found where the tribunal held the definition of "investment" was not satisfied.[28] In *CMS Gas Transmission Company v. Argentina*[29], the tribunal held that the claimant, a U.S. Company who was a minority shareholder in a local Argentine company could institute a claim under the U.S.-Argentina BIT because the definition of "investment" even included "a company or shares of stock or other interests in a company or interests in the assets thereof". Noting that the arbitral awards in ITA cases run into several million dollars, it is not surprising that States have started renegotiating their earlier BITs in a bid to narrow the scope of the definitions incorporated in BITs.

b) Ambiguous legal standards

Investment treaties usually confer protection on the basis of ambiguous legal standards such as 'fair and equitable treatment' ("**FET**") and

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[27] *Ministry of Finance, Model Indian BIT, Art I (b)*, FINANCE MINISTRY OF INDIA, http://finmin.nic.in/the_ministry/dept_eco_affairs/icsection/Indian%20Model%20Text%20BIPA.asp.

[28] Joy Mining Machinery Limited v. Egypt (Jurisdiction) ICSID Case No. ARB/03/11 (2004).

[29] CMS Gas Transmission Company v. Argentina (Decision on Objections to Jurisdiction), ICSID Case No.ARB/01/8 (2003).

'indirect expropriation'.[30] These standards are not distinctly defined either in the treaties or in international law,[31] and consequently tribunals interpret them on a case-to-case basis[32] using their broad discretion. Several variations exist of the FET standard in BITs, where it has been combined with general international law,[33] international custom[34] or even standards in domestic law.[35] These treaties also generally fail to make a distinction between 'indirect expropriation' and creeping expropriation, "where the state gradually encroaches upon a foreign investment so as to confiscate or destroy it",[36] and between legitimate government regulations for the domestic economy. Foreign investors naturally argue for a broad interpretation of these standards which States fear may jeopardize their legitimate domestic measures. Arbitral tribunals have adopted diverging approaches[37] to determine where the line must be drawn between the two, creating greater uncertainty among investors and States.

[30]Carlos M. Correa, *Hazards in Bilateral Investment Treaties (BITs): Investors' Rights v. Public Health*, 47 SOUTHVIEWS,6 (2012).
[31]M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT217-218 (Cambridge University Press, 2nd ed. 2004); A.F. LOWENFIELD, INTERNATIONAL ECONOMIC LAW 555 (Oxford University Press, 2nd ed. 2008); R. DOLZER & M. STEVENS, BILATERAL INVESTMENT TREATIES 58 (Kluwer Law International, 1995).
[32]David A. Gantz, *Investor-State Arbitration Under ICSID, the ICSID Additional Facility and the UNCTAD Arbitral Rules*, US-VIETNAM TRADE COUNCIL, http://www.usvtc.org/trade/other/Gantz/Gantz_ICSID.pdf[hereinafter Gantz].
[33]Switzerland-Uganda BIT Art 4(1), 1971; Canada-Costa Rica BIT Art II(1), 1998; France-Mexico BIT Art 4(1), 1998; US Model BIT Art II(2)(a), 1992.
[34]US Model BIT Art 5, 2004; Canada Model BIT Art 5, 2004.
[35]CARICOM-Cuba BIT Art. 4, 1997.
[36]Luke Eric Peterson, *Bilateral Investment Treaties – Implications for Sustainable Development and Options for Regulation*, FES CONFERENCE REPORT,http://www.fes-globalization.org/publications/ConferenceReports/FES%20CR%20Berlin_Peterson.pdf [hereinafter Peterson].
[37]CME Czech Republic v. The Czech Republic (Partial Award) IIC 62 (2003), ¶ 591; Tecnias Medioambientales Tecmed, SA v. United Mexican States (Merits), 19 ICSID Rev 158 (2003);Peterson, *supra* note 36.

c) The 'Most-Favored-Nation' (MFN) Clause

The MFN Clause has become another minefield for States; it requires the host state to accord treatment that is no less favourable[38] than the treatment extended by the State to its citizens or to the investors of any other State. The MFN clause has been interpreted to refer not only to the material economic treatment meted out by the host state but also procedural rights.[39] In *White Industries Australia Limited v. the Republic of India*, the claimant Australian company successfully invoked the clause "effective means of asserting claims and enforcing rights" — an obligation present in the India-Kuwait BIT — taking advantage of the MFN clause in the India-Australia BIT. This renders treaty-specific negotiations futile because an investor can claim the highest standard agreed by the host State in any BIT, who are entitled to a lower protection in the BITs with their home countries and encourages "treaty-shopping" among investors.

In *Maffezini v. Kingdom of Spain*, the tribunal did suggest:

> "*[a]s a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might not have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor, as will often be the case...emphasis added*"[40]

Laudable as it may be, uncertainty persists regarding the future identification of exactly what those fundamental public policy considerations might be.[41] This increases the potential discretion that

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[38]Rep. of the Int'l Law Comm'n, 13th Sess., *Draft Articles on the Most Favored Nation Clauses of the UN International Law Commission*, 2 Y.B. Int'l Law Commission11, U.N. Doc A./CN-4/Ser. A. 1978/Add. 1 (1978).

[39]Emilio Agustin Maffezini v. Kingdom of Spain (Decision on Objections to Jurisdiction), ICSID Case No. ARB/97/7 (2001).

[40]*Id.*

[41]JURGEN KURTZ, *The Delicate Extension of Most-Favoured-Nation Treatment to Foreign Investors: Maffezini v Kingdom of Spain, in* INTERNATIONAL INVESTMENT LAW

tribunals may exercise while interpreting MFN clauses, which has proven to be very expensive for several States, much to their chagrin.

C. An Evaluation

In contrast to the earlier State-State dispute resolution mechanisms, BITs certainly are a 'normative breakthrough'[42] because foreign investors now have direct access to international investment tribunals. But the host States' discontent with the bilateral regime is due in part to the readiness of tribunals to adopt expansive interpretations of 'vague' standards, which has major implications for the governments. The issues with regard to Investment treaty arbitration are discussed in the next section.

III. INVESTMENT TREATY ARBITRATION

A. Issues and Challenges in ITA

Ever since the first investor-State arbitration under a BIT materialized in 1984,[43] arbitration as a neutral forum for investor-State dispute settlement has found favour with almost all foreign investors for two main reasons. First, since BITs grant investors the right to take recourse to arbitration against the host State, the investors are no longer at the mercy of international politics and governmental bureaucracy and can pursue their litigation independent of any foreign relations considerations that often characterize State-to-State dispute settlement.[44] Second, the investors do

AND ARBITRATION: LEADING CASES FROM ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 546-547 (Todd Weiler ed., Cameron May, 2008).

[42]Tarcisio Gazzini, *Bilateral Investment Treaties, in* INTERNATIONAL INVESTMENT LAW: THE SOURCES OF RIGHTS AND OBLIGATIONS (T. Gazzini, E. De Brabandere (eds.), The Hague: Martinus Nijhoff)(2012).

[43]Asian Agricultural Products Ltd v Sri Lanka, ICSID Case No ARB/87/3 (1987).

[44]Daniel M. Price, *Some Observations on Chapter Eleven of NAFTA*, 23 HASTINGS INT'L & COMP. L. REV, 427 (2000).

not need a separate contract with the Host State to initiate arbitration as the consent of the State is often deemed to be present in the BIT itself.[45]

Once the investor has initiated the arbitration process, the procedures followed are relatively standard including: (1) submitting a notice of dispute to the host State, (2) complying with the applicable waiting period if any, (3) electing where to resolve the dispute, and (4) taking the chosen procedure forward in accordance with the chosen mechanisms articulated in the investment treaty. The next step is the appointment of the arbitral tribunal which typically provides for an arbitrator to be appointed by each party and the third arbitrator is chosen by the party-appointees.[46] The proceedings ensue according to the rules of the arbitration mechanism that the investor elected and the tribunal renders its award. In recent years, the arbitral awards have been rising in value, being anywhere between $8-10 million to "billions and billions of dollars". Noting the enormous claims made on public treasuries of States, a variety of critiques has questioned the lack of transparency in the arbitral proceedings,[47] among several other issues.

a) *Lack of Transparency in Arbitral Proceedings and Confidentiality of Awards*

Since ITA is based upon the model of commercial arbitration, a strong emphasis is placed on confidentiality of the process and award even though a State is involved as a party. Most arbitral rules contain specific provisions about the confidentiality or the publication of awards, providing that awards may be made by both parties, unlike court

[45]Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, 269 RECUEIL DES COURS, 299 (1997); Gramont & Gritsenko, supra note 5; Gantz, *supra* note 32.
[46]*Id.*
[47]Julie A. Maupinn, *Transparency in International Investment Law: The Good, the Bad, and the Murky, in* TRANSPARENCY IN INTERNATIONAL LAW (Andrea Bianchi & Anne Peters (eds.), Cambridge University Press, 2013);Alessandra Asteriti & Christian J. Tams, *Transparency and Representation of the Public Interest in Investment Treaty Arbitration, in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW (Stephen W Schill (ed.), Oxford University Press, 2010).

decisions which are in the public domain.[48] Consequently, the evidence, the documents prepared for and exchanged in the arbitration and arbitral awards are not easily accessible. In addition, the hearings are private and no "third party" can participate in these proceedings without the parties' consent or even submit opinions or briefs to the tribunals as *amicus curiae*.

This undermines the public interest involved: "the very presence of a State as a party to the arbitration raises a public interest because the nationals and residents of that State have an interest in how the government acts during the arbitration and in the outcome of the arbitration".[49] To be fair, in exceptional circumstances, when the public interest is compelling, *amicus* briefs have been admitted by some arbitral tribunals.[50] But it remains subject to their discretion and is limited to certain cases, which is unfair to legitimate public expectations.[51]

b) <u>Inconsistent Decisions and Insulation from Judicial Control</u>

Due to the ambiguous standards incorporated in BITs, different tribunals can come to different conclusions about the same standard in the same treaty. In the event that a foreign investor can claim rights under two treaties, different tribunals organized under different treaties can come to different conclusions about disputes involving the same facts, related parties, and similar investment rights.[52] The options for addressing inconsistency of decisions in the ITA framework are limited: an unsatisfied party may request a modification of the award under the

[48]UNCITRAL Rules, Art. 32(5); AAA ICDR, Art. 34; CRCICA, Art. 37 bis; LCIA Arbitration Rules, Art. 30; LMAA, Rule 26; WIPO Rules, Art. 73-76; IBA Rules of Ethics, Rule 9; 2004 AAA/ABA Rule of Ethics for Arbitrators in Commercial Disputes.
[49]Ruth Teitelbaum, *A Look At The Public Interest In Investment Arbitration: Is It Unique? What Should We Do About It?*, 5 BERKELEY J INT'L L 54 (2010).
[50]Methanex Corporation v. United States of America, UNCITRAL, http://www.naftaclaims.com/disputes_us_6.htm; United Parcel Service of America Inc. v. Government of Canada, ICSID Case No. UNCT/02/1.
[51]Loukas A. Mistelis, *Confidentiality and Third Party Participation: UPS v. Canada and Methanex Corp. v. United States, in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW, (Todd Weiler ed., Cameron May, 2008).
[52]D. Franck, *supra* note 11.

applicable rules or institute a suit in the national courts on limited grounds.[53]

Provisions for modification of an award under most applicable rules allow only for correction of minor clerical errors and do not usually permit a review of the merits of the claim.[54]

The more popular option in ITA to remedy inconsistent decisions is to challenge the award after the tribunal renders it either (1) at the seat of arbitration or (2) contest enforcement at the place where enforcement is sought.

But it has been observed that arbitration tribunals are often insulated from the review of judicial authorities as "*investment treaties provide that investor-state disputes are to be treated as commercial disputes for the purposes of the New York Convention. This restricts the degree to which domestic courts can refuse to enforce an investor-state award on the grounds that it goes beyond the bounds of commercial arbitration*".[55] In a bid to promote their domestic arbitration environment, many States have revised their national laws such that they now provide for a less vigorous standard of judicial review for foreign arbitral awards.[56]

For instance, Belgium has removed any kind of judicial oversight that Belgian Courts had over international arbitration awards.[57] The Indian Supreme Court, in its 2012 judgment in *Bharat Aluminium Co. (BALCO) v. Kaiser Aluminium Technical Service* has ruled that Indian courts will

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[53]Mark B. Feldman, *The Annulment Proceedings and the Finality of ICSID Arbitral Awards*, 2 ICSID REV.-FILJ85 (1987).

[54]ICSID,*Art. 49, ICSID Convention, Regulations and Rules: Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings*, WORLD BANK, http://www.worldbank.org/icsid/basicdoc/partD.htm.

[55]Biswajit Dhar et al., *India's Bilateral Investment Agreements: Time to Review*, 47(52)ECONOMIC AND POLITICAL WEEKLY119 (2012).

[56]Thomas W. Walsh, *Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality, Berkeley Journal of International Law,* 24 BERKELEY J. INT'L L., 445 (2006): http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1310&context=bjil.

[57]Georges R. Delaurne, *The Finality of Arbitration Involving States: Recent Developments*, 5 ARB. INT'L.29 (1989).

not entertain any application to set aside a foreign arbitral award under Section 34 of the Indian Arbitration Act,[58] giving a further boost to investors locked in disputes with Indian companies or Government of India. Thus, since there are no appeals processes provided for in the ITA framework, the diminishing number of effective options to review arbitral awards certainly gives cause for disillusionment.

c) A Private Tribunal for Questions of Public Law

Due to overbroad definitions of 'investment' in BITs and inclusion of terms like 'indirect expropriation', investors have been able to sue Host states even for to government actions taken to protect the public welfare, environment or national security.[59] Subject-matter of investor- State claims often include functioning of and decisions by domestic court systems, denial of regulatory permits, national resource policies, health and safety measures, environmental protections and emergency regulatory measures taken during financial crises.[60]

The arbitral tribunals have awarded egregious damages in such cases, disregarding the duty of the State to act in public interest and restricting their judgment to an assessment of whether the government action reduces the value of an investment.[61] In *Philip Morris Brands Sárl & Ors. v. Uruguay*, the claimants had instituted a challenge to the cigarette packaging and labelling requirements that adopted by Uruguay to reduce the domestic consumption of tobacco.[62] They claimed damages under the Uruguay-Switzerland BIT, arguing that the measures taken had frustrated their "legitimate expectations" regarding the stability of their investment

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[58]Bharat Aluminium Co. (BALCO) v. Kaiser Aluminium Technical Service, (2012) 9 SCC 552 (India).

[59]Jane Kelsey, *Investor-State Disputes in Trade Pacts Threaten Fundamental Principles of National Judicial Systems*, CITIZEN.ORG, http://www.citizen.org/documents/isds-domestic-legal-process-background-brief.pdf [hereinafter Kelsey].

[60]Middle East Cement v. Egypt (Award),ICSID Case No. ARB/99/6 (2002);Goetz v. Republic of Burundi, ICSID Case No. ARB/95/3 (1998);Loewen v. United States, ICSID Case No. ARB(AF)/98/3 (2003).

[61]Middle East Cement v. Egypt (Award), ICSID Case No. ARB/99/6, 107 (2002).

[62]Philip Morris Brands Sárl & Ors. v. Uruguay, *ICSID Case No. ARB/10/7 (2013).*

in Uruguay. This is not the first time such a challenge has arisen[63]and while the decision of the tribunal is still awaited, it demonstrates how ITA can be used as a strategy to stifle policy-making and to reduce regulations by States that are detrimental to the *profits* of investors.[64]

Arbitral tribunals no longer consider their authority restricted to pecuniary relief of damages; in several instances, they have even allowed injunctive relief that has created severe conflicts of law.[65] In a claim brought by Chevron against Ecuador under the U.S.-Ecuador BIT, the tribunal ordered the Executive branch of the Egypt Government to intervene and halt the enforcement of an appellate court ruling, unmindful of the fact that this order violates the principle of separation of powers.[66]

B. An Evaluation

These issues underscore the fact that ITA framework has been unable to accommodate several concerns regarding implications of an Investor-State dispute that usually do not figure in international commercial arbitration. We must not forget that these Arbitral tribunals are constituted of privately contracted lawyers and arbitrators who lack public accountability, do not operate under any standard judicial ethics rules and rule on significant questions of public law according to arbitration rules that are in many respects alien to public law.[67] Therefore, continuing transplantation of that model for regulatory adjudication between Investor-State may not be the best way forward.

[63]Emilio Agustin Maffezini v Kingdom of Spain, ICSID Case No. ARB/97/7 (2000).
[64]Gramont & Gritsenko, supra note 5.
[65]Enron & Ponderosa v. Argentina (Award on Jurisdiction), ICSID Case No. ARB/1/03 (2004).
[66]Kelsey, *supra* note 59.
[67]GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW70-71 (1st ed., Oxford University Press 2007).

IV. THE INDIAN MICROCOSM

Eager to tap into the mobility of foreign investment post-liberalization, India commenced its BIT programme in 1994 and since then, BITs have been concluded with 86 countries out of which 73 have entered into force. Conspicuously, India is neither a signatory to the ICSID Convention nor a member of ICSID and therefore, any arbitration under Indian BITs would be either under the Additional Facility Rules or modeled as an ad-hoc non ICSID arbitration under the UNCITRAL Rules.[68]

India's Model BIT has standard clauses for Fair and Equitable Treatment, Most-Favoured Nation, post-establishment national treatment and UNCITRAL model arbitration. It is worth noting that Model BIT does not grant a '*right to make investments in India*'; an investor can exercise the rights under any BIT to which is a party only after making investments in its territory. Also, it covers only those investments which are made in accordance with the laws and regulations of the contracting State.[69] The rosy picture that BITs painted for the Indian government regarding FDI inflows faded away in 2011 when the first ITA claim in the *White Industries* case was decided against India.

A. The Dabhol power settlement case

Earlier, proceedings had been instituted against India by two U.S. investors which had invested in India through their Dutch and Mauritian subsidiaries to build, own and operate a power plant in Maharashtra. The Maharashtra State Government attempted to terminate it thereafter, on the ground that no competitive bidding procedure had been followed in

[68]S. Bhushan, *Bit Arbitration in India: Exploring Applicability of the 1996 Act and Enforcement of Resultant Arbitral Awards,*4 CONTEMPORARY ASIA ARBITRATION JOURNAL 273-304 (2011).
[69]*Ministry of Finance, Model Indian BIT, Art 2*,FINANCE MINISTRY OF INDIA,http://finmin.nic.in/the_ministry/dept_eco_affairs/icsection/Indian%20Model%20Text%20BIPA.asp.

the allocation process.[70] Enron invoked investor-State arbitration under the India-Netherlands BIT. An award was never made as the Indian government settled the dispute for a significant sum.[71] But in *Capital India Power Mauritius I and Energy Enterprises (Mauritius) Company v. India,*[72] the other investor persisted and successfully received damages under the BIT arbitration clause.

B. White Industries Australia Ltd. v. India

The *White Industries* award, the first of its magnitude and the first ever published investment treaty arbitration award against India, was a startling twist for the Indian investment arbitration landscape. The claimant was an Australian investor, who had concluded a long-term contract with Coal India Limited (CIL), a State enterprise, to supply equipment and develop the Pipawar Mine located in Bihar, for CIL. In 1999, disputes arose between them regarding payments under the contract and subsequently, the claimant initiated arbitration proceedings against CIL under the ICC Arbitral Rules. In a majority decision, the ICC Arbitral Tribunal awarded damages to the claimant. In 2002, both CIL and the claimant instituted proceedings in Indian courts: the former, in the Calcutta High Court to set aside the Award under the Indian Arbitration and Conciliation Act of 1996 and the latter, in the Delhi High Court to enforce the ICC award.

Both proceedings experienced significant delays and even after almost 10 years, they were pending before the Indian Supreme Court with no date of hearing fixed. Seeing no other alternative to enforce the award, finally in December 2009, White Industries invoked investor-State Arbitration under the Australia-India BIT. The claimant argued that it had been denied "effective means of asserting claims and enforcing rights", an obligation present in the Kuwait- India BIT, which it asserted that it was

[70]Kenneth Hansen et al., *The Dabhol Power Project Settlement - What Happened? And How*?, 12 INFRASTRUCTURE JOURNAL (2005).
[71]*Id.*
[72]Capital India Power Mauritius I and Energy Enterprises (Mauritius) Company v. India (Award), ICC Case No 12913/MS (2005).

entitled to under the MFN Clause in the Australia-India BIT[73]. The Tribunal found that the ICC Award was an "investment" within the definition in the BIT and such long delays constituted a denial of "effective means" which translated into the denial of justice/fair and equitable treatment under the BIT. Thus, finding in favour of the claimant, the Tribunal ordered India to pay $98,12,077 (Aus.) as damages.[74]

The 'effective means' standard has opened its own can of worms; it seems to have lowered the threshold from the 'denial of justice' standard usually used in investment arbitrations. The denial of justice standard was articulated in the *Mondev* case:

"In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment."[75]

The test for FET standard has a "high threshold", and as an objective standard, it required a "*particularly serious shortcoming and an egregious conduct, that shocks or at least surprises, a sense of judicial propriety*."[76]

In the *White Industries* case, the Tribunal acknowledged that the "effective means" standard was a forward-looking, "distinct and potentially less demanding test, in comparison to denial of justice."[77] The tribunal also noted that the "effective means" standard was "measured against an objective, international standard," which focuses on "whether

[73]White Industries Australia Limited v. The Republic of India, UNCITRAL (2011) [hereinafter White Industries Australia Limited].
[74]*Bilateral Investment Treaties*, MINISTRY OF COMMERCE AND INDUSTRY, http://pib.nic.in/newsite/erelease.aspx?relid=95593.
[75]Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2.
[76]Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador, UNCITRAL, PCA Case No. 34877.
[77]White Industries Australia Limited, *supra* note 73, at 11.3.2 and 11.3.3.

the system of laws and institutions work effectively at the time the promisee seeks to enforce its rights/make its claim".[78] It is baffling that India was found guilty not for a specific commission or omission on its part but singularly on the basis of the ordinary delays in its judicial system. This precedent has worrisome implications for India as it enormously increases the potential State liability under other similar BITs as well.

C. The Post-White Industries Scenario

White Industries has led to a ripple effect among other foreign investors: for instance, on 17 April 2012, Vodafone through its Dutch subsidiary Vodafone International Holdings BV initiated the dispute settlement process under the India-Netherlands BIT.[79] It declared that it was challenging the retrospective amendments for the tax code proposed by the Indian Government.[80] In its press release, Vodafone has argued that these proposals "amount to a denial of justice and a breach of the Indian Government's obligations under the BIT to accord fair and equitable treatment to investors."[81] This is one among many; companies such as the Russian conglomerate Sistema, Norwegian company Telenor, and the British hedge fund Children's Investment Fund, have initiated arbitration proceedings against India for various regulatory actions,[82] including the recent 2G Judgment by the Indian Supreme Court.[83]

[78]*Id.*at 11.3.2 (f).
[79]Sandeep Joshi, *Vodafone serves notice to Centre on tax dispute,* THE HINDU, http://www.thehindu.com/todays-paper/tp-business/vodafone-serves-notice-to-centre-on-tax-dispute/article3325893.ece.
[80]*Id.*
[81]*Id.*
[82]S. Bhushan and Puneeth Nagaraj, *Need to Align Bilateral Investment Treaty Regime with Global Reality*, THE HINDU, https://www.thehindu.com/business/companies/need-to-align-bilateral-investment-treaty-regime-with-global-reality/article4276916.ece.
[83]Centre for Public Interest Litigation v. Union of India, (2012) 3 SCC 1 (India); *2G Case: Russia's Sistema seeks protection of $3 bn investment from Indian Govt*, THE ECONOMIC TIMES, https://economictimes.indiatimes.com/industry/telecom/2g-case-russias-sistema-seeks-protection-of-3-bn-investment-from-indian-govt/articleshow/12070509.cms?from=mdr.

To curb the onslaught of investment arbitrations, the Indian government recently froze all BITs negotiations till a "review of the model text of BIPA is carried out and completed".[84] The Indian Department of Industrial Promotion and Policy (DIPP) is contemplating the exclusion of investor-state arbitration clauses from the country's future BITs.[85]

V. THE WAY AHEAD: RENUNCIATION OR REINVENTION?

BITs have played a crucial role in the international investment regime by facilitating a stable regulatory framework for foreign investors to host their investments and flourish. But over the last few years, a gradual renunciation of the BIT & ITA framework is setting in, and spreading among States, especially the developing nations. This fundamental shift in due to the increasing risks and enormous costs involved that States now perceives under these treaties. The fact remains that the *status quo* is unsatisfactory and diminishing in its appeal and it is due in part to the transplantation of the international commercial arbitration model without accounting for extra-legal considerations that accompany the acts of States.

But the horizon is not as bleak as it appears; the BIT & ITA framework has slowly begun to respond to its perils and re-invent itself. States have begun renegotiations of their existing BITs[86] in order to address the issues and challenges that have been outlined in the previous sections of this paper. These new-generation treaties are a step forward in trying to correct the balance that is currently skewed completely in the favour of investors.

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[84]Sanjay Mehudia, *BIPA talks on a hold*, THE HINDU,https://www.thehindu.com/business/Economy/bipa-talks-put-on-hold/article4329332.ece#!.

[85]Asit Ranjan Mishra, *India may exclude clause on lawsuits from Trade Pacts*, THE MINT,https://www.livemint.com/Home-Page/dTXmHa0mYUyRrFko4HbiLP/India-may-exclude-clause-on-lawsuits-from-trade-pacts.html.

[86]UNCTAD, *Recent Developments in International Investment Agreements, IIA Monitor No.3 (2007)*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (2007), https://unctad.org/system/files/official-document/webiteiia20076_en.pdf.

UNCTAD has identified five distinguishing characteristics of these treaties:[87]

1. Greater precision in the scope of the definition of "investment";
2. Clarification of the meaning of key obligations;
3. Clarification that investment protection should not be pursued at the expense of other public policy objectives;
4. Promotion of greater transparency between the contracting parties and in the process of domestic rule-making; and
5. Innovation in relation to dispute settlement mechanisms.

A. Recommendations

The new generation treaties are certainly a laudable step forward but if investment arbitration mechanisms are to fulfil their promise, they will have to demonstrate greater sensitivity to crucial concerns such as public interest, transparency and minimize the risk of inconsistent decisions. States need to undertake an exhaustive review of their existing BITs and modify treaty provisions and procedures so that they are able to assume greater control over the arbitration process.

In addition, there is a need for an international body to provide appellate review and provide clarifications on the meaning of rights contained in investment treaties. States can utilize a variety of preventive mechanisms such as UNCTAD's concept of Dispute Prevention Policies (DPPs): it usually constitutes the establishment of institutional mechanisms within the government of the host State that focus on preventing the emergence and escalation of conflicts between the State and investors.[88]

[87]UNCTAD, *Investor-state Dispute Settlement and Impact on Investment Rulemaking*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (2007),http://unctad.org/en/docs/iteiia20073_en.pdf.
[88]UNCTAD, *Investor–State Disputes: Prevention and Alternatives to Arbitration*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (2010),http://unctad.org/en/docs/diaeia200911_en.pdf.

Reinvention is the key and now is the time; either BITs and ITA must rise to the occasion or forever miss the boat.