

***Renegotiation of Indian Bilateral Investment Treaties:
An Analysis from a Development Perspective***

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Abstract

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.

Key Words: *Bilateral Investment Treaties, Sustainable Development, Local Remedies, Regulatory Autonomy, and International Investment Agreements Reform.*

I. Introduction

Sustainable development refers to state's effort to achieve progress (development) in a way that can be maintained over the long term (sustainable).¹ The most popular definition defines sustainable development as, "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".² The Brundtland Report observes that, "Sustainable development is not a fixed state of harmony, but rather a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development,

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¹ Marie-Claire Cordonier Segger & Andrew Newcombe, *An Integrated Agenda for Sustainable Development in International Investment Law*, in SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 102 (Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe eds., 2011).

² World Commission Environment and Development, *Report of the World Commission on Environment and Development: Our Common Future*, UN Doc A/42/427 (1987).

and institutional change are made consistent with future as well as present needs”.³ Therefore economic development, social well-being and environmental protection are the key pillars of sustainable development.⁴ The concept of sustainable development did not focus on limiting economic activity but rather on re directing development in order to ensure the potential for long term sustained yields.⁵ In this background foreign investments are very important in developing economies for implementing the sustainable development agenda. Various initiatives at the international level stressed on the importance of foreign investments in achieving sustainable development.⁶

Foreign investments help to raise Gross Domestic Product (GDP), bring employment options and new technologies, and alleviate poverty. So there are reasons for developing countries to support foreign investments. At the same time it is equally important for a developing state to have policy flexibility and incentives for sustainability. John Ruggie referred this as the “governance gaps created by globalization- between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences”.⁷ In order to reconcile these diverse interests, to engage the one so as to promote the other, sustainable development law and policy can and should be developed and implemented within investment regimes.

The treaty-based investment law regime is based on the most powerful system of international adjudication in modern history.⁸ Arbitrators have shown pro investment stance and acquired power through expansive legal interpretations and the economic size of the awards.⁹ Not coincidentally, there is growing apprehension about the

³ *Id.* at overview ¶ 30.

⁴ See MARIE CLAIRE CORDONIER SEGGER & ASHFAQ KHALFAN, SUSTAINABLE DEVELOPMENT LAW PRINCIPLES, PRACTICES & PROSPECTS 2-3 (2004).

⁵ MARKUS W. GEHRING & MARIE CLAIRE CORDONIER SEGGER (EDS) SUSTAINABLE DEVELOPMENT IN WORLD TRADE LAW (2005).

⁶ See generally Programme of Action for Sustainable Development, Report of the UNCED, U.N. GAOR, 46th Sess., Agenda Item 21, U.N. Doc A/Conf.151/6/Rev.1 (1992), 31 I.L.M. 874 at ¶ 2.23; UN World Summit for Sustainable Development: Plan of Implementation, World Summit for Sustainable Development, UN Doc. A/CONF.199/L.1 (Johannesburg, South Africa 2002), Plan of Implementation of the World Summit on Sustainable Development, UN Doc. A/CONF.199/20 (2002) ¶ 4.

⁷ Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Entities UN doc. A/HRC/8/5 (April 1, 2008) at 3.

⁸ Gus Van Harten, *A Critique of Investment Treaties*, in RETHINKING BILATERAL INVESTMENT TREATIES CRITICAL ISSUES AND POLICY CHOICES 41 (Kavaljit Singh & Burghard Ilge, eds., 2016).

⁹ YVES DEZALAY & BRYANT GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996).

regime and pressure for reform.¹⁰ The increasing facility with which new directions of litigation are thought up and supported by arbitrators will add to the need for states to rethink the system of investment arbitration.¹¹ Addressing this issue would require a comparison of the initial and the revised treaties' design and a systematic coding of their substantive provisions on various dimensions. This paper attempts to understand the present Indian international investment regime from a development perspective.

II. The Background of International Investment Agreements Reform

In the last one decade, India's investment landscape has considerably changed. Foreign investment flows to India have also increased manifold from US\$393 million in 1992-93 to \$26192 million in the financial year 2011-12.¹² Increase in the number of IIAs coupled with increase in foreign investment flows has increased the interaction between different layers of governments, at the Centre and state levels, with foreign corporations belonging to one of the IIA partner countries of India and hence the possibility of a conflict due to the exercise of India's regulatory power.¹³

In fact, this past decade, treaty-based foreign investor arbitrations against host states have tripled, from just over 200 in 2005 to 668 in 2015,¹⁴ mirroring the corresponding global surge in foreign direct investment from US\$11 trillion to US\$26 trillion.¹⁵ The growing number of investor claims against sovereign states challenging a wide array of public policy decisions and regulatory measures has evoked deep concerns about the potential costs associated with such treaties.¹⁶ To spot difficulties that could lead to investment disputes and allow for timely correction, governments are mapping and monitoring possible obstacles. They are also promoting an improved environment for IIAs in general by including more precise language and more specific exceptions in

¹⁰ *Id.*

¹¹ See Article 1 (1) (d) of the Canada China Treaty 2014.

¹² See Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, *FDI in India Statistics available at* http://dipp.nic.in/English/Publications/FDI_Statistics/2012/india_FDI_January2012.pdf.

¹³ Prabash Ranjan, *Renegotiating India's Investment Agreements A Policy Perspective*, MADHAYM BRIEFING PAPER 7 (August 2012).

¹⁴ Investment Dispute Settlement Negotiator, <http://investmentpolicyhub.unctad.org/ISDS>.

¹⁵ World Investment Report, *Reforming International Investment Governance*, United Nations Conference on Trade and Development (2015).

¹⁶ Lauge Skovgaard Poulsen & Emma Aisbett, *When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning*, 65 (2) WORLD POLITICS 273-313 at 274 (2013).

agreements to better reflect policy.¹⁷

No aspect of BIT practice has been more informative to governments than investor-state dispute settlement.¹⁸ International treaties, like some domestic law, contain substantial ambiguities that are only clarified over time as the rules are implemented and enforced.¹⁹ Rulings made by dispute settlement bodies interpret ambiguous or contested substantive provisions and thereby clarify their meaning and consequences.²⁰ Anne Van Aaken refers to the “learning effect” of BIT arbitration, which has caused states to approach them more cautiously.²¹ Governments renegotiate when they have learned something new about the state of the world²² or when the state of the world has actually changed.²³ Revising the Model BIT, India addresses issues related to overly broad interpretations of certain provisions by arbitral tribunals, to adequately reflect and take into account India's socio-economic policy realities.

III. ISDS Claims Against India

This part discusses the major ISDS claims against India and analyzes the reasons why India lost in *White Industries* and *Antrix Devas*.

a. *White Industries*

In 1989, *Coal India* contracted *White Industries Australia* to supply mining machinery and develop a coalmine. Once the mine was in operation, a dispute arose between the two entities. In 1999, *White Industries* sought recourse from the International Chamber of Commerce Arbitration, and as there was a delay in the enforcement *White Industries* turned to the bilateral investment treaty between Australia and India.

¹⁷ Kathryn Gordon & Joachim Pohl, *Investment Treaties Over Time: Treaty Practice and Interpretation in a Changing World* (OECD Working Papers on International Investment, 2015/02, 2015) available at <http://dx.doi.org/10.1787/5js7rhd8sq7h-en>

¹⁸ STEPHAN W SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* (2009).

¹⁹ Mark C. Suchman & Lauren B Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 *LAW AND SOCIAL INQUIRY* 903-41 (1996).

²⁰ Judith Goldstein & Richard H Steinberg, *Negotiate or Litigate? Effects of WTO Judicial Delegation on U.S. Trade Politics*. 71 *LAW AND CONTEMPORARY PROBLEMS* 257-282 (2008).

²¹ Anne Van Aaken, *International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis*, 12 (2) *JOURNAL OF INTERNATIONAL ECONOMIC LAW* 507-538 at 532 (2009).

²² As a reaction to the decision in *Maffezini v. Kingdom of Spain*, the United States introduced a clause in some subsequent investment treaty negotiations aiming specifically at excluding the application of MFN Clauses to investor state dispute settlement. See Article 10.4 (2) footnote 1, Draft of the Central America-United States Free Trade Agreement (Jan. 28, 2004).

²³ Yoram Z. Haftel & Alexander Thompson, *When Do States Renegotiate International Agreements? The Case of Bilateral Investment Treaties* (Nov. 15, 2013) (Submission to University of Maryland).

Unfortunately for *White Industries*, there is nothing in the Australia-India BIT, which directly deals with the delays in the court system. White Industries found something suitable in the BIT between India and Kuwait under MFN, where India is required to maintain a favourable environment for Kuwaiti investors in India. The tribunal concluded that *White Industries*' rights under the ICC award were part of *White Industries*' original investment. This was because the ICC award crystallized the parties' rights and obligations under the contract. *White Industries*' rights under the award were therefore covered by the protection in the BIT and granted *White Industries* an award of over A\$4 million with interest, and related court fees.

b. Antrix Devas

In 2005, the Indian Space Research Organization's (ISRO) commercial arm *Antrix Corporation* entered into an agreement²⁴ with *Devas Multimedia* to lease out satellite spectrum that *Devas* could use to provide high-quality telephony and Internet services. In 2011 however, a leaked draft audit report noted that there were potentially a number of irregularities in the agreement including conflict of interest, favouritism, financial mismanagement and non-compliance of standard operating procedures.²⁵ Then the deal was scrapped and the official reasons given for scrapping the deal was the *force majeure* event, and in this case it was the government acting in its sovereign capacity, deeming that the S-band spectrum needed to be used for national purposes and thus could not be leased out to *Devas*.²⁶ The second arbitration was filed by the company's investors, which include *Columbia Capital* and *Telecom Ventures* under the Indo-Mauritius Bilateral Investment Treaty. The Permanent Court of Arbitration ruled that the government's actions in 2011 amounted to expropriation and that in annulling the *ISRO-Devas* contract, the country has breached treaty commitments to accord fair and equitable treatment to *Devas*'s foreign investors.²⁷ The first arbitration outcome, which was conducted by ICC, saw the Indian government receiving a fine

²⁴ "The deal involved *Antrix* committing to manufacturing and launching two ISRO satellites and then leasing nearly 70 MHz of S-band satellite spectrum to *Devas* for a period of 12 years. In return, *Devas* committed to paying upfront fees of a little over \$30 million".

²⁵ See the Report at http://www.cag.gov.in/sites/default/files/audit_report_files/Union_Compliance_Scientific_Department_Multimedia_Broadcasting_Service_4_2012.pdf

²⁶ Anuj Srivas, *Explained: Why Does The Ghost Of Antrix-Devas Continue?* THE WIRE, July 27, 2016 at <http://thewire.in/54291/india-isro-arbitration-antrix-devas/>

²⁷ See Anuj Srivas, *India Loses Big in Arbitration Case Over Antrix-Devas Controversy*, THE WIRE, July 26, 2016 at <http://thewire.in/53993/india-loses-big-in-arbitration-case-over-Antrix-Devas-Controversy/>

of nearly \$672 million for unilaterally terminating the contract with *Devas*. The second, delivered by the Permanent Court of Arbitration makes it liable to pay financial compensation”, with a minimum expected penalty of \$1 billion.²⁸

This annulment of the contract also resulted in another claim made under India-Germany BIT by *Deutsche Telekom*, the German telecom giant who invested \$100 million in *Devas*. This case is ongoing.²⁹

c. Other Claims

In June 2016, *Cairn Energy*, the Edinburgh-based oil firm, filed an arbitration claim under the previous India-UK BIT seeking \$5.6 billion in compensation from the Indian government for raising a retrospective tax demand of \$1.6 billion in 2014.³⁰

Vodafone under the India-Netherlands BIT has made a similar claim. *Vodafone*, already disputing a US\$3 billion tax claim by the Indian Government, held that India’s plan to retrospectively open tax cases was a breach of the country’s BIT obligations and a denial of justice.³¹

Khaitan Holdings Mauritius Limited has sued India under the India- Mauritius BIT claiming \$ 1400 million in damages for the Supreme Court ordering the cancellation of the 2G licenses.³²

A closer look at India’s experience explains its move to redraft principal provisions in its model BIT text. India’s worry is that the 89 international investment agreements it has signed render it highly vulnerable to expensive litigation,³³ in which disputants can often have, an unfair advantage. This is because India’s agreements are based on age-old model text, which is no longer in keeping with today’s realities.³⁴

²⁸ Prabash Ranjan, *Antrix-Devas: A BIT of Protectionism*, THE WIRE, Aug. 9, 2016 at <http://thewire.in/57586/antrix-devas-a-bit-of-protectionism/>

²⁹ *Id.*

³⁰ Ben Giaretta and Akshay Kishore, *The Changing Landscape of Investment Treaty Protection in India*, International Arbitration, April 2015.

³¹ Premila Nazareth Satyanand, *Once BITten, Forever Shy: Explaining India’s Rethink of Its Bilateral Investment Treaty Provisions*, 16 (1) AIB INSIGHTS 17 (2015).

³² Prabash Ranjan, *Antrix-Devas: A BIT of Protectionism*, THE WIRE, Aug. 9, 2016 at <http://thewire.in/57586/antrix-devas-a-bit-of-protectionism/>

³³ Kavaljit Singh, *India And Bilateral Investment Treaties – Are They Worth It?* FINANCIAL TIMES, Jan. 21, 2015.

³⁴ See generally James Nedumpara, *Imagining Space in India’s Trade and Investment Agreements* (São Paulo Law School of Fundação Getulio Vargas – FGV DIREITO SP Research Paper Series – Legal

IV. The Indian Model BIT 2015: A Developmental Analysis

States need to ensure that private investor interests do not prevail over legitimate public concerns. At the same time host countries must ensure sufficient regulatory flexibility in their IIAs to pursue their domestic policy agendas. One means of achieving balance is to ensure that development concerns are adequately addressed throughout the agreement. Further adding investor responsibility provisions directly as part of IIAs is also important.³⁵ Therefore this part engages a developmental analysis of the Model BIT 2015.

a. Sustainable Development

In the preamble, the Model BIT 2015 seeks to align the objectives of investment with sustainable development and inclusive growth of the parties. Further the Model BIT ensures that investments are in compliance with local laws and enhance their contribution to inclusive growth and sustainable development.³⁶ The terms “inclusive growth” and “sustainable development” are signs of “new generation” investment policies and the new Model BIT 2015 is a positive step to achieve sustainable development in India’s investment treaty relations.

b. Definition of Investment

The jurisdiction of an arbitral tribunal and the applicability of the investment treaty are largely based on the definition of “investment”. Defining investment is not merely a legal issue but also involves policy considerations, as the way in which investment is understood reflects the system as a whole. In determining whether an activity is eligible for investment protection development considerations are inevitable.³⁷

The 2003 Model was following a broad asset based definition of investment and the majority of Indian bilateral investment treaties incorporated the same except the

Studies Paper no. 113, 2014); Mihaela Papa, *Emerging Powers in International Dispute Settlement: From Legal Capacity Building to a Level Playing Field*, 3 (3) J. INT’L DISPUTE SETTLEMENT (2012).

³⁵ Anna Joubin-Bret, Marie-Estelle Rey & Jorg Weber, *International Investment Law and Development*, in SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 24-25 (Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe eds., 2011).

³⁶ See Article 8.

³⁷ Marek Jezewski, *Development Considerations in Defining Investment*, in SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 215 (Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe eds., 2011).

India-Mexico one.³⁸ An open-ended definition of investment persuaded the tribunal in *White Industries* to conclude that a contract to provide own working capital, equipment and technical know-how and assumed financial risks for cost escalation and other penalties for inadequate performance, fell with the terms “right[s] to money or to any performance having a financial value”.³⁹ On the other hand the 2015 Model provides a narrow definition of “investment”. To claim protection under the new model BIT, an investor will have to have “real and substantial business operations” in India.⁴⁰ The narrow definition of investment is not an attempt to regulate foreign investments. A simple reading may make people think that the enterprise-based definition may be an attempt to regulate the foreign investment. A reading further clarifies the objective as bringing equilibrium between the investment treaties and the regulatory power of the host states.⁴¹

In the same line the narrow definition of government refers only the actions of central government.⁴² Many of the IIA cases stem from conflicts with subnational bodies.⁴³ A procedural problem that often arises is that different bodies may give different signals in relation to an investment project, one giving favourable expectations to the concerned parties while the other indicates otherwise.⁴⁴ The narrow definition of government may bring sustainability regarding these issues.

c. Most Favoured Nation (Omitted)

A very broad application of MFN provisions is very common in the Indian BITs.⁴⁵ In many cases MFN allowed the investor to “cherry-pick” more favorable provisions from third-country BITs without being bound to any less favorable conditions

³⁸ Prabhash Ranjan, *India and Bilateral Investment Treaties – A Changing Landscape*, 29 ICSID REVIEW 2 – FOREIGN INVESTMENT LAW JOURNAL, 420, 419-450 (2014).

³⁹ See *White Industries Arbitration Award* ¶ 7.4.10.

⁴⁰ “It must have made a long- term commitment to India in terms of capital, employees and transfer of know-how, and cannot just be holding Indian assets”.

⁴¹ Prabhash Ranjan, *A BIT of an Overreaction*, THE FINANCIAL EXPRESS, Apr. 4, 2015.

⁴² “In some respects, the actions of state governments are covered by the BIT, but not those of local governments”.

⁴³ See generally *Metalclad Corp. v. Mexico*, Award of 30 August 2000, 5 ICSID Reports (2002) 209; *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, Award of 29 May 2003, 43 ILM (2004) 133.

⁴⁴ See generally *MTD v. Chile*; *Maffezini v. Spain*.

⁴⁵ See Biswajit Dhar, Reji Joseph, TC James, *India’s Bilateral Investment Agreements: Time to Review*, XLVII (52), ECONOMIC AND POLITICAL WEEKLY, <http://www.epw.in/special-articles/indias-bilateral-investment-agreements.html>.

contained in those treaties.⁴⁶ The technique is a departure from existing international law.⁴⁷

The use of provisions of another unconnected treaty goes well beyond the construction of consent that is involved when jurisdiction is claimed on the basis of an investment treaty. It seeks to link the consent in an entirely unrelated treaty to the foreign investor when there is no logical chain that connects the two treaties. Studies show that the wording of the treaties does not have such effect.⁴⁸ The wording of many MFN clauses did not suggest that they applied to dispute settlement and while interpreting MFN particular care should nevertheless be exercised in ascertaining the intentions of the parties with regard to an arbitration agreement which is to be reached by incorporation by reference in an MFN clause.⁴⁹ Broad interpretations will result in treaty shopping which is highly undesirable since the goal of investment treaty law is to foster sustainable economic relationships between states.

d. Fair and Equitable Treatment (Omitted)

The absence of a clear explanation of what is fair and what is equitable has led to a great variety of claims against host state regulations. It also raises fears that FET provision in IIAs threatens policy space and progress that has been made in promoting sustainable development. Such fears are intensified by the lack of legal certainty with respect to the application of fair and equitable treatment and the concrete scope of the standards sub elements such as fair procedure, non-discrimination, protection of investor's legitimate expectations, transparency and proportionality.⁵⁰ There is also a possibility that any attempt to reform policies, which affect foreign investors interests could be argued as undermining the stability of law and business, leading to its being

⁴⁶ See generally *Siemens v. Argentina*, Decision on Jurisdiction, August 3, 2004, ¶ 32–110; *Emilio Augustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7; *White Industries Australia Ltd. v. Republic of India*, UNCITRAL; *AAPL v. Srilanka*, ICSID Case No. ARB/87/3; *Pope & Talbot v. Canada*, UNCITRAL, 31 May 2002.

⁴⁷ *Impregilo SpA v. The Argentine Republic*, ICSID Case No ARB/07/17, Concurring and dissenting opinion of prof. Brigitte Stern, 21 June 2011.

⁴⁸ See generally Julie Maupin, *MFN Based Jurisdiction In Investor State Arbitration: Is There Any Hope For A Consistent Approach?* 14 JOURNAL OF INTERNATIONAL ECONOMIC LAW 157 (2011); Zachary Douglas, *The MFN Clause In Investment Treaty Arbitration: Treaty Interpretation Off The Rails*, 2 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 97 (2011).

⁴⁹ See generally *Telenor v. Hungary*, ICSID Case No. ARB/04/15; *Plama v. Bulgaria*, ICSID Case No. ARB/03/24; *Berschader v. Russia*, SCC Case No. 080/2004.

⁵⁰ Roland Klager, *Fair and Equitable Treatment and Sustainable Development*, in SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 237 (Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe eds., 2011).

ruled incompatible with IIAs. Interpretations that overemphasize stability may be inconsistent with the promotion of sustainable development.⁵¹

FET is omitted in the Model BIT 2015; however, the duty to afford due process and the protection is granted against manifestly abusive treatment or targeted discrimination on manifestly unjust grounds or denial of justice in any judicial or administrative proceedings.⁵²

e. Investor and Home State Obligations

The Model BIT indicates a change in course on the part of the Government. After delineating India's duty to protect investors and their investments, India's model text also places responsibilities on both investors and their home states to ensure responsible corporate conduct and inclusive and sustainable growth in its territory.⁵³ The Model BIT requires foreign investors to contribute to the development of the host country and to operate by recognizing the rights, traditions and customs of local communities in order to obtain treaty benefits. Investors are also required to make long-term commitments, hire local employees, avoid corruption, be transparent about financial transactions and governance mechanisms, and comply with host country taxation policies. Signatory home states are required to act against investors found to be violating Indian laws.⁵⁴ Host countries could initiate counterclaims in international arbitration for any violations of obligations on foreign investors. This is a mechanism to promote sustainable development using IIAs. It is accepted that host States could bring sustainability through direct regulations and investor obligations.⁵⁵

f. Exhaustion of Local Remedies Requirement

Modern investment treaties habitually grant investors the right to bring a claim against the host State directly before an international arbitral tribunal. The direct standing of foreign investors in investment law is thus mainly motivated by the ineffectiveness of the traditional system of diplomatic protection, which not only

⁵¹ Kate Miles, Sustainable Development, *National Treatment & Like Circumstances in Investment Law*, in SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 261 (Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe eds., 2011).

⁵² See Article 3.

⁵³ Kavaljit Singh, *Decoding India's New Model BIT*, Madhyam 2015.

⁵⁴ Premila Nazareth Satyanand, *Once BITten, Forever Shy: Explaining India's Rethink of Its Bilateral Investment Treaty Provisions*, 16 (1) AIB INSIGHTS 17 (2015).

⁵⁵ NON-STATE ACTORS AND HUMAN RIGHTS (Philip Alston, ed., 2005).

requires the exhaustion of all local remedies,⁵⁶ but more importantly is a discretionary right of a State only.⁵⁷ The direct access to arbitration on the contrary provides a guarantee for the investor to have access to an effective international remedy⁵⁸ while at the same time offering an interesting investor friendly environment for the hosts State.⁵⁹

Customarily, conflicts between individuals and a State in the exercise of its sovereign authority can be brought only before the domestic courts of that State, since the application of State immunity would prevent the submission of such claims to the domestic courts of the individual's home State. The direct access to arbitration is by no means intended to be a generalized claims procedure to deal with any type of dispute between host State and the foreign investor. States grants the access of foreign investors to arbitration only through the explicit consent, as is the case in general international law.⁶⁰ Access to investment treaty arbitration may be restricted by the consent of the State.⁶¹ States, when expressing consent to direct investment arbitration, may condition their consent and for example require foreign investors to exhaust local remedies, either generally or for a limited time period.⁶² The obvious intention behind these measures is that a good faith effort at solving the dispute through domestic means should first have been attempted before recourse to international means of settlement. But claimants have often ignored these prescriptions, and the practice of

⁵⁶ International Law Commission, Draft Articles on Diplomatic Protection, Report on the Work of Its 58th Session (1 May- 9 June and 3 July- 11 August, 2006) General Assembly Official Records, 61st Session, Supplement No 10, UN Doc A/61/10, 2006, p. 26.

⁵⁷ See generally *Mavrommatis Palestine Concession* ("The state of the individual's nationality is not acting in the rights of the individual, but is acting in its own rights, namely the right to see the law respected for its nationals"); *Barcelona traction* ("The individual has no right of diplomatic protection and is dependent on the political discretion of the government").

⁵⁸ "It is claimed that investment treaties replace domestic law and courts with a fair, independent, and neutral process of adjudication to resolve investor-state disputes and that the system therefore advances the rule of law".

⁵⁹ See contra Gus Van Harten, *A Critique of Investment Treaties*, in *RETHINKING BILATERAL INVESTMENT TREATIES CRITICAL ISSUES AND POLICY CHOICES* 41 (Kavaljit Singh & Burghard Ilge, eds., 2016) (Harrten criticizes investment treaty arbitration on the following grounds (i) only private investors are given the right to be heard; (ii) institutional safeguards of independence are lacking; (iii) decision making on public law matters by private arbitrators who are typically technocrats, intent on promoting the arbitration industry in competition with its alternatives; and (iv) no security of tenure for arbitrators which is one of the core safeguards of adjudicative independence in public law).

⁶⁰ *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 2 July 2013. See the dissenting opinion of arbitrator Laurence Boisson de Chazournes, ¶ 5.

⁶¹ ICJ, *Certain Questions of Mutual Assistance in Criminal Matters*, *Djibouti v. France*, ICJ reports 2008, 177 at 203 ¶ 60.

⁶² RUDOLF DOLZER AND CHRISTOPHER SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 214-26 (2008).

tribunals has been to condone the failure to have recourse to negotiations for the specified period, usually on the ground that such negotiations are not mandatory.⁶³

The grant of substantive rights to foreign investors is fundamentally different from the access to investment arbitration. The mere fact that contemporary investment treaties contain standards of treatment that create right to investment protection does not in and of itself create a right to initiate a claim for alleged breaches of these rights directly against the host State.⁶⁴ The exhaustion of local remedies requirement is an admissibility requirement for the exercise of the State's right to diplomatic protection; it does not affect the existence of the right of States to initiate claims as such.⁶⁵ Since the objective of these treaties is not the settlement of private disputes between foreign investors and host States, but rather to strengthen economic relations, promote foreign investment and the general development of State's economies, investor access to investment treaty arbitration needs to be seen as an element in achieving these objectives. Direct access to international arbitration causes detrimental impact on the development of rule of law as it creates disincentives for the domestic legal system to develop.⁶⁶

There is a need to revive the exhaustion of remedies rule and state a category of non-arbitrable disputes with greater precision.⁶⁷ The respondent State must be put in a position to redress the wrongdoings of its judiciary. In other words, it cannot be held liable unless the system as a whole has been tested and the initial *delict* remained uncorrected.⁶⁸ Local courts first requirements have often been deemed to constitute merely waiting periods, which do not pose an obstacle to the jurisdiction of an investment tribunal.⁶⁹ Exhaustion of local remedies can be considered a concession to the sovereign independence of the host State, which should be presumed capable of rendering justice through its own courts.⁷⁰ The requirement would put pressure on

⁶³ See generally *Belgium v. Senegal Questions Relating to the Obligation to Prosecute or Extradite*, ICJ Judgment General List No 144 (2012); Samuel Worthsone, *Jurisdiction, Admissibility And Preconditions to Arbitration*, 27 ICSID REVIEW 255 (2012).

⁶⁴ See *Impregilo SpA v. The Argentine Republic*, ICSID Case No ARB/07/17, Concurring and Dissenting Opinion of Prof. Brigitte Stern, 21 June 2011 ¶ 53.

⁶⁵ See generally Articles 26 and 27 of ICSID Convention.

⁶⁶ See Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT'L REV. LAW & ECON (2005) 107 at 108.

⁶⁷ See *Desert Line v. Yemen*, ICSID Case No. ARB/05/17.

⁶⁸ See *Jan de Nul v. Egypt*, ICSID Case No. ARB/04/13.

⁶⁹ See *Wintershall v. Argentina*, ICSID Case No. ARB/04/14 ¶ 74, 115.

⁷⁰ See C AMERASINGHE, *LOCAL REMEDIES IN INTERNATIONAL LAW* 61 (2004).

national courts to adjudicate quickly and efficiently.⁷¹ Furthermore due process might be adhered to if national courts know that their decision might come before an international tribunal.⁷² This would also allow for preliminary injunctions on the domestic plane. Further the victims cannot approach the international arbitration tribunal against the foreign investor for violation of their human rights. Providing effective domestic remedies in cases where actual violations have occurred could bring in sustainability.⁷³

From the point of view of the investor, the investor-state arbitration mechanism appears biased against small and medium-size investors.⁷⁴ The additional burden of exhausting local remedies can deter such firms from pursuing arbitration.⁷⁵

The most likely and most efficient way forward is a combination of the national and international levels in the use of remedies. This combination allows primary remedies to be sought and also they take care of the need to settle cases quickly.⁷⁶ The Model BIT recognizes the fundamental principle of exhaustion of local remedies.⁷⁷ The model merely strengthens the rule by making it mandatory for the investor to litigate the claim before domestic courts for a minimum period of five years.⁷⁸ If investment arbitrations were proceedings whereby the investor were acting on behalf of the home state, it appears logical that the State parties to the treaties would insist upon the exhaustion of local remedies.⁷⁹

g. Other Observations

⁷¹ See Rudolf Dolzer, *The Impact Of International Investment Treaties On Domestic Administrative Law*, 37 NYU JILP 953, 970 (2005).

⁷² See R H Mnookin & L A Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L J 950 (1979).

⁷³ John Ruggie, *State Responsibility to Regulate and Adjudicate Corporate Activities under the United Nations Core Human Rights Treaties* (2007).

⁷⁴ Srividya Jandhyala & Robert J. Weiner, *Institutions Sans Frontières: International Agreements and Foreign Investment*, 45 JOURNAL OF INTERNATIONAL BUSINESS STUDIES 649-669 (2014).

⁷⁵ Srividya Jandhyala, *Bringing the state back in: India's 2015 model BIT*, Columbia FDI Perspectives, No. 154, August 17, 2015.

⁷⁶ See Jacomijn J Van Haersolte- Van Hof & Anne K Hoffmann, *The Relationship Between International Tribunals And Domestic Courts*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 962, 1000 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

⁷⁷ It is significant to note that the principle of exhaustion of local remedies exists in other branches of international law such as in human rights treaties.

⁷⁸ Saurabh Garg, Ishita G. Tripathy and Sudhanshu Roy, *The Indian Model Bilateral Investment Treaty: Continuity and Change*, in RETHINKING BILATERAL INVESTMENT TREATIES: CRITICAL ISSUES AND POLICY CHOICES 69 (Kavaljit Singh & Burghard Ilge, eds., 2016).

⁷⁹ See Jacomijn J Van Haersolte- Van Hof & Anne K Hoffmann, *The Relationship Between International Tribunals And Domestic Courts*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 962, 1000 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

India is taking a more protectionist stand under the new Model BIT by providing for excluded areas.⁸⁰ Further, an arbitration tribunal is not given powers to re-examine any judicial decisions. It also contains expansive provisions to make the ISDS more transparent and accountable as good governance initiatives.⁸¹ To ensure arbitrators are impartial and free of any conflict of interest, detailed disclosure norms and codes of conduct for arbitrators have been introduced. Retaining the ISDS system demonstrates a continued commitment to settle disputes in accordance with international law. Attempts have been made to strike a balance between the costs and benefits of ISDS. From an Indian perspective, investments treaties are not just instruments of investor protection, but also a valid tool promoting sustainable development goals, ensuring transparency in corporate dealings and preventing unethical business practices.⁸²

V. Conclusion

Having a strong and predictable ISDS management framework brings sustainability in providing a more effective response to investment disputes, and may even serve as a deterrent to claims as investors assess the option of international investment arbitration.⁸³ Uniform rules of investment protection saves transaction costs in the drafting of BITs,⁸⁴ stabilizes the economy, reduces international conflicts and provides legal security to investors as well. The use of model treaties did not only serve the purpose of facilitating the negotiations about the content of a BIT and thus of reducing the drafting and negotiation costs. It also aimed at ensuring a certain level of uniformity with respect to the standards governing the investment relations between the home state and varying host states and to make more credible

⁸⁰ The Government has reserved the right to take action protecting public health, safety or the environment, without contravening foreign investors' rights. Further suggested that the following (among other matters) are also not covered: intellectual property rights; contracts with the Government; court judgments and arbitral awards; and taxation. *See* the Model BIT 2015.

⁸¹ *See generally* UN World Summit for Sustainable Development: Plan of Implementation, World Summit for Sustainable Development, UN Doc.A/CONF.199/L.1 (Johannesburg, South Africa 2002), Plan of Implementation of the World Summit on Sustainable Development, UN Doc. A/CONF.199/20 (2002) ¶ 4; Principle 6, New Delhi Declaration on the Principles of International Law Related to Sustainable Development (London: ILA, 2002); Monterrey Consensus of the International Conference on Financing for Development, Report of the International Conference on Financing for Development, UN Doc. A/CONF.198/11 (22 March 2002) Ch.1, Resolution 1, annex (2002) ¶ 21.

⁸² UNCTAD Expert Meeting on Taking Stock of IIA Reform, *Indian Model Bilateral Investment Treaty* (Geneva, 16 March 2016).

⁸³ Kathryn Gordon & Joachim Pohl, *Investment Treaties Over Time: Treaty Practice and Interpretation in a Changing World* (OECD Working Papers on International Investment, 2015/02, 2015) available at <http://dx.doi.org/10.1787/5js7rhd8sq7h-en>

⁸⁴ Kennedy, *A WTO Agreement on Investment: A Solution in Search of a Problem?* 24 U. PA. J. INT'L ECON. L. 77, 79–80 (2003).

commitments with respect to foreign investors.⁸⁵ The current reforms in BIT including on most disputed provisions in International Investment Arbitrations would create more stable investment regime and minimize misuse of ISDS mechanism.⁸⁶ Reforming the regime is a gradual process, and the Model BIT is obviously an important step to integrate sustainable development concerns in the investment treaty system.

Though the reform is in a positive direction, there are many issues yet to be clarified. For bringing clarity and sustainability in international investment agreements UNCITRAL could take initiatives to help the developing economies especially for doing a sustainable impact assessment of the international investment agreements. Transparency may be given special attention to ensure that interests of everyone are effectively taken care of for sustainable development in international investment relations.

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⁸⁵ STEPHAN W. SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* 91 (2009).

⁸⁶ UNCTAD Expert Meeting on Taking Stock of IIA Reform, *Indian Model Bilateral Investment Treaty* (Geneva, 16 March 2016).