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RESEARCH ARTICLE

INVESTMENT ARBITRATION REGIME - A DESIDERATUM FOR LEGITIMATE EXPECTATIONS FOR INVESTORS IN INDIA

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Abstract

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Introduction:-

Investment arbitration is a dispute resolution machinery for deciding conflict between the international investors and host country. Procedure safeguards the interests of a foreign investor in conflicting circumstances between the contracting parties. The investment arbitration offers such protection through qualified arbitrators who resolve the conflict and pass an arbitral award. The investor-state can only start such arbitration if the host state has consented to the same.¹ Thus, the foreign investors can detour the national jurisdiction on suspicion of any possibility of prejudice towards the host state. The dispute between the international investors and states comes under the ambit of The Public International Law. The aforesaid mechanism is an efficient tool to invite more investments and offers an efficient process to resolve the disputes amicably between the contracting parties.

The foundation of the investment arbitration is based upon the investment treaties entered by Host states and foreign investors. A considerable number of agreements between contracting parties form the basis of investment arbitration in Bilateral Investment Treaties or Multilateral Investment Treaties.² The Investment Arbitration clause in such Treaties imports the commercial arbitral model from the realm of International Commercial Arbitration into the domain of a host state, which enables the investors to file suit and claim damages in case of a dispute or malpractices followed by the Host State.³ Investment arbitration is an asset to a nation to boost FDI and attract more foreign investors without the pretext of non-availability of an efficient dispute settlement mechanism.

An investment treaty, the national investment law of the Host State, an independent agreement, and the choice of Independent Arbitrator Tribunal form the four wheels of the Investment Arbitration carriage. The Investment

¹ Future of investment arbitration in India. < <https://blog.ipleaders.in/future-investment-arbitration-india/?amp=1>>Accessed on 06/1/2025 11:23 AM.

² International Investment Protection | Conventus Law<<https://www.conventuslaw.com/report/international-investment-protection/>>Accessed on 06/1/2025 ,1:47 AM.

³ India: Investment Arbitration – The Assignment & Its Way Ahead in India. <<https://www.mondaq.com/advicecentre/content/3742/Investment-Arbitration-The-Assignment-its-Way-Ahead-in-India>> Accessed on 06/1/2025, 11:47 AM.

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arbitration carriage shall become futile if any of the wheel's plunge.⁴ Thus, these necessities must be fulfilled to ensure significant protection to the investors against the breach by the Host State. In case of any violation, these treaties entrust the power to investors to enforce their claim against the defaulting party before an Independent Tribunal.⁵

Research Methodology:-

The premise of the paper includes both descriptive and analytical research. Both primary and secondary sources are used for the collection of relevant information and data. The primary sources include the study of government reports and official documents. The secondary sources include journals, articles, books, magazines, newspapers, and websites etc.

The research paper focuses on the problems being faced by India due to non-standardised rules about Investment arbitration. Furthermore, India relies heavily on the BIT agreements, but the decisions by the various courts based on these agreements have been a detriment to the State. The deterrent effect comes to the BIT awards from the non-applicability of The Arbitration and Conciliation Act, 1996. To boost the FDI and proper implementation of the FDI policies, India must ratify the ICSID Convention. The parliament must pass legislative enactment for strict compliance of the various rules of the signed conventions for enforcement of arbitral awards. As it is necessary to fulfil the urgent need of the legitimate expectations of the foreign investors.

Non-Ratification of the ICSID Convention:

A body to resolve disputes between the Host states and investors was first established by the 1965 International Centre for Settlement of Investment Disputes (ICSID) Convention through the arbitration clause in the agreements between the contracting parties. India hasn't ratified the Convention until now.⁶

India has signed BITs with different countries to settle the disputes. A bilateral investment treaty is an accord between governments to cooperatively encourage and safeguard private investment undertaken by foreign investors and host states in each other's domains.⁷ These BITs provide foreign private investors with recourse to protection under various types of international law for multiple acts of omission or conduct in which the Indian Government may be involved. These accords cover, among other things, fair and equitable treatment, protection from expropriation, national treatment, dispute resolution regime, and most favoured nation clause.⁸ These clauses stand on an independent footing than those of domestic legal systems.

The BIT guarantees that foreign investors' investments will be protected, whereas they serve to attract and expand foreign investment by providing investment security to host countries.⁹ Furthermore, BITs combine national treatment, fair and equitable treatment, and MFN treatment, which significantly help maintain law.¹⁰

India opened its doors to the BIT agreements in 1994 by signing the India-UK BIT. With the advent of liberalization and globalization policies, India encouraged more foreign investment to boost the economy. India has become one of the most intriguing and emerging markets globally, with FDI inflows increasing elevenfold in two decades, from

⁴ India: Investment Arbitration – The Assignment & Its Way Ahead in India. <<https://www.mondaq.com/advicecentre/content/3742/Investment-Arbitration-The-Assignment-its-Way-Ahead-in-India>> Accessed on 06/1/2025, 11:47 AM.

⁵ International Investment Protection | Conventus Law <<https://www.conventuslaw.com/report/international-investment-protection/>> Accessed on 15/10/2024, 11:47 AM.

⁶ 41 - Convention on the Settlement of Investment Disputes. <<https://www.jus.uio.no/lm/icsid.settlement.of.disputes.between.states.and.nationals.of.other.states.convention.washington.1965/41.html>> Accessed on 06/10/2024, 11:23

⁷ Lauren Corbett, Application of Contract Law in BG Group v. Argentina, 34(81) Boston University Int'l L. J. 184.

⁸ Future of investment arbitration in India < <https://blog.ipleaders.in/future-investment-arbitration-india/?amp=1>.> Accessed on 15/10/2024, 11:23.

⁹ The Investor-State Dispute Settlement System: Reform <<https://lrus.wolterskluwer.com/store/product/the-investor-state-dispute-settlement-system-reform-replace-or-status-quo/>> Accessed on 21/10/2024, 11:23 AM.

¹⁰ Chapter 4: The 2015 India Model BIT and Its Suitability under ISDS. The Investor-State Dispute Settlement System: Reform, Replace, or Status Quo? Change in investment arbitration in India and discusses...REMEDIES [A] Investment Arbitration in India under the Commentary Pub: Nov 2020

USD 4 billion in 1990 to USD 44.8 billion in 2010.¹¹ From April 2000 to June 2018, India got USD 563.32 trillion in gross FDI. As a result, FDI has been the primary engine of India's economic growth. In recent years India has seen a great boom in FDI investment, India has received more than 49 billion USD in FDI in the year 2019 which makes India one of top recipients of FDI in the world.¹²

Impact of Prolonged Pendency of Cases in the Indian Judiciary:

The Indian BIT model, for the first time, was tested in the case of **Dabhol Power Plant Project**.¹³ In which around USD 2.9 billion were compensated to the investors. Dabhol Power Company, was a joint venture between Enron Corporation, General Electric Corporation, and Bechtel Enterprises, they signed an accord with the Maharashtra State Electricity Board (MSEB),¹⁴

An Indian public sector organization for a project for the construction of a distillate fuel power plant. Furthermore, MSEB would be the exclusive purchaser of power generated by DPC. However, MSEB canceled the contract because of alleged irregularities, political resistance, and DPC's high power costs. DPC no longer had a consumer to whom it could sell electricity.¹⁵ This had a negative impact on its investment. DPC began arbitration proceedings. According to the contract terms, MSEB would purchase 90% of the power generated by the project, irrespective of the market demand. The power bought was at a cost higher than the other alternative energy sources. However, this contract was controversial from the outset, as it was impracticable and highly unfavorable to India's national energy strategy. The taxpayers of India itself would have borne the entire expense of the project.¹⁶ MSEB revoked the contract in the face of public outrage, apparent irregularities, and the contract's financial value. Consequently, DPC sued MSEB in India and filed claims with foreign tribunals whose jurisdiction was drawn from India's different contracts and BITs.¹⁷ India-Mauritius BIT 1998 was enforced by General Electric (GE) and Bechtel IT through their Mauritius businesses, challenging India's actions as expropriation and seeking compensation.¹⁸ Due to the aforesaid reasons, the case concluded and ultimately resulted in an out-of-court settlement in which India compensated a whopping amount of USD 145 million to GE and USD 160 million to Bechtel.¹⁹

Furthermore, the aforesaid settlement made India aware of its obligations under a BIT because the claims brought against it were based on agreements under a BIT signed with Mauritius.²⁰

The White Industries case²¹, it was an eye-opener for India as the tribunal held that India violated the MFN Clause by delaying the enforcement of an arbitral award. India took recourse to develop a Model BIT for other agreements

11 Shikha Singh, Foreign Direct Investment (FDI) Inflows in India A Review, 6 J. of General Management Research, 42–50.

12 PTI United States, India among top 10 FDI recipients, attracts \$49 billion inflows in 2019: UN report, Business Line, [thehindubusinessline.com/economy/india-among-top-10-fdi-recipients-attracts-49-billion-inflows-in-2019-un-report/article30608178.ece](https://www.thehindubusinessline.com/economy/india-among-top-10-fdi-recipients-attracts-49-billion-inflows-in-2019-un-report/article30608178.ece). Accessed on 06/09/2024, 13:22

13 Capital India Power Mauritius I and Energy Enterprises (Mauritius) Company v. India ICC Case No 12913/MS, IIC 43 (2005); Bank of America, Memorandum of Determinations, OPIC, IIC 25 (2003).

14 Smart Cities Council | A new global support center <https://smarcitiescouncil.com/article/new-global-support-center-guidance-indias-growth>. Accessed on 19/10/2024, 13:22

15 Bilateral Investment Treaty Arbitration and India-PRINT-4. <https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Bilateral_Investment_Treaty_Arbitration_and_India-PRINT-2.pdf> Accessed on 06/1/2025, 17:50

16 Chapter 4: The 2015 India Model BIT and Its Suitability under ISDS. The Investor-State Dispute Settlement System: Reform, Replace, or Status Quo? Change in investment arbitration in India and discusses...REMEDIES [A] Investment Arbitration in India under the Commentary Pub: Nov 2020.

17 Girish Sant et al., Dabhol Project PPA – Structure and Techno-Economic Implications, 30(24) Econ. & Pol. Wkly. 1449, 1455 (17 June 1995).

18 Parikh, Thinking through the Enron Issue, 36 (17) Econ. & Pol. Wkly. 1463 (28 April 2001), <https://dea.gov.in/sites/default/files/Libya.pdf>; see also John J. Kerr and Janet Whittaker, 'Dabhol Dispute,' Construction Law International 1, 17–20 (March 2006).

19 V. Sridhar, Reviving Dabhol Frontline (22 May 2020), <<https://frontline.thehindu.com/thenation/article30205826.ece>> Accessed on 06/10/2023, 21:30

20 The Investor-State Dispute Settlement System: Reform < <https://rus.wolterskluwer.com/store/product/the-investor-state-dispute-settlement-system-reform-replace-or-status-quo/>> Accessed on 06/10/2024, 21:30

and rapidly shifted from conventional BIT's. In 1989, the Australian company signed an agreement with Coal India Limited, to develop coal mines in Piparwar, India. White Industries commenced arbitral proceedings under the International Chamber of Commerce (ICC) Arbitration Rules in 1999. A dispute ensued between the contracting parties regarding the quality of coal and the payment of penalties. USD 4.08 million was awarded to White Industries by the ICC tribunal awarded. Coal India applied to Calcutta High Court under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the arbitral award. To enforce the award, White Industries applied to Delhi High Court under Section 48 of the Act. Due to the prolonged pendency of the case, and while the matter was pending in the Supreme Court, White Industries invoked arbitration proceedings under India-Australia BIT. White Industries claimed that the business had sustained enormous losses due to incomprehensible delays at the hands of the Indian judiciary lasting almost nine years and that there had been a breach of treaty obligations. Thus, the award to White Industries was upheld, and India was bound to compensate the same.²²

The aftermath of the revocation of telecom licenses and retrospective effect of tax legislation in 2014:

In *Union of India v. Vodafone Group Plc*,²³ International Holdings BV initiated investment arbitration proceedings against the Republic of India in 2014 under the India-Netherlands Bilateral Investment Treaty (BIT), and yet another cast of investor arbitration process under the India-UK BIT against the retrospective effect of a constitutional amendment by the India under Sections 9(1) and 195 of the Income Tax Act, 1961, as promulgated by Section 119 of the Finance Act, 2012, underneath the India-UK BIT. Vodafone was obligated to pay to the Indian government in response of this legislation.

The Government of India petitioned the High Court of Delhi in lieu of an anti-arbitration injunction relief against VIHBV for launching two arbitration proceedings simultaneously time. The Republic of India's claims to uphold the notion of "kompetz kompetz" were dismissed by the Delhi High Court in 2018. It was decided that the extent of intervention in a BIT arbitration is limited, and that the Arbitration and Conciliation Act of 1996 will not apply to BIT arbitrations.²⁴

A ruling in these instances forced India to develop a new BIT operating model, which culminated in the publication of the New Model for BIT in 2016. The Model BIT of 2016 had 38 articles and seven chapters, and it did away with the MFN (Most Favored Nation) Clause. This elimination posed more risks to the foreign investors and provided more immunity to the host states as the investor was not allowed to benefit by a separate treaty with a third party.

In the *Vodafone*²⁵ and *Khaitan Holdings*²⁶ cases, Delhi High Court decided that BIT awards are not subject to the 1996 Act because the underlying arbitrations were not commercial. These decisions have blurred the vision of investment arbitration as the clouds of ambiguity have surfaced upon the enforcement of BIT.

Lack of Investment Arbitration Policies and Need for Ratification of ICSID Convention:

The Indian Government has unilaterally terminated all existing BIT's as of 31st March 2017. Around 23 more BIT's are at the peril of renewal and replacement as the current BIT's doesn't provide a proper framework for BIT

²¹ *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award (30 November 2011) <<https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/378/whiteindustries-v-india>>

²² Rajendra Beniwal & Kumar Sumit. *Bilateral Investment Treaty and Investment Arbitration: A Critique from India Perspective*, <<https://www.sconline.com/blog/post/2020/06/26/bilateral-investment-treaty-and-investment-arbitration-a-critique-from-india-perspective/>> Accessed on 06/10/2024, 22:00

²³ *Union Of India v. Vodafone Group Plc United Kingdom*, 2018 SCC OnLine Del 8842

²⁴ Rajendra Beniwal & Kumar Sumit. *Bilateral Investment Treaty and Investment Arbitration: A Critique from India Perspective* <<https://www.sconline.com/blog/post/2020/06/26/bilateral-investment-treaty-and-investment-arbitration-a-critique-from-india-perspective/>> Accessed on 06/10/2024, 22:00

²⁵ *Union Of India v. Vodafone Group Plc United Kingdom*, 2018 SCC OnLine Del 8842

²⁶ *Union of India v. Khaitan Holdings (Mauritius)*, 2019 SCC OnLine Del 6755

enforcement.²⁷ These termination of BIT's have been made because these agreements have been proven to detract the remedies offered to the foreign investors against the State.²⁸

There is no legal provision that provides for the enforcement of the awards under the BIT's. The law governing the applicability and enforcement of the domestic and arbitral awards is provided under the Arbitration and Conciliation Act, 1996. Due to the decided cases in this context, the said Act has not been applied in the purview of investment arbitration as they are not commercial in nature. The investors don't have access to enforce their award under any Indian Law, which also imperils the enforcement of awards through the New York Convention, of which India is a signatory.²⁹ India must ratify the ICSID Convention. It must be given proper implementation through national legislation so that investors have the power to get their awards enforced under the Convention. The ratification of the Convention will boost the FDI and a pro-investment arbitration approach in the country.

Solutions/Concluding Remarks:

India has been an attractive market for FDI's in the past few years. Despite the Covid-19 pandemic, India's accomplishments and development have shown an unprecedented rise in the FDI panorama. The United Nations Conference on Trade and Development (UNCTAD) has also appreciated efforts put in by India that it will continue to attract foreign investors post pandemic. According to the latest UNCTAD report, published in January 2021, FDI increased by around 13% in the year 2020.³⁰ There was a sharp decline in the global FDI 42% whereas India showcased a 13% increase in FDI inflows.³¹

There has been a huge increase of investment arbitrations and post-arbitral cases that which calls into question the principles of BIT in our country.³² Due to the less efficacy in the implementation of BIT's and the elimination of MFN Clause, most treaties have become a mere fiasco in the current scenario in the light of various decisions.

Recently, in the case of *Cairn v. India*³³, the tax dispute relating to the retrospective effect of the 2012 Amendment has caused the company to pay more in taxes to the Indian Government. The said amendment was challenged under the India-UK BIT seeking compensation of losses incurred due to the Government's expropriation policies in India.³⁴ The award was passed in December 2020 and the Tribunal Judiciaire de Paris has accepted the Cairn's contention to freeze 20 residential real estate properties owned by the Government in June 2021. The tribunal ordered India to pay \$1.2 billion to Cairn due to the failure of complying with the obligations of the India-UK BIT.³⁵

²⁷ India: Investment Arbitration – The Assignment & Its Way Ahead in India. <<https://www.mondaq.com/advicecentre/content/3742/Investment-Arbitration-The-Assignment-its-Way-Ahead-in-India>> Accessed on 06/10/2024, 11:47.

²⁸ Bhavana Sunder and Kshama A. Loya of Nishith Desai Associates. Investment Arbitration and India: 2020 Year in Review <<https://www.natlawreview.com/article/investment-arbitration-and-india-2020-year-review?amp>> Accessed on 06/10/2024, 19:00

²⁹ Convention on the Recognition and Enforcement of Arbitral Awards, 1958.

³⁰ Bhavana Sunder and Kshama A. Loya of Nishith Desai Associates. Investment Arbitration and India: 2020 Year in Review, <<https://www.natlawreview.com/article/investment-arbitration-and-india-2020-year-review?amp>> Accessed on 06/10/2024, 19:00

³¹ India bucks global decline in FDI; grows 13% against world's 42% fall in 2020. <<https://www.businesstoday.in/latest/economy-politics/story/india-bucks-global-decline-in-fdi-grows-13-against-world-42-fall-in-2020-285498-2021-01-25>> Accessed on 06/10/2021, 19:00

³² Rajendra Beniwal & Kumar Sumit. Bilateral Investment Treaty and Investment Arbitration: A Critique from India Perspective <<https://www.sconline.com/blog/post/2020/06/26/bilateral-investment-treaty-and-investment-arbitration-a-critique-from-india-perspective/>> Accessed on 06/10/2024, 22:00

³³ *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India* (PCA Case No. 2016-7).

³⁴ System: Reform, Replace, or Status Quo? Change in investment arbitration in India and discusses...REMEDIES [A] Investment Arbitration in India under the Commentary Pub: Nov 2020

³⁵ Harshvardhan Korada. Needed, framework for enforcement of investment treaty arbitration. <<https://www.thehindubusinessline.com/business-laws/needed-framework-for-enforcement-of-investment-treaty-arbitration/article36302023.ece/amp/>> Accessed on 06/10/2024, 20:00

The persistent cancellation of BITs threatens to deprive investors of international law-enforced remedies against State actions.³⁶ Thus, to resolve the problems faced by India, India must ratify the ICSID Convention and form BIT's exclusively under the rules of Convention. The prolonged litigation is a huge burden on the litigation system and have an adverse impact on the society as a whole. To resolve international commercial disputes, dispute resolution mechanism arbitration and litigation is normally utilized. Assessing its value may be exorbitant and time-consuming, demanding enormous resources, particularly massive international distance. Whereas Mediation is famous for its adaptability, cost-effectiveness, and timeliness.³⁷ Mediation empowers the litigants to tailor the procedure to parties own requirements and ensures that disagreements are settled in the manner that best suitable to the parties. INDIA has ratified the Singapore Mediation Convention, which offers a flicker of hope for commercial conflicts that will arise in India. The justice system of India requires a complete overhaul if the litigation is pending for more than 15-20 years as compared to the life expectancy has decreased to 50 these days.³⁸

The need of the hour to boost more investor friendly investments, there is an urgent requirement of a national legislation under Article 253 of the Indian Constitution. The Legislature must amend the Arbitration and Conciliation Act, 1996 to bring of BIT within purview of Act. The ambiguity in the present legal framework is a constant hurdle to the India's aim to become the most attractive investment hub. The Supreme Court and Legislature must join hands to devise a proper legal framework to bypass these ambiguities to promote an investor friendly regime for Investment Arbitration in India.³⁹

References:-

1. <https://blog.ipleaders.in/future-investment-arbitration-india/?amp=1>
2. <https://www.conventuslaw.com/report/international-investment-protection/>
3. <https://www.mondaq.com/advicecentre/content/3742/Investment-Arbitration-The-Assignment-its-Way-Ahead-in-India>
4. <https://www.conventuslaw.com/report/international-investment-protection/>
5. <https://www.jus.uio.no/lm/icsid.settlement.of.disputes.between.states.and.nationals.of.other.states.convention.washington.1965/41.html>
6. <https://rus.wolterskluwer.com/store/product/the-investor-state-dispute-settlement-system-reform-replace-or-status-quo/>
7. <https://smartcitiescouncil.com/article/new-global-support-center-guidance-indias-growth>
8. https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Bilateral_Investment_Treaty_Arbitration_and_India-PRINT-2.pdf
9. <https://dea.gov.in/sites/default/files/Libya.pdf>
10. <https://frontline.thehindu.com/thenation/article30205826.ece>
11. <https://rus.wolterskluwer.com/store/product/the-investor-state-dispute-settlement-system-reform-replace-or-status-quo/>
12. <https://www.sconline.com/blog/post/2020/06/26/bilateral-investment-treaty-and-investment-arbitration-a-critique-from-india-perspective/>
13. <https://www.natlawreview.com/article/investment-arbitration-and-india-2020-year-review?amp>,
14. <https://www.businesstoday.in/latest/economy-politics/story/india-bucks-global-decline-in-fdi-grows-13-against-world-42-fall-in-2020-285498-2021->
15. <https://www.thehindubusinessline.com/business-laws/needed-framework-for-enforcement-of-investment-treaty-arbitration/article36302023.ece/amp/>
16. <https://www.cambridge.org/core>.

³⁶ Bhavana Sunder and Kshama A. Loya of Nishith Desai Associates. Investment Arbitration and India: 2020 Year in Review <<https://www.natlawreview.com/article/investment-arbitration-and-india-2020-year-review?amp>> Accessed on 06/10/2024, 19:00

³⁷ Natalie Y. Morris-Sharma, The Singapore Convention Is Live, and Multilateralism, Alive!, 20 CARDOZO J. CONFLICT RES. 1

³⁸ By Itai Apter THE SINGAPORE CONVENTION ON MEDIATION: THE RIGHT INSTRUMENT AT THE RIGHT TIME ,<<https://www.cambridge.org/core> > Accessed on 06/10/2024, 11:47 AM

³⁹ India: Investment Arbitration – The Assignment & Its Way Ahead in India. See <<https://www.mondaq.com/advicecentre/content/3742/Investment-Arbitration-The-Assignment-its-Way-Ahead-in-India> >Accessed on 06/10/2024, 11:47 AM.