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IMAGINING A NEW AGE INVESTOR-STATE DISPUTE RESOLUTION MECHANISM – THE INDIAN STORY

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Abstract

In an increasingly inter-connected world, where trans-border deals are becoming the norm, dispute resolution is undergoing serious changes. Given the diverse interests at stake in investor-state disputes, the exhaustion of local remedies clause must also undergo changes to successfully adapt to the situation. Thus, it becomes especially crucial for a developing economy such as India to revamp its own outlook of investor-state dispute resolution. This paper shall analyse the current Indian situation vis- a-vis approaches adopted by other jurisdictions such as China and the European Union. Ultimately, the author aims to formulate suitable approaches, that are tailor made to suit the Indian context while also being able to deliver on the expectations of this increasingly inter-connected business ecosystem.

I. Introduction

The principle of exhaustion of local remedies is a widely accepted principle within customary international law. This principle has been the subject of vast discourse in contexts relating to injuries caused to diplomats of a State while serving in a foreign state, or cases that involve common citizens as well.[1] Consequent to such a notion finding support within the jurisprudence relating to alien tort protection, law on diplomats etc; one can also observe the acceptance and application of the principle even in context of contractual agreements, especially Bilateral Investment Treaties [

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[1] A. A. Cancado Trindade, *Denial of Justice and Its Relationship to Exhaustion of Local Remedies in International Law*, 53 PHIL. L.J. 404 at 405 (1978).

"**BIT**"]. With the advent of globalization, there emerged compelling need for States to chalk out a cohesive mechanism for managing issues of trade. The BITs' therefore, acted as helpful tools for States to not only regulate trade but also formulate mechanisms which helped sustain such investment and maintain trading relations.[2] An important role of these treaties however, was the manner in which it significantly regulated and continues to regulate dispute redressal between the State Parties. The impact the clauses within these treaties wield play a significant role not only in solving the conflict at hand but also in building long-lasting trading relations.

Accordingly, it becomes increasingly important to clarify the ambiguous aspects of such dispute resolution clauses. One such pertinent yet ambiguous and unevenly applied clause having a decisive impact on the way dispute resolution pans out amongst State Parties is the exhaustion of local remedies ["**ELR**"] clause. The primary focus of the paper is on the issue of framing, interpreting and applying such a clause in the context of BITs.

The specific point of inquiry, however, is how such clause should be reworked in the indian context. In 2016, the Indian government published the Model Indian BIT, which came as a shock to several states. One of the surprises was the language of the ELR clause. The said clause heavily curtailed the investor's ability to resort to investor-state arbitration by mandating that available local remedies be pursued at first for a period of five years.[3] Other conditions were also placed which made it cumbersome to circumvent such an exhaustion clause as well as to avoid arbitral discretion in the matter, which in several other

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[2] Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46.1 HARVARD INTL L. J 67 (Winter 2005).

[3] MODEL TEXT FOR THE INDIAN BILATERAL INVESTMENT TREATY 2016, http://mof.gov.in/reports/ModelTextlndia BIT.pdf [hereinafter, '*2016 Indian Model BIT*'].

treaties is usually the norm.[4] This has caused a deadlock of sorts, as far as further negotiations with states are concerned to revise erstwhile BITs.

In light of the aforesaid anomalous situation, this paper seeks to study and attempt to devise a beneficial approach toward reworking the said clause. In this pursuit, this study shall involve the scrutiny of practices adopted by States, which arguably profess a more sophisticated investment treaty regime, in order to build an appropriate solution for the Indian context.

In Chapter II, the author has briefly outlined the concept of the exhaustion of local remedies [ELR] capturing its evolution from first being an actively used rule in cases of public international law. In Chapter III, taking ahead the discussion from the previous chapter, the author moves onto highlight the Indian story in relation to its controversial ELR clause. Further, the author shall highlight the main concerns of India which illustrate to the reader the possible reasons behind the incorporation of such a rigid ELR clause. For doing so, the author shall highlight the inconsistencies pertaining to the Investor-state dispute settlement ["**ISDS**"] regime, in particular the International Centre for Settlement of Investment Disputes ["**ICSID**"] system, which is most popular for the resolution of investor-state disputes.

Chapter IV shall focus on the ambitious goal of the European Union to establish a multilateral investment court system. The author shall provide a summary of the key reasons why the region was inclined toward such reformation of the investor-state dispute system. The author shall therein, also provide a summary of points which discuss why such system may not be suited to India's needs.

[4] Prabhash Ranjan & Pushkar Anand, *The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction*, 38 NW. J. INT'L L. & BUS. 1 (2017).

Chapter V shall ultimately highlight the key takeaways of the whole discourse in order to devise a remedy which answers the research questions set forth in this paper, studying mainly the approach of Brazil and China, which may be streamlined to specific Indian needs.

Chapter VI shall provide a conclusion on the basis the foregoing chapters. The author provides an outline of certain suggestions which in the opinion of this author may be relevant towards formulating a more accessible and credible investor-state dispute resolution system.

II. Examining the Principle of Exhaustion of Local Remedies

This principle has been the subject of vast discourse in contexts relating to injuries caused to diplomats of a State while serving in a foreign state, or cases that involve common citizens. The notion that *whoever ill-treats a citizen indirectly injures the State* has found life through the widespread application of this principle as far as treaties are concerned.[5] The rule remains an important principle of customary international law and is applicable in diplomatic protection cases and in international human rights law.[6]

The popular justifications for such an idea naturally emanates from the emphasis on concepts such as sovereignty,[7] however, it is also believed that the motivations for imposing such rule is different. Scholars believe that in private matters, the entire procedure becomes a lot more efficient if carried out by those closer to the event.[8] This brings in the notion that local

[5] Theodor Meron, *The Incidence of the Rule of Exhaustion of Local Remedies*, 35 BRIT. Y. B. INT'L L. 85 at 101 (1959).
[6] Matthew C. Porterfield, *Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time Ha8s Come?* 15 YALE INT'L L.J 3 (Fall, 2015) [hereinafter '*Porterfield'*].
[7] David Mummery, *Content of Duty to Exhaust Local Remedies*, 2 A.J.I.L 390 (1964) [hereinafter *'David Mummery'*].
[8] *Id* at p. 391.

enforcement authorities, given their proximity to the dispute are better equipped to deal with resolution, from the early stages of fact finding, collection of evidence etc. In the Indian sense of things, we could possibly correlate this idea to how under the Code of Civil Procedure,1908,[9] the understanding of where the cause of action arises grants automatically to the authorities therein the requisite jurisdiction to deal with the matter.[10]

Another interesting aspect related to the history of the ELR rule is its sociological purpose. Sociologists suggest that associations and communities formulate internal uniformities and behavioural patterns which are termed as acceptable forms of conduct.[11] This is done not only for the purpose of setting a moral code within the community but also for it to act as a defence mechanism against the outside world.[12] Scholars have also argued that the basis for this rule also stems from the idea of natural justice principles. This rule permits the respondent (i.e. the state) to first be heard by its own courts, before it is arraigned into the relevant international forums.[13]

The ELR rule however, in the context of investment treaty arbitration, is certainly controversial. While there are the obvious benefits which come with it including protection of policy space of the host state, there is the other obvious fear – how effective are local remedies? Concerns about transparency, accountability, and recourses for affected communities will only be improved if the domestic law of host countries provides an adequate framework to protect such interests and the means for implementing them.[14] India has for the longest time faced

[9] Code of Civil Procedure, 1908 [India]. [hereinafter *'CPC'*].
[10] § 20, CPC.
[11] David Mummery, *supra* note 7 at 392.
[12] David Mummery, *supra* note 7 at 393.
[13] David Mummery, *supra* note 7 at 394-96.
[14] Sonia E. Rolland, *The Return of State Remedies in Investor-State Dispute Settlement: Trends in Developing Countries*, 49, LOYOLA UNIVERSITY COLLEGE CHICAGO L. J. 403 (2017) [hereinafter *'Rolland'*].

criticism for its courts being burdened by a serious backlog of cases and this problem has for many years been the top focus of every reigning Chief Justice.[15] Even in other more sophisticated jurisdictions such as the EU we see a tussle over the incorporation of this rule. Take for instance the negotiations between the EU and the United States' over Transatlantic Trade and Investment Partnership ["**TTIP**"]- the two parties have never been able to meet eye to eye on the issue of inclusion of the said rule simply because the US is adamant over the view that investors would not obtain the requisite form of effective dispute resolution.[16]

This shows a general scenario of clash amongst parties over inclusion of this rule. In the forthcoming chapter, the author deals more closely with the Indian situation and the Indian approach.

III. Chapter II: The Indian Model BIT - The Local Remedies Trap

In 2011, India experienced the biggest and most compelling instance of its turbulent relationship with ISDS mechanisms through the White Industries[17] case. The reason why White Industries obtained relief on account of being denied an effective means of remedy was not due to the wording of the India-Australia BIT but instead the Most Favoured Nation ["**MFN**"] clause within the India-Kuwait BIT which ensured that an effective means of remedy would be granted to the investors of

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[15] Soibam Rocky Singh, *Backlog of Cases due to Lack of Judicial Infrastructure*, THE HINDU (Apr.11, 2019) https://www.thehindu.com/news/cities/Delhi/backlog-of-cases-due-to-lack-of-judicial-infrastructure/article24515317.ece.

[16] Porterfield, *supra* note 6; Catharine Titi, *Transatlantic Trade and Investment Partnership [TTIP] and a Paradigm Shift from Arbitration to Investment Law Trial?*, KLUWER ARBITRATION LAW BLOG (Apr.10, 2019) http://arbitrationblog.kluwerarbitration.com/2016/01/19/transatlantic-trade-and-investment-partnership-ttip-and-a-paradigm-shift-from-arbitration-to-investment-law-trial/.

[17] White Industries Australia Limited v. Republic of India, Final Award UNCITRAL (30 November 2011) (India).

Kuwait.[18] Since the aforementioned case, the Ministry of Commerce (India) has actively pursued a study of revising BITs to ensure a balance between regulatory control and investor protection was maintained.[19] Recently in 2018, the Indian Government had established a think tank dedicated to studying the impact of investment treaties on the Indian economy along with a focus on protecting India from investment arbitration claims in future.[20]

In addition to revamping the language of India's Model BIT, as seen through the phrasing of the local remedies' clause, it has also been seen that there is an increasing recalcitrant approach undertaken by Indian domestic courts as far as injunctions in investment arbitration cases are concerned. The most recent example being the case of *Union of India* v. *Vodafone Group PLC United Kingdom & Anr,* [21]wherein the Delhi High Court granted an anti-arbitration injunction against arbitral proceedings initiated by Vodafone Group against Union of India in relation to the provisions contained in the India-UK Bilateral Investment Promotion & Protection Agreement ["**BIPPA**"].[22] Despite

[18] Rosmy Joan, *Renegotiation of Indian Bilateral Investment Treaties: An Analysis from a Development Perspective*, 4, UNCITRAL CONGRESS, http://www.uncitral.org/pdf/english/congress/Papers_for_Programme/99-JOAN-Renegotiation_of_Indian_Bilateral_Investment_Treaties.pdf.

[19] DEPARTMENT OF ECONOMIC AFFAIRS, MINISTRY OF FINANCE, GOVERNMENT OF INDIA, *Transforming the International Investment Agreement Regime: The Indian Experience*, http://unctadworldinvestmentforum. org/wp-content/uploads/201 5/03/Indiaside-event- Wednesday Model-agreements.pdf.

[20] Nicholas Peacock, *Indian Government Launches International Research Project On The Impact Of Bilateral Investment Treaties On Investment Flows From/To The Country*, MONDAQ (Apr.13, 2019), http://www.mondaq.com/india/x/743572/tax+treaties/Indian+Government+launches+international+research+project+on+the+impact+of+Bilateral+Investment+Treaties+on+investment+flows+fromto+the+country.

[21] Union of India v. Vodafone Group PLC United Kingdom & Anr., 2017 S.C.C Online Del 9930 (India).

[22] Chandni Ghatak, *The Power of National Courts to Injunct Investment Arbitration Proceedings*, CBCL, NLIU (Apr.13, 2019) http://cbcl.nliu.ac.in/arbitration-law/1856/.

landmark ICSID decisions such as *Maffezini* v. *Spain*,[23] which clearly states that the international character of the obligations in these treaties called for the Tribunal to retain the ultimate right to ascertain the scope and meaning of these obligations, Indian Courts are pursuing a rigid approach.

An additional factor within this restrictive local remedies clause is the fact that submitting to arbitral tribunals, namely ICSID, is possible only when both parties agree to the same. This is problematic because India is not party to the ICSID convention which means that submission of a dispute to this type of mechanism becomes practically impossible.[24]

The pertinent question therefore, in light of the aforementioned circumstances is why is India revamping its approach aggressively towards its own investment regime? This underlying answer shall be delved upon in this chapter by the author by first perusing the criticism meted out against India and its infamous local remedies trap followed by an analysis enumerating the possible reasons why India may have been compelled to take such a stance.

Once India announced its Model Bilateral Investment Treaty in 2016,[25] there was a widespread sense of shock over the exhaustion of local remedies clause.[26] The Model BIT mandates exhaustion of local remedies as well as negotiations and consultations before an investor is entitled to initiate arbitrations against the host State.[27] The limitation for initiating a case in the

[23] Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7 (2000).
[24] Rolland, *supra* note 14 at 392.
[25] 2016 Model Indian BIT, *supra* note 3.
[26] Jesse Coleman, *India's Revised Model BIT: Two Steps Forward, One Step Back?* INVESTMENT CLAIMS (Apr.13, 2019) http://oxia.ouplaw.com/page/India-BIT.
[27] Ashutosh Ray, Unveiled: Indian Model BIT, KLUWER ARBITRATION BLOG, (Jan 18, 2016) http://arbitrationblog.kluwerarbitration.com/2016/01/18/unveiled-indian-model-bit/.

court of law is one year from the date on which the investor first acquires knowledge of the measure in question and knowledge that the investment has incurred a loss as a result. However, a non-applicability situation has been created, namely that if the investor can demonstrate that there are no available domestic legal remedies capable of reasonably providing any relief in respect of the same measure or similar factual matters for which a breach of treaty is claimed by the investor.[28] It is pertinent to note that despite the 260th Law Commission[29] suggesting an amendment of such local remedies clause, the Indian Government did not do so. If it had, the investor would be granted a six months period after which in case the negotiations also have not resulted in any amicable solution there would be the liberty to resort to arbitration.[30] As a result of this inclusion, India has not witnessed a renegotiation of any of its standing BITs' aside from Cambodia since 2016.[31]

Developing countries for very long have viewed BITs to play an active role in attracting foreign direct investment. India also has been part of the same bandwagon since the ushering in of its significant economic reforms in 1991.[32] However, as noted earlier, the fact that India has been subject to various instances of investment claims, the cautious approach has since then been aggressively adopted. Therefore, at this juncture it is crucial to outline India's aversion towards submitting to ICSID jurisdiction. Aside from the obvious factor of India not being a signatory to

[28] 2016 Model Indian BIT, *supra* note 3.
[29] LAW COMMISSION OF INDIA, *Analysis of the 2015 Draft Model Bilateral Investment Treaty*, 260th Report, http://lawcommissionofindia.nic.in/reports/Report260.pdf.
[30] *Id* at 44-45.
[31] Kshama Loya Modani, *Why India's Model Bilateral Investment Treaty needs a Thorough Relook?,* BUSINESS STANDARD (Apr.13, 2019) https://www.business-standard.com/article/economy-policy/why-india-s-model-bilateral-investment-treaty-needs-a-thorough-relook-118123100150_1.html [hereinafter '*Kshama'*].
[32] Prabhash Ranjan, *India and Bilateral Investment Treaties – A Changing Landscape*, 29 ICDIS REVIEW-FOREIGN INVESTMENT LAW JOURNAL 419 AT 429 (2014) [hereinafter *'India and BITs'*].

ICSID,[33] the author attempts to highlight certain other factors which possibly illustrate this Indian aversion towards ICSID jurisdiction. The first and foremost factor is that of the inherent inconsistencies in the ICSID jurisdiction.

Why has ICSID jurisprudence been consistently accused of inconsistency? The amendment to its rules in 2006,[34] which had ushered in greater post-award transparency, had also brought to light several inconsistencies.[35] The reason why the UNCITRAL arbitration regime has been cushioned from such criticism is perhaps due to the less volume of cases it handles as well as the heightened emphasis on confidentiality it imposes, unlike the ICSID regime.[36] In her seminal work,[37] Katherina Diel Glighor outlines crucial aspects which impede the consistency goal in international investment arbitration currently. These are namely- lack of a universal legal system, over complexity of international investment arbitration and the ambiguity regarding duty of an arbitrator.[38]

F. LACK OF A UNIVERSAL LEGAL SYSTEM:

Fuller's most basic contention is that law's essential function, the one that a norms system must fulfil in order to deserve the label of law, is to subject people's conduct to the guidance of general rules by which they may themselves orient their behaviour.[39] Matthew Kramer also in his theory mentions situation-specific

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[33] INDIA AND WORLD BANK GROUP, DEPARTMENT OF ECONOMIC AFFAIRS, https://dea.gov.in/sites/default/files/India_WB_0.pdf.
[34] Tilbe Berengel, *Amendment of ICSID Rules and Regulations*, MONDAQ (Apr.13, 2019), http://www.mondaq.com/turkey/x/703380/Arbitration+Dispute+Resolution/Amendment+of+ICSID+Rules+and+Regulations.
[35] *Id*.
[36] Katherine Diel, TOWARDS CONSISTENCY IN INTERNATIONAL INVESTMENT JURISPRUDENCE: A PRELIMINARY RULING SYSTEM FOR ICSID ARBITRATION, 7 BRILL NIJHOFF 113 (2017) [hereinafter '*Katharina*'].
[37] *Id* at 142.
[38] Katharina, *supra* note 36 at 142-149.
[39] L FULLER, THE MORALITY OF LAW, 33 at 41 (Yale University Press: 1969).

directives must not be a principal means of regulating people's conduct.[40]

The rationale behind this requirement is that the generality of application and address of a system's rules is necessary for the subjects to 'gain a reliable sense of what other people are required and permitted and empowered to do.'[41]

However, we must look at investment treaties as diverse at their core. The fact that countries such as India have over the years released model BITs' indicate that a lot of socio-economic, political motivations unique to each country guide the motivations of a state while formulating such treaties. To then subject the adjudication process involving the interpretation of such diverse treaties is a fool's errand. To corroborate this view one can place reliance on the observation made by the ICSID Tribunal's ruling in *AAPL* v. *Sri Lanka*.[42]

´A BIT is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated(..), whether of international law character or of domestic law nature.'[43] This further indicates that a subjective interpretation becomes inevitable.

G. OVER-COMPLEXITY OF INTERNATIONAL ARBITRATION:

One cannot ignore the fact that the myriad of intricacies of this subject has hindered the setup of a global order in this respect. An intriguing aspect which exacerbates this factor is the

[40] Thomas Schultz, *The Concept of Law in Transnational Arbitral Legal Orders and some of its Consequences*, 2.1 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 59 at 62 (2011).
[41] *Id.*
[42] Asian Agricultural Products Ltd v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award (27 June 1990).
[43] *Id.*

differences within the individual provisions of investment treaties. From varied definitions of investment (which in fact was a highly contentious issue in the controversial White industries case)[44] to the diverse meaning of expropriation across BITs;[45] interpretation has to be extremely case specific. Additionally, the vast number of cases and the widespread nature of the impact such decisions generally have deterred consistency. Although scholars do argue that it is a flimsy excuse given the fact that more complex legal systems such as the EU have been able to achieve a considerable extent of harmonious interpretations; in the opinion of this author, to compare the remainder of the world with EU is unrealistic. EU as a region acts as one cohesive unit, with largely aligned economic and political aims. To contend that there is no dearth of such cohesion amongst the western and the eastern world is utopian.

A perfect example for this lies in the deadlock experienced with the proposed BIT between India and USA. Both countries have different positions regarding the MFN clause's inclusion and this difference has only weakened the possibility of reaching a conclusive treaty.[46] However, despite these diverse variations, it may also be argued that all BITs' at their core discuss and relate to the same fundamental concepts such as fair and equitable treatment.[47] Therefore, consistency in that regard could be urged for. As far as interpretation of a local remedies clause is concerned, given the fact that there is no mandatory requirement for the insertion of such clause in a BIT, the consistent

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[44] White Industries Australia Limited v. Republic of India, Final Award UNCITRAL (30 November 2011).

[45] Ritesh Kumar Singh, *Investment Treaties are a Knotty Affair*, THE HINDU (Apr.10, 2019) https://www.thehindubusinessline.com/opinion/investment-treaties-are-a-knotty-affair/article7054030.ece.

[46] Prabhash Ranjan, *Bit of a Bumpy Ride*, THE HINDU (Apr.13, 2019) https://www.thehindu.com/opinion/op-ed/Bit-of-a-bumpy-ride/article14378406.ece.

[47] Katharina, *supra* note 36 at 148.

interpretation of the same becomes challenging. Undoubtedly, if there was a court which ruled clearly on this subject, paving way for the conception of jurisprudence on the subject, or if states were to consistently draft such clauses in a pre-devised manner for it to emulate consistent state practice in order to transform into opinio juris, the situation may have been less chaotic.

H. THE UNKNOWN TERRAIN OF AN ARBITRATOR – PURELY FUNCTIONAL OR FUNCTIONAL YET PRUDENT?

In her seminal work, Ms. Katharina refers to the ambiguous role of arbitrators or rather the limits of the same to be a hindrance to the trustworthiness of the ICSID system as a whole.[48] A crucial point while considering most of the scholarly discourse surrounding the pitfalls of the ICSID system, concerns itself with the role of the arbitrator. – does the arbitral tribunal act only to resolve the dispute at hand or does it resolve disputes with the objective of setting precedents in a capacity of a law maker?[49]

If we analyse specifically the issue of interpretation of the ELR clause alone, one can see that the arbitrators under an ICSID purview have provided it with little or no significance. Although we can gather that an ELR clause is designated with the importance of being a jurisdictional requirement i.e. its non-satisfaction can result in an ICSID tribunal losing out on jurisdiction on a particular dispute arising out of a BIT, we see an increasing number of cases wherein this importance has been undermined. The former position however has been reflected in decisions such as *Kiliç* v. *Turkmenistan*[50] wherein the Tribunal while interpreting an ELR requirement in the Turkey–Turkmenistan BIT ruled the following:

[48] Katharina, *supra* note 36.
[49] Katharina, *supra* note 36.
[50] Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan, ICSID Case No. ARB/10/1, Award, (July 2, 2013).

"When such conditions [precedent] are set out in the [dispute resolution provisions] of a BIT (as conditions of the Contracting Parties' offer to arbitrate), which are the very source of an ICSID tribunal's jurisdiction, compliance with them constitutes a jurisdictional requirement, in the sense that a failure to meet the conditions has the consequence that there exists no jurisdiction to be exercised.." [51]

Despite the theoretical understanding as portrayed by the Tribunal in the aforesaid decision, the more popular approach has been to bypass this requirement.

The most landmark decision can be traced to *Abaclat* v. *Argentina*,[52] wherein although the main issue dealt with while assessing the jurisdiction of the ICSID tribunals over mass claims, a considerable portion of the majority's decision would help one examine the arbitrator's mindset when it comes to assessing the importance of an ELR requirement.[53] In the said decision, the Tribunal held that the consequences of non-compliance with a time-limited local litigation requirement would be lopsided (i.e. in favour of an investor) in keeping with the principles of fairness and justice.[54] Further, the Tribunal supported such reasoning with the stance that insisting on the litigation requirement would unfairly deprive the right of the investor to resort to arbitration. Accordingly, upon a scrutiny of the quality of the local remedies available, it was found that none of those available would have been able to effectively resolve the dispute in 18 months, thus

[51] *Id* at ¶ 6.2.9.
[52] Abaclat v. Argentina, ICSID Case No. ARB/07/05 (Formerly Giovanna A Beccara and Others v. The Argentine Republic).
[53] Abaclat and Others v The Argentine Republic (Formerly Giovanna A Beccara and Others v. The Argentine Republic), ALLEN & OVERY, http://www.allenovery.com/publications/en-gb/Pages/Abaclat-and-Others-v-The-Argentine-Republic-(Formerly-Giovanna-A-Beccara-and-Others-v-The-Argentine-Republic).aspx (2011).
[54] *Id*.

causing an unnecessary burden on the investors.[55] Accordingly, it held that Abaclat's non-compliance with the requirement did not preclude resorting to arbitration.[56]

This shows that arbitrators may tend to completely forego the importance of such clauses in order to keep with other larger requirements of ensuring that the dispute meets speedy resolution. Trends such as this highlight the limited extent to which arbitrators are expected to act as policy makers. Unlike judges of a court, arbitrators adjudicate with the mentality of solely resolving the dispute arisen. Although legal theorists advice that for a sentiment of rule of law to prevail in any legal regime, laws are to be applied consistently[57] which naturally gives rise to the presumption that when the law is less developed, consistent rulings become more necessary.[58] However, to contend that investment arbitration must undergo the same transformation is difficult, given the fact that ad hoc tribunals decide cases and each investment treaty is conceptualised as a result of different factors being at play. This creates a further problem for a country like India, given its own history with the regime.

Another crucial factor is the factor of biasness. Aside from the usual arguments which indicate biasness amongst all international adjudicators which range from policy biases,[59] bias towards the cause of developing or developed countries[60] as the case may be, investment arbitration brings forth another peculiar phenomenon.

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[55] *Supra* note 53.
[56] *Supra* note 53.
[57] L. Fuller, *supra* note 39.
[58] Gabrielle Kaufmann-Kohler, *Is Consistency a Myth? Precedent in International Arbitration*, ICCA, https://www.arbitration-icca.org/media/4/92392722703895/media012319141360720009500 62.pdf.
[59] Paulsson, *Moral Hazard in International Dispute Resolution,* 25 ICSID REVIEW - FOREIGN INVESTMENT LAW JOURNAL, 339 (Jan: 2010).
[60] *Id* at 343.

Unlike even the International Court of Justice ["**ICJ**"] wherein judges hail from diverse regions and countries, the ICSID in particular experiences a different form of bias. This is in some circles known as the '*revolving door bias*.'[61] The jobs of an ICSID arbitrator are not full-time, leaving them to serve either as counsel in other investment arbitrations to either host states or investor companies. Given this factor the likelihood of bias increases.[62]

In addition to the three factors which constitute major concerns for a country like India, to generally be wary of the ICSID regime, there is another separate and important consideration which deserves attention i.e. the 'Third World Approach to International Law'[63] ["**TWAIL**"] toward the ICSID regime.

I. TWAIL & INVESTMENT ARBITRATION – DOES INDIA PARTAKE IN THE SAME VIEW?

TWAIL, as a school of thought perceives international law as a legal regime which is motivated and dominated largely by the interests of the developed world. Scholars such as Matua have noted that TWAIL as a concept emerges from the view that all of the developed world presumes third world actors to be 'backward' and thus in immense need of intervention from the developed world.[64] This attitude as per TWAIL scholars finds replication even in the investment arbitration regime, wherein it is largely held that the public interest considerations such as the vulnerabilities of a developing economy are largely ignored.

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[61] Michael Waibel, Yanhui Wu, *Are Arbitrators Political? Evidence from International Arbitration*, Working Paper, http://www-bcf.usc.edu/~yanhuiwu/arbitrator.pdf (2017).
[62] *Id* at 9.
[63] Makau Matua, Antony Anghie, *What Is TWAIL?*, 94 SOC'Y INT'L L. PROC. 31 (2000).
[64] *Id* at 33.

India specifically, in the opinion of the author has gravitated toward this school of thought since the Dabhol Arbitration.[65] The said arbitration arose as a result of claims being brought against the Government of India in lieu of the India-Mauritius Investment Treaty, by companies including Enron, General Electric amongst others.[66] The interesting part however is that the reason why the International Chamber of Commerce [**ICC]** exercised jurisdiction in this matter was not due to the provisions of the power-purchase agreement but due to the provisions of the shareholder agreement subsisting between the Maharashtra Government and the other companies so involved. Scholars such as Prof. Gus Van Harten have argued that aspects of this arbitration all indicate a certain element of third world bias. This is evidenced by the fact that therein the ICC using a backdoor mechanism has not merely adjudicated the dispute but also gone ahead and commented on the policy decisions being taken by the concerned Maharashtra authorities.[67] Instances such as these go onto show that '*regime bias*' is in fact real and can possibly make institutions such as ICSID itself more prone to it.

Perhaps that is why; we observe a shift in India's approach since the Dabhol arbitration. For example, soon after the Dabhol arbitration, India signed a Free Trade Agreement ["**FTA**"] with Singapore.[68] This particular FTA did not contain clauses related to MFN, fair and equitable treatment etc; thereby exhibiting the paranoia that India began to undergo as far as investment related disputes were concerned.[69]

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[65] Anupama Katakam, Praveen Swami, *Dabhol and Political Sparks*, THE FRONTLINE: THE HINDU (Apr.8, 2019) https://frontline.thehindu.com/static/html/fl1822/18220400.htm.
[66] John J Kerr, Janet Whittaker, *Dabhol Dispute*, 1 CONST. L. INT'L 17 at 23 (2006).
[67] Gus Van Harten, *TWAIL and the Dabhol Arbitration*, 3 Trade L. & Dev. 131 (2011) [hereinafter *'Gus Van Harten'*].
[68] *Id.*
[69] India and BITs', *supra* note 32 at 427.

The ICSID has particularly shown this type of behaviour to the Latin American region.[70] In the case of *Tecnicas Medioambientales [Tecmed], S.A* v. *United Mexican States*,[71] the ICSID tribunal held that Mexico indirectly violated provisions of the Spain-Mexico BIT by indirectly expropriating the company's interest on account of its refusal to issue the permit to operate a hazardous landfill, without which there is no value associated with the investment made by the concerned company in related properties.[72] Situations such as these have most likely fuelled India's fear of being engulfed by the ICSID trap which has inevitably led to the water tight local remedies provision. In the forthcoming chapter, the author shall now explore the landmark yet elusive model of the EU's ambitious Multilateral investment Court.

IV. Chapter III: The EU v. ISDS – Make way for a 'Glocal' Court

This chapter shall embark on the study of analysing the monumental decision of the European Union ["**EU**"] to establish a unique system for settlement of investor-state disputes. For doing so, the author shall reflect briefly on the motivations which fuelled EU's need for making such a radical announcement and then move onto discussing the features of such reform.

The EU has been a highly unique region in terms of its diversity and success in managing that diversity. It has for years proven to be a reference model for economic cohesion which acts as a roadmap for emerging as an economic superpower.

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[70] Antonious R.Hippotyle, *Aspiring for a Constructive TWAIL Approach towards the International Investment Regime,* 207, in INTERNATIONAL INVESTMENT LAW AND DEVELOPMENT – BRIDGING THE GAP, Stephan W. Schill, Christian J. Tams et al, FRANKFURT INVESTMENT LAW SERIES (2015).

[71] *Tecnicas Medioambientales [Tecmed], S.A* v. *United Mexican States,* ICSID Case No. ARB/(AF)/002 [hereinafter '*Tecinas'*].

[72] *Id.*

One of the many factors contributing to its rise as an economic super power is the manner in which it has functioned as a single European market.[73] With its common currency, its high level of harmonization in terms of regulations and policies, it has over the years been perceived as this singular unit. Therefore, it comes as no real surprise that a singular unit such as the EU has announced its plan of establishing a multilateral investment court.[74]

In her announcement, Commissioner Malstrom has reiterated that EU has persistently been advocating for reform in ISDS.[75] She states that the motivations behind such move includes the need for ISDS to be of a more permanent nature, wherein adjudication is conducted by the requisite experts within feasible costs.[76] As per the EU, the current ISDS regime has been largely ineffective due to its unpredictable nature, lack of expertise and lack of diverse representation.[77] In a way, we may infer that a suggested body such as this Court could address most of the concerns India has over the current ICSID regime, as highlighted in the previous chapter of this paper.

For the purposes of the present chapter, the author shall undertake her inquiry in a two stage manner. First, the discourse shall be led by understanding the EU's agitation with the ICSID mechanism as a whole. This investigation shall help the reader understand the rationale behind EU's decision to establish an alternate dispute resolution scheme as far as resolution of disputes emerging from BITs' are concerned. Second, the author

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[73] Bogumila Mucha Lezko, *The European Union as a Global Economic Power*, 19.9 COMPARATIVE ECONOMIC RESEARCH, 30 (2016).

[74] *A Multilateral Investment Court: A contribution to the Conversation about reform of Investment Dispute Settlement,* SPEECH BY EUROPEAN COMMISSIONER FOR TRADE CECILIA MALSTROM, (22 Nov, 2018) http://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157512.pdf [hereinafter '*Cecilia Malstrom'*]

[75] *Id.*

[76] Cecilia Malstrom s*upra* note 74.

[77] Cecilia Malstrom s*upra* note 74 at 2.

elaborately studies the framework of this proposed multilateral investment court. In this section, the reader shall obtain a glimpse not only into the proposed working of the new system but also include coverage on the loopholes of this system as well as on its benefits. In keeping with the larger research question to be tackled within the instant research paper, the issue of local remedies and how such Court shall either harmonize or destruct the application of such clause will be discussed.

A. THE LONG-STANDING CONFLICT OF EU & ICSID:

Countries in Europe (inclusive of Non-EU members) have acted as active pools of investment since the first ever BIT was conceived, namely in form of the BIT between West Germany and Pakistan.[78] This is demonstrative of the significant stake Europe as a region has to play in the heavily interdependent economic world of today. The EU has been a consistent critic of the ISDS system and its attack on the right of states to regulate investor-state disputes In several occasions, the EU has been an advocate of the idea that majority of the arbitral tribunals constituted under BITs' happen to favour the interests of the investors.[79] Additionally, the problem is furthered when such tribunals provide beneficial interpretations of MFN clauses in other BITs' in order to provide leverage to the investor. The fact that the EU has been heavily against decisions such as Maffezini[80] is evidenced even through provisions of its recently enforced BIT

[78] THE ENTRY INTO FORCE OF BILATERAL INVESTMENT TREATIES, UNCTAD, https://unctad.org/en/Docs/webiteiia20069_en.pdf.
[79] EU COMMISSION ISSUES CONCEPT PAPER ON ISDS IN TTIP AND BEYOND: PROPOSALS FOR 'PROFOUND REFORM', HERBERT SMITH FREEHILLS, https://hsfnotes.com/publicinternationallaw/2015/05/19/eu-commission-issues-concept-paper-on-isds-in-the-ttip-and-beyond-proposals-for-profound-reform/.
[80] Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7 (2000).

with Canada,[81] which has been dealt with greater emphasis in the forthcoming section. Aside from that, one can also trace the roots of such dissatisfaction with ICSID decisions from the instance of the *Micula* v. *Romania*[82] case. In this particular instance, Romania was found to have violated certain provisions of the Sweden-Romania BIT by denying certain tax incentives. While the said BIT was negotiated in 2002, Romania having been inducted into the EU in 2005 was required to amend its state aid rules, which resulted in change of policy.[83] The ICSID tribunal denied interpretation of the treaty in light of EU law by stating that the position prior to induction within the EU was the appropriate position to interpret the treaty by.[84] This has perhaps fuelled the long-standing conflict between EU and ICSID in terms of exercising ultimate supervisory control.

Perhaps in lieu of the above, the EU Commission in early 2015, soon after making the announcement of kick starting its ambitious project of establishing a multilateral investment court ["**MIC**"], released a concept paper[85] discussing its stance on improving dispute resolution mechanisms in future BITs. Therein, concerns such as lack of trust toward the current ISDS schemes of resorting to arbitration via modes such as ICSID have

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[81] EUROPEAN UNION–CANADA COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (final draft of 29 February 2016), http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/ [hereinafter *'CETA'*].

[82] Ioan Micula, Viorel Micula and others v. Romania, ICSID Case No. ARB/05/20.

[83] THE EUROPEAN COMMISSION PROHIBITS ROMANIA FROM COMPLIANCE WITH AN ICSID AWARD: IMPLICATIONS FOR THE ENFORCEMENT OF INTRA-EU INVESTMENT TREATY AWARDS? HERBERT SMITH FREEHILLS, https://hsfnotes.com/publicinternationallaw/2015/04/16/the-european-commission-prohibits-romania-from-compliance-with-an-icsid-award-implications-for-the-enforcement-of-intra-eu-investment-treaty-awards/.

[84] *Id.*

[85] INVESTMENT IN TTIP AND BEYOND – THE PATH FOR REFORM: ENHANCING THE RIGHT TO REGULATE AND MOVING FROM CURRENT AD HOC ARBITRATION TOWARDS AN INVESTMENT COURT, CONCEPT PAPER, EUROPEAN TRADE COMMISSION, http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

been expressed. These concerns include lack of impartiality of arbitrators, the "revolving door" phenomenon therein etc.[86] Interestingly, as the author has highlighted in this paper, these concerns are similar to the concerns raised by India when it comes to resorting to investor-state arbitration.

B. THE PROPOSED MULTILATERAL INVESTMENT COURT:

First and foremost, it is important to note that the EU, although a unified unit, originally provided its members the liberty to negotiate policy matters such as BITs with other nations independently.[87] This autonomous exercise by members underwent a change post the enforcement of the Lisbon Treaty.[88] The said treaty sought to provide a common constitution for the whole of EU, establish an EU Parliament etc; along with empowering the EU as a unit to negotiate BITs as a singular unit.[89] This meant that the EU not only took decisions as a unit on other aspects of investment which are typically covered under a BIT but also took over the dispute resolution clauses incorporated there under.

The first BIT which was conceived after such shift in decision making was the EU- Canada Comprehensive Economic Trade Agreement ["**CETA**"].[90] CETA acted as the first document which presented to the world how EU intended to include investor-state arbitration mechanisms within such treaties. Within CETA, while it acknowledged the usage of investor-state

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[86] *Id* at 5-7.
[87] Jonas Parello-Plesner, Elena Ortiz de Solarzano, *A Comprehensive Approach to Investment Protection*, 2, EUROPEAN COUNCIL ON FOREIGN RELATIONS, https://www.ecfr.eu/page/-/ECFR82_INVESTMENT_BRIEF_AW.pdf.
[88] THE TREATY OF LISBON, FACT SHEETS ON THE EUROPEAN UNION: EUROPEAN PARLIAMENT, http://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon
[89] *Id*.
[90] CETA *supra* note 81.

arbitration by inserting detailed provisions related to establishment of such MIC,[91] it also inserted specific provisions related to clauses such as MFN which clearly exclude the Maffezini circumvention.[92]

The EU has been consistently working towards providing suggestions for establishing such MIC. It has also lobbied its way through the UNCITRAL Working Group (III) wherein this proposal is currently being discussed.[93] The important features of such MIC[94] have been illustrated in the table below alongside the differences with an ICSID based arbitral tribunal:

Multilateral Investment Court	**ICSID Regulated Tribunal**
Permanent bench	Formed on an Ad Hoc Basis
Consist of an Appeal Mechanism	Lack an Appeal Mechanism, hence every award is final upon being rendered
Constituted by a permanent set of arbitrators, (thereby avoiding the revolving door phenomenon)	Constituted by panel of arbitrators chosen by the investor & host state. These arbitrators are engaged on a part-time basis and for the remaining time otherwise

[91] CETA, *supra* note 81 at Art 8.29.
[92] CETA *supra* note 81 at Art 8.7.
[93] Martin Dietrich Brauch, *Multilateral ISDS Reform is Desirable: What Happened at the UNCITRAL meeting in Vienna and how to prepare for April 2019 in New York*, INVESTMENT TREATY NEWS, IISD (Mar.16, 2019) https://www.iisd.org/itn/2018/12/21/multilateral-isds-reform-is-desirable-what-happened-at-the-uncitral-meeting-in-vienna-and-how-to-prepare-for-april-2019-in-new-york-martin-dietrich-brauch/.
[94] THE MULTILATERAL INVESTMENT COURT PROJECT, EUROPEAN COMMISSION, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608.

	function as counsels, academics etc; thus heightening the biasness fear.

Although the MIC has been proposed vociferously by the EU, ironically certain inconsistencies between this proposal and internal EU law have come to light.[95] In the much awaited decision in *Achmea*,[96] the Court of Justice European Union ["**CJEU**"] has raised some interesting points regarding the co-existence of EU law and that of the law declared by any other international court.[97] Although the inference to be drawn from the judgment is one which permits the submission of disputes to other international tribunals (in this case the MIC), it comes with a caveat- such permission shall prevail so long as the autonomy of the EU legal order is respected.[98]

The crucial question to ask at this stage is what would this decision mean for those BITs which exist between EU members and third countries? From an analysis of the Achmea decision it can be inferred that the CJEU found no incompatibility with EU law primarily because it said that EU case law has limited role in commercial arbitration because in BITs parties divest their own courts of jurisdiction over certain range of disputes.[99] Herein

[95] Szilard Gaspar Szilgayi, *It is not just about Investor-State Arbitration: A Look at Case C-284/16, Achmea BV*, EUROPEAN PAPERS, http://www.europeanpapers.eu/en/europeanforum/it-is-not-just-about-investor-state-arbitration-achmea-case [hereinafter '*Szilard'*].
[96] *Id*.
[97] Guillaume Croisant, *CJEU Opinion 1/17- AG Bot Concludes that CETA's Investment Court System is Compatible with EU Law*, KLUWER ARBITRATION BLOG (Mar.21, 2019) http://arbitrationblog.kluwerarbitration.com/2019/01/29/cjeu-opinion-117-ag-bot-concludes-that-cetas-investment-court-system-is-compatible-with-eu-law/.
[98] *Id*.
[99] Szilard *supra* note 95.

arises an anomaly- given that the *Achmea*[100] decision requires that the legal autonomy of the EU order to be respected for no chance of incompatibility to arise, BITs cannot then simply divest EU countries or the investors the choice of submitting disputes to their own domestic courts.[101] An ELR clause then becomes the only way possible to circumvent this possibility of incompatibility. This aspect requires attention in the EU's working plan for the MIC which currently finds no mention.

Undoubtedly, the MIC project initiated by the EU is an ambitious proposal. However, there is no guarantee that it quells all the doubts experienced by countries such as India over ICSD. Additionally, the current framework of this ambitious project also showcases the long road ahead in terms of renegotiating treaties with third countries specifically. Plus, at best the current proposal of adjudicating investor disputes by an MIC acts as a fork in the road clause at best, with no reference to the exhaustion of local remedies. While ICSID makes it clear that the insertion of such clause is not mandatory,[102] the EU proposal does not replicate nor suggest an alternative to such approach.

Perhaps, a useful feature to make such a proposed court more efficient and less subject to frivolous claims being submitted would be to adopt the CJEU's jurisdiction over hearing and passing preliminary rulings.[103] This shall not only mean that disputes could receive a preliminary hearing to ascertain if the dispute is of real merit and/or poses substantive questions of law but may also increase the possibility of creating solid and consistent jurisprudence, in its advisory jurisdiction capacity.

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[100] Szilard, *supra* note 95.
[101] Szilard, *supra* note 95.
[102] Szilard, *supra* note 95.
[103] Art. 177, EEC TREATY, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12002E234:EN:HTML.

This hesitation toward adopting the approach as seen under CETA has been widely expressed by the Indian Ministry of Commerce in 2017 itself, when it summarily rejected such idea.[104]

V. Chapter IV: Exploring Options to Rectify the Indian Situation

The Indian scheme as far as BITs are concerned has traditionally been centred around the idea that investments made in India must be protected to the maximum level, as can be seen with the many provisions relating to assurances provided in its earlier version of the Model BIT released in 2003[105] (which includes provisions related to MFN[106], imposing no ELR[107] etc). This shows that from 2003-2015, India perceived itself to be a rule-taker in international investment.[108] Therefore, it becomes noteworthy to see the shift that India has undergone with its approach to BITs generally. India has off late emerged as a rising economic super power with its growth trajectory on the consistent rise,[109] thus giving it the luxury of now becoming a rule-maker instead. This transition is visible in its revised Model BIT which has been discussed in the earlier parts of this paper. Perhaps India's increasing significance in the world economy is providing it with

[104] INDIA REJECTS ATTEMPTS BY EU, CANADA FOR GLOBAL INVESTMENT AGREEMENT, THE HINDU (Mar.28, 2019), https://www.thehindu.com/business/India-rejects-attempts-by-EU-Canada-for-global-investment-agreement/article17083034.ece. [hereinafter '*India rejects'*].
[105] Indian Model Text of Bilateral Investment Promotion and Protection Agreement (2003) https://www.italaw.com/sites/default/files/archive/ita1026.pdf.
[106] *Id* at Art 4.
[107] Szilard *supra* note 95.
[108] Prabhash Ranjan, *India's Bilateral Invesmtent Treaty Program – Past, Present and Future,* in KAVALJIT SINGH & BURGHADARD IGLE, RETHINKING BILATERAL INVESTMENT TREATIES-CRITICAL ISSUES AND POLICY CHOICES, 106 (2016).
[109] *Id*.

the leverage to stress on reforms within the ISDS mechanisms, including the emphasis on the ELR rule.[110]

An analysis of India's Model BIT 2015 shall indicate that India has been treading a contradictory path; on one hand its BIT has restrictive dispute resolution clauses whereas its new arbitration regime strives to make India a desirable location for international commercial arbitration.[111] In this chapter, the author shall embark on a concluding discourse which attempts to explore the possible options at hand for India when it comes to revamping its dispute settlement clause within BITs. As illustrated in the earlier chapters, India has burnt its fingers with the usual Investor-State arbitration mechanism, which explains the heavy emphasis on the ELR rule. For the purposes of the discourse at this particular juncture, the author shall delve into the alternatives India may pursue as against the current restrictive provision on ELR.

A. LESSONS FROM THE INDIA-BRAZIL BIT:

In early 2016, reports of India and Brazil having concluded negotiating a BIT were floated.[112] The highlights of the said BIT were that it did away with the traditional ISDS mechanisms incorporated within the majority of BITs. Instead, the states followed the approach undertaken by Brazil in its Model BIT. Therein, it proposed formally for a state-state arbitration which would first be preceded by a Joint Committee Report (acting as an ombudsman) that would take into account the dispute, the nature and standing of the affected party (i.e. either the

[110] India rejects, s*upra* note 104.

[111] Jonathan Stoel, Michael Jacabson, *India's New BIT and Arbitration Law Send Mixed Signals to Foreign Investors*, HOGAN LOVELLS (Mar.25, 2019) https://www.hlregulation.com/2016/01/19/indias-new-bit-and-arbitration-law-send-mixed-signals-to-foreign-investors/.

[112] INDIA REVAMPS ITS BILATERAL INVESTMENT TREATY REGIME, INTERNATIONAL ARBITRATION LAW, http://internationalarbitrationlaw.com/blog/india-revamps-its-bilateral-investment-treaty-regime/.

Contracting State or an affected investor, as the case may be).[113] If the Joint Committee Report does not lead to an amenable and mutually agreeable solution, either contracting party may submit to an arbitral institution for pursuing arbitration.[114] Although this means that the ELR clause as envisaged within India's Model BIT finds no mention in this reported negotiation, it means that India is more amenable on having a framework which allows it to have some type of preliminary ruling.

The Joint Committee ["**Committee**"] as envisaged under the Brazilian model[115] calls for such committee to be constituted by members from the Governments of both contracting parties. These members shall not only determine the scheme of any dispute but also engage in discussion over other aspects including opportunities for mutual investment etc. If we look also at some of the BITs Brazil shares with countries such as Ethiopia,[116] the said provision related to the mandate of such committee also provides for engagement with stakeholders of civil society of both contracting parties. This ensures that inclusion of public interest considerations, a crucial factor currently missing under the present day ISDS regime, is being included in the process of investment related dispute settlement. For a developing economic nation such as India, these types of consideration are of relevance.

This goes onto show that similar to the way in the World Trade Organizations ["**WTO**"] Doha talks of 2001, wherein concerns of developing countries especially those related to public interest

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[113] See Art.23 of Bilateral Investment Treaty between Brazil and Ethiopia, https://investmentpolicyhub.unctad.org/Download/TreatyFile/5717 [hereinafter *'Article 23']*

[114] *Id* at Art. 24; *See* also INDIA AND BRAZIL CONCLUDE NEGOTIATIONS OF BILATERAL INVESTMENT TREATY, HERBERT SMITH FREEHILLS, https://hsfnotes.com/publicinternationallaw/2016/12/05/india-and-brazil-conclude-negotiations-of-bilateral-investment-treaty/#more-6033.

[115] Article 23 *supra* note 113.

[116] Article 23 *supra* note 113 at ¶ d.

were largely considered,[117] the present day ISDS regime perhaps through the UNCITRAL working groups needs to take the same direction in its discourse.

The takeaway from this type of a negotiated BIT goes onto show a preferable solution to India which can allow it to tone down its ELR requirement. This has found support even in the recent high profile Sri Krishna Committee report which taking on the example of the Brazil scenario itself has suggested that India stick to this mechanism so as to avoid submission to current day ISDS mechanisms as a whole.[118]

B. PURSUING A MULTILATERAL INVESTMENT COURT MECHANISM – IS IT INDIA'S YELLOW BRICK ROAD?

As discussed in the previous chapter of this paper, the question of following EU's path of establishing a MIC type of forum has been looming over India for long. The purpose of every investment treaty varies, depending on the contracting parties. India and EU for long have been attempting to emerge as significant partners for one another and with the recent turn of events revolving around BREXIT, it might just be a possibility.[119] However, developing an entirely new regime is a different ball game altogether. It is important to realise that for the establishment of such court, not only bilateral negotiations have to separately take place but also negotiations at world forums such as UNCITRAL etc; are required. As is already taking place, ISDS

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[117] C. Rammanohar Reddy, *What the Doha Development Agenda is all About?* THE HINDU (Apr.2, 2019), https://www.thehindu.com/2001/11/16/stories/0616000c.htm.

[118] REPORT OF THE HIGH LEVEL COMMITTEE TO REVIEW THE INSTITUTIONALISATION OF ARBITRATION MECHANISM IN INDIA, 108, http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf.

[119] Daniel Boffey, *Brexit could help EU strike free trade deal with India, MEPs believe*, THE GUARDIAN (Feb.27, 2019) https://www.theguardian.com/politics/2017/feb/23/brexit-could-help-eu-strike-free-trade-deal-india-meps.

mechanisms are being discussed in the UNCITRAL's current working group (III),[120] however for it to materialise is going to take a considerable amount of time. ISDS reform of any kind is a mammoth task. Not only has the complexity of treaty negotiations increased manifold simply because of the number of parties generally involved but also due to the sensitivities, political & otherwise of the issues at stake.[121] Further, experience has made States more mindful of the implications of international agreements and more cautious to the consequences of their application.[122]

Perhaps the consequence of such caution is the inevitable success of regimes such as ICSID wherein States are provided at least procedural certainty.[123] Aside from the hassle of creating a viable framework which is consistent with the needs of the global economic order as such, convincing states to submit to the jurisdiction of such a court is another difficulty.

At the global level, the two main bodies arbitrating disputes involving states are Permanent Court of Arbitration ["**PCA**"] & ICSID. Participation in these two bodies is not complete.[124] Neither ICSID nor PCA enjoy *ipso facto jurisdiction*. Compulsory jurisdiction for both these bodies would depend upon the language of the investment treaty concerned.[125]

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[120] UNCITRAL, WORKING GROUP III: 2017 TO PRESENT: INVESTOR STATE DISPUTE REFORM, http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html.

[121] EDUARDO ZULETA, CREATING A STANDING INTERNATIONAL INVESTMENT COURT IN JEAN E. & ANNA JOUBIN, RESHAPING THE INVESTOR STATE DISPUTE SETTLEMENT SYSTEM- JOURNEYS FOR THE 21ST CENTURY, 4 NIJHOFF INTERNATIONAL INVESTMENT SERIES, 403 at 404 (2015) [hereinafter '*Eduardo'*].

[122] *Id*.

[123] Eduardo, s*upra* note 121 at 410.

[124] Cesare PR Romano, *The Shadow Zones of International Judicialization* in CESARE ROMANO, KAREN J, YUVAL SHANY, THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION, 95 (2015) [hereinafter *'Cesare'*].

[125] Cesare, s*upra* note 124 at 95.

Although ICSID and WTO as bodies represents the confluence of trade and investment being dealt as issues, the discrepancies in their memberships is noteworthy. Notable ICSID absences are: Canada, EU (Poland), several economic super powers to be (including India) –Brazil, Mexico, South Africa & Russia; a populist trio of Latin American nations such as Venezuela, Bolivia and Ecuador etc.[126] Trends such as these indicate that generally the developing countries have always abstained from completely submitting to institutions which they believe represent some type of cultural elitism or disregard for the needs of the third world. As discussed earlier in Chapter 3 under the TWAIL approach, we sense this fear amongst the developing world and such purposeful absences indicate that such fear is a persisting one. Therefore, if India went about lobbying in favour of the MIC it would not only be contradictory but also counter-productive. There is no real guarantee that the MIC shall not turn out to be as criticised a mechanism as the usual ICSID measure. Take for instance, the issue of selecting arbitrators. The MIC provisions as incorporated under CETA indicate that selection of such permanent bench shall be undertaken by a 'Trade Committee.'[127] That being said, there is no elaboration on how this committee shall base its decision, thereby bringing forth once again the age-old concern of biasness.

Further, as far as tackling the issue of inconsistency is concerned, there is no specific guarantee that under such system as well this challenge can be completely overcome. Overcoming this would mean creating a centralised forum wherein all investment

[126] *Id,* at 96.

[127] *Investment Treaty Working Group: Task Force Report on the Investment Court System Proposal,* AMERICAN BAR ASSOCIATION (Mar.18, 2019) https://shop.americanbar.org/PersonifyImages/ProductFiles/262739281/6-Proposed%20EU%20Investment%20Court.pdf. [hereinafter '*ITWG'*].

arbitration cases have to be heard,[128] akin to say what the International Court of Justice does for matters of public international law. Doing so would mean going back to the first hindrance highlighted earlier, i.e of getting nations to submit to such a framework. Additionally, even if such permanent structure is miraculously set up without any obstacles, having only one panel to judge all investment cases is impossible.[129] Additionally, for there to be consistency, investment treaties would all have to be read in a streamlined and uniform manner, which as is known is a futile exercise as each BIT is unique in terms of its context and drafting language.[130] Plus, the direct submission of every dispute to such a setup would not differ at its core from the ICSID mechanism, against which India has incorporated a rigid ELR requirement in the first place. Thus, pursuing such an option becomes more or less futile.

C. LESSONS FROM CHINA – A POSSIBLE ROADMAP FOR INDIA AS WELL

China has been consciously chosen as a comparable jurisdiction for the purposes of the larger research question of this paper. Given its own remarkable emergence as a decisive player in the world economic order today, its involvement in the investment world is certainly not going to diminish in the near future. Traditionally as well, the boom in China's economy can be largely attributable to its open door policy[131] and other initiatives taken to attract foreign direct investment.[132] Aside from this similarity with India, the Chinese approach to arbitration has also been somewhat similar. China has been working greatly on

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[128] Stephan Wilske, Raaesa Rawal, Geetanjali Sharma, *The Emperor's New Clothes: Should India Marvel at the EU'S New Proposed Investment Court System*, 6 I.J.A.L. 93 (2018) [hereinafter *'Wilske'*].
[129] *Id* at 94.
[130] Wilske *supra* note 128 at 94.
[131] Hongling Ning, Tong Qi, *Multilateral Investment Court: The Gap Between EU and China*, 156 CHINESE JOURNAL OF GLOBAL GOVERNANCE, 57 (2018).
[132] *Id*.

strengthening its image as an international arbitration hub,[133] similar to how India has been working toward that goal.[134] In wake of ISDS reform taking the world investment arena by storm, China has been working enthusiastically toward strengthening its own reputation as a suitable jurisdiction for resolving investor state disputes. In 2016, the Schenzen Court of International Arbitration ["**SCIA**"] revised its arbitral rules to include under its purview even foreign claims[135] and has to that effected entered into a cooperation treaty with ICSID in 2018.[136] India too recently has introduced the Mumbai Centre for International Arbitration ["**MCIA**"][137] as well as the New Delhi International Arbitration Centre Bill.[138] Although the MCIA Rules 2016[139] do not have a provision specifically allowing submission of foreign claims etc; if the recent trends of India to attempt to emerge as a budding hub for international commercial arbitration are anything to go by, this could be a plausible approach to slowly follow. Undoubtedly, the infrastructural and logistical capacities for India to take up such disputes are not as sophisticated yet. However, through a gradual attempt and foresightedness the same is not impossible. Another remarkable aspect about the Chinese plan is its initiative to

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[133] Maarten Roos, Yang Limeng, *New Developments to Impact International Arbitration in China*, MONDAQ (Apr.11, 2019), http://www.mondaq.com/china/x/686054/International+Courts+Tribunals/New+developments+to+impact+international+arbitration+in+China.

[134] Huiping Chen, *China's Innovative ISDS Mechanisms and its Implications*, 112, A.J.I.L UNBOUND 209 (2018).

[135] Shenzhen Court of Int'l Arbitration, 2016 Arbitration Rules art. 2(2) (effective Dec. 1, 2016) [hereinafter '*Shenzhen*']

[136] China Int'l Commercial Court, Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions (June 27, 2018).

[137] MCIA Rules, 2019 (India), http://mcia.org.in/wp-content/uploads/2016/05/MCIA-Rules_2017.pdf.

[138] Binny Susan, Neha Sharma, *New Delhi International Arbitration Centre: Building India into a Global Arbitration Hub*, KLUWER ARBITRATION BLOG (Mar.1, 2019) http://arbitrationblog.kluwerarbitration.com/2018/05/04/new-delhi-international-arbitration-centre-building-india-global-arbitration-hub/.

[139] MCIA Rules, 2019 (India), http://mcia.org.in/wp-content/uploads/2016/05/MCIA-Rules_2017.pdf.

establish joint arbitration centres with partners it already shares BITs with. For instance, the China-Africa Joint Arbitration Center ["**CAJAC**"] which was set up in 2015; the Chinese government and fifty African countries established this venture at the Johannesburg Summit and the Sixth Ministerial Conference of the Forum on China-Africa Cooperation.[140] CAJAC has set up five centers: three in China (Shanghai, Beijing, and Shenzhen) and two in Africa (Johannesburg and Nairobi). In these locations, CAJAC will provide arbitration, mediation, and conciliation services that bypass the jurisdiction of local courts, local arbitration institutions, and other international arbitration institutions.[141]

The aforesaid directly represents an alternative to inserting a restrictive ELR clause. Given that the impact of investment treaties is far-reaching by building partnerships such as the one illustrated the conflicting issues of ELR and obtaining a fair and mutually agreeable solution may be solved more easily.

VI. Concluding Remarks

The exhaustion of local remedies is a difficult point, which often leads to unnecessary and otherwise easily avoidable clashes between contracting parties. Although matters of sovereignty and protecting national interests are crucial, their insertion can run a risk of deterring investment to a large extent. The standstill Indian BIT negotiations have reached[142] since the adoption of the Model BIT in 2016 containing a difficult ELR requirement amongst other problematic clauses indicates the need for reform.

As assessed in the course of this paper, the factors which cause India and other similarly placed economies to shy away from completely submitting to ICSID or other similar forums are fairly

[140] Shenzhen *supra* note 135.
[141] Shenzhen supra note 135.
[142] Kshama *supra* note 31.

same to a large extent. In keeping with this commonality, India could perhaps lead the way in forming strategic partnerships with similarly placed nations. Two plausible options were presented in the previous section of the paper, namely: the India-Brazil BIT approach and the Chinese mantra. The author would recommend the blending of both these approaches. While the latter is certainly far sighted in the sense that it not only aims to internally strengthen arbitration mechanisms and domestic institutions but also foster long standing partnerships, the Brazil example also indicates a more immediate solution. The Brazil model allows India to not only foster relationships by creating the Joint Committee for purpose of acting as an ombudsmen or providing preliminary rulings to ascertain and possibly resolve disputes amongst contracting parties, it also allows India to depend on the logistical framework readily available via the secretariat of the ICSID. The Chinese mantra calls for detailed and long-term planning, and although highly desirable, it will not be able to deal with immediate needs.

As far as the appeal mechanism is concerned, although the MIC framework provides for a permanent appellate body to be instituted, the dubious standards by which such permanent bench shall be chosen casts too many doubts for it to be the ideal way to go about meeting this requirement.[143]

Additionally, it is important for the Indian Government to realise that inclusion of such a strict ELR provision causes a detrimental effect, specifically in instances wherein urgent relief may be required by small and medium size investors who have already suffered (potentially significant) losses on their investment.[144] Further, local remedies also create a greater liability on the concerned host state, given that in any case if the matter were to be ultimately heard by an arbitral tribunal, the remedies so

[143] ITWG *supra* note 127.
[144] Wilske *supra* note 128 at 97.

exercised will be under the scrutiny of the 'fair and equitable' treatment test. By simply doing away with the MFN clause etc; as India has in its Model BIT,[145] we cannot guarantee that a tribunal may still not find a ruling that goes against it. This kind of circumvention therefore, is not fool proof.

The ultimate solution therefore lies in dedicating more policy attention toward creating innovative mechanisms to reform ISDS generally. Although the Srikrishna Committee Report[146] has highlighted India's favorable attitude towards suggestions such as sticking solely to a state-state arbitration model or a MIC model,[147] this author humbly submits that the need of the hour is to currently find ways of flexing the current ISDS framework itself. Starting an entirely new system from scratch is an extremely slow and arduous task. If pursued, it can be certainly done alongside finding and executing effective solutions which work sustainably within the existing framework itself.

[145] 2016 Model Indian BIT, *supra* note 3.

[146] REPORT OF HIGH LEVEL COMMITTEE TO REVIEW THE INSTITUTIONALISATION OF ARBITRATION MECHANISM IN INDIA, LEGAL AFFAIRS OF INDIA (30 July 2017), http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf.

[147] Rohit Bhat, *Will India Do away with Investor-State Arbitration?* KLUWER ARBITRATION BLOG (Mar.2, 2019) http://arbitrationblog.kluwerarbitration.com/2017/08/23/will-india-away-investor-state-arbitration/.