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Harmonizing Commercial and Investment Arbitration: Conflict Dynamics

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This article provides an independent analysis of the scope and extent of arbitration under investment agreements, and the implications of the possible convergence in the process of harmonization of international commercial arbitration law.
The successful settlement of any dispute depends on the compatibility of the nature of the dispute with the technique to which it is submitted for resolution. In the last decade, there was a constant increase in the number of disputes that were subjected to arbitration and a major chunk of those disputes covered a comparatively new but known area called international investment law. With economic globalization allowing the free flow of foreign direct investment (FDI) in and out of a country, the existing regulatory framework in international law to standardize investment liberalization is often seen as ineffective, hence the consequent disputes. Here, arbitration offers a suitable framework for the amicable settlement of commercial disputes covering investment agreements with the assistance of bilateral or multilateral agreements between the states. Preferential trade agreements pertaining to investment often contain an arbitration clause for the settlement of future disputes between parties. At this juncture, one may find that there exists a fundamental dilemma in ascertaining the true nature of investment arbitration and how it is different from commercial arbitration. For example, the protection being offered to human rights under the purview of investment arbitration may generate doubts in the minds of investment arbitrators. In commercial arbitration, divergences in a pluralistic order become particularly relevant whereas the diverse legal cultures supported by individual constitutional frameworks have a direct impact on investment arbitration due to their practical application. The article also discusses the need for harmonized rules governing arbitration procedures while maintaining the functional dissimilarities between commercial and investment arbitration.

Keywords: Investment; Arbitration; ADR;

1. INTRODUCTION

In international business transactions, parties come from different legal and cultural backgrounds, often ensuing various expectations as to the conduct and content of their business relationship. Disputes and misunderstandings assume greater potential as the issue of how and where disputes are resolved is of much more significance than in purely domestic transactions. The principles of freedom of contact play a petinent role in the recognition of autonomy of parties to opt out of the traditional litigation methods and look for alternate avenues. Having been influenced by this newly gained freedom, the major players in international trade are now focusing more on informal ways of dispute settlement rather than choosing the usual and conventional mode of litigation before domestic legal forums. The increased importance of the doctrine of party autonomy in the field of settlement of international business disputes has added momentum to the development of alternative dispute resolution (ADR) mechanisms including arbitration.[1] In the recent past, and in particular, for the last two decades, there has been a tremendous upsurge in the number of cases being settled by arbitration and similar alternative dispute settlement mechanisms.[2] Legal or practical obstacles to such private forms of dispute resolution are at the vanishing point as far as the binding nature of such agreements in the international business arena are concerned.[3] An excellent indicator of the general approach of a given legal system to

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1 Gary B. Born, Arbitration and the Freedom to Associate (2009-2010) 38 Georgia Journal of International and Comparative Law 7, 12.

2 See, MARGARET L. MOSES, The Principles and Practice of International Commercial Arbitration *5–9* (Cambridge University Press 2008).

3 Michael. A. Scodro, 'Arbitrating Novel Legal Questions: A Recommendation for Reform' (1996) 105 Yale Law Journal 1927, 1929–37.

party autonomy in dispute resolution is what limits it imposes on the parties' freedom to contract out of the state court system, and the nature of disputes which may be the subject matter in a given case.[4]

Amongst all other ADR forms, arbitration has become the most sophisticated form of dispute resolution in transnational business or trade. The success of any kind of dispute settlement mechanism depends on the compatibility of the nature of the dispute with the technique to which it is submitted for resolution.[5] In this context, it is pertinent to note that in the last decade there was a constant increase in the number of disputes that were subjected to arbitration and more interestingly, a major chunk of those disputes even covered a comparatively new but known area called international investment law. The significant point to be noted here is that international investment law is a crucial branch of international economic law, and one of the important forces of liberalization propelling economic globalization is investment liberalization. With the new global economic order allowing the free flow of FDI in and out of a country, the existing regulatory framework in international law to standardize this increasing investment is often seen as ineffective, hence the consequent disputes.[6]

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[4] A. S.. Rau, 'Integrity in Private Judging' (1997) 38 South Texas Law Review 455, 486–87. Also see: H.L. Yu and L. Shore, 'Independence, Impartiality, and Immunity of Arbitrators: U.S. and English Perspectives' (2003) 52 International & Comparative Law Quarterly 935, 965–67.

[5] Poppi Hagan and Zachary Lomo, 'International Law, and the Developing World: A Millennial Analysis' (2000) 41 Harvard International Law Journal 595, 606, where the authors note that "bias in the arbitration system results from the common training, intellectual background, and shared principles of the arbitrators—most notably, a shared idea of to what extent the public sphere can impede on the private".

[6] Sandra L. Caruba, Resolving International Investment Disputes in a Globalized World (2007) 13 New Zealand Business Law Quarterly 128, 148. Also see, Jan Paulsson, 'Third World Participation in International Investment Arbitration' (1987) 2 ICSID Review: Foreign Investment Law Journal 19, 21.

Here, arbitration offers a suitable framework for the amicable settlement of commercial disputes covering investment agreements with the assistance of bilateral or multilateral agreements between states. It clearly proves that in its role as an alternative to national courts, arbitration has proved to be the most successful option for the settlement of the newest types of disputes.[7] However, the notable resemblances between commercial and investment arbitration surrounded by the ensuing areas of conflict and concurrences are analyzed here suggesting the need for a harmonized arbitration system across the globe.

This article is divided into five sections. After this introduction, Section 2 examines the features of investment arbitration, its gradual transition from purely commercial arbitration to the specialized regime of investment arbitration and the possible areas interface between the two. Section 3 discusses the pertinent issues of transparency in investor-state arbitration and the existing issues of convergence and conflicts in the harmonization process. Section 4 reiterates the fact that besides, the striking similarity of rules of international institutions facilitating commercial arbitration across the globe, arbitral tribunals would certainly tend to give a congruous construction of the various norms in international trade law. This would in turn facilitate the making of a harmonized system of international arbitration in the world. Section 5 is the conclusing section.

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[7] Susan D. Franck, 'Integrating Investment Treaty Conflict and Dispute Systems Design' (2007) 92 Minnesota Law Review 161, 171.

2. INVESTMENT ARBITRATION: NEW CHALLENGES

Preferential trade agreements pertaining to investment often contain an arbitration clause for the settlement of future disputes between parties. Investors are increasingly resorting to investor–state arbitration to challenge various unfavourable governmental decisions, including laws, regulations and administrative actions in all economic sectors. However, the municipal law may have its significance in investment arbitrations under treaties also. Under the Convention of the International Centre for Settlement of Investment Disputes (ICSID), article 42 expressly refers to the law of the host state over and above the rules of international law. More or less similar provisions are found in most bilateral investment treaties (BITs). As a general rule, the foreign investor will have to accept that the laws of the host state control the investment, and this will include any future changes in the domestic law as well.[8] However, the limitations provided by the treaty apply to such cases. This paper is an independent analysis of the scope and extent of arbitration under investment agreements and the implications of a possible convergence in the process of harmonization of international commercial arbitration law.

Less than two decades ago, this form of international arbitration was rarely used to settle disputes between foreign investors and host states. Now it is used more regularly, and the number of cases is increasing quickly. It has become common for states to agree to arbitration through different kinds of treaties, municipal legislation or the specific contracts they negotiate with foreign investors.[9] In general, it

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[8] See Andrea Kupfer Schneider, 'Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations' (1999) 20 Michigan Journal of International Law 697, 717, stating that investors who are "concerned with the potential bias, inefficiency, or unfamiliarity of foreign courts" are likely to prefer the investor–state arbitration regime.

[9] Susan D. Franck, 'Empiricism and International Law: Insights for Investment Treaty Dispute Resolution' (2008) 48, Virginia Journal of International Law,767.

is left to the investor who brings a claim against a host state to choose the method of arbitration from the options specified in the individual treaty. This will decide whether the arbitration will be conducted under the supervision of an arbitral institution and how it will be done.[10] Investment treaties most commonly allow the investor to settle the dispute under the Rules of the ICSID and the United Nations Commission on International Trade Law (UNCITRAL).[11] The UNCITRAL Rules, which are the most popular rules governing arbitration are not attached to a particular arbitral institution. Unlike the ICSID Rules, UNCITRAL itself does not administer dispute settlement but only establishes rules for the effective settlement of an investment dispute.[12] Many host states and trade organizations are sceptical about the mode of conduct of investor–state arbitration, and are demanding substantial changes in the international law and policy regarding the

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[10] Malcolm J. Rogge, 'Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of Forum Non-Conveniens in In Re: Union Carbide, Alfaro, Sequihua, and Aguinda' (2001) 36 Texas International Law Journal 299, 314, where the author says that "[g]overnments in both rich and poor nations compete in a race to the bottom to attract needed foreign investment". See also, Dinah Shelton, Remedies in International Human Rights Law 221–23 (Oxford University Press 1999) and, Frank I. Michelman, Property, 'Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation Law" (1967) 80 Harvard Law Review 1165, 1168–69.

[11] Eva Horvath, 'A Handy Tool for the Settlement of International Commercial Disputes' (2008–2009) 27 Penn State International Law Review 783, 787.

[12] In investment arbitration, often investors choose one arbitrator, and the government chooses the other. However, the presiding arbitrator is selected in a different way. The ICSID Convention allows the parties to agree on the selection of the presiding arbitrator. In the absence of such an agreement, the Convention stipulates a default mechanism. See, International Convention on the Settlement of Investment Disputes between States and Nationals of Other States [hereinafter referred to as ICSID Convention], art. 37(2)(b). In ad hoc arbitrations under UNCITRAL, the party appointed arbitrators can choose the chair. See, UNCITRAL Arbitration Rules art. 7(1).

same.[13] Issues of general concern are the lack of transparency in investment arbitration proceedings, the absence of impartiality and independence of arbitrators, the certainty and consistency of the interpretation of the term "right to development" vis-à-vis human rights, and the enormous costs involved in arbitration.[14]

2.1 Transition from Commercial to Investment Arbitration

The global initiative of harmonizing commercial arbitration law has added momentum to the development of the institutional model of arbitration in many countries across the world. Significant issues such as the proper balance between judicial intervention and judicial restraint in arbitration matters, neutrality of arbitrators and providing wide interim powers to arbitrators are gaining attention amongst the various stakeholders in arbitral regimes. On the specific issue of judicial intervention, it is pertinent that there is a right balance struck with judicial restraint. The transition from a purely commercial arbitration to investment arbitration inevitably demands certain improvements in the outcome in general, and in the arbitral proceedings in particular. The new UNCITRAL rules in relation to the transparency of the arbitration process support this argument.[15] Since the lack of transparency had been the main

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13 M. Sornarajah, 'Power and Justice: Third World Resistance in International Law' (2006) 10 Singapore Year Book of International Law 19, 32. The author suggests that there is no empirical foundation that investment treaties achieve their purported objectives.

14 A.F.M. Maniruzzaman, 'Modernisation of International Arbitration Law in the Age of Globalisation: A Bangladesh Perspective' (2004) 5 International Company and Commercial Law Review 132. See also The World Bank, World Development Report 2005: A Better Investment Climate for Everyone where the World Bank suggests that governments might provide fiscal incentives (like tax concessions or subsidies), improve domestic infrastructure, promote a skilled labour force, establish agencies to promote foreign investment, improve the regulatory environment, or enter into international agreements.

15 The UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration, which came into effect on 1 April 2014, comprise a set of procedural rules that provide for transparency and accessibility to the public in treaty-based Investor–State arbitration.

cause both of misunderstanding and of hostility between parties, these rules aim at providing a fair and equal platform for parties coming from different legal and cultural backgrounds. Though arbitration has become a global technique for the resolution of commercial disputes in general, yet there are some fundamental differences in the assessment of claims by parties with respect to a purely commercial arbitration and investment arbitration. The existence of conflicting interests in private and public spheres adds to this problem. On the other hand, the conventional idea of investment arbitration is that the host states have been enjoying a large amount of freedom in determining the regulatory autonomy granted to them. As a result, the investors often find it difficult to establish their legitimate claims based on the intransigent approach being taken by the host government. Thus, the primary duty of an arbitral tribunal dealing with investment disputes is to find the right balance between public international law and its frequent interface with the regulatory powers guaranteed under the State's Constitution. The varying nature of domestic law perspectives on investment treaty arbitration has been under debate for quite some time.

Of late, these concerns have only been intensified by the changing dimensions of international investment law and the trade negotiations of agreements like the Transatlantic Trade and Investment Partnership (TTIP). This establishes the fact that the regulatory standards for enhancing foreign direct investment (FDI) in the European region have undergone a major shift in the recent past. As a remedy to the existing problems, sustainable development impact assessments are being projected as a potential tool for the European Union (EU) in measuring the tensions between international investment protections and sustainable development objectives. It assumes significance in the light of the fact that it is a practice already established and proved in many trade-related negotiations to promote better cooperation between parties. The integration of environment impact assessments in International Investment Agreements (IIAs) also acts as a crucial aid to help arbitral tribunals to ensure fast compliance with governmental norms. This is an essential task to be performed while interpreting the protective measures granted to foreign investors to maintain the trade standards driven by environmental considerations. Through this mechanism of

fair treatment in investment treaty arbitration, independent tribunals make certain that the right balance is struck between the private rights of investors and public interest.[16] At this juncture, one may find that there exists a fundamental dilemma in ascertaining the true nature of investment arbitration and the variations it assumes from that of commercial arbitration. For example, the protection being offered to human rights under the purview of investment arbitration may create obstacles for investment arbitrators. This is probably because of the fact that a majority of arbitrators have a private or commercial law background rather than public law or public international law. Consequently, there is always a tendency to see international human rights as a conceivable cause of political disturbances and intrusion into their "purely legal," autonomous field, with its ground rules being determined by neo-liberal thought.[17]

As distinct from commercial arbitration, there are different ways of approaching this problem. Once a tribunal has before it the standard human right rules, it must decide when and how the application of these rules affects the private rights of parties. More specifically, the question to be ascertained here is whether the implications of "fair and equitable treatment" when properly understood include a balancing of obligations emanating from human rights against the State's obligations to its people in general. The harmonization of the host state's obligations under the two regimes demands that it shall be weighed against investor rights under BITs. Usually, this will be a tough exercise, and often readiness to comply with both sets of obligations will

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16 Mehmet Toral and Thomas Schultz, 'The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations' in Claire Balchin, Kyo Hwa Chung, et al.(eds), The Backlash against Investment Arbitration: Perceptions and Reality (Kluwer Law International 2010)

17 For differing views on the effect of neo-liberal thinking on the international investment regime, see K.J. Vandevelde, 'Sustainable Liberalism and the International Investment Regime' (1997–1998) 19 Michigan Journal of International Law 373; M. Sornarajah, 'Toward Normlessness: the Ravage and Retreat of Neo-liberalism in International Investment Law' in KP Sauvant (eds). Yearbook on International Investment Law and Policy (Oxford University Press 2010).

be practically impossible. At this point, the most feasible way out is to judiciously ascertain the policy motivations upholding human rights on the one hand, and investor rights on the other.[18]

Further, treaty obligations under international investment agreements generally address the issues pertaining to cross-border investments and particularly, the protection, promotion, and liberalization of FDI. The enduring "public–private" divide between those who argue for public interests through human rights and those who defend the established practice of autonomy of international investment law is ever increasing. Hence the latest developments in international investment agreements would be beneficial to the needs of the trading community only through diverse means of incorporating human rights norms within the investment treaty framework, as the case may be. This can be done in a number of ways such as,

(i) broad provisions on the governing or applicable law in investment treaties may also include human rights norms as "any relevant rules of international law applicable",[19]
(ii) through the incorporation of specific human-rights-based provisions in the investment agreement itself,[20] and

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[18] In this direction, a report of the (former) UN High Commissioner on Human Rights submitted in 2003 had rightly stated that while human rights are "fundamental" to human dignity, investment rights are "instrumental" to the achievement of certain policy objectives, which presumably are not indispensable for human dignity Report of the High Commissioner for Human Rights, Human Rights, Trade and Investment, E/CN/4/Sub. 2/2003/9, 2 July 2003, ¶ 24.

[19] See similar or identical language in the ICSID Convention, art. 42(1); North American Free Trade Agreement (NAFTA), art. 1131; Energy Charter Treaty (ECT), art. 26(6); Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement, art. 40(1).

[20] For example, since 2010, Canada has been including "Voluntary Corporate Social Responsibility" as part of its BIT regime. See also, 2004 Canada Model BIT, art. 11 (Health, Safety and Environmental Measures); Similarly, art 12 (Investment and Environment) and art 13 (Investment and Labor) of the 2012 US Model BIT include language of protection extended to environment and labour issues as compared to the 2004 US Model BIT.

(iii) through the interpretation of investment terms or concepts using human rights jurisprudence or treaty standards on the basis of article 31(3)(c) of the Vienna Convention on the Law of Treaties.[21]

For any country to enjoy a stable economy, it must ensure legislative and administrative regulations in the nature of protective measures to sustain the free flow of FDI. This shall be further supported by an investor-friendly trade environment, and certainty and finality of dispute resolution mechanisms including arbitration. Since investment treaty arbitrations largely involve issues directly related to policy decisions of the government in the State, the interest of the public may at times be jeopardized while protecting the rights of foreign investors. On the other hand, commercial arbitration essentially deals with issues of private rights of contracting parties. The general notion that investment arbitration is quite different from commercial arbitration as the former contains issues of public interest and it may not be legitimate to have such matters decided in a private forum is slowly fading away as ascertained by the recent developments in international investment law. In this direction, the application of the UNCITRAL transparency rules in investment arbitration reflects the growing acceptance of independent investor–state arbitration. However, it is an undeniable fact that the ICSID system has yet again been followed in the investment chapters of recently concluded trade agreements such as the CETA with Canada[22] and the EU–Singapore FTA[23] and the TPP with the United States.[24] The latest proposal for investor–state dispute resolution issued by the European Commission in connection with the TTIP suggests the formation of an

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[21] B. Simma and T. Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in C. Binder, U. Kriebaum, A. Reinisch, and S. Wittich (eds) International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer ((Oxford University Press 2009) 678–707

[22] Comprehensive Economic and Trade Agreement.

[23] Free Trade Agreement between the European Union and Singapore.

[24] Trans Pacific Partnership.

international investment court. However, inspired by the widely accepted WTO dispute resolution model, it still foresees a likely role for the ICSID Rules in the amended treaty regime.[25] Regarding the activities of the WTO, dispute resolution has been identified as the major component. A dispute arises when a government party to the WTO agreement thinks that something exists to believe that another member government is violating an agreement or an obligation that it has made in the WTO. It is an accepted fact that since its inception, the WTO has been recognized as the provider of one of the most frequently used international dispute settlement mechanisms in the world.[26] It reinforces the fact that the success of any kind of dispute settlement mechanism depends on the compatibility of the nature of the dispute with the technique to which it is submitted for resolution. Similarly, another agreement that aims to make investor–state dispute settlement transparent is the TPP.[27] There is a provision in the TPP for making the transcripts of hearings publicly available to ensure transparency in the arbitration proceedings. This unique step has been introduced to overcome the criticism that there is a general lack of transparency in the investor–state dispute settlement process.

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[25] However, public opposition to the TTIP, and to investor–state arbitration in particular had made the European Commission partially interrupt its trade negotiations with the United States in order to conduct a public consultation on the investment aspects of the TTIP. Ever since, investor–state arbitration has remained one of the most controversial parts of planned trade agreements. Most recently, the European Commission tabled a TTIP proposal to set up a permanent investment court that would replace the system of ad hoc investor–state arbitrations.

[26] Since 1995, over 500 disputes have been brought to the WTO and over 350 rulings have been issued.

[27] Trans-Pacific Partnership. The United States has recently pulled out of the 12-Nation Trans Pacific Partnership that had been acknowledged as the main economic pillar to boost trade in the Asia–Pacific region to counter China. Its other signatories are Australia, Vietnam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Brunei. They together represent 40 percent of the world economy.

It is worth examining here as to what constitutes FDI in the commercial context. The legal framework for the protection of FDI requires an agreement as to what exactly constitutes FDI. There is no universally accepted definition of what constitutes FDI. However, judicial decisions suggest that FDI refers to a commercial act whereby a person or entity from one country deploys substantial resources from that country to another country in order to establish commercial operations. This would further help to acquire income-generating tangible assets in the foreign country and to take effective control of or have a significant degree of influence over the management of such operations or assets with the expectation of obtaining a return on such investment.[28] These characteristics of trade constituting FDI have been widely accepted amongst the international arbitral community irrespective of the regional differences that may hover on the surface. In many developing countries, the national arbitration law also makes favourable provisions for the smooth conduct of international commercial arbitration, which is more desirable to foreign investors. The task of consolidation of domestic arbitration law encapsulates a broad definition of "international arbitration" as including any arbitration that the parties have explicitly agreed to treat as international arbitration by way of an arbitration agreement. This also stipulates the condition that the consequent arbitral awards shall be capable of enforcement under the New York Convention, 1958.[29] Similarly,

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[28] Salini Costruttori S.p.A. and Italstrade S.p.A. v Morocco (ICSID Case No. ARB/00/4), Decision on Jurisdiction of 23 July 2001. 42 ILM 609 (2003). Hence, for a venture to be classified as an FDI, there must be the expectation of a relationship of a certain length of time between the foreign investor and the state, the regularity of profits and returns, assumption of risks by one or both parties, and a substantial commitment by the investing party in a venture or project that would normally have significance for the development of the host state.

[29] For example, in India, the Arbitration and Conciliation Act of 1996 in section 2 (f) defines international commercial arbitration. Similarly, in Nigeria, the Arbitration and Conciliation Act (CAP. A18 L.F.N, 2004), in section 56(2)(d) defines international arbitration to include any arbitration that the parties have expressly agreed in the arbitration agreement to treat as international arbitration.

countries in the Asian and African region have established many regional and international arbitration institutions to promote international commercial arbitration in general and investment arbitration in particular. As regional hubs for the settlement of international commercial disputes, these arbitration centres also act as catalysts promoting the flow of FDI into these regions. This will give foreign investors the opportunity to determine the mode of settlement of disputes that may arise out of their investments without resorting to conventional litigation in domestic courts. However, the expectation that such arbitration will reliably and efficiently protect and enforce the rights of foreign investors and their investments may not always be fulfilled. It is also an irrefutable fact that such regional arrangements supported by domestic laws do not usually afford any additional protection to foreign investors, and they rarely incorporate any of the protection standards established by customary investment law.

Bilateral investment treaties refer to mutual agreements entered into between two countries to protect the interests of private investors and corporations from one country in another country. It provides for adequate protection of the foreign investment and security, and protection is extended only to investors who are nationals of countries whose BITs are mutually enforceable. On the other hand, Multilateral Investment Treaties (MITs) are transnational investment agreements entered into jointly by more than two states. Multilateral investment treaties are similar to BITs in many ways, but the parties have limited obligations inter se, to the extent that they have negotiated certain reservations or choices. The common feature of BITs is that the parties provide reciprocal protection and establish favourable conditions for investments by investors of contracting states. The BITs postulate a definition of what would be interpreted as an investment, and the reciprocal standards of protection that investors would be entitled to in the contracting states. There are some common standards of investment protection found in BITs viz., national treatment, most-favoured-nation clause, fair and equitable treatment, free and unrestricted transfer of funds out of the host country, no expropriation without ensuring adequate compensation, etc. Besides these protective requirements in BITs, they often incorporate provisions that facilitate the resolution of disputes in an

amicable and efficient manner. Hence, the treaty often provides foreign investors with an avenue to seek a remedy in forums outside the administrative control of the country to safeguard their foreign investment. Various investment treaties contain multiple conditions on which a dispute between the parties to an investment agreement can be referred to arbitration. However, it is pertinent to note that an investment treaty may not necessarily make a direct suggestion for a specific arbitral institution or arbitral rules to be acted upon in a given case. What it generally guarantees an investor is the right to initiate proceedings for the resolution of disputes by way of ordinary court litigation in the host country or through the mutually agreed upon mechanism of arbitration. This step is often resorted to against any detrimental measure implemented by the government machinery in the host state, or against the non-implementation of certain measures beneficial to the investor, which the host state should have implemented. It is applicable, regardless of any positive steps taken by the host state in the direction of implementation of other treaty provisions in the interest of investors in a given case. At present, predominantly disputes concerning foreign investments between a contracting state and an investor from the other contracting state are being resolved through investor–state arbitration. Investors invoke these dispute resolution clauses to institute arbitral proceedings at the ICSID[30] or by means of an express agreement suggesting international commercial arbitration with the support of any other institutional mechanism as the case may be.[31]

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[30] The ICSID is a fully integrated, self-contained arbitration institution that provides standard arbitration clauses, rules governing arbitration proceedings, venue, financial arrangements and general administrative support including the appointment of arbitrators for the parties.

[31] For eg: UNCITRAL also provides for arbitration rules for the resolution of investment disputes.

2.2 Interface between Commercial Arbitration and Investment Arbitration

The basic foundation of commercial arbitration is an arbitration agreement entered into by the parties to a commercial contract, whereas investment arbitration is generally based on an investment treaty, which may be multilateral or bilateral in nature. The investment arbitration may stem from the host state's domestic investment law that provides for protection of foreign investors. Under certain special circumstances, an investment agreement may form the basis of investment arbitration. As explained above, BITs are international agreements between countries which confer companies and individuals special economic rights and legal protections when they invest in a foreign country generally called the host state. BITs specify the terms and conditions for diverse investments in one country by private corporations and individuals from another country.[32] The primary purpose of BITs is to promote investment in the host state. There are over 2,000 BITs in existence today, affecting numerous countries and investors around the globe.[33] Drawing a clear line of difference between commercial and investment arbitration may sometimes be difficult. The disputes often relate to a contract between a company formed by a foreign investor on the one side and a state enterprise on the other side. Such a contract will also contain what one would treat as a "normal" arbitration clause referring to the resolution of disputes under the rules of an international institution dealing with commercial arbitration. However, a meticulous analysis shows that it is actually an investment dispute. In today's world of frequently occurring arbitrations, the most observable difference is that between the common law system and the

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[32] Susan D. Franck, 'Empiricism and International Law: Insights for Investment Treaty Dispute Resolution' (2008) 48 Virginia Journal of International Law 767.

[33] Multilateral *agreements*, like NAFTA and the Central American Free Trade Agreement (CAFTA) function in the same way as BITs, but provide investment protection on a multilateral basis.

civil law system of continental Europe. Both these legal systems have been widely adopted by many other states throughout the world.[34] Coming to the issue of commercial arbitration at the state level, the various arbitral tribunals generally maintain the traditional particularities and cultural differences of both systems.[35] In the international arena, convergence between common law and civil law is more visible in investment arbitration than in commercial arbitration.[36]

In commercial arbitration, divergences in a pluralistic order become particularly relevant, because most international institutional arbitration rules provide that the tribunal has to take into consideration the relevant trade usages and customs which may be diametrically opposite in different countries and regions of the world.[37] The diverse legal culture supported by individual constitutional frameworks has a direct impact on investment arbitration due to their practical application.[38] In different national jurisdictions, commercial and investment arbitration operate on various legal parameters, and there exist many deviations regarding governmental policies as well. As far as public international law is concerned, the only significant treaty for commercial arbitration is the New York Convention. It deals

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34 Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521, 1587–610.

35 Alan Redfern, 'Martin Hunter et al., Law and Practice of International Commercial Arbitration' (Sweet & Maxwell 2004). 202

36 John Thibaut and Laurens Walker, 'Procedural Justice: A Psychological Analysis' (Lawrence Erlbaum 1975) 94 (arguing that the dispute resolution process strongly influences the disputants' level of satisfaction with the ultimate resolution); Tom R. Tyler and Steven L. Blader, Cooperation in Groups: Procedural Justice, Social Identity, and Behavioral Engagement (Psychology Press 2000) 77–80; Tom R. Tyler, Why People Obey the Law (Princeton University Press 2006) 107–08 (observing that in all types of dispute resolution, people are far more likely to obey the law if they are confident that decision-making procedures are fair).

37 For example, the ICC Rules, article 21.2.

38 Jacques Werner, 'The Trade Explosion and Some Likely Effects on International Arbitration' (1997) 14(2) Journal of International Arbitration 5, 9–10; B.M. Cremades and David J.A.Cairns, 'The Brave New World of Global Arbitration' (2002) 3 Journal of World Investment 173, 208.

with the recognition and enforcement of foreign arbitral awards, whereas the other conventional instruments directly relating to public international law play no significant role in the commercial arbitration proceedings being conducted worldwide today.[39] In contrast, treaties of public international law provide the major legal basis and fundamental framework for investment arbitration. As already mentioned, there are many bilateral instruments and other multilateral treaties such as the ICSID Convention, the Energy Charter Treaty, and regional instruments such as TTIP, NAFTA, CAFTA, are in operation today.[40] The most recent one in the series viz., the Trans-Pacific Treaty with 12 members is viewed as an important free-trade agreement between countries in the transpacific region.[41] The final proposal was signed on 4 February 2016 in Auckland, New Zealand, concluding seven years of negotiations. Presently, it cannot be ratified due to U.S. withdrawal from the agreement on 23 January 2017.[42]

In Europe, EU Law may be relevant both in commercial and investment arbitration, though in different ways.[43] The Lisbon treaty plays an important role in the harmonization process of international law in the European region.[44] For commercial arbitrations, the frequent use of mandatory rules

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[39] See Albert Jan van den Berg, 'Striving for Uniform Interpretation in Enforcing Arbitration Awards under the New York Convention: Experience and Prospects' (United Nations Publication 1999) 41, 44

[40] UNCTAD, Dispute Settlement: Investor–State (United Nations 2003) 32–34; See also Thomas Wälde, ,'Investment Arbitration under the Energy Charter Treaty: From Dispute Settlement to Treaty Implementation' (1996) 12 Arbitration International 429, 434–36.

[41] Hereinafter referred to as TPP.

[42] Supra n. 27.

[43] The Treaty of Lisbon (initially known as the Reform Treaty) is an international agreement, which amends the two treaties which form the constitutional basis of the European Union. The Treaty of Lisbon was signed by the EU member states on 13 December 2007 and entered into force on 1 December 2009. It amends the Maastricht Treaty (1993), also known as the Treaty on the European Union, and the Treaty of Rome (1958), also known as the Treaty establishing the European Community (TEEC). The Treaty of Lisbon renamed the Treaty of Rome, the Treaty on the Functioning of the European Union (TFEU).

[44] Ibid.

of public policy becomes pertinent. The expanded scope of the definition of the term 'public policy' has often resulted in conflicting judicial interpretation. Some scholars opine that judicial review undermines the finality of arbitral awards and interferes with the integrity of the arbitral process while others believe that intervention of national courts only adds to the value of the final award.[45] When it comes to arbitration under the BIT's, the issue is far more critical as there is involvement of various social, political and environmental factors in it. The Lisbon Treaty has already initiated some major debates and deliberations regarding its conflicts with the existing regime of BITs and better prospects for the conclusion of new BITs in the future by EU Member States.[46] It is an accepted fact that arbitrations are successfully conducted under the aegis of different international arbitral institutions. Consequently, the cultural, legal and political differences would naturally get reflected in their institutional rules.[47] Though the litigating parties come from jurisdictions unrelated to the seat of arbitration, the arbitration agreement would usually stipulate a lex causae, i.e., the law governing the contract in question. This diversity of legal systems touching upon a dispute often raises questions of applicable law to various issues at different stages of the arbitral process. This is a gradual and continuing process, which will undeniably have the potential for ultimately promoting the harmonization of international law.[48] At the same time, some share the concern that certain kinds of disputes involving public law and choice of arbitration would be facing a legitimacy crisis, as "private tribunals consider legal issues that impact the international economy, public policy and

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45 M. Sornarajah, 'The Climate of International Commercial Arbitration' (1991) 8 Journal of International Arbitration 47. See also, Hans Smit, 'Comments on Public Policy in International Arbitration' (2002) 13 American Review of International Arbitration 65, 67.

46 See UNCTAD, 'Investor–State Disputes Arising from Investment Treaties: A Review' (United Nations 2005).

47 J.G. Merrills, *International Dispute Settlement* (Cambridge University Press 1998).

48 Kirk Simmons and Scott McDonald, 'Using Investor–State Arbitration to Remedy Delays in the Court Enforcement of an International Commercial Arbitration Award' (2012) 15(3) International Arbitration Law Review 19.

international relations, but they do so in a vacuum."[49] This is aptly applicable to the disputes emanating from international investment contracts. The general view that the conventional mode of structural constraints often results in judicial outcomes based on strategic behaviour and new institutionalism assumes importance here.[50]

Thus, the domestic legal system plays a significant role in investment arbitration. In commercial arbitrations not governed by treaties such as ICSID or NAFTA, the rules of respective arbitral institutions assume greater significance. Such arbitrations are generally conducted under the rules of international arbitral institutions such as the International Chamber of Commerce (ICC), American Arbitration Association (AAA) or the London Court of International Arbitration (LCIA) which, in turn, have to take into account the mandatory law of the place of arbitration.[51] As a substantive law of arbitration, national law may become applicable in many ways. In investment agreements between the host state and the foreign investor, an express reference to the applicability of the substantive law of the host state is very common. Nonetheless, the scope and extent of its applicability differs from case to case. By and large, the application of such a choice of law clause will have to be interpreted to mean that the investor must follow the subsequent changes in the national law and policy.[52]

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[49] See for details, supra n. 35.

[50] Richard Lillich and Charles Brower, International Arbitration in the 21st Century: Towards Judicialization and Uniformity (Transnational Publishers 1994).

[51] Jeswald W. Salacuse and Nicholas P. Sullivan, 'Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46 Harvard International Law Journal 67. See also; Winston Stromberg, 'Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes' (2007) 40 Loyola of Los Angeles Law Review 1337, 1367 (observing how tribunals may rely on "testimonial summaries prepared by the presiding arbitrator and presented to the witness for approval and signature").

[52] Andreas Lowenfeld, 'The Party-appointed Arbitrator in International Controversies: Some Reflections' (1995) 30 Texas International Law Journal 59, 65, (discussing how party-appointed arbitrators must carefully consider the representations of the appointing party and also serve as translators of the parties' legal culture). See also; Charles N. Brower and

However, in actual practice, this rule often results in conflicts of interests. The investor may often claim that that the host state modified its domestic law to create an advantageous situation with the ulterior intent to undervalue the contractual rights of the investor.[53] This may get further exemplified in the direct legal expropriation procedures or other changes in the economic laws of the country. There may also arise situations in which the economic agreements between the state enterprises and individual investors get affected by the amendments in the existing law or government orders which either amend the bargaining position of its state enterprise to the detriment of the investor or prevent the state enterprise from fulfilling certain of its contractual obligations. Often such a step is justified by referring to the state's acts as force majeure or unavoidable accidents.[54] However, in investment arbitrations under treaties, national law may have its significance. For example, in ICSID arbitrations, article 42 of the Convention explicitly refers to the law of the host state besides the rules of international law. More or less similar provisions in varying degrees are found in most BITs. As a result, the foreign investors will normally have to accept the supremacy of national law and domestic policies relating to investment.[55] The fact is that it will have a continuing effect on the investment agreements encapsulating the contractual interests of the state and foreign parties. Nevertheless, the application of prospective changes in the national law and policy is subject to the limitations provided by the investment treaty.

Lee A. Steven, 'Who Then Should Judge? Developing the International Rule of Law under NAFTA Chapter 11' (2001) 2 'Chicago Journal of International Law' 193; Ian A. Laird, 'NAFTA Chapter 11 Meets Chicken Little (2001) 2 Chicago Journal of International Law 223.

53 Amr A. Shalakany', 'Arbitration and the Third World: A Plea for Reassessing Bias under the Spector of Neoliberalism' (2000) 41 Harvard International Law Journal 419, 430 (arguing that international arbitration is "…not per se biased on an institutional level—that is, it is not inescapably predisposed to particular political interests or agendas" from either the developed or the developing world).

54 Susan Franck, 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50(2) Harvard International Law Journal 435.

55 M. Sornarajah, 'The Settlement of Foreign Investment Disputes'(Kluwer Law International 2001) 19–20. See also; Jan Paulsson, Arbitration without Privity (1995) 10 ICSID Review 232, 232–33.

As a matter of practice, arbitration clauses forming a part of an investment treaty usually call for a dispute resolution technique supported by the terms and conditions of that investment treaty. On the other hand, commercial arbitrations may be either ad hoc or institutional. As mentioned earlier, in commercial arbitration, the parties while exercising their freedom of contract may opt out of a formal litigation before the ordinary courts and select a forum for arbitrating their disputes amicably. Earlier, the rules of only a limited number of non-governmental institutions contained provisions for investment arbitration, and only the UNCITRAL Rules were frequently incorporated as an alternative arrangement in investment treaties.[56] However, today almost all the major international arbitral institutions deal with the rules of investment arbitration, and one can find investment arbitrations under the rules of the ICC, AAA, LCIA, Singapore international Arbitration Centre (SIAC), and other national arbitration institutions originally constituted for promoting only commercial arbitrations.[57] They play a major role in the settlement of investment disputes, especially when there arise situations where states are reluctant to be a party to the ICSID. Necessarily, the states would rely on the arbitration rules of other institutions for resolving their disputes with foreign investors.[58]

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[56] Charles N. Brower and Lee A. Steven, supra note 53 at 196 (demonstrating that "the fundamental reason that the great majority of modern investment protection treaties have opted for international adjudication is that domestic courts are often in fact, and just as important, usually are perceived to be, biased against alien investors.").

[57] Gary B. Born, International Arbitration and Forum Selection Agreements: Drafting and Enforcing 67–68 (Kluwer Law International 2013).

[58] Venezuela denounced the ICSID Convention on 24 January 2012, and thus they have to select other arbitration rules for their disputes with foreign investors. In fact, Venezuela had already done so earlier. An example is the ICC Award in the Exxon Mobil v. Petroleos de Venezuela SA, ICSID CASE NO. ARB/07/27 case, which granted damages worth US$ 1.6 billion against Venezuela based on a choice of the ICC Rules in 2007. Recently in 2017, a part of the award was annulled by ICSID panel making it to a reduced amount. Also, for example, India is not a party to ICSID and parties contesting investment disputes with India often resort to Rules of major international arbitral institutions.

As stated earlier, the success of any dispute resolution depends on the compatibility of the nature of the dispute with the technique to which it is submitted for a decision. The global acceptance of arbitration as the most suitable form of dispute resolution in transnational business or trade is a proven fact. It is assumed that international arbitration may be preferable to court proceedings as the outcome is more predictable.[59] While the choice of final and binding dispute settlement mechanisms may vary from a strategic perspective, from a systemic point of view, arbitration has certain unparalleled merits. Parties have a significant degree of autonomy, and therefore control, over the resolution of their dispute. Therefore, the advantage of arbitration over other forms of settlement of disputes is that the parties can select judges of their own choice, confidence, and preference.[60] Arbitration includes the ability to choose arbitrators with specialized knowledge, the venue, substantive and procedural laws and standards, and the language. The ability to make these choices translates into a neutral and flexible system of dispute resolution where parties can adapt the rules and procedures to their particular needs and requirements. Having been influenced by this newly gained freedom, the major players in international trade are now focusing more on these informal ways of settlement of disputes rather than opting for the conventional mode of litigation before domestic legal forums. It is worth noting here that the general approach of a given legal system to party autonomy in dispute resolution depends on what limit it imposes on the parties' freedom to contract out of the state court system and on the nature of disputes which may be the subject matter in a given case.[61] In this context, it is pertinent to note that in the last decade there was a constant

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59 Shabtai Rosenne, The Perplexities of Modern International Law (Martinus Nijhoff Publishers 2004). 109

60 Simon Greenberg, Christopher Kee and J. Romesh Weeramantry, International Commercial Arbitration: An Asia-Pacific Perspective (Cambridge University Press 2011) 36

61 Jeremy P. Carver, ,'The Strengths and Weaknesses of International Arbitration Involving a State as a Party: Practical Implications' (1985) 1 Arbitration International 179, 180.

increase in the number of disputes that could be subjected to arbitration and more interestingly, a major chunk of those disputes covered investment law. On the other hand, there is uncertainty over the relevance or irrelevance of norms external to international arbitration law within party-dominated arbitration procedures. Notwithstanding the substantive similarity of institutional rules governing international arbitration provisions, often arbitral tribunals deliver inconsistent decisions on the meaning of international law norms. It is also an undisputed fact that the trade interests of the international community demand certainty and finality in decisions pertaining to international commercial disputes. Taking into consideration the diverse fields of commerce such as construction, production, service, finance, insurance or transport, it is apparently crucial for the parties to be able to choose a forum of arbitrators well acquainted with such subjects.[62] To some extent, in investment arbitration, the situation is different. Bilateral, as well as multilateral investment treaties, encompass a limited number of protective measures with unique characteristics.

Usually, they include similar provisions dealing with measures such as expropriation, fair and equitable treatment, discrimination and contracts by umbrella clauses.[63] In this scenario, the special expertise required from an arbitrator in these major areas of public international law assumes greater significance than in a purely commercial dispute. At the international level, various factors surrounding a legal system

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[62] See Pierre Lalive, 'On the Neutrality of the Arbitrator and of the Place of Arbitration' in Claude Reymond and Eugène Bucher,(eds) *Swiss Essays on International Arbitration* (Claude Reymond and Eugène Bucher, eds. Schulthess Publisher 1984) 23, 25–26 (The author has commented on the importance of the perceived neutrality of the presiding arbitrator).

[63] M.Sornarajah, 'Power and Justice in Foreign Investment Arbitration' (1997) 14(3) Journal of International Arbitration 103, 117. See also; Rajesh Babu, 'International Commercial Arbitration and the Developing Countries' (2006) 4 AALCO Quarterly Bulletin 385, 386–87 and 399. (Author stating that developing countries are using and complaining less about international arbitration,but arguing that the developing world should "dismantle the existing [arbitration] structure which is based on doctrines associated with neo-colonialistic efforts aimed at the preservation of economic dominance").

such as its socio-political environment, economic aspirations of the trading community, the professional background of the entities or persons involved and the kind of protection offered by the domestic courts to various commercial agreements have a strong bearing on the legal framework and implementation of an alternative dispute resolution mechanism.[64]

3. TRANSPARENCY IN INVESTOR-STATE ARBITRATION

Since the very beginning, foreign investment has been essentially regulated by international law, and domestic law has a very little role there. As a result of globalization and the resultant cross-border trade, international investment law has developed as an independent discipline in its own right. In the recent past, the acceptance of investment arbitration by the trade community has added momentum to the growth of international investment law as a multi-faceted subject. Thousands of BITs between states and several other multilateral investment treaties have contributed to the development of international investment arbitration as a practical means of dispute resolution.[65] The vital issue of transparency in international investment arbitration is also gaining worldwide attention.[66] This is more frequently addressed in matters pertaining to the standard of protection in international investment agreements, the concept of

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[64] Catherine A. Rogers, 'The Arrival of the "Have-Nots" in International Arbitration' (2007) 8 Nevada Law Journal 341, 356–57. See also, Eric Neumayer and Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment in Developing Countries? ' (2005) 33 World Development 1567.

[65] Tony Cole, The Structure of Investment Arbitration 1 (Routledge 2013).

[66] DIMITRIJ EULER, MARKUS GEHRING ET AL., TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION: A GUIDE TO THE UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR–STATE ARBITRATION 87 (Cambridge University Press 2015).

jurisdiction and competence in international investment arbitration including the notions of recognition, enforcement, and execution of the arbitral award.[67] Investment arbitration also deals with contemporaneous issues regarding the future of intra-EU BITs and free trade agreements like the TPP.[68] Infact, this treaty-based method forms part of the legal developments in international law to protect foreign investments by multinational actors and to control any misconduct on their part. This aims at ensuring effectiveness of bilateral and regional investment treaties. The reverse flow of investments from fast-growing economies such as China and India has gained attention on account of the changing dimensions of the regulatory mechanisms of market-oriented commerce.[69] International investment law has been evolving. At the international level, a large number of states continue to enter into investment treaties, and there is a rapid increase in the types of investor–state arbitration disputes. With the advent of investor–state arbitration in the last quarter of the twentieth century and its exponential growth over the last decade, new levels of complexity, uncertainty and conflicts are still emerging.[70] Apart from this, the various actors in investment treaty arbitration are being faced with increasingly difficult issues due to the distinct procedure for the settlement of disputes and the unique character of the investment treaty regime.[71] The international trade community recognizes the

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67 The UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration is one of the most recent and innovative developments in international law.

68 Claude Reymond, The Channel Tunnel Case and the Law of International Arbitration (1993) 109 Law Quarterly Review 337, 341.

69 M. Sornarajah, The International Law on Foreign Investment (Cambridge University Press 2010) 306–07

70 Chester Brown and Kate Mileshe, Evolution in Investment Treaty Law and Arbitration (Cambridge University Press 2011). 97

71 Howard Mann and Konrad von Moltke, NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor–State Process on the Environment (1999) International Institute for Sustainable Development, at 5–6 .(…suggesting that the "presumption behind the [investor–state arbitration] process is that foreign investors do not generally receive fair treatment in domestic courts in developing countries when complaining of a government action").

indispensability of a well-functioning system for settling investment disputes and the need for enhancing the legitimacy and functionality of investment arbitration.

The driving and dominant force of international investment arbitration stems from a number of factors. Democratic accountability and pro-investor bias are the two most important issues often addressed in investment arbitration. Competitive forces to sign investment treaties may shrink the domestic policy space and prove the increased investment flows obscure. Lack of flexibility in treaty obligations and absence of coordinated responses to changing economic circumstances may result in the renegotiation and termination of BITs, especially during periods of peak financial crisis.[72]As compared to commercial arbitration, pervasive secrecy and breach of confidentiality of arbitral proceedings followed by the conflict of interest often calls for effective rules governing the bona fide conduct of arbitrators. The traditionally proven advantages of commercial arbitration as a speedy, inexpensive and independent mechanism of resolution of disputes get reflected in the process of evaluation of public interest vis-à-vis private interests in investment arbitration as well. This is more evident in issues relating to the extent of protection afforded to shareholders in connection with denial of benefits clauses and the inter-relationship between regional law and BITs.[73] The domestic constitutional law generally imposes restrictions on international investment arbitration to avoid the flow of investment stained by illegal transfer of funds in violation of foreign exchange regulations. Thus, the future of investment arbitration depends largely on the interrelationship between the state and sustainable individual rights. Parties entering into economic agreements often include arbitration clauses in their contracts to ensure that any dispute can be resolved without recourse to expensive and time-consuming

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72 Michael Waibel, ‚The Backlash against Investment Arbitration: Perceptions and Reality'(Kluwer Law International 2010) 82

73 Jeswald W. Salacuse, 'Toward a Global Treaty on Foreign Investment: The Search for a Grand Bargain in Arbitrating Foreign Investment Disputes' (Stefan Michael Kröll and Norbert Horn eds., Kluwer Law International 2004) 68–70

litigation. Beyond its practical importance, international arbitration is worthy of attention because it involves a framework of international rules and institutions.[74] As a whole, the prominence of the study of international investment arbitration lies in the fact that in the contemporary world of changing economic dimensions, it has become a sophisticated mechanism for consensually dealing with international disputes. This with remarkable success provides a fair, neutral, expert, durable and efficient means for resolving complicated transactional problems. These rules have evolved over time, in multiple countries through the joint efforts of governments and large corporations. The role of domestic judicial forums in recognizing and enforcing arbitral awards is worth mentioning here.[75]

4. CONVERGENCE AND CONFLICT ISSUES IN THE PROCESS OF HARMONIZATION

When international arbitration first emerged as a new phenomenon in the 1960s and 1970s, a debate arose about the conflicts of different laws that might apply to the arbitral process. The harmonization of international commercial arbitration law and procedure continues to take place gradually. There has already been a plethora of international conventions, treaties, and agreements that have assisted in attempting to achieve harmonization of arbitration law and practice. This has further helped to shape international

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[74] Robert E. Hudec, 'The Judicialization of GATT Dispute Settlement in Whose Interest?: Due Process and Transparency in International Trade' (Proceedings of a Conference held at the University of Ottawa, Faculty of Law) (Michael M. Hart and Debra P. Steger eds., Centre for Trade Policy and Law 1992); See also John H. Jackson, William Davey et al., 'Legal Problems of International Economic Relations' (Thomson/West 2008) 12.

[75] Andrea Kupfer Schneider, 'Not Quite a World Without Trials: Why International Dispute Resolution is Increasingly Judicialized' (2006) 1 Journal of Dispute Resolution 119, 119–24 (arguing that certain inter-national disputes are increasingly judicialized).

commercial arbitration as the primary means for global organizations to resolve their disputes.[76] However, it is not very easy to overlook the underlying theoretical foundations upon which international commercial arbitration is founded and the impact this may have on the process of harmonization. It is these theoretical foundations, which continue to influence and dictate whether a municipal court and, therefore, a state adopts an interventionist or non-interventionist approach to international commercial arbitration.[77] The two most influential and competing theories of international commercial arbitration include the delocalization theory and the seat theory. The delocalization theory holds that international commercial arbitration should remain free from the constraints of national laws. In other words, it says that international commercial arbitration does not and should not have any connection to the legal mechanisms and controls of the seat of arbitration. The seat theory maintains that the parties to a dispute may determine how their dispute is to be resolved in accordance with the legal or public policy of the seat of arbitration or place of enforcement of the arbitral award. The litigating parties come typically from jurisdictions unrelated to the arbitral seat, and the differences between legal cultures get reflected in the dispute as well. This diversity of legal systems touching upon a dispute raises questions of the law applicable to various issues at different stages of the arbitral process. Generally the principles of private international law supplement the rules of choice of law in international commercial arbitration proceedings. This is a major deviation from investment treaty arbitration where the principles of public international law play a primary role in the settlement of investment disputes.

The very fact that international commercial arbitration is a consensual means of dispute resolution has called for the attention of the international trade community with regard to

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[76] Robert Wai, 'Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization' (2002) 40 Columbia Journal of Transnational Law 209, 217.

[77] Loukas Mistelis, 'The Arbitral Seat: Important Features and the Relevance of Law' (2012) 23 American Review of International Arbitration 407, 413.

the smooth enforcement of arbitral awards. The interface between commercial arbitration and investment arbitration assumes importance due to many other reasons. National arbitration laws, international conventions, and institutional arbitration rules provide a specialized legal regime for most international arbitrations. It has a binding effect only by virtue of a complex framework of national and international law. This legal arena enhances the enforceability of both arbitration agreements and arbitral awards. It seeks to insulate the arbitral process from undue interference of national courts.[78] At the same time, it is also necessary to have such interference on the part of the courts. Such a situation arises when there are questions as to the competency or jurisdiction of an arbitral tribunal. Parties to commercial contracts who want to use arbitration to resolve their disputes, therefore, take advantage of one of the flexibilities of arbitration to agree that the seat of the arbitration be a territory in which arbitrations are generally permitted to proceed unhindered by governments or domestic courts in that jurisdiction. Hence, different states have differing views on international arbitration, and it is common that the policy reasons behind the national approach relate to the need for minimal state control over arbitration. The interplay between international arbitration law and comparative law assumes greater significance since investment tribunals use the comparative method in their reasoning.[79] By fostering judicial dialogue amongst international courts and tribunals, legal transplants may constitute a key component to include natural rights considerations into international investment arbitration as well. International commercial arbitration law has now developed into an independent branch of study making it worthy of attention amongst the global trade community. As stated earlier, though commercial arbitration is different from ordinary court procedures, many a times, it is an undisputed

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78 Choi You, Vishnu Konoorayar, and Jaya V.S., 'International Commercial Arbitration in South Asia: A Comparative Study 113' (Korea Legislation Research Institute 2012).

79 Charles Brower and Stephan W. Schill., 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9 Chicago Journal of International Law 471, 473.

fact that the intervention of a court may become necessary to make it more effective. The "foreign jurisdiction" clause in international commercial transactions specifies that in the event of a dispute arising out of a contract, it shall be submitted to a specific forum in a given country and it shall be decided in accordance with the applicable foreign law. This clause is commonly found in investment contracts between foreign investors and the host state. Like in all other commercial arbitration proceedings, for all practical purposes, the final outcome in any legal framework for the protection of foreign investments also depends on the scope and extent of judicial intervention by courts in the host states. Based on the civil law principle of *pacta sunt servanda*, courts often show a predilection towards upholding private contractual obligations between parties in an international transaction. The increasing number of judicial pronouncements in relation to foreign investments and the associated right to seek a judicial remedy in a domestic forum substantiates this view.

5. CONCLUSION

This article has analysed the significant issues encircling the nature and scope of commercial arbitartion in general and investment arbitration in particular. The interrelationship between the two presents more of procedural similarities than the substantial differences.This will undeniably have the potential for ultimately promoting the unification of international arbitration law. Meantime, there may arise a concern that disputes involving public law and human rights would be facing a legitimacy crisis while private tribunals decide commercial disputes involving transnational principles of economic law.[80] With the party-dominated arbitration procedures, there may also arise situations where the tribunal refer to norms outside the international arbitration law. It is

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80 John Collier and Lowe Vaughan, The Settlement of International Disputes: Institutions and Procedures (Oxford University Press 1999).

also an undisputed fact that inconsistent arbitral awards create legal uncertainty and undermine the coherence of the international legal system. Nonetheless, with the striking similarity of rules of international institutions facilitating commercial arbitration across the globe, arbitral tribunals would certainly tend to give a congruous construction of the various norms in international trade law. The harmonization of arbitration law across the globe is further expected to impact and influence the varying demands of the international trade community engaged in both commercial and investment arbitration.