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TRANSNATIONAL ASPECTS OF FINANCIAL AND MERCANTILE LAW

Investment Rule Making and Good Governance in International Investment Arbitration	DR. ROSMY JOAN
India's Foreign Direct Investment Inflows: A Policy Assessment	JASMINE KAUR
Transnational Corporations as a Menace to Environmental Development	AYUSH VERMA
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PREFACE

This is the second issue of the sixth edition of RGNUL Financial & Mercantile Law Review. The objective of the law review is to better understand the laws regulating the activities related to trade and commerce in the markets of India and other South East Asian regimes. This issue of the law review intends to critically assess the recent dominant financial model of corporate law and governance and its contribution to the world economy. Many commentators argue that international law and national law are no longer adequate categories for the totality of "law" today, and offer an array of new concepts such as transnational law, global law, global legal pluralism, etc., to help us understand law in the global space. Since the introduction of the LPG Scheme, India has been very keen in removing the economic barriers and promoting the ease of doing business index.

The development of the "global society" - also referred to as "globalization" - brings about fundamental changes not only in the economy, in society, and in politics but also in the law. These changes affect the areas subject to legal regulation. With the increase in cross border trade and e-commerce, transnational aspects of commercial world have achieved an international perspective and gained considerable significance today.

The current issue has received papers from across the country along with a greater display of enthusiasm. The review makes for an interesting read and loves to hear your opinion on how to make it better. Please feel free to write in to us.

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INVESTMENT RULE MAKING AND GOOD GOVERNANCE IN INTERNATIONAL INVESTMENT ARBITRATION

Dr. Rosmy Joan[*]

ABSTRACT

This paper is about the role of the State in investment rule making, balancing the investor rights and the regulatory autonomy of the States, and thereby evolving good governance standards. This paper explores into how States could better define their treaty obligations, preserve more efficiently their sovereign prerogatives and ensure an appropriate level of accountability and responsibility of multinational companies. This paper argues that States shall be given an opportunity to resolve the issues at the domestic level to better reflect the values of good governance preceding the international investment arbitration. This paper also argues that States should be afforded with sufficient degree of regulatory flexibility to ensure good governance in pursuing policy objectives while they are expected to comply with good governance standards in their treatment of foreign investors. This paper views the model bilateral investment treaty as a powerful tool in the hands of the States to frame investment rules with clarity and certainty for good governance. This paper concludes that the Indian Model Bilateral Investment Treaty 2016 reflects the Indian style of investment rule making, for good governance balancing investor rights and the regulatory autonomy of the host State.

[*] Assistant Professor of Law, National Law University, Jodhpur (rosmyjoan@gmail.com)

1. INTRODUCTION

The question of how to balance the regulatory powers of the State with the rights of the individual in international investment dispute settlement is very pertinent for States to make good investment relations. There is still a long way to the development of a general theory, which reconciles the opposing positions of the State and the individual.[1] Host States are to be given space to pursue their sovereign policies, but they are expected to make good use of this space.[2] International investment treaties gradually come to be interpreted as requiring host States to maintain good governance standards in their dealings with foreign investors. Good governance implied firstly non-arbitrary and non-personalistic decisions by the State or consistent, predictable and stable policies. Good governance meant accountability of the State to the society. Lack of transparency, stability, predictability as well as the lack of effective remedies and enforcement mechanisms at a national level can now lead to a host State's liability in damages.[3]

Historically references to good governance, the rule of law and transformation of legal and bureaucratic culture in host States were sporadic and made predominantly in the context of justifications for the foreign investor's right to claim monetary damages directly against host States. Since its inception in early international investment treaties, the

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[1] Andreas Kulick, *Sneaking though the Back Door-Reflections on Public Interest in International Investment Arbitration*, 29 (3) ARBITRATION INT'L 435-51 (2013).
[2] Krista N. Schefer, *State Powers and Investor-State Dispute Settlement, in* THE ROLE OF THE STATE IN INVESTOR STATE ARBITRATION 19 (Shaheeza Lalani & Rodrigo Polanco Lazo eds., 2015).
[3] Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States Behaviour Some Doctrinal, Empirical and Interdisciplinary Insights*, *in* THE ROLE OF THE STATE IN INVESTOR STATE ARBITRATION 162 (Shaheeza Lalani & Rodrigo Polanco Lazo eds., 2015).

private right to damages has been justified by reference to broader objectives of the international investment regime.[4]

A string of arbitral awards including *Metalclad*, *Tecmed*, and *Occidental* awards proclaimed that transparency, stability predictability, consistency ought to be construes as elements of Fair and Equitable Treatment (FET). A failure to create and maintain a transparent, stable and predictable regime was found to be a sufficient ground for claiming compensation against the host State. Beyond arbitral jurisprudence there are also treaties that contain a host State obligation to create and maintain in its territory a legal framework apt to guarantee to investors the continuity of legal treatment.[5] Such provisions advance a programme of good governance that no State in the world is capable of guaranteeing at all times.[6]

This paper examines the issues pertaining to governmental regulation and investor rights in ISDS and analyses the role of the State in investment rule making balancing the investor rights and the regulatory autonomy of the States for good governance.

2. THE BACKGROUND

All States seek to attract foreign direct investment for economic development. For this purpose, governments have liberalized their national regulatory frameworks for foreign investment and have also established investment promotion agencies to attract foreign direct investment actively. Corporations, which are simultaneously vital instruments for

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[4] Alan O. Sykes, *Public versus Private Enforcement of International Economic Law: Standing and Remedy*, 34(2) J. LEGAL STUDIES 631 (2005).
[5] Bilateral Investment Treaty, It.-Jordan, art. 2(4), July 21, 1996,
[6] El Paso Energy Int'l Co. v. Arg., ICSID Case No. ARB/03/15, Award, ¶ 342 (Oct. 31, 2011), IIC 519 (2011).

achieving national economic goals as well as actors seeking to maximize their own profits for their more restricted universes of shareholders, also appreciate that, in pursuit of resources and markets, they must operate globally. Fulfilling the capital needs for economic development through foreign investment enlarges the boundary of dispute settlement beyond the local limits of the State as the State deals not only with its institutions or nationals but also with the nationals of other States.[7] The past two decades witnessed a rapid development of the international investment treaty regime and its mechanism of dispute settlement. It is expected that the international investment treaty regime will continue to develop in the future with the rise in economic relationships between States. However the growing number of investor claims against sovereign states challenging a wide array of public policy decisions and regulatory measures[8] has evoked deep concerns about the potential costs associated with such treaties and calls for ISDS reform.[9]

Every legal arrangement, whether substantive or procedural, is always under some pressure for change to meet new situations of fact. For examining how far the existing pattern of factual relationships in the matter of foreign investment is regulated by accepted and acceptable rules of law, Lord Shawcross relies on the saying that "law is a reflection of fact—that it represents a fixed and predictable adjustment of the various

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[7] *See* E. I. Nwogugu, *Legal Problems of Foreign Investments*, 153 RECUEIL DES COURS 177 (1976-V).

[8] *See* Metalclad Corp. v. Mexico, ICSID Case No. ARB(AF)/97/1, Award, ¶¶ 92-93 (Aug. 30, 2000), IIC 161 (2000); Renco Group, Inc. v. Peru, ICSID Case No. UNCT/13/1; S.D. Myers, Inc. v. Can., UNCITRAL, Partial Award, ¶ 134 (Nov. 13, 2000), IIC 249 (2000); Saluka Inv. BV v. Czech, PCA, Partial Award, ¶ 290 (Mar. 17, 2006), ICGJ 368 (PCA 2006); CMS Gas Transmission Co. v. Arg., ICSID Case No. ARB/01/8, Award, ¶¶ 282- 284 (Apr. 25, 2005), IIC 65 (2005); Eureko B.V. v. Pol., UNCITRAL, Partial Award, ¶ 233 (Aug. 19, 2005), IIC 98 (2005).

[9] Lauge S. Poulsen & Emma Aisbett, *When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning*, 65 (2) WORLD POL. 273-313, 274 (2013).

and sometimes conflicting interests which arise from any given relationship".[10] Lord Shawcross further observes that:

> *The impact of these facts upon the traditional rule is not, be it noted, the simple one that the old rule has gone: it is rather that States have felt obliged to review their relations with one another in this matter, sometimes on a bilateral, sometimes on a multilateral basis, for the purpose of adjusting the old law to the new factual situations.*[11]

Therefore the international investment law must accommodate and manage the convergence of different interests in the International Investment Agreements. Otherwise the respondent States who lost the claims will lose their faith in investment arbitration and this will result in backlash. The recent trends are showing that States like Brazil, India, South Africa, Bolivia, Ecuador, Venezuela and Indonesia are significantly changing their approach to investment rule making, with a lot of policy innovations.[12] It is in this context, this paper examines the investment rule making and good governance in international investment arbitration.

3. THE INVESTMENT RULE MAKING AND GOOD GOVERNANCE

Investment protection treaties, with their investor State dispute settlement provision are or at least could be instruments to promote good governance. Indirectly they promote regulatory foreseeability by increasing the transparency of laws- in their existence, creation, and

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[10] *See* The Rt. Hon. Lord Shawcross QC, *The Problems of Foreign Investment in International Law*, 102 RECUEIL DES COURS 335 (1961).
[11] *Id*., at 340.
[12] *See generally* Cooperation and Facilitation Investment Agreements instead of ISDS in Brazil; Indian Model BIT 2016; South African Domestic Bill relying on Mediation instead of investment arbitration and so on.

application they ensure that governmental agents can be held accountable for violations of legal norms through the imposition of compensation where the investor can prove harmful effects stemming from the State's unlawful or unfair behaviour; and they may broaden participation in international governance by allowing natural and legal persons to bring an action directly against a government on the international level.[13]

Several States have criticized or expressed dissatisfaction with the current regime of the protection of foreign investment. They believe that investment treaties often require the surrender of important sovereign prerogatives and unacceptable limitations on regulatory powers.[14] From the host State's point of view, this is an encroachment on State sovereignty.[15] The host State mandate to compensate foreign investors while regulating for public interest would deter the States to act for public welfare in the future and they may give undue weightage to investor concerns over public interest.[16] For example in *Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States* the tribunal found breach of Fair and Equitable Treatment for refusing the license renewal regarding the operation of a hazardous waste landfill.[17] Therefore

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[13] Schefer, *supra* note 2.
[14] MICHAEL WAIBEL ET AL. EDS., THE BACKLASH AGAINST INVESTMENT ARBITRATION (2010). *See* Part IV.
[15] Christopher Ryan, *Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law,* 29 U. PA. J. INT'L L. 725, 729 (2008).
[16] Following the Fukushima disaster in Japan in 2011, the German government took the decision to phase out nuclear energy by 2022. Vattenfall, a Swedish company which had made substantial investments in the German nuclear sector, started legal proceedings against Germany, asking – according to media reports - for €4.7bn worth of compensation since they would be unable to capitalise on their investment. In 2011, tobacco company Philip Morris against Australia for introducing plain packaging laws on cigarette packets initiated investment treaty arbitration at the Permanent Court of Arbitration (PCA) in The Hague.
[17] Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 154 (May 29, 2003); Charles N. Brower & Stephan W. Schill,

the limitation of private arbitration to address public issues was identified.[18]

The real problem lies with the establishment of the limits within which the host State is entitled to exercise its inherent sovereign powers over foreign investors. These limits are set *inter alia* by international treaties binding the host State. It is certainly true that the overwhelming majority of these treaties are manifestly unbalanced. It is therefore important for the parties negotiating an investment treaty to define, as clearly as possible, the limits of their own benefit as well as for the benefit of the respective foreign investors.[19] They are essentially about the legal relationship between the host State and the foreign investor but as a rule impose obligations exclusively upon host States.[20] Not surprisingly in the arbitral proceedings that they generate, the host State is systematically the respondent in investment arbitration.[21] This is not inherent in these treaties; it is a deliberate choice of the contracting parties.[22] This part of the paper look into how States could better define their treaty obligations, preserve more efficiently their sovereign prerogatives and ensure an

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Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?, 9 CHI. J. INT'L L. 471, 474 (2009).

[18] Christopher Ryan, *Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law*, 29 U. PA. J. INT'L L. 725, 740 (2008).

[19] Tarcisio Gazzini, *States and Foreign Investment A Law of the Treaties Perspective*, *in* THE ROLE OF THE STATE IN INVESTOR STATE ARBITRATION 29 (Shaheeza Lalani & Rodrigo P. Lazo eds., 2015).

[20] *Id.*, at 23.

[21] Mehmet Toral & Thomas Schultz, *The State A Perpetual Respondent In Investment Arbitration? Some Unorthodox Considerations*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION 577 (Waibel et al. eds., 2010).

[22] Tarcisio Gazzini, *States and Foreign Investment A Law of the Treaties Perspective*, *in* THE ROLE OF THE STATE IN INVESTOR STATE ARBITRATION 23 (Shaheeza Lalani & Rodrigo P. Lazo eds., 2015).

appropriate level of accountability and responsibility of multinational companies with specific reference to India.

In the Indian context, the Model BIT, 2016 contains expansive provisions to make the Investor State Dispute Settlement (ISDS) more transparent and accountable as good governance initiatives.[23] To ensure arbitrators are impartial and free of any conflict of interest, detailed disclosure norms and codes of conduct for arbitrators have been introduced. From an Indian perspective, investments treaties are not just instruments of investor protection, but also a valid tool promoting sustainable development goals, ensuring transparency in corporate dealings and preventing unethical business practices.[24] This part focuses on the Omission of Fair and Equitable Treatment, Investor-Home State Obligations and the Exhaustion of Local Remedies Requirement amongst many other good governance initiatives.

3.1 THE OMISSION OF FAIR AND EQUITABLE TREATMENT

The absence of a clear explanation of what is fair and what is equitable has led to a great variety of claims against host State regulations. It also raises fears that FET provision in IIAs threatens policy space and progress that has been made in promoting sustainable development. Such fears are intensified by the lack of legal certainty with respect to the application of fair and equitable treatment and the concrete scope of the standards sub

[23] *See generally* UN World Summit for Sustainable Dev.: Plan of Implementation, World Summit for Sustainable Dev., UN Doc.A/CONF.199/L.1 (Johannesburg, South Africa 2002), Plan of Implementation of the World Summit on Sustainable Dev., UN Doc. A/CONF.199/20 (2002), ¶ 4; Principle 6, New Delhi Dec. on the Principles of Int’l Law Related to Sustainable Dev. (London: ILA, 2002); Monterrey Consensus of the Int’l Conf. on Financing for Dev., Report of the Int’l Conf. on Financing for Dev., UN Doc. A/CONF.198/11 (22 March 2002) Ch.1, Res. 1, annex (2002), ¶ 21.
[24] UNCTAD Expert Meeting on Taking Stock of IIA Reform, *Indian Model Bilateral Investment Treaty* (Geneva, Mar. 16, 2016).

elements such as fair procedure, non-discrimination, protection of investor's legitimate expectations, transparency and proportionality.[25]

There is also a possibility that any attempt to reform policies, which affect foreign investors interests could be argued as undermining the stability of law and business, leading to its being ruled incompatible with IIAs. Interpretations that overemphasize stability may be inconsistent with the promotion of sustainable development.[26] This sub part addresses in detail the issues raised by "regulatory State" and legitimate expectations.

3.1.1 Regulatory State

As States use specialized agencies to create and implement public policy, the number of government actors making and enforcing rules increases. The policy goals of one regulatory agency may conflict with those of another. This potential for disagreement is multiplied in a federal structure, in which different levels of government are also at work. A foreign investor may thus require administrative approval from a multitude of entities that do not have a mechanism to coordinate their decisions. Several investor State arbitral awards have suggested that such a duty of consistency may in fact be a component of the Fair and Equitable Treatment obligation, found in a vast majority of investment treaties. These awards have required consistency among different levels of government, different branches of government and different government

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[25] Roland Klager, *Fair and Equitable Treatment and Sustainable Development*, i*n* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 237 (Marie-Claire C. Segger et al. eds., 2011).

[26] Kate Miles, *National Treatment & Like Circumstances in Investment Law*, i*n* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 261 (Marie-Claire C. Segger et al. eds., 2011).

ministries. This absolute duty of consistency would be difficult to implement and risks rewarding a foreign investor's lack of diligence.

The International Law Commissions' Draft Articles on State Responsibility are widely recognized to codify customary international law on the subject.[27] These articles make clear that the State is treated as a unit for the purposes of international responsibility.[28] Most relevant for present purposes is the reference to State organs, such as government ministries, regulatory agencies and courts.[29] All of the acts taken by these entities in the scope of their duties are attributable to the State.[30] The State will thus be responsible for an entity's acts if the latter is empowered by the law of that State to exercise elements of the governmental authority and is acting in that capacity in the particular instance.[31] This is true even when the entity in question is not officially designated as an organ by municipal law.[32]

As States regulatory efforts have expanded in scope, there has been a corresponding tendency towards specialization and so fragmentation. States may choose to delegate authority for policy creation and enforcement to a variety of government actors. The resulting structure by which the State applies and extends rule making, monitoring and enforcement via bureaucratic organs has been dubbed the "regulatory State".[33]

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[27] Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Rep. on the Work of its Fifty-Third Session (2001).
[28] *Id.*, art.2, cmt. 6.
[29] *Id.*, art. 4(2).
[30] *Id.*, art. 4 (1).
[31] *Id.*, art. 5.
[32] *Id.*, art. 4, cmt. 11.
[33] David Levy-Faur, *The Odyssey of the Regulatory State, Episode One: The Rescue of the Welfare State* 14 (Jerusalem Papers in Regulation & Governance, Working Paper No. 39, 2011).

The regulatory State poses potentially significant difficulties for the traditional conceptions of attribution and international responsibility. This is due to the sheer number of government actors involved. States commonly delegate authority to ministries within the executive branch and regulatory agencies and this may result in differences of opinion or different policy goals. It may also be unknowing with the implicated government actors simply unaware of each other's decisions. In either case is State is responsible for all of these decisions under international law. Regardless of the actors involved, one common denominator is often a claim by the investor that it had received some form of official approval of its investment on which the investor was entitled to rely. Various tribunals found that consistency by the State in its relations with the investor is an important element of the fair and equitable standard.[34]

As part of its obligation to provide foreign investment fair and equitable treatment, a host State would be required to monitor decisions taken by all relevant government actors. It would then need to ensure that any inconsistent decisions are either avoided or remedied.[35]

Requiring States to ensure consistency would entail substantial effort and expense, assuming the goal is even attainable. If relevant laws and regulations are transparent and accessible as already required by the FET obligation, then international investment law should encourage due diligence. Foreign investors are in best position to know the details of their own investment plans. They should accordingly share responsibility with

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[34] *See generally* Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, ¶¶ 101, 107 (Aug. 30, 2000); Franck C. Arif v. Mold., ICSID Case No ARB/11/23, Award, ¶ 538 (Apr. 8, 2013); MTD Equity Sdn. Bhd. & MTD Chile S A v. Chile, ICSID Case No ARB/01/7, Award, ¶ 165 (May 5, 2004).

[35] Danielle Morris, *The Regulatory State and the Duty of Consistency*, *in* THE ROLE OF THE STATE IN INVESTOR STATE ARBITRATION 62 (Shaheeza Lalani & Rodrigo P. Lazo eds., 2015).

the host State for the regulatory compliance of that investment. An absolute duty of consistency on the other hand risks rewarding an investor's lack of diligence.[36]

3.1.2 Legitimate Expectations

Investor's legitimate expectations have played a significant role in the assessment of whether a State's conduct is fair and equitable.[37] A claim based on legitimate expectations is subject to a certain easy circularity of argument in that an investor can postulate an expectation to condemn the sovereign conduct without articulation of the origins and scope of expectations. This leads to the so-called moving target problem because one expectation can be expressed at different levels of generality.[38] A distinct and unique role of legitimate expectations remains unclear in different types of situations. This has led to a superfluous reliance on legitimate expectations as a basis for a breach of fair and equitable treatment in various situations.[39]

The fundamental element in the analysis of legitimate expectations is to determine which expectations are reasonable. The task is challenging because the boundary of reasonableness concept is malleable and elastic, as each side exerts some pull on one's sense of fairness.[40] The concept of reasonableness serves as the fundamental criterion for evaluating the validity of the public conception of justice and all political claims and

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[36] *Id.*, at 67.
[37] Electrabel S.A. v. Hung., ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶ 7.75 (Nov. 30, 2012).
[38] Franck Arif v. Mold., ICSID Case No ARB/11/23, Award, ¶¶ 533-35 (Apr. 8, 2013).
[39] Michele Potesta, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and Limits of a Controversial Concept*, 28 (1) ICSID REVIEW-FOREIGN INVESTMENT L.J. 88-122 (2013).
[40] Abdi v. Secy. of State, Home Dept. [2005] EWCA (Civ) 1363, ¶ 66 (Nov. 22, 2005).

decisions. Under Rawlsian theory reasonable citizens have to recognize the right of others to develop, pursue and realize their own visions of the good life.[41] Such recognition is necessary to establish and preserve a well-ordered liberal democracy. Transposing that framework to the context of an investment treaty, investors as rational and reasonable agents have to recognize that in some circumstances, especially in time of crisis, States may have to take draconian measures to protect public interests.[42] It is argued that despite numerous approaches for defining the boundaries of expectations, no coherent rules have been developed to apply those approaches in a principled and systematic manner.[43]

Reasonableness of expectations must take into account the underlying presumption that, absent an assurance to the contrary, a State cannot be expected to freeze its laws and regulations especially measures in response to unpredictable circumstances.[44] Some tribunals went further in recognizing that a State owes a duty to its people to be able to respond to the emerging needs and ensure maximum effective use of its economic resources.[45] It would be unconscionable for a State not to be able to respond to changing needs and circumstances.[46] Expansive recognition of legitimate expectations will create excessive burden on States.[47]

FET is omitted in the Model BIT 2016; however, the duty to afford due process and the protection is granted against manifestly abusive

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[41] Shaun P. Young, *Rawlsian Reasonableness: A Problematic Presumption?*, 39(1) CANADIAN J. POL. SCI. 159-180 (2006).
[42] El Paso v. Arg., Award, ¶ 363.
[43] Teerawat Wongkaew, *The Transplantation of Legitimate Expectations in Investment Treaty Arbitration A Critique*, *in* THE ROLE OF THE STATE IN INVESTOR STATE ARBITRATION 98 (Shaheeza Lalani & Rodrigo Polanco Lazo eds., 2015).
[44] Micula v. Romania, Awrad ¶ 673; Suez v. Argentina, Decision on Liability ¶ 236.
[45] Total v. Argentina, Decision on Liability ¶ 115; El Paso v. Argentina, Award ¶ 369.
[46] Continental Casualty v. Argentina, Award ¶ 258.
[47] EDF v. Romania, Award ¶ 217.

treatment or targeted discrimination on manifestly unjust grounds or denial of justice in any judicial or administrative proceedings.[48] Further the definition of government is very narrow and refers only the actions of central government.[49]

3.2 INVESTOR AND HOME STATE OBLIGATIONS

The purpose of IIAs is not only to protect investments, but also to promote the economic development of the host States, and for that reason there must be some regulation or control regarding investor's wrongful acts that are detrimental to the host State's economy.[50]

The International Institute for Sustainable Development (IISD) has elaborated a model IIA that provides for investor's responsibility[51] and includes provisions on corporate governance,[52] corporate social responsibility,[53] and investor's liability for civil wrongs[54] as well as

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48 *See* Article 3.

49 "In some respects, the actions of state governments are covered by the BIT, but not those of local governments".

50 For example the preamble of the agreement among the Government of Japan, the Government of the Republic of Korea and the Government of the People's Republic of China for the promotion, facilitation and protection of investment signed in 2012 stipulates that, "recognizing that the reciprocal promotion, facilitation and protection of such investment and the progressive liberalization of investment will be conducive to stimulating business initiative of the investors and increase prosperity among the contracting parties".

51 The International Institute for Sustainable Development (IISD), Model International Agreement on Investment for Sustainable Development (2005).

52 Art.15, Model International Agreement on Investment for Sustainable Development (2005).

53 Art.16, Model International Agreement on Investment for Sustainable Development (2005).

54 Art.17, Model International Agreement on Investment for Sustainable Development (2005).

mandatory provisions for the protection of minimum environmental and labour standards.[55]

The Model BIT indicates a change in course on the part of the Government following the IISD Model. After delineating India's duty to protect investors and their investments, India's model text also places responsibilities on both investors and their home states to ensure responsible corporate conduct and inclusive and sustainable growth in its territory.[56] Once admitted within the jurisdiction of the host state, foreign investors must respect its sovereignty and comply with its laws and regulations.[57] The Model BIT requires foreign investors to contribute to the development of the host country and to operate by recognizing the rights, traditions and customs of local communities in order to obtain treaty benefits. Investors are also required to make long-term commitments, hire local employees, avoid corruption, be transparent about financial transactions and governance mechanisms, and comply with host country taxation policies. Signatory home States are required to act against investors found to be violating Indian laws.[58] Host countries could initiate counterclaims in international arbitration for any violations of obligations on foreign investors. This is a mechanism to ensure good governance using IIAs.[59] The lack of obligations on investors, and in particular the absence of any requirement that investors themselves behave transparently

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[55] Art.22, Model International Agreement on Investment for Sustainable Development (2005).
[56] Kavaljit Singh, *Decoding India's New Model BIT,* MADHYAM (2015).
[57] The preamble of BIT between Switzerland and Nigeria for instance reiterates the duty of the investor to respect the sovereignty of the host country and observe its laws.
[58] Premila N. Satyanand, *Once BITten, Forever Shy: Explaining India's Rethink of Its Bilateral Investment Treaty Provisions*, 16 (1) AIB INSIGHTS 17 (2015).
[59] Anna Joubin-Bret et al., *International Investment Law and Development, in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 24-25 (Marie-Claire C. Segger et al. eds., 2011).

and eschew corruption, presents a serious flaw, as a result of which IIAs might contribute to entrenching bad governance.[60] Thus investor responsibilities in addition to investor rights are also finding a place in recalibrating the asymmetry between investment regulation and investment protection within the good governance framework.[61]

3.3 EXHAUSTION OF LOCAL REMEDIES REQUIREMENT

Modern investment treaties habitually grant investors the right to bring a claim against the host State directly before an international arbitral tribunal. Allowing foreign investors to resort to international treaties and arbitration and thereby avoid domestic law and institutions international investment law does not ameliorate but in fact entrenches weakness of domestic legal orders.[62] By allowing foreign investors to exit domestic legal orders IIL creates the problems of reverse discrimination against domestic investors as well as regulatory chill.[63] The regulatory chill impact of IIAs on host governments may work against governance improvements. The investor rights enshrined in BITs and enforced through private arbitration represent a significant shift in power from states to private investors.[64]

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[60] Stephen Gelb, *States and the Investor State Arbitration Regime*, *in* THE ROLE OF THE STATE IN INVESTOR STATE ARBITRATION 127 (Shaheeza Lalani & Rodrigo Polanco Lazo eds., 2015).
[61] *See* Celine Tan, *Reviving the Emperor's Old Clothes: The Good Governance Agenda, Development and International Investment Law*, *in* INTERNATIONAL INVESTMENT LAW AND DEVELOPMENT BRIDGING THE GAP 147, 175 (Stephan W Schill et al., eds., 2015).
[62] *Id.*
[63] UNCTAD Series on Issues in International Investment Agreements II: Fair and Equitable Treatment: A Sequel (United Nations, Geneva, 2012) 12.
[64] Gus van Harten, *Private Authority and Transnational Governance: The Contours of the International System of Investor Protection*, 12(4) REV. INT'L POL. ECON. 600-23 (2005).

Requiring governments to compensate foreign investors for their losses, while not extending equivalent protection to other private actors is likely to lead decision makers to over value the interests of foreign investors.[65] There is a little doubt that over valuing foreign investors' interests is unlikely to benefit host communities through a spill over of good governance practices into the domestic sphere.[66] Instead the disadvantaging of domestic investors may lead to the internal political opposition and backlash against investment treaty law.[67] The Indian Model BIT balances the interests of States and investors by keeping the requirement of exhaustion of local remedies only for a period of five years.

4. CONCLUSION

It is important to stress that the flexibility of the current legal framework in the field of foreign investment, which is essentially constituted of BITs and other treaties with a normally limited number of parties, permit States to tailor their commitments in accordance with their specific and changing needs.[68] This flexibility in governmental action vis-à-vis the private sector is justified under the good governance framework,

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[65] Jonathan Bonnitcha, *Outline of a Normative Framework for Evaluating Interpretations of Investment Treaty Protections, in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 128 (Chester Brown & Kate Miles eds., 2011).

[66] Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT'L REV. L. ECON. 21 (2005).

[67] MICHAEL WAIBEL ET AL. EDS., THE BACKLASH AGAINST INVESTMENT ARBITRATION (2010).

[68] Kevin C Kennedy, *A WTO Agreement on Investments: A Solution in Search of a Problem,* 24 UNIV. OF PENNSYLVANIA J. INT'L ECON. L. 83 (2003).

and it will be the base for economic growth and social development through foreign investments.[69]

Having a strong and predictable ISDS management framework brings sustainability in providing a more effective response to investment disputes,[70] and may even serve as a deterrent to claims as investors assess the option of international investment arbitration.[71] If States are expected to comply with good governance standards in their treatment of foreign investors, they should be afforded the corresponding degree of regulatory flexibility to ensure good governance in pursuing other policy objectives.

Uniform rules of investment protection saves transaction costs in the drafting of BITs,[72] stabilizes the economy, reduces international conflicts and provides legal security to investors as well. The use of model treaties did not only serve the purpose of facilitating the negotiations about the content of a BIT and thus of reducing the drafting and negotiation costs. It also aimed at ensuring a certain level of uniformity with respect to the standards governing the investment relations between the home State and varying host States and to make more credible commitments with respect to foreign investors.[73] The current reforms in BIT including on most disputed provisions in International Investment Arbitrations would create more stable investment regime and minimize misuse of ISDS

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[69] Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 GLOBAL BUSINESS & DEV. L. J. 337, 341 (2007).
[70] World Bank, *Initiatives in Legal and Judicial Reform* (World Bank 2004) 2.
[71] Kathryn Gordon & Joachim Pohl, *Investment Treaties Over Time: Treaty Practice and Interpretation in a Changing World* (OECD Working Papers on International Investment, 2015/02, 2015) *available at* http://dx.doi.org/10.1787/5js7rhd8sq7h-en
[72] Kevin C Kennedy, *A WTO Agreement on Investment: A Solution in Search of a Problem?* 24 U. PA. J. INT'L ECON. L. 77, 79–80 (2003).
[73] STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 91 (2009).

mechanism.[74] Now as investment law is in the process of rebalancing the interests of States and investors, we need to remain committed to pursuing a goal of improving States as regulators of individual's lives, not just to state powers for the sake of preserving sovereignty.[75]

[74] UNCTAD Expert Meeting on Taking Stock of IIA Reform, *Indian Model Bilateral Investment Treaty* (Geneva, 16 March 2016).
[75] Schefer, *supra* note 2, at 21.

INDIA'S FOREIGN DIRECT INVESTMENT INFLOWS: A POLICY ASSESSMENT

Jasmine Kaur[*]

ABSTRACT

Foreign Direct Investment (FDI) is vital for economic development of a developing nation. This paper traces India's approach towards FDI. Just after independence, India granted national treatment to foreign investors, however, soon government started becoming apprehensive about foreign investments especially in key sectors due to the outflow of remittances of profits, dividends etc. India enacted Foreign Exchange Regulation Act (FERA) in 1973 to regulate foreign exchange. Still, India was witnessing severe debt crisis in 1980s, which resulted in complete economic overhaul through Liberalisation Privatisation Globalisation policy of 1991. With this, FERA was replaced by comparatively less stringent Foreign Exchange Management Act, 1999 (FEMA). The latter established two FDI routes: automatic and approval. Foreign Investment Promotion Board (FIPB) was established to look into these routes. This paper discusses the impact of economic measures taken post-liberalization to promote foreign investments. It also highlights the shift brought in by FDI Policy 2015, abolition of FIPB and recent changes in FDI in different sectors. The paper concludes with recommendations to the Government to reduce tax rates, improve infrastructure, and eliminate corruption and red tapism, in order to further boost foreign investment.

[*] Assistant Professor of Economics, Rajiv Gandhi National University of Law, Punjab, Patiala.

Foreign Direct Investment holds great significance in the economic development of less developing nations. Owing to the paucity of domestic capital, Less Developing Countries rely on the foreign capital to supplement its own scarce domestic capital for initiating and sustaining the level of economic development. Foreign Direct Investment (FDI) contributes positively to the stimulation of economic development by the transfer of capital, advanced technology, efficiency, knowledge, etc. to the host nations. The major determinants of FDI are size of the market, economic stability, political factors, policy structure, level of human capital, etc.

Owing to the significance of FDI in the process of economic development, the Government of India have been reforming economic policies to attract foreign direct investment inflows.

After independence, India developed a strategy of import substitution for the development of local industries. A Policy of Protectionism was adopted in order to protect its own industries. The Government of India had undertaken investment in infrastructure for the overall development of industrial sector. The attitude towards foreign capital was not encouraging. The industrial policy of 1948 focused on the regulation of foreign investment for the protection of national interest. As a result, the flow of foreign capital was very limited. During 1949, the foreign investors were assured 'national treatment', no restrictions on the remittances of profits and repatriation of capital and fair and equitable compensation to investors in the event of nationalisation of the undertaking.[1] A number of initiatives and concessions were extended to the investors to attract Foreign Direct Investment. As a result, Multinational Corporations started showing real interest in investing in India during late 1950s and 1960s. However, the local firms were unable to compete with the foreign firms. On the other hand, the outflow of remittances of profits, dividends, etc. had increased sharply. These factors led the government to adopt a more opposed attitude towards Foreign Direct Investment. FDI was not permitted in trading activities, banking and financial institutions, industries of strategic importance, etc. It was stated that foreign capital should aim at export promotion and the majority of ownership and control will be in Indian hands. A number of restrictions were imposed on FDI proposals which were not accompanied by transfer of technology and were seeking more than 40 per cent foreign ownership.[2]

During 1972, the Government of India permitted fully owned subsidiaries of foreign companies with a condition that they undertake to export 100 per cent of their output. Further, Foreign Exchange Regulation Act (FERA) was enacted in 1973 and came into force on January 1, 1974. The objective of FERA was to regulate the foreign exchange dealings, the trade of currency and bullion, transactions indirectly affecting foreign exchange and for the conservation and proper utilisation of foreign exchange resources of the nation. Under Section 29 of FERA, the foreign companies with foreign equity of not more than 40 per cent were required to register themselves under Indian corporate legislation. However there

[1] Biswajit Dhar, *State Regulation of Foreign Private Capital in India*, ISID Working Paper No. 006, 1988, Institute for Studies in Industrial Development.

[2] Nagesh Kumar, *Liberalisation and Changing Patterns of Foreign Direct Investments: Has India's Relative Attractiveness as a Host of FDI Improved?*, 33 ECONOMIC AND POLITICAL WEEKLY 1321-1329 (1998).

were certain exemptions under certain conditions. For example- Foreign equity up to 74 per cent was allowed if they were engaged in core sector as mentioned in Industrial licensing policy 1973, manufacturing activities requiring modern and sophisticated technology, predominantly export-oriented industries.[3]

India's failure to increase the volume and proportion of manufacturing exports was seen towards the end of 1970s. The reasons behind low export levels were technological obsolescence, high cost, low product quality, etc. As a result, the Government of India emphasised on the liberalised imports of capital goods and technical know-how for exposing the domestic industries to foreign competition. During 1980s, a number of liberalisation measures were undertaken such as relaxation of industrial licensing rules, exemptions from foreign equity restrictions under FERA to 100 per cent export-oriented units. Foreign collaboration and joint ventures were welcomed. The total number of collaboration agreements approved per year rose from 242 during 1967-79 to 744 during 1980-88.[4] During 1990-92, India experienced an external debt crisis which brought about an introduction to new economic policy. The adverse effects of Gulf war were seen on Indian economy. There had been an increase in Petroleum, Oil and Lubricant (POL) imports, reduction of remittances from non-resident Indians in the afflicted countries, fractional loss of export markets in West Asia. All of these led to a rise in the current account deficit upto 3.2 per cent of Gross Domestic Product in 1991. Due to the dried up lending activities of commercial banks after the debt crisis

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[3] Sudip Chaudhuri, *FERA: Appearance and Reality*, 14 ECONOMIC AND POLITICAL WEEKLY 734-744 (1979).

[4] V.N Balasubramanyam. & Vidya Mahambare, *Foreign Direct Investment in India*, Working Paper 2003/001, Lancaster University Management School.

and growing competition for foreign resources, a more liberal new economic policy was initiated to attract foreign capital. Several measures were undertaken to create a conducive economic environment for encouraging the private domestic and foreign investment. The FDI inflows were encouraged into export-oriented, high tech manufacturing sectors.[5]

The Liberalisation Privatisation Globalisation policy of 1991 encompassed abolition of industrial licensing, dilution of the role of private sector, further relaxation towards foreign investment and technology, removal of Monopolistic and Restrictive Trade Practices (MRTP) Act and mandatory convertibility clause. It also included liberalisation measures such as rise in the foreign equity participation up to 51 per cent for existing companies and freedom for the use of foreign brand name, introduction of dual route system i.e. automatic and approval route; establishment of Foreign Investment Promotion Board (FIPB) for the screening of FDI applications under approval route, approving the FDI automatic permission for technology agreements in high priority industries, etc. Later on Foreign Exchange Regulation Act was replaced by comparatively less stringent Foreign Exchange Management Act, 1999.[6] The economic reforms have been successful in increasing the level of foreign trade and foreign exchange reserves along with the inflow of sophisticated technology and skilled human capital. The amount of FDI inflows rose 34 times during 1991-2010. There was a rapid increase in

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[5] Pami Dua & Aneesa I. Rashid, *Foreign Direct Investment and Economic Activity in India*, 33 INDIAN ECONOMIC REVIEW 153-168 (1998).
[6] Abhishek Vijaykumar Vyas, *An Analytical Study of FDI in India (2000-15)*, 5 INTERNATIONAL JOURNAL OF SCIENTIFIC AND RESEARCH PUBLICATIONS 1-30 (2015).

FDI inflows from 1991-2000, but it came down to 8 per cent from 2000-2010.[7]

The scope for Foreign Direct Investment has increased gradually since 1991. It not only covers industrial sector but also services sector. The Steering group on Foreign Direct Investment was constituted by Planning Commission in August, 2001 to provide suggestions for increasing the FDI inflows which was necessary for achieving the growth targets of Tenth Five Year Plan. The committee suggested that State should consider enacting legislation relating to special investment covering infrastructure. It could lay out labour laws, rules and procedures for infrastructural investment. It also suggested setting up of investment facilitation fund to provide assistance to the needy states.[8]

Since then, a number of liberalisation measures have been undertaken for a sharp increase in FDI inflows. The Foreign Direct Investment policy is reviewed on an ongoing basis. The general caps on FDI in different sectors have been raised. The 'Make in India' initiative was launched in September, 2014 to transform Indian economy into a manufacturing hub. It targets twenty five sectors of the economy including automobile, food processing, railways, pharmaceuticals, textiles, mining, etc. It seeks to encourage both domestic and foreign companies to undertake the manufacturing process within India. It aims to raise the contribution of manufacturing sector to 25 per cent of Gross Domestic

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[7] Mohammad Iftekhar Khan & Amit Banerji, *A Study of Drivers, Impact, and Pattern of Foreign Direct Investment in India*, 48 THE JOURNAL OF DEVELOPING AREAS 327-348 (2014).
[8] Government of India, Report of the Steering Group on Foreign Direct Investment, 2002, Planning Commission

Product by 2025. It further aims at creation of employment opportunities, promote innovation and encourage skill development.[9]

As per the consolidated FDI Policy 2015, the percentage of FDI cap is allowed up to 100 per cent under automatic route in agriculture, mining and exploration of metal and non-metal ores, exploration activities of oil and natural gas, greenfield airport projects, construction development projects, etc. subject to applicable laws and conditionalities.[10] Mostly the sectors are open for 100 per cent FDI under Automatic Route. In order to improve the procedural efficiency for seeking clearance on FDI proposals, the Cabinet approved the proposal to abolish FIPB in May, 2017. At present, the individual ministries are responsible for evaluating FDI proposals under the approval route. On August 28, 2019, the Union Cabinet has decided to relax the stringent condition of local sourcing for single-brand retail sector. It has permitted 100 per cent FDI in coal mining and contract manufacturing through automatic route to ensure that India remains investor friendly destination.[11]

Foreign Direct Investment has played a significant role in providing capital, skills and technological know-how to Indian economy. The FDI flows from the developed nations are more likely to exploit cheap Indian labour for improving efficiency. On the other hand, FDI from developing nations are attracted on account of growing Indian market. The liberalisation measures have played an important role in attracting FDI

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[9] www.makeinindia.com
[10] Government of India, Consolidated FDI Policy, 2015, Department of Industrial Policy and Promotion, Ministry of Commerce and Industry
[11] Government of India, Press Information Bureau, 2019

flows into different sectors and thereby to facilitate economic growth. Soon after 1991, the number of countries investing in India rose from 29 in 1991 to 106 in 2003. The major portion of FDI came from Mauritius, the largest investor.[12] The trend of India's total FDI Inflows from 1990-91 till 2017-18 is shown in Table 1.

Table 1: India's Foreign Direct Investment Inflows

S.No.	Financial Year	India's Total FDI Inflows (US $ million)
1.	1990-91	97
2.	1991-92	129
3.	1992-93	315
4.	1993-94	586
5.	1994-95	1,314
6.	1995-96	2,144
7.	1996-97	2,821
8.	1997-98	3,557
9.	1998-99	2,462
10.	1999-00	2,155
11.	2000-01	4,029
12.	2001-02	6,130

[12] Mathiyazhagan, M.K., "Impact of Foreign Direct Investment on Indian Economy Sectoral Level Analysis" ISAS, 2005, Working Paper No. 6.

13.	2002-03	5,035
14.	2003-04	4,322
15.	2004-05	6,051
16.	2005-06	8.961
17.	2006-07	22,826
18.	2007-08	34,835
19.	2008-09	41,873
20.	2009-10	37,745
21.	2010-11	34,847
22.	2011-12	46,556
23.	2012-13	34,298
24.	2013-14	36,046
25.	2014-15	44,291
26.	2015-16	55,559
27.	2016-17	60,220
28.	2017-18	60,974

Source: Reserve Bank of India Bulletin (2018)

The trend of FDI inflows has been impressive over time. The FDI inflows have increased from US $ 97 million in 1990-91 to US $ 60,974 in 2017-18.

Though India is receiving higher amount of FDI flows, but it’s rank is lower in competitiveness index and it continues to rank among the most corrupt nations in the world. There are a number of challenges facing FDI inward i.e. lack of infrastructure, procedural delays, high taxes, implementation issues, etc. The Government of India should further open up to International platform through reduction in tax rates, corruption, improvement in infrastructure, liberalisation of labour laws, elimination of red tapism and cumbersome bureaucracy. The government should address implementation issues that arise for foreign investors. In sum, India has the potential to attract greater Foreign Direct Investment. The government should undertake policies in the interest of both domestic and foreign investors.

TRANSNATIONAL CORPORATIONS AS A MENACE TO THE ENVIRONMENTAL DEVELOPMENT

*Ayush Verma**

ABSTRACT

Transnational Corporations are important entities with regard to economic development, however they are also responsible for major environmental degradation throughout the world. They chose developing countries strategically because they offer opportunity to expand the market and also there regulatory framework is weaker to control transnational corporations. Their assets are their power, which are enormous than GDP of several countries. Thus their powerful position enables them to exploit the natural resources that sometimes even food, water and health becomes scarce for everybody. The paper is classified into 4 major portions. The first one discusses introduction and historical development. In second part the paper has discussed various cases in which environmental degradation was found to be rampant. It also discusses the ways through which influence is exercised to get favour. The third part deals with the legal framework to properly regulate the TNCs. It discusses the entire journey whenever attempts were made to influence others. Lastly, the fourth portion contains the findings of the research and conclusion along with the suggestions. The author through this paper makes an attempt to thoroughly understand the issue of environmental degradation due to the actions of Transnational Corporations and further,

* Ph.D. Candidate, Dr. Ram Manohar Lohiya National Law University, Lucknow (aushhdi21@gmail.com).

explore the areas which are generally not analysed but plays crucial role in exposing the topic.

1. INTRODUCTION

The 21st Century is an era of globalisation that is responsible for interconnection of human societies and activities beyond the national borders. Among these activities, when reference is made to economic activities, the economy is called global economy wherein production, exchanges and consumption are not limited to territorial borders.

In modern day global economy, number of non-state actors is growing at rapid speed. Among these non-state actors, corporate entities that are operating across borders can be classified into two- (1) Multinational Corporations, and (2) Transnational Corporations. Generally, the terms are used interchangeably, but there lies a thin line of difference between the two. Multinational corporations (MNCs) are companies or enterprises those are registered or having registered operations in more than one countries but have headquarters in one country that is their home country. On the other hand the transnational corporations (Hereinafter referred as TNCs) do not have any single home country. They operate more in a decentralized manner. If a look is taken of decision making process performed, in case of an MNCs at home country but in case of TNCs decision making is done by senior executives of different nationalities, and their business strategy of global perspective plays vital role as a lighthouse in their decision making process.[1]

[1] UNDERSTANDING PUBLIC HEALTH: GLOBLISATION AND HEALTH, 30 (Johanna Hanefeld ed., RawatPublicaitions, 2015)

Since long times the TNCs have been found guilty of mass human rights violations. They alleged to influence national and international authorities to obtain favour from them or to satisfy their profit driven mind. Thus, the author in this paper attempts to enquire about the allegations and to check whether there is any mechanism to regulate the TNCs. The scope of this paper shall be limited to cover the allegations as to human rights violations and then to look into the regulatory measures, if available.

2. HISTORICAL DEVELOPMENT OF TRANSNATIONAL CORPORATIONS

Historical development of the TNCs can be traced back to the end of 16th century when, in Europe, trade and related activities were given boost through formation of companies for specific purposes. Some of those companies were the East India Company of Netherlands, English East India Company, and French East India Company etc. Companies of that time were also conferred powers to engage in war along with trade. Thus these corporations carried on for several hundred years and performed trade and territorial acquisitions for their own country across the globe. Over a period of time this led to setting the premise for two infamous world wars in 19th century. This was the time when TNCs took shape as these are known today. There were several factors responsible for growth of TNCs of modern era like- industrialisation, development of factories involving more efficient and accurate manufacturing processes, faster delivery of services, transportation etc. and also requirements of that time creating pressure to search more resources, energy and foodstuff along with protecting and conserving the same, resulted into development and expansion of modern day transnational corporate giants, like Mitsubishi.

After Second World War, transnational corporations started mushrooming very fast. It is evident from the fact that where in 1906 only two or three such corporations having assets of about US$500 million were there, in 1971 their number rose to 333 corporations of which some leading corporations were holding assets of about US$ 1 billion.[2] This rise in number was the result of high investment in industrial stocks and encouragement to the corporate activities. Technological advancement of that time facilitated smooth transportation by all means road, rail, water, air and computerisation and faster modes communication gave boost to the economic activities across the globe. This trend kept gaining momentum and about in the last decade of 20th century TNCs began to deliver their goods and services to the foreign market, especially the less developed countries, just because the less-developed countries offer not just the potential for market expansion but also lower wages and fewer & week health and environmental regulations than i highly industrialized and developed countries.[3]

3. TRANSNATIONAL CORPORATIONS

Transnational Corporations are crucial players in the modern capitalist global economy. In last few decades they emerged and developed in rapid manner. TNCs are responsible for major portion of the

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[2] Jed Greer & Kavaljeet Singh, *A Brief History of Transnational Corporations*, Global Policy Forum (2000), https://www.globalpolicy.org/empire/47068-a-brief-history-of-transnational-corporations.html

[3] *Id*

total investment and trade.[4]TNCs are comprised of a parent corporate entity which exercise control over the assets of other entities in countries other than their own home country and their foreign affiliates which are incorporated or unincorporated entities in which investor, a resident of another economy owns a stake permitting lasting interest in the management of the that entity. TNCs are engaged in production beyond the limitations of borders. With the operation of TNCs many advantages can be obtained like increase in Foreign Direct Investment, technology transfer, sharing of managerial and organisational skills, development of cross-cultural understandings etc. these factors benefit both developed and developing countries.[5]Some of the famous transnational corporations are Samsung, Shell, Unilever, and Coca-Cola etc.

TNCs having view of global economy are in itself so distinct as to their massive size, unique structure, organization, value etc. that their total annual sales are equal or more than the GDP most of the countries of the world. For example: Itochu Corporation's sales exceed the GDP of Austria, while Royal Dutch/Shell equals Iran's GDP and together, the sales of Mitsui and General Motors are greater than the GDPs of Denmark, Portugal, and Turkey combined together, and US$50 billion more than all the GDPs of the countries in sub-Saharan Africa.[6]

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[4] LUCY FORD, TRANSNATIONAL ACTORS IN GLOBAL ENVIRONMENTAL POLITICS, 35 (Gabriela Kütting (ed.), Routledge, 2011)

[5] Alexandra Nicula & Amalia Niculs, *Development of Transnational Corporations in the World: Opportunities and Threats*, Progress in Economic Sciences 279 (2015), http://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.desklight-4b3b08d0-164d-4866-93a2-5548363a6a37/c/279.pdf

[6] *Supra* 3

4. TRANSNATIONAL CORPORATIONS AND GLOBAL ENVIRONMENT

Transnational Corporations are profit driven entities and are one of the most important transnational actors because when it comes to global environment TNCs are closely linked to global economic upgradation and global environmental degradation. It is argued that economic development is the key for human development, which is not so.

The key to human development lies in sustainable development. The concept of sustainable development first time published in Brundtland Report of 1987, namely ‘Our Common Future’. The report provided definition to sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.[7] Thus sustainable development tries to create balance between economic development, environmental development, and social development by giving them all equal importance, not through preference to one over another.

Some important cases reflecting the position of the transnational corporations concerning the human development are given below-

4.1 BHOPAL GAS LEAK CASE

In December 1984, extremely poisonous gas methylisocyanate (MIC) leaked from a plant of Union Carbide Corporation in Bhopal, India. In the aftermath of that leak several thousand persons died due to exposure and others suffered permanent loss to their physical well-being. This did

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[7] *What is sustainable development?*, http://www.sd-commission.org.uk/pages/what-is-sustainable-development.html

not last up to them but carried through generations. Those born to the exposed persons also showed symptoms of affected by gas. Also it affected environment to a large extent, even today actions for cleansing are being carried on.

The corporation kept claiming that their safety measures were of high standards and the accident was caused due to activities of a disgruntled employee while investigative facts prove that MIC is highly volatile gas that needs to be stored at 0 degree temperature but in the present case refrigeration unit was shut down to reduce costs as directed. Along with that other safety equipment were also found inactive, thereby leading towards a chemical disaster to occur.[8]

The Corporation fought vigorously to avoid compensation. It even persuaded the Indian Govt. to settle without consulting the victims of the disaster. Undue influence caused by the corporation upon Indian Government can observed from the fact that it claimed US$ 3Bn but settled for just US$ 470 Million.[9] The corporation even fought to have legal case heard in India as it would reduce the cost of compensation as compared to in the US. Further it also delayed cases for long until the out of court settlement between the Indian Government and UCC came into picture.

4.2 WIWA ET AL. V ROYAL DUTCH SHELL

The defendants in this case were involved in extraction of oil from Ogoni Region of Niger Delta. Their activities gained attention of the

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[8] Barbara Dinham & Satinath Sarangi, *The Bhopal gas tragedy 1984 to The evasion of corporate responsibility*, *Environment&Urbanization* 89 (2002), https://journals.sagepub.com/doi/abs/10.1177/095624780201400108

[9] *Id*, at 90

global community when Ogoni people, in 1990s, began protesting against environmental degradation and harm caused to the local community due to oil extracting activities. In 1995, with the help of Niger Government and Military, the protests were suppressed violently. Several of them including Ken Saro Wiwa, an acclaimed writer and environmentalist[10]and 8 others constituting "Ogoni Nine" (A group leading the protest) members were killed and many arrested, tortured etc. Royal Dutch Petroleum Company, Shell Transport and Trading, and a company official and Nigerian Affiliate were sued for human rights violations, arbitrary arrests and summary execution etc. Later this case was settled out of court for US$ 15.5 Mn in 2009.[11]

There were two more lawsuits with regard to the Niger Delta. The first one *Kiobel v. Royal Dutch Petroleum Co.* case in which issue was with regard to environmental degradation in Ogoni region of Niger River delta. When protested protests were suppressed by violent means. Then the case was brought to the Court under Alien Tort Claims Act in US. The Second Circuit court of appeals rejected the proposition that the corporations may be held liable for torts in violation of international law under the ATS and this decision, on April 17, 2013, was affirmed by the US Supreme Court.

The second one, *Bodo v. Shell*, where the issue was of oil spill from very old and poorly maintained pipeline. The Bodo community

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[10] *Wiwa v. Royal Dutch Shell: Getting Away with Murder: Shell's Complicity with Crimes Against Humanity in Nigeria*, https://earthrights.org/case/wiwa-v-royal-dutch-shell/

[11] *Ingrid Wuerth, Wiwa v. Shell: The $15.5 Million Settlement*, American Society of International Law (2009), https://www.asil.org/insights/volume/13/issue/14/wiwa-v-shell-155-million-settlement

claimed for cleanup of oil pollution against this environment hazard activity in London High Court in 2012. Two major incidents of spill over occurred in 2008 and 2009 due to which thousands of people suffered their land, livelihood and health. Shell admitted that its subsidiary in Nigeria Shell Petroleum Development Company is responsible for oil spill but at the same denied allegation by arguing that oil spill is due to activities of theft and sabotage. In this case Shell's offer for settlement was refused for being insignificant. Further in 2014, Shell was held responsible for spills from their pipelines as the company failed to take reasonable measures to protect them from malfunction or from oil theft.[12]

Later some documents also revealed that despite knowing poor condition of pipelines Shell continued use that old infrastructure consequently affecting the Bodo community. After this revelation in January 2015 Shell offered to pay £55Mn for cleanup purposes. For this, a mission Bodo Mediation Initiative was sponsored by the Dutch Government and parties decided to put the legal claim on hold but reserved a right to resume in case cleanup work is inadequately done. Further to avoid this, Shell tried to pursued member of the Bodo Community to include a clause avoiding any lawsuit in future, which was turned down by the UK judge by holding that right to revive legal claim by the Bodo community members cannot be taken away.[13]

4.3 T&CS IN GLOBAL ENVIRONMENTAL POLITICS

Generally the role played by the transnational actors (including TNCs) in policy-making process is not matter of analysis. If we go deeper,

[12] *Shell lawsuit (re oil spills & Bodo community in Nigeria)*, https://www.business-humanrights.org/en/shell-lawsuit-re-oil-spills-bodo-community-in-nigeria
[13] *Id*

there is more to be found than what the ideal system shows. TNCs are motivated by profit that means if there is more demand in the market that has to be satisfied by more supply thus maximising profits and causing extra burden on the natural resources and also maximising environmental degradation. This is also the reason behind presence of major sites for production units in environmental sensitive areas. Such areas may be sensitive because of their geographical location or may have become degraded to the extent that the areas are declared sensitive.

As Lucy Ford has cleared the position of TNCs in her paper, they are so much powerful that some of them have assets even more than the GDP of several countries. They have involvement in lobbying processes and attempt to influence the agenda to prevent the measures that could be harmful to business.[14] When in 1992, UN Conference on Environment and Development was going on, the same time a lobby group WBCSD came into being and influenced the negotiations to avoid the role of business groups in environmental degradation. Agenda 21 which was a comprehensive document on sustainable development includes role of corporations only with respect to the sustainable development and abstain from counting on the need for their regulation. During the UNCED Conference, the UN Centre on Transnational Corporations (UNCTC) was dismantled and its propositions to held corporations accountable under Agenda 21 were turned down by the developed countries. The aforementioned controversy got revealed after some corporations who

[14] *Supra* 4, at 36

were found to be major polluters had track record of funding anti-environment lobby groups were also found to be funding UNCED.[15]

5. INTERNATIONAL LEGAL FRAMEWORK TO REGULATE TRANSNATIONAL CORPORATIONS

TNCs always prefer voluntary guidelines because these provide them with favourable conditions to work. Taking favours for long of these voluntary guidelines they act below the standards. Finally the idea for establishing a legal framework to regulate TNCs at international level was discussed in 1970s. Journey begins in 1974, when UN Economic and Social Council (ECOSOC) established the UN Commission of Transnational Corporations (UNCTC). The UNCTC prepared a draft Code of Conduct for Transnational Corporations which never saw the day light and finally both the bodies were dismantled in the year of 1993-1994.[16]

In 2000, UN Secretary General Kofi Annan, launched the Global Compact in which he envisaged to encourage the TNCs and work together for the development of human rights. The TNCs were made committed to respect the human rights and environmental standards on voluntary basis. This relationship of the United Nations and the TNCs gave opportunity to TNCs to achieve their goals irrespective of human rights violations and they were also able to justify their actions. Later on two research reports of the United Nations Research Institute for Social Development (UNRISD) emphasizing that this partnership gives TNCs the "means of pursue their particular political interests within the United Nations" and further called upon the United Nations to "reinforce the procedures designed to control

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[15] *Id*

[16] *Transnational Corporations: What Regulations?*, https://www.stopcorporateimpunity.org/transnational-corporations-what-regulations/

the respect of ILO and of international human rights standards, to support complaint procedures…"[17]

In another report published in 2010, the United Nations Joint Inspection Unit (JIU) expressed concerns about the "risks associated with the use of the United Nations brand by companies that may benefit from their association with the Organization without having proven their conformity with United Nations core values and principles." This body clearly pointed out that the Global Compact was lacking a proper regulatory governmental and institutional framework.[18] It can be easily ascertained the fact that the UN Global Compact directed at "corporate sustainability" though they were endorsed by more than 8,500 signatories from 135 countries, as it gave very little relevance to the accountability of TNCs.[19]

On the other hand the UN Commission of Human Rights, in 2005, appointed John Ruggie (also known as the Father of Global Compact), as the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises.[20] He clearly opposed the possibility for receiving complaints from the NGOs with regard to the human rights violations done by the TNCs. In June 2011, he presented his principles, to the Human Rights Council, entitled "Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework".[21] The principles

[17] *Id*
[18] *Id*
[19] *Accountability of Transnational corporations*, 59 Emerald Insight, https://doi.org/10.1108/cpoib-08-2014-0040
[20] *Supra* 18
[21] *Id*

contained in his report were voluntary in nature as can be seen from the following provisions: "Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."[22]

Further in principle 23:

> *In all contexts, business enterprises should:*
> *a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate*
> *b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements*
> c) *Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate*"[23]

In aforementioned both principles of the report of Ruggie principles are loosely knitted as reflected from the term 'should' rather 'must' which would have made the obligation mandatory upon the transnational corporations. Thus leaving path for TNCs to commit human rights violations and get away.

With tenure of Ruggie getting away in 2011, the UN Human Rights Council approved his report and new working group of human rights and transnational corporations including other business enterprises and a Forum on Business and Human Rights were formed. But this mandate proved to worthless because the fundamental substance running

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[22] *Guiding Principles on Business and Human rights: Implementing the United Nations "Protect, Respect and Remedy Framework*, 13, https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf
[23] *Id*, at 25

this mandate was based on Ruggie's Report. Thus no human rights violation cases could have been presented.

Recently, in 2014, the Human Rights Council (HRC) adopted a resolution for the establishment of an open-ended intergovernmental working group (IGWG) 'to elaborate an international legally-binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'.[24] The working group recently submitted their "report on the fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights" in 2019.[25]

6. FINDINGS

Transnational corporations can have bases in two or more countries and are not restricted to one country like multi-national country. This feature of transnational corporations make them free to choose any place where they can easily carry on their business activities without any sort of resistance. This is the reason that they generally go for developing countries because, firstly, there laws and their enforcement are not strong enough to make them bend their practices thus they go on with what practices they were earlier practicing, example, McDonald, business model of McDonald is considered to be very strict as they never change their practices and standards according to the place, secondly, in developing countries they gain importance over all other local business

[24]Olivier De Schutter, *Towards a New Treaty on Business and Human Rights*, 41, https://law.yale.edu/system/files/bhrj-treaty_on_business_and_human_rights-2015_0.pdf
[25] Report on the fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, https://daccess-ods.un.org/TMP/9545667.17147827.html

groups and sometime even influence the governments to favour them because their assets are higher than the local business groups and sometimes they hold assets even larger than the GDP of any country or group of countries collectively.

With change in time, transnational corporations have changed so far that their nature and activity got also changed. History is evident as to how the companies changed their activities from trade to gain control over the kingdoms and become ruler and then rampant human rights violations can also be witnessed under their regime. This can be termed as power hunger which in the long run brought the world two world wars killing more than millions of people across the world.

Transnational corporations of the modern times can also be said not less than the earlier ones. Their immense power makes them capable of influencing and sometimes even controlling the governments of some of the states. Cases of *Bhopal Gas Tragedy*, *Wiwa et al v. Royal Dutch Shell* are the cases which clearly reflect how government or the leading personalities settled for very insignificant amount. In *Wiwa* and other cases it was also alleged that their own government took part in committing violence upon for protesting against the activities of the transnational corporations which were degrading the environment and also caused harm to health.

It seems to be the history repeating itself as can be observed from the cases of Niger River Delta Region and callous attitude of transnational corporations towards human rights violations and non-admittance and shifting of the burden of their faults etc. are the incidents proving lack of ethics and values in them and their activities. Hence it can be made to understand that they not even trustworthy.

The aforementioned character sketch of transnational corporations is also reflected in their response to their liability. They prefer those places to work where their liability for anything done is voluntary in nature. That means they attempts to avoid liabilities so that in no case they suffer harm regardless of the fact that the cost of their profit is paid by other persons' health, food, water and sometimes lives. In order to keep themselves motivated for gains they have been found lobbying into policy making process to turn policies in their favour. Example of UNCED conference is in itself a disastrous event as policies and laws are made after utilization of vast number of resources and hard-work to achieve major targets but actions of some selfish persons cause them to be worthless. Gravity of the issue can be mapped by the above example because if they are able to influence at international level then what would be the position of a small country. Thus the position of transnational corporations can be better understood by the words of David Korten who described TNCs as "instruments of a market tyranny that is extending its reach across the planet like a cancer, colonising ever more of the planet's living spaces, destroying livelihoods, displacing people, rendering democratic institutions impotent, and feeding on life in an insatiable quest for money".[26]

The concept of Sustainable Development talks about proper balance among Economic Development, Environmental Development and Social Development. But the activity of TNCs clearly shows their

[26] *Supra* 5, at 281

motivation towards economic growth at the cost of the other two. While doing so TNCs fail to understand the basic spirit of the concept of Sustainable Development that is to use natural resources in a manner that they remain available to the future generations as well. Therefore it is need of hour to strike down balance among all the components of the sustainable development. The case here is not to suppress the economic development because it also plays important role in keeping sustainable development especially by provision of technology and other effective ways to conserve the natural environment.

Now the question arises as to how to obtain such balance? As here the issue is of transnational corporations and as per the observation in an aforementioned paragraph that the transnational corporations act as unruly horse who doesn't want to be tied. Thus it becomes most important to control the transnational corporations. Such efforts have been taking place since 1974. Few years ago a resolution was passed to adopt a legally binding treaty to regulate the TNCs and their activities. Recently in 2019 a report of 4^{th} session of the working group has been submitted. Hence it can be said that we are on the right track to promote human rights, environmental rights, and health care rights?

7. CONCLUSION

Transnational corporations are motivated by profit and do not care about anything till they are being benefitted. In history once such corporations had created chaos and made the world face two world wars. Even today they are found involved in corrupt practices, human rights violations, environmental degradation, and causing social disorder etc. Here they fail to understand that everything is knitted together, if one thread is untied the whole society face the consequences. Environmental degradation more than the regeneration capacity of nature will definitely lead to imbalance and as human society is closely linked to natural environment, in some cases it is their life because they get food, shelter, wood etc. from it. To protect the environment the global community is making efforts to reduce the emission of greenhouse gases and to prevent other activities harmful to the environment. But TNCs and such other persons are only concerned with making profits. They forget that everything is perished if not maintained properly.

Their callous nature is reflected in facts of the cases of MIC Leak, Oil Pollution, Oil Spillover etc. shows their insensitiveness and overexploitation of resources and not maintaining according to the proper standards. Apart from this they even made effort lot to keep their liability voluntary in nature and pursued countries to reduce the settlement amounts. This all raises question over their intentions which does not seem good. No one can be allowed to take law into their own hands and for this person must be in control. This indicates towards regulation of transnational persons.

8. SUGGESTIONS

Through the findings, it can be observed that there is a need to make trans-national corporations accountable for their actions, and therefore, there can be some steps taken in furtherance of meeting this goal, which are as follows:

1. To adopt a legally binding treaty making transnational corporations accountable

2. To create a proper mechanism to strike a balance among the 3 components of sustainable development.
3. To ensure proper implementation of treaties.
4. To provide a proper dispute resolution mechanism.
5. To spread sensitization among the persons involved in corporate world towards the human rights and environmental issues.
6. To adopt high standards in order to meet with the regeneration capacity of nature.

CROSS BORDER DATA PROTECTION AND E-COMMERCE

*Mayank Singhal**

ABSTRACT

There has been a consistent increase in e-commerce transactions all across the world and India is not an exception to it. These transactions generate huge amount of data. Such data involves personal as well as the financial data like bank account details. E-commerce industry in India has presence of foreign enterprises like Amazon, e-bay etc. It is a genuine concern for a developing country like India to regulate the cross border data flows with a balanced approach towards the issue. A balance between the privacy of individuals and economic concerns of the stakeholders involved. The Department for Promotion of Industry and Internal Trade released a draft e-commerce policy to address the issue of data protection along with other issues relating to e-commerce. The policy terms data as a new oil and emphasizes upon the need to prevent misuse and regulate the data flows. It places a restriction upon the cross border data flows, seeks to nationalise data and rest the control in hands of the government to utilise the economic benefit derived for the larger public benefit. The draft policy may be termed as extremely protectionist in nature. The method of data localisation adopted to achieve the objective of the policy, suffers from major deficiencies. The cost and risks of hacking involved in local storage of data has been overlooked by the policy. Another aspect of the policy, which favours domestic enterprises over the

* Student, B.A. LL.B. (Hons.) FYIC, 3rd Year, Rajiv Gandhi National University of Law, Punjab, Patiala (mayanksinghal@rgnul.ac.in).

foreign counterparts is devoid of reasons and may be a ground of challenge under the WTO Agreement for discriminating between local and foreign enterprises. The draft e-commerce policy has been formulated to regulate the e-commerce sector, but has widened its scope by inclusion of an unidentified term like 'digital economy' which may include all others aspect relating to information technology like cloud computing services, internet service providers etc. These aspects form a separate field altogether and cannot be regulated along with the e-commerce. The policy must define its scope with clarity so as to avoid uncertainty.

1. INTRODUCTION

"Data is the new oil. Therefore, just like oil or any other natural resource, it is important to protect data, prevent its misuse, regulate the use and processing of data and address the concerns related to privacy and security."[1] The increasing use of information technology services including e-commerce has raised concerns regarding the protection of data generated by the consumers while they enter into transactions. The data so generated is surely a valuable resource; it is monetized by business enterprises for purposes like user – based advertisement. Many foreign companies like Amazon, E-bay, etc. operated in India, thus the need arises for cross- border data protection.

2. NEED FOR CROSS BORDER DATA PROTECTION

The importance of data protection has been increasing due to an increase in the number of economic activities taking place online. There is

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[1] *Draft National E-Commerce Policy: India's Data for India's Development*, DEPT. FOR PROMOTION OF INDUS. & INTERNAL TRADE (May 25, 2019), https://dipp.gov.in/sites/default/files/DraftNational_ecommerce_Policy_23February2019.pdf.

a huge amount of information being generated, stored and transmitted across the globe. The data flows needs to be regulated so as to address concerns of consumer confidence as well as the privacy of the individuals. Right to privacy has been recognised as a Fundamental Right enshrined under Article 21 of the Indian Constitution.[2] In the judgment delivered by the Supreme Court in *Justice K.S. Puttaswamy*,[3] the Court emphasized upon the regime of data protection in following words, "Formulation of a regime for data protection is a complex exercise which needs to be undertaken by the State after a careful balancing of the requirements of privacy coupled with other values which the protection of data sub-serves together with the legitimate concerns of the State." The data protection regime must necessarily be balanced. An imbalanced approach would lead to a breach of privacy of the individuals. An excessively stringent regime, on the other hand, would seriously hamper the trade flows. E-Commerce has been a growing phenomenon, with more and more people becoming digitally educated. There has been consistent growth in the e-commerce market. The Indian B2C e-commerce market was valued at USD 38.5 billion in 2017 and is estimated to rise to USD 200 billion in 2026.[4] Activities undertaken by the consumer during e-commerce transactions generated an unprecedented amount of data.

3. DRAFT E-COMMERCE POLICY AND DATA PROTECTION

The Department for Promotion of Industry and Internal Trade (DPIIT) released the draft e-commerce policy ("draft policy") on February 23, 2019. The policy, in light of increasing importance of data protection

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[2] Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.
[3] *Id*.
[4] *Indian Ecommerce Industry Analysis*, INDIAN BRAND EQUITY FOUNDATION (May 25, 2019), https://www.ibef.org/industry/ecommerce-presentation.

and privacy, aims at regulation of cross border data flows. The term 'data' has been broadly defined by the draft policy. It defines 'data' as any type of information converted into a binary digital form that is efficient to store, process and transfer across different devices, platforms, servers and borders. Data includes both standalone personal data as well a financial data.[5]

The data generated may be monetized by the corporations in various ways by analysing, processing and utilizing it. The online advertisements nowadays are based upon activities of the user. The draft policy, asserts that "An Individual owns the right to his data", thereby granting the right to an individual over the data generated by him. It further states that "the data that is generated in India belongs to Indians, as do the derivatives there from".[6] Thus, draft policy terms data as a "national asset" and that it must be held by the government in 'trust'.[7]

The draft policy restricts the cross border transfer of data generated by way of e-commerce and social media activities. The policy aims to restrict the sharing of data with business entities outside India even with the consent of the customer. The data cannot be made available to the foreign government, without prior permission of Indian authorities. The government by way of the draft policy, seeks to exercise sovereignty over the data generated in the country.

The draft policy, however, exempts cross-border flow in the case where (a) data that is not collected in India (b) B2B data is sent to India as part of a commercial contract (c) data flows relating to cloud computing

[5] *supra* note 1, at 10.
[6] *Id*. at 15.
[7] *Id*. at 14.

services, have no personal or community implications; which and (d) MNCs moving internal data of company.

4. ANALYSIS OF THE DRAFT POLICY

The draft policy may be termed as an extremely protectionist measure taken by the government as it restricts the cross border data flows in a stringent manner. The government seeks to justify the stringency of the measures in the guise of India being a developing nation and there being consequential need to develop and boost the domestic digital infrastructure.

4.1 EXCESSIVELY WIDE SCOPE

The draft e-commerce policy has been formulated to regulate data transfers in the e-commerce sector. But usage of the term 'digital economy', expands the coverage to all network related communications like search engines, ISPs, OTT services providers, content ecosystem and the larger Indian IT industry which processes data on behalf of clients. NASSCOM recommends that "DPIIT should avoid placing conflicting or significant views in the e-commerce policy on matters which are core to other ministries. Placing them in the policy causes anxiety for the industry as it generates avoidable uncertainty."[8] The recommendations by the NASSCOM are relevant to address the issue of defining the scope of the draft policy. If the policy has been formulated with an aim to regulate the e-commerce sector, then it must regulate the only e-commerce sector and not beyond. The vagueness in defining the scope causes uncertainty.

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[8] Ashish Aggarwal, *NASSCOM's comments on the draft e-commerce policy*, NASSCOM (May 26, 2019), https://community.nasscom.in/communities/policy-advocacy/nasscoms-comments-on-the-draft-e-commerce-policy.html.

4.2 EXCESSIVE PROTECTIONISM

The draft policy addresses the genuine concerns of a developing nation like India in the global digital regime, which is dominated by developed nations. Treating individual data, as a national resource and its transfer being controlled by the government, is unjustified. The individual has a right over the data generated by his activity and transfer of such data may be allowed with his consent. The draft policy, does not allow transfer with consent of customer.[9] The policy intends to nationalize the data and transfers the control of transfer in the hands of the government. The government is attempting to adopt an excessive protectionist regime. The government intends to treat the data as community asset and derive economic benefit as public trust. The approach suffers from a few deficiencies. First, it fails to address how such data shall be utilised by the government for the benefit of public. Second, the approach is based upon data localization and restriction upon the cross border data flow. The draft policy does not take into consideration the rationale and efficiency of these methods. Moreover, for ensuring public benefit it assumes that domestic enterprises are more beneficial than the foreign counterparts. This approach is devoid of reasons as it may be possible that a foreign enterprise may handle data more effectively than a domestic one. Government cannot escape from its obligation to ensure privacy of the citizens by way of restricting cross border data flows. The draft policy provides for discriminatory provisions in favour of the domestic players by restricting data flows with foreign enterprises which may be challenged before WTO for violation of principle of National Treatment found in Article 3 of GATT. All e-commerce sites or apps are required to have a

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[9] *supra* note 1, at 16.

registered entity in India.[10] This reduces competition for Indian enterprises because the small and medium foreign enterprises might not be able to comply with the requirements.

4.3 PROBLEM WITH DATA LOCALIZATION

The draft policy suggests localisation of data generated in India. Such restriction may act as a barrier to trade and raise the costs of handling data. The US Trade Representative's 2019 National Trade Estimate Report on Foreign Trade Barriers state, "India has recently promulgated a number of data localisation requirements that would serve as significant barriers to digital trade between the US and India, the US strongly encourages India to reconsider the most discriminatory and trade-distortive aspects of this draft policy and the other measures described above.[11] Data localisation has been a measure to protect privacy. But, the viability of such measure may be a concern owing to lack of sufficient infrastructure in India.

4.4 OVERLAPPING WITH DATA PROTECTION BILL, 2018

The draft e-commerce policy prepared by the Department for Promotion of Industry and Industrial Trade contains six categories – Data, Infrastructure Development, E-commerce marketplaces, Regulatory issues, Stimulating the domestic digital economy and Export promotion through e-commerce. In regard to data protection, it overlaps with the Personal Data Protection Bill, 2018 (draft bill) which is based on Justice Shrikirishna committee report. The bill is prepared by the Ministry of

[10] *Id.*, at 20.
[11] *US criticises India's data localisation norms, draft ecommerce policy*, CNBC TV- 18 (May 27, 2019), https://www.cnbctv18.com/economy/us-criticises-indias-data-localisation-norms-draft-ecommerce-policy-2891051.htm.

Electronics and Information Technology (MeitY). The Bill is wide in scope and it covers the e-commerce sector. It allows data – sharing with the consent of the user, while the same is not allowed under the draft e-commerce policy. There may be a situation where conflict may arise between both the draft bill and the e-commerce policy. Such situations may cause uncertainty. Data protection measures should be done away with the draft e-commerce policy and should be solely governed by the Data Protection Act, eventually. It was suggested by the Ministry of Finance, a government official said "The draft data protection bill, which is being dealt by the information technology (IT) ministry, is not restricted to e-commerce companies but is applicable for every industry and sector. It is best if the issue is not a part of the e-commerce policy,"[12] The suggestions by the Finance Ministry must be incorporated so as to ensure that there is no overlapping and uncertainty which may arise due to parallel laws governing the same domain.

5. SUGGESTIONS

A few suggestions are provided for the draft policy in respect to cross border data transfers. First, the draft policy must restrict the regulations in respect to data generated by way of e-commerce transactions only as the personal data is being dealt under the Personal Data Protection Bill. The overlap between both may become an unwanted cause for legal uncertainty. Second, there is need to define the scope of community data with clarity and a need to provide a due process to enable its sharing. The policy needs to address the manner in which data shall be

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[12] Shreya Nandi, *FinMin wants data protection provisions out of e-commerce policy*, LIVEMINT (May 26, 2019, 7:30 PM), https://www.livemint.com/politics/policy/finmin-wants-data-protection-provisions-out-of-e-commerce-policy-1557773284732.html.

utilised for the benefit of public in general and domestic enterprises. Third, the draft policy has adopted an excessive protectionist regime for cross border data flows. Data localisation method used to restrict data flow will create unnecessary expenditure and it may become hurdle in global trade. In alternate, the government can provide for free data flow but ensure high level protection for data generated by way of e-commerce transactions taking place in the country.

6. CONCLUSION

The draft policy addresses the major concerns which have been raised due to the increasing growth of the e-commerce sector in the India. The policy terms data as the new oil and has adopted an extreme protectionist approach towards the cross – border data flows. Such an approach has been adopted in an attempt to address the legitimate grievances of developing nation like India. The government must also consider the alternative approaches to data localisation and restriction upon the cross border data flows. Data localisation requires storage of data in India. Such storages may be an expensive affair and also expose the data to the risk of being hacked. In such cases, the costs may outweigh the benefits. The future impact of such a policy has to be kept in mind before it is to be implemented. The policy must comprehensively define its scope and lay down the provisions with clarity so as to avoid unfavourable consequences.

JURISDICTIONAL CHALLENGES TO CLAIMS MADE BY TRUST & TRUST PARTICIPANTS IN INVESTMENT TREATY ARBITRATION

Alok Chaurasia[*] *& Chitresh Baheti*[**]

ABSTRACT

Claims made by trust & its participants in investment treaty arbitration is relatively a new phenomenon which has been left untouched by a majority of scholars. While trusts have no domicile across major common law jurisdictions, they have been increasingly used by states and private entities to enter into transactions that involves voluminous inflow and outflow of capital and at the same time risk protection. At the outset, the authors have provided a general description of trusts and the rights and obligations of the parties set out in trust structures. The authors aim to discuss the standing of trusts as an entity to make claims for a breach of provisions of a treaty and at the same time elucidate upon the intricacies involved for trust parties namely, trustee, protector, settlor, and beneficiary, to make a claim subsequent to a dispute arising out of the treaty provisions. Further, the authors have ventured to discuss various case laws pertaining to both standing of trusts and trust parties that expose the legal conundrums, such as control and ownership, involved in arriving at a conclusion as to standing of the concerned parties. Towards the end the authors have tried to summarise the entire discussion while

[*] Student, B.A. LL.B. (Hons.) FYIC, 4th Year, Dr. Ram Manohar Lohiya National Law University, Lucknow, alokchaurasia900@gmail.com.

[**] Student, B.A. LL.B. (Hons.) FYIC, 4th Year, Dr. Ram Manohar Lohiya National Law University, Lucknow, chitreshbaheti11@gmail.com.

maintaining that it is entirely upon the parties to the arbitration agreement and the drafting of the treaty provisions to include or exclude claims by trusts or trust parties.

1. INTRODUCTION

Foreign investment is an indisputable if not the most important facet of sustaining a country's economy. In order to attract Foreign Direct Investment ("**FDI**") and to extol maximum benefit out of such capital influx, international policy making efforts have increased and International Investment Agreements ("**IIAs**") at the bilateral, regional, sub-regional and inter-regional levels has attained a whole new status. With the growth of IIAs,[1] the exponential rise of International Treaty Arbitration ("**ITA**") and the prevalent use of trusts has called for the attention of majority of users and practitioner. Recent case laws have revealed that trust has been at the forefront of the ITA. The intermingling of ITA and trust has resulted in fierce battles which was beyond the expectation of the legal scholars. This article, focusing on the impediments associated with the use of trust in ITA, sets out to answer certain questions like who has the standing to bring a claim for trust and trust assets, whether the parties associated with trust can be considered as an investor, the standing of trusts in ITA etc.

[1] Malcolm Langford et al., *The Revolving Door in International Investment Arbitration*, 20 J. INT'L ECON. L., 301 (2017).

2. TRUST PRINCIPLE & TAXONOMIES

In *Empresa Ele´ctrica del Ecuador, Inc. v. Republic of Ecuador,*[2] trust has been defined as a "a contract by which a natural or juridical person transfers ownership of a given portion of its assets to a trustee, so that the trustee can use these assets to carry out a lawful purpose, which must be expressly set forth in the contract by the person setting up the trust." In other words, trust means a legal relationship created by "the 'settlor', when assets have been placed under the control of a 'trustee' for the benefit of a 'beneficiary' or for a specified purpose."[3]

From the above definition it is evident that in creation of a trust, there exists a relationship between three different entities i.e. settlor, trustee & beneficiary.[4] A settlor is a person who holds absolute ownership of a property which is to be the subject matter of the trust. Once the trust has been validly declared, the settlor ceases to have any role in the trust.[5] On creation of a valid trust, the title to the property must be vested in a trustee and the rights must be held by trustee for the beneficiaries. The trustee is not entitled to any personal or beneficial ownership in the trust property.[6] A beneficiary is a person for whom equitable ownership or partial equitable interest in real or personal property is created.[7] However, another party to trust in certain offshore territory is a Protector.[8] The major role of the protector is to supervise the functioning of trustee and

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[2] Empresa Ele´ctrica del Ecuador, Inc. v. Ecuador, I.C.S.I.D. Case No. ARB/05/9, ¶ 56 (2009).
[3] Hague Convention on the Law Applicable to Trusts and on their Recognition 1985 art 2.
[4] 2 ALISTAIR HUDSON, EQUITY AND TRUST 73 (2017).
[5] Paul v. Pual, 1882 20 Ch. D. 742.
[6] PAOLO PANICO, INTERNATIONAL TRUST LAW 236 (2010).
[7] LYNTON TUCKER ET AL., LEWIN ON TRUSTS 1-009 (2017).
[8] BVI Trustee Act 1961 ch. 303, § 84(2)(d).

safeguarding the interests of settlor.[9] Unlike trustee, the settlor is not the legal owner of the property and can be removed from his fiduciary position by the beneficiary.[10] Generally, all property, real or personal, legal or equitable, can be made the subject of a trust provided that neither the policy of law nor statute bars the settlor from parting with the beneficial interest in favour of intended beneficiary.[11]

Further, the common law jurisprudence also distinguish between types of trust. A distinction has traditionally been drawn between "bare/simple/naked trust & special trust". A bare trust holds property for a single beneficiary absolutely and indefeasibly, a passive repository for beneficial owner with a single task of disposing the property to beneficial owner or as per his direction. Whereas, a trustee in a special trust have special duties to perform.[12] Another distinction has been drawn between "lawful & unlawful trust" on the basis of the objective & purpose of the trust. Another division in the nomenclature of trust is between "public & private trust" depending upon the end term beneficiary of the trust.[13] Another aspect is the distinction between "revocable & irrevocable trust". In revocable trust, the property is transferred back to the settlor or any other person appointed by the settlor, whereas, in irrevocable trust, the property is divested by the settlor permanently and cannot revert back to settlor.[14]

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[9] *Id.*, § 86.
[10] Jasmine Trustees Limited [2015] J.R.C. 16; In the matters of the A and B Trusts (Jersey) [2012] J.R.C. 169A.
[11] PANICO, *supra* note 6, at 36.
[12] PANICO, *supra* note 6, at 15.
[13] PANICO, *supra* note 6, at 22.
[14] PANICO, *supra* note 6, at 236.

3. THE CLAIMANT CONUNDRUM

When it comes to determining a dispute under a Bilateral Investment Treaty (BIT), the first aspect to explore concerns with who is to be the claimant, to be more specific, when determining the meaning of the word ‘investor’, is it to be construed to mean the trust itself, or the parties attached to trust namely, trustee, beneficiary, settlor, or protector, so as to assert a claim subsequent to a dispute arising out of an alleged violation of the terms of a treaty. Traditionally, trusts are the outward face of an intricate corporate structure whose entire purpose is to maintain confidentiality of the ultimate owner. In these instances, the investment vehicles, usually a limited company, forms a part of trust assets as they invariably control the investment, consequently providing them a standing to make claims regarding the investment. However, sometimes it is the case that the trust assets include the investment in contention, in which situation it becomes pertinent to determine whether it is the trust itself that has a standing or the parties associated with the trusts i.e. trustee, beneficiary, etc. who have one.

3.1 STANDING OF CLAIMS BY TRUSTS IN INTERNATIONAL TREATY ARBITRATION

This section deals with the situations in which trusts themselves have a standing to make a claim. When it comes to covering trusts within the ambit of the term investors under a BIT, there are a handful few who expressly provide for inclusion. Chapter 11 of the North Atlantic Free Trade Agreement (NAFTA) provides for inclusion of Trusts[15], the

[15] The North American Free Trade Agreement 1992, 32 I.L.M. 289 (1993) Ch. 11 art 1139 & Ch. 2 art 201.

Protocol on Finance and Investment of the Southern African Development Community (SADC) contains an article covering trusts within the meaning of the term investors.[16] The BIT between Canada and Costa Rica states the term investor to mean 'any entity constituted or organized under applicable law, whether or not for profit, whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association'.[17] In the abovementioned BITs, the dilemma regarding the standing of trusts has been comprehensively dealt with. However, the question that arises, in cases where the terms of a treaty do not expressly mention the inclusion of trusts, is whether such entities could be covered under 'investor' provided a constructive interpretation is given to the terms of a treaties who usually use the test of incorporation, the seat of business and control test, or a combination of these criteria to identify investor.[18]

3.1.1 Seat and Place of Incorporation

Various treaties provide varied definitions of the term 'investor', for example, the Cyprus-Serbia-Montenegro (hereinafter 'CSM treaty') states that an investor is, "a legal entity incorporated, constituted or otherwise duly organized in accordance with the laws and regulations of one Contracting Party, having its seat in the territory of that Contracting Party and making investments in the territory of the other Contracting Party"[19]. It could become problematic to include trusts in a BIT if it encapsulates the tests for incorporation and seat to determine standing

[16] S.A.D.C. Protocol on Finance and Investment 2010 annex 1 art 1(2).
[17] Canada–Costa Rica B.I.T. 1999 art 1(b) (i).
[18] JESWALD W. SALACUSE, THE THREE LAWS OF INTERNATIONAL INVESTMENT 376, 377 (2013).
[19] Cyprus-Serbia and Montenegro B.I.T. 2005 art 1 (3) (b).

because, firstly, trusts have no legal personality as explained above, secondly, common law jurisdictions recognize only the notion of domicile not seat and in cases where seat or domicile is to be established reference will have to be made to domestic law. In India, for instance, the creation of trust does not require a domicile or seat, let alone incorporation, essential requirements are that the parties have to obtain the permission of a civil court and the person creating such trust should be competent to contract.[20]

3.1.2 Trusts established According to the Applicable Laws of the Contracting Parties

The Energy Charter Treaty ("**ECT**") proclaims an investor to be "a company or 'other organisation' organised in accordance with the law applicable in that contracting party".[21] Under this definition a trust established according to the laws of India, or for that matter of fact, of any country, would qualify as an investor under a BIT containing such definition making it flexible for parties to make a claim.

3.1.3 Applicable Laws and Control

The Switzerland-UAE BIT defines investor as "companies including corporations, partnerships, associations and other organizations, which are constituted or otherwise duly organised under Swiss law, as well as companies not established under Swiss law but effectively controlled by Swiss nationals or by companies established under Swiss law".[22] Two essentials can be culled out the definition, (1) trust must be included in the

[20] Indian Trusts Act, 1882, § 7.
[21] Energy Charter Treaty 1994, 34 I.L.M. 373 (1995) art 1(7) (a) (ii).
[22] Switzerland–UAE B.I.T. 1999, art 1(1) (a) (ii).

term 'other organisation' established under Swiss law and (2) control by Swiss nationals of the same. Establishing control will invariably lead us to the question, whether the control is administered by the trustee, settlor, beneficiary etc. Further, if the trustee is a Swiss national and the beneficiary of Indian origin, will the tern 'investor' still cover the trust?

3.1.4 Nationality Principle

Another principle that tribunals are increasingly considering is regarding that of nationality of trusts where emphasis is placed on the creation of trust according to the applicable laws of the contracting parties rather than the nationality of the trustee or the beneficiaries. In the ongoing claim in *Strategic Infrasol v. India*,[23] where the claimants happened to be a limited liability company based in UAE and a joint venture (whose standing can also be questioned) created by Thakur Family Trust and Ace Hospital Management. The main contention made was regarding the nationality of the Thakur trust which was allegedly established in India but was managed by the trustee who was a resident of UAE thus, making the trust a national of UAE.

3.1.5 Conflict of Laws

Another highlighting factor which has been recently taken into consideration while determining the jurisdiction of the claims brought by the trust in ITA is the conflict of laws. Trust instruments and its interrelated concepts including but not limited to incorporation, seat and control are generally interpreted in the light of extent and applicability of

[23] Strategic Infrasol Foodstuff L.L.C., The Joint Venture of Thakur Family Trust, U.A.E. with Ace Hospitality Management D.M.C.C., U.A.E. v. India, Notice of Arbitration ¶ 8, 9 (2015) & Reply to Second Notice of Arbitration (2017).

domestic laws. The permissibility of recourse to municipal laws to interpret such matters has been examined by the ICSID in the case of *Capital Financial Holdings Luxembourg v. Cameroon*,[24] & *Orascom v. Algeria*.[25] In *Capital Financial*, the tribunal held that the *renvoi* to municipal law is permissible, whereas, in *Orascom*, the tribunal did not reject the renvoi to municipal laws, however, it took the view that even if domestic laws were applied instead of principle of *effet utile*, the nationality of the trust would be the same. Based on the above, it can be contested that the jurisdiction of the claims brought by trust have a bearing upon the municipal laws. Moreover, as mentioned above, few investment treaties expressly include trusts under the definition of 'investors' in the respective BITs & therefore, following the views endorsed in *Capital Financial* and *Orascom*, this could lead to broad interpretation of word 'investor' and in turn providing trusts a standing to sue.

3.2 STANDING OF CLAIMS BY TRUST PARTIES IN INTERNATIONAL TREATY ARBITRATION

Recent developments in the landscape of Investment Arbitration has led many to question the jurisdictional challenges to claims made by trust parties namely, trustee, beneficiary, settlor and protector. A plethora of cases with diverse jurisdictional and legal complexities have thrown light on the problems involved in claims made by trusts in investment arbitration.

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[24] Capital Finan. Holdings Luxembourg SA v. Cameroon, ICSID Case No. ARB/15/18, Final Award. 22 June 2017.
[25] Orascom TMT Investments Sa`rl v. Algeria, ICSID Case No ARB/12/35, Final Award, 31 May 2017.

Under investment treaties, the most highlighted case discussing the issue of control over the trust and its assets is *Saba Flakes*.[26] In this case, the claimant had acquired 67% shareholding in a leading telecommunication company 'Teslim'. As per the agreement, the claimant was entitled to the legal title of shares whereas Mr. Uzan was entitled as beneficial owner of the shares.[27] The tribunal observed that the:

> *... [t]he separation of legal title and beneficial ownership rights does not deprive such ownership of the characteristics of an investment within the meaning of the ICSID Convention or the Netherlands-Turkey BIT. Neither the ICSID Convention, nor the BIT make any distinction which could be interpreted as an exclusion of a bare legal title from the scope of the ICSID Convention or from the protection of the BIT.*[28]

In other words, the tribunal ruled that both the trustee as well as the beneficiaries could have the standing to bring a claim under the ICSID Convention & treaty.

Another watermark judgement in determining the jurisdiction claim of the trust parties is that of *Blue Bank v. Venezuela*, a claim arose out of the Barbados–Venezuela BIT (1994) which provided for definition of 'investment' as "every kind of asset invested by nationals or companies of one Contracting Party in the territory of the other Contracting Party".[29] Blue Bank was appointed as a trustee to the Qatar trust created under the laws of Barbados. Blue bank was to administer, manage, and ensure smooth functioning of the assets of the trust. The trust included shareholdings in two companies who in turn were indirect shareholders in

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[26] Saba Fakes v. Turkey, I.C.S.I.D. Case No. ARB/07/20, ¶ 2, 125, 133 (2010).
[27] Id, ¶ 133.
[28] *Id.*, ¶ 134.
[29] Barbados–Venezuela B.I.T., (1994) art I (a).

two Venezuelan companies, namely, ITC as well as Hamesa.[30] The central question arising out of the dispute was whether, Blue Bank, provided the ownership and control over the assets of the trust, as a trustee, had a standing to bring a claim. The tribunal after detailed analysis arrived at the conclusion that, Blue Bank did not own the assets of the trust but was merely managing and administering them.[31] The tribunal cleared the fact that under the BIT an active investment was required by party making a claim which was not the case in the present instance as Blue Bank cannot "be considered as having committed any assets in its own right, as having incurred any risk, or as sharing the loss or profit resulting from the investment".[32] Further the tribunal, after making inquiries as to whether the trustee could make decisions independently of the beneficiary, arrived at a conclusion that Blue Bank was not in a position to "perform many essential trustee functions independently, but, with respect to them' was 'under the control of Hampton (beneficiary), who had effective control over Blue Banks's management of Qatar Trust."[33] Owing to the above, only Hampton could make claims regards to dispute arising out of BIT. The case is illustrative of the fact that tribunals tend to put aside the conventional trust structures or pierce the veil to have a closer look at intricate trust instruments before adjudicating a claim.

The recent judgement in the same line is that of *Mercer v. Canada*,[34] which is a dispute under NAFTA involved Mercer LLC, the claimant, that was a publicly listed entity established under the laws of the

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[30] Blue Bank Int'l & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela, I.C.S.I.D. Case No. ARB12/20, ¶ 46 (2017).
[31] *Id.*, ¶ 163.
[32] *Id.*, ¶ 163-64.
[33] *Id.*, ¶ 196.
[34] Mercer Int'l, Inc. v. Govt .of Canada, I.C.S.I.D. Case No. ARB(AF)/12/3.

State of Washington. Mercer owned and operated industrial plants in Canada through its wholly owned subsidiary Celgar that was responsible for the plants as a trustee.[35] Both the entities formed a Canadian limited partnership by the name of Celgar partnership, in which, Mercer was a limited partner with 99.9% economic interest while Celgar had a 0.1% economic interest.[36] This in a way provided Mercer LLP a standing to make a claim as it was in control of investment and other decisions. However, what needs to be examined here is the fact that Mercer LLP was not owner of trust assets and the beneficiary here was the Celgar partnership, yet when the claim was made it was made under the name of Mercer LLP, neither the trustee nor the beneficiary were made a party to the claim. This reveals un unavoidable fact that designations such as trustee and beneficiary have no standing if ultimately all economic interest accrues to a third entity within the trust structure.

The underlying difficulties posed by the aforementioned problem relates to which party has, as claimant, the requisite investment through control or ownership. In other words, the relationship between qualifying nationals and protected assets can be elaborated upon by the use of concepts of ownership and control.

3.2.1 Ownership

The notion of ownership is prima facie not problematic, however, where legal and beneficial ownership of the trust assets tends to be with different persons, the question of the relevant person exercising the control arises. The ruling in *Saba Flakes,* as discusses above, supports that the

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[35] *Id.*, Request for Arbitration, Apr. 30, 2012, ¶ 1.
[36] *Id.*, ¶ 13.

"separation of legal title and beneficial ownership did not deprive such ownership characteristics of an investment" and therefore is of no relevance, however, the general international law unconditionally treats beneficial ownership rather than legal ownership as the proper criteria for assessment of claims and standing of the parties.[37] It is submitted that the principle of general international law is also relevant in the present scenario with consequences such as "in case of split between a legal owner and a beneficial owner, it is only the beneficial owner which can be compensated".[38] This can also be supported with a fact that in the absence of beneficial ownership, the investment wouldn't have been made at the first place. The similar line of reasoning can be deduced from the ruling of *Blue Bank* where justifying that the claimant had not "committed any assets in its own right", had not "incurred any risk", and was not "sharing the loss or profit resulting from the investment". Similarly, ICSID tribunals have considered the same criteria while examining the 'investment' under Article 25 of ICSID Convention (also known as *Salini* test).[39] Moreover, various panels have looked into same characteristics while assessing the investment under various IIA.[40] Therefore, it can be concluded that to be considered as an investor, the requirement of having some beneficial interest in the trust assets is a prerequisite condition.[41]

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[37] Int'l Technical Products Corp. v. Iran, Award of 28 Oct. 1985, 9 Iran-US C.T.R. 206
[38] Occidental Petroleum Corp. & Occidental Exploration & Production Co. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Dissenting Opinion of Prof. B. Stern to Award of 5 Oct. 2012, para. 144
[39] Salini Costruttori v. Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 23 July 2001, para. 52
[40] Georgia-Switzerland BIT, Art. 1(2); ASEAN Comprehensive Investment Agreement, Art. 4(2), n. 2.
[41] Hanno Wehland, *Blue Bank International v. Venezuela: When Are Trust Assets Protected under International Investment Agreements?*, 34(6) J. INT'L ARB. 947 (2017).

3.2.2 Control

The concept of control has eluded academicians and practitioners alike. In the context of ITA, control cannot be understood to have a singular connotation rather it has multifaceted undertones, i.e. legal and de facto control. Article 1(6) of the ECT provides for definition of investment and further explanation to the article states that “control of an investment means control in fact, determined after an examination of the actual circumstances in each situation”. It goes on to state that the “examination shall include a consideration of all relevant factors, including the investor’s financial interest, including equity interest, in the Investment, his ability to exercise substantial influence over the management and operation of the Investment, and his ability to exercise substantial influence over the selection of members of the board of directors or any other managing body”. On similar lines, Article 1(1) (j) of the Poland-U.S.A. BIT defines control as “having a substantial interest in or the ability to exercise substantial influence over the management and operation of an investment”. A slightly different approach can be observed in Egypt-U.S.A. BIT which elaborates upon control as “means to have a substantial share of ownership rights and the ability to exercise decisive influence”.[42]

From above examples, a more accurate difference that merits attention is that between rights arising out of ownership and actual exercise of power, direction and decision making. While it will be unfair to say that both are mutually exclusive for control or presence of either of them is an absolute

[42] *Id*.

requirement to establish control, the tribunals have emphasised while evaluating control both the aspects have to be taken into consideration.[43]

3.2.3 The Interplay between Ownership and Control

The concepts of ownership and control have been at crossroads due to their intertwined nature with some experts arguing that, irrespective of the terms of agreement, control should be the definitive requirement when it comes to defining the relationship between qualifying nationals and protected assets. Proponents argue that while ownership does not guarantee control, the latter in addition to decision making power also encompasses other rights such as mortgage, hold, leases etc.[44] However, this approach fails to understand that ownership does not amount to control and control does not amount to ownership, both can be exercised without the need for other, i.e. ownership can be exercised without control and vice versa. In case an agreement stipulates both the conditions as a requirement it would be appropriate to evaluate both ownership and control before arriving to a conclusion.

4. CONCLUSION

This article has focused on the potential for use of trust and related parties, the operability and effectiveness of the arbitration clause, the extent to which a treaty provision can be said to be binding on the party against whom the arbitration provision is sought to be enforced, proper representation of parties, and arbitrability. As the preceding analysis suggests, trusts have a standing to sue in case the treaty provisions provide

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[43] Aguas del Tunari v. Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction of 21 Oct. 2005, para. 227.
[44] Z. DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 300 (2009).

for their inclusion. If one goes by the aforementioned examples, it is easy to ascertain standing based on nationality, place of incorporation or seat, however, the same cannot be said for trust parties, as that is dependent on the person who's in control of the investment made despite an outward manifestation of investment poured by some other entity. However, as we have seen from the emerging jurisprudence that beneficial ownership by qualified nationals has gradually become a condition requisite for bringing claims. It is apparent from the above discussed cases like *Flakes*, *Blue Bank* & *Marcena* that each represents a varied set of facts for example *Flakes* involved the tussle between beneficial and legal ownership, *Blue bank* discussed whether trustees can be considered protected investors. A more comprehensive approach to resolve the diversity in issues is to consider the substance of the treaty *in toto* and cater to the requirements of the treaty on a case to case basis rather than sticking to old precedents because each case presents a vastly different and complex set of structures than seen previously.