JURISDICTIONAL LIMITATIONS: ASSESSMENT OF THE INTERNATIONAL INVESTMENT AGREEMENT LIMITING INVESTOR'S ACCESS TO THE INVESTOR-STATE DISPUTE SETTLEMENT MECHANISM

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Globalisation has linked economies through international trade and foreign investment. International Investment Agreements (IIAs) assure the foreign investor by establishing standards for the protection of investment and provisions for prompt and effective dispute redressal mechanisms upon their breach. However, it creates a disequilibrium between the rights of the foreign investor and the Host State's power to pursue its regulatory policies. Consequently, the Host State modifies the provisions of the IIA, which directly or indirectly limits the rights of investors to pursue a claim before the Investor-State Dispute Settlement Mechanism (ISDS) under IIA. Such limitations are generally placed through the removal of investment in certain sectors from the scope of the ISDS, barring claims pertaining to illegal investment before the ISDS, barring claims not complying with the pre-arbitration requirements provided in the IIA, etc. Against this background, this article undertakes the evaluation of such provisions of the IIAs that have the implication of limiting the jurisdiction of the ISDS and thereby prevents the investor from pursuing any claim for the breach of the obligations by the Host State.

Keywords: *Jurisdiction, limitation, International Investment Agreement ('IIA'), InvestorState Dispute Settlement ('ISDS')*

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I. INTRODUCTION

Globalisation has led to increased cross-linkages between various economies through international trade and foreign investment, which are instrumental for the growth

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and development of a country.[1] While investing in a foreign country, an investor requires protection for its investment from the actions of the country such as retrospective taxation, limiting royalty payment, foreign transaction restrictions, acquisition of investment, etc.[2] In this regard, certain forms of protection for the investor are the Double Taxation Avoidance Agreement ("DTAA"),[3] International Investment Agreements ("IIAs")[4] (also called Bilateral Investment Treaties ("BITs")),[5] remedies under domestic laws (if any), remedies provided under the Investor-State contract, political risk insurance, etc.[6] Among other things, IIAs ensure predictability and security for the foreign investors through various protections accorded to them and access to the Investor-State Dispute Settlement ("ISDS") mechanism upon their breach.[7] In other words, it allows the foreign investors to approach the dispute settlement mechanism against the Host State before a binding international arbitration tribunal upon fulfilment of certain conditions. The impact of such a dispute settlement mechanism increases the investor's confidence towards the Host State's obligation contained in the IIA and the provision for a fair opportunity before an independent dispute adjudication mechanism.[8] Various types of protections committed under the BITs are expropriations, fair and equitable treatment, full protection and security, etc. The fundamental aim behind the establishment of the ISDS mechanism is to depoliticise and streamline the dispute redressal body through a

[1]International Centre for Settlement of Investment Disputes ('ICSID) Convention, <https://icsid.worldbank.org/sites/default/files/documents/ICSID%20Convention%20English.pdf> accessed 12 April 2022; *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1965*, [1993] 1 ICSID Reports 23; OECD, *Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs* (OECD 2002).

[2] B. Legum, *Defining Investment and Investor: Who is Entitled to Claim?* (presentation at the Symposium "Making the Most of International Investment Agreements: A Common Agenda" co-organised by ICSID, OECD and UNCTAD, 12 December 2005, Paris, see at <https://www.oecd.org/investment/internationalinvestmentagreements/36370461.pdf >; Christoph Schreuer, *ICSID Convention: A Commentary* (CUP, Cambridge 2000), pp. 124-5.

[3]The DTAAs operate in context of some proposed institutional models such as the OECD Model Double Taxation Convention on Income and Capital Taxation Convention on Income and Capital (issued in 1977, 92 and 95); UN Model Double Taxation Convention between Developed and Developing Countries (adopted 1980,ST/ESA/102); The US Model Income Tax Convention (September, 1996).

[4]There were attempts in 1995-98 to conclude a Multilateral Agreement Investment which resulted in the Draft MAI Negotiating. Text, although the negotiations were discontinued post 1988; Existing Multilateral Investment Agreement may include USMCA.

[5] Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes), Germany and Pakistan (Germany – Pakistan BIT); Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 2.

[6] Juan Carlos Hatchondo and Leonardo Martinez, 'Legal Protection of Foreign Investors' [2011] 97(2) Economic Quarterly 175-76.

[7] Hatchondo and Martinez, ibid, 175-76; Mahnaz Malik, *Definition of International Investment Agreements* (August 2019)(International Institute for Sustainable Development) 1-2; UNCTAD, World Investment Report (2015) 125-126; Minor, M.S., 'The Demise of Expropriation as an Instrument of LDC Policy' [1994] 25 Journal of International Business Studies, 177-188; See David Gaukrodger & Kathryn Godor, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community,*[2012]OECD Working Papers on Investment No.3.

[8] See Jennifer L. Tobin & Marc L. Busch, 'A BIT is Better than a Lot: Bilateral Investment Treaties and Preferential Trade Agreements' [2010] 62(1) World Politics 1-42.

mechanism that allows the investors to submit claims for the violation of the BITs.[9] However, the ISDS has its own set of problems such as transparency, legitimacy, conflicting arbitral awards, etc.,[10] and consequently, various reforms are being initiated in this regard.[11]

Apart from adjudicating the cases submitted before it,[12] the ISDS mechanism plays a crucial role in strengthening global governance systems.[13] The importance of the ISDS is evident from the fact that even though the award applies to the parties to the dispute, its effect is not only limited to the dispute as it guides the future policy actions of the Host State.[14]For instance, in 2016, India unilaterally terminated BITs with 61 countries due to increasing number of arbitration claims arising out of them.[15]The tribunal establishes standards for the determination of the IIA-compatibility of the Host State's actions and indirectly serves as an agency for the assessment of the government's policies.[16] Alternatively, the ISDS mechanism resolves the conflict between the Host State's public interests and foreign investors' rights.

The inclusion of the ISDS in the BITs manifests State's decisions to attract foreign investment at the cost of parting with a piece of its sovereignty.[17]The ISDS tribunals are endowed with a wide array of powers.[18]Withthe power to adjudicate disputes arising out of various obligations contained in the IIA and following the procedures to exercise these powers, the arbitral tribunal considers the legislation, assesses the fairness of the Host State's actions, specifies the content of the property rights, and thereby imposes penalties.[19] The vagueness in outlining the investor's rights

[9] 'Reform of Investor-State Dispute Settlement: In Search of a Roadmap' (UNCTAD IIA Issues Note No. 2, June 2013), 2.
[10]ibid, 1.
[11] George Pothan and Manisha Singh, 'Reforming the ISDS Mechanism: An Idea Whose Time Has Come', in Gourab Banerji and Promod Nair (eds.) *International Arbitration and the Rule of Law: Essays in Honour of Fali Nariman*[2021] 347.
[12] Gus Van Harten &Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law'[2006] 17(1) The European Journal of International Law 121–150.
[13] Mingqian Li, 'Rethinking and Reforming the Investor-State Dispute Settlement Mechanism in the Context of Global Governance' [2020] 1(2) Foundation for Law and International Affairs Review 21.
[14] Harten & Loughlin, (n.12). See also Benedict Kingsbury and Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law,* New York University Public Law and Legal TheoryWorking Papers, No.146 [2009] <http://lsr.nellco.org/nyuplltwp/146>, accessed 10, April 2022.
[15] S. Hartmann & R. Spruk, 'The impact of unilateral BIT terminations on FDI: Quasi-experimental evidence from India' [2022]The Review of International Organizations.
[16] ibid (*Kingsbury*), 146
[17] Kiran N. Gore and Charles H. Camp, 'The Rise of NAFTA 2.0: A Case Study in Effective ISDS Reform', in Alan M. Anderson and Ben Beaumont (eds) *The Investor-State Dispute Settlement System: Reform, Replace or Status Quo?*[2020] 120.
[18]Sophie Nappert, 'International Arbitration as a Tool of Global Governance: The Use (and Abuse) of Discretion' in Eric Brousseau, Jean-Michel Glachant, and Jérôme Sgard (eds) *The Oxford Handbook of Institutions of International Economic Governance and Market Regulation* (2019) <https://ssrn.com/abstract=2994914> accessed 10 April, 2022.
[19] Li (n 13), 30.

offers discretion to the ISDS tribunal in defining the investor's rights.[20] For instance, in *CMS Gas Transmission Company v. Argentine Republic*, the tribunal acknowledged the extremity of Argentina's crisis but held that it did not result in total economic collapse and hence denied Argentina's recourse to Article XI of the Argentina-US BIT to defend its measure.[21] Such discretionary power can lead to a huge cost on the Host State, which is borne out of the taxpayer's money.[22] Ultimately, it leads to the overprotection of the investors at the cost of the Host State's power to regulate its policies.[23] Such tendency of the arbitral tribunal harms the Host State by denouncing the regulatory rights of the Host State.[24] Further, the ISDS is designed in such a way that only the investor has the right to bring a claim against the Host State and not the other way round. Consequently, the ISDS mechanism has faced significant criticism, especially due to the decisions in favour of investors,[25] and for preventing the Host State from fully defending its claims.[26]

Considering such criticism against the Host State, various countries have backed out from the International Centre for Settlement of Investment Disputes ("ICSID") Convention or ceded the dispute settlement chapter in the IIAs. Further, certain Host States incorporate provisions in the IIAs to limit the investor's accessibility to the ISDS mechanisms. For instance, exclusion of the matters from the scope of ISDS, circumvention of the arbitral tribunal powers to determine the compensation amount, non-compliance with procedural requirements such as exhaustion of local remedies, mandatory consent of disputing parties to submit for arbitration, etc., which bars the investor or limits the investor's access to the ISDS mechanism. Investors' rights are also restricted by limiting the breaches that can be challenged at the ISDS, such as only allowing claims for the violation of direct expropriation.

Against this background, this article delineates the text of the IIAs and their provisions restricting investors from asserting their right by limiting their access to the ISDS mechanism provided under the IIA. Broadly, the article classifies such provisions into four categories viz. (i) limiting the scope of investment; (ii) inclusion of legality; (iii) exhaustion of local remedies; and (iv) requirement of consent to initiate disputes before the ISDS. As compared to the existing scholarship on these issues, this article assesses these issues in light of their implications on the jurisdiction of the ISDS tribunal which ultimately limits investors' right to pursue a claim before the ISDS tribunal. Part II of the article looks into the dispute settlement provisions which impose sectoral limitations,

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[20] Steffen Hindelang, *Part II: Study on Investor-State Dispute Settlement ("ISDS") and Alternatives of Dispute Resolution in International Investment Law* (Social Science Research Network 2014), 74 <https://papers.ssrn.com/abstract=2525063> accessed 12 April 2022.

[21] *CMS Gas Transmission Company v. Argentine Republic*[2005] ICSID Case No. ARB/01/8, paras.281, 355, 468, 469, 471.

[22] Marina Kofman, 'Investor-State Dispute Settlement Challenges and Reforms' [2018] 25 Australian International Law Journal 52.

[23] Stephen Schill, 'Crafting the International Economic Order: The Public Function of-Investment Treaty Arbitration and its Significance for the Role of the Arbitrator' 23Leiden Journal of International Law 402-403; Reinhard Quick, 'Why TTIP Should Have an Investment Chapter Including ISDS' [2015] 49 Journal of World Trade 200.

[24] Moshe Hirsch, *Invitation to the Sociology of International Law*, (OUP, 2016) 149.

[25] Fahira Brodlija, 'The Path of (Re)volution of the International Investor- State Dispute Settlement Regime: A Case Study of Bosnia and Herzegovina' in Anderson and Beaumont (n.17) 55 – 76.

[26] Alan Redfern, *Law and Practice of International Commercial Arbitration* (OUP, 4th ed. 2004), 486.

exclusion of the substantive protections from the text of the IIA, etc. Part III of the article delves into 'legality requirement' and its relationship with the jurisdiction of the ISDS. Similarly, Part IV and V analyse the issue of 'consent' and 'exhaustion of local remedies' respectively and how non-compliance with these provisions affects the jurisdiction of the ISDS. Finally, in Part VI, the authors conclude the article.

II. LIMITATIONS AS TO THE SCOPE OF OBLIGATIONS AND SCOPE OF INVESTMENT AMENABLE TO ISDS

The wide range of the measures as well their standard of treatment outlined in the IIAs is an issue of fundamental concern for the States as it broadens the scope of claims to be brought before the ISDS. Further, it restricts the policy-making space of the Host State.[27]The Host States find it difficult to formulate policies vis à vis providing deference to their commitments under the IIAs, and consequently undermines their sovereignty. Resultantly, it leads to a disparity between the sovereign rights of States, and the rights of private investors. In this context, the States have crafted IIAs in such a manner that investors' right to bring a claim is restricted, and States secure the right to formulate their policies on certain aspects. The variations as to the limitations to the scope of claims before the ISDS take various forms such as limitations as to the scope of the subject matter of investment, level of the government of the Host State rolling out the measures, limitations as to the type of expropriation, etc.

The jurisdiction of the ISDS arises out of IIAs as well as *rationae materiae* of the investment. For bringing a claim before the ISDS, the investor must establish that the subject matter of the dispute falls within the scope of the IIA. Alternatively, the investor must establish that the claim falls within the scope of 'investment' of the IIA and hence make the determination of investment a jurisdictional issue.[28] Similarly, the exclusion of a certain sector from the scope of the BIT forbids the investor from pursuing any claims against the Host State. Such limits to the claimants' rights are pursued through specific exclusion from the scope of the ISDS provisions,[29] modification in the substantive standard, which consequently limits the grounds for the claims,[30] or differences in the procedures for claims pertaining to those certain sectors.[31]

Concerning the *first* type of limitation, i.e. specific exclusion from ISDS, as compared to the Australia-Hong Kong BIT, 1993,[32] the modified Australia-Hong Kong Investment Agreement, 2019 contains a specific stipulation excluding investors from

[27] Megan Wells Sheffer, 'Bilateral Investment Treaties: A Friend or Foe to Human Rights' [2011] 39 Denv. J. Int'l L. & Pol'y 484.

[28] E. Gaillard, 'Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice, Binder et al. (eds) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*[2009] 403-416; Y. Andreeva, 'Salvaging or Sinking the Investment? MHS v. Malaysia Revisited' [2009] 7(2) The Law and Practice of International Courts and Tribunals 161.

[29] For instance, exclusion of measures related to tobacco in Australia-Hong Kong Investment Agreement.

[30] For instance, exclusion of indirect expropriation India-Brazil BIT.

[31] For instance, different ISDS procedures for investment in certain sectors provided in USMCA.

[32] Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments. [2019]

bringing any claim before the ISDS that pertains to tobacco control measures.[33] There are various BITs containing general exception provisions allowing the Host State to pursue public health objectives, and thereby allowing the Host State to pursue measures towards public health.[34] However, the difference between specific exclusion (e.g. Australia-Hong Kong Investment Agreement) and mere inclusion of general exception provision is that the former out rightlyexcludes the jurisdiction of the ISDS tribunal, and the Host State is required to prove that the measure is related to tobacco. Whereas in the latter case, the ISDS tribunal still has the jurisdiction and the Host State is required to prove that the challenged measures fall within the general exception provision.

Another peculiar limitation to the investor's right to bring a claim is through "public welfare notice" stipulated in the Australia-China Free Trade Agreement ("FTA"). According to the same, the measures of the Host State for the legitimate publicwelfare objective of public health, safety, environment, public morals or public order, which are non-discriminatory, cannot be claimed by the investor before the ISDS.[35] However, if the investor still pursues the claim in this regard, the Host State can issue a public welfare notice, and consequentially, the arbitral proceedings would be suspended, and consultation between the States would start.[36] If the States would have consensus as to the fact that the challenged measures fall within the scope of the above-mentioned provision, then the ISDS would also be bound by such decisions, and any award issued by the ISDS in this regard must be consistent with that decision.[37]China-Australia FTA appears to be a watershed in the ISDS mechanism in the context of modifying the interpretative exercise of the ISDS. Ultimately, it maintains an equilibrium between the rights of investors and State sovereignty vis à vis the interpretative power of the arbitral tribunal and treaty parties.[38]Consequentially, the implications of such provision is that there will be limited scope for subjecting measure to national treatment, and the measures cannot be challenged before the ISDS if it seeks to serve public policy objectives.[39]

The s*econd* type of limitation is concerned with the exclusion or modification in the substantive standard, which limits the grounds for an investor to pursue a claim before the ISDS. Japan-Georgia BIT, for instance, excludes the application of certain provisions like national treatment, most favoured nation treatment, and prohibition of

[33] See Australia-Hong Kong Investment Agreement (2019), footnote 14. Further, the Australia-Hong Kong Investment Agreement also excludes claims pertaining to the measures comprising or related to the Pharmaceutical Benefits Scheme, Medicare Benefits Scheme, Therapeutic Goods Administration and Office of the Gene Technology Regulator. See, Australia-Hong Kong Investment Agreement (2019), footnote 13.

[34] UK-Australia Free Trade Agreement, article 13.17; Agreement between Japan and Georgia for the Liberalisation, Promotion and Protection of Investment (Japan-Georgia BIT) article 15; Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India (India-Brazil BIT), article 23.1; Agreement between the Government of Japan and the Government of the Republic of Cote d'Ivoire for the Reciprocal Promotion and Protection of Investment (Côte d'Ivoire - Japan BIT), article 15.

[35] China-Australia FTA, article 9.11.4.

[36] ibid, article 9.11.5-9.11.6.

[37] Ibid, article 9.18.3.

[38]See also, US Model BIT, article 20.

[39] W. Zhou, 'Chinese investment in Australia: A Critical Analysis of the China-Australia Free Trade Agreement' [2017] 18(2) Melbourne Journal of International Law 20-21.

performance requirements on certain sectors such as agriculture, forestry, fisheries, finance, heat supply, mining, etc. (for Japan), and financial services-insurance, broadcasting, etc. (for Georgia).[40] Similarly, Indonesia-Korea Comprehensive Economic Partnership Agreement ("CEPA") also excludes various sectors such as mining and quarrying, agriculture, fisheries and energy from obligations such as national treatment, most favoured nation treatment, performance requirement, and requirement of appointment of senior management and board of directors.[41]

An investor's right to bring a claim may also be excluded if it arises out ofgovernment procurement transactions by a Party.[42] In *ADF Group Inc. v. United States of America*,[43] the investor claimed damages for the injuries due to the requirement pertaining to the use of domestically produced steel. The tribunal held that the substantive obligations concerning national treatment, most-favoured-nation treatment and performance requirements are not applicable to government procurement transactions and ruled in favour of the Host State.[44] Whereas, in *Bosca v. Lithuania*,[45] the tribunal held the measures falling within the scope of the government procurement transactions to be violative of the just and equitable treatment provisions under the BIT.[46] The exclusion of the government procurement from the scope of the BITallows the State to provide preferential treatment to its domestic industries in the national interest.

Similarly, various other aspects such as the exclusion of most-favoured-nation treatment from dispute resolution process,[47] issuance of compulsory licence in accordance with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights,[48] claims arising out of the event before entry into force of the treaty,[49] etc.may be excluded from the application of substantive treaty protections. Further, various IIAs have excluded indirect expropriation, and thereby investors can only bring claims for the violation of commitments concerning direct expropriation.[50] Brazil-India BIT has

[40] For example, Japan-Georgia BIT, art 7.1-7.2, annex I and II.
[41] For example, Indonesia-Korea Comprehensive Economic Partnership Agreement (Indonesia-Korea CEPA), art. 7.10, annex I.
[42] India-Brazil BIT, art 3.6; Japan-Georgia BIT, art 7.7; Regional Comprehensive Economic Partnership, art. 10.
[43] *ADF Group Inc. v. United States of America*, [2003] ICSID Case No. ARB(AF)/00/1.
[44] ibid, para 170.
[45] *Luigiterzo Bosca v. The Republic of Lithuania*, [2013] PCA Case No 2011-05.
[46] ibid, para 174.
[47] Israel-Korea Free Trade Agreement, art 9.4; Indonesia-Korea CEPA, art 10.6(3); Agreement between the Government of the State of Israel and the Government of the United Arab Emirates on Promotion and Protection of Investments (Israel - United Arab Emirates BIT), art 4. In this regard, it is crucial to note that Model India BIT has fully excluded MFN treatment provision.
[48] For example, Japan-Georgia, art 11; RCEP, art 10.13.
[49] For example, Indonesia-Korea CEPA, 7.19(3); Brazil-India BIT, art 3.6; Agreement between the State of Israel and Japan for the Liberalization, Promotion and Protection of Investment (Israel-Japan BIT), art 28; Agreement between the Government of the Republic of Turkey and the Government of Republic of Chad concerning the Reciprocal Promotion and Protection of Investments (Turkey-Chad BIT), art 2.
[50] For example, United State-Mexico-Canada Agreement (USMCA), arts 14.D.3(1)(a)(i)(B), 14.3(1)(b)(i)(B); Brazil-India BIT, art 6.3.

specifically excluded indirect expropriation,[51] whereas the United State-Mexico-Canada Agreement ("USMCA") defines indirect expropriation[52] but prohibits the investor from pursuing any claim arising out of the violation of commitment pertaining to indirect expropriation.[53] Certain BITs limit the jurisdiction of the ISDS tribunal only to determine the amount of compensation in situations concerning corruption.[54]

The *Third* type of limitation is with respect to different ISDS provisions concerning procedures based on the covered sector. For instance, the USMCA provides expeditious procedures for the claims pertaining to investment through government contracts in five covered sectors including (i) oil and gas; (ii) power generation; (iii) telecommunications; (iv) transportation; and (v) infrastructure.[55] In other words, the USCMA still allows the investor to bring a claim as opposed to complete prohibition contained in other IIAs. However, claims for other investments are adjudicated through different procedures.[56] For instance, claims not related to covered sectors cannot be brought before the ISDS for arbitration until and unless the claimant obtains a final decision from a court of last resort of the Host State or 30 months have elapsed from the date of the proceeding.[57]

III. JURISDICTION OF ISDS CONDITIONED BY THE LEGALITY OF INVESTMENT

The impact of illegality in investment is not only observed from the perspective of public policy and economic impact, it has a significant impact on the legal sphere, especially when it becomes a part of IIAs. The impact of actions involving corruption (an example of illegality in investment) can be observed from the fact that the IIAs determine the ability of an investor to pursue a claim against the Host State. A foreign investor can pursue a claim before the tribunal to seek protections under the IIAs only if there exists an investment made legally. *Inter alia*, one of the major constituents of investment stipulated in the IIAs is that it has been made in accordance with the Host State's law or complies with the 'legality requirement'. This principle is based on the premise that when there is illegality in the conduct during the acquisition of the investment, no rights arise in the first place.Resultantly, no investment under the IIA can be said to exist and thereby,

[51] Prabhash Ranjan, *India-Brazil Bilateral Investment Treaty – A New Template for India?*(Kluwer Arbitration Blog, 19 March 2020) <http://arbitrationblog.kluwerarbitration.com/2020/03/19/india-brazil-bilateral-investment-treaty-a-new-template-for-india/> accessed 12 April 2022.

[52] See generally, USMCA, para 3, Annex 14-B.

[53] See USMCA, art 14.D.3(1)(a)(i)(B), art 14.3(1)(b)(i)(B)

[54] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments (UK-Russia BIT), art 8.1; Agreement Between the Government of the People's Republic of China and the Government of the State of Qatar Concerning the Encouragement and Reciprocal Protection of Investments (China-Qatar BIT), art 9.3; Protocol to the Agreement between the Governments of the Grand Duchy of Luxembourg and the Kingdom of Belgium, and the Government of the Union of Soviet Socialist Republics, concerning the Mutual Encouragement and Protection of Investments (Belgium-Russia BIT), art 10.

[55] See generally, Annex 14-E, USMCA.

[56] See generally, USMCA, annex 14-D,

[57] See generally, USMCA, para 14.D.5(1)(b), annex 14-D,

the tribunal would lack *ratione materiae*.[58]This part of the article focuses on the issue of corruption, an example of illegality in investment, *vis à vis* limitation to the jurisdiction.

The IIAs deal with the issue of corruption in two ways viz.,*first*, by taking away the rights of the investor if the investment has any link with corruption, and*second*, by imposing an obligation on the States to encourage the enterprise operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognised standards of corporate social responsibility in their practices and internal policies, such as statements of principle (such as those addressing labour, the environment, human rights, community relations and anti-corruption) that have been endorsed or are supported by the Parties.[59] The jurisdiction of the ISDS tribunal is limited in the first category of provisions. Pursuant to such provisions, the issue of corruption is dealt with either under a specific provision of the IIA dealing with corruption that bars the jurisdiction of the tribunal[60] or it may be dealt with under the 'legality requirement' provision of the IIA.[61]For instance, India's Model BIT as well as Netherlands Model BIT specifically bar the jurisdiction of the tribunal if the investment is obtained by corruption.[62] Various IIAs treat the breach of the anti-corruption clause as equivalent to the breach of domestic laws.[63]

The issue of corruption may be dealt with either as an issue of jurisdiction or admissibility, depending on the facts and circumstances surrounding it.[64] In *Hamester v. Ghana*, the investment contract for the production of cocoa was obtained by fraud and therefore, Ghana objected to the claimant's jurisdiction. The tribunal held that (i) legality as to the initiation of investment is a jurisdictional issue; and (ii) legality during the

[58] Andrew Newcombe, 'Investor Misconduct: Jurisdiction, Admissibility or Merits?' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011) 198.

[59] Canada-Colombia Free Trade Agreement, art 8.16; Canada-Panama Free Trade Agreement, art 9.17; Agreement Between the Government of. Canada and the Government of the. Republic of Benin for the Promotion and Reciprocal Protection of Investments (Canada-Benin BIT), art 16; Canada-Korea Free Trade Agreement, art 8.16; USMCA, art 4.17.

[60] Morocco Model BIT 2019, art 32(1); Belgium-Luxembourg Economic Union Model BIT 2019, art 19(2); Norway Model BIT (draft) 2015, art 15(5); Model India BIT, art.13(2), (4); Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (Slovakia- Iran BIT), art 14(2); European Union-Viet Nam Investment Protection Agreement, art 3.27(2).

[61] Article 2(1) of the Colombia-the United Arab Emirates BIT; See also *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, [2019]ICSID Case No. ARB/16/6, paras 570–571; *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, [2017] ICSID Case No. ARB/13/1, para 277; *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, [2018] ICSID Case No. ARB/12/39, para 221; *Getma International v. Republic of Guinea [II]*, [2016] ICSID Case No. ARB/11/29, paras 111–112.

[62] Netherlands Model BIT, art 16.

[63] Southern African Development Community Model BIT, art 10; Morocco Model BIT, art 19; Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, art 17.

[64] CA Miles, 'Corruption, Jurisdiction and Admissibility in International Investment Claims' [2012] 3 Journal of International Dispute Settlement 329; Michael Polkinghorne and Sven-Michael Volkmer, 'The Legality Requirement in Investment Arbitration' [2017] 34 Journal of International Arbitration 149; Rahim Moloo and Alex Khachaturian, 'The Compliance with the Law Requirement in International Investment Law' [2011] 34(6) Fordham International Law Journal 1473-1501.

performance of an investment is an issue concerning the merits of the claim.[65]Following from the reasoning of the tribunal, it can be stated that the issue is dealt with as a jurisdictional issue when the provision of the BIT stipulates a 'legality requirement' for bringing a claim before the tribunal. In other words, as a limit to the jurisdiction of the tribunal, illegally procured investments (including those obtained through corruption) are excluded due to their inextricable link with the *ratione materiae*.[66] It is dealt with as an issue of admissibility if the event of corruption occurs after the investment or the IIAs do not contain any 'legality requirement'. It is the former which limits the jurisdiction of the ISDS to adjudicate a claim based on the fact that the investment falls short of the 'legality requirement' while it was being made. It is due to the fact that while making an investment, the Host State's consent to arbitrate is circumscribed by the 'legality requirement', and thereby, it becomes a jurisdictional issue due to the failure of the investor to comply with the laws of the Host State.[67]

In *Inceysa v. El Salvador*,[68] the investment was procured through misrepresentation and therefore ran afoul of legality requirements under the El Salvador–Spain BIT, due to which the tribunal declined the jurisdiction. Further, the tribunal also assessedthe Host State's consent to arbitrate. The tribunal held that the Host State's consent was restricted to those investments made in accordance with the laws of the Host State, and therefore, disputes arising out of an illegally procured investment that was not in accordance with the laws of the Host Statefell outside the Host State's consent and hence the tribunal did not have jurisdiction.[69] Similarly,in *Fraport v. Philippines (II)*, the secret shareholder agreement entered into by the claimant with the intention to circumvent the corporate ownership laws of the Host State was held to be inconsistent with the legality requirement and hence deprived the tribunal of its jurisdiction.[70]

Based on the existing jurisprudence, it becomes a jurisdictional issue when the 'legality requirement' is stipulated in the BIT. However, it may limit the jurisdiction even if the BIT does not provide for any such requirements. Due to the lack of precise criteria for determining investment under Article 25 of the ICSID, various additional criteria have been added to determine 'investment'.[71] Some tribunals have removed certain

[65]*Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, [2010] ICSID Case No. ARB/07/24, para 127.

[66]*Salini Construttori SpA and Italstrade SpA v. Kingdom of Morocco*, [2001] ICSID Case No ARB/00/4 Decision on Jurisdiction, para 46; *Inceysa Vallisoletana SL v. Republic of El Salvador (Inceysa v. El Salvador)* [2006] ICSID Case No ARB/03/26 Award, paras 240-242, 249; Dolzer & Schreuer, (n 5) 84-88.

[67] Stephan W Schill, 'Illegal Investments in Investment Treaty Arbitration' (2012) 11 The Law & Practice of International Courts and Tribunals, 281-323; August Reinisch, 'How to Distinguish 'In Accordance with Host State Law' Clauses from Similar International Investment Agreement Provisions?' (2018) 2(1) Indian Journal of Arbitration Law 70–83.

[68]*Inceysa v. El Salvador* (n 61), para 335.

[69] ibid paras195, 207.

[70]*Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, [2006] ICSID Case No. ARB/03/25, paras 467-468.

[71] Alex Grabowski, 'The Definition of Investment under the ICSID Convention: A Defense of Salini' [2014] 15(1) Chicago Journal of International Law 297; *Saba Fakes v. Republic of Turkey* (*Saba v.Turkey*), [2010] ICSID Case No. ARB/07/20; *Victor Pey Casado and President Allende Found. v. Republic of Chile*, [2008] ICSID Case No. ARB/98/2, para 238; *Phoenix Action, Ltd. v. Czech Republic*, [2009] ICSID Case No. ARB/06/5, paras 39, 100, 136-143.

criteria, while some tribunals have added additional criteria. In this regard, for instance, in *Phoenix Action v. Czech Republic*, the tribunal laid down additional criteria for determining investment according to which the investments must be made in good faith in accordance with the laws of the Host State,[72] as it would lead to the utilisation of the resources of the ISDS to protect the illegal investment.[73] This observation implies that the 'legality requirement' limits the right of the foreign investor to bring a claim against the Host State even if such provision is not stipulated in the IIA.

However, one of the fundamental problems with declining the jurisdiction of foreign investors due to the corrupt activities of the Host State is that the decline of jurisdiction creates a disequilibrium between the Host State and the foreign investor as the corrupt act requires the active involvement of the Host State as well.[74] Even the Host State (specifically its officials) are benefitted through corruption, the important issue which is still left unaddressed is the usage of 'corruption' by the Host State as defence due to which the cardinal question is "is it really fair that the host state, which is also tainted by the corruption, can be discharged from all responsibility regarding its alleged unfair or arbitrary measures?".[75]

IV. NON-COMPLIANCE WITH EXHAUSTION OF LOCAL REMEDIES REQUIREMENT

The exhaustion of local remedies ("ELR") requirement shields the sovereign rights of the Host State.[76] It provides an opportunity to the Host State to apply its domestic laws to all persons within its territory, in the present context, to assess the violation of the rights of the foreign investor.[77]Consequently, through effective redressal of the dispute concerning the rights of the foreign investor through administrative and judicial bodies before the dispute is elevated to any other international platform, it benefits the Host State by preventing the internationalisation of claims.[78] However, the requirement of ELR is undermined by the ICSID Convention, which allows the investors to pursue the claim directly before the ISDS tribunal.[79] The ELR principle was

[72]*Phoenix Action, Ltd. v. Czech Republic* (n 69), paras 136-143

[73] ibid, para 100.

[74] A. Kulick & C. Wendler, 'A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption' [2010] 37(1) Legal Issues of Economic Integration 61 – 85.

[75] Hiroyuki Tezuka, 'Corruption Issues in the Jurisdictional Phase of Investment Arbitrations' in Domitille Baizeau and Richard Kreindler (eds), *Addressing Issues of Corruption in Commercial and Investment Arbitration* (Dossiers of the ICC Institute of World Business Law, Vol 13 (2015)) 53-54.

[76]Chittharanjan Felix Amerasinghe, *Local Remedies in International Law* (CUP 2004), 200; Bernardo Sepulveda Amor, 'International Law and National Sovereignty: The NAFTA and the Claims of Mexican Jurisdiction',[1997] 19 Houston Journal of International Law 565-585; Chittharanjan F. Amerasinghe, *Diplomatic Protection* (OUP, 2008) 142.

[77] C.H.M. Waldock, 'The Plea of Domestic Jurisdiction Before International Legal Tribunals' [1954] 31 British Yearbook of International Law 96, 101.

[78] Paula Rivka Schochet, 'A New Role for an Old Rule: Local Remedies and Expanding Human Rights Jurisdiction Under the Torture Victim Protection Act' [1987]19 Columbia Human Rights Law Review 223, 227.

[79] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), art 26.

established as a mode of limitation to the right of reprisal.[80] The ELR requirement was encapsulated as an essential fundamental principle of international customary law that cannot be "tacitly dispensed with".[81] In the *Case concerning Elettronica Sicula*, the International Court of Justice held that:

> *"The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law*."

However, the ELR requirement has been modified in the IIAs as it has either been completely done away with,[82] or it merely requires the foreign investors to initiate a dispute before the domestic judicial mechanism for a certain time period before pursuing the same before the ISDS tribunal.[83] To elaborate, the ELR requirement under the IIAs are stipulated in four ways viz., (i) IIAs explicitly incorporating mandatory ELR requirement (Type 1); (ii) IIAs explicitly waiving off the ELR requirement (Type 2); (iii) IIAs are silent as to the ELR requirement which implies that the ELR requirement has been waived off (Type 3);[84] and (iv) express rejection of the ELR requirement (Type 4). Such provisions in the IIAs are stipulated as follows:

Type of Provision	**Text**
Type 1	In respect of a claim that the Defending Party has breached an obligation under Chapter II, other than an obligation under Article 9 or 10, a disputing investor must first submit its claim before the relevant domestic courts or administrative bodies of the Defending Party for the purpose of pursuing domestic remedies in respect of the same measure or similar factual matters for which a breach of this Treaty is claimed. Such claim before the relevant domestic courts or administrative bodies of the Defending Party must be submitted within one (1) year from the date on which the investor first acquired, or should have first acquired, knowledge of the measure in question and knowledge that

[80] Douglas Wong, 'From Redundancy to Resurgency: Revisiting the Local Remedies Rule in International Investment Arbitration' [2017] 35 Singapore Law Review. 116-118.

[81] *Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*[1989] ICJ Rep 15 at 42.

[82] Agreement on the Encouragement and Reciprocal Protection of Investments, Belgium–Indonesia; Agreement between the Belgium–Luxembourg Economic Union, on the one hand, and Montenegro, on the other hand, on the Reciprocal Promotion and Protection of Investments, art 12(2); Agreement between the Government of Montenegro and the Government of the Republic of Moldova on Promotion and Reciprocal Protection of Investments, art 8(2)(b).

[83] Model India BIT, art 15; Protocol to the Agreement between the Belgium–Luxembourg Economic Union and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments, art 8; Agreement between the Swiss Confederation and the Arab Republic of Egypt on the Promotion and Reciprocal Protection of Investments, Egypt–Switz., (June 7, 2010), art 12(2) -(3).

[84] Matthew C. Potterfield, 'Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time Has Come?' [2015] 41 Yale Journal of International Law 1-12.

	the investment, or the investor with respect to its investment, had incurred loss or damage as a result.[85]
Type 2	If such disputes cannot be settled according to the provisions of paragraph (1) of this Article within six months from the date of request in writing for settlement, other party to the dispute may submit dispute to: a) the competent court of the host contracting party for decision, if the investor so agrees, or b) the International Centre for the Settlement of Investment Disputes established under the Convention on the Settlement of investment Disputes between States and Nationals of other States of March 18, 1965 done in Washington, D.C., if this Convention is applicable to the Contracting Parties, or c) an Ad Hoc Arbitral Tribunal Either party to the investment dispute who choose one of the above mentioned way of the settlement of dispute, cannot choose the two other ways.[86]
Type 3	A foreign investor seeking coverage under such IIAs is neither required nor waives the ELR requirement to pursue a claim before the domestic adjudicating body of the Host State.[87]
Type 4	a)If a dispute under paragraph 1 of this Article cannot be settled within six (6) months of a written notification, the dispute shall at the request of the investor be settled as follows: b) by conciliation or arbitration by the International Centre for Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature in Washington on March 18th, 1965. In case of arbitration, each Contracting Party, by this Agreement irrevocably consents in advance, even in the absence of an individual arbitral agreement between the Contracting Party and the investor, to submit any such dispute to this Centre. <u>This consent implies the renunciation of the requirement that the internal administrative or judicial remedies should be exhausted; or</u> c) by arbitration by three arbitrators in accordance with the Arbitration

[85]art 15.1, Model India BIT; Agreement between the Government of the People's Republic of China and the Government of The Republic of Cote D'ivoire on the Promotion and Protection of Investments, art 9.3.

[86] Agreement between the Government of Montenegro and the Government of the State of Qatar for the Reciprocal Promotion and Protection of Investments, art 8.

[87] See, IISD Best Practices Series: Exhaustion of Local Remedies in International Investment Law, 7. See also, Treaty Between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment.

	Rules of the United Nations Commission on International Trade Law (UNCITRAL), as amended by the last amendment accepted by both Contracting Parties at the time of the request for initiation of the arbitration procedure. In case of arbitration, each Contracting Party, by this Agreement irrevocably consents in advance, even in the absence of an individual arbitral agreement between the Contracting Party and the investor, to submit any such dispute to the tribunal mentioned; or[88]

In the provisions falling under the Type-1 category of ELR requirements, the rights of the foreign investor to pursue a claim before the ISDS is limited by the fact that the investor has not pursued the claim before the domestic adjudicatory body of the Host State, and therefore due to procedural non-compliance, the ISDS tribunal lacks jurisdiction.[89] ELR is a mandatory requirement for the valid consent of the Host State, and non-compliance with the same empowers the tribunal to dismiss the claim on jurisdictional grounds.[90] In *Kiliç v. Turkmenistan*, the tribunal held that "*when such conditions [precedent] are set out in the [dispute resolution provisions] of a BIT (as conditions of the Contracting Parties' offer to arbitrate), which are the very source of an ICSID tribunal's jurisdiction, compliance with them constitutes a jurisdictional requirement, in the sense that a failure to meet the conditions has the consequence that there exists no jurisdiction to be exercised*".[91] The pre-conditions to be complied with before approaching the tribunal only relate to the issue of jurisdiction.[92]

In the second types of provisions, there are various BITs which contains such provisions barring the ELR by the host state once the investor initiates a dispute. For instance, Article 11(4) of the Czech Republic Saudi Arabia BIT bars the Host State for claiming the compliance with the ELR requirement if the investor chooses to initiate arbitration.[93]Similar provision is contained in Austria-India BIT.[94]

In the third types of provisions, in *Generation Ukraine v. Ukraine*, the tribunal noted that the Host States' consent to arbitration must be contained in the instrument in which such consent is expressed i.e. the BIT. The tribunal noted that the United States

[88] For example, see the Agreement Between the Government of the Republic of Croatia and the Government of the Kingdom of Cambodia on the Promotion and Reciprocal Protection of Investments, art 10.2(b).

[89]*Maffezini v. Spain*, [2000] ICSID Case No. ARB/97/7,para 36; *Siemens A.G. v. The Argentine Republic*, [2007] ICSID Case No. ARB/02/8; *Wintershall Aktiengesellschaft v. Argentine Republic*, [2008] ICSID Case No. ARB/04/14, para. 127,160; *ICS Inspection and Control Services Limited v. Argentine Republic*, [2012] P.C.A. Case No. 2010–9, *Award on Jurisdiction*, paras. 262, 326–327.

[90]*Dedev. Romania*, [2013] ICSID Case No. ARB/10/22, paras. 186, 262.

[91]*Kdih v. Turkmenistan*, [2013] ICSID Case No. ARB/10/1, para. 6.2.9.

[92]*Abaclat and Others V. Argentine Republic*, ICSID Case No. ARB/07/5, Dissenting Opinion by Georges Abi-Saab, para 23.

[93] Agreement between the Czech Republic and the Kingdom of Saudi Arabia Concerning the Encouragement and Reciprocal Protection of Investments, Czech–Saudi Arabia, art. 11(4).

[94] Agreement between the Government of the Republic of Austria and the Government of the Republic of India for the Promotion and Protection of Investments, art. 9(4).

and Ukraine have omitted any such requirements requiring the investor to exhaust local remedies before submitting the claim for arbitration.[95]

The implication of fourth type provision is that due to express rejection of ELR, the Host State cannot seek bar to the jurisdiction of the tribunal on the ground that the claimant has not complied with ELR requirement.

However, to balance the ELR requirement andeffective recourse to the foreign investor against the host state, certain exceptions are envisaged. For instance, ineffective or lack of domestic redressal mechanismsmay imply that the possibility of any redressal is bleak.[96] Further, an undue delay in the municipal legal system of the Host State may also exempt the investor from the ELR requirement. Even ELR provisions benefit the Host State as when they are not complied with, these exceptions come to rescue the Host State. However, at the same time, it may not be economically viable for an investor to pursue a claim before the domestic adjudicatory body of the Host State, and then before the ISDS tribunal under IIA due to the failure to achieve any remedy before the domestic adjudicatory body of the Host State.

V. PRIOR WRITTEN CONSENT FOR ADJUDICATING INVESTOR-STATE DISPUTE BY ARBITRATION

Arbitration, as an effective mode of dispute resolution, is premised upon the free consent of the parties and constitutes one of the cornerstones of jurisdiction of international courts and tribunals.[97] In the case of a State-State dispute, the jurisdiction of the court is established only when both the parties consent to the dispute resolution and the States are not mandated to give their consent.[98]Consequently, in the interest of "international comity", the tribunal does not assert its jurisdiction.[99] As opposed to international commercial arbitration where the consent is expressed through an arbitration agreement,[100] the consent in investment arbitration is expressed in various ways viz. (i) direct agreement between the parties; (ii) through host state legislation; or (iii) through IIAs or multilateral treaties.[101]

First, consent through direct agreement is established through the compromissory clause in the investment agreement between the foreign investor and the Host State,

[95]*Generation Ukraine, Inc. v. Ukraine*, [2003] ICSID Case No. ARB/00/9, para. 13.5.
[96] Model India BIT, art 15.1-15.2.
[97] Guiguo Wang, 'Consent in Investor State Arbitration: A Critical Analysis' [2014] 13(2) Chinese Journal of International Law 335-361.
[98] Gaukrodger, D. and K. Gordon (2012), *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* (OECD Working Papers on International Investment, 2012/03, OECD Publishing) 7-31.
[99] Jan Paulsson, 'The World Court: What It Is and How It Works by Shabtai Rosenne' [1996] 12 Arbitration International 223;Ibrahim FI Shihata, *The Power of the International Court to Determine Its Own Jurisdiction* (Springer Netherlands 1965) 204.
[100] William W Park, 'Non-Signatories and International Contracts: An Arbitrator's Dilemma' (Social Science Research Network 2008) <https://papers.ssrn.com/abstract=3018722> accessed 10 April 2022.
[101] UNCTAD, *Dispute Settlement: Consent in Arbitration*, (United Nations, 2003) <https://unctad.org/system/files/official-document/edmmisc232add2_en.pdf>

which allows the foreign investor to submit disputes to arbitration.[102] Sometimes, consent to arbitration is recorded by reference to another instrument.[103] For instance, in *CSOB v. Slovak Republic,* the agreement between the investor and the Host State also provided that the agreement will also be governed by the BIT between the Czech and Slovak Republic. Consequently, the tribunal held that the reference to the IIA in the investor-Host State agreement implies that the Host State consented to ICSID arbitration.[104]

Second, consent through national legislation is established through the stipulations in the domestic laws of the Host State. For instance, Rule 38 of the *Code des Investissements* of the Democratic Republic of Congo,[105] provides for the settlement of investment disputes between an investor and the Democratic Republic of Congo to be settled at the ICSID.[106]

Third, the IIAs between the States confer jurisdiction to an arbitral tribunal, generally ICSID.*[107]* The issue of consent becomes problematic in this category, especially when the relevant provision of the IIA is modified by the Host State.

The Host State's consent to the dispute resolution is a foundational point from which the tribunals interpret the IIAs to settle the dispute. In the case of ISDS, the States express their consent to dispute resolution through the stipulated ISDS mechanism in the BIT i.e., the Host State does not consent to arbitration per se, but consents or provides a unilateral offer to arbitrate with a future investor.[108] Since the investor is not a party to the IIA, the principle of privity to contract does not apply.[109] Further, the investor's consent to the Host State's unilateral offer becomes effectuated only when the investor complies with the other requirement of the IIA.[110] Refusal to such terms and conditions invalidates the Host State's consent.

Apart from signing the ICSID Convention (or any other institutional arbitration mechanism), the State is also required to agree to the types of disputes to be adjudicated

[102]Dolzer and Schreuer, (n.5) pp.239; A.M. Steingruber, *Consent in International Arbitration* (OUP 2012), 82.

[103]*Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic* [1999] ICSID Case No. ARB/97/4, Decision on Jurisdiction, paras 251, 268-271.

[104] ibid, para 47-55.

[105] Investment Code of the Democratic Republic of Congo (2002), art 38.

[106] Togo's Investment Code (Law No 89–22 of 31 October 1989), article 5; Mali's Law No 91–048/AN-RM of 26 February 1991 on Bearing on Investment Law, Investment Laws of the World, art 21; Law No 95–620 of 3 August 1995 on the Investment Code of the Republic of Côte d'Ivoire, art 24; Investment Code of the Democratic Republic of Congo (Law No 004/2004 of 21 February 2002), art 38; Investment Code, 1988;Article 10 of the Investment Code, 1984, art 30; Cameroon Investment Code, 1990, Article. 45(1); Kazakhstan Law on Foreign Investments, 1995, art 27(2); Somalia Foreign Investment Law, 1987, art 19; Zambian Investment Act, 1991, sec 40(6).

[107] Christoph Schreuer, 'Consent to Arbitration', in Peter Muchlinski et al (eds) *The Oxford Handbook of International Investment Law* [2008] 831.

[108] Andrea Marco Steingruber, 'The Mutable and Evolving Concept of 'Consent in International Arbitration- Comparing Rules, laws, treaties and types of arbitration for a better understanding of the concept of Consent' [2012] Oxford University Comparative Law Forum 2**;** Rose Rameau, 'The Battle between Consent and the Principle of Competence-Competence in Investment Arbitration' [2015] 28 U. Ghana L.J. 87.

[109] Steingruber , ibid, 2; Rameau, ibid, 87.

[110] ibid

by such an ISDS body, which is generally done through the stipulations in the BIT.[111] Since ICSID does not impose any limitations on the Host State to circumscribe their consent, the Host State does so through ways such as consenting only to the disputes after the IIA enters into force.[112] Further, in the case of mass claims, specific consent from the Host State is required to pursue the claim. In other words, the Host State's consent to the BIT does not imply consent to mass claims.[113]

Certain IIAs contain modified ISDS provisions due to which the Host State's consent is not implied merely by signing the IIA, but additional consent is also required. For instance, Luxemburg-Senegal BIT stipulates as follows:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.[114]

Based on the interpretation of the above-mentioned provision under the Vienna Convention on Law of Treaties ("VCLT") in accordance with its ordinary meaning, it appears that apart from the consent at the time of conclusion of the IIA, an additional manifestation of consent is also required.[115] However, in *Millicom v. Senegal*, instead, the tribunal looked into the object and purpose of the BIT i.e., to guarantee efficient protection.[116] The tribunal held that any contrary interpretation would make the concerned BIT *lex imperfecta*, and hence tribunal declined the argument that IIA requires specific consent apart from consent while signing the BIT to submit to the jurisdiction of the ISDS tribunal. However, Guiguo Wang opines that such interpretation is against the principles stipulated in the VCLT, and an introduction of the factors such as necessity and reasonableness leaves unfettered discretion to the tribunal to interpret the IIA.[117] The dual consent requirement plays a vital role when the measure at issue is concerned with the Host State's policy to pursue regulatory objectives or prevent backlash from the public in case of potential loss of the dispute, which would resultantly involve drainage of public resources.

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[111] UNCTAD (1964), (n 96).

[112] Agreement between the Government of the Republic of Turkey and the Government of the Republic of Mozambique concerning the Reciprocal Promotion and Protection of Investments, article 2; Israel-Japan BIT, article 28; Belarus-Georgia, article 13; See also Sadie Blanchard, 'State Consent, Temporal Jurisdiction, and the Importation of Continuing Circumstances Analysis into International Investment Arbitration' [2011] Washington University Global Student Law Review 424.

[113] S.I. Strong, 'Does Class Arbitration "Change the Nature" of Arbitration? Stolt-Nielsen, AT&T and a Return to First Principles'[2012], Harvard Negotiation Law Review, 201; *Abaclat v. Argentina*[2011],ICSID Case No. ARB/07/5,para 195, 151.

[114] See Article 10, Luxemburg-Senegal BIT. See also, Mauritius-Egypt BIT, Article 10.4; Japan – Oman BIT, Article 15(5)(b).

[115]*Millicom International Operations B.V. and Sentel Gsmsa v. The Republic of Senegal*[2010], ICSID Case No. ARB/08/20, para 60.

[116] ibid, 65.

[117] Guiguo Wang, 'Consent in Investor-State Arbitration: A Critical Analysis' [2014] 13 Chinese J. Int'l L. 354.

VI. CONCLUSION

The determination of jurisdiction in each investment dispute varies from case to case. However, the fundamental approach is to observe if the claimant is eligible in light of the terms and conditions provided in the IIA in order to accept the Host State's offer to arbitrate before the ISDS tribunal and consequently, to bring the arbitration process into action and confer jurisdiction upon the ISDS tribunal. While assuring guarantees to the investor, the IIAs seek to safeguard the regulatory autonomy of the parties by affirming them in various parts of the treaties viz. preamble, investment protection provisions, or general exceptions. The limitation with these approaches is that, *first*, the preamble is not necessarily binding. *Second*, allowing the ISDS to interpret the substantive clauses may lead to a lack of uniformity in interpretations. Further, even if the award is passed in favour of the Host State, the adjudication by ISDS would lead to considerable drainage of the resources. In order to pursue policy objectives while immunising themselves from any claim by the foreign investor, the Host States are redefining the text of the IIAs to limit the investor's access to the ISDS tribunal. However, at the same time, such asymmetry between the investor and the Host State, especially the exclusive power upon the investor to bring forth disputes, prohibits the Host State from adopting policies in furtherance of public interest. In order to ensure certainty and predictability in the disputes and allow the Host State to pursue its objectives, the primary method of interpretation should be on the text of the IIAs, which ultimately reflects upon the intention of the parties when the IIA was negotiated.