5.1 Introduction

In earlier times, the dispute settlement mechanism was based on power, force and gunboat diplomacy. As time changed, dispute resolution transferred into judiciary for right-based adjudication.\(^1\) In the current scenario, it is interest-based adjudication which was incorporated in FCN treaties as mentioned in previous chapter and the same is incorporated in BITs and other regional investment treaties. Many options were available to redress investment disputes where investors used to negotiate with host state’s government officers but they were ignored by them and sometimes, investors had to resolve the disputes unilaterally or making a claim under their political risk insurance. There are three options available in BITs for investors to seek remedy before a) host state local courts b) arbitration tribunal under ICSID and c) ad-hoc arbitration as per UNCITRAL Arbitration Rules (popularly followed in India especially in Bengaluru).\(^2\) The roots for investment arbitration can be found in Jay Treaty 1794 which was a treaty of Amity, Commerce & Navigation between US and Great Britain, another treaty called Treaty of Ghent 1814 (Peace Treaty between UK & US) started using arbitration mechanism to settled investment disputes and entitled investors to access international commission to settle their claims. Article VI of Jay Treaty entitled the British investors to claim compensation, Article VII authorised US investors to claim compensation against British Government.\(^3\) During this period, arbitration mechanism was a combination of judicial and diplomatic process which was considered as a face of imperialism of gunboat diplomacy.\(^4\)

At present, the investment dispute may be between state & investor or between state & state. In state & investor dispute as per BITs, they prefer amicable settlement of claims and they use non-binding resolution method such as negotiation, mediation or conciliation to settle their claims. Most of the investment treaties have

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\(^2\) Id at 151

\(^3\) Id at 152

\(^4\) Id at 152
adopted this mechanism to settle their disputes. When compared to other means, BIT gives significance to settle dispute through international arbitration mechanism. Since 1970, arbitration mechanism has gained importance but became popular only in 1990s at international level as it saves time and helps in quick settlement of dispute.\textsuperscript{5}

Investment dispute gives two options to parties of BITs to refer the dispute either to domestic courts of host state or arbitration tribunal. Sometimes depending upon the investment contracts impliedly investor may waive arbitration forum and approach the local courts for redress. Investors must choose the option under free consent and not under any compulsion,\textsuperscript{6} otherwise, it would have become an issue in the field of foreign investment. If investors sign investment contracts to choose domestic court to redress which indicates that they have waived right to approach international arbitration tribunal for redress. These situations always arise when host state gives preference to domestic economy than protecting investors which may reduce the flow of FDI to some extent. BIT will include a clause saying that the investors can approach arbitral tribunal only after exhausting the local remedies in host state, otherwise international law will interfere in internal affairs of host state which is against the sovereign power of host state accorded under international principles. BITs must include provisions related to standards applicable to judicial proceedings and non-arbitrary measures.\textsuperscript{7} When foreign investment treaties are signed as a precautionary measure, they shall include dispute settlement clause into it. It is not necessary that the investment dispute should always be referred to international arbitration, it may also be referred to domestic courts in host state. But foreign investors try to avoid local courts as they do not trust them due to lack of competency, lack of impartiality and delay in trials as a result of which they prefer international arbitration for settlement of disputes. The reasons behind parties choosing arbitration are, it offers independence to parties to choose between ad-hoc and international arbitration.\textsuperscript{8} While inserting arbitration clause, one has to be very careful with respect to the laws which will be made applicable for settlement of disputes. In order to facilitate international arbitration, a new forum is established which is called as

\textsuperscript{5}Supra Note 1, at 155
\textsuperscript{7}Id at 125
International Centre for Settlement of Investment Disputes (ICSID) by enforcing ICSID Convention 1965. To resolve disputes according to ICSID, the parties to the BITs must be the signatories to ICSID Convention, otherwise it will be resolved by applying Additional Facilities Rule of the same convention.

5.1.1 Meaning of Investment Dispute

Investment disputes means any legal disputes directly arising out of investments between the contacting parties who are the signatories to ICSID Convention.\(^9\) As per other international agreements if any disputes arise related to foreign investment between the parties to the agreement with respect to expropriation, compensation and breach of investment agreements are identified as investment disputes. Only investment disputes can be referred to ICSID Centre under ICSID Convention.

5.1.2 Parties to the Dispute

Transfer of capital from one state territory to other territory takes place through BITs or RIAs which are signed between two states or between state & the individuals. If any disputes arise between the contracting parties related to investment agreements, the disputes will be referred to the appropriate forum for settlement. These contracting parties are identified as parties to the disputes, the parties may be states or MNCs or individuals who invest in host state territory or who receives investment.

5.2 Development of Investment Arbitration

The implementation of socialist economic policies and expropriation of foreign investment by capital-importing states, the disputes related to foreign investment increased which led to the establishment of international arbitration forum to redress investment disputes. In the beginning of 18\(^{th}\) century, state parties preferred local courts of the host state but there were certain lacunas such as bias, non-transparency, corruption and inefficiency. In order to overcome these lacunas, the home states started including clauses in BITs related to choice of law, contractual mechanism and international arbitration in order to reduce political risk. This is how the concept of international arbitration was introduced to redress the international investment disputes and arbitrators were appointed according to the terms and

\(^9\)Article 25 of ICSID Convention
conditions as agreed by the state parties to BITs. When international arbitration started gaining significance, simultaneously there were problems in enfor-
ing international arbitral awards. To address these difficulties, efforts were made in 1958 and New York Convention on the ‘Recognition of Foreign Arbitral Awards’ which is also known as New York Convention was passed.\textsuperscript{10} The New York Convention considered arbitration agreement as a treaty obligation. The Convention incorporated provisions for recognition and enforcement of foreign arbitral awards and limits the grounds upon which local courts may refuse to recognize and enforce arbitration awards.\textsuperscript{11} But this convention did not address the issue of state immunity.

5.3 Types of Investment Disputes

As discussed earlier, investment can be made by anybody (individual/corporation). Depending upon the type of investor or nature of investment the type of investment dispute can be analysed. The basis of most of the investments is BITs which may be signed between two individuals or corporations or between states. Investment disputes can be classified on the basis of parties to the investment agreements which are discussed below.

a) State v. States Investment Dispute

The investment dispute between two states who are sovereign powers in international regime enters into BITs or RIAs for flow of capital especially FDI. The breach of terms & conditions of the treaty leads to dispute between the parties and for disposal of such dispute state, parties must approach the proper forum. The options available for the state parties are as follows:

i) Diplomatic protection

When investors cannot directly approach the host state for claims, they can approach their home state and seek diplomatic protection to protect their interest. When home state steps into the shoe of its nationals and exercise diplomatic protection to espouse its national’s claims in its own name, in such situation dispute arises between two sovereign states.\textsuperscript{12} International law imposes obligation on the

\textsuperscript{10}http://www.newyorkconvention.org, visited on 21/06/2016, @ 8a.m

\textsuperscript{11}http://www.newyorkconvention.org, visited on 21/06/2016, @ 8a.m

\textsuperscript{12}Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law, (Ed,1\textsuperscript{st}, Oxford University Press, Oxford, 2008), at 211
states to protect the interest of its subjects when they are injured by act of other state and when subjects are unable to get justice before regular forum.\textsuperscript{13}

The investors must prove the existence of few factors before seeking diplomatic protection such as: the investor (Individual/corporation) must be the national of the home state, they possess nationality continuously from the date of receiving injury till the date of settlement of claim and they have to exhaust all the local remedies available in host state. However the relief through the diplomatic protection depends upon the political willingness of home state because home state uses this channel as a last resort to protect its subjects’ interest.\textsuperscript{14}

ii) Direct dispute between two states

Under this category, the involvement of individual investors will not be there, BITs or RIAs will be signed between two states and direct investment disputes arose between states, in such circumstances arbitration clause will be inserted in the treaties. As per the arbitration clause, the states refer disputes to arbitration tribunal. Most of the time investment disputes would be referred to ICSID Centre for adequate relief.

b) Investor and State Investment Dispute

i) Domestic courts of host state

As per the BIT or investment contract between the states, the disputes will be referred to domestic courts of host state and local laws of the host state will be applied as investments will be governed generally by the laws where investments have made and the same will be specified in BITs. From investors’ angle, this is not easily acceptable as they are suspicious about domestic courts as it lacks impartiality in deciding the disputes. There are certain situations where the executive wing of the host state may interfere in judicial matter which will affect the independent nature of judiciary. In case, if domestic courts exercise jurisdiction to try investment dispute, it has to follow the local laws even though those laws are contrary to international laws. As a result, the investor prefers impartial international forum to resolve their disputes.\textsuperscript{15}

\textsuperscript{13}PCIJ held in Mavrommatis Palestine Concession Case
\textsuperscript{14}Supra Note 12, at 211
\textsuperscript{15}Supra Note 12, at 215
If Investment disputes are not referred to ICSID, the host state may approach the traditional arbitration institutions like International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA) and the American Arbitration Association (AAA). There are some regional arbitration centers like Euro-Arab Chambers of Commerce, Inter-American Commercial Arbitration Commission, Stockholm Chamber of Commerce Arbitration Institute and Federal Economic Chamber Arbitral Centre which are functioning in the field.16 The institutional arbitration provides better administrative support and the parties can select the details of the arbitration proceedings which helps in providing chance of securing effective arbitral proceeding through social control and peer pressures.

5.4 Evolution of Arbitration Proceedings

The modern arbitration proceedings has origin in Hague Conference of 1899 and 1907 which laid the foundation for institutional arbitration proceedings way back in 18th century and is evidenced by available literature ‘A.M. Stuyt’s Survey of International Arbitration 1794-1989’. It reveals that the development of arbitration proceedings took place in two periods. First period during 1899 to 1922, after the World War-I and the number of arbitration proceedings were not more than hundreds and second period during 1922 to 1989, the number was more than hundreds, by the end of 19th century nearly 6000 arbitral awards were passed in international regime.17 While tracing the historical development of arbitration, we come across some legislation such as British Arbitration Act 1698, 1889 & 1934 based on Geneva Agreement of 1920s and were followed by Arbitration Act of 1950, 1979 and 1996.18

League of Nations adopted a) Geneva Protocol on Arbitration Clause 1923 b) Geneva Protocol on Execution of Foreign Arbitral Awards 1927. According to A.M. Stuyt’s Survey of International Arbitration, during 1794 to 1899, nearly 227 inter-state arbitral agreements were signed, related to these agreements 34 disputes were settled by arbitration tribunal. During the same period, just one arbitration agreement was signed between state and other entities. From 1899 to 1922 after first Hague Conference till the establishment of Permanent Court of International Justice (PCIJ), nearly 125 inter-state arbitration agreements were signed, out of which 6 disputes

16Supra Note 8, at 45
18Id at 807
were settled by the tribunal and 6 arbitration agreements were signed between state and other entities. After the establishment of PCIJ, from 1923 to 1989 nearly 195 arbitration agreements were signed between states and just one dispute was settled by the tribunal, 84 agreements were signed between state and other entities.19 When we look at the above statistics, it clearly indicates that the concept of arbitration mechanism slowly started gaining recognition as a result of which a strong set of institutional arbitration is developed at present. The UNO, between 1945 and 1970 adopted the following conventions related to arbitration mechanism a) Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York) 1958 b) European Convention on International Commercial Arbitration Geneva 1961 supplemented by Arbitration Rules of UN Economic Arbitration prepared by UN Economic Commission for Asia and the Far East in 1966, the World Bank Convention on Settlement of Investment Dispute between State and Nationals of other States in Washington during 1965 and European Convention providing uniform laws on Arbitration in Strasbourg during 1966.20

In 1985, the UNCITRAL adopted a Model Law on International Commercial Arbitration and UNO also recommended the members to adopt the same. More than 19 states including USA, many states by the end of 1998 reformed their laws on the basis of UNCITRAL Arbitration Model.21

5.5 Arbitration Clause in BIT

The significant reason behind the evolution of international arbitration is that the foreign investors will not have confidence in impartial nature of domestic courts and tribunals in host state. In such situation, the international arbitration has been seen as the best means for securing justice for foreign investors. But it cannot be assured that uniform pattern of arbitration will be followed in all arbitration forums. Some of the BITs provides for conciliation before approaching arbitration. In the present scenario, it has become common to follow both conciliation and arbitration process which has become a neutral forum to resolve investment disputes. BITs have kept arbitration as optional rather than compulsory and many BITs prefer ICSID arbitration as it ensures protection of foreign investment.

20Supra Note 17, at 808
21Supra Note 8, at 46
Most of the BITs provide cooling-off period within which the investment disputes can be settled before taking further actions. It is followed in France model where the cooling-off period is 6 months, UK model is 3 months, German model is 6 months and Spain-Indonesia BIT provides 12 months cooling-off period. Many states have not followed the cooling-off period example **Bayindir v. Pakistan**\(^{22}\) in which Pakistan raised an objection saying that Bayindir did not exhaust cooling-off period and did not give notice of claim hence the tribunal cannot exercise jurisdiction to decide investment dispute.\(^{23}\) But later, the tribunal rejected the objection raised by Pakistan and held that giving notice is not a procedural lacuna to object the jurisdiction of the forum, it also held that in absence of serving the notice, the investment tribunal cannot be deprived from exercising its jurisdiction in investment disputes.\(^{24}\)

If dispute is not settled within the cooling-off period, the parties can refer the dispute to ICSID arbitration or ad-hoc arbitration under UNCITRAL rules or to arbitration institution of Stockholm Chamber of Commerce or to the local courts in host state. The BITs must have arbitration clause to refer the disputes to arbitration. The first case came up before ICSID was **SPP v. Egypt**,\(^{25}\) the tribunal held that the provisions of the Egyptian Foreign Investment Law constituted an express consent to refer disputes to ICSID which is sufficient and there is no further requirement for formal expression of consent of the parties to refer disputes to ICSID arbitration.

Another principle in dispute settlement is ‘Fork in the road’ which means if the parties to BITs select a particular dispute resolution procedure then, they cannot avail other procedures.\(^{26}\) It remains distinct from diplomatic remedy which can be availed only after exhausting the local remedies available for protection of FDI.

**5.6 Independent Arbitrators**

The issue related to ICSID arbitration is the independent and impartial nature of arbitrators while passing award. While appointing arbitrator, their background and

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22 Bayindir Insaat Turizm Ticaret ve Sanayi AS v. Islamic Republic of Pakistan ICSID Case No ARB/03/29, 2005
24 Supra Note 23, at 51
25 Southern Pacific Properties (Middle East) Ltd (SPP) v. Arab Republic of Egypt (Jurisdiction 1)3 ICSID Rep 112(ICSID) 1985 & 1988
26 Supra Note 23, pp 54 & 55
their relationship with parties shall be checked properly so that it will not violate the principles of natural justice. Under ICSID Convention, a panel of arbitrators will be constituted and they shall be persons of high moral character, competent in the field of law & related fields and capable of exercising independent judgment. To maintain the impartial nature of arbitrators, they are required to sign a declaration under Rule 6(2) of ICSID Arbitration Rules, where they have to disclose a) their relationship with the parties b) information which might affect their independent judgment.

Along with ICSID provisions, Article 9 of UNCITRAL Arbitration Rules also impose obligation on arbitrators to disclose any changing circumstances which will affect their impartiality & independence. The party can challenge the appointment of arbitrator at the initial or at later within 15 days of discovery of circumstances on the ground of impartiality. Article 7 of International Chamber of Commerce Rule of Arbitration says, ‘every arbitrator must be independent and impartial while resolving investment disputes’. Article 6(4) of the Permanent Court of Arbitration statute which says, the appointing authority of arbitrator must consider all the facts which help in appointing independent and impartial arbitrators which is similar to UNCITRAL Arbitration Rules.

In *Holiday Inns SA/Occidental Petroleum v. Morocco*, arbitrators were appointed to resolve the disputes, later the party (Morocco) challenges that arbitrator has become a non-executive director of Occidental Petroleum Co. which will affect the independent judgment and on this ground they urged that the tribunal should remove him. But as per Article 56(3) of ICSID Convention which says that ‘if co-arbitrators have consented for his resignation, party need not to challenge the appointment of arbitrator on the ground of impartiality’. This proves that at any stage of proceeding, the party can challenge the appointment of arbitrator or sumoto the arbitrator can resign from the post if the prevailing circumstances threaten the impartiality of arbitral award. Article 57of ICSID Convention says mere appearance of partiality is not sufficient to challenge and there must be high probable facts to prove the partiality.

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27 Article 14(1) of ICSID 1966
29 http://www.uncitral.org, visited on 24/8/16 @ 4p.m
30 ICSID Case No ARB/72/7, Reported in 11 Annual Report 1976-77, at 34
31 Supra Not e 28, pp138 &139
5.7 Transparency in Arbitration Proceedings

Transparency is a key factor in proceedings of investment arbitration as the states, state entities and issues related to public interest are involved. There is no scope for privacy and confidentiality which is supported by OECD investment committee and in 2005, OECD released a statement supporting the additional transparency in investment arbitration. 32 The essentials of transparency indicates that the information related to the disputes such as information about the parties, tribunal, the nature of disputes and after the conclusion of arbitration proceedings the award should be published and made available in public domain. 33 To add greater transparency, the ICSID Rule 37(2) provides for filling written submission by the third party which will be allowed after consulting the parties. To allow the written submission, the tribunal considers the significance of such written submission on the basis of arbitral proceedings. The third party to the dispute will not have right to know about arbitration proceedings unless the consent is given by the parties to the dispute. Sometimes a non-party to the dispute who is an amicus curiae associated with the case is allowed to access the arbitration proceeding as it is provided in traditional courts when public interest is involved. The same procedure is also followed in ICSID arbitration provided a request to that effect shall be made by the third party. After considering the request, the tribunal will accept his submission. Before accepting the submission made by the third party, the tribunal will check his background, relationship with the parties, personal interest in the proceeding, etc. This principle was laid down by ICSID tribunal in Vivendi Universal SA v. Argentine. 34

*Mr. Aran Broches’s* 35 analysis of Investment Arbitration

He studied about BITs & ICSID arbitration and has made the following analysis:

i) Parties must submit dispute to ICSID arbitration and mere inclusion of arbitration clause will not amount to consent.

ii) The request for conciliation or arbitration must submit to the Centre, mere request will not amount to consent but it is implied once request is made and it can be presumed that the consent is given by the parties.

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32 Supra Note 23, at 57
33 ICSID Rules of Procedure, Rule 48(4)
34 Supra Note 23, at 58, ICSID Case No ARB/03.19, ICSID 2005
35 Mr Aran Broches was a General Counsel of the World Bank from 1946-1979 and responsible for establishment of ICSID
iii) Host state must assent for the demand made by the investors to refer disputes to conciliation or arbitration otherwise it amounts to international wrong.

iv) There must be a clause in BIT creating ICSID jurisdiction by giving consent in anticipation of the dispute.

5.8 International Centre for Settlement of Investment Disputes (ICSID)

ICSID is the brain child of the World Bank and a leading world institution in resolving international investment disputes. The state parties have incorporated clauses in their investment treaties making ICSID as a forum to resolve their investment disputes. The Centre was established under ICSID Convention 1965 which came into force on October 14th 1966. On 18th March 1965, the convention was opened for signature and Tunisia was the first state to sign in 1965 followed by UK. Nigeria was the first state to ratify the convention on August 23rd 1965 & it has 161 signatory states and 151 states have ratified it. Being a multilateral convention drafted by the Executive Directors of the World Bank with the objective of promoting settlement of investment disputes between investors and the contracting parties or between two states under BITs and FTA which promotes free flow of FDI and it maintains balance between the interest of investors and host states. The disputes will be decided by conciliation commission or by arbitration tribunal, so far more than 550 cases are resolved effectively by ICSID. The Centre has also taken the initiative in creating awareness among states about foreign investment laws and ICSID procedures. The Centre is publishing a journal titled ‘ICSID Review-Foreign Investment Law Journal’ periodically which is very informative and contains current issues related to foreign investments. The Administrative Council is a governing body of the Centre which consist of one representative from each member state and they have one vote each, at present it consist of 56 staff members from 30 states parties. A Secretariat is established which is a separate body from Administrative Council.

In order to provide a permanent forum for settlement of investment disputes, the Executive Directors of the Word Bank on March 18th 1965 submitted the draft of the convention along with the report to the member governments of the World Bank.

36 ICSID Annual Report 2015, at 5
37 http://www.icsid.worldbank.org, visited on 29/07/16 @ 12.10p.m
38 http://www.worldbank.org/icsid, visited on 26/9/16 @ 3p.m
39 http://www.worldbank.org/icsid, visited on 26/9/16 @ 3.30p.m
for the approval and signature. The seat of the ICSID is situated at Headquarters of Washington, DC (USA). In 2003, nearly 37 cases were settled by the Centre. The first investment case decided by the Centre is Asian Agriculture Products (P) Ltd (AAPL) v. Sri Lanka in 1987, much before this 23 non-investment cases were settled by the Centre. After 1987 slowly cases were flooded to ICSID Centre, in 2010 nearly 305 cases were filed, out of which 271 cases for arbitration, 6 cases for conciliation and 28 cases under Additional Facilities Arbitration Rule. These cases arose out of BITs & IIAs. ICSID is mainly known for investor-state investment cases, more than 200 case decisions are published in 2010.40 At present, 395 cases are decided and 212 cases are pending before the Centre.41

5.8.1 Objectives & Scope of the Convention

The objective of the Convention is to provide facilities for conciliation and arbitration for settlement of investment dispute between contacting parties and their nationals. For effective and smooth functioning of the Centre, the convention provides for administrative & financial regulations, institutional rules, conciliation rules, arbitration rules with amendments in 2006. For effective economic co-operation and development there is a necessity of international investments, which will be followed by investment disputes between the parties. In order to provide appropriate international methods of settlement by way of conciliation and arbitration the World Bank took initiative to draft this Convention. The parties to the Convention shall submit their disputes only by mutual consent.42 The Convention contains 75 Articles, set of rules and regulations regulating conciliation & arbitration proceedings. The ICSID Arbitration Rules 6, 32, 37, 39, 41 & 48 was amended in 10th April 2006 which introduced changes in fast track procedures for dismissal of cases especially when it is filed without merit and access of non-parties to the proceeding which is very much required to maintain transparency in its proceedings.43

ICSID exercise jurisdiction if investment agreement consisted of an arbitration clause with respect to investment dispute, sometime it can resolve disputes even

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41http://www.worldbank.org/icsid, visited on 12/01/17 @ 8p.m
42Preamble of ICSID Convention 1965
43Supra Note 40, at 11
without such clause. But the parties to the investment agreements must be the nationals of the ICSID Convention or Arbitration Rules.

The Convention under Article 1 has established an International Centre for Settlement of Investment Disputes having seat in the principal office of the World Bank. The Centre is functioning with the Administrative Council & Secretariat and also consists of panel of arbitrators and conciliators. The Secretary General will be the principal officer and the legal representative of the Centre and has authority to authenticate the arbitral awards of the Centre.44

**Administrative Council:** It is a governing body consisted of one representative from each member state, the World Bank Governor is appointed as representative in ICSID administrative council and the President of the World Bank Group is appointed as ex-Officio Chairman.45 At present, there are 161 representatives in Administrative Council, each representative state has one vote and the Chairman has no right to vote, but he will preside over the meeting.46

**The Secretariat:** It will carry out the daily activities of the Centre which is headed by the Secretary-General and a Deputy Secretary-General who would be elected by the Administrative Council.47 The Secretariat will also consist of staff member who are experienced and are available for consultation service for parties who need clarifications on arbitration provisions. The Secretariat perform functions like maintaining the list of arbitrator & conciliation, registering the request for arbitration, helps in constituting arbitral tribunal, administration of funds, overall it provides institutional support for arbitration proceedings.48

### 5.8.2 Features of ICSID

ICSID being an international forum to decide investment disputes and has unique features which is helping the investors to approach ICSID for adequate relief. Unlike ICJ, the ICSID is allowing the individuals to file cases against states or individuals to obtain adequate reliefs. The features of ICSID in conducting arbitration mechanism are discussed below.

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44Article 11 of ICSID Convention 1965
45Article 4, http://www.worldbank.org/icsid, visited on 26/9/16 @ 3p.m
46Supra Note 40, at 7
47ICSID Annual Report 2015, at 33
48Supra Note 40, at 9
Self-contained Proceedings

ICSID appoint arbitrators for tribunal who follows rules & regulations framed by the Centre as per the convention. There is no scope for application of local laws of the territory where the seat of ICSID is established. As the arbitrators are appointed by the Centre they are neutral. If award is not passed on the merit, it would be referred to ad-hoc committee which conducts annulment proceedings.49

Increasing Transparency

Amendment to ICSID Arbitration Rule 32(2) highlights the principle of transparency. The provision allows the non-disputing parties to observe the proceeding and can make submission with prior permission of the Centre.50 This principle is already explained above.

Reasonable Fee Structure

The cost incurred by the parties to file cases before the Centre is very reasonable. The Centre fixes remuneration for conciliators, arbitrators & other members. If parties want, may agree for different remuneration which would be paid to the arbitrator.51

Application of Laws

Arbitration & Conciliation proceeding of ICSID Centre is governed by ICSID Convention. The rules and regulations of ICSID will be made applicable to resolve disputes and general principles of international laws are applicable.

5.8.3 Establishment of Panels

The contracting parties may designate four persons with expert knowledge in law, finance, industry and commerce52 to function as conciliators or arbitrators.53 These designated persons need not to be the national of the contracting parties. Along with the contracting parties, the Chairman can also designate ten persons to each

49Supra Note 40, at 14
50Supra Note 40, at 15
51Supra Note 40, at 17
52Article 14, http://www.worldbank.org/icsid, visited on 26/9/16 @ 3p.m
53Article 13, http://www.worldbank.org/icsid, visited on 26/9/16 @ 3p.m
panel with different nationality. These panel members will serve for renewable period of 6 years.  

5.8.4 Jurisdiction of the Centre

Under Article 25 of the convention the Centre exercises jurisdiction directly or indirectly related to investments between the contracting state parties and the nationals of another contracting party provided the parties must consent in writing to submit their dispute. Once parties consent is given it cannot be withdrawn unilaterally. No state shall provide diplomatic protection to investments when parties have consented to submit or have submitted the disputes to arbitration. The number of cases has increased since 15 years which reflects the growth of BITs which helps in flow of FDI for economic development. In Mihalay IN Corporation v. Democratic Socialist Republican of Sri Lanka held that ICSID can exercise jurisdiction if the following requirements are fulfilled such as a) there must be a dispute, b) dispute must be of legal nature and c) dispute must be related to foreign investments.  

a) Cases Related to Nationality of the Parties

The nature of the investment will be decided on the basis origin of investors may be individual investor or MNCs. Many cases are decided by arbitration tribunal related to nature of investment which is discussed below.

Amco Asia Corporation & Others v. Republic of Indonesia the question before the tribunal was whether ‘PT Amco Corporation’ is a national of US or not?

The Amco Asia Corporation being an US company formed an Indonesian company called ‘PT Amco’ to carry out hotel business in Indonesia. Amco Asia Corporation submitted application before Foreign Investment Board (FIB) of Indonesia to incorporate PT Amco Corporation. In an investment dispute between Amco Asia & Government of Indonesia before ICSID, the Indonesia Government
took a contention that as PT Amco is established in Indonesia, as a result of which it is an Indonesian company but Amco Asia Corporation denied the same. The tribunal held that for establishment of PT Amco the application was submitted to FIB, it was accepted and licence was issued to carryout hotel business which indicates that PT Amco is a US entity.

SOABI v. State of Senegal,\textsuperscript{60} in this case ICSID held that if any one party to the dispute is a signatory for ICSID Convention, the ICSID tribunal can exercise jurisdiction to resolve the disputes.

Liberian Eastern Timber Corporation (LETC) v. Republic of Liberia,\textsuperscript{61} the ICSID held that the contracting state signing an investment treaty constituting ICSID arbitration, the ICSID exercises jurisdiction even though the company nationality is not expressly mentioned, but the Centre can exercises jurisdiction as the Republic of Liberia is a party to ICSID Convention.

\textbf{b) Consent to Arbitration Proceedings}

The parties to the dispute must express their consent in writing to the Centre, once parties give voluntary consent to the arbitration proceedings it cannot be withdraw as the jurisdiction of ICSID will be decided on the basis of the consent of the parties, hence, once a valid consent is given it cannot be withdraw. Under Article 25 of the Convention, once consent is given in investor-state disputes by the state it cannot exercise its sovereign immunity to escape from the jurisdiction of ICSID. It implies that once dispute referred to ICSID jurisdiction the state has to waive sovereign immunity.\textsuperscript{62}

\textbf{5.8.5 Conciliation Proceedings}

Article 28 to 35 deals with conciliation proceedings, the contacting state or nationals of contacting state make a request in writing containing issues in disputes, identification of the parties and their consent to the Secretary-General to initiate conciliation or arbitration proceedings.\textsuperscript{63} Upon receiving a request, the Secretary-General will enquire about the jurisdiction of the Centre to resolve the dispute and thereby send a copy of registration to the disputed parties.

\textsuperscript{60}ICSID Case No ARB/82/01, 1\textsuperscript{st} August 1984, ICSID Report 2, 1994, at 175
\textsuperscript{61}ICSID Case No ARB/83/2 Award 3\textsuperscript{rd} March 1986, ICSID Report 2 1993, at 346
\textsuperscript{62}Supra Note 40, at 51
\textsuperscript{63}Article 28(1), ICSID Convention 1965
After registering the request under Article 28, the Secretary-General will constitute a conciliation commission which shall consist of sole conciliator or uneven number of conciliators as agreed by the parties. If parties are not agreed upon the numbers, the commission shall be consisted of three conciliators as one appointed by each party and the third who acts as a president shall be appointed by the parties as they agreed. Within 90 days after receipt of registration of disputes as sent by the Secretary-General or as many days as agreed by the parties, if the parties have not appointed the conciliators then the commission will appoint conciliator or conciliators who have not been appointed to initiate conciliation proceedings. The Commission can decide about its jurisdiction as a preliminary question before commencing the proceedings.

During the proceedings, the commission shall clarify the issues and try to bring agreement of settlement between parties on mutual terms. During its proceedings it always recommends to bring settlement and it also entrust duty on the parties to co-operate in good faith to carry out its functions. If parties reach settlement, the commission shall report the issues of the dispute and the settlement. If there is no chance to settle the disputes and if any party fails to participate in the proceedings, the commission shall submit the report containing the same. The report or the recommendations of the commission shall not be used in court or tribunal proceedings.

5.8.6 Arbitration Proceedings

Article 35 to 55 of the convention deals with arbitration proceedings, the contacting state or nationals of contacting state make a request in writing containing issues in disputes, identification of parties and their consent to the Secretary-General to initiate conciliation or arbitration proceedings. Upon receiving a request, the Secretary-General will enquire about the jurisdiction of the Centre to resolve dispute and thereby send a copy of registration to the parties.

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64 Article 29, http://www.worldbank.org/icsid, visited on 26/9/16 @ 3p.m
65 Article 30, http://www.worldbank.org/icsid, visited on 26/9/16 @ 3p.m
66 Article 32, ICSID Convention 1965
67 Article 34, http://www.worldbank.org/icsid, visited on 27/9/16 @ 4p.m
68 Article 36(1), http://www.worldbank.org/icsid, visited on 27/9/16 @ 4p.m
a) Procedure in Arbitration Proceedings

The parties must submit a written request in English/ French/ Spain to the Secretary-General of ICSID (1+5 copies) under Institutional Rule 4. The claimant must pay lodging fee means case filing fee as prescribed in the fee schedule of the convention.

The request made by the claimant consists of information related to issues between parties, parties name & nationality, expressive consent. The request must also contain the authorization given by the corporation if it is a party to the investment dispute and will authorise a person to represent it in proceedings. Along with the request, the parties must submit documents related to consent and nationality of the parties. There is no time limit for submission of request but it must be submitted only after cooling-off period.69

Once the claimant submits a request it will be acknowledge by the Secretary-General, a copy of the request and related documents shall be submitted to the respondent. If there is any mistake or insufficient information, the same can be rectified by submitting a corrected or supplement request by the party to the Secretariat. Due to technical deficiency in the request, the Secretary-General can refuse the same. After the refusal, the claimant can file a new request based on the same issues.70 The date of submission of request becomes the date of registration of case which is significant for appointment of arbitrator within a given time as prescribed by the convention. Once registration is done, the Secretary-General will send a notice about the date of registration to both the parties.

b) Arbitration under ICSID Additional Facility Rules

The parties to the dispute can submit request under ICSID Additional Facility Rules provided the following conditions shall be fulfilled:

i) Either party to the dispute is not a signatory to the ICSID Convention or if any one party to the investment contract is not a national of the signatory of ICSID Convention.

69ICSID Arbitration Rule 2(1)(c), 2(1)(d)iii & 2(1)(f)
70Supra Note 40, at 127
ii) If dispute is not within the jurisdiction of ICSID as the dispute does not fall within the subject of investments, but the party to the dispute must be a signatory for ICSID Convention.

iii) If it is a fact-finding proceedings.

c) Constitution of the Tribunal

After registering the request the arbitration tribunal is constituted under Article 37 of the convention, which shall consist of sole arbitrator or uneven number of arbitrators as agreed by the parties. If parties are not agreed upon the numbers, the tribunal shall be consisted of three arbitrators as one appointed by each party and the third who acts as a president shall be appointed by the party as they agreed.\(^71\) Within 90 days after receipt of registration of disputes as sent by the Secretary-General or as many days as agreed by the parties. If parties have not appointed the arbitrators, in such cases the tribunal will appoint arbitrator or arbitrators who have not been appointed to initiate arbitration proceedings.\(^72\) The tribunal can decide about its jurisdiction as a preliminary question before initiating the proceedings.\(^73\)

d) Power and Functions of the Tribunal

The arbitral tribunal shall decide the disputes according to the rule of law as agreed between the parties. In absence of such laws, the tribunal may apply the laws of the contracting parties or may decide the disputes according to the principles of international law.\(^74\)

Under Article 43 of the convention, the tribunal has power to collect relevant documents as evidence to decide the matters. If it is required, the tribunal may visit the field and conducts inquiry about the disputes.\(^75\) If a party fails to attend the proceedings which cannot be presumed as acceptance of the admissions of the other party, the other party may request the tribunal to consider his claim and pass an award, but before passing an award in such situation, the grace period shall be given to the party who failed to appear before the tribunal.\(^76\)

\(^71\)Article 37, http://www.worldbank.org/icsid, visited on 28/9/16 @ 3p.m
\(^72\)Article 38, http://www.worldbank.org/icsid, visited on 28/9/16 @ 3p.m
\(^73\)Article 41, http://www.worldbank.org/icsid, visited on 28/9/16 @ 3p.m
\(^74\)Article 42, http://www.worldbank.org/icsid, visited on 28/9/16 @ 3p.m
\(^75\)http://www.worldbank.org/icsid, visited on 28/9/16 @ 3p.m
\(^76\)Article 45, http://www.worldbank.org/icsid, visited on 28/9/16 @ 3p.m
e) Removal of Arbitrator

On the following grounds, the parties can challenge the appointment of arbitrator\(^{77}\):

i) Lack of qualities

ii) Lack of high morality

iii) Lack of competency in the field of law, etc

iv) Lack of ability to make independent decision

f) Written Procedures

The written submission made by the parties are called as ‘memorials’ which will be filed by the claimant and the respondent will submit ‘counter memorial’ in which he will deny the claims of the claimant. The claims memorial consisted of statement of facts related to the dispute, statement of law, claims and relief. The respondent’s counter memorial consisted of information about facts of the case, issues, statement of law, his reply to the claims of the claimant, relief and additional facts which are not mentioned by the claimant.\(^{78}\) Under Article 37(2) of Arbitration Rule, written submission can be made by non-disputed parties with the prior request and with the consent of the parties under three circumstances:\(^{79}\)

i) He acts as amicus curiae to the tribunal and his submission will assist the arbitration proceedings

ii) The submission shall be related to the dispute

iii) Non-disputing party shall not be having any personal interest in dispute and not related to the parties in any manner

g) Oral Procedures

There will be one or more hearing of the dispute during the proceedings related to the jurisdiction of the Centre, merits of the case and issues in dispute. The oral hearing would take place for a period of two weeks and must be related to the written submission made by the parties.\(^{80}\)

\(^{77}\) Supra Note 40, at 134
\(^{78}\) Supra Note 40, at 139
\(^{79}\) Supra Note 40, at 141
\(^{80}\) Supra Note 40, at 141
h) Evidence

Under Arbitration Rule 34, the tribunal exercise discretion while accepting the evidence. Under Article 43, the parties can voluntarily produce evidence related to investment agreements, documentary evidence, witness, expert evidence and it can also visit the site related to investment disputes. Sometimes, the tribunal can go beyond voluntary evidence submitted by the parties. If parties fail to submit evidence the same can be noted by the tribunal. If a party fails to produce evidence, it will have impact on award of the tribunal. In AIGP v. Congo\textsuperscript{81}, it is analysed that if parties do not submit evidence it will have impact on assessment of damages by the tribunal.

5.8.7 Procedure to Pass Award

The tribunal must pass award on the basis of majority vote of its members, the award shall be signed by the members who voted for it, also contain the reasons behind the award. The members must express their opinion for their dissent and the award will be published by the Centre with the consent of the parties.\textsuperscript{82} The Secretary-General must dispatch the certified copies of the award to the parties, the date of dispatch will be the date of passing of the award. From the date of dispatch within 45 days the party can approach the tribunal to decide any matter which is omitted by the tribunal or to rectify any clerical error in the award. The tribunal will decide and rectify the error if it is required and will become a part of the award passed earlier.\textsuperscript{83}

The parties to the dispute can request in writing to the Secretary-General to interpret the award, later it will be given to the same tribunal for interpretation. Till the pendency of the proceedings, the award will not be enforced by the tribunal.\textsuperscript{84} The parties have right to submit application for revision of award within 90 days after the discovery of the fact provided it should be within 3 years from the date of pronouncement of award.\textsuperscript{85}

a) Review of the Award

The award passed by the tribunal under ICSID Convention has to pass through review mechanism. Under review process, the awards are subjected to interpretations,
revision and annulment in order to check its validity as there is no appeal mechanism to check the awards. Review process plays a significant role in checking the content of the award thoroughly. The Articles 50, 51 & 52 and Arbitration Rules 50 to 55 deals about procedure of the above mentioned mechanism under ICSID Convention.

b) Interpretation of Award

Under Article 50 of the Convention, either party to the dispute shall apply to the Secretary-General requesting for interpretation of award to know the scope and meaning of the award. There is no limitation period to submit such request, but the request must mention about the points to be interpreted. After acceptance of request for interpretation, the Secretary-General forward the same to the original tribunal which had decided earlier for reconsideration of the award, if the original tribunal does not exist, parties can constitute a new tribunal to interpret the award.86

c) Revision of the Award

Under Article 51 of the Convention, the either party may request to revise or amend the decision of the tribunal, the application for revision can be made on the ground of discovery of new facts which are very important and which will affects the award passed by the tribunal. The revision application must specify the changes which would take place after the revision of awards. Revision request must be filed before Secretary-General within 90 days after finding the new facts related to the dispute. The Secretary-General will forward the application to the old tribunal otherwise to the new tribunal like interpretation process.87

d) Annulment of the Award

The annulment of arbitration award means, nullifying the award passed by the original tribunal. Annulment jurisdiction will be excised by Ad-hoc Committee consisted of three members which is constituted by the Chairman of the Administrative Council, these three members shall not be related to the parties neither through nationality nor by having interest in dispute and these members should not have been selected to constitute the earlier tribunal whose decision is challenged in annulment process. The idea of annulment of the award is to maintain the integrity of the ICSID Centre.

86Supra Note 40, pp 159 &160
87Article 51(3) & Arbitration Rules 51(2), 51(3)
The application for annulment shall be submitted by the parties within 120 days on any grounds or within 120 days after the discovery of the corruption incidents. The application shall be submitted to the Chairman of the Administrative Council who in turn submits it to Ad-hoc Committee. The committee will not give its decision but it gives an opportunity to the parties to refer their dispute to the new tribunal for consideration. If parties want, they can waive their right to apply for annulment of the award. As per the statistical data available, nearly 384 cases are concluded by ICSID Centre and 218 cases are pending which includes review and annulment cases also.

e) Stay of Enforcement of Award

The parties under Article 53(2) of the Convention can approach for stay of the enforcement of the award till the disposal of interpretation, revision and annulment application. The stay application can be submitted to the tribunal or Ad-hoc Committee. Stay can be granted on the following grounds: Promptness of the award, party applied for stay is indulged in dilatory tactics, party must give security and enforcement of the award would cause irreparable loss or damage to the party asking for stay.

Under Article 52 of the Convention either party to the dispute shall submit an application to Secretary-General for annulment of award on the following grounds:

i) The tribunal is not constituted properly
ii) Exceeding the jurisdiction
iii) Practice of corruption
iv) Violation of fundamental rules of procedures
v) Award has failed to state the reason

f) Enforcement of Award

Under Article 53 of the Convention, each party to the arbitration proceedings are bound by the award and they are not entitled to appeal or any other remedy except

88 Supra Note 40, at 162
89 http://www.icsid.cases.org, visited on 1/12/16, @ 5.20p.m
90 Supra Note 40, at 176
provided by the convention. The parties must enforce the pecuniary obligation of the award in their respective territory as if the award is passed by the domestic courts. 91

g) Place of Arbitration Proceedings

Under Article 62, the seat of the Centre will be held at the main place of business or if the parties agree, the proceedings can be held at Permanent Court of Arbitration or any other institution, or any other place provided by the commission and the tribunal after consulting the Secretary-General. Parties can choose to hold proceedings in any location, till date the proceedings were conducted in Washington, Paris and France. The names of the Centre to conduct proceeding are as follows: 92

   i) Australian Centre for International Commercial Arbitration, Melbourne
   ii) Australian Commercial Disputes Centre, Sydney
   iii) Cairo Regional Centre for International Arbitration
   iv) Centre for Arbitration and Conciliation at the Chamber of Commerce, Bogota
   v) China International Economic and Trade Arbitration Commission
   vi) German Institution of Arbitration
   vii) Gulf Co-operation Council Commercial Arbitration Centre, Bahrain
   viii) Hon-Kong International Arbitration Centre
   ix) Kuala Lumpur Regional Centre for Arbitration
   x) Maxwell Chambers in Singapore
   xi) Permanent Court for Arbitration, Hague
   xii) Regional Centre for International Commercial Arbitration, Lagos
   xiii) Singapore International Commercial Arbitration

5.8.9 Constitution of the Tribunal

In 2015, nearly 47 tribunals and 7 Ad-hoc Committees were constituted, a total number of 135 arbitrator and conciliators were appointed by the parties to the disputes by ICSID. 53 proceedings were concluded, 38 of which were arbitration, 1

91 Article 54, ICSID Convention 1965
92 http://www.worldbank.org/icsid, visited on 26/9/16, @ 3p.m
was conciliation and remaining 14 were post-award proceedings which was the highest number of cases concluded by ICSID. 10 of the post-award cases were annulments, which were either discontinued or the application was rejected by Ad-hoc Committee. The tribunal was also concluded 1 revision, 1 interpretation and 1 rectification proceeding.\textsuperscript{93}

It is held by ICSID tribunal that BIT must be interpreted as per the law of the contracting parties or as per public international law and BITs must consist of laws which are made applicable in case if dispute arise. The doctrine of precedent is excluded from ICSID provisions. Under Article 53 (2) which says that decisions of the tribunal binds only the parties. As BITs are signed between different state parties who are sovereign hence they are not bound by the previous decisions of the tribunal.\textsuperscript{94}

In 2013, the arbitration case increased to 56, out of which 40\% of cases filed against member states of EU. ICSID also provides facilities for Non-ICSID cases, the Secretariat often provides facility for arbitration conducted under UNCITRAL Arbitration Rules and cases conducted under free trade agreements. In Financial Year 2015, majority 33 cases decided as per BITs clause, 14 cases according to Energy Charter, 5 cases under investment contracts, 8 cases on international investment laws, 6 cases on the basis of regional agreements such as NAFTA, UAIA & Central American-United State Free Trade Agreement (CAFTA).\textsuperscript{95}

53 cases were concluded in 2015, out of which 38 by arbitration proceedings, 1 conciliation proceedings and 14 were post-award proceedings. Out of 38 arbitration cases, 22 cases were decided by the tribunal and 16 cases were discontinued or settled. Out of 22 cases decided by the tribunal, 4 awards denied the jurisdiction of ICSID, 8 cases where tribunals rejected all the investor’s claim and 10 cases investor’s claim was upheld as a part.\textsuperscript{96} In 2015, ICSID has collaborated with multilateral institutions on investments laws and settlement of disputes. Example UNCITRAL Working Group II on Arbitration and Conciliation, OECD and UNCTAD.

\textsuperscript{93}ICSID Annual Report 2015, at 29
\textsuperscript{94}Supra Note 23, at 58
\textsuperscript{95}ICSID Annual Report 2015, at 23
\textsuperscript{96}ICSID Annual Report 2015, pp 29 & 30
5.9 UNCITRAL Arbitration Rules

The United Nation Commission for International Trade Law (UNCITRAL) is a main legal body of United Nation related to international trade law. According to this, development of trade means faster growth of economy, higher living standard and new opportunities through commerce. It was established by the General Assembly of UNO in 1966 Resolution 2205 of 17th December 1966. Much before creating this commission, there was a different set of municipal laws governing international trade, in order to maintain uniformity of these laws and to use Commission as an effective vehicle of UNO to remove the obstacle in international trade laws.\textsuperscript{97} The objective of the commission is to make progressive efforts for harmonization and unification of international laws. UNCITRAL has framed laws which consisted of the following:

i) Conventions and model laws  
ii) Legal and legislative guides  
iii) Updated information on case laws and enactments on uniform commercial laws  
iv) Technical assistance in law reforms projects related to international trade law

5.9.1 Composition of the Commission

The Commission consisted of 60 members elected by the General Assembly of UNO, the membership is structured in such a manner that all the geographical representation will be made properly. The members of the commission will be elected for a term of 6 years.\textsuperscript{98}

5.9.2 Principles Incorporated in UNCITRAL Rules

a) Rule of Transparency

UNCITRAL Rules on ‘Transparency in Treaty-based Investor Arbitration’ which came into force on 1\textsuperscript{st} April 2014, consisted of set of rules & procedures provided for transparency and accessibility by the public to treaty based investors-state arbitration. This transparency rule will be applicable to the disputes raised from the treaties before 1\textsuperscript{st} April 2014 provided the parties agree for the same and the provisions will also be applicable to future treaties if it is agreed by the parties to the treaties. Along with this rule, the UNCITRAL Arbitration Rules 2013 came into force.

\textsuperscript{97}http://www.uncitral.org, visited on 24/8/15 @ 4p.m  
\textsuperscript{98}http://www.uncitral.org, visited on 24/8/15 @ 5p.m
in 2014,\footnote{http://www.uncitral.org, visited on 25/8/15 @ 3p.m} it has provided comprehensive set of procedural rules related to arbitration proceedings. There is no proper data about disposal of arbitration cases as per UNCITRAL Rules.

World Investment Report 2013 stated that, International Investment Court has to be established by enforcing multilateral investment framework.

Investors are winning the cases against host governments due to lacunas in investment agreements such as a) definition of term ‘Investment’ which is very broad and includes direct investment, portfolio investment, loans, franchise, intellectual property rights, the investors can bring their every claim for violating their rights, b) the investment treaties grant equal treatment and protection to investors which is very flexible, due to which certain rules are not easy to frame, c) some investment agreements prevent host state from regulating and controlling FDI, d) some investment treaties allow investors to file case before tribunal for remedy and e) the arbitration system is not working effectively.\footnote{‘Deccan Herald’, December 11, 2012}

Arbitration mechanism must maintain both external and internal transparency in its proceedings and decisions. The external transparency can be maintained by giving information such as a) basic information about disputes settlement, b) information about arbitration proceedings to non-disputed parties and c) publication of awards.\footnote{Fedrico Ortino, ‘Transparency of Investment awards-External and Internal Dimension’, (Eds, Ed, 1st, Junji Nakargawa, Routledge, Transparency in International Trade and Investment Dispute Settlement, London & New York, 2013), at 119} The internal transparency of the award includes a) disclosure of the language of the decision, b) table of contents of the decision, c) uncontroversial circumstances of the case, d) record of the proceedings of the tribunal. In brief, the content of the case must be made available to the public.\footnote{Id at 134} By adopting the principle of external transparency, parties & non-parties will be having knowledge about arbitration proceedings which gains the confidence of investors to approach international arbitration tribunal for settlement of their claims. The investors’ right to transparency goes against the duty of the tribunal to maintain the confidentiality of the award, but it depends upon the discretionary powers of the parties to the disputes means if parties give consent, the award shall be disclosed to the third party otherwise not. As per ICSID Arbitration Rules, the duty of confidentiality is revised to the
partial duty of transparency which imposes obligation on arbitrator to maintain transparency provided the consent of the parties must sought as per Article 48(5) of ICSID Convention.\footnote{Supra Note 101, at 122}

Under Article 28(2) of ICC Arbitration rules which imposes obligation on ICC Secretariat not to provide certified copy of the arbitral award to non-disputed parties. However, the extracts of the award will be published by ICC by ensuring the confidentiality about parties to the proceedings.\footnote{Supra Note 101, at 122}

As per UNCITRAL Arbitral Rules 1976 Article 35(5) which was reviewed in 2010 states that confidentiality of the award shall be maintained and if it is required, with the consent of the parties it can publish the award and will be made available to the legal proceedings in court or before any competent authority, same is followed in Stockholm Chamber of Commerce Arbitration and NAFTA also. But many BITs and RIAs have remained silent on transparency of arbitration proceedings.

Under Article 38 of FIRA 2004 applied between Canada & US provides for publication and access to arbitration proceedings by public but with restriction such as confidential information shall not be disclosed. The transparency principle will helps in strengthening the investment arbitration mechanism and find out the loopholes in it. It gives information about the host state to the prosperous investors to think before investing in host states. The principle of transparency improves the quality of the decision and it can be referred by the parties in future cases. To conclude, in the interest of the public there is a need for transparency to be maintained in arbitration mechanism and same is supported by US, Canada, Mexico and Norway since 10 years in their investment treaties.

5.9.3 Award of the Tribunal

a) Provisional Orders of Tribunal

The arbitration tribunal can issue provisional measures between 1 month and 1 year of the proceedings upon the request of the party and such order can be made public and brief hearing can be held through conference calls.\footnote{Loretta Malintoppi, ‘Provisional Measures in Recent ICSID Proceedings: What Parties Request and What Tribunals Order’, (Eds, Ed 1st, Christina Binder, \textit{International Investment Law for 21st Century}, Oxford University Press, 2009), at 157}
b) Issues Related to Arbitration Award

i) The danger of poor reasoned awards & decisions due to which annulment of arbitral award took place in CMS Gas Transmission Company v. The Argentine Republic, Ad-hoc Committee identified a series of error in application of law and defects in the award.

ii) Danger of inconsistency in award and decisions.

5.10 Improvement of Arbitration Mechanism

i) Quality assurance: it depends upon the quality of arbitrator, their capabilities and knowledge about the subject which leads to good awards.

ii) Option to avoid inconsistency: to eliminate the risk involved in passing the award to avoid error and to overcome the errors, appellate mechanism must be provided.

Appellate mechanism in international arbitration was first highlighted in Lander v. Czech Republic where the idea of appellate mechanism of investment arbitration was discussed among arbitration community.

The main issue in field of international investment law is payment of compensation for expropriation of foreign investments. Many disputes are referred to arbitration on the same issue. The word ‘compensation’ in context of international investment law means reparation after the violation of an international obligation as per the principle of state responsibility. Compensation is a pre-requisite in process of acquisition of foreign property which shall be paid by the host states when they breach the treaty obligation or host states exercising their sovereign authority to expropriate for public purpose as per the due process of law.

5.11 Compensation

Compensation for expropriation is a recognised general principle under international law. The sovereign state under international law has authority to acquire

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106 ICSID Case No ARB/01/08 Award, 12 May, 2005, 44 ILM(2005) 1205
foreign property within its sovereign territory. In the process of acquisition of foreign property, the state must pay reasonable and adequate compensation, International Law Commission (ILC) said that the payment of compensation is a state’s responsibility.\textsuperscript{109} Traditional valuation methods are as follows:

i) Liquidation value of the property market value prevailed at the time of expropriation

ii) Replacement value means placing the property in its original place

iii) Book Value

iv) Discounted cash flow value which means determining the market value of the property on the basis of its profitability. Most of the arbitration tribunals follow this method while awarding compensation.

As per ILC’s Responsibility of State for Internationally Wrongful Act 2001 where state is under an obligation to make full reparation for damage caused to foreigner for its wrongful act. At present, there is no clarity with respect to the standard of compensation for expropriation. The compensation will be considered adequate if it is equal to the fair market value of the property at the time of expropriation.\textsuperscript{110} Compensation for breach of international law can also be awarded by the tribunal. Along with the compensation, interest amount can also be awarded. After the conclusion of arbitration proceedings the losing party is liable to give cost of the proceedings to the winning party.\textsuperscript{111}

In 1928, PCIJ laid down that compensation must be such which could be able to wipe out all the consequences of the illegal acts and would be able to re-establish the situation which was damaged. In foreign investment case when expropriation takes place, the amount which is equal to the investment shall be paid by the host state.

In ADC Affiliate Ltd & ADC & ADMC Management Ltd v. Republic of Hungary,\textsuperscript{112} the ICSID tribunal held that if the value of the expropriate property

\textsuperscript{109}Supra Note 108, at 30
\textsuperscript{110}World Bank Guidelines on FDI
\textsuperscript{111}Supra Note 23, at 69
\textsuperscript{112}ICSID Case No ARB/03/16/Award of 2 Oct 2006
increases between the time of expropriation and assessment of compensation, the value of the property at the time of payment of compensation must be considered.

In *Siemens AG v. Argentina*,\(^{113}\) the ICSID held that the date of valuation shall be the date of award rather than the date of expropriation of foreign property, but this principle would be applying only in case of unlawful expropriation, but not in lawful expropriation.\(^{114}\) Compensation in breach of contract is supported in *Sapphire International v. National Iranian Oil Co*\(^{115}\) it was held that the object of paying compensation is to place the victim in the same pecuniary position where he was placed before causing damage.

The main issue in foreign investment is compensation for expropriation of foreign investments as mentioned above. Many disputes are refereed to arbitration related to the same issue. The term ‘compensation’ in context of foreign investment law means reparation after violation of an international obligation in law of state responsibility.\(^{116}\) Compensation is a pre-requisite in the process of acquisition of foreign property which shall be paid by the state when it breaches treaty obligation or the host state exercising its sovereign authority expropriate for public purpose as per the due process of established law. Compensation for expropriation is a recognised general principle under international law. The sovereign state under international law has authority to acquire foreign property within its sovereign territory. In the process of acquisition of foreign property, the state must pay reasonable and adequate compensation, International Law Commission (ILC) said payment of compensation is a state’s responsibility.\(^{117}\)

### 5.12 Jurisdictional Conflict in Arbitration Mechanism

Umbrella clause shall be included in investment treaties which imposes obligation on the state parties to fulfill their responsibilities in providing full protection to FDI and on the other hand the foreign investor must protects the natural resources of host state. If a claim gives jurisdiction to more than one forum to decide the dispute which is against ‘Fork in the Road’ principle where option can be exercised by the parties at the same time the parties can waive alternative option of

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\(^{113}\)ICSID Case No ARB/02/08/ Award of 6 Feb 2007  
\(^{114}\)Supra Note 108, at 39  
\(^{115}\)(1967) 35 ILR pp 136 &185  
\(^{116}\)Supra Note 108, at 29  
\(^{117}\)Supra Note 108, at 30
dispute settlement. If a claim is referred to more than one arbitration tribunal the subsequent proceedings can be stopped by applying the principle of res-judicata.  

5.13 Appeal Mechanism Against Arbitration Award

Conflict between investor and host state is caused due to dissatisfaction in process of admission of FDI. The parties to BIT try to settle their dispute in informal way to respect the personal relationship, ability to adopt business models, etc. In case if informal means are failed then parties may approach tribunal for legal action as per BIT. In dispute mechanism, the parties adopt either right-based method or interest-based conflict management. The key factors which shall be considered in dispute settlement mechanism are a) analyse the current system, b) creation of a dispute resolution system based & practical principles, c) implementation & adoption of new method and d) evolution of new method. Latter, it was followed in Sweden to settle conflict between individual and government, in the recent time the ‘Ombudsperson’ mechanism became more popular among all the state and adopting it in every sphere of government activities and shall be applicable in corporate context also. An Ombudsperson is an officer appointed by a statute to hear complaints against government authorities. The Ombudsperson is an impartial and transparent but it can only recommend because it lacks binding force like an instrument without the sharp edges.

Advantages of appeal mechanism in arbitration process

i) Consistency: to avoid inconsistency of ICSID award as mentioned in Czech Republic case the principles of consistency can be analysed on the following-to avoid conflicting decision by different tribunals on the same facts, to avoid difficulties in interpretative of international principles agreements, to achieve uniformity to challenge the award.

ii) Rectification of error: appeal mechanism provides to correct any serious error done by the tribunal in resolving dispute which affects public policy.

iii) Review of decision of the tribunal & national court: review of decisions on non-ICSID and national Courts decision shall be implemented effectively as it is provided in ICSID system.

118 Supra Note 23, at 68
119 Supra Note 1, pp 146 & 147
120 Supra Note 1, at 160
iv) **Effective enforcement:** the appeal mechanism must provide for executing a bond by the respondent which is equal to the amount of award before filling an appeal which helps in effective enforcement of arbitration award.

**Disadvantages of Appeal Mechanism**

i) Appeal mechanism is against the principle of finality of decision: to avoid the time consuming judicial approach, ADR is developed saying that the decision of arbitration will be final and will not be subjected to appeal mechanism provided it goes against principle which is accepted in international regions.

ii) It causes delay, waste of time and increase number of disputes/appeal.

iii) Politicization of system: the investment dispute is always de-politicisation in the interest of investors, if appeal mechanism is provided it may politicises the investment disputes which may causes delay in resolution of disputes.

With respect to appeal mechanism in investment dispute OECD mentioned few ideas such as:121

i) To refer arbitration award to International Chamber of Commerce for scrutiny to check the validity of award.

ii) To establish Annulment Facility as an alternative to ICSID, Non-ICSID award can be checked or revised and annulled if it is not valid.

During 2008, nearly 59 bilateral treaties were concluded bringing to the total of 2,676 and nearly 75 double taxation treaties were concluded adding to 2,805 by the states. But in the same year, nearly 6 bilateral treaties were terminated unilaterally. Due to this problem, the investors will not know when these bilateral treaties will be terminated by the contracting states. These types of practice are not safe in providing protection to FDI. Inspite of many treaties, the investment disputes are increased to 317 in 2008, this shows the failure of international laws in avoiding investment disputes.122

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122 World Investment Report, *(Foreign Trade Review, vol-44,2009)*
5.14 Conclusion

The major factor which influences the flow of FDI is disposal mechanism of investment disputes and the host state must establish effective and transparent judicial system to gain the confidence of investors. The major issue related to FDI is difficulties in resolving the investment disputes by the proper forum. When investment dispute arise between the parties, they exercise option to refer the dispute either to domestic courts or international arbitration tribunal. Investors will not approach the domestic courts as it lacks impartiality & transparency and the arbitration forum even though it provides speedy disposal but there is no appeal mechanism to check the validity of its awards. To overcome this situation and to maintain uniformity in disposal procedure, as suggested in UNCTAD report, there is a requirement of International Investment Court which can decide all the investment disputes as per the international standard prescribed by international investment treaties. If International Investment Court comes into existence, it may act impartially and gain the confidence of all the states & investors and can avoid different dispute settlement mechanisms which are in practice. All the investment treaties must adopt a single process to determine the compensation for expropriation of foreign investments. At present ad-hoc arbitration has become more popular as it is convenient to the parties, but a permanent international arbitration forum must be made more popular among foreign investors which will be easy for them to approach and resolve their dispute. Along with arbitration mechanism, the conciliation and negotiation modes shall also be made more popular as a dispute settlement mechanism. These mechanisms must function in such manner where it can able to protect the interest of both host state and investors. The cases which are discussed in this chapter prove that most of the awards are passed in favour of investors. The ICSID must maintain balance between the interest of investors and host states. Along with ICSID, the other arbitration centers are also playing a key role in protection of FDI. At present, the world authorities must establish Ombudsperson to supervise the administration of arbitration mechanism in international regime and to avoid corruption in arbitration proceeding. To gain the trust of investors, the host state’s judiciary must be competent and transparent to decide investment disputes. The legal experts must be well equipped with investment principles to assure the investors about protection of investments in host state.