THE INVESTOR-STATE DISPUTE SETTLEMENT

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INTRODUCTION

"*IF YOU wanted to convince the public that international trade agreements are a way to let multinational companies get rich at the expense of ordinary people, this is what you would do: give foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes a law to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe. Yet that is precisely what thousands of trade and investment treaties over the past half-century have done, through a process known as "investor-state dispute settlement", or ISDS*"[1].

The investor-state dispute settlement, or ISDS, process has become one of the most contentious topics in the international investment treaty framework due to the countries' current apprehension of uncertainty. The international legal system for foreign investments is a complex structure of interconnected international treaties that includes both multilateral and bilateral investment treaties (BITs or Bilateral Investment Promotion and Protection Agreements - BIPAs). The ISDS mechanism, which puts a host country before international private arbitration tribunals, is established in these accords. It provides a legal incentive in the form of investor rights, which ensure that such international investments are made in a lawful environment. Thus, we can say ISDS is a generic and umbrella concept which encapsulates investment treaty arbitration as a form of dispute resolution.

Some countries are challenging this concept today as an unwarranted infringement[2] of their sovereignty. In 2011, the Australian government published a policy statement declaring that the ISDS mechanism was neither relevant nor required, and that it would include investment treaties longer. When India was smacked with an unfavourable arbitral ruling in the White

[1] The Arbitration Game, THE ECONOMIST (October 11, 2014) http://www.economist.com/news/finance-andeconomics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration (Last visited on April 28, 2016)

[2] Chevron, Request for Public Comment on The Transatlantic Trade and Investment Partnership comments on the TTIP to USTR, (May 7, 2013), https://assets.documentcloud.org/documents/1237936/ttip-lobbybrief-chevron.pdf

Industries[3] case, it found itself in a devilish situation. Capital India Power Mauritius and Energy Enterprises (Mauritius) v. Maharashtra Power Dev. Corp. (the Dabhol project)[4] was India's first step or entry into investment treaty arbitration. However, since 2010, India has seen a spike in international investors filing an investment arbitration claims under several investment treaties[5]. As a result, India was forced to revise its Model Treaty text in 2012. The White Industries[6] case also raised a number of problems about how investments are treated under the 72 BITs currently in existence. Soon after the release of the Draft Model BIT in 2015, the Indian Government has finalised the new Model BIT[7] which includes the definition of 'investment' providing that investment arbitration can be made only under UNCITRAL Arbitration Rules rather than a choice between UNCITRAL Arbitration Rules and ICSID Additional Facility Rules as provided in the 2003 BIPA and also, it removed the MFN clause and asked for exhaustion of local remedies and a transparency clause.

However, by ensuring access to a neutral forum for settling disagreements, these conflict resolution procedures ensure that neither party has the authority to unduly influence legal determinants. As a result, ISDS becomes a cornerstone of investment protection, acting as a procedural enforcement mechanism for investment treaty's main substantive issues. Investors can dispute or challenge government actions that infringe on their rights under the BIT through investment treaty arbitration. It is supported by both domestic and international legislation, including the New York Convention[8]. According to the agreement given by the State under the concluded BIT, an investor seeking a remedy under investment treaty arbitration may turn to various forums such as ICSID[9] and UNCITRAL[10].

The goal of this research is to learn more about the ISDS mechanism. To that purpose, it traces its origins back to the signing of the FCN Treaties. By tracing the growth of the current system,

[3] White Industries Australia Limited and The Republic of India, UNCITRAL, Final Award, 30 November 2011
[4] Capital India Power Mauritius I and Energy Enterprises (Mauritius) Company v. Maharashtra Power Development Corporation Limited, Maharashtra State Electricity Board, and the State of Maharashtra, Int'l Comm. Arb. Case No. 12913/MS, 27 April 2005
[5] UNCTAD, Recent Trends In IIAS and ISDS, IIA Issues Note, at 5, February No. 1, (2015), available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf
[6] Supra note 3
[7] Indian Model Text of BIPA, http://www.italaw.com/sites/default/files/archive/ita1026.pdf
[8] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, hereinafter referred as the New York Convention, 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968).
[9] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, hereinafter referred as the Washington Convention or the ICSID Convention, 17 UST 1270, TIAS 6090, 575 UNTS 159.
[10] UNCITRAL Arbitration Rules, UN Doc. A/RES/31/98; 15 ILM 701 (1976).

this study focuses solely on investor-state dispute resolution by using one of its mechanisms i.e. by analysing the clauses of international arbitration in ICSID convention, ICSID additional facility rules and UNICTRAL rules.

DISPUTE RESOLUTION IN EARLY PERIODS (HISTORY)

Historically, the developed nation has been a power influence in global/international trade and investment. Capital was collected in the most financial cities. The worldwide economy was revolutionised by a triggered process of globalization[11], which resulted in the emergence of a liberalised economy characterised by free competitive marketplaces and international trade. During the 18th and 19th century, protection of investments was not a major concern of the developed States for expanding their overseas trade. The origins of bilateral trade and investment growth can be traced back to the early commercial Treaties of Friendship, Commerce, and Navigation (hence referred to as the FCN) treaties[12]. For example, the United State started deducing FCN Treaties in earlies 1770's, with the motive of establishing trade relation with the treaty partners[13]. The first of its kind was the Treaty of Amity and Commerce between the United States and France which was signed on February 6th of 1778. However, these treaties[14] were not only limited to commerce but also govern the issues of port access[15], alien treatment[16] and the protection of property rights[17] and the business interest of foreigners. Since, these treaties were protecting the right of access to the territory of the other Contracting

[11] Three events were responsible that triggered the process of globalization transforming the international economy. They were: end of the Napoleonic Wars in 1815; the advent of industrial revolution in Europe; and the emergence of liberal economic theory.
[12] Kenneth J. Vandevelde, A Brief History of International Investment Agreements, 12 U.C. – Davis Journal of International Law and Policy, 157, 158 (2005).
[13] Other eighteenth century agreements include: Treaty of Amity and Commerce, U.S. – Neth., 8 Oct. 1782; Treaty of Amity and Commerce, U.S. – Sweden, 3 Apr. 1783; Treaty of Peace and Friendship, U.S. – Morocco, 23 June26 July 1786; Treaty of Amity, Commerce and Navigation, U.S. – G.B., Nov 19, 1794; Treaty of Friendship, Limits and Navigation, U.S. – Spain, 27 Oct. 1795
[14] See, e.g. General Convention of Peace, Amity, Navigation and Commerce, U.S.-Colombia, Art.10 (Oct. 3, 1824); Treaty of Peace, Friendship, Commerce and Navigation, U.S.-Bolivia, Art. 13 (May 13, 1858); General Treaty of Amity, Commerce, and Consular Privilege, U.S. –El. Sal., Art. 13, (Dec 6, 1870).
[15] General Convention of Peace, Amity, Navigation and Commerce, U.S.-Colombia, Art.10: All the ships, merchandize and effects belonging to the citizens of one of the contracting parties, which may be captured by pirates, whether within the limits of its jurisdiction or on the high seas, and may be carried or found in the rivers, roads, bays, ports or dominions of the other, shall be delivered up to the owners, they providing the due and proper form their rights, before the competent tribunals (…)'.
[16] Treaty of Friendship, Commerce and Navigation with Protocol between U.S. – Ireland Art. 1(1)(b) 'Nationals of either Party shall be permitted to enter territories of the other Party, for other purposes subject to compliance with the relevant laws and regulations applicable to the entry and sojourn of aliens.
[17] Treaty of Peace, Friendship, Commerce and Navigation, U.S. – Bolivia, Art. 13

State, the right of access to host State's judicial system, right to protection and security but still its lacking the clauses of investment.

International Monetary Fund (IMF) has tried to define the meaning of "direct investment" by stating "category of international investment made by a resident entity in one economy (direct investor) with the objective of establishing a lasting interest in an enterprise resident in an economy other than that of the investor (direct investment enterprise)"[18]. In simple words, we can say, it is the movement of tangible and intangible assets from one state to another with the motive of developing the host state by generating wealth. "Thus, with a comprehensive view of FCN treaties on the protection of foreign property, alien treatment, and accessibility to ports etc., investment found a little mention of no recourse to investor – dispute mechanism"[19]. The UK and USA were the leading states in establishing the network of FCN treaties[20].

DISPUTE SETTLEMENT IN EARLY DAYS: -

As colonial systems were homogenized under imperial powers during 18th and 19th centuries, the imperial system provided sufficient security for investment flowing into these colonies, and therefore the need for international law on foreign investment protection was minimal.[21] Assertions have been made regarding the superiority of capital – exporting States over international investment regimes, with the developing States merely being the objects rather than subjects at the international arena[22]. This means that colonial powers had jurisdiction over the critical issue of balancing the interest of the host state and the foreign investment.

Where foreign investments were made in un-colonized countries, the imperial system used a combination of diplomacy and overt or covert force to defend foreign investment. As these uncolonised states were enclaved outside the control of imperial powers, the use of force to settle investment disputes had grown commonplace. The United Kingdom and the United States, in particular, were notorious for their willingness to use military force to protect their

[18] Glossary of Foreign Direct Investment Terms, https://www.imf.org/external/np/sta/di/glossary.pdf
[19] Radhika Narang, "A study of contemporary issues and challenges faced by India in Investment Treaty Arbitration", NLU Delhi
[20] For a list of the United Kingdom's and the U.S. FCN Treaties, http://www.bailii.org and http://www.state.gov/s/l/treaty/tif/
[21] M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT, Cambridge University Press, 9 (1994).
[22] Paul Obo Idornigie, Investment Treaty Arbitration And Emerging Markets: Issues, Prospects And Challenges,8 available at http://nialsnigeria.org/pub/INVESTMENT_TREATY_ARBITRATION,_AND_EMERGING_MARKETS__ISSUES_,_PR OSPECTS_AND_CHALLENGES_BY_PROF._PAUL_OBO_IDORNIGIE.pdf

abroad citizens. Because of the political nature of diplomatic protection, power imbalances between capital-exporting countries and developing countries unavoidably influenced international dispute settlement. The developing nation (like the area of Latin America) consider diplomatic protection as a "discriminatory exercise of power rather than a method for protection of human rights"[23]. In response to this, these developing countries developed a safety valve in form of Drago and Calvo Doctrines.

1. CALVO AND DRAGO DOCTRINES: -

Calvo doctrine was introduced by the Argentine scholar CARLOS CALVO. According him, this doctrine means that foreign nationals must be treated equally with the nationals of a state and if any dispute arises regarding foreign investment, it must be resolved through national adjudication by applying domestic law of the host state.

This doctrine binds the foreign investors to abandon his rights of diplomatic protection. Though, this expounding was challenged by arbitral tribunals on the ground that the right to grant diplomatic protection lies to the home state and it cannot be waived by the foreign investor as the right does not vest on them and the condition for the exercise of diplomatic protection under the customary international law is to exhaust the local remedies (which were being offered by the host state) by the aggrieved investors. However, some of the developed states started doing the same which resulted in political dispute between countries and tensed the international relation.

The Drago doctrine, named after Argentinean Minister of Foreign Relations LUIS MARIE DARGO, which was developed after the Anglo- German blockade of Venezuela to enforce debts owned to their respective foreign nationals out of the host state's custom revenues[24]. This doctrine renounces the use of force by the state to collect its foreign debt.

At the end of 20th century there was reform in international adjudication which allowed the individuals to assert their rights to claim before international tribunal. The home state's ultimate goal, subject to diplomatic protection for its citizens, was to facilitate adjudication of investment issues with the host state. Many Latin American countries (especially Mexico)

[23] ILC, First Report on Diplomatic Protection, 15, UN Doc. A/CN.4/506 (2000); ILC, Preliminary Report on Diplomatic Protection, 5, UN Doc. A/CN.4/484 (1998)
[24] Radhika Narang, "A study of contemporary issues and challenges faced by India in Investment Treaty Arbitration", NLU Delhi

started shifting from Clavo doctrine and signed NAFTA agreement in 1992. As time progressed, arbitration administered by mixed claims tribunals became the preferred means of achieving this objective[25]. However, instead of competing arbitration colonizers seeking to control investment arbitration and imbue it with their preferred attributes, there has been a combination of elements of pre-existing practises that may create new norms suitable for the specialised mode of practise occasioned by investment arbitration's hybrid nature.[26]

2. MULTILATERAL INVESTMENT AGREEMENTS: -

Earlier, the Multilateral Investment Agreement (MIA) was focused to protect and promote private foreign investment and such initiatives includes the League of Nations in 1928, the Geneva and Havana Conferences of 1947 and 1948, and the Bogotá Conference of 1948. In

1948, the International Law Association (ILA), a non-governmental organization published

'Draft Statutes of the Arbitral Tribunal for Foreign Investment and the Foreign Investment Court', and the International Chamber of Commerce (ICC). Also, there was a series of multilateral draft convention depending upon the interest of some countries.

If, we note, there are certain MIA like The 'International Convention for the Mutual Protection of Private Property Rights in Foreign Countries' (November 1957), the Abs-Shawcross 'Draft Convention on Investments Abroad' (April 1959), the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens', the OECD Draft Convention on the Protection of Foreign Property, which failed to gather support from the world as they were persistently disagreeing on the some of the substantive issue. Also, the developing countries were trying to bring the New International Economic Order (NIEO) which suggest the national control over the economic aspects of the country.

Article X of the International Convention for the Mutual Protection of Private Property Rights in Foreign Countries (1957) provides the creation of a permanent international tribunal and the committee which deals with the issue relating to the compensation in matters of expropriation

[25] O. Thomas Johnson JR. & Jonathan Gimbllet, From Gunboats To BITS: The Evolution Of Modern International Investment Law, Chapter – 17, 653, available at https://www.cov.com/files/Publication/94b15e88-5981-4e23844c-a5b6484d0b9e/Presentation/PublicationAttachment/b2c6cf12-df61-4019-9c89-df0fc18/From_Gunboats_to_BITs_Evolution_of_Modern_International_Investment_Law.pdf

[26] Radhika Narang, "A study of contemporary issues and challenges faced by India in Investment Treaty Arbitration", NLU Delhi

by host countries and Article XI of the same provides the remedies in the form of powers to the tribunal which prohibits unlawful activity of the host states and if there is failure in this regard (in the time period of 3mnth.), the tribunal can make a public declaration of breach of obligation by the host state. The similar provision can also be seen in Abs Show cross Draft Convention on Investments Abroad in Article VII where dispute settlement machinery is given and says it is equally important as the substantive standards of protection. In their commentary, they express the view that:

"There must, at the heart of any instrument dedicated to the creation of an atmosphere of confidence, always lie a provision for the effective adjudication by an impartial body of all disputes which may arise. Undertakings without the machinery for determining their content and application cannot achieve the desired end"[27].

In contrast to earlier multilateral codes/agreements, the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (1961) did not allow for the establishment of an international tribunal before which the injured investor(s) may present their claim. Only injured aliens might file claims directly against the State who was believed to be liable for an unlawful act or omission, or directly to an international tribunal that would have jurisdiction, according to Article 22 of the same Convention. Also, Article 7 of the OECD Draft Convention on the Protection of Foreign Property (1962) provides the possibility of claim and the ISDS procedure.

The above mentioned international diplomatic efforts lead to articulate procedural multilateral agreement in order to resolve investment disputes which resulted to formulate ICSID Convention which was adopted on 18 March 1965 in Washington DC, and entered into force on 14 October 1966. This convention was born from the failure attempts of different multilateral draft conventions who failed to resolve the investors- state disputes.

ARBITRATION INSTITUTION AND REGIMES FOR SETTLING INVESTMENT DISPUTE.

Investment treaty arbitration (ITA) may be conducted through the World Bank's dispute resolution organ like the Washington Convention on the Settlement of Investment Disputes

[27] BUNGENBERG, supra note 28 at 165-166, 'Comment on the Draft Convention by its Authors' (1960) 9 J. Pub. L. 119, 123

between States and Nationals of Other States (hereinafter referred to as the ICSID Convention or the Washington Convention), or through ad hoc arbitration of the United Nations Commission on International Trade Law Arbitration Rules (hereinafter referred to as the UNCITRAL Rules14) or through another institution like International Chamber of Commerce

Rules (hereinafter referred to as the ICC Rules15), Stockholm Chamber of Commerce Rules (hereinafter referred to as the SCC Rules16) or ICSID Additional Facility Rules in the alternative. In other words, the BITs provide for two types of arbitration mechanisms

a) Institutional arbitration often ICSID or

b) An ad hoc arbitration under UNCITRAL.

There a treaty which offer a choice to the investor between various arbitral institution which we can see in recent BIT Model signed by the US. This Model BIT suggest a catalogue of alternative method of arbitration under ICSID Convention, ICSID Additional Facility Rules, UNCITRAL Rules or other, mutually agreed upon arbitration rules. For instance, if we consider Article VII of the Argentina-US BIT it states that the investor or the state can go for settlement of dispute in different organ like under ICSID Convention or under ICSID additional facility rules or under UNCITRAL Rules or to any other another arbitrational intuition to which the party agrees. This menu has also been followed by European countries for e.g. the Italy–Bangladesh BIT.

There is choice for selecting a type arbitration in every treaty which allows the investor to access a neutral forum for settle investment dispute. Selecting a particular institution for arbitration indicates that the settlement can be done according to the rules of that institution and if ad hoc arbitration is selected then the dispute is settled through the procedures defined in either BITs or through set of identified ad hoc rules or, by agreement of the parties. The advantage of selecting institution over ad hoc arbitration is that the disputants is not required to formulate their own rules because the rules are already available to the institution. Whereas, in ad hoc arbitration rules are required to be formulated. In most cases of ad hoc arbitration

UNCITRAL Arbitration Rules are used for the procedure even though some BITs provide to determine their own rules.

(A) ICSID CONVENTION: -

ICSID is one most important intuitional arbitration which was established in 1966. The primary purpose of this convention in to resolve the dispute between the investors and the host state. As per recent report, 163 countries are signatory and Contracting States of the ICSID Convention.

It is basically a forum for conflict resolution between investors and states which carefully balances the interests and requirement of them. Though the primary focus of the convention is to encourage "larger flow of international capital" to the states who have the "favourable climate" to attract it, still it recognises the interest of the host state once the arbitration has started and also consider the formulation of the arbitral procedure. "Arbitration under the ICSID Convention is subject to four conditions:

a) The parties must have agreed to submit their dispute for settlement under the ICSID;

b) the dispute must be between a contracting state to the ICSID (or a subdivision or agency of that state) and the national of another contracting state;

c) the dispute must be a legal dispute; and

d) the dispute must arise directly out of an investment made in the host contracting state."[28]

The proceeding under ICSID is independent from the intervention of the outside bodies as the convention contains their own rules. Also, no domestic court has the power to stay, to compel or to otherwise influence the proceeding.

The convention provides that once the matter is submitted to the centre, the party cannot go to the other forum. In particular, the state cannot provide diplomatic protection to their own citizen claim unless there is failure in compliance of the award. As ICSID awards are final and binding and they are not subject to review except the condition provided in the convention (Article 49-52). Also, the non-compliance of the award by the state results into the breach of obligation which may lead to the revival of right to diplomatic protection by the investor state (Article 53 and 27).

[28] Art. 25(1), ICSID Convention, supra note 13, jurisdiction of the centre

ICSID has their own system of enforcement, as awards are considered to be final so it is binding to all the state parties of the convention. Pecuniary obligation is that the award is enforced in the same manner as the final judgment of the local courts are enforced (Article 54)

(B) ICSID ADDITIONAL FACILITY RULES: -

ICSID Additional facility rule is created by the Administrative council of ICSID in the year 1978. These rules are available to the parties who are not the contracting members of the convention (ICSID). "This has become especially important in the context of NAFTA since only the US has ratified the ICSID convention but Canada and Mexico have not[29]. Article 1120 of the NAFTA provides arbitration in different forum like under ICSID, ICSID additional facility rules and the UNCITRAL Arbitration Rules. Most of the cases of NAFTA are conducted through additional facility rules.

The proceeding of these rules is similar to that of ICSID but when we see the recognition and enforcement of awards, the Convention on the recognition and enforcement of Foreign Arbitral Award of 1958 (the New York Convention) applies. Also, the awards passed under these rules are scrutinized and can be set aside by the competent national courts.

(C) UNCITRAL RULES: -

Under the leadership of the United Nations, the UNCITRAL is a body comprising of member and observer states. While international arbitration is one aspect of UNCITRAL's activities, it is not an arbitral institution, and UNCITRAL has no role in the day-to-day operations of any arbitration. The Arbitration Procedures, which govern international business arbitrations, were adopted in 1976 as a comprehensive collection of current and universally recognised procedural rules. The thirty-year-old norms were updated in 2010, and they are substantially different from other institutional arbitration mechanisms. These regulations do not offer a mechanism for administering arbitration procedures, thus it is up to the parties to develop both an administrative framework and an ad hoc arbitration tribunal to adjudicate their dispute. As there is no institution dealing with cases under UNCITRAL Rules, it is difficult to understand how investor-state cases is going to adjudicate. The Iran-US Claims Tribunal first applied these guidelines in 1981 to settle claims in the wake of the 1979 hostage crisis and the United States'

[29] NAFTA, 32 ILM 605(1993), was ratified by Canada, Mexico and the US. See pp15-17

subsequent freeze of Iranian assets. They've been used in investor-state disputes under BITs and international investment treaties since then.

Certain BITs and Multilateral investment treaties provides an option for dispute resolution if the state or investor applies for UNCITRAL. In this regard there is an example of U.K. – Argentina BIT where Article 8(3) provide for a choice between ICSID and UNCITRAL Rules, subject to agreement by both the investor and the host – State. Also, there are some BITs for e.g. Article 10 of the Hong Kong – Australia BIT which says UNCITRAL Rules are the only arbitration option subject to the agreement between the parties. Such provision of single forum for dispute settlement may create a problem in cases where none of the parties is not a contracting party of the ICSID Convention and if we see Egypt – Thailand BIT, which provides ICSID as the only arbitration option and where Thailand has not ratified ICSID Convention, it simply implies that the sole avenue for an injured investor would be local courts of the host state[30].

CONCLUSION

After exhaustive study on this topic we can conclude that the investor-state dispute settlement can be done through various organ like through ICSID Convention or through ICSID additional facility rules or through UNCITRAL Rules.

As ICSID Convention has established the essential procedural framework for resolving and arbitrating investment disputes between ICSID Member States and foreign nationals, it has separated its proceeding from domestic procedures which means that ICSID process is not affected by local courts. If we see the main feature of the convention: in this the award passed are final and binding and cannot be set aside by any local courts of the contracting state (Art. 53). Also, once the disputing parties consented to ICSID arbitration, they accept their available remedies unless they agree otherwise (Art.26). In this convention a member state cannot provide any diplomatic protection to its nationals who are consented to arbitration unless the matter is regard for enforcement of awards or for breach of obligation.

Now when we look into ICSID additional facility rules, it takes up the matter which falls outside the ICSID convention which means that either party is not a member of ICSID. The proceeding in this is similar to that of ICSID convention proceeding but when we talk about

[30] BROWN & MILLS, supra note 42 at 374.

the recognition and enforcement of award, it done through the Convention on the recognition and enforcement of Foreign Arbitral Award of 1958 (the New York Convention). Also, the award can be scrutinized and set aside by the competent national courts.

At last when we see UNCITRAL Rules, it plays an important role in settling matters related to investment dispute as 20 to 30 percent of the published investment cases are conducted under these rules. Many bilateral treaties and NAFTA provide an option for arbitration under the UNCITRAL Rules. In UNCITRAL investment arbitration, the role of state court for enforcement and annulment procedures comes into play which clearly indicates the transparency in investment arbitration.

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8. UNCITRAL Arbitration Rules, UN Doc. A/RES/31/98; 15 ILM 701 (1976).

9. NAFTA, 32 ILM 605(1993)

10. O. Thomas Johnson JR. & Jonathan Gimbllet, From Gunboats To BITS: The Evolution Of Modern International Investment Law, Chapter – 17, 653